



Federal Bar Council

VILIA B. HAYES
President

June 26, 2015

Honorable Patti B. Saris
Chair, United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: *Amending the U.S. Sentencing Guidelines to Reflect Recent Supreme Court Case Law and Juvenile Brain and Behavioral Science*

Dear Chairwoman Saris:

The Federal Bar Council (the “FBC”) is an organization of lawyers who practice in federal courts within the Second Circuit. Through its Federal Criminal Practice Committee, the FBC brings together attorneys with a broad cross-section of expertise—including current and former federal prosecutors, and federal defense counsel—for the purpose of examining and improving the federal criminal justice system. The FBC thus is well-positioned to offer an experienced and balanced perspective on the United States Sentencing Guidelines.

The FBC submits this letter to join the New York Council of Defense Lawyers, and former Manhattan District Attorney Robert Morgenthau, in requesting that the Sentencing Commission declare the Sentencing Guidelines to be inapplicable to juvenile offenders under the age of 18.¹ The Guidelines were designed for adult offenders and do not account for recent scientific advancements or Supreme Court decisions regarding juveniles’ “lessened culpability” and greater “capacity for change.” *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012) (quoting *Graham v. Florida*, 560 U.S. 48, 68, 74 (2010)). Unless and until the Commission undertakes the study and implementation of guidelines that adequately account for these developments and the significant ways in which juveniles differ from adults, the Guidelines should not be applied to juveniles tried as adults in the federal system.

Since 2005, the Supreme Court has held in a series of cases that “children are constitutionally different from adults for purposes of sentencing.” *Miller*, 132 S. Ct. at 2464. In 2005, the Court outlawed the death penalty for juvenile offenders under the age

¹ To avoid any conflict issues, the current prosecutors on the Federal Criminal Practice Committee have abstained from the Committee’s endorsement of this letter.

of 18 at the time their crimes were committed. *Roper v. Simmons*, 543 U.S. 551 (2005). In 2010, the Court banned life without parole sentences for juvenile offenders who commit non-homicide offenses. *Graham*, 560 U.S. 48. And in 2012, the Court struck down mandatory life without parole sentences for juveniles who commit homicide offenses. *Miller*, 132 S. Ct. 2455.

The Court based its decisions on recent scientific advancements in the study of adolescent brain and behavioral development that show “fundamental differences between juvenile and adult minds.” *Id.* at 2464 (quoting *Graham*, 560 U.S. at 68). Research shows that the human brain undergoes a massive reorganization during the teenage years, which makes adolescence a stage of life biologically distinct from childhood and adulthood. See Brief in Support of the Resentencing of Petitioner Angel Alejandro on Behalf of Amici Curiae Robert M. Morgenthau et al. at 15, *United States v. Alejandro*, No. 98-cr-00290 (S.D.N.Y. Apr. 4, 2014) (citing David Dobbs, *Beautiful Brains*, Nat’l Geographic Mag., Oct. 2011, available at <http://ngm.nationalgeographic.com/print/2011/10/teenage-brains/dobbs-text>; Laurence Steinberg, *A Behavioral Scientist Looks at the Science of Adolescent Brain Development*, 72 *Brain & Cognition* 160, 160 (2010)). Critically, although certain brain capabilities stop maturing around age sixteen, the brain systems that control complex judgments—such as risk/reward evaluations, responses to environmental stressors, and impulse control—take much longer to develop. Brief in Support of the Resentencing at 15-16, *Alejandro*, No. 98-cr-00290 (citing Nat’l Research Council, Comm’n on Assessing Juvenile Justice Reform, *Reforming Juvenile Justice: A Developmental Approach* 2, 91, 96-99 (Richard J. Bonnie et al. eds., 2013)). As a result, research demonstrates that juveniles are more prone to recklessness and impulsivity than adults, see, e.g., Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 *Ann. Rev. Clinical Psychol.* 459, 469-70 (2009), and are also more vulnerable to peer pressure and negative external influences, see, e.g., *id.* at 468-69. However, the same characteristics of the adolescent brain that render it sensitive to environmental influences also make it receptive to rehabilitation. See Brief in Support of the Resentencing at 21-22, *Alejandro*, No. 98-cr-00290; Steinberg, *Behavioral Scientist* at 161. Furthermore, criminological studies have shown that juveniles generally outgrow their criminal behavior, and only a small proportion of juvenile offenders become chronic offenders as adults. See, e.g., Steinberg, *Adolescent Development* at 478; Edward P. Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Adjudication Among Serious Adolescent Offenders*, 22 *Dev. & Psychopathology* 453, 470 (2010).

The distinctive attributes of youth “diminish the penological justifications” for harsh sentencing of juveniles. *Miller*, 132 S. Ct. at 2465. Because juveniles have less control over their actions, and “‘the heart of the retribution rationale’ relates to an offender’s blameworthiness, ‘the case for retribution is not as strong with a minor as with an adult.’” *Id.* (quoting *Graham*, 560 U.S. at 71). And because “‘the same characteristics that render juveniles less culpable’ . . . make them less likely to consider potential punishment,” it is imperative that a sentencing judge be able to consider the individual characteristics of each

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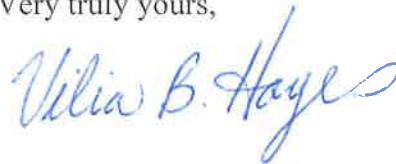
juvenile before the court to determine the efficacy and weight to be given to the deterrence impact of the sentence to be imposed. *Miller*, 132 S. Ct. at 2465 (quoting *Graham*, 560 U.S. at 72).

Despite this research and the Court's recognition that juveniles are constitutionally different from adults for purposes of sentencing, the Guidelines fail to meaningfully distinguish between juvenile and adult offenders. In fact, until recently, the Guidelines specifically provided that "[a]ge (including youth) is not ordinarily relevant to sentencing." U.S. Sentencing Guidelines Manual § 5H1.1 (1987-2009). The Guidelines now allow that age *may* be relevant in unusual circumstances, but they also caution that specific offender characteristics, such as age, generally should not be considered as a reason for sentencing outside the applicable guideline range. *See id.* (2010-present); Introductory Commentary to § 5H. We disagree.

The FBC urges the Commission to reconsider how to properly account for youth during sentencing and to determine, after thorough study, whether it is most appropriate to (a) meaningfully incorporate youth into the current Guidelines, (b) develop separate guidelines formulated specifically for juvenile offenders, or (c) declare juvenile offenders to be outside the scope of the guidelines regime entirely.

Unless and until the Commission completes such a study, the Guidelines should not be applied to juveniles tried as adults in the federal system. The limited consideration in the Guidelines of a youthful offender's age fails to account for the significant, scientifically established ways in which juvenile and adult offenders differ and is out of step with the guidance provided by the United States Supreme Court. We urge the Commission to resolve this disparity, which is ripe for the Commission's attention, this amendment cycle and to declare that the Guidelines, as currently issued, are inapplicable to juvenile offenders under the age of 18.

Very truly yours,



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

ANGEL ALEJANDRO,

Defendant.

S4 98 Cr. 290-06 (CM)

**BRIEF IN SUPPORT OF THE RESENTENCING
OF PETITIONER ANGEL ALEJANDRO ON BEHALF OF *AMICI CURIAE*
ROBERT M. MORGENTHAU, THE CAMPAIGN FOR THE FAIR
SENTENCING OF YOUTH, CHILD WELFARE LEAGUE OF AMERICA,
COUNCIL OF JUVENILE CORRECTIONAL ADMINISTRATORS, FATHER
GREGORY BOYLE, S.J., HUMAN RIGHTS WATCH, JUVENILE LAW
CENTER, LAWYERS FOR CHILDREN, NATIONAL CENTER FOR YOUTH
LAW, NATIONAL LEGAL AID & DEFENDER ASSOCIATION, NATIONAL
JUVENILE DEFENDER CENTER, NATIONAL JUVENILE JUSTICE
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PRELIMINARY STATEMENT

This brief is submitted in support of the resentencing of Angel Alejandro on behalf of *amici curiae* Robert M. Morgenthau, The Campaign For The Fair Sentencing Of Youth, Child Welfare League Of America, Council of Juvenile Correctional Administrators, Father Gregory Boyle, S.J., Human Rights Watch, Juvenile Law Center, Lawyers For Children, National Center For Youth Law, National Legal Aid & Defender Association, National Juvenile Defender Center, National Juvenile Justice Network, New York Council of Defense Lawyers, New York State Association of Criminal Defense Lawyers, and New York State PTA. *Amici* respectfully urge the Court to reject the U.S. Sentencing Guidelines calculation as the starting point, and rather to follow the teachings of the U.S. Supreme Court by accounting for developments in juvenile justice, science, and criminology which were not considered by the Court at Mr. Alejandro's original sentencing. Mr. Alejandro's sentence should be reduced appropriately.

This Court agreed to resentence Mr. Alejandro in the wake of *Miller v. Alabama*, 132 S. Ct. 2455 (2012), in which the Supreme Court banned mandatory life without parole¹ sentences for juveniles who commit crimes before the age of 18. In *Miller*, the Court predicted that such sentences would be uncommon and rarely imposed because juveniles bear "diminished culpability and greater prospects for reform." *Id.* at 2464.

In this brief, we argue that this Court may not use the Sentencing Guidelines to calculate Mr. Alejandro's sentence because the Guidelines, if applied, would yield an unconstitutional starting point: namely, a life sentence without possibility of parole. *Miller* requires the Court to take into account that a defendant who was a child at the time of the crime cannot be considered

¹ Throughout this brief, the term "life without parole" is used to refer to any life sentence without the possibility of release, such as a life sentence in the federal system. See *United States v. Reyes*, 283 F.3d 446, 456 n.2 (2d Cir. 2002) (explaining that parole was abolished in the federal system on November 1, 1987).

the same as an adult for the purpose of sentencing. This brief also argues that new scientific and criminological knowledge developed since Mr. Alejandro was first sentenced indicates that this Court should not re-impose a life sentence or its equivalent.² For biological and penological reasons, downward adjustments in Mr. Alejandro's sentence are necessary to ensure that his punishment is proportionate to the reduced responsibility he bore as a child and reflective of his subsequent maturation and rehabilitation. We leave it to the Federal Defenders to argue the specific facts about Mr. Alejandro's conduct and characteristics—at the time of the crime or thereafter—that may further mitigate his culpability.

BACKGROUND

In 1995, when he was 15 years old, Mr. Alejandro participated in a gang-related murder in Yonkers, New York. He acted as the lookout, not the shooter. The government indicted him and five other members of the Yonkers-based Latin Kings gang for murder in aid of racketeering and related charges. He was arrested in 1998 and transferred from juvenile status in 1999.

On December 14, 2000, following a jury trial, the Court sentenced Mr. Alejandro and several of his codefendants to mandatory life terms pursuant to 18 U.S.C. § 1959(a)(1). *See United States v. James*, 239 F.3d 120, 127 (2d Cir. 2000) (holding that sentence of life in prison or death is mandatory for conviction under 18 U.S.C. § 1959(a)(1)). The Court found that it was required by law to sentence Mr. Alejandro to a life term, *see* Sentencing Tr. at 7, which in the federal system is the equivalent of life without parole, *see supra* n.1. Now 34 years old, Mr. Alejandro has served approximately 16 years in prison. On August 22, 2013, this Court granted Mr. Alejandro's § 2255 petition for a resentencing pursuant to *Miller v. Alabama*, 132 S. Ct.

² For the Court's reference, copies of the scientific, criminological, and international law sources cited in this brief (listed in the "Other Authorities" section of the Table of Authorities) can be found in the separate Appendix.

2455. *See Alejandro v. United States*, 13 Civ. 4364, Dkt. No. 6 (Aug. 22, 2013) (“Decision and Order Granting Motion to Set Aside Sentence Pursuant to 28 U.S.C. § 2255”).

ARGUMENT

I. **THE SENTENCING GUIDELINES ARE UNCONSTITUTIONAL AS APPLIED TO JUVENILE OFFENDERS BECAUSE THEY DO NOT ACCOUNT FOR THE LEGALLY RECOGNIZED DIMINISHED CULPABILITY OF YOUTH**

In the thirteen years since Mr. Alejandro’s sentencing, federal law has undergone a fundamental shift in its approach to the punishment of juvenile offenders under the age of 18. A series of landmark Supreme Court decisions in the area of juvenile justice reflect a new understanding that, compared to adults, children are inherently less blameworthy and have a greater potential for rehabilitation. These judicial decisions have begun to bring the United States in line with the international consensus that children should be spared the harshest penalties. Federal precedent now requires this Court to consider youth and other recognized factors in sentencing (or, in this case, resentencing), and not the Sentencing Guidelines range.

A. **The Supreme Court Has Held that Juveniles Are Different Than Adults for Purposes of Sentencing**

Federal courts now recognize that juvenile offenders under the age of 18 should not be treated as adults at sentencing. Since the imposition of life without parole on Mr. Alejandro, the Supreme Court outlawed the death penalty for children under age 18, *Roper v. Simmons*, 543 U.S. 551 (2005), banned life without parole sentences for juvenile offenders in nonhomicide cases, *Graham v. Florida*, 560 U.S. 48 (2010), and, most recently, held that mandatory life without parole sentences for juveniles convicted of homicide violate the Eighth Amendment’s prohibition against cruel and unusual punishment, *Miller v. Alabama*, 132 S. Ct. 2455 (2012). Together, *Roper*, *Graham*, and *Miller* “establish that children are constitutionally different from

adults for purposes of sentencing.” *Miller* at 2464. The constitutionally distinct status of juveniles is premised on the Court’s repeated finding that juvenile offenders “have diminished culpability and greater prospects for reform” than adult offenders. *Id.* As a result, juveniles are inherently “less deserving of the most severe punishments,” such as life without the possibility of parole. *Id.* (quoting *Graham*, 560 U.S. at 68).

Juvenile offenders are legally different because they are developmentally different. The judicial acknowledgement that “youth is more than a chronological fact,” *id.* at 2467 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)), is in accord with long established voting, drinking, and marriage laws across the country. *Miller* recognizes that youth is a “transient” period of “immaturity, irresponsibility, ‘impetuousness, and recklessness.’” *Id.* (alteration omitted) (quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993)).³ These “distinctive attributes of youth” are not “crime-specific,” but apply even to juveniles who “commit terrible crimes.” *Miller*, 132 S. Ct. at 2465; *see also Roper*, 543 U.S. at 571 (“the same reasoning applies to all juvenile offenders under 18”). Both petitioners in *Miller* received mandatory sentences of life without parole for committing murders at the age of 14.⁴ *Miller*, 132 S. Ct. at 2461-62. Despite

³ Specifically, the Supreme Court has noted “three significant gaps between juveniles and adults.” *Miller*, 132 S. Ct. at 2464. First, juveniles’ “lack of maturity” and “underdeveloped sense of responsibility” engenders “recklessness, impulsivity, and heedless risk-taking.” *Id.* (internal quotation marks omitted). Second, juveniles are more susceptible to negative environmental influences and pressures, “including from their family and peers,” in part because minors “have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings.” *Id.* (alteration and internal quotation marks omitted). And third, juveniles are more likely to change and develop: “a child’s character is not as well-formed as an adult’s, his traits are less fixed and his actions are less likely to be evidence of irretrievable depravity.” *Id.* (alterations and internal quotation marks omitted).

⁴ Petitioner Kuntrell Jackson was convicted of capital felony murder and aggravated robbery in Arkansas state court. *Miller*, 132 S. Ct. at 2461. Petitioner Evan Miller was convicted of murder in the course of arson in Alabama state court. *Id.* at 2462. The Supreme Court described Evan Miller’s crime as particularly “vicious.” *Id.* at 2469.

the fact that the petitioners' criminal behavior resulted in the most serious of crimes, *Miller* invalidated their sentences because the sentencing court was legislatively denied the opportunity to consider the petitioners' "diminished culpability and heightened capacity for change." *Id.* at 2469. *Roper*, *Graham*, and *Miller* establish that, *regardless of the nature of the crime*, the crime committed by a juvenile offender is "not as morally reprehensible as that of an adult." *Graham*, 560 U.S. at 68 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)); *see also Miller*, 132 S. Ct. at 2465; *Roper*, 543 U.S. at 570. The Court warned that the brutality or cold-blooded nature of a crime risks overpowering "mitigating arguments based on youth . . . even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require" a less severe sentence. *Graham*, 560 U.S. at 78 (internal quotation marks omitted). The differences between juveniles and adults "render suspect any conclusion that a juvenile falls among the worst offenders," notwithstanding the heinous nature of the crime. *Roper*, 543 U.S. at 570.⁵

Under Supreme Court precedent delivered after the imposition of sentence in this case, Mr. Alejandro cannot be re-sentenced using the same criteria applicable to an adult.

⁵ At Mr. Alejandro's original sentencing, the Court acknowledged Mr. Alejandro's youth at the time of the crime, *see Sentencing Tr.* at 11, but effectively found that the interests of specific deterrence warranted life in prison without parole. The Court explained that "the nature of the crime, my assessment, based on the evidence that I heard during a three-plus week trial, convinces me that each and every one of the defendants, including Mr. Alejandro, is most appropriately sentenced by sending him to spend the rest of his life away from society," *Sentencing Tr.* at 8. The Court did not have the opportunity to consider the scientific evidence that has been developed that demonstrates that youthful offenders suffer from diminished culpability and that they have the capacity to reform because of their brain development. *See Parts II and III, infra* at 15-26. At resentencing, the Court has the opportunity to consider these new insights.

B. Following *Miller*, Federal Courts Sentencing Juveniles Must Disregard Sentencing Guidelines Calculations Recommending Life

It would be unconstitutional to apply the U.S. Sentencing Guidelines in the resentencing of Mr. Alejandro. Under the federal sentencing laws, there is no provision for parole; thus any sentence that imposes life or its chronological equivalent on a juvenile offender becomes presumptively suspect under *Miller*. The Sentencing Guidelines have not been revised to account for *Miller*, and do not incorporate the principle that children are different for the purposes of sentencing. Therefore, the Court may not use an unconstitutional Guidelines calculation of life as the starting point for its sentencing decision.

Although the Sentencing Guidelines are no longer mandatory, using a Guidelines calculation of life without parole as the starting point for determining a juvenile offender's sentence would violate the principles articulated in *Miller*. See *People v. Moffett*, 209 Cal. App. 4th 1465 (2012) (“A presumption in favor of LWOP . . . is contrary to the spirit, if not the letter, of *Miller*.”).⁶ The Guidelines impermissibly fail to distinguish between juveniles and adults and do not incorporate the scientific and penological underpinnings of *Miller*. In fact, the Sentencing Guidelines according to which Mr. Alejandro was sentenced provided that age, “including

⁶ In *Moffett*, the court vacated a juvenile life without parole sentence imposed under Cal. Penal Code § 190.5, which California courts have interpreted as creating a presumption in favor of life without parole for defendants aged 16 and 17. 209 Cal. App. 4th 1465, review granted by 290 P.3d 1171 (Cal. 2013); see Cal. Penal Code § 190.5(b) (“The penalty for a defendant found guilty of murder in the first degree . . . [who was age 16 or 17 at the time of the crime] shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life.”).

Following *Miller*, the Supreme Court has remanded for reconsideration a series of cases applying the same California statute. See, e.g., *People v. Blackwell*, 202 Cal. App. 4th 144 (2013), vacated and remanded, 133 S. Ct. 837 (2013) (“remanded to the Court of Appeal of California, First Appellate District, for further consideration in light of *Miller v. Alabama*”). The constitutionality of § 190.5(b) after *Miller* is currently under review in the Supreme Court of California. See *Moffett*, 290 P.3d 1171.

youth,” was not ordinarily relevant to sentencing. *See* U.S. Sentencing Guidelines Manual § 5H1.1 (2000). That provision directly opposes the holding of *Miller*, which requires the Court to take the offender’s youth into consideration. *Miller*, 132 S. Ct. at 2469; *see* Part I.C., *infra* at 8.

This Court should not, in any event, apply Guidelines which fail to account for the “general presumption of diminished culpability” that should attach to juvenile offenders. *Graham*, 560 U.S. at 92 (Roberts, *J.*, concurring); *cf. Moffett*, 209 Cal. App. 4th 1465 (“Treating LWOP as the default sentence takes the premise in *Miller* that such sentences should be rarities and turns that premise on its head[.]”). Nor do the Guidelines account for the scientifically established fact that juveniles have greater prospects for reform. *See Miller*, 132 S. Ct. at 2464. While the Second Circuit has held that the Sentencing Guidelines “should serve as a benchmark or a point of reference or departure for a sentencing court,” *United States v. Capanelli*, 479 F.3d 163, 165 (2d Cir. 2007) (internal quotation marks and emphasis omitted), the more recent holdings of the Supreme Court trump adherence to that rule in the case of juveniles facing life without parole precisely because the Guidelines treat adults and juveniles the same.

In sentencing a *Miller* defendant, the appropriate factors for this Court to consider include the purposes of sentencing and the individual characteristics of the defendant. 18 U.S.C. § 3553(a). The Supreme Court has provided guidance as to the characteristics of a *Miller* defendant that are relevant to sentencing, including his youth at the time of the crime and his subsequent growth and rehabilitation. *See* Part I.C., *infra* at 8; 18 U.S.C. § 3553(b)(1) (“In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2).”).

C. **Miller Held that Courts Must Consider the “Mitigating Qualities of Youth” and Other Individualized Factors When Deciding Whether to Sentence a Juvenile to Life Without Parole**

The Supreme Court requires this Court to recognize that a defendant who was a child at the time of the crime should be sentenced as a child: “imposition of . . . [the] most severe penalties on juvenile offenders cannot proceed as though they were not children.” *Miller*, 132 S. Ct. at 2466. Based on new scientific discoveries about adolescent development, this Court is now “require[d] . . . to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Id.* at 2469 (emphasis added).

Under *Miller*, the sentencing court must consider the “mitigating qualities of youth,” *id.* at 2467 (internal quotation marks omitted), primarily, the defendant’s “chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.” *Id.* at 2468; *see also id.* at 2475 (“[A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.”). These mitigating qualities exist wholly apart from any factual details about the nature and extent of the offender’s participation in the specific crime: no matter the crime committed, the offender’s youth at the time of the offense reduces his fault. This immaturity also plays a significant role in the way the offender responded to environmental stressors which may have influenced his criminal activity. *Miller* stands for the proposition the sentencing court should engage in an individualized sentencing determination involving the weighing of factors such as the “circumstances of the homicide offense, including the extent of [the juvenile’s] participation in the conduct and the way familial and peer pressures may have affected him;” the “family and home environment that surround[ed]” him; the potential for rehabilitation; and any procedural

hurdles the offender may have faced owing to his youth, including “inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.” *Id.* at 2468; *see United States v. Reingold*, 731 F.3d 204, 214 (2d Cir. 2013) (explaining that *Miller* held that juvenile life without parole sentences “ha[ve] to reflect an individualized sentencing determination”).⁷

Miller and related cases also recognize that major scientific advances over the past decade have uncovered a biological basis for why youth should mitigate criminal responsibility. *See Miller*, 132 S. Ct. at 2464-65; *Graham*, 560 U.S. at 68 (citing developments in psychology and brain science). As we explain in greater detail in Part II, *infra* at 15, empirical research shows that adolescents are neurobiologically prone to risk-taking and sensation-seeking behaviors, less capable of impulse control and anticipating future consequences than adults, and more vulnerable to environmental influences. Simultaneously, adolescents are more receptive to change and reformation.

The discovery of the neurobiological and psychosocial underpinnings for commonly observed teenage tendencies leads to the conclusion that “much teenage criminal activity is probably a product of developmental forces rather than deeply rooted deficiencies in character.” Nat’l Research Council, Comm. on Assessing Juv. Just. Reform, *Reforming Juvenile Justice: A Developmental Approach* 132 (Richard J. Bonnie et al., eds., 2013). The harshest penalties are therefore inappropriate and unjust responses to adolescent criminal behavior. “Simply put,

⁷ Following *Miller*, several state courts have ruled that trial courts must hold individualized sentencing hearings, including consideration of the factors listed in *Miller*, for juveniles facing potentially severe sentences. *See, e.g., Bear Cloud v. State*, 294 P.3d 36, 47 (Wy. 2013) (vacating sentence and detailing *Miller* factors to be considered on remand); *State v. Null*, 836 N.W.2d 41, 74-75 (Iowa 2013) (recognizing that *Miller* requires “more than a generalized notion of taking age into consideration as a factor in sentencing” or “a mere recitation of the nature of the crime”) (citing other state cases); *accord People v. Carp*, 828 N.W.2d 685, 720 (Mich. Ct. App. 2012) (listing *Miller* factors).

because the brain of a juvenile is not fully developed, either structurally or functionally, by the age of eighteen, a judge cannot find with confidence that a particular offender, at that point in time, is irretrievably depraved.” *Diatchenko v. Dist. Attorney*, 466 Mass. 655, 670 (2013) (holding that all juvenile life without parole sentences are unconstitutional).

The import of *Miller* for this resentencing is therefore clear: in determining what sentence to impose on a juvenile offender, the Court is required to weigh his youth at the time of the crime and its attendant mitigating qualities independent of the nature of the underlying crime.

D. Life Without Parole Is the Harshes Possible Penalty for Juvenile Offenders and Should Not Be Imposed Here

The principles expressed throughout *Miller* and related cases regarding the nature of childhood suggest that, constitutionally and for policy reasons, life without parole will rarely, *if ever*, be an appropriate sentence for juvenile offenders.⁸ This conclusion follows “straightforwardly” from “the principle of *Roper*, *Graham*, and [the Supreme Court’s] individualized sentencing cases that youth matters for purposes of meting out the law’s most serious punishments.” *Miller*, 132 S. Ct. at 2471.

Life without parole is the harshest sentence available for juvenile offenders, now that the Supreme Court has outlawed the death penalty for juveniles. *See id.* at 2475. Indeed, the Supreme Court’s aversion to life without parole for *Miller* defendants is evident from its observation that this harsh sentence is akin to the death penalty since it “alters the offender’s life by a forfeiture that is irrevocable.” *Graham*, 560 U.S. at 70; *see also Miller*, 132 S. Ct. at 2466; *Diatchenko*, 466 Mass. at 670 (“When considered in the context of the offender’s age and the

⁸ The dissenting justices in *Miller* predicted that the practical outcome of the majority’s opinion would be effectively to eliminate life without parole for all juveniles. *Miller*, 132 S. Ct. at 2481, 2486; *see also Diatchenko*, 466 Mass. at 669-71.

wholesale forfeiture of all liberties, the imposition of a sentence of life without parole on a juvenile homicide offender is strikingly similar . . . to the death penalty[.]”). For a juvenile defendant, life without parole “means denial of hope[,] . . . that good behavior and character improvement are immaterial,” and “that whatever the future might hold in store for the mind and spirit of the convict, he will remain in prison for the rest of his days.” *Graham*, 560 U.S. at 70 (internal quotation marks and alteration omitted). In fact, life without parole is a *harsher* sentence for a juvenile than for an adult, since a “juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender.” *Id.* Such an absolute sentence runs counter to all the Supreme Court has said in *Roper*, *Graham*, and *Miller* about the diminished culpability and rehabilitative potential of adolescents.

Although the *Miller* Court declined to consider whether life without parole is cruel and unusual punishment for all juvenile offenders, the Court did predict that “this harshest possible penalty will be uncommon.” *Miller*, 132 S. Ct. at 2469. “That is especially so,” the Supreme Court explained, “because of the great difficulty . . . of distinguishing at this early age between ‘the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.’” *Id.* (quoting *Roper*, 543 U.S. at 573); *see also Roper*, 543 U.S. at 573 (noting that even “expert psychologists” cannot distinguish incorrigible juvenile criminals from those capable of change). A court sentencing a juvenile offender to life without parole therefore runs a high risk of failing to comprehend the juvenile’s true level of culpability and of failing to accurately predict the potential for reform. Following this logic, the Massachusetts Supreme Court recently became the first state court to outlaw altogether juvenile life without parole sentences as disproportionate in light of the youth of the offender. *Diatchenko*, 466 Mass. at 669-71.

Furthermore, from a policy perspective, “the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.” *Miller*, 132 S. Ct. at 2465. As we discuss in greater detail in Part III, *infra* at 22, criminological evidence undercuts any rational policy reason for imposing very harsh sentences on juvenile offenders. The very qualities that make children distinct from adults indicate that children are less likely to be deterred from criminal conduct by the prospect of harsh penalties, more likely to be rehabilitated, and ultimately less deserving of harsh punishments from a retributive standpoint. *See Graham*, 560 U.S. at 70-71. Although incapacitation can be a legitimate goal of punishment, it should not be allowed to “override all other considerations, lest the Eighth Amendment’s rule against disproportionate sentences be a nullity.” *Id.* at 73; *see supra*, n.5. For this reason alone, a life without parole sentence would be unjust here.

E. Moral Standards in the United States Are Evolving Away From Harsh Sentences for Juveniles and Aligning with International Norms

Standards of decency in the United States are evolving away from harsh sentences for juvenile offenders. *See Miller*, 132 S. Ct. at 2463 (the Eighth Amendment’s concept of proportionality should be viewed “according to the evolving standards of decency that mark the progress of a maturing society” (internal quotation marks omitted)). Although the United States is the only country in the world that imposes life without parole sentences on juveniles,⁹ over the past 13 years, policy has begun to shift away from the imposition of lengthy incarceration for

⁹ One-hundred-thirty-five countries have expressly outlawed the sentence in their domestic legal commitments, while the remaining ten countries with potentially permissive laws, apart from the United States, have no known cases in which life without parole was actually imposed on a juvenile. *See Connie de la Vega & Michelle Leighton, Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. Rev. 983, 989-90 & n.18, n.20 (2008); *see also* Br. of Amici Curiae Amnesty International et al. in Support of Pet’rs at 16-20 & n.7, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647), 2012 WL 174238.

juveniles. For example, the authors of a recent study commissioned by the U.S. Department of Justice observed that “the general principle of mitigation” espoused in Supreme Court jurisprudence “supports more lenient dispositions for adolescents as a general policy.” Nat’l Research Council, *supra*, at 133. Likewise, another report funded by the Department of Justice has recommended against prosecuting juvenile offenders as adults. See U.S. Dep’t of Just., *Report of the Attorney General’s National Task Force on Children Exposed to Violence* 189-90 (2012), available at www.justice.gov/defendingchildhood/cev-rpt-full.pdf (hereinafter “*Children Exposed to Violence*”). And New York Governor Andrew Cuomo has publicly endorsed raising the age of criminal responsibility so that 16 and 17 year olds are not tried as adults. See Joel Stashenko, *Governor Endorses Raising Age of Criminal Responsibility*, N.Y. L.J., Jan. 9, 2014, available at <http://www.newyorklawjournal.com/id=1202637068579?slreturn=20140110120112>.

In fact, statistics suggest that Mr. Alejandro’s sentence is already an aberration within the United States. In the federal system, the sentence is rare: as of 2011, Mr. Alejandro was one of only four federal inmates serving a life sentence for a crime committed at the age of 15 or younger. Ashley Nellis & Jody Kent Lavy, *Federal Stats: Juveniles Serving Life without Parole Sentences in the Federal System*, Campaign for the Fair Sentencing of Youth (Mar. 14, 1:22 PM), www.fairsentencingofyouth.org/the-issue/federal-stats/. Since the year 2000, the number of detained or incarcerated youth in the United States has decreased by approximately 40 percent nationwide as jurisdictions adopt policies that favor community-based alternatives. See Nat’l Juv. Just. Network & Texas Pub. Pol’y Found., *The Comeback States: Reducing Youth Incarceration in the United States* (Mar. 14, 2014, 1:58 PM), http://www.njjn.org/uploads/digital-library/Comeback-States-Report_FINAL.pdf; see also Anne E. Casey Found., *Reducing Youth Incarceration in the United States* (Feb. 2013), available at <http://www.aecf.org/~media/>

Pubs/Initiatives/KIDS%20COUNT/R/ReducingYouthIncarcerationSnapshot/DataSnapshotYouthIncarceration.pdf.

These developments are bringing the United States into line with human rights principles that are widely accepted internationally. The international legal community almost universally condemns sentencing juveniles to life without parole as an unjust and inhumane practice. The United Nations Convention on the Rights of the Child (“CRC”), ratified by every country except the United States and Somalia, forbids sentencing children under 18 to life in prison without possibility of release. CRC art. 37(a), Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990); *see Graham*, 560 U.S. at 81 (citing CRC art. 37(a)); Human Rights Watch & Amnesty Int’l, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 99 (2005), available at <http://www.amnestyusa.org/sites/default/files/pdfs/therestoftheirlives.pdf>. The CRC further calls for imprisonment of juvenile offenders “only as a measure of last resort and for the shortest appropriate period of time.” CRC art. 37(b).¹⁰

The Supreme Court recognized the persuasive value of this “overwhelming” international consensus in *Roper*, 543 U.S. at 578, and *Graham*, 560 U.S. at 81 (quoting *Roper*). In resentencing Mr. Alejandro, the Court should adjust his sentence downward so that it aligns with evolving standards of decency and international law.

¹⁰ The U.N. committee charged with monitoring the implementation of the CRC explained that the psychological and physical differences between children and adults, as well as the differences between their educational and emotional needs, “constitute the basis for the lesser culpability of children in conflict with the law,” and “require a different treatment for children.” Comm. on the Rights of the Child, Gen. Comment No. 10, U.N. Doc. CRC/C/GC/10, at ¶ 10 (Apr. 25, 2007), available at <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>.

II. **SCIENTIFIC RESEARCH CONFIRMS THAT ADOLESCENTS ARE BIOLOGICALLY LESS DEVELOPED AND THEREFORE HAVE DIMINISHED CULPABILITY**

As the Supreme Court recognized in *Miller* and related cases, *see Miller*, 132 S. Ct. at 2464-65 & 2464 n.5, new developments in neuroscience demonstrate that adolescents are biologically different than adults, and that these biological differences diminish adolescents' responsibility for criminal activity. Biologically, an adult man is not the same person he was at the age of fifteen; likewise, the characteristics of a teenager are not necessarily indicative of who the teenager will become. Science, therefore, teaches that a sentence which imposes adult-level responsibility on a juvenile is disproportionately harsh. This Court should resentence Mr. Alejandro in light of this new scientific knowledge.

A. **Advances in Neuroscience Demonstrate that Adolescence Is a Distinct Developmental Phase Characterized by Heightened Proclivity to Risk Taking and Impulsivity**

The human brain takes a much longer time to mature than was previously believed. *See* Nat'l Research Council, *supra*, at 96-99; David Dobbs, *Beautiful Brains*, Nat'l Geographic Mag., Oct. 2011, *available at* <http://ngm.nationalgeographic.com/print/2011/10/teenage-brains/dobbs-text>. Owing to innovations in brain imaging technology and an explosion of developmental research, we now know that the human brain undergoes a "massive reorganization" during the teenage years, including structural and functional changes which make adolescence a stage of life biologically distinct from childhood and adulthood. Dobbs, *supra*; Laurence Steinberg, *A Behavioral Scientist Looks at the Science of Adolescent Brain Development*, 72 *Brain & Cognition* 160, 160 (2010) (hereinafter, Steinberg, *Behavioral Scientist*); *see* Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 *Annual Rev. of Clinical Psychol.* 459, 465 (2009) (hereinafter, Steinberg, *Adolescent Development*). Critically, although logical capabilities

stop maturing around age 16, the brain systems which control more complex judgments—such as risk/reward evaluations, responses to environmental stressors, and impulse control—take much longer to develop. *See, e.g.*, Nat’l Research Council, *supra*, at 2, 91, 96-99; Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescents: Why Adolescents May Be Less Culpable Than Adults*, 18 *Behav. Sci. & the L.* 741, 744 (2000).

The cause of much teenage behavior, including an increased appetite for risk, can be found in the developing brain. As the adolescent brain matures, it undergoes a temporary developmental imbalance between two neurobiological systems: the limbic system,¹¹ associated with emotions and reward-seeking, and the prefrontal regulatory system,¹² which governs rational judgment and impulse control. *See e.g.*, Nat’l Research Council, *supra*, at 2; Alison Gopnik, *What’s Wrong With the Teenage Mind*, *Wall St. J.*, Jan. 28, 2012; Steinberg, *Adolescent Development* at 466-65. During early and middle adolescence, the limbic system experiences a “rapid and dramatic increase in dopaminergic activity,” causing a marked increase in reward seeking, sensation seeking, and accompanying risky behavior. Steinberg, *Adolescent Development* at 466; *see* Nat’l Research Council, *supra*, at 97-98; Gopnik, *supra*. The reward centers of the adolescent brain are more active than those of adults, leading to an overestimation of rewards versus risks. *See, e.g.*, Gopnik, *supra*; Dobbs, *supra*. Behavioral experiments confirm that adolescents demonstrate notably higher sensitivity to rewards, in particular immediate rewards, than adults or children. *See* Steinberg, *Behavioral Scientist* at 161-62 (citing

¹¹ Also referred to as the “incentive processing system” or the “socio-emotional system” in different scientific papers. *See, e.g.*, Charles Geier & Beatriz Luna, *The Maturation of Incentive Processing and Cognitive Control*, 93 *Pharmacology, Biochemistry & Behav.* 212, 213 (2009); Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 *Dev. Rev.* 78, 83 (2008).

¹² Also referred to as the “cognitive control system.” *See, e.g.*, Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 *Dev. Rev.* at 83.

various behavioral experiments). Reward sensitivity and sensation-seeking peaks between the ages of approximately 13 and 17, and then declines. *See id* at 162; Dobbs, *supra*; Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 *Dev. Rev.* 78, 89 (2008) (hereinafter, Steinberg, *Risk-Taking*).

Meanwhile, there is “compelling neurobiological evidence” that the brain’s regulatory system undergoes a more gradual, linear maturation over the course of adolescence. Steinberg, *Adolescent Development*, at 466; *see, e.g.*, Nat’l Research Council, *supra*, at 92, 96-99; Steinberg, *Risk-Taking* at 83. Anatomically, the brain experiences a loss of “gray matter”—the shedding of excess, unused synaptic connections—and a gradual increase in “white-matter,” a coating of myelin which speeds neural-transmission. *See, e.g.*, Dobbs, *supra*; M.R. Asato et al., *White Matter Development in Adolescence: A DTI Study*, 20 *Cerebral Cortex* 2122, 2122 (2010); Charles Geier & Beatriz Luna, *The Maturation of Incentive Processing and Cognitive Control*, 93 *Pharmacology, Biochemistry & Behav.* 212, 215-16 (2009) (hereinafter, Geier & Luna, *Cognitive Control*); Steinberg, *Adolescent Development*, at 466. Together, the reduction in gray matter and the increase in white matter improve the efficiency and connectivity of neural signaling in the prefrontal cortex and among multiple regions of the brain. *See, e.g.*, Nat’l Research Council, *supra*, at 99; Geier & Luna, *supra*, at 215-16; Steinberg, *Risk-Taking* at 93-95. These functional changes are associated with improved “response inhibition, planning ahead, weighing risks and rewards, and the simultaneous consideration of multiple sources of information.” Steinberg, *Risk-Taking* at 94; *see, e.g.*, Nat’l Research Council, *supra*, at 99; Asato et al., *supra*, at 2123; Geier & Luna, *supra*, at 215. Behavioral studies confirm that adolescents’ performance in the areas of self-control, anticipation of future consequences, and strategic planning steadily improve over the course of adolescence. *See* Steinberg, *Behavioral*

Scientist at 6; Kathryn C. Monahan et al., *Trajectories of Antisocial Behavior and Psychosocial Maturity from Adolescence to Young Adulthood*, 45 *Developmental Psychol.* 1654, 1660-63 (2009).

Thus, during adolescence there is an imbalance between the slow development of the brain's regulatory functions and its overactive reward center. While adolescents are neurologically inclined toward risky behavior, their ability to control impulses or accurately assess future consequences increases only gradually as they age. *See, e.g.*, Lawrence Steinberg, *A Dual Systems Model of Adolescent Risk-Taking*, 52 *Developmental Psychobiology* 216, 216 (2010); Geier & Luna, *supra*, at 215-18. In other words, "adolescents develop an accelerator a long time before they can steer and brake." Gopnik, *supra*. Furthermore, evidence shows that emotionally-charged situations exacerbate the problem, leaving teenagers—especially young men—even less able to exercise the regulatory functions of the brain in contexts when they might need it most. *See, e.g.*, Nat'l Research Council, *supra*, at 92-93; Bernd Figner et al., *Affective and Deliberative Processes in Risky Choice*, 35 *J. Experimental Psychol.* 709, 709 (2009).

Ultimately, this developmental imbalance explains why "adolescence is a time of inherently immature judgment." Steinberg, *Adolescent Development* at 467. Indeed, although teenagers might seem as intelligent as adults, "their ability to regulate their behavior in accord with these advanced intellectual abilities is more limited." *Id.* Adolescents value immediate rewards higher than adults and are less future-oriented than adults; they are more impulsive, more susceptible to emotion and stress, and less likely to perceive the consequences of their actions. *See id.* at 468-70; Human Rights Watch & Amnesty Int'l, *supra*, at 46. Although these

developmental forces do not negate a juvenile's responsibility for criminal acts, they do lessen culpability for failing to act as a mature and thoughtful adult.

B. Research Shows that Teenagers Are Uniquely Vulnerable to Peer Influence and Environmental Factors

Recent scientific studies also provide evidentiary support for the Supreme Court's observation that juveniles are especially vulnerable to outside pressures, including from peers. *See Miller*, 132 S. Ct. at 2464.

Substantial scientific research now confirms that adolescents are "more oriented toward peers and responsive to peer influence than are adults." Steinberg, *Adolescent Development* at 468; *see* Nat'l Research Council, *supra*, at 94. This is especially true with regard to risky behavior. Adolescents are far more likely to engage in risk-taking activities, including antisocial behavior, in the presence of peers. *See* Jason Chein et al., *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain's Reward Circuitry*, 14 *Dev'l Sci.* F1, F1 (2010); Steinberg, *Risk-Taking* at 90. In fact, studies show that the mere presence of peers, or awareness of their presence, leads to riskier behavior among adolescents and increases preferences for small, immediate rewards rather than larger delayed rewards. *See* Chein et al., *supra*, at F1-F8; Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risk Decision Making in Adolescence and Adulthood*, 41 *Dev'l Psychol.* 625, 626, 632-34 (2005); Steinberg, *Behavioral Scientist* at 162. Brain imaging technology has allowed researchers to observe that the presence of peers causes "significantly greater" activity in the reward system of adolescents' brains as they make decisions about risk. *See* Chein et al., *supra*, at F7. Similar neural activation was not observed in adults. *Id.* Thus, the same reward-seeking circuitry that is on overdrive during adolescence, *see supra* at 16-18, appears to influence teenagers' sensitivity to the influence of peers. The ability to resist peer influence, however, increases gradually over

the course of adolescence. See Monahan et al., *supra*, at 1663; Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J. L. & Fam. Stud. 11, 56 (2007). As a result, “in the heat of the moment, as in the presence of peers or rewards, functionally mature reward centers of the brain may hijack less mature control systems in adolescents.” Nat’l Research Council, *supra*, at 98.¹³

Although peers play an outsized role in adolescent development and behavior, teenagers are also especially susceptible to the influence of other environmental factors, including family dynamics and exposure to violence. In particular, the involvement of a parental figure is critical to an adolescent’s psychological development. See *id.* at 101-02. Neglectful or abusive parenting during adolescence has a “pronounced impact on increasing involvement in later delinquency and related problem behaviors,” *id.* at 103-04, while juveniles in father-absent households have significantly higher odds of incarceration than those from two-parent households, even controlling for income, see Cynthia C. Harper & Sara S. McLanahan, *Father Absence and Youth Incarceration*, 14 J. of Res. on Adolescence 369, 388-93 (2004). Where parental role models are absent or engaged in drug and alcohol abuse, adolescents are more likely to join gangs, which often replace the role of the family for teenagers seeking guidance

¹³ Outside the lab, statistics backup the results of these studies. For example, the presence of same-age passengers in a car driven by an adolescent increases the risk of a serious accident; likewise, teens are more likely to engage in drug or alcohol use or sexual activity when their peers are doing the same (or they believe their peers are so engaged). See, e.g., Steinberg, *Adolescent Risk-Taking* at 90. And adolescents typically commit crimes in groups, whereas adults are more likely to engage in criminal activity alone. See Nat’l Research Council, *supra*, at 131. Indeed, the type and quality of peer interactions can have a profound impact on whether an adolescent will engage in antisocial or criminal behavior. High levels of unsupervised, informal contact with peers during middle school have been shown to predict growth in antisocial behavior, while structured activities with peers can have the opposite effect. See *id.* at 105-106.

and acceptance. *See* James C. Howell, *Youth Gangs: An Overview*, Juv. Just. Bull. at 3, 6 (Aug. 1998).¹⁴

Not only are adolescents developmentally prone to influence from friends and failed family relationships, but, as the Supreme Court has observed, adolescents typically have less control over their environment and less ability to extricate themselves from bad situations. *See Miller*, 132 S. Ct. at 2464. A teenager who succumbs to these pressures is therefore less blameworthy than an adult.

C. **Research Shows that the Teenage Brain Is Highly Adaptable and Receptive to Rehabilitation**

The same characteristics of the adolescent brain that render it sensitive to environmental influences also make it receptive to positive change. Myelin, the material which gradually coats the nerves in the brain, speeds processing but also prevents new nerve branches from forming. *See* Dobbs, *supra*. Thus, the late maturation of the human brain creates a prolonged period of neuroplasticity, or flexibility. *See id.*; Gopnik, *supra*. For example, research shows that personality traits change significantly during the developmental transition from adolescence to adulthood. *See* Brent W. Roberts & Kate E. Walton, *Patterns of Mean-Level Change in Personality Traits Across the Life Course: A Meta-Analysis of Longitudinal Studies*, 132 Psychol. Bull. 1, 14-15 (2006). Measures predictive of general propensity for criminal offending, such as lack of self-control and inability to take another's perspective, have been shown to change substantially over the course of development. *See* Monahan et al., *supra*, at 1660-63. Similarly, children are more open to rehabilitation and recovery. Children exposed to traumatic

¹⁴ Relatedly, there is a strong correlation between adolescents' exposure to violence, victimization, and antisocial behavior. *See, e.g., Children Exposed to Violence, supra*, at 29-30; Carlos A. Cuevas et al., *Children's Exposure to Violence and the Intersection between Delinquency and Victimization*, Juv. Just. Bull. at 1 (Oct. 2013).

violence, when given adequate support and treatment, are able to recover. *See* Carlos A. Cuevas et al., *Children's Exposure to Violence and the Intersection between Delinquency and Victimization*, *Juv. Just. Bull.* at 29 (Oct. 2013).

Adolescence is thus “a time of considerable opportunity for intervention.” Steinberg, *Behavioral Scientist* at 161. Indeed, the primary characteristic of adolescence is its transience. The sentence in this case should take into account that the developmental factors at work when Mr. Alejandro was fifteen are no longer present, and the degree to which he has grown and matured since that time.

III. CRIMINOLOGICAL DATA GATHERED OVER THE LAST TWO DECADES DO NOT SUPPORT SENTENCING JUVENILES TO LONG SENTENCES

New criminological studies published since Mr. Alejandro was sentenced undermine the outdated penological reasons for resentencing him to life without parole or an equivalently long sentence. None of the federally recognized purposes of criminal punishment—incapacitation, deterrence, rehabilitation, and just punishment¹⁵—supports a term of imprisonment except “for the shortest appropriate period of time.” CRC art. 37(b); *see* 18 U.S.C. § 3553(a) (sentences should be “sufficient, but not greater than necessary” to comply with the purposes of sentencing set forth in § 3553(a)(2)).

A. Lifelong Incapacitation for Juvenile Offenders Is Unnecessary for Public Safety

Keeping a juvenile offender locked away for decades does not further any incapacitation goal because juvenile offenders largely outgrow their criminal behavior. Criminologists refer to the so-called “age-crime curve,” which indicates that criminal activity peaks on average at age 17 and decreases sharply thereafter. *See* Steinberg, *Adolescent Development* at 478. Dozens of

¹⁵ *See* 18 U.S.C. § 3553(a)(2); U.S. Sentencing Guidelines Manual § 1A1.2 (2013).

longitudinal studies show that only a small minority of juvenile offenders become adult criminals. *See id.*; *see also* Edward P. Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Adjudication Among Serious Adolescent Offenders*, 22 *Dev'l Psychopathology* 453, 470 (2010). One recent study found that only a very small percentage of serious juvenile offenders continued to offend at a high level following court adjudication, while juveniles with low or moderate levels of offending mostly did not escalate their criminal activity or significantly decreased their level of offending. Mulvey et al., *supra*, at 470. In fact, a juvenile arrested at age 16 has the same likelihood of arrest as his peers by the time he turns 24.5. *See* Nat'l Research Council, *supra*, at 25. These statistics accord with the latest developmental science, which suggests that risk-taking behavior peaks around the same age as the age-crime curve. *See* Part II, *supra* at 15.

Since most juveniles will outgrow criminal behavior, “mounting evidence indicates that imposing harsh sentences on young offenders is unlikely to reduce reoffending or contribute to public safety in the way that supporters of get-tough policies assumed.” Nat'l Research Council, *supra*, at 32. Due to an increase in juvenile violent crime between the late 1980s and mid-1990s, policymakers predicted that a generation of “juvenile superpredators”—hardened and incorrigible youthful offenders—posed a serious threat to public safety. *See id.* at 32-38. But the myth of the juvenile superpredator has since been debunked by empirical evidence and repudiated by its first proponent. *See* Elizabeth Becker, *As Ex-Theorist on Young ‘Superpredators,’ Bush Aide Has Regrets*, N.Y. Times, Feb. 9, 2001, at A19; Shay Bilchik, *Challenging the Myths*, 1999 Nat'l Rep. Series, *Juv. Just. Bull.* at 1, 4 (Feb. 2000) (“[N]ational crime and arrest statistics provide no evidence for a new breed of juvenile superpredator.”). By the mid-1990s, the rate of serious juvenile offending had decreased to levels comparable to the

last generation. *See* Bilchik, *supra*, at 2. Significantly, juvenile crime rates had begun to decline long before the end of the recent punitive era, indicating that the increase in punitive measures was not causally related to the subsequent decline. *See* Nat'l Research Council, *supra*, at 41.

These studies and statistics strongly suggest that the incapacitation rationale for punishment does not justify resentencing an adolescent offender to a lengthy sentence.

B. Neither Rehabilitation nor Deterrence Rationales Supports Harsh Sentences for Juvenile Offenders

Criminological studies also undermine the rehabilitation or deterrence-based rationales for sentencing a juvenile offender to life without parole.

By its very terms, a life without parole sentence negates any possibility of rehabilitation. Sending a juvenile offender to spend the rest of his life in prison “requires the sentencer to make a judgment that the juvenile is incorrigible,” but “incorrigibility is inconsistent with youth.” *Graham*, 560 U.S. at 72-73 (internal quotation marks omitted). A judgment that a juvenile is incapable of rehabilitation runs afoul of not only developmental science but also a growing body of research indicating that evidence-based rehabilitation programs *do* work. *See* Nat'l Research Council, *supra*, at 32, 41; Scott W. Henggeler & Sonja K. Schoenwald, *Evidence-Based Interventions for Juvenile Offenders and Juvenile Justice Policies that Support Them*, 25 *Social Policy Rep.* 1, 1 (2011). For example, a review of delinquency, drug, and violence prevention programs found that “functional family therapy,” “multisystemic therapy,” and “multidimensional treatment foster care” were successful at producing sustained rehabilitative results for juvenile offenders. Henggeler, *supra*, at 5-6.

Additionally, there is a dearth of evidence that harsher sanctions are effective in deterring would-be juvenile criminals from criminal acts. *See, e.g.*, Thomas A. Loughran et al., *Estimating A Dose-Response Relationship Between Length of Stay and Future Recidivism in Serious*

Juvenile Offenders, 47 *Criminology* 699, 726 (2009) (finding incarceration had no effect on juveniles' future rates of rearrest or self-reported offending and no marginal effect for longer incarceration); Steinberg, *Adolescent Development* at 479; David S. Lee & Justin McCrary, *Crime, Punishment, and Myopia* 27 (Nat'l Bureau of Econ. Res., Working Paper No. 11491, 2005) (transferring juveniles to adult court or lowering the age of majority for criminal offenders does not reduce crime through deterrence). Most empirical evidence shows that laws allowing the transfer of youths to adult court have "little or no general deterrent effect" on potential juvenile offenders. Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, *Juv. Just. Bull.* at 2 (June 2010). The absence of evidence linking longer sentences to deterrence makes sense given what we now know about the adolescent brain: "the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment" when making decisions. *Miller*, 132 S. Ct. at 2465 (internal quotation marks omitted). Moreover, once arrested, adolescent defendants are less capable of dealing with police and prosecutors, of aiding defense counsel, or engaging in intelligent plea bargaining. *See id.* at 2468.

Imposing a life sentence or its equivalent on an adolescent offender contravenes the rehabilitative purpose of criminal punishment by denying that he has grown or matured since he committed the crime. *See Pepper v. United States*, 131 S. Ct. 1229, 1242 (2011) (explaining that evidence of postsentencing rehabilitation may be "pertinent to 'the need for the sentence imposed' to serve the general purposes of sentencing set forth in § 3553(a)(2)"). Likewise, punishing an adolescent with a long sentence is unlikely to deter other potential juvenile criminals from committing crimes. We submit that this Court should evaluate the Federal

Defender's submission respecting Mr. Alejandro's potential for maturation as a contributing member of society before determining the appropriate sentence.¹⁶

C. **A Life Sentence Is Not a Just Punishment for Adolescent Offenders Due to Their Diminished Culpability**

In light of all the evidence compiled about the nature of adolescence, life without parole is not a just punishment in these circumstances. "Because the heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult." *Miller*, 132 S. Ct. at 2465 (internal quotation marks and alteration omitted). For developmental reasons outside their control, juveniles are less blameworthy for their actions. Legally, too, the Supreme Court has recognized that juvenile offenders have less moral responsibility regardless of their crime. Because juveniles lack the kind of ultimate moral responsibility that justifies the ultimate sentence, retribution does not justify re-imposing such a sentence on a juvenile offender.

CONCLUSION

Mr. Alejandro typifies the kind of juvenile offender for whom a life without parole sentence (or its equivalent) is disproportionate and unjust. In resentencing Mr. Alejandro, the Court may not rely on the Guidelines sentencing range. Instead, it should fashion a sentence which takes into account Mr. Alejandro's youth at the time of the crime, the rehabilitation he has achieved since that time, his potential for maturity, and other sentencing factors in 18 U.S.C. § 3553(a). The sentence imposed should be consistent with the current scientific knowledge and

¹⁶ Imposing the shortest possible sentence could also save taxpayers hundred of thousands of dollars. The cost of imprisoning Mr. Alejandro for another 30 years will be approximately \$870,000, based on an average annual cost of \$29,000 per federal inmate in FY 2012. See Julie Samuels et al., Urban Inst., *Stemming the Tide: Strategies to Reduce the Growth and Cut the Cost of the Federal Prison System* 13 (Nov. 2013), available at www.urban.org/UploadedPDF/412932-stemming-the-tide.pdf.

human rights principles regarding the nature of childhood as recognized in the decisions of the Supreme Court.

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April 4, 2014

Respectfully submitted,

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EXHIBIT A

STATEMENTS OF INTEREST OF *AMICI CURIAE*

Robert M. Morgenthau was the District Attorney of New York County from 1975 to 2009, and was the longest serving incumbent of that position. In his nine terms in office, his staff conducted about 3.5 million criminal prosecutions. During that period, homicides in Manhattan were reduced by over 90%. Mr. Morgenthau vigorously prosecuted white-collar criminals as well, becoming the nation's leading proponent of the enforcement of state law to combat "crime in the suites." He was appointed by Governor Hugh Carey to the Executive Advisory Committee on Sentencing in 1979.

Mr. Morgenthau is currently counsel at the law firm Wachtell, Lipton, Rosen & Katz. He maintains an active legal practice, and speaks and writes on issues of current importance, including the administration of criminal justice. He serves as the chairman of New York City's Police Athletic League and as chairman of the Museum of Jewish Heritage -- A Living Memorial to the Holocaust.

In 1961, he was appointed by President Kennedy to the position of United States Attorney for the Southern District of New York and continued in that role until 1970. He attended Yale Law School, and, upon graduation, he was employed as an associate by Patterson, Belknap & Webb to work on matters for Robert P. Patterson, the former United States District Court Judge and Judge of the Court of Appeals for the Second Circuit.

Mr. Morgenthau was born in 1919 in New York City. In June 1940, while still an undergraduate at Amherst College, he enlisted in the United States Navy's V-7 program. Upon his graduation in 1941, Mr. Morgenthau joined the Navy and on December 7, 1941, he was an ensign on a destroyer in Boston Harbor. He served throughout World War II aboard destroyers in the North Atlantic, the South Atlantic, the Mediterranean, and the Pacific Theater, rising to the rank of Lieutenant Commander. Mr. Morgenthau was the Executive Officer and Navigator aboard the USS Lansdale when that ship was torpedoed and sunk by German aircraft while protecting a convoy. He was then the Executive Officer and Navigator on a new destroyer assigned to support the Iwo Jima and Okinawa invasions. That ship, the USS Harry F. Bauer, was torpedoed and was hit by a Kamikaze carrying a 550 pound bomb that failed to explode. The ship's crew received a Presidential Unit Citation for its conduct during the Okinawa campaign.

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.

Child Welfare League of America ("CWLA") is a coalition of hundreds of private and public agencies serving vulnerable children and families by advancing policies, best practices and

collaborative strategies in support of every child growing up in a safe, loving, stable family. CWLA's focus is on children and youth who may have experienced abuse, neglect, family disruption, or a range of other factors that jeopardize their safety, permanence, or well-being. Through our work on policies and practices regarding children and youth impacted by the juvenile and criminal justice systems we have grown increasingly concerned about the link between child maltreatment and juvenile delinquency. CLWA advocates for policies that seek to interrupt the path to criminal offending that is frequently the outcome for victims of child abuse and neglect. In all of its work CWLA strives to ensure that every child and young person is protected from harm, injustice and discrimination.

Council of Juvenile Correctional Administrators ("CJCA") is a national non-profit organization, formed in 1994 to improve local juvenile correctional services, programs and practices so the youths within the systems succeed when they return to the community and to provide national leadership and leadership development for the individuals responsible for the systems. CJCA represents the youth correctional CEOs in 50 states, Puerto Rico and major metropolitan counties.

CJCA fulfills its mission through educational activities and programs as well as research and technical assistance projects. CJCA is a founding member of the John D. and Catherine T. MacArthur Foundation's Models for Change juvenile justice reform initiative, which aims to advance reforms that effectively hold young people accountable for their actions, provide for rehabilitation, protect them from harm, increase their life chances and manage the risk they pose to themselves and to public safety.

Father Gregory Boyle, S.J.—best known as Fr. Greg by all who meet him—is founder and executive director of Homeboy Industries, in his hometown of Los Angeles, CA. Homeboy Industries serves high-risk, formerly gang-involved men and women with a continuum of free services and programs, and operates seven social enterprises that serve as job-training sites.

Homeboy Industries traces its roots to "Jobs For A Future" (JFF), a program created in 1988 by Fr. Greg at Dolores Mission parish. In an effort to address the escalating problems and unmet needs of gang-involved youth, Fr. Greg and the community developed positive alternatives, including establishing an elementary school, a day care program and finding legitimate employment for young people. JFF's success demonstrated the model followed today that many gang members are eager to leave the dangerous and destructive life on the 'streets.'

In 1992, as a response to the civil unrest in Los Angeles, Fr. Greg launched the first business (under the organizational banner of JFF and Proyecto Pastoral, separated from Dolores Mission Church): Homeboy Bakery with a mission to create an environment that provided training, work experience, and above all, the opportunity for rival gang members to work side by side. The success of the Bakery created the groundwork for additional businesses, thus prompting JFF to become an independent non-profit organization, Homeboy Industries, in 2001. Today Homeboy Industries' nonprofit economic development enterprises include Homeboy Bakery, Homeboy Silkscreen, Homeboy/Homegirl Merchandise, and Homegirl Café.

As Executive Director of Homeboy Industries and an acknowledged expert on gangs and intervention approaches, Fr. Boyle is a nationally renowned speaker. He has given commencement addresses at numerous universities, as well as spoken at conferences for teachers, social workers, criminal justice workers and others about the importance of adult attention, guidance and unconditional love in preventing youth from joining gangs. Fr. Greg and

several “homies” were featured speakers at the White House Conference on Youth in 2005 at the personal invitation of Mrs. George Bush. In 1998 he was a member of the 10-person California delegation to President Clinton’s Summit on Children in Philadelphia. Fr. Greg is also a consultant to youth service and governmental agencies, policy-makers and employers. Fr. Boyle serves as a member of the National Gang Center Advisory Board (U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention). He is also a member of the Advisory Board for the Loyola Law School Center for Juvenile Law and Policy in Los Angeles. Previously, he held an appointment to the California Commission on Juvenile Justice, Crime and Delinquency Prevention.

Fr. Greg has received numerous accolades and recognitions on behalf of Homeboy and for his work with former gang members, including the California Peace Prize granted by the California Wellness Foundation in 2000 and the 2004 Lifetime Achievement Award from MALDEF. In 2007, Fr. Greg received the Bon Appétit magazine “Humanitarian of the Year” Award and the Caring Institute’s Caring People Award. In 2008, Fr. Greg was honored with the Civic Medal of Honor by the Los Angeles Chamber of Commerce and the Irvine Leadership Award conferred by the James Irvine Foundation.

Human Rights Watch is an international, independent organization dedicated to defending and protecting human rights. It focuses international attention where human rights are violated, and uses rigorous, accurate, and objective investigations and strategic advocacy to expose human rights violations and hold abusers accountable. Working in some 90 countries, Human Rights Watch works to change abusive policy and practices at the highest levels of government.

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

Lawyers For Children (“LFC”) is a not-for-profit legal corporation dedicated to protecting the rights of individual children in foster care and compelling system-wide child welfare reform in New York City. Since 1984, LFC has provided free legal and social work services to children in cases involving foster care, abuse, neglect, termination of parental rights, adoption, guardianship, custody and visitation. Currently, our attorney-social worker teams represent children and youth in more than 6,000 judicial proceedings in New York City’s Family Courts each year. In addition, LFC publishes guidebooks and other materials for children and legal practitioners, conducts professional training sessions, and works to reform systems affecting vulnerable children. LFC’s insight into the issues raised in this brief are borne of 30 years experience working with children and youth—including a substantial number of “cross-over youth,” who are involved in both the criminal justice and child welfare systems.

National Center for Youth Law (“NCYL”) is a private, non-profit organization that uses the law to help children in need nationwide. For more than 40 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support, and opportunities they need to become self-sufficient adults. NCYL provides representation to children and youth in cases that have a broad impact. NCYL also engages in legislative and administrative advocacy to provide children a voice in policy decisions that affect their lives. NCYL supports the advocacy of others around the country through its legal journal, *Youth Law News*, and by providing trainings and technical assistance.

One of NCYL’s priorities is to reduce the number of youth subjected to harmful and unnecessary incarceration and expand effective community based supports for youth in trouble with the law. NCYL has participated in litigation that has improved juvenile justice systems in numerous states, and engaged in advocacy at the federal, state, and local levels to reduce reliance on the justice systems to address the needs of youth, including promoting alternatives to incarceration, and improving children’s access to mental health care and developmentally appropriate treatment. One of the primary goals of NCYL’s juvenile justice advocacy is to ensure that youth in trouble with the law are treated as adolescents, and not as adults, and in a manner that is consistent with their developmental stage and capacity to change within the juvenile justice system.

National Legal Aid & Defender Association (“NLADA”) is the nation’s leading advocate for frontline legal aid and defender attorneys, and other equal justice professionals — those who make a difference in the lives of low-income clients and their families and communities. Representing legal aid and defender programs, as well as individual advocates, NLADA is privileged to be the oldest and largest national, nonprofit membership association devoting 100 percent of its resources to serving the broad equal justice community. NLADA and its members are keenly aware of the need to insure that reduced culpability as a child and subsequent maturation are considered fairly. It follows therefore, that life without parole sentence is disproportionate and inappropriate. *Miller v. Alabama*, 132 S. Ct. 2455 (2012). NLADA has worked with the Campaign for the Fair Sentencing of Youth and the National Association of Criminal Defense Lawyers to highlight the importance of opposing the use of pre-*Miller* U.S. Sentencing Guidelines to calculate any child’s sentence because the Sentencing Guidelines, if applied, would yield an unconstitutional starting point: namely, a life without parole sentence. While working to continue this and like partnerships, NLADA has worked with Criminal Justice Act Attorneys, federal, and state defenders to establish, develop and maintain accessible resources to better aid in comprehensive advocacy for our juvenile clients involving new scientific and criminological knowledge developed and presented in *Miller*.

National Juvenile Defender Center was created to ensure excellence in juvenile defense and promote justice for all children. The National Juvenile Defender Center responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. The National Juvenile Defender Center gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice. The National Juvenile Defender Center provides support to public defenders, appointed counsel, child advocates, law school clinical

programs and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural and tribal areas. The National Juvenile Defender Center also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

National Juvenile Justice Network (“NJJN”) leads and supports a movement of state and local juvenile justice coalitions and organizations to secure local, state and federal laws, policies and practices that are fair, equitable and developmentally appropriate for all children, youth and families involved in, or at risk of becoming involved in, the justice system. NJJN currently comprises forty-three members in thirty-three states, all of which seek to establish effective and appropriate juvenile justice systems. NJJN recognizes that youth are fundamentally different from adults and should be treated in a developmentally appropriate manner that holds them accountable in ways that give them the tools to make better choices in the future and become productive citizens. Youth should not be transferred into the adult criminal justice system where they are subject to extreme and harsh sentences such as life without the possibility of parole, and placed in adult prisons where they are exceptionally vulnerable to rape and sexual assault and have much higher rates of suicide. NJJN supports a growing body of research that indicates the most effective means for addressing youth crime are age-appropriate, rehabilitative, community-based programs that take a holistic approach, engage youth’s family members and other key supports, and provide opportunities for positive youth development.

New York Council of Defense Lawyers (“NYCDL”) is a not-for-profit professional association of approximately 200 lawyers (including many former federal prosecutors) whose principal area of practice is the defense of criminal cases in the federal courts of New York. NYCDL’s mission includes protecting and ensuring individual rights guaranteed by the U.S. Constitution by rule of law through education; supporting and advancing the criminal defense function by enhancing the quality of defense representation; taking positions on important defense issues; promoting study and research in the criminal justice system; and promoting the proper administration of criminal justice.

As *amicus curiae*, NYCDL offers the Court the perspective of experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts. NYCDL’s *amicus* briefs in *United States v. Booker*, 543 U.S. 220 (2005), and *Rita v. United States*, 551 U.S. 338 (2007), were cited by the Court or concurring justices. NYCDL also submitted briefs in *Claiborne v. United States*, 551 U.S. 87 (2007) and *Gall v. United States*, 552 U.S. 38 (2007), and has an interest in ensuring that every criminal defendant in the United States receives the protections guaranteed to him or her by the Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution.

In particular, NYCDL has an interest in ensuring a uniform sentencing approach that allows all factors that relate to the offense at issue and increase a defendant’s sentence—whether a minimum or a maximum—to be found by a jury beyond a reasonable doubt. At the same time, NYCDL has an interest in sentencing efficiency and preserving the traditional discretion that judges maintain when it comes to assessing characteristics particular to an individual defendant.

New York State Association of Criminal Defense Lawyers (“NYSACDL”), an affiliate of the National Association of Criminal Defense Lawyers and the state’s largest private criminal bar group, is a nonprofit membership organization of some 750 criminal defense attorneys practicing

throughout New York. It assists its members in better serving their clients and works to enhance their professional standing. NYSACDL strives to protect individual rights and liberties for all.

New York State PTA (“NYS PTA”) is the first chartered PTA congress in the nation. NYS PTA has been a longtime supporter of policies advocating for the rights of children and youth involved in the justice system. PTA’s earliest efforts to assure the extension of juvenile courts and probation systems to protect children and youth from being incarcerated with adult criminals accord with recent constitutional determinations that child offenders are less culpable than adults and that this must now be considered by the courts upon sentencing. As representative of nearly 300,000 members, NYS PTA stands in support of this brief, and in doing so, adheres to our PTA purpose to secure adequate laws for the protection of children and youth as we continue to strive for a strengthened juvenile justice and delinquency protection system and for the opportunity (in this case, rehabilitation) for every child to reach his/her potential.