No. 124046

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate
	)	Court of Illinois, Third District,
Respondent-Appellant,	)	No. 3-15-0189
	)	
v.	)	There on Appeal from the Circuit
	)	Court of the Twelfth Judicial Circuit,
ASHANTI LUSBY	)	Will County, No. 01-CF 664
	)	
Petitioner-Appellee.	)	The Honorable David M. Carlson,
	)	Judge Presiding

BRIEF OF AMICI CURIAE CHILDREN AND FAMILY JUSTICE CENTER AND JUVENILE LAW CENTER, ET AL., IN SUPPORT OF PETITIONER-APPELLEE

Shobha L. Mahadev
Scott F. Main
Children & Family Justice Center
Bluhm Legal Clinic
Northwestern Pritzker School of Law
375 E. Chicago Ave
Chicago, IL 60611
P: (312) 503-8576
F: (312) 503-8977
E: scott.main@law.northwestern.edu

Marsha L. Levick
Juvenile Law Center
1315 Walnut St., 4th Floor
Philadelphia, PA 19107
P: (215) 625-0551
F: (215) 625-2808
E: mlevick@jlc.org

COUNSEL FOR *AMICI CURIAE*

E-FILED
7/24/2019 10:40 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

POINTS AND AUTHORITIES

IDENTITY AND INTEREST OF AMICI CURIAE

In 2002, in most of the country, "youth" did not have special meaning in the criminal justice system. Although decades before, children were guaranteed constitutional rights (*In re Gault*, 387 U.S. 1 (1967)), the United States Supreme Court fundamentally altered the definition of "youth" in a series of decisions beginning in 2005. The Court's decisions in *Roper v. Simmons, Graham v. Florida*, *J.D.B. v. North Carolina, Miller v. Alabama,* and *Montgomery v. Louisiana* provided courts with a new lens through which they must approach youth under the law—one that considers the developmental characteristics of youth. Before these decisions, sentencing courts did not have the requisite framework to adequately consider the attributes of youth. Any life sentence meted out before these game-changing cases were decided, fails to adequately account for youth status and must be subject to review.

Illinois was the first jurisdiction in the United States to create a court system dedicated exclusively to juveniles. 1899 Ill. Laws 131. Even before the juvenile court was founded, this Court recognized that the proportionate penalties clause embraces different types of punishments for adults and minors for the same offense due to the "unformed and unsettled" characteristics of youth:

> There is in the law of nature, as well as in the law that governs society, a marked distinction between persons of mature age and those who are minors. The habits and characteristics of the latter are, presumably, to a large extent as yet unformed and unsettled. This distinction may well be taken into consideration by the legislative power in fixing the punishment for crime, both in determining the method of inflicting punishment and in limiting its quantity and duration.

People ex rel. Bradley v. Illinois State Reformatory, 148 Ill. 413, 423 (1894). This Court should act on these principles embedded and embodied by this State and reassert Illinois' proud history of leadership in recognizing that all children are different and deserving of

special consideration.

Amici Curiae, Children and Family Justice Center, Juvenile Law Center, et al., work on behalf of children and young individuals involved in the child welfare, juvenile, and criminal justice systems.[1] *Amici* understand that youth are fundamentally different from adults in ways that reduce their culpability and accordingly, require different treatment from the criminal justice system, specifically in sentencing. Ashanti Lusby was sentenced in 2002, ten years before the Supreme Court's decision in *Miller*. His sentence reflects neither the understanding of adolescent development that has marked the last decade or so of the U.S. Supreme Court's jurisprudence nor the evolving standards of decency that have emerged in this State's legislative and legal recognition of youth-centered punishment. *Amici* urge this Court to find Lusby's sentence unconstitutional and remand this matter for a resentencing hearing to properly consider Lusby's youth status.

[1] A full list of amici and statements of interest are attached as Appendix A.

ARGUMENT

I. A PRE-*MILLER* SENTENCING HEARING DOES NOT ADEQUATELY CONSIDER "YOUTH AND ITS ATTENDANT CIRCUMSTANCES."

In 2002, Ashanti Lusby was sentenced to 130 years in prison—a life sentence—for an offense that he committed when he was sixteen years old. In the nearly two decades that have passed since Lusby's initial sentencing, the United States Supreme Court has fundamentally altered our view of "youth" and how they should be treated in the criminal justice system in light of a more comprehensive understanding of youth development. During this time, Supreme Court case law has acknowledged and relied upon the unique developmental characteristics of youth in ruling that these youthful traits require courts to provide youth special procedural protections. *See e.g. Roper v. Simmons*, 543 U.S. 551, 569-570 (2005) (explaining that youth are more immature, subject to external pressures, and more amenable to change than adults); *Graham v. Florida*, 560 U.S. 48, 76 (2010) (finding that criminal justice laws that fail to take defendants' youthfulness into account are flawed). In 2002, any consideration of youth would have failed to account for these newly developed concepts regarding the distinct characteristics of young people, resulting in a sentence that violates the Eighth Amendment.

A. The United States Supreme Court Has Identified Specific Factors Regarding Youth And Its Attendant Circumstances That Courts Must Assess Before Imposing A Life Without Parole Sentence.

In *Miller v. Alabama*, 567 U.S. 460 (2012), the United States Supreme Court established a new substantive rule of constitutional law that youth under eighteen cannot be sentenced to mandatory life without parole sentences. The *Miller* decision

echoed previous Supreme Court cases which emphasized the principle that youth are developmentally different from adults and that these differences are relevant to their constitutional rights, and in particular, their rights under the Eighth Amendment. *See*, *e.g.*, *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that imposing the death penalty on individuals convicted as juveniles violates the Eighth Amendment's prohibition against cruel and unusual punishment); *Graham v. Florida*, 560 U.S. 48, 82 (2010) (holding that it is unconstitutional to impose life without parole sentences on juveniles convicted of non-homicide offenses); and *J.D.B. v. North Carolina*, 564 U.S. 261, 271-72 (2011) (holding that a child's age must be taken into account for the purposes of the *Miranda* custody test).

Along with *Roper*, *Graham*, and *J.D.B., Miller* profoundly changed the role that youth and its attendant circumstances play in the criminal justice system. First, *Miller* reaffirmed the understanding that children have diminished culpability for offenses they may commit – no matter how terrible the offense – and have greater prospects for reform. *Miller*, 567 U.S. at 471-72. Based on these characteristics, youth are "less deserving of the most severe punishments." *Id.* (quoting *Graham*, 560 U.S. at 68).

Second, *Miller* provided new guidance to sentencing courts on how to assess the differences between children and adults and "how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480. The Court specifically delineated six such characteristics that should be considered in light of the differences between children and adults: (1) the youth's chronological age related to "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 offense, including extent of participation in the criminal conduct, (4) the impact of familial and peer pressures, (5) the effect of the offender's youth on his ability to navigate the criminal justice process, and (6) the possibility of rehabilitation *Id.* at 477-78. Only through this analysis can sentencing courts ensure that harsh punishments such as life without parole are only imposed on the rare youth whose crime reflects irreparable corruption. *Id*. *See also Montgomery v. Louisiana*, 136 S.Ct. 718, 734 (2016).

Miller's mandate was applied retroactively to the states in *Montgomery.* 136 S. Ct. at 734. *Montgomery* clarified that *Miller* rendered life without parole unconstitutional for the class of juvenile defenders who crimes reflect the "transient immaturity of youth." *Id.* In their *Montgomery* dissenting opinion, Justices Scalia, Thomas, and Alito noted that imposition of a life without parole sentence would be "a practical impossibility" given the Court's decision in *Montgomery*. *Id*. at 744 (Scalia, J., dissenting).

Miller and *Montgomery* effectively established a presumption against life without parole for young people, which many states later explicitly adopted. *See e.g. State v. Riley*, 110 A.3d 1205, 1214 (Conn. 2015) (holding that *Miller* established a presumption against imposing a life sentence without parole on juvenile offenders that must be overcome by evidence of unusual circumstances); *State v. Hart*, 404 S.W.3d 232, 241 (Mo. 2014) (explaining that the state has the burden of demonstrating, beyond a reasonable doubt, that life without parole is an appropriate sentence); *State v. Seats*, 865 N.W. 2d 545, 555 (Iowa 2015) (holding that *Miller*

established a presumption against life without parole); and *Commonwealth v. Batts*, 163 A.3d 410 (Pa. 2017) (holding that there must be a presumption against the imposition of life without parole and that youth can only be sentenced to life without parole upon a showing of permanent incorrigibility).

B. This Court Has Extended The Protections Of *Miller* To Young People Sentenced To Discretionary And *De Facto* Life Sentences.

Although Lusby was not subject to a mandatory life without parole sentence, three recent decisions by this Court extend the protection of *Miller* to young people sentenced to discretionary *de facto* life sentences. First, in *People v. Reyes*, this Court found that mandatory term-of-years sentences that cannot be served in one lifetime have the same practical effect on a young person's life as an actual mandatory sentence of life without parole because in both situations, the youth will die in prison. 2016 IL 119271, ¶ 10. In *Reyes*, this Court found that a sentence of 97 years qualified as a *de facto* life sentence subject to *Miller*. *Id.*

Second, in *People v. Holman*, 2017 IL 120655, this Court held that *Miller* applies even in cases when a defendant is sentenced to a discretionary life sentence. This Court recognized that the United States Supreme Court in *Miller* had provided "far-reaching commentary about the diminished culpability of juvenile defendants" that applied whether a young person was sentenced to a mandatory or discretionary sentence. *Id* at ¶ 40. In *Holman*, this Court also broadly applied *Miller*, holding that trial courts must specifically consider the characteristics mentioned by the United States Supreme Court, rather than generally considering mitigating factors concerned with youth. *Id.* at ¶¶ 43-45. "Under *Miller* and *Montgomery*, a juvenile defendant may be sentenced to life imprisonment without parole, but only if the trial court determines that the defendant's

conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation." *Id*. at ¶ 46.

More recently, this Court in *People v. Buffer* looked to Illinois' recent legislative enactments to hold that a sentence of greater than 40 years imposed on a juvenile constituted a *de facto* life sentence for purposes of *Miller*. *People v. Buffer*, 2019 IL 122327, ¶¶ 39-41. Where Lusby's sentence easily exceeds the line drawn by *Buffer*, it is a discretionary, *de facto* life sentence and warrants *Miller*'s protections; in other words, it could not have been constitutionally imposed without proper consideration, in mitigation, of *Miller*'s youth-centered factors and a determination that, based on those factors, Lusby's offense reflected "irreparable corruption," as opposed to "transient immaturity." *Montgomery*, 136 S.Ct. at 734.

C. Courts Cannot Adequately Assess Whether a Sentencing Decision Made Before *Miller* Appropriately Considered the Attendant Characteristics Of Youth; This Court's Decision in *Holman* that Such Determination Could Be Made Retrospectively by Examining the "Cold" Record, Was Flawed.

After finding that *Miller* was retroactive, the Supreme Court provided two ways that states could remedy the illegal sentences of youth mandatorily sentenced to life without parole: either permit the individual to be considered for parole, or resentence those serving mandatory life without parole sentences consistent with the process prescribed in *Miller*. *Montgomery*, 136 S.Ct. at 736 ("A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them").

Upholding *Miller* requires a new sentencing hearing for Lusby, not a retrospective assessment of whether his prior hearing comported with *Miller*'s requirements. This

Court in *Holman* correctly held that the spirit of *Miller* requires broad application by state courts, including specific consideration of the *Miller* factors before sentencing a young person to life in prison. *Holman*, 2017 IL 120655, at ¶¶ 43-44. *Holman* recognized that "*Miller* contains language that is significantly broader than its core holding." *Id*. at ¶ 38. However, notwithstanding its sweeping language, the *Holman* Court chose a perplexingly narrow approach to applying *Miller* to a pre-*Miller* sentencing; it held that "[a] court revisiting a discretionary sentence of life without parole must look at the cold record to determine if the trial court considered such evidence [of a defendant's youth and its attendant circumstances] at the defendant's original sentencing hearing." *Id*. at ¶ 47. Thus, rather than granting Holman a new sentencing hearing, this Court simply reviewed the original sentencing hearing and concluded that the *Miller* factors, first articulated in 2012, had been sufficiently considered in 1981.

This type of retrospective analysis of the *Miller* factors is contradictory both to the broad application of *Miller* that undergirds the *Holman* opinion and to an honest assessment of how youth was considered—or, more correctly, not considered—in the pre-*Miller* era. As discussed in Section IA, *Miller* went beyond creating new procedures for lower courts—it adopted a specific view of youth under the law, their culpability, and constitutionally viable punishments. Following *Miller*, many states, including Illinois, made significant changes to their sentencing statues as applied to youth. Lower courts must now approach youth sentencing hearings through a completely different lens of youth development than was required of them before the *Miller* decision. *See*, *e.g.*, 730 ILCS 5/5-4.5-105 (West 2016) (providing a new sentencing scheme for individuals under 18 at the time of their offenses and requiring consideration of *Miller*-type factors in

mitigation); 730 ILCS 5/5-4.5-110 (P.A. 100-1182, eff. June 1, 2019, providing for parole eligibility for most individuals under age 21 at the time of the offense and sentences after the effective date of the statute). Indeed, this Court in *Holman* also recognized that "[b]ecause *Miller* is retroactive, *all* juveniles, whether they were sentenced after [the new youth-specific mitigation sentencing requirements] became effective on January 1, 2016, *or before that*, should receive the same treatment at sentencing." *Holman*, 2017 IL 120655, at ¶ 45 (citing *People v. Ortiz*, 2016 IL App (1st) 133294, ¶ 23) (internal citations omitted, emphasis added).

Yet despite this salient recognition that all youth should receive the same consideration of youth-specific factors in mitigation, this Court's cold-record assessment acts to deny that equal treatment. To discern the flaw in this approach, this Court need look no further than to the appellate court decisions applying *Holman* to discretionary natural life sentences imposed on juveniles. While the U.S. Supreme Court in *Miller* and *Montgomery* unequivocally stated that such sentences should be "rare" and "uncommon," Illinois' appellate courts, in the wake of *Holman*, have affirmed every discretionary juvenile life-without-parole sentence before them—presumably, finding that all of those pre-*Miller* sentencing decisions were in keeping with the letter and spirit of the Constitution. *People v. Walker*, 2018 IL App (3d) 140723-B; *People v. Stafford*, 2018 IL App (4th) 140309-B; *People v. Biro*, 2018 IL App (1st) 160128-U; *People v. Croft*, 2018 IL App (1st) 150043; *People v. Generally*, 2017 IL App (5th) 140489. This unsettling trend alone should give this Court pause and reason to reconsider its interpretation of the Eighth Amendment proportionality requirements as articulated in *Holman*.

Against this backdrop, *Holman*'s instruction to rely on the "cold record" at the

time of the original sentencing hearing is flawed in another sense as well: it completely misapprehends *Roper*, *Miller* and *Montgomery*'s fundamental lesson. In 2005, the Court instructed, "It 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." *Roper*, 543 U.S. at 573. We cannot accurately predict whether a youth's childhood actions are the product of "transient immaturity" or "irreparable corruption." The passage of time, however, can provide greater insight into this core question. To put on blinders and ignore that information—particularly with respect to an individual sentenced prior to *Miller*—is to accept the notion that, contrary to *Roper* and its progeny, that individual was fully formed at the time of sentencing.

The *Holman* Court's conclusion that, "[i]n revisiting [the constitutionality of] a juvenile defendant's life without parole sentence, the only evidence that matters is evidence of the defendant's youth and its attendant characteristics at the time of sentencing," is rooted in a flawed reading of *Graham*. 2017 IL 120655, at ¶ 47 (quoting *Graham*, 560 U.S. at 73). In *Graham*, the Court was not positing that evidence of maturity, growth, and rehabilitation were somehow irrelevant to the central question of a youthful defendant's incorrigibility. Rather, the *Graham* Court cautioned against an "at the outset" determination of incorrigibility—even in the face of post-sentencing prison misbehavior—because of its central understanding that incorrigibility was, in fact, "inconsistent with youth." *Graham*, 560 U.S. at 73 (quoting *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968)). Put another way, the *Graham* Court's concern was that a life without parole sentence "improperly denies the juvenile offender to demonstrate

growth and maturity"—evidence that, no doubt, might become apparent in the years and decades after the original sentencing hearing. *Id.* at 73.

Indeed, to the extent that the *Montgomery* Court recognized the relevance of post-sentencing conduct to a determination of incorrigibility, this Court's refusal to permit consideration of such conduct in determining whether *Miller*'s requirements were properly met runs afoul of the U.S. Supreme Court's conclusion. *Montgomery*, 136 S.Ct. at 736 (describing Montgomery's work establishing an inmate boxing team, work in the prison's silkscreen department, and his effort to serve as a role model to other inmates as "relevant" to the "kind of evidence that prisoners might use to demonstrate rehabilitation"); see also *U.S. v. Briones*, __ F.3d __, 2019 WL 2943490 (9th Cir. 2019) ("We reaffirm that when a substantial delay occurs between a defendant's initial crime and later sentencing, the defendant's post-incarceration conduct is especially pertinent to a *Miller* analysis. The key question is whether the defendant is capable of change. If subsequent events effectively show that the defendant has changed or is capable of changing, LWOP is not an option") (internal citations omitted).

It is highly improbable that pre-*Miller* sentencing courts would have been able to account for and consider youth in accordance with *Miller's* mandate and its central understanding about how young people grow, change, and become rehabilitated. Courts simply lacked the knowledge and research, as well as the controlling case law, to do so. If this Court intends to require lower courts to, in fact, view age as "not just a chronological fact but a multifaceted set of attributes that carry constitutional significance," it must find that a retrospective assessment of Lusby's sentence is not sufficient to comply with the Eighth Amendment's requirements; rather, resentencing is the only appropriate remedy.

D. Lusby's Original Sentence Did Not Sufficiently Consider the *Miller* Factors and the Attendant Characteristics of Youth.

Even if a retrospective review of the pre-*Miller* sentencing hearing was appropriate, the record clearly establishes that the trial court's sentencing analysis did not comport with either the letter or spirit of *Miller*. First, the court only mentioned Lusby's age in two instances of the trial—to note that he was not eligible for the death penalty, and a generalized statement that youthful choices sometimes reflect poor judgment. *People v. Lusby*, 2018 IL App (3d) 150189, ¶ 27. This perfunctory analysis is insufficient considering this Court's ruling in *Holman* that the *Miller* factors specifically have to be addressed. 2017 IL 120655, ¶¶ 43-44. While the court mentioned Lusby's chronological age, there is no mention of its "hallmark features" such as "immaturity, impetuosity, and failure to appreciate risks and consequences" as required by *Miller. See* 567 U.S. at 478.

Besides Lusby's age, the court considered very limited information regarding his background. The presentence investigation report (PSI) included some information regarding his past offenses, some drug use, as well as background on his family. *Lusby*, 2018 IL App (3d) 150189, ¶ 4. However, none of the background information was analyzed to determine whether Lusby was incorrigible. For example, although the PSI mentioned that Lusby's sisters have theft convictions—there was no further analysis of whether Lusby's home and family environment impacted his behavior. *See id.* Most importantly, none of the evidence was reviewed by the court to determine whether Lusby was one of the "rare juvenile offenders whose crime reflects irreparable corruption" as required by *Miller*. *See* 567 U.S. at 479. In fact, the PSI seemed to indicate the exact opposite as it included a recommendation from Lusby's probation officer that Lusby should attend counseling to control his violent tendencies—demonstrating that he

considered reform was possible for Lusby. 2018 IL App (3d) 150189, ¶ 27.

Rather than focus on Lusby's youthful characteristics and his amenability to rehabilitation, the court solely focused on the nature of Lusby's offense. A significant portion of the evidence concerned the victim rather than Lusby. The court allowed twenty-one victim impact letters as an addendum to the PSI. *Id.* at ¶ 4. The victim's mother testified on her victim impact statement at the sentencing hearing, while the defense did not present any evidence or witnesses. *Id.* at ¶ 5. During the trial court's oral pronouncement, the judge explained that it was very difficult to consider any leniency in the case because Lusby committed a depraved act that showed no respect for human life. *Id.* at ¶ 7. The court's pronouncement did not specifically discuss any of the factors required by *Miller* or make any conclusions about Lusby's capacity for rehabilitation.

The sentencing court erroneously overemphasized the nature of Lusby's offense. The Supreme Court in *Miller* specifically noted that the attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, *even when they commit terrible crimes*," *Miller*, 567 U.S. at 472 (emphasis added), and that the vast majority of juvenile offenses are a reflection of transient immaturity inherent to adolescent behavioral and neurological development. See *id*. at 471-73 ("[N]one of what [Graham] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. Those features are evident in the same way, and to the same degree [no matter the crime]"). In this case, the sentencing court allowed the nature of the crime to outweigh the meager considerations that were presented about Lusby's youth in a manner that violates *Miller.* A more careful analysis of Lusby's background in light of the *Miller* factors would have given the court a clearer

understanding of whether rehabilitation was a possibility.

For these reasons, *Amici* urge this Court to affirm the appellate court below and its conclusion that Mr. Lusby's *de facto* life sentence is cruel and unusual punishment and remand the matter for resentencing where his youth and its attendant circumstances are considered in mitigation.

II. UNDER THE BROADER PROPORTIONALITY PROTECTIONS AFFORDED BY THE ILLINOIS CONSTITUTION, THIS COURT SHOULD FIND THAT ANY SENTENCE IMPOSED ON A JUVENILE THAT DENIES OPPORTUNITY FOR A RETURN TO "USEFUL CITIZENSHIP," ABSENT EXPRESS CONSIDERATION OF THE HALLMARK ATTRIBUTES OF YOUTH AS MITIGATION AND A DETERMINATION THAT THE CRIME REFLECTS IRREPARABLE CORRUPTION, IS UNCONSTITUTIONAL.

Illinois has long been a leader in the realm of juvenile justice and in emphasizing the importance of rehabilitation. As Justice Theis wisely summarized, "[o]ur state, home of the country's first juvenile court and once a leader in juvenile justice reform, should not be a place where we boast of locking up juveniles and throwing away the key. Illinois should be a place where youth matters, and we work to tailor punishment to fit the offense and the offender, as required by our federal and state constitutions." *People v. Patterson*, 2014 IL 115102, ¶ 177 (J. Theis, dissenting). *Miller, Montgomery, Holman*, and *Buffer* all are grounded in the foundational reality that youth can and do change and are more capable of rehabilitation. Deciding that a juvenile offender forever will be a danger to society requires making a judgment that he is incorrigible, "but incorrigibility is inconsistent with youth." *Miller*, 567 U.S. at 473. The view that a juvenile cannot be rehabilitated reflects "an irrevocable judgment about [an offender's] value and place in society, at odds with a child's capacity for change." *Id*; s*ee also Montgomery*, 136 S. Ct. 718, 734. Today in Illinois, any youth in adult court cannot be lawfully sentenced absent express consideration in mitigation of the hallmark attributes of youth. 730 ILCS 5/5-4.5-105 (West 2016). This Court should take the opportunity to recognize that Ashanti Lusby – and any youth sentenced to a life or "de facto" life (as now defined by this Court in *People v. Buffer*, 2019 IL 122327) term absent such express consideration of youth, in mitigation – is entitled to resentencing.

Article 1, section 11 of the Illinois Constitution provides that penalties must be determined "according to the seriousness of the offense" and "with the objective of restoring the offender to useful citizenship." Ill. Const. of 1970, art. I, § 11. As this Court concluded in *People v. Clemons*, this provides broader protections than the Eighth Amendment. 2012 IL 107821, ¶¶ 35–39. "[W]hat is clear is that the limitation on penalties set forth in the second clause of article I, section 11, which focuses on the objective of rehabilitation, went beyond the framers' understanding of the Eighth Amendment and is not synonymous with that provision." *Clemons*, 2012 IL 107821, ¶ 40.

The purpose of the proportionate penalties clause is to provide a check on both the sentencing of the judiciary and the sentencing guidelines set forth by the legislature. *Id.* at ¶ 29. Both the Eighth Amendment and the proportionate penalties clause apply to the criminal process—that is, to direct actions by the government to inflict punishment. *In re Rodney H.*, 223 Ill. 2d 510, 517-18 (2006). A proportionality analysis under either constitution involves a consideration of evolving standards of decency and fairness to determine the validity of any particular sentence. *People v. Brown*, 2012 IL App (1st) 091940, ¶ 56, citing *Graham*, 130 S. Ct. at 2021; *Miller*, 202 Ill. 2d at 339. Thus, regardless of what this Court ultimately concludes as to whether Lusby's sentence passes scrutiny under Eighth Amendment analysis, it should find it unconstitutional under the Illinois Constitution – particularly in light of recent legislative reform efforts – as it shocks the moral sense of the community to sentence a 16-year-old to die in prison absent express consideration of his youth in mitigation. *See, e.g., People v. Leon Miller*, 202 Ill. 2d 328, 338 (2002) (outlining three different forms of proportionality review including whether punishment for the offense is cruel, degrading, or so wholly disproportionate to

the offense as to shock the moral sense of the community).

Illinois courts have long considered age in treating children differently and in an age-appropriate manner for purposes of sentencing. Even before the U.S. Supreme Court confirmed the categorical distinctions between children and adults in *Roper*, *Graham*, *Miller*, and *Montgomery*, Illinois courts recognized that "more mature criminals require more significant punishment in order to rehabilitate them, whereas juvenile offenders and those younger offenders subject to the criminal law can be treated more leniently." *People v. Dimmick*, 90 Ill.App.3d 136, 139 (3d Dist. 1980). Indeed, the special status of children was the very premise for Illinois establishing this nation's first court dedicated exclusively to children in 1899. See 1899 Ill. Laws 131; *People v. Willis*, 2013 IL App (1st) 110233, ¶ 39.

The lynchpin of *Amici*'s contention under the Illinois Constitution is society's evolving standards of decency and fairness. This Court has "never defined what kind of punishment constitutes 'cruel,' 'degrading,' or 'so wholly disproportioned to the offense as to shock the moral sense of the community.'" *Miller*, 202 Ill. 2d at 339. "This is so because, as our society evolves, so too do our concepts of elemental decency and fairness which shape the 'moral sense' of the community." *Miller*, 202 Ill. 2d at 339. Although Illinois jurisprudence and legislative enactments subscribed to a basic notion that children should be treated differently in the criminal justice system, our societal and legal landscape has shifted fundamentally and dramatically since 1996. A clear example of this shift can be found in the pertinent jurisprudence of the U.S. Supreme Court regarding children. Compare *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (holding that the imposition of capital punishment on an individual for a crime committed at 16 or 17

years of age did not violate evolving standards of decency and thus did not constitute cruel and unusual punishment under the Eighth Amendment) with *Roper v. Simmons*, 543 U.S. 551, 574 (2005) (holding that the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed). While it is true that a sentence does not offend the requirement of proportionality if it is commensurate with the seriousness of crime and gives adequate consideration to rehabilitative potential of the defendant, our evolving standards have redefined what that adequate consideration of rehabilitative potential means. Put another way, in light of the substantive shift in constitutional jurisprudence—which made manifest that children are constitutionally different from adults in their level of culpability and potential for rehabilitation—individuals sentenced before this substantive change in Eighth Amendment constitutional law was pronounced must now be given the opportunity to show their crime did not reflect irreparable corruption. *Montgomery*, 136 S.Ct. at 736-37 (requiring that for those juveniles not permanently incorrigible, "their hope for some years of life outside prison walls must be restored").

This Court in *Buffer* reiterated that legislation is the "clearest and most reliable objective evidence of contemporary values." 2019 IL 122327, ¶ 34 (quotations and citations omitted). The Illinois General Assembly has been consistently right-sizing the punishment it deems appropriate for juvenile offenders: *See e.g.*, 705 ILCS 405/5-105(3) (West 2014) (including 17-year-olds charged with felonies within the definition of a delinquent minor); 705 ILCS 405/5-130 (West 2016) (reducing the number of offenses requiring the automatic transfer of juveniles to adult court, and raising the automatic transfer age to 16 years old); 730 ILCS 5/5-4.5-105 (West 2016) (giving judges discretion

to refuse to apply formerly-mandatory firearm enhancements on juvenile offenders in adult court, and requiring the consideration of a number of mitigating factors related to youth at sentencing). If Lusby were sentenced today, he would be eligible for release on parole after serving 20 years of his sentence. 730 ILCS 5/5-4.5-110(b) (West 2019) (establishing, effective June 1, 2019, that persons under 21 who commit first degree murder are eligible for parole after serving 20 years of their sentence). And, relying on recent Illinois juvenile legislation, the *Buffer* Court recognized that a 40-year prison term imposed on a juvenile constitutes a life sentence. 2019 IL 122327, ¶¶ 34-41. While many of these enactments do not apply retroactively, they are indicative of a changing moral compass in our society when it comes to trying and sentencing juveniles as adults. *People v. Aikens*, 2016 IL App (1st) 133578, ¶ 38.

This evolving standard – expressed through case law and through the voice of the General Assembly – indicates that all life and "de facto" life sentences imposed on youth should be reevaluated. Such consideration, in light of *Miller* and its progeny, would require an individualized assessment of childhood background, family environment, development, including immaturity, impetuosity, and failures to appreciate risks and consequences, as well as an evaluation of time spent in prison and any now-demonstrated (beyond mere potential for) rehabilitation. Because Lusby, and those similarly situated, were sentenced to die in prison without such express consideration, these sentences offend the Illinois Constitution's proportionality requirement and they should be resentenced. *See also People v. Kane*, 140 Ill. App. 3d 928 (1st Dist. 1986) (reducing 80 year sentence to 40 years where trial court erred in determining that the 17-year-old defendants' crime was "brutal and heinous" when they sought out a cab driver, robbed

and killed him with a single shotgun blast to the neck).

In order to fulfill the Illinois Constitution's mandate, a trial court is required to consider both the seriousness of the offense and the likelihood of restoring the defendant to useful citizenship. *People v. Evans*, 373 Ill. App. 3d 948, 967 (1st Dist. 2007). In determining an appropriate sentence, the trial judge must also consider all factors in aggravation and mitigation, including the defendant's "credibility, demeanor, general moral character, mentality, social environments, habits and age, as well as the nature and circumstances of the crime." *Evans*, 373 Ill. App. 3d at 967. Under *Miller* and its progeny – held retroactive in Illinois under *Davis* – our evolving understanding of adolescent brain development, and more directly, our evolving standards of decency and fairness now require judges to consider age-specific factors in mitigation before imposing our harshest possible penalty on a juvenile (as well as the possibility for parole for many of those same juveniles after serving a portion of their sentence). Given all that we have learned in the more than 20 years since this offense occurred, the groundbreaking jurisprudence of the U.S. Supreme Court in the last decade, and given Illinois' proud history of understanding and addressing the categorical differences of youth from adults in measuring appropriate punishment, Ashanti Lusby's 130-year sentence shocks the moral sense of the community and the matter should be remanded for resentencing.

CONCLUSION

For the foregoing reasons, we urge this Court to affirm the appellate court's decision remanding Mr. Lusby's case for a resentencing hearing.

Respectfully submitted,

/s/ Marsha L. Levick
MARSHA L. LEVICK
Juvenile Law Center
1315 Walnut St., 4th Floor
Philadelphia, PA 19107
(215) 625-0551

COUNSEL FOR *AMICI CURIAE*

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 21 pages.

/s/ Marsha L. Levick
MARSHA L. LEVICK
Juvenile Law Center

IDENTITY OF *AMICI* AND STATEMENTS OF INTEREST

The **Children and Family Justice Center** (CFJC), part of Northwestern University Law School's Bluhm Legal Clinic, was established in 1992 as a legal service provider for children, youth and families, as well as a research and policy center. Currently clinical staff at the CFJC provide advocacy on policy issues affecting children in the legal system, and legal representation for children, including in the areas of juvenile delinquency, criminal justice, special education, school suspension and expulsion, and immigration and political asylum. In its 27-year history, the CFJC has served as amici in numerous state and United States Supreme Court cases based on its expertise in the representation of children in the legal system.

Juvenile Law Center advocates for rights, dignity, equity, and opportunity for young people in the child welfare and justice systems through litigation, appellate advocacy, and submission of amicus briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting young people advance racial and economic equity and are rooted in research, consistent with the unique developmental characteristics of youth and young adults, and reflective of international human rights values. Juvenile Law Center has represented hundreds of young people and filed influential amicus briefs in state and federal cases across the country.

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

Chicago Lawyers' Committee for Civil Rights is a public interest law organization founded in 1969 and works to secure racial equity and economic opportunity for all. The Chicago Lawyers' Committee for Civil Rights provides legal representation through partnerships with the private bar, and collaborates with grass roots organizations and other advocacy groups to implement community-based solutions that advance civil rights, including in areas of police accountability and criminal justice reform. Through litigation, policy advocacy and coalition work, Chicago Lawyers' Committee for Civil Rights works to ensure that systems operate with fairness and justice to produce equitable outcomes.

The **Civitas ChildLaw Clinic** is a program of the Loyola University Chicago School of Law, whose mission is to prepare law students and lawyers to be ethical and effective advocates for children and promote justice for children through interdisciplinary teaching, scholarship and service. Through its Child and Family Law Clinic, the ChildLaw Center also routinely provides representation to child clients in juvenile delinquency, domestic relations, child protection, and other types of cases involving children. The ChildLaw Center maintains a particular interest in the rules and procedures regulating the legal and governmental institutions responsible for addressing the needs and interests of court-involved youth.

The **Illinois Prison Project** was created to help reduce mass incarceration through the direct representation of incarcerate people in strategic campaigns that elevate systemic problems within the criminal justice system. Founded in 2019, the Illinois Prison Project's mass commutation campaigns on behalf of individuals serving unjust or illegal sentences are designed to help address historical wrongs within Illinois' sentencing structure, including excessive sentences involving youthful offenders. The Illinois Prison Project's work on behalf of people who have been sentenced to life or life-equivalent sentences is premised on the idea that everyone is capable of rehabilitation, personal growth, and maturity, and that Illinois' sentencing structure must include mechanisms to re-evaluate historic sentences that are unjust, unnecessary, or no longer appropriate.

The **John Howard Association of Illinois** provides critical public oversight of Illinois' prisons, jails, and juvenile correctional facilities. As it has for more than a century, the Association promotes fair, humane, and effective sentencing and correctional policies, addresses inmate concerns, and provides Illinois citizens and decision-makers with information needed to improve criminal and juvenile justice.

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 firm. 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 **Edwin F. Mandel Legal Aid Clinic** of the University of Chicago Law School, created in 1957, is one of the oldest law school clinical programs in the United States. The Clinic is currently designed to provide law and social work students the supervised opportunity to represent the poor in criminal, juvenile, mental health, employment discrimination, and police accountability matters. In addition to individual and class

representation, the Clinic is active in legislative and policy reform related to issues affecting the poor and disadvantaged. The Clinic's Criminal and Juvenile Justice Project (CJJP) provides legal representation to poor children and young adults accused of delinquency and crime. The CJJP is a national leader in expanding the concept of legal representation to include the social, psychological, and educational needs of clients.

The **Midwest Juvenile Defender Center** (MJDC), an affiliate of the National Juvenile Defender Center, provides leadership and resources for juvenile defenders throughout an eight state region. The MJDC maintains a listserv, holds regional trainings, provides resources for statewide trainings, participates in statewide juvenile defender assessments, provides resources and technical assistance to juvenile defenders in ongoing juvenile cases, and provides resources for Midwestern juvenile defenders to participate in policy advocacy.

The **James B. Moran Center for Youth Advocacy** ("Moran Center") is a nonprofit organization dedicated to providing integrated legal and social work services to low-income Evanston youth and their families to improve their quality of life at home, at school, and within the community. Founded in 1981 as the Evanston Community Defender, the Moran Center has worked to protect the rights of youth in the criminal justice and special education systems for decades. Because of the Moran Center's critical position at the nexus of both direct legal and mental health services, we are uniquely positioned to advocate for the distinct psycho-social needs presented by youth.

Restore Justice Illinois (RJI) was founded to mitigate the human and fiscal impact of the extreme sentencing laws of the 1980s and 1990s, particularly where they have impacted children. RJI's first priority is ending the practice of sentencing children to "life without parole" in Illinois by helping the Illinois General Assembly make good policy based on principled legal analysis, best practices in other states, guidance from the U.S. Supreme Court, and international law. RJI believes in the possibility of rehabilitation, redemption, and reunification with the community for all incarcerated people, even those who have committed the most serious crimes.