IN THE SUPREME COURT

STATE OF WYOMING

THE STATE OF WYOMING, Appellant (Plaintiff), v. EDWIN IKE MARES, Appellee (Defendant).	)	No. S-13-0223

BRIEF OF *AMICI CURIAE* JUVENILE LAW CENTER *ET AL.* IN SUPPORT OF APPELLEE EDWIN IKE MARES

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I. INTEREST AND IDENTITY OF *AMICI*

The organizations and individuals 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 life without parole sentences on juvenile offenders is unconstitutional. Instead, *Miller* requires that a sentencer make an individualized determination of the juvenile's level of culpability, taking into account the unique characteristics associated with his young age. When Appellee was convicted of first-degree felony murder for an offense he committed as a juvenile, he received a mandatory life without parole sentence which, pursuant to *Miller*, is unconstitutional. The Wyoming legislature's attempt to cure this constitutional defect by providing parole review after

twenty-five years is insufficient because it fails to provide an individualized sentencing hearing – even though certain juvenile offenders may be denied the opportunity for parole review altogether. Because Miller requires an individualized sentencing hearing before a juvenile offender receives a life without parole sentence, this sentencing scheme is unconstitutional.

The parties agree that Appellee Mares, and others similarly situated, benefit from Wyoming's new legislation even though his conviction was final before the *Miller* decision and before the legislation was enacted. To the extent this Court still needs to resolve the question, *Miller* applies retroactively to Appellee and to other cases that have become final after the expiration of the period for direct review, for four primary reasons. First, the United States Supreme Court has already applied *Miller* retroactively by affording relief in Kuntrell Jackson's case, which was before the Court on collateral review. Second, *Miller* announced a substantive rule, which pursuant to Supreme Court precedent applies retroactively. Third, *Miller* is a watershed rule of criminal procedure that applies retroactively. Finally, *Miller* must be applied retroactively because, once the Court determines that a punishment is cruel and unusual when imposed on a child, any continuing imposition of that sentence is itself a violation of the Eighth Amendment; an arbitrary date on the calendar cannot deem a sentence constitutional which the United States Supreme Court has now declared cruel and unusual punishment.

III. ARGUMENT

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

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

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

> As compared to adults, juveniles have a "lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed."

560 U.S. at 68 (citing *Roper*, 543 U.S. at 569-70). *Graham* found that "[t]hese salient characteristics mean that '[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' Accordingly, 'juvenile offenders cannot with reliability be classified among the worst offenders.'" *Id.*

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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.

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

Importantly, the *Miller* Court found that none of what *Graham* "said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific." 132 S. Ct. at 2465. The Court instead emphasized

"that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id.* As a result, it held in *Miller* "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," *id.* at 2469, because "[s]uch mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at 2467.

B. Appellee's Mandatory Life Sentence Is Unconstitutional Even In Light Of Wyoming's Post-*Miller* Sentencing Amendments

When Appellee Mares was convicted of first-degree felony murder for an offence he committed as a juvenile, the only available sentencing option was life without parole. *See* Wyo. Stat. Ann. § 6-2-101(b); Wyo. Stat. Ann. § 6-10-301(b). After *Miller*, this mandatory life without parole sentencing scheme was unconstitutional as applied to juvenile offenders. *Bear Cloud v. State*, 294 P.3d 36, 45 (Wyo. 2013). The Wyoming Legislature attempted to cure this constitutional defect in Wyoming's sentencing scheme by enacting legislation providing that juveniles sentenced to life imprisonment are parole-eligible after serving twenty-five years in prison. *See* Wyo. Stat. Ann. §§ 6-10-301(c), 7-13-402(a) (2013). The legislation provides, however, if the juveniles commit certain acts (such as an attempt to escape or an assault with a deadly weapon) after turning 18, they will not be eligible for parole. *See* Wyo. Stat. Ann. §§ 6-10-301(c), 7-13-402(b) (2013). This new legislation fails to comply with *Miller* because the sentencer has no "ability to consider the 'mitigating qualities of youth,'" as required by the U.S. Supreme Court. 132

S. Ct. at 2467. This legislation is particularly infirm because juvenile offenders can be deprived the opportunity for parole even when a sentencer may find that their young age and other age-related characteristics would render this harshest available sentence unconstitutionally disproportionate.

1. *Miller* Requires Individualized Sentencing Determinations

Miller requires that a sentencer make an individualized determination of the juvenile's level of culpability, taking into account the unique characteristics associated with his young age. *Miller* faulted "mandatory penalty schemes [that] prevent the sentencer from considering youth and from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." 132 S. Ct. at 2466.

Miller sets forth specific factors that the sentencer, at a minimum, should consider: (1) the juvenile's "chronological age" and related "immaturity, impetuosity, and failure to appreciate risks and consequences;" (2) the juvenile's "family and home environment that surrounds him;" (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him;" (4) the "incompetencies associated with youth" in dealing with law enforcement and a criminal justice system designed for adults; and (5) "the possibility of rehabilitation." *Id.* at 2468. Prior to imposing a juvenile life without parole sentence, the sentencer *must* consider how these factors impact the juvenile's overall culpability. *Id.* at 2469.

Under Wyoming's sentencing scheme, the sentencer has no opportunity to take these factors into consideration before imposing a life sentence on a juvenile offender.

Instead, all juvenile offenders convicted of certain homicide offenses receive life sentences. Imposing a one-size-fits-all approach to juvenile sentencing ignores the U.S. Supreme Court's concern with harsh mandatory sentencing schemes:

> Under these schemes, every juvenile will get the same sentence as every other – the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one.

Id. at 2467-68.

Wyoming's sentencing scheme is particularly problematic because the legislature has categorically determined that certain juvenile offenders will be denied the opportunity for parole. *See* Wyo. Stat. Ann. §§ 6-10-301(c), 7-13-402(b). For example, if a juvenile offender convicted of first degree murder attempts to escape from prison at the age of 18, the juvenile loses his opportunity for parole and is therefore sentenced to die in prison. *Miller* makes clear, however, that a sentencer (not the legislature) must consider the juvenile's level of culpability, including the factors described above, before any juvenile receives a life without parole sentence. Absent this individualized consideration, a life without parole sentence cannot constitutionally be imposed on a juvenile, even if the juvenile, for example, attempts to escape from prison.[2]

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[2] The factors that automatically deprive juvenile offenders the opportunity for parole (specifically escapes, attempted escapes, and assaults while incarcerated) would be factors a parole board could appropriately consider in determining whether a juvenile

In fact, prison maladjustment and increased levels of prison misconduct, especially early in a juvenile offender's incarceration, are quite typical; this misconduct decreases as the juveniles age. *See, e.g.,* Elizabeth P. Shulman & Elizabeth Cauffman, *Coping While Incarcerated: A Study of Male Juvenile Offenders*, 21 J. Res. On Adolescence 818, 825 (2011) (finding, in a study of males in their first month of incarceration at a high security juvenile facility, that "incarcerated youth are not very effective at coping with the stresses that confront them" and that "youth exhibited high levels of distress and misconduct during the first month of incarceration.") Though "juveniles in adult prisons are more likely to engage in disciplinary misconduct than adult inmates," "because the risk of committing disciplinary infractions decreases with age, it is expected that rule-breaking behavior declines to a level that makes [juvenile inmates] no different than other adult inmates." Margaret E. Leigey & Jessica P. Hodge, *And Then They Behaved: Examining that Institutional Misconduct of Adult Inmates Who Were Initially Incarcerated as Juveniles*, 93 Prison J. 272, 285-86 (2013). Early prison misconduct should not operate to automatically deny juvenile offenders an opportunity to ever leave prison, especially since, as *Miller* and research teach, juveniles are likely to outgrow this conduct.

2. Individualized Sentencing Determinations Are Particularly Important When Juveniles Are Convicted Of Felony Murder

Individualized sentencing determinations are particularly important when juveniles convicted of felony murder face life sentences. Wyoming's felony murder

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offender should be released into the community, but, pursuant to *Miller*, cannot automatically disqualify a juvenile offender from parole.

statute requires no finding that the defendant actually killed or intended to kill; instead, it creates a legal fiction in which intent to kill is inferred from the intent to commit the underlying felony. Because this theory of transferred intent is inconsistent with adolescent developmental and neurological research recognized by the United States Supreme Court, it is particularly important that a sentencer have the discretion to consider the facts of the offense and the juvenile's young age before imposing a life sentence.

a. The Felony Murder Doctrine Is Inconsistent With Adolescent Development

A felony murder conviction requires simply that an offender participated in a felony and that someone was killed in the course of the felony; the offender need not have actually committed the killing or intended that anyone would die. *See Richmond v. State*, 554 P.2d 1217, 1232 (Wyo. 1976) ("Felony-murder is an unusual offense in that the death arising out of the [felony] is purely an incident of the basic offense. It makes no difference whether or not there was an intent to kill."). Felony murder is justified by a "transferred intent" theory, where the intent to kill is inferred from an individual's intent to commit the underlying felony since a reasonable person would know that death is a possible result of felonious activities.

The felony murder doctrine's theory of transferred intent is inconsistent with adolescent developmental and neurological research recognized by the United States Supreme Court in *Roper*, *Graham*, *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011), and *Miller*. *See, e.g., J.D.B.*, 131 S. Ct. at 2404 (noting that the common law has long recognized that the "reasonable person" standard does not apply to children). These cases

preclude ascribing the same level of anticipation or foreseeability to a juvenile who takes part in a felony – even a dangerous felony – as the law ascribes to an adult. As Justice Breyer explains in his concurring opinion in *Miller*:

> At base, the theory of transferring a defendant's intent is premised on the idea that one engaged in a dangerous felony should understand the risk that the victim of the felony could be killed, even by a confederate. Yet the ability to consider the full consequences of a course of action and to adjust one's conduct accordingly is precisely what we know juveniles lack the capacity to do effectively.

132 S. Ct. at 2476 (Breyer, J., concurring) (internal citations omitted). Because adolescents' risk assessment and decision-making capacities differ from those of adults in ways that make it unreasonable to infer that a juvenile who decides to participate in a felony would reasonably know or foresee that death may result from that felony, their risk-taking should not be equated with malicious intent, nor should their recklessness be equated with indifference to human life. In particular, the U.S. Supreme Court has observed that adolescents "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *J.D.B.*, 131 S. Ct. at 2403 (internal quotation omitted). In the criminal sentencing context, the Court has recognized that adolescents' "'lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions.'" *Graham*, 560 U.S. at 72 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). In particular, the Court has noted that adolescents have "[d]ifficulty in weighing long-term consequences" and "a corresponding impulsiveness." *Graham*, 560 U.S. at 78. The Supreme Court has also recognized "that juveniles are more vulnerable or susceptible to negative influences and

outside pressures" than adults. *Roper*, 543 U.S. at 569. They "have less control, or less experience with control, over their own environment." *Id.*

b. U.S. Supreme Court Precedent Requires Individualized Sentencing For Juveniles Convicted Of Felony Murder Who Face Potential Life Sentences

In death penalty cases involving *adults* convicted of felony murder, the U.S. Supreme Court has recognized the importance of individualized sentencing determinations. In *Enmund v. Florida*, the Court held that the death penalty cannot be imposed upon a person "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." 458 U.S. 782, 797 (1982). *Enmund* emphasized that the culpability of a defendant must be based on his personal actions, not the actions of other participants in the felony. The Court found that Enmund – who was the getaway driver in the robbery – could not be sentenced to death based on the murders committed by his accomplices:

> For purposes of imposing the death penalty, Enmund's criminal culpability *must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt.* Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts.

458 U.S. at 801 (emphasis added). Similarly, the criminal culpability of a juvenile convicted of felony murder should be limited to the juvenile's personal participation in the underlying felony, not the actions of their accomplices.

Enmund stands for the proposition that individualized sentencing that accounts for a defendants' personal role in a felony is required when adults convicted of felony murder face capital punishment. In support of an individualized approach to adults convicted of felony murder, the dissent in *Enmund* noted:

> [T]he intent-to-kill requirement is crudely crafted; it fails to take into account the complex picture of the defendant's knowledge of his accomplice's intent and whether he was armed, the defendant's contribution to the planning and success of the crime, and the defendant's actual participation during the commission of the crime. Under the circumstances, the determination of the degree of blameworthiness is best left to the sentencer.

Enmund, 458 U.S. at 825 (O'Connor, J., dissenting). According to the dissent, a sentence in a capital felony murder case "must consider any relevant evidence or arguments that the death penalty is inappropriate for a particular defendant because of his relative lack of *mens rea* and his peripheral participation in the murder." *Id.* at 828 (O'Connor, J., dissenting). Since the U.S. Supreme Court in *Miller* recognized that life without parole sentences for juveniles are "akin to the death penalty" for adults, 132 S. Ct. at 2466, *Enmund*'s analysis regarding the imposition of death penalty on adults is instructive for juvenile sentencing cases.

Accordingly, before imposing a life sentence on a juvenile, a court must have the discretion to craft a sentence that accounts for the age of the juvenile, his or her level of involvement in the offense, the circumstances of the offense, and the juvenile's individual level of culpability in light of his or her development. The recklessness and impulsiveness of juveniles, their inability to perceive and weigh risks, their vulnerability

to outside pressure, and the transient nature of these characteristics makes the rationale for imposing mandatory life sentences for felony murder questionable when applied to a juvenile. The assumption that a juvenile knew and considered, or should have known or foreseen, the potentially deadly consequences of participating in a felony – even a dangerous felony – is inconsistent with the realities of adolescent development. A mandatory life sentence that does not allow the sentencer to account for the juvenile's individual level of culpability – including his actions, intent and expectations – is counter to the Court's reasoning in *Enmund, Roper*, *Graham,* and *Miller.*

3. Pursuant to *Miller* and *Graham*, Mandatory Life With Parole Sentences Must Provide A Meaningful Opportunity For Release

Wyoming's mandatory life with parole sentencing scheme must ensure that each juvenile receives a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham,* 560 U.S. at 75. As *Graham* makes clear, the Eighth Amendment "forbid[s] States from making the judgment at the outset that [juvenile] offenders never will be fit to reenter society." *Id.* Juveniles who receive non-life without parole sentences "should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential." *Id.* at 79. Therefore, replacing a mandatory juvenile life without parole scheme with a mandatory life with parole scheme does not cure the scheme's constitutional infirmities since "life with parole" is the functional equivalent of "life without parole" if the opportunity for release is not meaningful.

For an opportunity for release to be "meaningful" under *Graham*, review must begin long before a juvenile reaches old age. The Supreme Court has noted that "'[f]or most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.'" *Roper*, 543 U.S. at 570 (quoting Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)). Because most juveniles are likely to outgrow their antisocial and criminal behavior as they mature into adults, review of the juvenile's maturation and rehabilitation should begin relatively early in the juvenile's sentence, and the juvenile's progress should be assessed regularly. *See, e.g.*, *Research on Pathways to Desistance; December 2012 Update*, Models for Change, *available at*: http://www.modelsforchange.net/publications/357 (finding that, of the more than 1,300 serious offenders studied for a period of seven years, only approximately 10% report continued high levels of antisocial acts. The study also found that "it is hard to determine who will continue or escalate their antisocial acts and who will desist[,]" as "the original offense . . . has little relation to the path the youth follows over the next seven years."). Early and regular assessments enable the reviewers to evaluate any changes in the juvenile's maturation, progress and performance. Regular review also provides an opportunity to confirm that the juvenile is receiving vocational training, programming and treatment that foster rehabilitation. *See, e.g., Graham*, 130 S. Ct. at

2030 (noting the importance of "rehabilitative opportunities or treatment" to "juvenile offenders, who are most in need of and receptive to rehabilitation").

A "meaningful opportunity for release" also requires that the parole board focus on the characteristics of the youth, including his or her lack of maturity at the time of the offense, and not merely the circumstances of the offense. *Roper* cautioned against the "unacceptable likelihood" that "the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course." 543 U.S. at 573. *See also Graham*, 560 U.S. at 77-78. Similarly, in parole review, the parole board must not allow the underlying facts of the crime to overshadow the juvenile's immaturity at the time of the offense and progress and growth achieved while incarcerated. The risk that the circumstances of the offense will outweigh the rehabilitative progress of the juvenile would be especially acute in states such as Wyoming in which individuals convicted of first degree murder are statutorily denied parole eligibility and therefore the parole board is not accustomed to reviewing the cases of inmates who have committed first degree murder. If these cases now come before the parole board for juvenile offenders only, the facts of the underlying offense may impair the parole board's ability to assess the juvenile's reduced culpability or rehabilitation.

Additionally, for the opportunity for release to be meaningful, the juvenile's young age at the time of the offense and incarceration cannot be a factor that makes release *less* likely. *Cf. Roper*, 543 U.S. at 573 (noting that "[i]n some cases a defendant's youth may even be counted against him"); Ga. Comp. R. & Regs. r. 475-3-.05(8)(e)

(automatically assigning a higher risk score to inmates admitted to prison at age 20 or younger for the purposes of assessing parole eligibility in Georgia).[3]

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

Both parties agree that Wyoming's new sentencing scheme applies retroactively to Appellee Mares and others similarly situated. However, to the extent this Court must consider the question of *Miller*'s retroactivity, 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

[3] Parole boards should be mindful that any risk assessment tools that favorably assess inmates with stable employment histories or stable marriages may not be applicable to inmates who were incarcerated as children. *See, e.g.,* Ga. Comp. R. & Regs. r. 475-3-.05(8)(g) (giving lower risk scores to inmates who were employed at the time of their arrest); Mich. Comp. Laws Ann. § 791.235 (3)(a) (noting that the parole board in Michigan can consider an inmate's marital history).

consistency and legitimacy.

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

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

Having granted relief to Jackson on collateral review, the Supreme Court's ruling should be deemed retroactive. In *Teague v. Lane*, 489 U.S. 288 (1989), the Supreme Court noted that the fair administration of justice requires that similarly situated defendants be treated similarly. *Id.* at 315-16. *See also Tyler v. Cain*, 533 U.S. 656, 663 (2001) ("The new rule becomes retroactive, not by the decisions of the lower court or by the combined action of the Supreme Court and the lower courts, but simply by the actions of the Supreme Court."). Appellee Mares should likewise benefit from the Supreme Court's ruling in *Miller*.

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

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

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

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

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

Miller, the law can no longer impose on him. *See Schriro*, 542 U.S. at 352.[4] Like the

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

rules announced in *Atkins*, *Roper* and *Graham*, which have all been applied retroactively,[5] *Miller* "prohibit[s] a certain category of punishment" – mandatory life imprisonment without the possibility of parole – "for a class of defendants," – juvenile

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Successive Motion Under 28 U.S.C. § 2255 at 8-15, *In re Corey Grant*, No. 13-1455 (3d. Cir. June 17, 2013) (arguing that *Miller's* new rule is substantive).

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

homicide offenders. *Horn v. Banks*, 536 U.S. 266, 271 n.5 (2002).

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

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

> [the U.S. Supreme] Court's holding that, *because Arizona* has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as [*the U.S.*

> *Supreme*] *Court's* making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive.

542 U.S. at 354 (emphasis in original). Because *Miller* requires the sentencer "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," *Miller*, 132 S. Ct. at 2469, the U.S. Supreme Court has made consideration of certain factors "essential" to imposing life without parole on juveniles. As directed by *Schriro*, *Miller* is a substantive rule.

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

As clarified by *Alleyne* and *Schriro*, *Miller* did not simply require that certain factors uniquely relevant to youth be considered before a juvenile can receive life without parole, it in fact *expanded* the range of sentencing options available to juveniles by prohibiting mandatory life without parole and requiring that *additional* sentencing

options be put in place – a fundamental change in sentencing for juveniles that goes well beyond a change in a procedural rule.

Because *Miller* relies on a new, substantive interpretation of the Eighth Amendment that recognizes that children are categorically less culpable than adults, and because sentencers must consider how these differences mitigate against imposing life without parole sentences, the decision must be applied retroactively. Appellee Mares is entitled to be resentenced pursuant to a sentencing scheme that comports with *Miller*'s constitutional mandates – one that is proportionate and individualized.

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

The Supreme Court consistently has recognized that a child's age is far "more than a chronological fact," and has recently acknowledged that it bears directly on children's constitutional rights and status in the justice system. *See, e.g., J.D.B. v. North Carolina,* 131 S. Ct. 2394, 2403 (2011) (citations omitted). *Roper*, *Graham*, and *Miller* have enriched the Court's Eighth Amendment jurisprudence with scientific research confirming that youth merit distinctive treatment. *See Roper*, 543 U.S. at 569-70 (explaining that "[t]hree general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders") (*citing* Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Rev. 339 (1992); Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the

Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003)); *Graham*, 560 U.S. at 68 (reiterating that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"); *Miller*, 132 S. Ct. at 2464 n.5 ("[t]he evidence presented to us in these cases indicates that the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger.").

This understanding that juveniles, as a class, are less culpable than adult offenders is central to the Court's holding in *Miller*, 132 S. Ct. at 2469, and reflects a substantive change in children's rights under the Eighth Amendment. 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. These factors include: (1) the juvenile's "chronological age" and related "immaturity, impetuosity, and failure to appreciate risks and consequences;" (2) the juvenile's "family and home environment that surrounds him;" (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him;" (4) the "incompetencies associated with youth" in dealing with law enforcement and a criminal justice system designed for adults; and (5) "the possibility of rehabilitation." 132 S. Ct. at 2468-69. *Miller* therefore requires a substantive, individualized assessment of the juvenile's culpability prior to imposing life without parole.

In requiring individualized sentencing in adult capital cases, the Supreme Court stated that "the fundamental respect for humanity underlying the Eighth Amendment . . .

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

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

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

constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." *Id.* at 608.

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

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

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

> But given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, *we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. . . .* Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, *we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.*

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

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

As discussed above, *Miller* must be applied retroactively pursuant to *Teague* because it is a substantive rule. *Miller* must also be applied retroactively pursuant to *Teague*'s second exception, which applies to "watershed rules of criminal procedure" and to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 311. This occurs when the rule "requires the

observance of 'those procedures that . . . are 'implicit in the concept of ordered liberty.'"" *Id.* at 307 (internal citations omitted). To be "watershed[,]" a rule must first "be necessary to prevent an impermissibly large risk" of inaccuracy in a criminal proceeding and, second, "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton v. Bockting*, 549 U.S. 406, 418 (2007) (internal citations omitted). The Supreme Court has recognized that sentencing is a critical component of the trial process, and thus directly affects the accuracy of criminal trials. *See, e.g., Witherspoon v. Illinois*, 391 U.S. 510, 523 n.22 (1968) (retroactively applying a decision on a jury selection process that related to sentencing because it "necessarily undermined 'the very integrity of the . . . process' that decided the [defendant's] fate.") (internal citation omitted).

Miller satisfies both requirements. First, mandatory life without parole sentences cause an "impermissibly large risk" of *inaccurately* imposing the harshest sentence available for juveniles. *Whorton*, 549 U.S. at 418. The automatic imposition of this sentence with no opportunity for individualized determinations precludes consideration of the unique characteristics of youth – and of each individual youth – which make them "constitutionally different" from adults. *Miller*, 132 S. Ct. at 2464. *See also id.* at 2469 (explaining that imposing mandatory life without parole sentences "poses too great a risk of disproportionate punishment."). By requiring that specific factors be considered before a court can impose a life without parole sentence on a juvenile, *Miller* alters our understanding of what bedrock procedural elements are necessary to the fairness of such a proceeding. *See id.* (requiring sentencing judges "to take into account how children are

different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."). Indeed, some state appellate courts have adopted this analysis. *See, e.g., People v. Williams*, 982 N.E.2d 181, 196, 197 (Ill. App. Ct. 2012) (granting petitioner the right to file a successive post-conviction petition because *Miller* is a "watershed rule," and at his pre-*Miller* trial, petitioner had been "denied a 'basic 'precept of justice'' by not receiving any consideration of his age from the circuit court in sentencing," and finding that "*Miller* not only changed procedures, but also made a substantial change in the law."). Moreover, *Miller's* admonition – and expectation – that juvenile life without parole sentences will be "uncommon" upon consideration of youth and its "hallmark attributes" explicitly undermines the accuracy of life without parole sentences imposed pre- *Miller* – the very sentences at issue in this appeal.

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

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

In recent years, Eighth Amendment jurisprudence has evolved with extraordinary speed in the context of juvenile sentencing. Prior to the Court's 2005 decision in *Roper*, juvenile offenders could be executed. Less than a decade later, not only the death penalty, but life without parole sentences for children are constitutionally disfavored. *See Miller*, 132 S. Ct. at 2469 ("[W]e think appropriate occasions for sentencing juveniles to this harshest possible penalty [life without parole] will be uncommon."). This evolution in Eighth Amendment jurisprudence has been informed by brain science and adolescent development research that explains why children who commit crimes are less culpable than adults, and how youth have a distinctive capacity for rehabilitation. *See* Section III. A., *supra*. In light of this new knowledge, the Court has held in *Roper*, *Graham*, and *Miller* that sentences that may be permissible for adult offenders are unconstitutional for juvenile offenders. *See, e.g., Miller,* 132 S. Ct. at 2465 ("In [*Graham*], juvenile status precluded a life-without-parole sentence, even though an adult could receive it for a similar crime.").

While this understanding of adolescent development was not fully incorporated into Eighth Amendment jurisprudence when Appellee Mares' direct appeal rights were exhausted, this does not change the fact that Appellee, as well as all other juveniles sentenced pre-*Miller*, is categorically less culpable than an adult convicted of homicide and therefore 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 on which they committed their offenses and their convictions became final runs counter to the Eighth Amendment's reliance on the evolving standards of decency and serves no societal interest. *See Mackey v. United States*, 401 U.S. 667, 692-93 (1971) (Harlan, J., concurring) ("[T]he writ [of habeas corpus] has historically been available for attacking convictions on [substantive due process] grounds. This, I believe, is because it represents the clearest instance where finality interests should yield. There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose."). It is both common sense and a fundamental tenet of our justice system that

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

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

Additionally, depriving the majority of juveniles sentenced to life without parole the benefit of *Miller*'s holding because they have exhausted their direct appeals violates the Eighth Amendment's proscription against the arbitrary infliction of punishments. *See Furman*, 408 U.S. at 256 ("The high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that

general laws are not applied sparsely, selectively, and spottily to unpopular groups."). In his concurring opinion in *Furman*, Justice Brennan found:

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

Id. at 274 (Brennan, J., concurring). Unless *Miller* is applied retroactively, children who lacked sufficient culpability to justify the life without parole sentences they received will remain condemned to die in prison simply because they exhausted their direct appeals. As the Illinois Appellate Court concluded in finding *Miller* retroactive for cases on collateral review, in addition to mandatory life without parole sentences constituting "cruel and unusual punishment[,]" "[i]t would also be cruel and unusual to apply that principle only to new cases." *Williams*, 982 N.E.2d at 197. *See also Hill v. Snyder*, No. 10-14568, 2013 WL 364198, at *2 (E.D. Mich. Jan. 30, 2013) (proclaiming that "if ever there was a legal rule that should – as a matter of law and morality – be given retroactive effect, it is the rule announced in *Miller*. To hold otherwise would allow the state to impose *unconstitutional* punishment on some persons but not others, an intolerable miscarriage of justice."). The constitutionality of a child's sentence cannot be determined by the arbitrary date his sentence became final. Such a conclusion defies logic, and contravenes Eighth Amendment jurisprudence.

Finally, the U.S. Supreme Court has found that "[t]he basic concept underlying the

Eighth Amendment is nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). *See also Furman*, 408 U.S. at 270 (Brennan, J., concurring) ("The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings."). The Eighth Amendment's emphasis on dignity and human worth has special resonance when the offenders being punished are children. As Justice Frankfurter wrote over fifty years ago in *May v. Anderson,* 345 U.S. 528, 536 (1953), "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." More recently, the Court has found that:

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

Roper, 543 U.S. at 570.

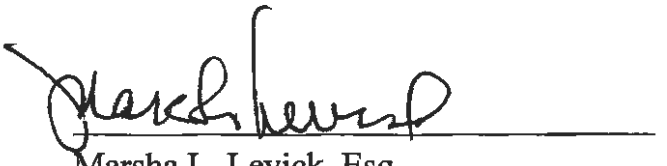
In order to treat Appellee Mares – and any other children sentenced to mandatory life without parole sentences seeking collateral review – with the dignity that the Eighth Amendment requires, *Miller* must apply retroactively. "The juvenile should not be deprived of the opportunity to achieve maturity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

IV. CONCLUSION

Sentencing practices that preclude consideration of the distinctive characteristics of individual juvenile defendants are unconstitutionally disproportionate punishments. Requiring individualized determinations in these cases does not require excusing juvenile offending. Juveniles who commit serious offenses should not escape punishment. But the U.S. Supreme Court's recent Eighth Amendment jurisprudence striking particular sentences for juveniles does require that additional considerations and precautions be taken to ensure that the sentence reflects the unique developmental characteristics of adolescents. As the Supreme Court has acknowledged, a child's age is far "'more than a chronological fact.'" *See J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011) (*quoting Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)). Wyoming must comply with *Miller* and provide individualized sentencing to Appellee Mares.

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

Respectfully submitted,



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APPENDIX

Identity of *Amici* and Statements of Interest

ORGANIZATIONS

Juvenile Law Center, founded in 1975, is the oldest multi-issue public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Among other things, Juvenile Law Center works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and; that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights. Juvenile Law Center has worked extensively on the issue of juvenile life without parole, filing *amicus* briefs in the U.S. Supreme Court in both *Graham v. Florida*, 130 S. Ct. 2011 (2010) and *Miller v. Alabama*, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

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. The CFSY includes 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 multipronged 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 **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 **Children and Family Justice Center (CFJC)** of the Bluhm Legal Clinic at Northwestern University School of Law is a comprehensive children's law center that has represented young people in conflict with the law and advocated for policy change for over 20 years. In addition to its direct representation of youth and families in matters relating to delinquency and crime, immigration/asylum and fair sentencing practices, the CFJC also collaborates with community members and other advocacy organizations to develop fair and effective strategies for systems reform. CFJC staff attorneys are also law school faculty members who supervise second- and third-year law students; they are assisted in their work by the CFJC's fellows, social workers, staff and students.

Children's Law Center of California (CLC) is a non-profit public interest law corporation that receives appointments from the Los Angeles County and the Sacramento County dependency courts to serve as counsel for abused and neglected youth. CLC serves as counsel for the vast majority of youth under the jurisdiction of Los Angeles and Sacramento counties. It has been providing children with representation for twenty years, and serves a greater number of children than any other such organization in the country. CLC is also actively engaged in local, statewide and national legislative and other reform efforts.

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 **Defender Association of Philadelphia** is an independent, non-profit corporation created in 1934 by a group of Philadelphia lawyers dedicated to the ideal of high quality legal services for indigent criminal defendants. Today approximately two hundred and fifteen full time assistant defenders represent clients in adult and juvenile, state and federal, trial and appellate courts, and at civil and criminal mental health hearings as well as at state and county violation of probation/parole hearings. Association attorneys also serve as the Child Advocate in neglect and dependency court. More particularly, Association attorneys represent juveniles charged with homicide and facing life imprisonment without the possibility of parole. The Defender Association attorneys have had numerous juveniles given sentences of life imprisonment without parole. The constitutionality of such sentences has been challenged at the trial level and at the appellate level by Defender Association lawyers.

Juvenile Justice Initiative (JJI) of Illinois is a non-profit, non-partisan, inclusive statewide coalition of state and local organizations, advocacy groups, legal educators, practitioners, community service providers and child advocates supported by private donations from foundations, individuals and legal firms. JJI as a coalition establishes or joins broad-based collaborations developed around specific initiatives to act together to achieve concrete improvements and lasting changes for youth in the justice system, consistent with the JJI mission statement. Our mission is to transform the juvenile justice system in Illinois by reducing reliance on confinement, enhancing fairness for all youth, and developing a comprehensive continuum of community-based resources throughout the state. Our collaborations work in concert with other organizations, advocacy groups, concerned individuals and state and local government entities throughout Illinois to ensure that fairness and competency development are public and private priorities for youth in the justice system.

The **National Association of Counsel for Children (NACC)** is a non-profit child advocacy and professional membership association dedicated to enhancing the well-being of America's children. Founded in 1977, the NACC is a multidisciplinary organization with approximately 2200 members representing all 50 states, DC, and several foreign countries. The NACC works to improve the delivery of legal service to children, families, and agencies; advance the rights and interests of children; and develop the practice of law for children and families as a sophisticated legal specialty. NACC programs include

training and technical assistance, the national children's law resources center, the attorney specialty certification program, the model children's law office project, policy advocacy, and the amicus curiae program. Through the amicus curiae program, NACC has filed numerous briefs involving the legal interest of children in state and federal appellate courts and the Supreme Court of the United States. Founded in 1977, the National Association of Counsel for Children (NACC) is a 501(c)(3) non-profit child advocacy and professional membership association dedicated to enhancing the well being of America's children. The NACC works to strengthen legal advocacy for children and families by promoting well resourced, high quality legal advocacy; implementing best practices; advancing systemic improvement in child serving agencies, institutions and court systems; and promoting a safe and nurturing childhood through legal and policy advocacy. NACC programs which serve these goals include training and technical assistance, the national children's law resource center, the attorney specialty certification program, policy advocacy, and the amicus curiae program. Through the amicus curiae program, the NACC has filed numerous briefs involving the legal interests of children and their families in state and federal appellate courts and the Supreme Court of the United States. The NACC uses a highly selective process to determine participation as amicus curiae. Amicus cases must pass staff and Board of Directors review using the following criteria: the request must promote and be consistent with the mission of the NACC; the case must have widespread impact in the field of children's law and not merely serve the interests of the particular litigants; the argument to be presented must be supported by existing law or good faith extension the law; there must generally be a reasonable prospect of prevailing. The NACC is a multidisciplinary organization with approximately 3000 members representing all 50 states and the District of Columbia. NACC membership is comprised primarily of attorneys and judges, although the fields of medicine, social work, mental health, education, and law enforcement are also represented.

Amicus Curiae **National Association of Criminal Defense Lawyers (NACDL)** is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice including issues involving juvenile justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in this case because the proper administration of justice requires that age and other circumstances of youth be taken into account in order to ensure compliance with constitutional requirements and to promote fair, rational and humane practices that respect the dignity of the individual.

The **National Juvenile Defender Center** was created to ensure excellence in juvenile defense and promote justice for all children. The National Juvenile Defender Center responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. The National Juvenile Defender Center gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, Improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice. The National Juvenile Defender Center provides support to public defenders, appointed counsel, child advocates, law school clinical programs and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural and tribal areas. The National Juvenile Defender Center also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

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-one 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 focused on their rehabilitation. Youth should not be transferred into the punitive adult criminal justice system where they are subject to extreme and harsh sentences such as life without the possibility of parole, and are exposed to serious, hardened criminals. NJJN supports a growing body of research that indicates the most effective means for addressing youth crime are 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 **Northeast Juvenile Defender Center** is one of the nine Regional Centers affiliated with the National Juvenile Defender Center. The Center provides support to juvenile trial lawyers, appellate counsel, law school clinical program and nonprofit law centers to ensure quality representation for children throughout Delaware, New Jersey, New York, and Pennsylvania by helping to compile and analyze juvenile indigent defense data, offering targeted, state-based training and technical assistance, and providing case support specifically designed for complex or high profile cases. The Center is dedicated to ensuring excellence in juvenile defense by building the juvenile defense bar's capacity to provide high quality representation to children throughout the region and promoting justice for all children through advocacy, education, and prevention.

The **Pacific Juvenile Defender Center** is a regional affiliate of the National Juvenile Defender Center. Members of the Center include juvenile trial lawyers, appellate counsel, law school clinical staff, attorneys and advocates from nonprofit law centers working to protect the rights of children in juvenile delinquency proceedings in California and Hawaii. The Center engages in appellate advocacy, public policy and legislative discussions with respect to the treatment of children in the juvenile and criminal justice systems. Center members have extensive experience with cases involving serious juvenile crime, the impact of adolescent development on criminality, and the differences between the juvenile and adult criminal justice systems. These cases, involving the imposition of Life Without the Possibility of Parole on juvenile offenders, present questions that are at the core of the Pacific Juvenile Defender Center's work.

Based in one of our nation's poorest cities, the **Rutgers School of Law – Camden Children's Justice Clinic** is a holistic lawyering program using multiple strategies and interdisciplinary approaches to resolve problems for indigent individuals facing juvenile delinquency charges, primarily providing legal representation in juvenile court hearings. While receiving representation in juvenile court and administrative hearings, clients are exposed to new conflict resolution strategies and are educated about their rights and the implications of their involvement in the juvenile justice system. This exposure assists young clients in extricating themselves from destructive behavior patterns, widen their horizons and build more hopeful futures for themselves, their families and their communities. Additionally, the Clinic works with both local and state leaders on

improving the representation and treatment of at-risk children in Camden and throughout the state.

The mission of the **San Francisco Office of the Public Defender** is to provide vigorous, effective, competent and ethical legal representation to persons who are accused of crime and cannot afford to hire an attorney. The office provides representation to 25,000 individuals per year charged with offenses in criminal and juvenile court.

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 juveniles is an issue that fits squarely within the Center's long-term interests.

INDIVIDUALS

Mary Berkheiser is a Professor of Law at the William S. Boyd School of Law, University of Nevada, Las Vegas. Professor Berkheiser's area of specialization is juvenile law and the rights of juveniles accused of committing crimes. Professor Berkheiser directs the Juvenile Justice Clinic in the law school's Thomas & Mack Legal Clinic and teaches Criminal Law and Criminal Procedure – Adjudication. In the clinic, law students represent juveniles in proceedings in the juvenile and state district courts, advocating for their legal rights and their expressed interests. In addition, Professor Berkheiser and her students have drafted legislation and testified at legislative hearings on matters affecting juveniles in the State of Nevada. Professor Berkheiser has authored two articles on juvenile issues, *Capitalizing Adolescence: Juvenile Offenders on Death Row,* 59 Miami L. Rev. 135 (2005), and *The Fiction of Juvenile Right to Counsel: Waiver*

in the Juvenile Courts, 54 Fla. L. Rev. 577 (2002), as well as two on juvenile life without parole: "Developmental Detour: How the Minimalism of *Miller v. Alabama* Led the Court's 'Kids Are Different' Eighth Amendment Jurisprudence Down a Blind Alley," 46 Akron L. Rev. 489 (2013); "Death Is Not So Different After All: *Graham v. Florida* and the Court's 'Kids Are Different' Eighth Amendment Jurisprudence," 36 Vt. L. Rev. 1 (2011).

Stephen K. Harper is a clinical professor at Florida International University College of Law. Prior to that he taught juvenile law as an adjunct professor at the University of Miami School of law for 13 years. From 1989 until 1995 he was the Chief Assistant Public Defender in charge of the Juvenile Division in the Miami-Dade Public Defender's Office. In 1998 he was awarded the American Bar Association's Livingston Hall Award for "positively and significantly contributing to the rights and interests" of children. Harper took a leave of absence from his job to coordinate the Juvenile Death Penalty Initiative which ended when the Supreme Court of the United States ruled in *Roper v Simmons*, 543 U.S. 551 (2005). In 2005 he, along with Seth Waxman, received the Southern Center for Human Rights Frederick Douglass Award for his work in ending the juvenile death penalty. He has consulted in many juvenile cases in Florida, Guantanamo and the United States Supreme Court (including *Graham v Florida*, 130 S. Ct. 2011 (2010), and *Miller v Alabama*, 567 U.S.___ 2010).