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Amici Curiae Brief on Behalf of the Fred T. Korematsu Center for Law and Equality and the American Academy of Child and Adolescent Psychiatry in Support of Petitioner Filed with Consent of Parties

Fred T. Korematsu Center for Law and Equality

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SC92980, SC93324, SC93335, SC93465

IN THE SUPREME COURT OF MISSOURI

In Re: JOHNATHAN COLLIER,

Petitioner,

vs.

TERRY RUSSELL,

Respondent.

STATE OF MISSOURI Ex Rel.
GARY L. GRIFFIN,

Petitioner,

vs.

JEFF NORMAN,

Respondent.

In Re: RALPH MCELROY,

Petitioner,

vs.

JAY CASSADY,

Respondent.

STATE OF MISSOURI Ex Rel.
LONNIE LOCKHART,

Petitioner,

vs.

JEFF NORMAN,

Respondent.

AMICI CURIAE BRIEF ON BEHALF OF THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY AND THE AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY IN SUPPORT OF PETITIONER FILED WITH CONSENT OF PARTIES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

IDENTITY AND INTEREST OF *AMICI CURIAE*

The Fred T. Korematsu Center for Law and Equality ("Korematsu Center"), based at Seattle University School of Law, advances justice through research, advocacy, and education. Currently, the Korematsu Center is making ongoing efforts to study the racial disproportionality that exists within our criminal justice system. The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

The American Academy of Child and Adolescent Psychiatry ("AACAP") is a medical membership association established by child and adolescent psychiatrists in 1953. Now over 8,700 members strong, AACAP is the leading national medical association dedicated to treating and improving the quality of life for the estimated 7-15 million American youth under 18 years of age who are affected by emotional, behavioral, developmental and mental disorders. AACAP's members actively research, evaluate, diagnose, and treat psychiatric disorders, and pride themselves on giving direction to and responding quickly to new developments in addressing the health care needs of children and their families.

SUMMARY OF ARGUMENT

In *Graham v. Florida,* the United States Supreme Court held that sentencing juveniles to life without parole for non-homicide offenses constitutes cruel and unusual punishment. 560 U.S. 48 (2010). The Court reasoned that youth are less culpable than adults because of biological difference in brain development that render youth more immature, more likely to engage in risky behavior, and more vulnerable to external influences like peer pressure. *Id.* at 91-92. Additionally, because youth brains are still

developing well into late adolescence, the Court determined that their personality traits are more transient and capable of change than adult personalities. *Id.* at 68-69. The undisputed scientific data confirms that youth cannot be expected to act as mature adults.

The Supreme Court clarified and extended the *Graham* decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012). There, the Court found that because youth offenders were less culpable due to the characteristics noted in *Graham*, imposing mandatory life sentences without the possibility of parole for juvenile homicide offenders constituted cruel and unusual punishment. Taken together, the Court's decisions in *Graham* and *Miller* mandate that when sentencing youth offenders, a court must consider as mitigating factors the characteristics that make youth offenders different.

The Petitioner's sentence must be vacated because, pursuant to the *Graham* and *Miller* framework, youth offenders are less culpable and are entitled to a meaningful opportunity for release. In addition to concluding that *Miller* may be applied retroactively, *amici* respectfully request that the Court provide guidance to the lower courts on how to apply Missouri sentencing statutes in a constitutional fashion so that youth offenders have the opportunity to seek parole and become productive members of society. Providing this constitutionally-mandated opportunity is especially important here, where the Petitioners' early life was scarred by poverty, despair, and fear.

ARGUMENT

I. Medical Research on Brain Development Confirms That Youth Offenders Under 18 Years of Age Are Categorically Different From Adult Offenders With Regard to Culpability, Susceptibility to Deterrence, Vulnerability to Peer Pressure, and Capacity to Change.

A youth's mind is different. Science, law, and social values have all recognized this essential fact. In *Roper v. Simmons*, *Graham*, and *Miller*, the Court recognized that a youth's culpability "is diminished, to a *substantial degree*" based on biological differences between a youth's brain and an adult's brain. *Roper v. Simmons*, 543 U.S. 551, 571 (2005) (emphasis added). These biological distinctions have long been recognized by common-sense and ratified by our society's laws which "recognize[] a host of distinctions between the rights and duties of children and those of adults." *New Jersey v. T.L.O.*, 469 U.S. 325, 350 n.2 (1985) (Powell, J., concurring).[1]

[1] For example, Missouri has enacted numerous protective laws to keep youth from purchasing, using, or possessing certain substances or items. *See, e.g.,* Mo. Rev. Stat. § 311.325 (prohibiting persons under twenty-one years of age from purchasing or possessing alcohol); Mo. Rev. Stat. § 407.931 (prohibiting minors from purchasing or obtaining tobacco products). Further, the state has categorically barred minors from playing in authorized gambling activities. Mo. Rev. Stat. § 572.020. Similarly, minors are limited in their ability to contract, Mo. Rev. Stat. § 431.056, or even mark their bodies with a tattoo without parental consent. Mo. Rev. Stat. § 324.520.

These judicially and legislatively recognized distinctions are based on three categorical differences that separate youths from adults: (1) a propensity to engage in risky behavior; (2) a susceptibility to external pressures; and (3) a transient personality with a penchant for change. *Graham*, 560 U.S. at 71-76. "Juveniles' susceptibility to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'" *Roper*, 543 U.S. at 570 (citation omitted). Science now verifies what law and common sense have always known to be true: because youth minds are different, youth offenders must be treated differently than adult offenders.[2]

A. Because Youth Brains Are Structurally Hardwired in Ways That Promote Risky and Impulsive Behavior, Adult Sanctions Do Not Deter Youth Misconduct.

The notion that youth, as a group, are prone to impulsive behavior is not simply a stereotype. Indeed, various studies have confirmed that youth "exhibit a disproportionate

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Federal law also recognizes youth incompetency in certain activities. Under 10 U.S.C. § 505(a), a person must be eighteen to serve in the military without parental consent. Federal law also prohibits, with certain exceptions, persons under the age of eighteen from possessing a handgun or handgun ammunition. 18 U.S.C. § 922(x)(2), (5).

[2] Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009, 1011-13 (2003).

amount of reckless behavior, sensation seeking and risk taking."[3] In fact, across cultures, developmental psychiatrists have found that reckless and sensation seeking behavior *peaks* during adolescence.[4] This behavior often involves criminal activities such as drunk driving and drug use, and reckless conduct such as unprotected sex.[5] In particular, violent crimes "peak sharply" in late adolescence (ages 16 and 17).[6] This is due, in part, because youth overvalue rewards and minimize risks, thereby skewing their cost calculus

[3] Linda Patia Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCI. & BIOBEHAV. REVS. 417, 421 n.1 (2000).

[4] Beatrice Luna, *The Maturation of Cognitive Control and the Adolescent Brain, in* FROM ATTENTION TO GOAL-DIRECTED BEHAVIOR 250 (Francisco Aboitiz & Diego Cosmelli, eds.) (2009).

[5] "[I]n laboratory experiments and studies across a wide range of adolescent populations, developmental psychologists [have shown] that adolescents are risk takers who inflate the benefits of crime and sharply discount its consequences, even when they know the law." Jeffrey Fagan, *Why Science and Development Matter in Juvenile Justice*, THE AMERICAN PROSPECT, Aug. 14, 2005, at 2.

[6] Terrie Moffit, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy,* 100 PSYCHOL. REV. 674, 685-86 (1993).

when making decisions.[7] The overvaluing of rewards has been observed to be particularly pronounced when youth are interacting with other adolescents.[8]

Recent brain imaging studies have found a biological link between risk-taking behavior and pre-frontal brain development.[9] In particular, youth brains show increased neural activity in parts of the brain linked to risky behavior,[10] and less activity in the prefrontal cortex, which continues to mature through late adolescence.[11] Prefrontal cortex maturation is especially important when gauging youth culpability because that

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[7] Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 16:3 ANN. REV. CLINICAL PSYCHOL. 47, 57 (2009) [hereinafter "Steinberg 2009"].

[8] Laurence Steinberg. *Does Recent Research on Adolescent Brain Development Inform the Mature Minor Doctrine?* 38.3 J. MED. & PHIL. 256, 260 (2013).

[9] James Bjork et al., *Developmental Differences in Posterior Mesofrontal Cortex Recruitment by Risky Rewards*, 27 J. NEUROSCI. 4839 (2007).

[10] Robert Shepherd, *The Relevance of Brain Research to Juvenile Justice*, 19 CRIM. JUST. 51, 52 (2005) ("[T]here are clear neurological explanations for the difficulties adolescents have in cognitive functioning, in exercising mature judgment, in controlling impulses, in weighing the consequences of actions, in resisting the influence of peers, and in generally becoming more responsible.").

[11] Casey, B. J. et al., *The Adolescent Brain*, 28 DEVELOPMENTAL. REV. 62, 68 (2008).

part of the brain is associated with decision making generally,[12] including making moral judgments[13] and evaluating future consequences.[14] Moreover, the ability to regulate one's emotions – a crucial element of behavior control[15] – does not fully develop until post-adolescence.[16]

As a result, youth brains develop with a structural imbalance that effectively promotes poor decision making: the areas that motivate reckless behavior mature sooner than the areas that regulate such behavior.[17] Put simply, the youth brain is literally hard-wired to promote poor decision making. Because youth brains are biologically less

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[12] Samantha B. Wright et al., *Neural Correlates of Fluid Reasoning in Children and Adults*, 1:8 FRONTIERS HUM NEUROSCI. 7 (2008) (prefrontal cortex controls reasoning).

[13] Jorge Moll et al., *Frontopolar and Anterior Temporal Cortex Activation in a Moral Judgment Task: Preliminary Functional MRI Results in Normal Subjects*, 59 ARQ NEURO-PSQUIATR 657 (2001).

[14] Antoine Bechera et al., *Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 BRAIN 2189, 2189-99 (2000).

[15] Sang Hee Kim & Stephan Hamann, *Neural Correlates of Positive and Negative Emotion Regulation*, 19:5 J. COGNITIVE NEUROSCI. 776, 776 (2007).

[16] Casey, *supra* note 11, at 65.

[17] Steinberg 2009, *supra* note 7, at 54.

"capable" of regulating their behavior,[18] "[i]t is statistically aberrant to refrain from such [risk-taking] behavior during adolescence."[19]

Additionally, experience and scientific research confirm that long sentences such as life without parole do nothing to deter youth offenders because their limited life experiences make it difficult for them to weigh consequences and perceive long stretches of time.[20] Indeed, "*Roper* noted that 'the same characteristics that render juveniles less

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[18] Elizabeth Cauffman & Laurence Steinberg, *(lm)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults,* 18 BEHAV. SCI. & L. 741, 742 (2000).

[19] Spear, *supra* note 3. *See also* Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 344 (1992) (noting that over half of youth reported driving drunk, using drugs, engaging in other criminal acts).

[20] "Few adolescents are likely to be able to grasp the true significance of a life sentence. One twenty-nine-year-old woman serving life without parole told a researcher for this report that when she was sentenced, at the age of sixteen: 'I didn't understand "life without" ... [that] to have "life without," you were locked down forever. You know it really dawned on me when [after several years in prison, a journalist] came and ... he asked me, "Do you realize that you're gonna be in prison for the rest of your life?" And I said, "Do you really think that? You know ... and I was like, "For the rest of my life? Do you think that God will leave me in prison for the rest of my life?'" Human Rights Watch, "'The Rest of Their Lives," *supra* note 2, at 4-5.

culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Graham*, 130 S. Ct. at 2028 (quoting *Roper*, 543 U.S. at 571); *see also Miller*, 132 S.Ct. at 2465.[21] In one study, researchers found that the threat of adult sanctions had no deterrent effect whatsoever on youth crime.[22] In sum, there is a strong biological basis for the notion that youth offenders are less culpable than their adult counterparts.

B. Youth Are Particularly Vulnerable to External Pressures at Home and From Peers.

Another reason youth are less culpable than adults is because they are uniquely susceptible to negative external influences and peer pressure. First, youth are not old enough to control or remove themselves from negative environments, which can undermine decision making. In particular, youth are "dependent on living circumstances of their parents and families and hence are vulnerable to the impact of conditions well

[21] "Because juveniles' lack of maturity and under-developed sense of responsibility ... often result in impetuous and ill-considered actions and decisions," *Johnson v. Texas*, 509 U.S. 350, 367 (1993), they are less likely to take a possible punishment into consideration when making decisions. This is particularly so when that punishment is rarely imposed." *Graham*, 130 S. Ct. at 2028-29.

[22] Eric L. Jensen & Linda Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violence Juvenile Crime,* 40 CRIME & DELINQ. 96, 100-02 (1994).

beyond their control."[23] Put differently, youth are not old enough to "extricate themselves from a criminogenic setting." *Roper*, 543 U.S. at 569; *see also id.* (noting that "juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment").

Second, youth brains are more sensitive to certain emotional triggers, such as fear, rejection, and the desire to "fit in," making them particularly vulnerable to peer pressure.[24] In fact, the parts of the brain associated with resistance to peer influence are still developing well into late adolescence.[25] One study found that peer pressure doubles risky behavior, including criminal behavior, among youth.[26] Peer pressure can be especially pronounced in the gang context, where the data indicate enormous group

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[23] Alan E. Kazdin, Ad*olescent Development, Mental Disorders, and Decision making of Delinquent Youths*, *in* YOUTH ON TRIAL 33 (Thpmas Grisso & Robert G. Schwartz, eds., 2000).

[24] Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Pressure*, 43 DEVELOPMENTAL PSYCHOL. 1531, 1536-38 (2007).

[25] Steinberg 2009, *supra* note 7, at 56.

[26] Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking. Risk Preference and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEVELOPMENTAL PSYCHOL. 625, 626-34 (2005).

pressure exists to engage in self destructive behavior.[27] Indeed, the mere *presence* of other teens can directly influence adolescents' decisions and actions.[28] It is no coincidence that most youth crime is *group* youth crime.[29]

Together, these two vulnerabilities – an inability to control their external environment and a susceptibility to peer pressure – combine to make youth less culpable. These pressures were particularly salient for the four Petitioners. Petitioner Griffin was beaten by his stepfather and went through 13 schools in 11 years. Petitioner McElroy grew up in a violent environment of gangs and suffered from abuse at home. Petitioner Lockhart also grew up surrounded by gang violence and had his house sprayed with

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[27] *See* Michele Mouttapa et al., *I'm Mad and I'm Bad: Links Between Self-Identification as a Gangster, Symptoms of Anger, and Alcohol Use Among Minority Juvenile Offenders*, 8 YOUTH VIOLENCE & JUVENILE J. 71 (2010) (finding that identifying with a "gang member peer group" increases the likelihood of destructive behavior such as heavy alcohol use).

[28] Alexandra O. Cohen and B. J. Casey. *Rewiring Juvenile Justice: The Intersection of Developmental Neuroscience and Legal Policy*, 18.2 TRENDS COGNITIVE SCI. 63, 65 (2014).

[29] Franklin Zimring, *Penal Proportionality for the Young Offender*, *in* YOUTH ON TRIAL 281 (2000) ("No matter the crime, if a teenager is the offender, he is usually not committing the offense alone."); Moffit, *supra* note 5, at 686-88 (finding a strong correlation between a youth's propensity to commit a crime and peer delinquency).

bullets when he was 16 years old. Petitioner Collier experienced peer pressure in assisting a friend to scare the friend's parole officer. Long before the Petitioners became prisoners in the Missouri Department of Corrections, they were trapped in environments they could not shape or escape. These environments profoundly affect the calculus of culpability.

C. The Same Factors That Make Youth Less Culpable Than Adults Also Make Them More Capable of Change. Life Sentences Without Parole Fail to Recognize This Potential For Rehabilitation.

"[I]ncorrigibility is inconsistent with youth." *Graham*, 560 U.S. at 73 (internal citation omitted). Adolescence is a time of remarkable change and transience, when youth are still struggling to form a basic identity. *Roper*, 543 U.S. at 570 (noting that "[t]he personality traits of juveniles are more transitory, less fixed" than those of adults). Youth crime reflects this transient period and is one of the "qualities of youth" itself, rather than a sign of an intractably bad character. *Id.* Although violent crime peaks around 16 and 17 years, it "drop[s] precipitously in to young adulthood."[30] In fact, developmental psychiatrists have found that the vast majority of youth offenders will stop committing crime once they are adults,[31] and very few youth offenders develop intractable or long term problems with criminality.[32] This capacity for change is a crucial distinction

[30] Moffit, *supra* note 5, at 675.

[31] Steinberg & Scott, *supra* note 2, at 1015.

[32] *Id.*

between youth offenders and adult offenders. "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." *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 570).

Youth characteristics are so malleable 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 73 (quoting *Roper*, 543 U.S. at 573). If trained psychiatrists cannot distinguish between those rare youth offenders who are incorrigible from the majority who are capable of change, then surely trial judges (and prosecutors) cannot do so either.[33] "The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of [an] irretrievably depraved character." *Roper*, 543 U.S. at 570. Echoing its reasoning in *Roper*, the Court made clear in *Graham* and *Miller* that there is no reliable way – either for a prosecutor or a sentencing judge – to determine when a youth offender's crimes are the result of "irreparable corruption," and no reliable way to

[33] In fact, vexed researchers have found that those youth offenders who change and those who continue committing crimes exhibit identical behavior at the outset, making it impossible to identify incorrigible offenders. Edward Mulvey & Elizabeth Cauffman, *The Inherent Limits of Predicting School Violence*, 56 AM. PSYCHOLOGIST 797, 799 (2001).

conclude that a youth offender ought to die in prison. Sentencing the Petitioners to life sentences, therefore, cannot rest on the assumption that they are irredeemably depraved.

Additionally, because youth have such tremendous capacity for change and rehabilitation, *Roper* and *Graham* emphasized that youth offenders should not be given irreversible sentences. Life without parole sentences "share some characteristics with death sentences that are shared by no other sentences." *Graham*, 560 U.S. at 69. Like the death penalty, a life without parole sentence "does not even purport to serve a rehabilitative function." *Harmelin v. Michigan*, 501 U.S. 957, 1028 (1991) (Stevens, J., dissenting).[34] Additionally, like the death penalty, these life sentences are irreversible because the years Petitioners will serve can never be returned, and their sentences can only end with death.[35] This sentence, like the death sentence, effectively condemns Petitioners to die in prison whether or not they demonstrate what most youth offenders eventually demonstrate: a matured moral character that warrants a second chance. In this way, a life without parole sentence "deprives children of both any hope for return to

[34] Notably, the United States Supreme Court explicitly found in *Miller* that *Harmelin* did not preclude the Court's holding that life-without-parole sentences for juveniles violate the Eighth Amendment.

[35] "The State does not execute the offender sentenced to life without parole, but the sentences alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration." *Graham*, 560 U.S. at 69.

society and any opportunity for rehabilitation."[36] The remote possibility of gubernatorial clemency does not change this calculus. *Graham*, 560 U.S. at 70 ("the remote possibility of [executive clemency] does not mitigate the harshness of the sentence").

Given that the vast majority of youth offenders do change, and that judges cannot predict whether they will not, the Court in *Miller* opted for a categorical rule against mandatory life without parole sentences for youth offenders, even for first-degree murder convictions. *Miller*, 132 S. Ct. at 2464. The Petitioners' life sentences under Missouri's statute directly conflict with the Court's holding in *Miller*, and must therefore be vacated.

II. Given the Court's Holding in *Miller*, this Court Should Find Mo. Rev. Stat. § 565.020 Unconstitutional as Applied to Juveniles, and Find That Petitioners Must be Resentenced With *Miller's* Considerations Explicitly Taken Into Account.

A. For *Graham* and *Miller* to be Given Constitutional Effect, *Miller* Must be Applied Retroactively and Petitioners Should be Resentenced.

Graham and *Miller* make clear that juveniles must have a meaningful opportunity for release. Petitioners have never received one, and *Miller* must be applied retroactively to give Petitioners this opportunity. Only by applying *Miller* retroactively will Petitioners ever receive a "meaningful opportunity" to obtain release as required by the United States Constitution.

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[36] Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Disclosure*, 41 U.C. DAVIS L. REV. 111, 162 (2007).

Although the United States Supreme Court did not directly address retroactivity in *Miller*, its disposition of the consolidated companion case of Kuntrell Jackson demonstrates that it intended its decision to be retroactive. *Miller*, 132 S. Ct. at 2461-62. As with the Petitioners here, Jackson's conviction was final, but after the Arkansas Supreme Court affirmed his convictions, "Jackson filed a state petition for habeas corpus." *Id.* at 2461. The Supreme Court granted relief to Jackson, reversing the decision of the Arkansas Supreme Court, and remanding for an individualized resentencing allowing "a judge or jury [to] have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* at 2475.

If *Miller* were not retroactive, Jackson could not have obtained this relief. A "new rule becomes retroactive…simply by the action of the Supreme Court." *Tyler v. Cain*, 533 U.S. 656, 663 (2001). Further, *Miller* rested directly on the Court's prior decisions in *Roper* and *Graham*, both of which have been found to be retroactive. Because Jackson obtained relief from the Supreme Court on collateral review, *Miller* applies retroactively to all individuals seeking review after their convictions have become final. *See Tyler v. Cain*, 533 U.S. 656, 668-669 (O'Connor, J. concurring) ("[I]f we hold in Case One that a particular type of rule applies retroactively to cases on collateral review and hold in Case Two that a given rule is of that particular type, then it necessarily follows that the given rule applies retroactively to cases on collateral review.").

Amici will not rehash the Petitioners' detailed analysis regarding the retroactive application of *Miller*. It is worth noting, however, that in announcing *Miller*, the Supreme Court relied significantly on the research and analysis that youth offenders are

different from adult offenders. A finding that *Miller* is not retroactive would deny Petitioners a meaningful opportunity to obtain release by demonstrating their capacity for rehabilitation. For example, Petitioner Griffin has completed numerous programs while incarcerated and has demonstrated the capacity for rehabilitation recognized in the scientific research. Petitioner Lockhart has successfully completed his GED, become vice-president of a hospice program, and completed numerous other vocational and behavioral courses. Most significantly, Petitioner Lockhart has removed himself from the gang violence of his past and founded an anti-gang program ("Critical Change") while incarcerated.

Principles of justice and fairness demand that Petitioners receive a hearing on their capacity for rehabilitation because "children are constitutionally different from adults for purposes of sentencing." *Miller*, 132 S. Ct. at 2464.

B. Principles of Constitutional and Statutory Interpretation Require a Finding That Mo. Rev. Stat. § 565.020 is Unconstitutional as Applied to Juveniles, and the Appropriate Remedy is For Petitioners to be Resentenced.

The United States Supreme Court has "held on multiple occasions that a sentencing rule permissible for adults may not be so for children." *Miller*, 132 S. Ct. at 2470 (citing *Roper*, 543 U.S. 551; *Graham*, 560 U.S. 48). Because Missouri Revised Statute § 565.020 mandates that anyone, including a child, who is convicted of committing murder in the first degree be sentenced to life without parole, it is

unconstitutional as applied to children. *See id.* at 2460. Therefore, this Court should vacate Petitioners' sentences and remand for constitutionally-mandated resentencing.

Section 565.020 provides:

> 1. A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.
>
> 2. Murder in the first degree is a class A felony, and the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor;…

Mo. Rev. Stat. § 565.020.

Here, the only possible sentence for Petitioners under the statute was a life sentence without the possibility of parole. "The trial court only may impose a sentence that is authorized by law and…the only sentence authorized by section 556.020 [sic] when a juvenile is found guilty of first-degree murder is life without parole." *State v. Hart*, 404 S.W.3d 232, 235 (Mo. 2013). In *State v. Hart*, a case on direct appeal, this Court explained that *Miller* requires an individualized sentencing assessment before a court could impose a life sentence pursuant to section 565.020. *Id.* at 239.

> On remand, if the sentencer conducts the individualized assessment required by *Miller* and is persuaded beyond a reasonable doubt that sentencing Hart to life in prison without parole is just and appropriate under all the circumstances, the trial court must impose that sentence. If the sentencer is not persuaded that this sentence is just and appropriate, **section 565.020 is void as applied to him because it fails to provide a**

constitutionally permissible punishment. In that event, *Hart* cannot be convicted of first-degree murder and the trial court must find him guilty of second-degree murder instead.

Hart, 404 S.W.3d at 235, 239 (emphasis added).

Petitioners here did not receive an individualized sentencing assessment and, therefore, under *Miller* and *Hart*, the appropriate remedy for Petitioners is to have their prior sentences vacated and be resentenced on remand. Pursuant to *Hart*, if the lower courts do not find beyond a reasonable doubt that a life sentence for Petitioners is just and appropriate, then the sentence of life imprisonment without parole under section 565.020 is unconstitutional and void as to Petitioners. *Hart*, 404 S.W.3d at 242. The lower courts must then enter a new finding that Petitioners are guilty of second-degree murder under Mo. Rev. Stat. § 565.021, and resentence them pursuant to Mo. Rev. Stat. § 558.011.1(1). *Hart*, 404 S.W.3d at 242-43.[37]

In the resentencing, "the trial court should instruct the jury, before it begins its deliberations, that if it is not persuaded [beyond a reasonable doubt] that life without parole is a just and appropriate sentence under all the circumstances of the case,

[37] Second-degree murder under section 565.021.1(1) is a lesser-included offense of first-degree murder. *Hart*, 404 S.W.3d at 242, n.8h. Second-degree murder convictions provide for a sentencing range of 10 to 30 years or life with the possibility of parole. Mo. Rev. Stat. § 558.011.1(1).

additional instructions concerning applicable punishments" and the possibility of lesser sentences can then be considered at that time. *Id.* at 242.

Further, this Court should explicitly direct the lower courts to consider the following factors under *Miller* as to whether a life sentence is just and appropriate: (1) minors have substantially lessened culpability than adults; (2) minors are more prone to risky and reckless behavior than adults; (3) cognitive processes are substantially diminished in minors compared to adults; (4) minors are especially susceptible to peer pressure and negative environments in committing crimes; and (5) minors have a greater capacity for change and rehabilitation than adult offenders. Given the U.S. Supreme Court's "doubt[s] [about] the penological justifications for imposing life without parole on juveniles, *Miller*, 132 S. Ct. at 2466, only this approach will give *Miller* constitutional effect so as to provide juvenile offenders individualized sentencing. Without clear direction to consider these key "mitigating qualities of youth," Petitioners will not actually receive an individualized sentencing as mandated by the Supreme Court that considers the factors critical to the Supreme Court's analysis. *See id.*, 132 S. Ct. at 2467, 2470.

Clear direction to lower courts as to the procedure and relevant factors for resentencing the Petitioners will prevent confusion in the lower courts, promote efficient judicial administration, and allow for the goals of *Miller* to be effectuated. *See State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003) (endorsing effective administration of justice when applying new standards retroactively).

CONCLUSION

"[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). Thirty-two years after *Eddings*, scientific research confirms that youth offenders cannot be expected to think or behave like adults. Recognizing these differences, the Supreme Court articulated a rule that youth offenders must receive an individualized sentencing that considers the factors explored in *Miller*.

The Eighth Amendment does not guarantee that Petitioners will not spend their lives in prison, but it does forbid statutory schemes that make the judgment at the outset, whether that judgment was made for youths in the past or going forward. Because Petitioners never received an opportunity to present mitigating factors, show their potential for rehabilitation, or have the *Miller* factors considered, their sentences must be vacated, with direction to resentence pursuant to the factors discussed herein.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06(b); and (3) contains 4,861 words, as determined using the word-count feature of Microsoft Office Word 2013. The undersigned further certifies that the electronic file has been scanned and was found to be virus-free.

/s/ Bradley M. Bakker

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this brief was served by operation of electronic filing system on all counsel of record on December 1, 2014.

/s/ Bradley M. Bakker