No. 120655

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. RICHARD HOLMAN, Petitioner-Appellant.	)))))))))))	Appeal from the Appellate Court of of Illinois, Fifth District, No. 5-10-0587 There heard on Appeal from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois No. 80 CF 5 Honorable Charles V. Romani Judge Presiding

BRIEF AND ARGUMENT OF *AMICI CURIAE* IN SUPPORT OF PETITIONER-APPELLANT

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POINTS AND AUTHORITIES

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici Curiaè, Children & Family Justice Center, *et al.*, work on behalf of children involved in the child welfare and juvenile and criminal justice systems.[1] *Amici* are advocates, researchers, and policy advisors who have a wealth of experience and expertise in litigating issues related to the application of the law to children in the juvenile and criminal justice systems. *Amici* understand that adolescent immaturity manifests itself in ways that implicate culpability, including diminished ability to assess risks, make good decisions, and control impulses. *Amici* also know that a core characteristic of adolescence is the capacity to change and mature and believe that the developmental differences between youth and adults warrant distinct treatment. *Amici* recognize – as does the United States Supreme Court – that juveniles are categorically different from adults and accordingly require categorically different treatment, including, among other things, sentencing practices that account for their capacity to grow, change, and become rehabilitated. *See, e.g., Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *J.D.B. v. North Carolina*, __ U.S. __, 131 S.Ct. 2394 (2011); *Miller v. Alabama*, __ U.S. __, 132 S.Ct. 2245 (2012); and *Montgomery v. Louisiana*, __ U.S. __, 136 S. Ct. 718 (2016).

Amici support the petitioner-appellant's position that an individual's youth and attendant characteristics are as pertinent today as they were

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

decades ago—a court cannot condemn a child to spend a lifetime in prison without individualized child centered consideration and a determination that he or she is the rare individual for whom rehabilitation is demonstrably impossible. *Amici* further contend that these requirements apply regardless of whether the youth's sentence was "mandatory" or "discretionary." Moreover, because a life without parole sentence is antithetical to the notion that children have a great capacity for rehabilitation and it is impossible to determine at the outset whether any individual child is "permanently incorrigible," *Amici* urge this Court to seize this opportunity to hold that life without parole sentences are, categorically, unconstitutional for children.

ARGUMENT

I. The United States Supreme Court's Holdings in *Miller v. Alabama* and *Montgomery v. Louisiana* Apply to all Youth who are Serving Life Sentences or their Equivalent.

In *Miller* and *Montgomery*, the U.S. Supreme Court banned mandatory life-without-parole sentences for juveniles, but also went further: 1) requiring sentencing courts to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison"; and 2) "bar[ring] life without parole for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery v. Louisiana*, __ U.S. __, 136 S. Ct. 718, 733, 734 (2016). To the extent that any confusion existed as to whether *Miller* applied *only* in cases where mandatory sentences were imposed, *Montgomery* made clear that this interpretation of *Miller* was too narrow. Rather than simply answering a binary question of whether a life without parole sentence—or a "de facto" life sentence—imposed on a youth under 18 was "mandatory" or "discretionary," a sentencing court must not only consider a child's youth and its attendant mitigating characteristics, but must *also* make a determination that the youth's crime reflects his "irreparable corruption" before sentencing him to serve his lifetime in prison. *Montgomery*, 136 S. Ct. at 734. The Court's decisions in these cases relied on scientific research that applied to children and adolescents, regardless of the crime they committed or, for that matter, whether their sentences were "mandatory" or "discretionary." As such,

Petitioner Richard Holman and others in Illinois serving life sentences or de facto life sentences for crimes that occurred when they were in their youth, are entitled to resentencing in a manner that comports with *Miller*, *Montgomery*, and the U.S. Supreme Court's recent jurisprudence as it pertains to children.

A. The Supreme Court's Language in *Miller* and *Montgomery* Applies to All Juvenile Offenders Sentenced to Spend Their Lifetime in Prison, Not Merely Those Serving Mandatory Life Without Parole Sentences.

Notwithstanding *Montgomery*'s clarification that *Miller*'s requirements apply to all individuals serving life without parole whose crimes occurred when they were under 18, Illinois appellate courts are refusing to apply *Miller* and *Montgomery* to cases in which a life-without-parole sentence was imposed on a "discretionary" basis. Such a conclusion is patently incorrect under *Miller* and *Montgomery*; the central inquiry is not whether the youth's life (or "de facto" life) sentence is "mandatory" or "discretionary," but whether the individual's youth is adequately and comprehensively considered at the time of sentencing. Merely mentioning a youth's age at the time of sentencing without articulating how that individual's age mitigates *against* condemning that youth to die in prison does not satisfy the Constitution. Thus, a youth cannot be condemned to spend their life in prison without a finding that "[he] exhibits such irretrievable depravity that rehabilitation is impossible." *Montgomery*, 136 S. Ct. at 733. Nonetheless, incorrectly interpreting *Miller* is precisely what Illinois Appellate Courts have done, some even after

Montgomery. *See, e.g., People v. Croft*, 2013 IL App (1st) 121473, ¶ 14 ("Addressing the appeal on its merits, we find defendant's claim that his life sentence is unconstitutional under *Miller* to be without merit. In *Miller*, the Supreme Court prohibited "mandatory" life sentences for juveniles. Here, section 5–8–1 of the Unified Code of Corrections, which applied at the time of defendant's sentencing, provided for a *discretionary* life sentence. . .") (internal citation omitted); *People v. Walker*, 2016 IL App (3d) 140723, ¶ 22, reh'g denied (Apr. 27, 2016) ("The defendant in this case was not given a mandatory sentence. Ergo, *Miller* does not apply."); cf. *People v. Stafford*, 2016 IL App (4th) 140309 (recognizing that *Miller* is not exclusive to mandatory life, but affirming discretionary life imposed in 2002).

Not all Illinois courts have taken such an untenably narrow approach to applying *Miller* and *Montgomery*. In *People v. Nieto*, the First District Appellate Court found a 78-year sentence as applied to a juvenile to be a de facto life sentence in violation of the Eighth Amendment's prohibition on cruel and unusual punishment pursuant to *Miller's* holding. *People v. Nieto*, 2016 IL App (1st) 121604, reh'g denied (Apr. 29, 2016). In *People v. House*, relying on the adolescent development and neuroscience research undergirding *Roper*, *Graham* and *Miller*, a different division of the same court made the ground-breaking decision to apply the logic of those cases to a young person who was 19 years old at the time of his offense, finding his mandatory life without parole sentence unconstitutional under the

proportionate penalties clause of the Illinois Constitution. *People v. House*, 2015 IL App (1st) 110580, ¶¶ 94, 102-03 ("Although the Court in *Roper* delineated the division between juvenile and adult at 18, we do not believe that this demarcation has created a bright line rule"). Because "[y]oung adults are, neurologically and developmentally, closer to adolescents than they are to adults," the *House* Court recognized that the reasoning driving the rulings in *Roper*, *Graham*, and *Miller* warrants an even greater breadth of protections than the Supreme Court was willing to extend in those instances. *Id.* at ¶ 95 (citation omitted). The *House* Court also noted that the U.S. Supreme Court is moving away from sanctioning juvenile life without parole sentences of any sort and is likely to abolish them in forthcoming case law. *Id.* at ¶¶ 92–93 (citing Maureen Dowling, Note *Juvenile Sentencing in Illinois: Addressing the Supreme Court Trend Away From Harsh Punishments for Juvenile Offenders,* 35 N. Ill. U. L. Rev. 611, 619 (2015)).

Most recently, yet another Illinois appellate court applied *Miller*'s protections to discretionary sentences. *People v. Ortiz*, 2016 IL App (1st) 133294, ¶23 (emphasis added) ("We hold that for a juvenile's *mandatory or discretionary* sentence of life in prison without parole to be constitutionally valid, the sentencing judge must take into consideration his "youth and attendant characteristics" to determine whether the defendant is "the rarest of juvenile offenders * * * whose crimes reflect permanent incorrigibility"). Additionally, the Seventh Circuit has reached these same conclusions:

> Although our court said in *Croft v. Williams,* 773 F. 3d 170, 171 (7th Cir. 2014), that *Miller* is inapplicable even to a defendant sentenced to life without parole provided that the legislature does not require such a sentence but leaves the matter to the sentencing judge, the court did not discuss the 'children are different' passage in *Miller.* That passage implies that the sentencing court must *always* consider the age of the defendant in deciding what sentence (within the statutory limits) to impose on a juvenile.

McKinley v. Butler, 809 F. 3d 908, 911 (7th Cir. 2016) (citation omitted). The *McKinley* Court went on to elaborate that "[*Miller*] does not forbid, but it expresses great skepticism concerning, life sentences for juvenile murderers. Its categorical ban is limited to life sentences made mandatory by legislatures, but its concern that courts should consider in sentencing that 'children are different' extends to discretionary life sentences and *de facto* life sentences, as in this case." *McKinley*, 809 F. 3d at 913.

Other state supreme courts have agreed—both pre- and post-*Montgomery*—with this analysis, applying *Miller* and *Montgomery* in cases where life sentences were imposed on juveniles on a discretionary basis. *See,* e.g., *State v. Riley*, 110 A.3d 1205, 1216 (Conn. 2015); *State v. Long*, 8 N.E.3d 890, 892 (Ohio 2014); *Aiken v. Byars*, 765 S.E.2d 572, 576–77 (S.C. 2014); *People v. Gutierrez*, 324 P. 3d 245, 249–50 (Cal. 2014); *Daugherty v. State*, 96 So. 3d 1076, 1079 (Fla. App. 2012); *Luna v. Oklahoma*, 2016 OK CR 27, ¶14; *Landrum v. State*, 192 So. 3d 459, 467-70 (Fla. 2016); *Veal v. State*, 298 Ga. 691, 702 (2016) (citation omitted).

These courts have grasped what is at the core of the U.S. Supreme Court's recent decisions—that the overwhelming majority of crimes

committed by youth are the product of transient immaturity, that deterrence schemes do not effectively reach the minds and hearts of other children, and that few if any juveniles should be forced to spend their lives in prison without a meaningful opportunity for review. *Amici* ask that this Court forego a mechanical, unprincipled approach to applying *Miller* and *Montgomery* and, instead, hold that the mitigating factors of youth and its attendant circumstances apply to all juvenile offenders, not merely those serving mandatory life without parole sentences. This is what is required.

B. The Scientific Research and Findings Relied upon by the United States Supreme Court in *Roper*, *Graham*, *Miller*, and *Montgomery* Compel the Conclusion that All Juvenile Offenders Serving a Natural Life Sentence or the Functional Equivalent Deserve *Miller's* Protections.

In reaching the conclusion that children are different in ways that necessitate a youth-centered approach with respect to criminal procedure and sentencing practices, the United States Supreme Court has relied upon an settled body of research confirming that, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Graham v. Florida*, 560 U.S. 48, 68 (2010); *see also Miller v. Alabama*, __ U.S. __, 132 S.Ct. 2245, 2464 n. 5 (2012) ("[T]he science and social science supporting *Roper* and *Graham*'s conclusions have become even stronger"). This research confirms the existence of three primary characteristics that distinguish youth from adults for the purpose of determining culpability. *See Miller*, 132 S. Ct. at 2464; *Graham*, 560 U.S. at

68; *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

"First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking." *Miller*, 132 S. Ct. at 2464 (internal citations omitted). Prominent psychological researchers have concluded that "even when adolescent cognitive abilities approximate those of adults, youthful decision-making may still differ due to immature judgment." *See, e.g.*, Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 Tex. L. Rev. 799, 813 (2003). Neuroscientific research has similarly confirmed that adolescents have limited ability to coordinate the different brain regions needed for reasoning and problem solving. Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights*, 2006 Wis. L. Rev. 431, 461 (2006). In particular, the human brain's prefrontal cortex—which controls risk assessment, the ability to evaluate future consequences, and impulse control—does not fully develop until a person reaches his or her early 20s. Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 Annals N.Y. Acad. Sci 77, 77 (2006). Adolescents, thus, frequently "underestimate the risks in front of them and focus on short-term gains rather than long-term consequences." Barry Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 Ohio St. J. Crim. 107, 116-17 (2013). Sixteen and seventeen year olds in particular are "more

present-oriented and discount future consequences," which means that they value immediate gratification and short-term rewards over potential negative outcomes and long-term losses. Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality and Sentencing Policy:* Roper, Graham, Miller/Jackson, *and the Youth Discount,* 31 Law & Ineq. 263, 285 (2013).

"Second," the *Miller* Court stated, "children are more vulnerable . . . to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings." *Miller,* 132 S. Ct. at 2464; *accord Graham,* 560 U.S. at 68; *Roper,* 543 U.S. at 569. That adolescents are developmentally less capable than adults of making sound decisions when peer pressure is strong is widely accepted. *See, e.g.,* Jay D. Aronson, *Brain Imaging, Culpability and the Juvenile Death Penalty,* 13(2) Psychol. Pub. Pol'y & L. 115, 119 (2007). The effect of peer influence has even broader implications, however. Studies show that adolescents and young adults are more likely to make risky and impulsive decisions, not only when peer pressure is being applied, but even when their peers are simply present. Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence,* 43 Developmental Psychology 1531 (2007). Researchers have also noted that environmental factors can pressure children to break the law: "[A]s legal minors, [adolescents] lack the freedom that adults have to extricate themselves from a criminogenic

setting." Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003).

"And third," the *Miller* Court found, "a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity." *Miller*, 132 S. Ct. at 2464; *see also Roper*, 543 U.S. at 569-70; *Graham*, 560 U.S. at 68. The elasticity of human development, particularly during the years of maturation from childhood into adulthood, is again well-supported by research. *See, e.g.*, Alex R. Piquero, *Youth Matters: The Meaning of Miller for Theory, Research, and Policy Regarding Developmental/Life-Course Criminology*, 39 New Eng. J. on Crim. & Civ. Confinement 347, 349 (2013) ("As juveniles . . . transition into early adulthood, there is a strengthening of self-regulation in the brain that is coupled with a change (or de-emphasis) in the way the brain responds to rewards. This change is also consistent with the aggregate peak and eventual precipitous decline in delinquency and crime observed in very early adulthood"). Even for those adolescents whose environmental factors lead them to commit serious crimes, progressing into adulthood behind bars does not stunt their capacity for growth and rehabilitation. In a study that followed juvenile offenders between the ages of 14-18 for seven years after they were convicted, Steinberg found that:

> Even in a population of serious juvenile offenders, there were significant gains in psychosocial maturity during adolescence

> and early adulthood. Between ages 14 and 25, youth continue to develop an increasing ability to control impulses, suppress aggression, consider the impact of their behavior on others, consider the future consequences of their behavior, take personal responsibility for their actions, and resist the influence of peers. Psychosocial development is far from over at age 18.

Laurence Steinberg et al., *Psychosocial Maturity and Desistance from Crime in a Sample of Serious Juvenile Offenders,* JUV. JUST. BULL., Mar. 2012, at 8, http://www.ojjdp.gov/pubs/248391.pdf.

Borne of a new recognition of these three major differences between children and adults, and of the ways in which these differences reduce children's culpability for even the worst offenses, *Miller* and *Montgomery* mark a transformative moment in juvenile justice. Where once the watchword was "adult time for adult crimes," the law now recognizes that almost no child warrants a life-without-parole sentence—even when that child has killed another person—except the vanishingly few who can reliably be deemed irreparably corrupt. Moreover, the scientific backdrop of *Roper* and its progeny reminds us that the severity of a young person's crime should not be the determinative factor as to whether he or she receives constitutional protections; the lack of impulse control, sensation seeking, risk-taking, short-sightedness, reward bias and vulnerability to peer influence which culminate in the idea that "youth matters," are all functions of normal brain development and characteristics adolescents share regardless of their offense.

Neither law, nor reason, nor science supports an application of the U.S. Supreme Court's rulings in *Miller* and *Montgomery* that arbitrarily

distinguishes between those young people who were condemned to die in prison on a "discretionary" or "mandatory" basis. What must be at the root of this and any court's analysis—whether undertaken prospectively or retroactively—is whether that young person's youth and its attendant features and deficits were properly accounted for at the time of sentencing and whether that child is indeed the rare individual for whom rehabilitation is demonstrably impossible. *Montgomery*, 136 S. Ct. at 733. This Court should take the opportunity available in the present case to clarify these principles and require Illinois courts to meaningfully apply *Miller* and *Montgomery* to all youth facing and serving life without parole sentences or their equivalent.

II. This Court Should Categorically Bar Life-Without-Parole Sentences for Juveniles and Permit Meaningful Opportunity for Review to Distinguish Between Actions Reflecting Transient Immaturity and Irreparable Corruption.

In *Montgomery*, the U.S. Supreme Court confirmed that *Miller* applies retroactively on collateral review, but for reasons more expansive than those relied on by this Court in *People v. Davis*, 2014 IL 115595, when reaching that same conclusion. 136 S. Ct. at 734 (*Miller* "did more than require a sentence to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of the distinct attributes of youth"). When applied solely on a prospective basis, *Miller*'s shortcoming is that it forces a once-and-for-all finding regarding irreparable corruption and incorrigibility even though the best evidence to make that judgment is unavailable for years – or even decades – after the original sentencing determination. The risk of a jury or judge erroneously determining that a child is irretrievably depraved or permanently incorrigible is real and untenable under the reasoning of *Roper*, *Graham*, *Miller*, and *Montgomery*. This Court should answer the question left open by *Miller* and *Montgomery*: whether the Eighth Amendment and the Illinois Constitution requires a categorical bar on life-without-parole sentences for juveniles.

Just as the Eighth Amendment now requires that states provide meaningful review and the potential for release to juveniles who commit non-

homicide crimes, in order to correct the deficit laid bare in *Miller* and *Montgomery*, this Court should categorically ban all juvenile life without parole sentences. To do otherwise would be to forswear the rehabilitative ideal that is characteristic of youth. As more states move to eliminate this sentence (be it judicially or legislatively), as resort to the sentence has become exceedingly rare, and as Supreme Court Justices acknowledge that the Court has made this sentence a "practical impossibility," *Montgomery*, 136 S. Ct. at 744 (J. Scalia dissenting), this Court should find that natural life sentences for juveniles do not comport with contemporary societal norms and should be eliminated in favor of a sentencing scheme that permits meaningful review. "Our 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 (Theis, J., dissenting). This case presents a prime opportunity for this Court to reestablish Illinois as a leader in juvenile justice reform.

Prior to *Graham*, the U.S. Supreme Court's jurisprudence regarding the 8th Amendment could be divided into death penalty cases and non-death penalty cases. In the latter category, the Court considered all of the circumstances of the case to determine whether the sentence is

unconstitutionally excessive. *Graham*, 130 S.Ct. at 2021; *compare Solem v. Helm*, 463 U.S. 277 (1983) (Court held unconstitutional a life without parole sentence for the defendant's seventh nonviolent felony, the crime of passing a worthless check) *with Harmelin v. Michigan*, 501 U.S. 957 (1991) (divided Court upheld a life without parole sentence for a first-time offender in possession of a large quantity of cocaine).

In death penalty cases, the Court used categorical rules to define Eighth Amendment standards. *Graham*, 130 S.Ct. at 2022. This classification turned on two considerations: (1) nature of the offense; and (2) characteristics of the offender. *Id.* With respect to the nature of the offense, the Court concluded that capital punishment is impermissible for nonhomicide crimes against individuals. *Kennedy v. Louisiana*, 554 U.S. 407 (2008); see also *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977). In cases turning on the characteristics of the offender, the Court adopted categorical rules prohibiting the death penalty for defendants who committed their crimes before the age of 18, *Roper*, 543 U.S. 551, or whose intellectual functioning is in a low range, *Atkins v. Virginia*, 536 U.S. 304 (2002).

In addressing a categorical challenge by a juvenile to a term-of-years sentence, the Court found the appropriate analysis to be the one used in *Atkins*, *Roper*, and *Kennedy*. *Graham*, 130 S.Ct. 2022. This analysis begins "with objective indicia of national consensus." *Id.* at 2023. Courts must

determine whether there is a national consensus against the practice in question. Community consensus, while "entitled to great weight," is not itself determinative of whether a punishment is cruel and unusual. *Kennedy*, 554 U.S. at 434. In accordance with the constitutional design, "the task of interpreting the Eighth Amendment remains" the court's responsibility. *Roper*, 543 U.S. at 575. "The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question." *Graham*, 130 S.Ct. at 2026 (internal citations omitted).

1. The Highest Courts in Many States Have Recognized *Miller's* Applicability to a Broader Scope of Sentences than Mandatory Life Without Parole.

Even prior to the recent decision in *Montgomery*, some state courts held their discretionary sentencing schemes to be a violation of *Miller*. *See, e.g.*, *State v. Riley*, 110 A.3d 1205, 1216 (Conn. 2015); *State v. Long*, 138 Ohio St.3d 478, ¶29 (Ohio 2014); *Aiken v. Byars*, 765 S.E. 2d 572, 576–77 (S.C. 2014); *People v. Gutierrez*, 324 P. 3d 245, 249–50 (Cal. 2014); *Daugherty v. State*, 96 So. 3d 1076, 1079 (Fla. App. 2012); *cf. State v. Seats*, 865 N.W. 2d 545, 555–558 (Iowa 2015) (based on *Miller* and Iowa constitution).

Other state courts have begun to acknowledge the practical difficulties in attempting to evaluate hearings in "discretionary" cases under post-*Miller* standards. For instance, the Florida Supreme Court held earlier this year that Florida's parole system was incompatible with *Miller* and *Montgomery*,

despite the fact that it required an opportunity for parole after twenty-five years, because it did not provide for "individualized consideration of [the defendant's] juvenile status at the time of the murder" and required him to serve the equivalent of a life sentence. *Atwell v. State*, 197 So.3d 1040, 1042 (Fla. 2016), reh'g denied, No. SC14-193, 2016 WL 4440673 (Fla. Aug. 23, 2016) (noting that Florida's parole process failed to recognize "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," as required by *Miller*). The Florida Supreme Court used the same language from *Miller* in another case in June of this year, finding that even discretionary life without parole sentences are unconstitutional in violation of the Eighth Amendment for juveniles convicted of second degree murder. *Landrum v. State*, 192 So.3d 459, 460 (Fla. 2016); *see also Luna v. Oklahoma*, 2016 OK CR 27, ¶14 (*Miller* and *Montgomery* applicable to Oklahoma's discretionary life without parole sentencing scheme).

The Georgia Supreme Court took *Miller's* and *Montgomery's* directives even further, noting the U.S. Supreme Court's emphasis on the extreme unlikelihood that a juvenile offender is utterly incapable of rehabilitation:

> The *Montgomery* majority explains, however, that by *uncommon, Miller* meant *exceptionally rare,* and that determining whether a juvenile falls into that exclusive realm turns not on the sentencing court's consideration of his age and the qualities that accompany youth along with all of the other circumstances of the given case, but rather on a specific determination that he is *irreparably corrupt.* Thus, *Montgomery* emphasizes that a LWOP sentence is permitted only in "*exceptional* circumstances," for "the *rare* juvenile offender who

> exhibits such *irretrievable depravity* that rehabilitation is *impossible*"; for those "*rarest* of juvenile offenders ... whose crimes reflect *permanent incorrigibility*"; for "those *rare* children whose crimes reflect *irreparable corruption*"—and not, it is repeated twice, for "the vast majority of juvenile offenders."

Veal v. State, 298 Ga. 691, 702 (2016) (citation omitted) (emphasis in original). In *Veal*, the Georgia Supreme Court vacated the sentence and remanded for resentencing on account of the fact that the trial court had not made a specific finding of irreparable corruption or permanent incorrigibility. *Id.* at 703. However, neither the Georgia Supreme Court nor the United States Supreme Court attempted to elucidate how a trial court may determine that a young person convicted of a crime is incorrigible. Other states, having noted this difficulty in making determinations of whether a juvenile is "irretrievably corrupt" at the time of sentencing, have opted instead to ban all life-without-parole sentences for juveniles. *See State v. Sweet*, 879 N.W.2d 811, 839 (Iowa 2016) ("[W]e conclude that sentencing courts should not be required to make speculative up-front decisions on juvenile offenders' prospects for rehabilitation because they lack adequate predictive information supporting such a decision."); *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 466 Mass. 655, 669-70 (2013) (finding both mandatory and discretionary life without parole sentences for juveniles unconstitutional, stating, "Given current scientific research on adolescent brain development, and the myriad significant ways that this development impacts a juvenile's personality and behavior, a conclusive showing of traits

such as an "irretrievably depraved character," *Roper,* 543 U.S. at 570, can never be made, with integrity").

Justice Scalia predicted this inevitable outcome of *Miller's* and *Montgomery's* combined precedent in his *Montgomery* dissent: "All of the statements relied on by the majority do nothing more than express the *reason* why the new, youth-protective *procedure* prescribed by *Miller* is desirable: to deter life sentences for certain juvenile offenders." *Montgomery*, 136 S. Ct. at 743 (Scalia, dissenting). Justice Scalia recognized that the effect of *Miller* and *Montgomery* was to "[make] imposition of [juvenile life without parole] a practical impossibility." *Id.* at 744.

2. The Impossible Task Created By *Miller* And *Montgomery* Is Being Resolved By An Increasing Number of State Legislatures.

Even more pronounced than the upheaval of juvenile sentencing schemes within state judiciaries, is the overwhelming legislative response to *Miller*. Since 2012, twenty-six states have modified their laws governing the sentencing of juvenile offenders who commit homicide. Joshua Rovner, *Juvenile Life Without Parole: An Overview,* The Sentencing Project (2016), http://www.sentencingproject.org/wp-content/uploads/2015/12/Juvenile-Life-Without-Parole.pdf. At present, seventeen states do not allow life without parole sentences for children. *Righting Wrongs: The Five-Year Groundswell of State Bans on Life Without Parole for Children,* The Campaign for the Fair Sentencing of Youth (2016), available at

http://juvenilesentencingproject.org/righting-wrongs/. Eight of those seventeen states—Connecticut, Hawaii, Massachusetts, Nevada, Texas, West Virginia, Wyoming, and Vermont—have abolished juvenile life without parole in response to *Miller*. The Phillips Black Project, *Juvenile Life Without Parole After* Miller v. Alabama, 2 (2015) [hereinafter The Phillips Black Project] (*See, e.g.*, Conn. Gen. Stat. Ann. § 54-125a(f)(1) (West 2015) all juvenile sentences are parole-eligible after a maximum period of 30 years; Mass. Gen. Laws Ann. Ch. 265, § 2 (West 2015) juvenile offenders in the state of Massachusetts convicted of first-degree murder are now eligible for parole after a period of 20 to 30 years; Tex. Penal Code Ann. § 12.31(a) (West 2011) juveniles adjudged guilty of even capital felonies are given the opportunity for parole; Vt. Stat. Ann. tit. 13, § 7045 (West 2015) "A court shall not sentence a person to life imprisonment without the possibility of parole if the person was under 18 years of age at the time of the commission of the offense").

Several more states have functionally, if not technically, banned juvenile life without parole. The Phillips Black Project at 2. For example, Delaware still allows for the imposition of discretionary juvenile life without parole sentences, however, these individuals are categorically afforded opportunities to petition for judicial sentencing modification after 20 or 30 years depending on the offense. Del. Code Ann. tit. 11 § 4204A(d)(1-2). California also maintains discretionary juvenile life without parole, but

provides opportunities to petition for judicial resentencing in almost every case and provides parole consideration to any inmate whose sentence has been reduced to a term of years. The Phillips Black Project at 12; Cal. Penal Code § 1170(d)(2)(A)(i) (West 2016) (*amended by* 2016 Cal. Legis. Serv. Ch. 696 (A.B. 2590) (WEST)) (offering the vast majority of juvenile offenders sentenced to life without parole the opportunity to petition for a reduced sentence after fifteen years' imprisonment). North Carolina, Pennsylvania, and Washington have all outlawed juvenile life without parole for a major class of juvenile offenders. The Phillips Black Project at 2; N.C. Gen. Stat. Ann. § 15A-1340.19A (West 2012) (allowing juvenile offenders convicted of first degree murder to become eligible for parole after 25 years); 18 Pa. Stat. Ann. § 1102.1(c) (West 2012) (removing "life without parole" from the sentencing guidelines for juveniles convicted of second-degree murder); Wash. Rev. Code § 10.95.030 (eliminating juvenile life without parole for offenders under the age of 16).

The Illinois Legislature, along with numerous other states, has taken moderate but definitive steps toward reforming the way juveniles are sentenced in this state. Before the Supreme Court released its decision in *Montgomery*, the Illinois Legislature passed a new statute detailing the factors of youth and all of its attendant circumstances a court may consider during sentencing, including:

> (1) The person's age, impetuosity, and level of maturity at the time of the offense, including the ability to consider risks and consequences

of behavior, and the presence of cognitive or developmental disability, or both, if any;
(2) whether the person was subjected to outside pressure, including peer pressure, familial pressure, or negative influences;
(3) the person's family, home environment, educational and social background, including any history of parental neglect, physical abuse, or other childhood trauma;
(4) the person's potential for rehabilitation or evidence of rehabilitation, or both;

730 ILCS 5/5–4.5–105(a)(1)–(a)(3) (West 2016). While these factors are a mark of progress for compliance with *Miller's* ruling, this statute does not solve the indelible problem of asking trial judges to predict a person's potential for rehabilitation at the time of sentencing. This Court has an opportunity to remedy this problem in Mr. Holman's case. No coalition, organization or governmental body is better situated to let our state legislators know that this statute falls short of providing adequate compliance with *Miller*'s and *Montgomery*'s precedents. The only way to ensure the constitutionality of juvenile sentencing in this state is through a bar to a natural life sentence and some periodic review of an inmate's actual rehabilitation, rather than a tenuous prediction of a young person's ability to rehabilitate.

3. Juvenile Life Without Parole Violates International Human Rights

The practice of sentencing children to a lifetime in prison without the possibility of parole violates international law and standards that are almost universally accepted worldwide. "These standards recognize that, however serious the crime, children, who are still developing physically, mentally and

emotionally, do not have the same level of culpability as adults and require special treatment in the criminal justice system appropriate to their youth and immaturity." They further hold that the primary objectives should always be the best interests of the children and the potential for their successful reintegration into society. Juvenile Life Without Parole, Amnesty International (2016), http://www.amnestyusa.org/our-work/issues/children-s-rights/juvenile-life-without-parole. According to Amnesty International and Human Rights Watch, the United States is alone in its widespread use of life imprisonment without the possibility of parole for juveniles. There are over 2,000 people in the country serving life sentences for crimes they committed when they under the age of 18 and, though some countries technically permit the practice, there have been no recent cases outside the United States where it has been imposed. US/OAS: End Juvenile Life-Without-Parole Sentences, Human Rights Watch (March 25, 2014), https://www.hrw.org/news/2014/03/25/us/oas-end-juvenile-life-without-parole-sentences. The United States' continuation to mete out such sentences violates its obligations under both the Charter of the Organization of American States and the American Declaration of the Rights and Duties of Man. *Id.*

While it has not yet ratified the American Convention on Human Rights which is the primary human rights instrument in the Inter-American system, the United States is nonetheless bound by its obligations to the declaration which requires countries to provide children with special means

of protection, "recognizing that their incarceration should only be used as a last resort and for the shortest duration, and that children are entitled to a proportionate sentence, to rehabilitation, and to be free from discrimination, among other rights." *Id.* International human rights experts have further found that life without parole sentences for juveniles violate three core human rights treaties, all of which have been ratified by the United States – the Convention Against Torture, the International Covenant on Civil and Political Rights, and the Convention on the Elimination of All Forms of Racial Discrimination. Moreover, the Convention on the Rights of the Child, which has been ratified by 195 countries–every country in the world except the United States—expressly prohibits the imposition of life without parole sentences on children. *See* United Nations Treaty Collection, Convention on the Rights of the Child, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en; Committee on the rights of the Child, General Comment No. 10: Children's Rights in Juvenile Justice, 77; U.N. Doc. CRC/C/GC/10 (Apr. 25. 2007); http://www.un.org/apps/news/story.asp?NewsID=50759#.WEYVD2Vfndk. The United Nations General Assembly has further called for an immediate abrogation of such sentences every year since 2006 and they have also been rejected by a variety of regional human rights bodies that monitor its compliance in the Americas. Challenging Juvenile Life Without Parole: Has Human Rights Made a Difference?, Columbia Law School Human Rights Institute (June 2014).

Although recent Supreme Court cases such as *Miller* and *Montgomery* have limited the practice of such sentencing schemes, it is clear that the United States continues to stand behind the rest of the world when it comes to juvenile rights.

4. In the Exercise of its Independent Judgment, this Court Should Find that No Court or Trier of Fact Can Reasonably Predict the Ability or Inability of a Juvenile to Evolve and Rehabilitate.

The rulings in *Roper, Graham, Miller* and *Montgomery* demonstrate an undeniable trend in juvenile justice, one in which life sentences without parole imposed on children are not compatible with "the evolving standards of decency that mark the progress of a maturing society." *Miller*, 132 S. Ct. at 2463. Even if a state judicial system insists on asserting its right to impose these sentences against the current of Supreme Court jurisprudence, the effect of these cases, as Justice Scalia pointed out and the Supreme Courts in Iowa and Massachusetts recognized, is to make imposition of juvenile life without parole too problematic to be viable. Indeed, the Illinois judiciary would be remiss to burden its trial courts with the task of assessing a young person's capacity for personal, mental and emotional growth over the course of a lifetime. It is an impossible task. As the *Miller* Court stated, the constitutional requirement that juvenile offenders be afforded a meaningful opportunity for release does not rob a state of its ability to incarcerate an incorrigible criminal for his entire life or protect its law-abiding citizens from dangerous people. *Miller*, 132 S.Ct. at 2469. These penological goals can still

be realized through even the broadest interpretations of *Miller* and *Montgomery*. But rather than attempt to make a determination of irredeemability at the time of sentencing, trial courts are better situated to assess a juvenile offender's growth or lack thereof after he or she has had the benefit of time and maturity to distinguish themselves from their youthful transgressions.

This Court should hold that life without the possibility of parole for youth under the age of 18 is unconstitutional because *Miller* and *Montgomery* have created an unworkable standard for the individualized sentencing of juveniles. Under *Miller*, and similar to death penalty sentencing, courts are required to consider mitigating factors of youth and its hallmark features, such as immaturity and the failure to appreciate consequences and risks. They are further required to take into account family and home environments – from which juveniles usually cannot extricate themselves, even if they are brutal or dysfunctional, as well their roles in crime and their potential to become rehabilitated. The Court also made it clear that discretionary life without the possibility of parole sentences for juveniles should be rare, with Justice Kagan writing, "Given all that we have said in *Roper*, *Graham*, and this decision about children's diminished culpability, and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Miller*, 132 S. Ct. at 2475. While such considerations bring the nation closer to the proper

administration of juvenile justice, this Court should hold that life without the possibility of parole for juveniles is unconstitutional altogether because the test outlined in *Miller* and *Montgomery* has created an unworkable standard. It is near impossible for judges to take such factors into consideration to determine which juveniles are permanently incorrigible and which are simply undergoing transient immaturity. Therefore, *amici* submit that what is mandated by the U.S. Supreme Court precedent is a sentencing structure that permits age-appropriate sentencing that accounts for a youth's categorically diminished culpability and permits "hope for some years of life outside prison walls," 136 S.Ct. at 737; or a system in which an individual is given an meaningful opportunity for release based on demonstrated maturity and rehabilitation (cf. *Graham*, 560 U.S. at 75) and an opportunity "to show their crime did not reflect irreparable corruption," *Montgomery*, 136 S.Ct. at 736.

5. Lastly, this Court should determine that Juvenile Life Without Parole Violates the Greater Protections Afforded by the Proportionate Penalties Clause of the Illinois State Constitution

Natural life sentences imposed on juveniles who possess a great capacity to rehabilitate and change are wholly disproportionate and offend the rehabilitative goal of the Illinois Constitution's proportionate penalties clause. Article I, § 11, of the Illinois Constitution states: "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art.

I, § 11.1 This Court has recognized that the Illinois Constitution provides greater protection than the Eighth Amendment of the U.S. Constitution alone. "[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." *People v. Clemons*, 2012 IL 107821, ¶40. Thus, even if this Court declines to categorically bar juvenile life without parole sentences under the Eighth Amendment, this Court should follow the example of Iowa and Massachusetts and find that punishment unconstitutional under our state constitution. *See, e.g., State v. Sweet*, 879 N.W.2d 811, 839 (Iowa 2016); *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 466 Mass. 655, 669-70 (2013).

There are two ways in which a penalty can violate the proportionate penalties clause: (1) if it is so cruel, degrading, or disproportionate to the offense that the sentence shocks the moral sense of the community; or (2) if it is greater than the sentence for an offense with identical elements. *People v. Ligon*, 2016 IL 118023, ¶10. The first prong provides a check on the judiciary, *i.e.*, the individual sentencing judge, while the second prong serves as a check on the legislature, which sets the statutory penalties in the first instance. *People v. Taylor*, 102 Ill. 2d 201, 205-06 (1984). 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.'"

People v. Leon Miller, 202 Ill. 2d 328, 339 (2002). "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." *Leon Miller*, 202 Ill. 2d at 339. The societal and legal landscape has shifted fundamentally and dramatically over the last thirty years. It is true that a sentence does not offend the requirement of proportionality if it is commensurate with the seriousness of the crime and gives adequate consideration to the rehabilitative potential of the defendant. *People v. St. Pierre*, 146 Ill. 2d 494, 513 (1992). Society's evolving standards have redefined what that adequate consideration of rehabilitative potential means when focusing on youth. Such consideration would require an individualized assessment of his childhood background, family environment, development, including immaturity, impetuosity, and failures to appreciate risks and consequences.

It would be a fundamental miscarriage of justice to only apply *Miller* and *Montgomery*'s protections to offenders who were previously sentenced to a mandatory life without parole sentence. What rationale could we as a society possibly have for affording a meaningful opportunity for release to the individuals convicted of multiple homicides, but not those who took the life of one person and were thus sentenced to a death-in-prison term of years or given life on a discretionary basis? In the state of Illinois, almost 25% of those serving natural life for crimes committed as juveniles were given those sentences on a "discretionary" basis. These individuals are equally capable of

demonstrating that their crimes were the product of the transient immaturity of youth. If there is any fairness or justice to be had in our criminal justice system, we owe these similarly situated citizens the same retroactive benefit of their constitutional rights.

6. Conclusion.

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 abided 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 so long understood and embraced by this State and reclaim Illinois' proud history of leadership in recognizing that children are different and deserving of special consideration.

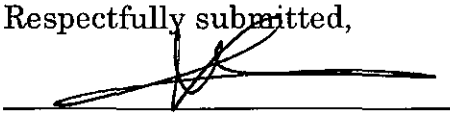
As Justice Scalia's trenchant dissent in *Montgomery* explained, "if, indeed, a State is categorically prohibited from imposing life without parole in juvenile offenders whose crimes do not 'reflect permanent incorrigibility,'

then even when the procedures that *Miller* demands are provided the constitutional requirement is not necessarily satisfied. It remains available for the defendant sentenced to life without parole to argue that his crimes did not in fact 'reflect permanent incorrigibility.'" *Montgomery,* 136 S. Ct. at 743-44. The current sentencing structure we have in place consequently runs the risk of youthful offenders serving disproportionate penalties. Judges do not have magic crystal balls at the time of sentencing to help them decide whether particular youth are incapable of being rehabilitated and should therefore serve life sentences in prison. It is even more difficult for federal and state judges to determine "whether a 17-year-old who murdered an innocent sheriff's deputy half a century ago was at the time of his trial 'incorrigible.'" *Montgomery,* 136 S. Ct. at 744 (J. Scalia, dissenting). Because judges can neither look to the future, nor back in time, to make accurate guesses about which children are a permanent threat to society, they are simply unable to comply with the standard set forth in *Miller* and *Montgomery.* Illinois should therefore either give juveniles a term of year sentence that is not life (or its equivalent) or the law should be amended to create some system for sentencing review to determine whether someone is demonstrably incapable of rehabilitation.

CONCLUSION

As outlined above, *Amici Curiae* support Petitioner-Appellant and respectfully request that this Court reverse the judgment of the Fifth District of the Illinois Appellate Court, find that the holdings of *Miller* and *Montgomery* should be applied to all youth who are serving life without parole sentences or their equivalent, and categorically ban life without parole sentences for children.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I, Scott F. Main, 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 33 pages.

SCOTT F. MAIN
Amicus Counsel

APPENDIX TO THE BRIEF

IDENTITY OF *AMICI* AND STATEMENTS OF INTEREST

The **Children and Family Justice Center** (CFJC), part of Northwestern Pritzker School of Law'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, and immigration and political asylum. In its 24-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.

The **Campaign for the Fair Sentencing of Youth (the Campaign)** is a national coalition that coordinates, develops, and supports efforts to implement just and reasonable alternatives to the harsh sentencing of America's youth. The focus of the Campaign is on abolishing life-without-parole sentences for all youth in the United States. The Campaign aims to create a society that respects the dignity and human rights of all children through a justice system that operates with consideration of the child's age, provides youth with opportunities to return to community, and bars the imposition of life-without parole for people under age eighteen. The Campaign consists of lawyers, religious groups, mental health experts, children's rights advocates, victims, law enforcement, doctors, teachers, families, and people directly impacted by the sentence, who believe that young people deserve the opportunity to present evidence of their remorse and seek rehabilitation. Founded in February 2009, the Campaign uses a multi-pronged approach, which includes coalition-building, public education, strategic advocacy and collaboration with leading litigators—on both state and national levels—to accomplish its goal. The Campaign believes that the status of childhood and adolescence separates youth from adults in categorical and distinct ways such that, while youth should be held accountable, youth cannot be held to the same standards of blameworthiness and culpability of their adult counterparts.

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 **Criminal and Juvenile Justice Project** of the University of Chicago Law School's Mandel Legal Aid Clinic was created in 1991 to provide law and social work

students the supervised opportunity to provide quality legal representation to children and young adults. The Clinic is a national leader in expanding the concept of legal representation to include the social, psychological and educational needs of clients and their families. Students and faculty also participate in policy reform and advocacy related to sentencing, mass incarceration, race and justice, policing, and the collateral consequences of criminal justice involvement.

The **Juvenile Justice Initiative (JJI)** of Illinois is a non-profit, non-partisan, inclusive statewide coalition of state and local organizations, community advocates, legal educators, practitioners, community service providers, and child advocates, supported entirely by private funding. JJI establishes broad collaborations around specific initiatives to achieve concrete and sustainable reforms to ensure full human rights for all children in conflict with the law. Our mission is to reduce reliance on confinement, enhance fairness, and develop a comprehensive continuum of community based resources throughout the state. Our collaborations work in concert with other organizations, concerned individuals and state and local government entities throughout Illinois to ensure that fairness and competency development are public and private priorities for all children in conflict with the law, and that incarceration is a last resort for as short a time as possible.

Juvenile Law Center, founded in 1975, is the oldest 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.

The **Law Office of the Cook County Public Defender** is the second largest public defender office in the nation. With a full time staff of approximately 700, of which 506 are attorneys, the Office represents approximately 89 percent of all persons charged with felonies and misdemeanors in Cook County. The Office also represents juveniles charged with delinquent conduct, and parents against whom the State files allegations of abuse, neglect, or dependency. In 2014, the Office was appointed to more than 130,000 cases. The mission of the Office is to protect the fundamental rights, liberties and dignity of each person whose case has been entrusted to us by providing the finest legal representation.