ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
PLAINTIFF-APPELLEE,	:	Case No. 2012-1410
V.	:	On discretionary appeal from the Hamilton County Court of Appeals First Appellate District, No. C-110160
ERIC LONG, A MINOR CHILD	:	
DEFENDANT-APPELLANT.	:	

BRIEF OF *AMICUS CURIAE* JUVENILE LAW CENTER ON BEHALF OF APPELLANT ERIC LONG

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I. STATEMENT OF INTEREST

Founded in 1975, Juvenile Law Center is the oldest multi-issue public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Among other things, Juvenile Law Center works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and; that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights. Juvenile Law Center urges this Court to vacate Appellant's life without parole sentence and remand for a sentencing consistent with the U.S. Supreme Court's decision in *Miller v. Alabama*, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

II. STATEMENT OF FACTS

Amicus adopts the Statement of Facts as articulated in the brief of Appellant Eric Long.

III. ARGUMENT

Juvenile Law Center writes in support of Appellant's argument that the trial court's imposition of a sentence of life imprisonment without the possibility of parole violates the Supreme Court's holdings in *Miller v. Alabama*, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) and *Graham v. Florida*, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

A. *Miller* Reaffirms The U.S. Supreme Court's Recognition That Children Are Fundamentally Different From Adults And Categorically Less Deserving Of The Harshest Forms Of Punishments

Miller held that, prior to imposing a life without parole sentence on a juvenile offender, the sentencer must take into account the juvenile's decreased culpability. *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*, 130 S. Ct. at 2026-27, 2029-30). 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*, 130 S. Ct., at 2027; *Roper v. Simmons*, 543 U.S. 551, 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)).

In *Graham*, which held that life without parole sentences for juveniles convicted of non-homicide offenses violate the Eighth Amendment, the U.S. Supreme Court found that three essential characteristics 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." *Roper*, 543 U.S. at 569-70. These 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." *Id.* at 573. Accordingly, "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 569.

Id. at 2026. 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.'" *Id.* (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (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 review 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." *Ibid.*

Id. at 2026-27. 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.

The *Graham* Court relied upon an emerging body of research confirming the distinct emotional, psychological and neurological status of youth. The Court clarified 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." *Id.* at 2026. Thus, the Court underscored that because juveniles are more likely to be reformed than adults, the "status of the offender" is central to the question of whether a punishment is constitutional. *Id.* at 2027.

Importantly, in *Miller*, the Court found that none of what *Graham* "said about children — about their distinctive (and transitory) mental traits and environmental vulnerabilities — is crime-specific." *Id.* at 2465. Accordingly, the Court 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.*

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

B. *Miller* Requires The Sentencer To Make An Individualized Sentencing Determination Based On A Juvenile's Overall Culpability

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 2458.

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.

C. Appellant's Life Without Parole Sentence Is Unconstitutional Because The Court Failed To Account For How Appellant's Status As A Juvenile Counseled Against A Life Without Parole Sentence

Prior to imposing a life without parole sentence on a juvenile offender, the U.S. Supreme Court "*require[s]* [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. Because the trial court never took into account how Appellant's young age counseled against sentencing him to life without parole, his sentence is unconstitutional and must be vacated.

Here, the record does not reflect how, if at all, the trial court considered Appellant's young age at the time of the offense. Though Appellant's counsel, at sentencing, argued that his age should be treated as a mitigating factor (T.p. 2784-85), the state's attorney argued that Defendant's youth justified a longer sentence because his young age "means that even after thirty years [in prison] [he] could still pose a danger to society." *See* State's Sentencing Memorandum,

Feb. 23, 2011 (Doc. 233), at 4.[1] At sentencing, the trial court made no findings with respect to Appellant's youth or juvenile status at the time of the offenses. Significantly, in spite of the constitutional requirement that the sentencer must consider the attributes of youth, the trial court drew no distinction between Appellant and his adult co-defendants.

Before imposing a life without parole sentence on a juvenile, the trial court must make specific findings demonstrating why the sentence is appropriate. The Supreme Court has repeatedly found 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." *See Roper*, 543 U.S. at 573; *see also Graham*, 130 S. Ct. at 2026; *Miller*, 132 S. Ct. at 2469. While the United States Supreme Court left open the possibility that a trial court could impose a life without parole sentence, the Court found that "given all we have said in *Roper*, *Graham*, and [*Miller*] 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*." *Miller*, 132 S. Ct. at 2469 (emphasis added). Here, the trial court disregarded the social and developmental science that irreparably corrupt juveniles are rare and concluded, without any justification or explanation, that Appellant was beyond redemption. *Cf. Roper*, 543 U.S. at 573 ("An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower

[1] *See also Graham*, 130 S. Ct. at 2028 (observing that "[l]ife without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16–year–old and a 75–year–old each sentenced to life without parole receive the same punishment in name only. This reality cannot be ignored.") (internal citations omitted). The Court explicitly takes note of the unfairness of sentencing a child to life without parole without considering the longer number of years that he or she will have to serve, relative to an adult facing the same charges.

mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death"). Because the trial court failed to justify why Appellant's case reflects the uncommon occasion in which this harshest possible penalty is justified, the sentence must be vacated.

On remand, this Court should clarify that juvenile life without parole sentences are only permissible in rare and unusual cases. *See Miller*, 132 S. Ct. at 2469. This Court should be explicit that life without parole is only appropriate for children convicted of aggravated homicide when, consistent with the factors outlined in *Miller*, the trial court concludes, *on the record*,[2] that *all* of the following apply:

- The nature and circumstances of the offense are unrelated to the hallmarks of adolescent development and reflect the child's irreparable corruption;
- The nature and circumstances of the offense are unrelated to the child's family and home environment and reflect the child's irreparable corruption;
- The child's participation in the offense, including the extent of his participation, were unrelated to family and/or peer pressures;
- The child's level of participation in the offense, including the child's participation in both the planning and commission of the offense, reflect the child's irreparable corruption;
- The child possessed the sophistication to competently negotiate the criminal justice system, including his interactions with law enforcement; and
- The child's culpability, age, mental capacity, maturity, criminal sophistication, and other factors dictate a finding that the child cannot be rehabilitated.

Reserving juvenile life without parole sentences for circumstances when all of these factors are met is consistent with the Supreme Court's finding in *Miller* that "appropriate

[2] Pennsylvania and North Carolina, for example, now require trial courts to consider enumerated factors *on the record* before sentencing a juvenile to life without parole. *See* Act effective July 12, 2012, 2012 N.C. ALS 148 (amending the state sentencing laws to comply with the United States Supreme Court Decision *Miller v. Alabama*); 18 Pa.C.S. § 1102.1(d).

occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* (quoting *Roper*, 543 U.S. at 573).[3]

D. Absent A Determination That Appellant Is Among The "Uncommon" Juveniles For Whom A Life Without Parole Sentence As Justified, His Sentence Must Provide A Meaningful Opportunity For Release

Absent a finding that Appellant is among the rare juveniles for whom life without parole is appropriate, the trial court must impose a sentence that provides Appellant a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 130 S. Ct. at 2030. As *Graham* makes clear, the Eighth Amendment "forbid[s] States from making

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[3] Other state courts have provided this sort of guidance to lower courts. The Wyoming Supreme Court, for example, held:

> To fulfill *Miller*'s requirements, Wyoming's district courts must consider the factors of youth and the nature of the homicide at an individualized sentencing hearing when determining whether to sentence the juvenile offender to life without the possibility of parole or to life according to law. While not exhaustive, the *Miller* Court specifically indicated some factors for a trial court to consider at sentencing include:
>
> (a) "the character and record of the individual offender [and] the circumstances of the offense," *Miller*, 567 U.S. at , 132 S.Ct. at 2467 (quotation marks omitted);
> (b) "the background and mental and emotional development of a youthful defendant," *id.*;
> (c) a juvenile's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate the risks and consequences," *id.*, 567 U.S. at , 132 S.Ct. at 2468;
> (d) "the family and home environment that surrounds" the juvenile, "no matter how brutal or dysfunctional," *id.*;
> (e) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressure may have affected" the juvenile, *id.*;
> (f) whether the juvenile "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth," e.g., the juvenile's relative inability to deal with police and prosecutors or to assist his own attorney, *id.*; and
> (g) the juvenile's potential for rehabilitation, *id.*

Bear Cloud v. State, 2013 WY 18, P42 (Wyo. 2013).

the judgment at the outset that [juvenile] offenders never will be fit to reenter society." *Id.* at 2032. 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 2032. Therefore, absent a finding that the juvenile is among the most culpable juvenile offenders, a sentencer cannot replace a "life without parole" with a sentence that is the functional equivalent of life without parole.

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*, 130 S. Ct. at 2032. 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.[4] Additionally, for the opportunity for release to be

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[4] Unfortunately, juveniles sentenced as adults in Ohio are often denied meaningful opportunities to participate in rehabilitative programming. *See, e.g.*, OAC 5120-2-06(R) (2012) ("No inmate may earn days of credit pursuant to this rule if he is serving a sentence of imprisonment for ... (1) Life with parole eligibility . . . (2) Life parole eligibility after serving twenty full years for the offense of aggravated murder . . . or (4) Life imposed prior to October 19, 1981, for an offense other than the offense of first degree or aggravated murder . . . or (5) Life for rape or felonious sexual penetration; or (6) A minimum term longer than fifteen years imposed under any law of this state in effect prior to January 1, 1974."). They are thus, ironically, less likely to become eligible for parole, and Ohio's current practices thus undermine *Miller*'s premises. *Miller*, like *Roper* and *Graham*, recognized "the great difficulty . . . of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Miller*, 567 U.S. at 2026. (internal citations omitted). Rehabilitative programming and meaningful opportunities for parole are the vehicles by which society can distinguish the former from the latter. The American Bar Association (ABA) provides a model: in 2008, the ABA adopted a policy that built upon *Roper* and anticipated *Miller* by calling for different sentencing and parole policies for offenders who were under 18 at the time of their crimes. With respect to parole, the ABA declared that:

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).[5]

Accordingly, this Court should clarify that, unless the trial court makes on-the-record findings that establish that a juvenile homicide offender is among the rare and uncommon juveniles who are irredeemable and for whom life without parole is appropriate, the trial court must impose a sentence that provides a meaningful opportunity for release based on the juvenile's demonstrated maturity and rehabilitation. *See Graham*, 130 S. Ct. at 2030.

> Youthful offenders should generally be eligible for parole or other early release consideration at a reasonable point during their sentence; and, if denied, should be reconsidered for parole or early release periodically thereafter.

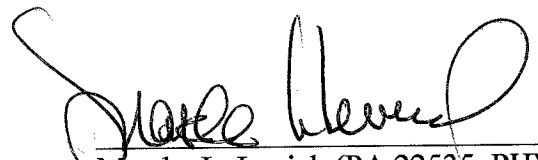
See ABA Criminal Justice Section, The State of Criminal justice 2007–2008, at 317 (Victor Streib, ed. 2008). Ohio should adopt a similar scheme.

[5] Additionally, parole boards should be mindful that any risk assessment tools that favorably assess inmates with a stable employment histories or stable marriages may not be applicable to inmates who were incarcerated as children and therefore had little or no opportunity to establish an employment history or stable marital relationships prior to their incarceration. *See, e.g.*, Ga. Comp. R. & Regs. r. 475-3-.05(8)(g) (Georgia regulations 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).

IV. CONCLUSION

WHEREFORE, Juvenile Law Center respectfully requests that this Court withdraw its previous opinion, vacate Mr. Long's sentence and remand this matter to the trial court for a sentencing hearing consistent with the dictates set forth by the Supreme Court in *Miller v. Alabama*.

Respectfully submitted this 8th day of March, 2013.



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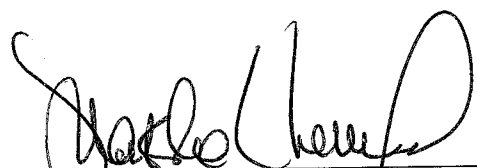

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