No. 18-1259

In the Supreme Court of the United States

BRETT JONES,

Petitioner,

v.

MISSISSIPPI,

Respondent.

On Writ of Certiorari to the Mississippi Court of Appeals

BRIEF OF JUVENILE LAW CENTER, NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AND 65 OTHER ORGANIZATIONS AND INDIVIDUALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Amici Juvenile Law Center, the NAACP Legal Defense & Educational Fund, Inc., the Lawyers' Committee for Civil Rights Under Law, and 65 other organizations and individuals join together in this brief because of their dedication to an equitable and fair justice system that recognizes the distinctive developmental attributes of youth. Each is committed to advancing civil rights, including the rights of children in the criminal justice system. *Amici* have extensive experience advocating for children in the criminal justice system nationwide, including by filing *amicus curiae* briefs in this Court and in other courts.[1]

Juvenile Law Center is the first non-profit public interest law firm for children in the country. Founded in 1975, Juvenile Law Center advocates for rights, dignity, equity, and opportunity for youth in the criminal justice system.

The NAACP Legal Defense & Educational Fund (LDF) is the Nation's first civil rights organization. Since its incorporation in 1940, LDF has fought to eliminate the arbitrary role of race in the administration of the criminal justice system by challenging laws, policies, and practices that discriminate against communities of color.

The Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) is a nonpartisan, nonprofit civil rights organization formed in 1963 at the

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[1] No counsel for a party authored this brief in whole or in part, and no one other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. See Sup. Ct. R. 37.6. The parties have consented to the filing of this brief.

request of President Kennedy. The Lawyers' Committee enlists the American bar's leadership and resources in defending the civil rights of racial and ethnic minorities. The Lawyers' Committee works to combat the criminalization of poverty and racial inequities in the criminal justice system.

Amici submit this brief to provide their unique perspective on the question presented. A complete list of *amici* is provided in an appendix to this brief. App., *infra*, 1a-4a.

SUMMARY OF THE ARGUMENT

As this Court has recognized, youth matters in criminal sentencing. Individuals who commit crimes while under 18 years of age are less culpable than adult offenders and are presumed to have the capacity for rehabilitation. For that reason, the Court held in *Miller* v. *Alabama*, 567 U.S. 460 (2012), that a court may not sentence a juvenile offender to life imprisonment without the possibility of parole unless he or she is permanently incorrigible. *Id.* at 479-480. The Court also explained that juvenile life without parole sentences should be rare, because very few juvenile offenders are permanently incorrigible. *Ibid.* The Court reaffirmed the *Miller* rule in *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016), and applied that rule retroactively to cases pending on collateral review. *Id.* at 732.

The question in this case is whether a sentencing court must find that a juvenile offender is permanently incorrigible before sentencing that person to life imprisonment without parole. The answer is yes.

Requiring a sentencing court to make a finding of permanent incorrigibility is necessary to give effect to the constitutional rule set out in *Miller* and *Montgomery*. In those cases, the Court distinguished between

two classes of juvenile offenders – the very small category of offenders who are permanently incorrigible, and the much larger category of those who are not. Because only permanently incorrigible juvenile offenders can receive sentences of life imprisonment without parole, a court seeking to impose that sentence must make a finding of permanent incorrigibility in order to comply with the Eighth Amendment.

Requiring a sentencing court to make a finding of permanent incorrigibility ensures that the court has correctly assessed the offender's eligibility for life imprisonment without parole. In *Miller*, the Court instructed sentencing courts to conduct holistic and individualized assessments of juvenile offenders' characteristics and circumstances. The Court also set out certain factors for sentencing courts to consider as part of those assessments. But courts have misunderstood some of the factors and thus have not been correctly performing the assessments *Miller* requires.

Further, requiring a sentencing court to make a finding of permanent incorrigibility helps to avoid biased sentencing and ensures meaningful appellate review. If a court is not required to make such a finding on the record, it may rely on conscious or subconscious biases, including racial biases, instead of considering the particular facts and circumstances of each offender.

Finally, requiring this finding will not be burdensome. State and federal courts already must comply with *Miller*, so requiring determinations of permanent incorrigibility will not meaningfully add to the courts' tasks. And those findings are exactly the type of determinations that courts routinely make during sentencing. At the same time, requiring findings of permanent incorrigibility is critical to ensuring compliance with the Eighth Amendment.

ARGUMENT

I. THE EIGHTH AMENDMENT REQUIRES A SENTENCER TO DETERMINE THAT A JUVENILE OFFENDER IS PERMANENTLY INCORRIGIBLE BEFORE IMPOSING A SENTENCE OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE

Juvenile offenders – individuals who commit crimes while under age 18 – are categorically different from adult offenders. As this Court has recognized, juvenile offenders are less culpable and more capable of rehabilitation than adults.

For that reason, the Court held in *Miller* v. *Alabama*, 567 U.S. 460 (2012), and *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016), that a court may not impose a sentence of life imprisonment without parole on a juvenile offender unless he or she is permanently incorrigible. A sentencing court must make a finding of permanent incorrigibility to give effect to that constitutional rule.[2]

A. Under The Eighth Amendment, Youth Matters In Sentencing

The Eighth Amendment prohibits "cruel and unusual punishments." U.S. Const. Amend. VIII. Punishments are "cruel and unusual" if they are excessive under the circumstances. *Atkins* v. *Virginia*, 536 U.S. 304, 311 & n.7 (2002) (citing *Robinson* v. *California*, 370 U.S. 660, 666-667 (1962)). That is, under the Eighth Amendment, "punishment for crime" must be

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[2] Many of the undersigned *amici* believe that no child is permanently incorrigible – a view informed by science, legal analysis, and lived experience. Because that issue is not squarely presented in this case, *amici* submit this brief to offer their views on the question on which the Court has granted review.

"graduated and proportioned to [the] offense." *Id.* at 311 (internal quotation marks omitted).

In determining whether a punishment is proportional to the offense, this Court considers two factors: an offender's "culpability" in light of his or her "crimes and characteristics," and whether the punishment "serves legitimate penological goals." *Graham* v. *Florida*, 560 U.S. 48, 67 (2010). A sentence is constitutionally excessive if it is disproportionate to the offender's culpability and does not advance any legitimate penological goal over a lesser sentence. *Id.* at 71.

The Court has repeatedly concluded that, as an Eighth Amendment matter, juvenile offenders are fundamentally different from adults. Scientific research has conclusively demonstrated that children are developmentally and neurologically different from adults in ways that make them, as a class, less culpable than adults. *Roper* v. *Simmons*, 543 U.S. 551, 569 (2005); *Graham*, 560 U.S. at 68; *Miller*, 567 U.S. at 471; see *Eddings* v. *Oklahoma*, 455 U.S. 104, 115-116 (1982). The research supporting that conclusion has "become even stronger" over time. *Miller*, 567 U.S. at 472 n.5. Further, the "distinctive attributes" of juvenile offenders "diminish the penological justifications for imposing the harshest sentences" on them. *Id.* at 472.

In light of children's lessened culpability and the diminished justifications for punishing them, this Court has progressively narrowed the range of permissible sentences for juvenile offenders. In *Roper*, the Court held that juvenile offenders cannot be sentenced to death, 543 U.S. at 575; in *Graham*, it held that juvenile offenders cannot be sentenced to life imprisonment without the possibility of parole for nonhomicide offenses, 560 U.S. at 75; and in *Miller*, it held that juvenile offenders convicted of homicide cannot

be sentenced to mandatory life imprisonment without parole, 567 U.S. at 476. The central insight of those decisions is that "youth matters" in juvenile sentencing. *Id.* at 473.

After *Miller*, juvenile offenders may be sentenced to life imprisonment without parole only in very narrow circumstances. Specifically, that sentence is constitutional only when the offender's crime "reflects irreparable corruption," rather than "unfortunate yet transient immaturity." *Miller*, 567 U.S. at 479-480 (internal quotation marks omitted). Further, the Court stated that juvenile life without parole sentences should be "rare." *Id.* at 479 (internal quotation marks omitted).

In *Montgomery*, the Court applied the *Miller* rule to cases pending on collateral review. 136 S. Ct. at 736. In so doing, the Court reaffirmed that only those juvenile offenders who are permanently incorrigible are eligible for sentences of life imprisonment without parole. *Id.* at 734. Again, the Court cautioned that life without parole sentences for juvenile offenders should be "rare." *Ibid.*

B. To Impose A Sentence Of Life Imprisonment Without Parole, The Sentencer Must Make A Finding That The Juvenile Offender Is Permanently Incorrigible

The question before this Court is whether, under the Eighth Amendment, a sentencer must make a finding of permanent incorrigibility before sentencing a juvenile offender to life imprisonment without the possibility of parole. This Court has substantially answered that question already.

Miller and *Montgomery* make clear that there are two classes of juvenile offenders: (1) the vast majority whose crimes "reflect the transient immaturity of

youth," and (2) the rare few whose crimes "reflect permanent incorrigibility." *Miller*, 567 U.S. at 479-480; *Montgomery*, 136 S. Ct. at 734. Under the Eighth Amendment, only the latter are eligible for the sentence of life imprisonment without parole. *Montgomery*, 136 S. Ct. at 734.

To impose a sentence of life imprisonment without parole on a juvenile offender, the sentencer must distinguish between two categories of juvenile offenders. Specifically, the sentencing court must make an individualized assessment of the juvenile's background, characteristics, and circumstances, in order to "separate those juveniles who may be sentenced to life without parole from those who may not." *Montgomery*, 136 S. Ct. at 735 (internal quotation marks omitted). Whether called a "finding," a "determination," or something else, the objective is the same – the sentencer must decide that life imprisonment without parole is a proportional punishment for the particular juvenile offender, which is true only if the offender is permanently incorrigible.

Absent this sorting process, a sentencing court could not constitutionally impose a life without parole sentence on a juvenile offender, because the court would not have established that the offender is eligible for that sentence under the Eighth Amendment. States and the federal government are not "free to sentence a child whose crime reflects transient immaturity to life without parole." *Montgomery*, 136 S. Ct. at 735. Although "specific words" are not required, the "record must reflect that the [sentencing] court meaningfully engaged in *Miller*'s central inquiry" – meaning that the court concluded, under the totality of the circumstances, that the particular offender before the court falls into the very small category of juvenile offenders who are permanently incorrigible. *United*

States v. *Briones*, 929 F.3d 1057, 1067 (9th Cir. 2019) (en banc).

This Court has recognized that very few juvenile offenders lack the potential for rehabilitation, and therefore the vast majority of juvenile offenders are *not* permanently incorrigible. *Montgomery*, 136 S. Ct. at 734. The reality that most juvenile offenders are ineligible for life without parole sentences underscores the need for the sentencing court to make a finding of permanent incorrigibility.

C. *Montgomery* Did Not Resolve The Question Presented Here

Mississippi argues that sentencing courts are not required to make findings of permanent incorrigibility before sentencing juvenile offenders to life imprisonment without parole. Br. in Opp. 4. Mississippi relies on certain language in *Montgomery* – that "*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility." *Montgomery*, 136 S. Ct. at 735. But in context, it is clear that the Court was not addressing the question presented here.

The *Montgomery* Court was not asked to decide anything about the sentencing process, including whether the sentencer must make a finding of permanent incorrigibility. Rather, the Court was addressing only the narrow question whether the rule in *Miller* – that only permanently incorrigible juvenile offenders who commit homicide offenses may be sentenced to life imprisonment without the possibility of parole – is a new, substantive rule that applies retroactively to individuals whose convictions and sentences were final when *Miller* was decided. *Montgomery*, 136 S. Ct. at 725.

The Court concluded that *Miller*'s rule *does* apply retroactively to cases on collateral review, because it

is a substantive limitation on the States' and the federal government's ability to impose a certain punishment on juvenile offenders. See *Montgomery*, 136 S. Ct. at 734. *Miller* banned a particular sentence for a particular category of offender: It held that courts may not impose life without parole sentences on juvenile offenders who are not permanently incorrigible. *Ibid.* Individuals in this category – the vast majority of juvenile offenders – have a substantive right to an opportunity for parole, and sentencing them to life imprisonment without the possibility of parole deprives them of that right. *Ibid.*

In *Montgomery*, Louisiana had argued that *Miller* did not set out a new substantive rule, because *Miller* did not create two categories of juvenile homicide offenders. See *Montgomery*, 136 S. Ct. at 735. In support of that argument, Louisiana noted that the *Miller* Court did not expressly require sentencing courts to make findings of fact about incorrigibility. *Ibid.*

The *Montgomery* Court rejected Louisiana's argument that the *Miller* rule is procedural only. In that context, the Court explained that *Miller* did not decide the question about fact-finding one way or another: "*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility," *Montgomery*, 136 S. Ct. at 735, because that issue was not presented in *Miller*. The issue in *Miller* was whether a juvenile offender could *ever* be sentenced to life imprisonment without parole for a homicide offense. The *Miller* Court's answer was yes, a juvenile offender could receive that sentence – but only if he or she was the rare juvenile offender who could not be rehabilitated. *Ibid.* That is as far as *Montgomery* went. The Court did not say more about the process for sentencing juvenile offenders to life imprisonment without

parole, because the process was not at issue in the case.

In this case, Mississippi argues that *Montgomery* actually decided that a finding of permanent incorrigibility was *not* required in order to respect principles of federalism. Br. in Opp. 4. Mississippi relies on the Court's statement that, "[w]hen a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems." *Montgomery*, 136 S. Ct. at 735.

Mississippi misunderstands the *Montgomery* Court's reasoning. States do not necessarily have to find facts about permanent incorrigibility, because States could choose to simply eliminate life without parole sentences for juvenile offenders "by permitting [all] juvenile homicide offenders to be considered for parole." *Montgomery*, 136 S. Ct. at 736 (citing Wyo. Stat. Ann. § 6-10-301(c)). And in fact, many States have eliminated life without parole sentences for juvenile offenders. See Josh Rovner, *Juvenile Life Without Parole: An Overview*, The Sentencing Project (Feb. 25, 2020) (Rovner, *Juvenile Life Without Parole*), https://perma.cc/DSR5-89WS. But the States that choose to retain those sentences must comply with the Eighth Amendment, which means that they must require courts to make determinations of permanent incorrigibility before imposing sentences of life imprisonment without parole on juvenile offenders.

II. REQUIRING A FINDING OF PERMANENT INCORRIGIBILITY IS NECESSARY TO GIVE EFFECT TO *MILLER* AND TO ENSURE THAT JUVENILE LIFE WITHOUT PAROLE SENTENCES TRULY ARE RARE

In *Miller*, the Court instructed sentencing courts to engage in holistic and individualized assessments of juvenile offenders' "characteristics and circumstances." 567 U.S. at 476. The Court set out factors for sentencing courts to consider as part of those factual assessments. *Id.* at 477-478. And the Court explained that when the factors are correctly applied, very few juvenile offenders should receive sentences of life imprisonment without parole. *Id.* at 479.

But sentencing courts often have failed to conduct the individualized assessments of incorrigibility that *Miller* requires. Requiring sentencing courts to make express determinations of permanent incorrigibility will address this problem and ensure that juvenile life without parole sentences truly are rare.

A. *Miller* Requires The Sentencer To Make An Individualized Assessment Of Permanent Incorrigibility, Using Particular Factors

The *Miller* Court held that before a sentencing court can impose a sentence of life imprisonment without parole on a juvenile offender, the court must determine whether the offender is eligible for that sentence. *Miller*, 567 U.S. at 477. The Court instructed the sentencing court to engage in an individualized assessment that "tak[es] account of [the] offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at 476.

In particular, the Court identified five factors for the sentencing court to consider as part of its assessment:

(1) the defendant's "chronological age [at the time of the crime] and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences," *Miller*, 567 U.S. at 477;

(2) "the family and home environment that surrounds [the defendant] – and from which he cannot usually extricate himself – no matter how brutal or dysfunctional," *ibid.*;

(3) "the circumstances of the homicide offense, including the extent of [the defendant's] participation in the conduct and the way familial and peer pressures may have affected him," *ibid.*;

(4) "that [the defendant] might have been charged and convicted of a lesser offense if not for incompetencies associated with youth – for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys," *id.* at 477-478; and

(5) "the possibility of rehabilitation," *id.* at 478.

Those factors are considered as part of an inquiry that is individualized to each particular offender. As the Court demonstrated in the way it applied the factors in *Miller* itself, sentencing courts must consider *all* of the relevant factors, see 567 U.S. at 478-479; no one factor can be dispositive.

The Court also stated its expectations as to the result. It explained that, when courts consider the innate characteristics of youth, along with each offender's particular background and circumstances, they should only rarely impose sentences of life imprisonment without parole. *Miller*, 567 U.S. at 479

(juvenile life without parole sentences should be "uncommon"); see *Montgomery*, 136 S. Ct. at 733-734 (same).

B. Requiring A Finding Of Permanent Incorrigibility Will Ensure That The Sentencer Correctly Applies The *Miller* Factors

Despite this Court's guidance in *Miller*, many courts do not engage in the analysis *Miller* requires. In particular, courts often base sentences of life imprisonment without parole solely on the egregiousness of the offenses, even though that alone has little to do with permanent incorrigibility. And courts often sentence juvenile offenders who have the potential for rehabilitation to life imprisonment without parole, contrary to *Miller*. This Court should provide guidance so that sentencing courts conduct the *Miller* inquiry appropriately.

1. Severity of the crime is not a proxy for permanent incorrigibility

One of the *Miller* factors is the "circumstances of the homicide offense." *Miller*, 567 U.S. at 477. The Court explained that a juvenile offender's limited role in an offense might mitigate that offender's culpability and demonstrate that the offender is not incorrigible. *Id.* at 477-478 (explaining that a juvenile offender who did not pull the trigger and did not intend for the victim to die had diminished culpability).

But courts too often rely on the circumstances of the offenses to justify sentences of life imprisonment without parole, by focusing solely on the severity of the offenders' actions. That is contrary to *Miller*'s "central intuition" that even youth who commit heinous crimes are capable of change. *Montgomery*, 136 S. Ct. at 736. In *Miller* itself, the Court explained that although one of the petitioners "committed a vicious

murder," other factors indicated that life imprisonment without parole was not an appropriate sentence. 567 U.S. at 478-479; see *Adams* v. *Alabama*, 136 S. Ct. 1796, 1800 (2016) (Sotomayor, J., concurring in the decision to grant certiorari, vacate the court of appeals' decision, and remand the case) (the "gruesomeness of a crime is not sufficient" to conclude a defendant is the rare juvenile offender who can constitutionally receive the harshest punishment).

Miller thus clearly contemplated that the circumstances of the offense would be a starting point, not an ending point. Nonetheless, sentencing courts across the country routinely use the severity of a crime to justify sentences of life imprisonment without parole.

Take the case of Anthony Booker. In resentencing Booker to life imprisonment without parole, the sentencing court focused principally on the crime itself. Resentencing Order at 3-5, *State* v. *Booker*, No. 2003-10,660(3) (Miss. Cir. Ct. Mar. 28, 2018). The court highlighted that Booker "willingly helped plan and participate in a brutal murder." *Id.* at 6. In its view, the fact that Booker and his co-defendants "plan[ned]" the crime "over a period of weeks" "belie[d] any impetuosity of youth." *Ibid.* The court did not give any weight to the fact that Booker had an IQ of 65, *id.* at 5, and its discussion of Booker's potential for rehabilitation consisted of a single sentence, *id.* at 6.

The court took the same tack in resentencing Booker's co-defendant, Shawn Davis, to life imprisonment without parole. The court again focused on the "depravity of [the] murderous scheme," without giving any weight to Davis's "difficult and dysfunctional family life" or other factors that indicated his immaturity. Tr. at 124, 127, *State* v. *Davis*, No. 2003-10,660(3) (Miss. Cir. Ct. Apr. 15, 2016).

The court in Christopher Howard's sentencing proceeding also focused on the severity of the crime over the other *Miller* factors. The court repeatedly commented on the violent nature of the crime, ultimately concluding that "this type of killing and absolute uncalled for stabbing of 12 times of a victim laying there does not say mitigation." Tr. at 15-16, *People* v. *Howard*, No 17-1364-FC (Mich. Cir. Ct. July 26, 2018). The court did not consider Howard's lack of criminal record or assess his potential for rehabilitation. See *id.* at 22. On the basis of the severity of the crime alone, the court sentenced Howard to life imprisonment without parole. *Id.* at 23.

These are just a few examples of a systemic misunderstanding of the circumstances-of-the-offense factor. Those courts' approaches are inconsistent with *Miller*, because they put all of the weight on the severity of the particular crimes instead of engaging in the individualized and holistic assessments the Eighth Amendment requires. Homicide offenses are by their nature severe crimes. See *Maynard* v. *Cartwright*, 486 U.S. 356, 364 (1988) ("[A]n ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'"). That is why this Court has warned that sentencing courts must not allow the "brutality or cold-blooded nature of any particular crime" to "overpower" the analysis of whether a sentence is constitutionally permissible. *Roper*, 543 U.S. at 573. Put another way, "[i]ncapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity." *Graham*, 560 U.S. at 73.

The Court can prevent sentencing courts from continuing to rely solely on the severity of the crimes by requiring them to make findings of permanent incorrigibility using the *Miller* factors. Sentencing courts

cannot use the circumstances-of-the-offense factor alone to justify harsher sentences. Instead, sentencing courts must consider that factor, in conjunction with the other *Miller* factors, as part of individualized assessments of permanent incorrigibility.

2. Capacity for rehabilitation is incompatible with permanent incorrigibility

Another factor identified by the Court is the "possibility of rehabilitation." *Miller*, 567 U.S. at 478. This factor must be a central part of the *Miller* analysis, because a juvenile offender's capacity for rehabilitation is a strong indicator of whether the offender is permanently incorrigible. *Ibid.*; see *Montgomery*, 136 S. Ct. at 733-734. Finding that a juvenile offender is permanently incorrigible means finding that "there is no possibility that the offender could be rehabilitated at any point later in his life, no matter how much time he spends in prison and regardless of the amount of therapeutic interventions he receives." *Commonwealth* v. *Batts*, 163 A.3d 410, 435 (Pa. 2017); see *State* v. *Seats*, 865 N.W.2d 545, 558 (Iowa 2015) ("The question the court must answer at the time of sentencing is whether the juvenile is * * * beyond rehabilitation, and thus unfit ever to reenter society, notwithstanding the juvenile's diminished responsibility and greater capacity for reform that ordinarily distinguishes juveniles from adults.").

Put simply, a finding that a juvenile offender can be rehabilitated is inconsistent with a finding of permanent incorrigibility. And because of their transient immaturity, juvenile offenders are presumed to have the potential for rehabilitation.

Yet some courts have sentenced juvenile offenders to life imprisonment without parole *despite* finding that the offenders had the potential for rehabilitation,

or that they actually had been rehabilitated. For example, in resentencing Brian Granger to life imprisonment without parole, the court acknowledged that Granger "has done exceptionally well in prison." Resentencing Order at 29, *State* v. *Granger*, No. 83-4565-FY (Mich. Cir. Ct. May 5, 2020). He had completed college courses, worked throughout his incarceration, and had been a "model prisoner" during his 35 years in prison. *Id.* at 34-35. Unsurprisingly, the court concluded that it could "*not* find that [Granger] is incapable of reform." *Id.* at 36 (emphasis added). But the court held that this evidence "ha[d] no mitigating effect," because "it is impossible to prove that a person will or will not do some action in the future." *Id.* at 36-37. That sentencing court misunderstood the possibility-of-rehabilitation factor, effectively taking it off the table, contrary to *Miller*.

The court in Jessica Hill's case similarly disregarded evidence of her potential for rehabilitation. She had earned her GED in prison, had "participated in every program" that she could (including training service dogs for veterans), and had committed very few rules violations. Sentencing Order at 18, *Hill* v. *State*, No. 01-CF-4019 C (Fla. Cir. Ct. Aug. 3, 2017). The court concluded that Hill had demonstrated that she could be rehabilitated, *ibid.* – yet incorrectly discounted this evidence because, in its view, it could not be certain how Hill would behave outside of prison, *ibid.* The court accordingly resentenced Hill to life imprisonment without parole. *Id* at 18-19.[3]

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[3] The Florida court of appeals reversed that decision, holding that the sentencing court did not correctly apply the *Miller* factors, and remanded for a new sentencing proceeding. See *J.M.H.* v. *State*, No. 2D17-3721, 2020 WL 1313662, at *12 (Fla. Dist. Ct. App. Mar. 20, 2020).

The sentencing courts' approaches in Granger's and Hill's cases reflect a common misunderstanding of the rehabilitation factor. In essence, the courts placed the burden on the juvenile offenders to prove that they can be rehabilitated. But that is not consistent with *Miller*. *Miller* instructs that a court should ask whether there is a "possibility" of rehabilitation. *Miller*, 567 U.S. at 478. And it explains that that possibility should exist in most cases, because one of the hallmark attributes of youth is "capacity for change." *Id.* at 473. Further, an offender's conduct in prison can be evidence of the potential for rehabilitation. *Montgomery*, 136 S. Ct. at 736.

The Court can prevent sentencing courts from continuing to make those errors by requiring them to make findings of permanent incorrigibility using the *Miller* factors. If a court concludes that a juvenile offender has the potential to be rehabilitated, the individual is not permanently incorrigible. Sentencing courts should consider evidence of rehabilitation in prison, but should recognize that some juvenile offenders will not have had the opportunity to demonstrate rehabilitation in prison. In those cases, sentencing courts cannot use the lack of evidence of prison conduct to justify findings of permanent incorrigibility. Instead, the courts must assess that factor using the individuals' own characteristics and circumstances.

C. Requiring A Finding Of Permanent Incorrigibility Will Help Ensure That Juvenile Life Without Parole Sentences Are Rare

This Court has twice emphasized that sentences of life imprisonment without parole should be imposed on juvenile offenders only very rarely, because very few juvenile offenders are irreparably corrupt. *Montgomery*, 136 S. Ct. at 734; see *Miller*, 567 U.S. at 479.

Nonetheless, courts commonly impose those sentences on juvenile offenders. That underscores that courts are not conducting the individualized inquiry that *Miller* requires.

Of the States that have retained life without parole sentences for juvenile offenders, some have taken steps to ensure that those sentences are imposed only rarely. The supreme courts of Pennsylvania and Wyoming, for example, have held that courts must presume that juvenile offenders are ineligible for life without parole sentences, and that the burden is on the prosecution to overcome that presumption beyond a reasonable doubt. *Batts*, 163 A.3d at 470-476; *Davis* v. *State*, 415 P.3d 666, 681 (Wyo. 2018). Since the Pennsylvania Supreme Court's decision, courts in Philadelphia County have not resentenced a single juvenile offender to life imprisonment without parole. Allie Gross, *More Than Half of Michigan Juvenile Lifers Still Wait Resentencing*, Detroit Free Press (Aug. 16, 2019) (comparing resentencing processes in Michigan to those in Pennsylvania) (Gross, *Michigan Juvenile Lifers*), https://perma.cc/VQ7L-42CM; see Tarika Daftary-Kapur & Tina Zottoli, *Resentencing of Juvenile Lifers: The Philadelphia Experience* 1 (2020) (as of 2012, 325 individuals in Philadelphia County were serving life without parole sentences for crimes they committed before age 18), https://perma.cc/9BE9-9RFT.

But juvenile life without parole sentences are not so rare in other States, even after *Miller*. For example, between 2012 and 2017, courts in Louisiana imposed sentences of life imprisonment without parole on 62% of juvenile offenders convicted of homicide. Juvenile Law Center *Amicus* Br. at 5-6, *Dove* v. *Louisiana*, 138 S. Ct. 1279 (2017) (No. 17-6231). Similarly, in Michigan, prosecutors have sought to reimpose life

without parole sentences in nearly two-thirds of the cases eligible for resentencing, and the courts in many of those cases have agreed. Gross, *Michigan Juvenile Lifers*. And in Mississippi, courts have resentenced over one-quarter of juvenile offenders to life imprisonment without parole. See Off. of State Public Def., Miss., *Juvenile Life Without Parole in Mississippi* 3 (2020), https://perma.cc/W4WG-HZH6.

It cannot be the case that two-thirds (or even one-quarter) of juvenile homicide offenders are permanently incorrigible. That is not "rare" or "uncommon." *Miller*, 567 U.S. at 479 (internal quotation marks omitted). All of the innate attendant characteristics of youth indicate that juvenile offenders are transiently immature. *Id.* at 473 ("[I]ncorrigibility is inconsistent with youth." (internal quotation marks omitted)). The courts in those States thus cannot be correctly performing the individualized assessments of permanent incorrigibility that *Miller* requires.

Requiring sentencing courts to make findings of permanent incorrigibility before sentencing juvenile offenders to life imprisonment without parole will put the courts back on track. The Court should reiterate that sentencing courts should engage in the individualized inquiries *Miller* requires, by considering the *Miller* factors with the ultimate aim of determining permanent incorrigibility. And the Court should reiterate that findings of permanent incorrigibility should be very rare. That guidance is necessary to give effect to the promise of *Miller* and *Montgomery*.

III. REQUIRING THE SENTENCER TO MAKE A FINDING OF PERMANENT INCORRIGIBILITY WILL HELP ROOT OUT RACIAL BIAS IN SENTENCING AND ENSURE MEANINGFUL APPELLATE REVIEW

Requiring sentencing courts to make findings of permanent incorrigibility will help to avoid biased sentencing and will facilitate appellate review. Without this fact-finding requirement, judges are more likely to consider improper factors, disregard relevant information, and allow their biases – especially racial biases – to influence their sentencing decisions. As a result, there is a serious risk that sentencing courts will continue to impose life without parole sentences on Black children who are capable of reform, while insulating the sentences from appellate review.

A. Requiring A Finding Of Permanent Incorrigibility Will Help Avoid Racial Bias In Sentencing

Requiring that sentencing courts determine whether juvenile offenders are permanently incorrigible will help ensure that the courts do not base their decisions on impermissible factors, such as racial biases. Racial disparities plague the criminal justice system, with a particularly severe impact on Black boys. See, *e.g.*, Wendy Sawyer, *Youth Confinement: The Whole Pie*, Prison Policy Initiative (Feb. 27, 2018), https://perma.cc/UZX4-VKFT.

Those disparities are especially pronounced when it comes to the imposition of juvenile life without parole sentences. In the years before *Graham* and *Miller*, courts sentenced Black juvenile offenders to life imprisonment without parole ten times more often than white offenders. Ltr. from United States & Int'l

Human Rights Orgs. to the U.N. Comm. on the Elimination of Racial Discrimination 2 (June 4, 2009), https://perma.cc/8KB2-E4CM. The disparity was even more evident for Black juvenile offenders convicted of killing white victims; courts sentenced those offenders to life imprisonment without parole more than 12 times more often than white offenders convicted of killing Black victims. See The Sentencing Project, *Shadow Report of The Sentencing Project to the Committee on the Elimination of Racial Discrimination* 3 (2014), https://perma.cc/T9CW-2VM8.

Racial stereotypes often are the cause of those disparate sentencing outcomes. One particularly pernicious stereotype that has plagued Black youth is the now-debunked myth of the "super-predator," an especially depraved, immoral, relentless, and dangerous class of teenage offenders responsible for the most heinous crimes. See, *e.g.*, Peter Annin, *Superpredators Arrive*, Newsweek, Jan. 22, 1996, at 57; David Gergen, Editorial, *Taming Teenage Wolf Packs*, U.S. News & World Rep., Mar. 17, 1996, at 68; Richard Zoglin, *Now for the Bad News: A Teenage Time Bomb*, Time, Jan. 15, 1996, at 52. John J. DiLulio, Jr., who coined the term in 1995, described "super-predators" as "tens of thousands of severely morally impoverished" and "super crime-prone young males," for whom "murder [and] rape" come "naturally." John DiLulio, *The Coming of the Super-Predators*, Weekly Standard (Nov. 27, 1995), https://perma.cc/33B6-A3W6. DiLulio claimed that "the trouble will be greatest in black inner-city neighborhoods." *Ibid.*

The myth of the super-predator spread across the country, influencing policies locally and nationally. States enacted laws that removed discretion from juvenile court judges and made it easier for courts to sentence juvenile offenders as adults. See David S.

Tanenhaus & Steven A. Drizin, "*Owing to the Extreme Youth of the Accused": The Changing Legal Response to Juvenile Homicide*, 92 J. Crim. L. & Criminology 641, 642 (2002). States also enacted laws that allowed courts to sentence juvenile offenders to life imprisonment without parole. See The Campaign for the Fair Sentencing of Youth, *From the Desk of the Director: Black History Month* (Feb. 28, 2018), https://perma.cc/WZ4U-QCSD. Many of those laws remain in effect today, even though subsequent research has thoroughly discredited the "super-predator" myth and juvenile crime rates have dramatically declined. See, *e.g.*, Off. of Surgeon Gen., *Youth Violence: A Report of the Surgeon General* (2001), https://perma.cc/ZD2A-5PKQ. In fact, DiLulio himself has publicly renounced the myth he helped establish. See Fagan et al. *Amicus* Br. at 18-19, *Miller*, 567 U.S. 460 (No. 10-9646).

But in the meantime, many people have internalized those false stereotypes. Studies show that implicit biases against Black children are very widely held. For example, one study found that, as compared to similarly situated white children, people are likely to perceive Black children as older, less innocent, and more culpable. See Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. Personality & Soc. Psychol. 526, 540 (2014). Another study found that people presented with a scenario involving a Black juvenile defendant are significantly more likely to view children to be as culpable as adults, and to favor more severe sentencing, than those presented with the same scenario involving a white juvenile defendant. See Aneeta Rattan et al., *Race and the Fragility of the Legal Distinction Between Juveniles and Adults*, 7 PLoS ONE 1, 2 (2012).

Those "powerful" stereotypes are very likely to affect sentencing decisions. *Buck* v. *Davis*, 137 S. Ct. 759, 776 (2017). Judges, like everyone else, are not immune from racial biases. In one study, researchers "found a strong white preference among white [trial] judges," stronger even than that observed among a sample of white subjects from the general population obtained online. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195, 1210 (2009). Another study of trial judges found that they often rely on intuitive, rather than deliberative, decision-making processes, which risks leading to reflexive, automatic judgments, such as intuitively "associat[ing] * * * African Americans with violence." Hon. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149, 156-157 (2010). Yet another study found that "judges harbor the same kinds of implicit biases as others [and] that these biases can influence their judgment." *Id.* at 157 (internal quotation marks omitted).

Judges' implicit biases undoubtedly contribute to the fact that "at virtually every stage of the juvenile justice process, Black youth receive harsher treatment than white youth, even when faced with identical charges and offending histories." Ellen Marrus & Nadia N. Seeratan, *What's Race Got to Do with It? Just About Everything: Challenging Implicit Bias to Reduce Minority Youth Incarceration in America*, 8 J. Marshall L. J. 437, 440 (2015).

Requiring a full review of the relevant evidence and an express finding on permanent incorrigibility will mitigate the risk that racial biases will adversely affect Black youths during sentencing. One of the

most effective ways to avoid group biases is to focus on the particular individual's unique characteristics. For that reason, the American Bar Association advises judges to engage in "[i]ndividuation," meaning "gathering very specific information about a person's background, tastes, hobbies and family so that [the] judgment will consider the particulars of that person, rather than group characteristics." Am. Bar Ass'n, *Judges: 6 Strategies to Combat Implicit Bias on the Bench* (Sept. 2016); see Sean Darling-Hammond, *Designed to Fail: Implicit Bias in Our Nation's Juvenile Courts*, 21 U.C. Davis J. Juv. L. & Pol'y 169, 186 (2017) (judges who do not consider information unique to the defendant "may struggle to view out-group members (like Black juveniles) through non-stereotypical lenses").

Although *Miller* already requires a sentencing court to engage in an individualized assessment of each juvenile offender's particular characteristics and circumstances, many courts are not engaging in that analysis. Requiring a finding of permanent incorrigibility will help ensure that the sentencing court performs the correct, totality-of-the-circumstances assessment. That in turn will decrease the likelihood that the sentencing court will rely on impermissible factors, leading to less arbitrariness and less biased sentencing.

B. Requiring A Finding Of Permanent Incorrigibility Will Facilitate Appellate Review

Requiring a finding of permanent incorrigibility will ensure meaningful appellate review. Sentencing courts must "adequately explain" their chosen sentences in order for there to be "meaningful appellate review." *Gall* v. *United States*, 552 U.S. 38, 50 (2007). That is especially true when the Constitution prohibits a certain punishment for certain offenders because

the punishment is cruel and unusual. See, *e.g.*, *Gregg* v. *Georgia*, 428 U.S. 153, 195 (1976).

If a sentencing court does not make a finding that the juvenile offender is permanently incorrigible and explain the basis for that decision, the appellate court will not be able to determine whether the sentence is constitutional. The reviewing court will not know whether the sentencing court considered the *Miller* factors, what weight it put on those factors, whether the court considered any impermissible factor, and what else the court believed justified the sentence imposed. Without that information, the reviewing court cannot uphold the sentence as compliant with the Eighth Amendment. See *Chavez-Meza* v. *United States*, 138 S. Ct. 1959, 1965 (2018).

Meaningful appellate review is important not only in each individual defendant's case, but also for the overall integrity of the criminal justice system. Without on-the-record findings of permanent incorrigibility, supported by the evidence, appellate courts cannot ensure consistency in sentencing decisions. A lack of consistency harms the "perception of fair sentencing," *Gall*, 552 U.S. at 50, undermining public confidence in the judicial system. This concern is particularly acute in cases involving juvenile life without parole sentences, given the severity of the sentences and the risk of bias and arbitrariness.

IV. REQUIRING A FINDING OF PERMANENT INCORRIGIBILITY WILL NOT BE BURDENSOME

Requiring findings of permanent incorrigibility will not burden sentencing courts. Courts in 23 States (and the District of Columbia) will not be affected at all, because those States have categorically banned

life imprisonment without parole for juvenile offenders by making all juvenile offenders eligible for parole as a matter of state (or district) law. See Rovner, *Juvenile Life Without Parole*.

In the remaining state courts and in federal court, the sentencing process will not change significantly. For juvenile offenders, sentencing courts already must conduct individualized sentencing determinations, guided by the *Miller* factors. And sentencing courts make threshold eligibility determinations all of the time. Requiring a finding of permanent incorrigibility thus will not add any significant burden.

For example, many States have advisory or recommended sentencing guidelines. Sentencing courts in those States often are required to make specific findings to determine a sentencing range and to justify departures from the recommended range. See Jacqueline E. Ross, *What Makes Sentencing Facts Controversial – Four Problems Obscured by One Solution*, 47 Vill. L. Rev. 965, 965 n.1 (2002). In at least seventeen States, any departure must be specifically justified by the judge on the record, in a sentencing order, or on a sentencing worksheet. See Neal B. Kauder & Brian J. Ostrom, *State Sentencing Guidelines: Profiles and Continuum* (2008), https://perma.cc/6R7P-3S8Q. Accordingly, even outside of the juvenile-offender context, judges in those States already are conducting individualized sentencing determinations and considering factors specified by state law.

And with respect to juvenile offenders, courts in the States that permit sentences of life imprisonment without parole already are conducting "hearing[s]" to comply with *Miller*. *Montgomery*, 136 S. Ct. at 735. At least nine of those States have statutes specifically

requiring those hearings.[4] And some States have added factors (above those identified in *Miller*) that sentencing courts must consider when deciding whether to sentence juvenile offenders to life imprisonment without parole. See, *e.g.*, *Ex parte Henderson*, 144 So. 3d 1262, 1284 (Ala. 2013) (identifying nine additional factors); *Seats*, 865 N.W.2d at 555-556 (identifying six additional factors); *State* v. *Montgomery*, 194 So. 3d 606, 609 (La. 2016) (identifying two additional factors).

State courts thus already are considering various factors in determining whether to impose sentences of life imprisonment without parole on juvenile offenders. Requiring those courts to analyze the *Miller* factors and make a finding of permanent incorrigibility will not substantially change their tasks.

The same is true for federal district courts. Like state courts, federal courts already are bound to comply with *Miller*. And as a matter of federal law, a court must consider various statutory factors when it fashions an appropriate sentence for a particular offender. Under 18 U.S.C. 3553, the sentencing court follows a two-step process. First, the court applies the federal Sentencing Guidelines, which "require a sentencing judge to consider listed characteristics of the offender and the offense for which he was convicted." *Chavez-Meza*, 138 S. Ct. at 1963. Doing so "brings the judge to a Guidelines table that sets forth a range of punishments." *Ibid.*

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[4] See Fla. Stat. Ann. § 921.1401(2); 730 Ill. Comp. Stat. Ann. 5/5-4.5-105; Iowa Code § 902.1; Mich. Comp. Laws § 769.25; Mo. Rev. Stat. § 565.033(2); Neb. Rev. Stat. Ann. § 28-105.02(2); N.C. Gen. Stat. § 15A-1340.19B; 18 Pa. Cons. Stat. Ann. § 1102.1(d); Wash. Rev. Code Ann. § 10.95.030.

Second, the court chooses the specific penalty, either within or outside the Guidelines range, after considering certain statutory factors. See *Chavez-Meza*, 138 S. Ct. at 1963; 18 U.S.C. 3553(a). Those factors include "the history and characteristics of the defendant," as well as the penological justifications for sentencing, including the potential for rehabilitation. 18 U.S.C. 3553(a)(1), (2)(D). The court must then explain why, based on those factors, the court chose the sentence it did. 18 U.S.C. 3553(c).

Requiring a determination that a juvenile offender is permanently incorrigible, based on the *Miller* factors, will not substantially change that process. The district court will first determine, based on the Sentencing Guidelines for the homicide offense, whether the Guidelines range includes a life sentence. (Because there is no parole in the federal system, all federal life sentences are life without parole sentences. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, § 218(a)(5), 98 Stat. 1837, 2027 (repealing 18 U.S.C. 4201 *et seq.*).)

If a life sentence is a possible sentence, the court will then consider the factors set out in *Miller* and 18 U.S.C. 3553(a) to answer *Miller*'s central question – whether the juvenile offender is permanently incorrigible and therefore deserving of a life without parole sentence. Finally, the court would explain its analysis and state its ultimate finding. See *Briones*, 929 F.3d at 1065 (explaining how the *Miller* inquiry fits into the federal sentencing process); see also 18 U.S.C. 3553(c) (requiring district court to explain basis for federal sentence). No change to the process is needed, and no additional burdens are imposed.

CONCLUSION

The Court should reverse the decision of the Mississippi Court of Appeals.

Respectfully submitted.

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APPENDIX

APPENDIX
List of *Amici Curiae*

1. Advancing Real Change, Inc.
2. African American Juvenile Justice Project
3. Alabama Criminal Defense Lawyers Association
4. Arizona Attorneys for Criminal Justice
5. Arizona Capital Representation Project
6. Arizona Justice Project
7. Atlantic Center for Capital Representation
8. Barton Child Law & Policy Center, Emory University School of Law
9. California Public Defenders Association
10. Campaign for the Fair Sentencing of Youth
11. Campaign for Youth Justice
12. The Center for Children & Youth Justice
13. Center for Children's Law & Policy
14. Central Florida Association of Criminal Defense Lawyers
15. Children's Defense Fund – New York
16. Colorado Juvenile Defender Center
17. Cornell Juvenile Justice Project
18. Criminal Defense Attorneys of Michigan
19. Tarika Daftary-Kapur, Ph.D., Associate Professor of Justice Studies, Montclair State University
20. The Defender Association of Philadelphia

21. Jeffrey Fagan, Isidor and Seville Sulzbacher Professor of Law, Columbia Law School
22. Florida Association of Criminal Defense Lawyers
23. Florida Juvenile Resentencing and Review Project
24. Gator TeamChild Juvenile Law Clinic, University of Florida Levin College of Law
25. Emily Haney-Caron, Ph.D., Director of the Youth Law & Psychology Lab
26. Kristin Henning, Director of the Juvenile Justice Clinic, Georgetown University Law Center
27. Human Rights for Kids
28. Idaho Association of Criminal Defense Lawyers
29. Illinois Juvenile Defender Resource Center
30. Jaffe Raitt Heuer & Weiss, P.C., counsel for Barbara Hernandez in *People* v. *Hernandez*, No. 350565 (Mich. Ct. App.)
31. James B. Moran Center for Youth Advocacy
32. Robert Johnson, Ph.D., Professor of Justice, Law, and Criminology, American University
33. Justice Policy Institute
34. Juvenile Innocence & Fair Sentencing Clinic, Loyola Law School Los Angeles
35. Juvenile Justice Initiative
36. Juvenile Law Center
37. The Juvenile Sentencing Project, Quinnipiac University School of Law
38. Antoinette E. Kavanaugh, Ph.D., ABPP

39. Lawyers' Committee for Civil Rights Under Law
40. Louisiana Center for Children's Rights
41. Maricopa County Public Defender
42. The Maryland Office of the Public Defender
43. Michigan State Appellate Defender Officer
44. Midwest Juvenile Defender Center
45. Missouri Association of Criminal Defense Lawyers
46. Mothers Against Murderers Association
47. NAACP Legal Defense & Educational Fund, Inc.
48. National Center for Youth Law
49. The National Juvenile Defender Center
50. National Juvenile Justice Network
51. New Jersey Parents' Caucus
52. North Carolina Advocates for Justice
53. North Carolina Office of the Appellate Defender
54. Office of the Minnesota Appellate Public Defender
55. The Office of the Ohio Public Defender
56. Pacific Juvenile Defender Center
57. Pitt McGehee, P.C.
58. Public Defender of Indiana
59. Mae C. Quinn, Visiting Professor of Law, University of Florida Levin College of Law
60. The Sentencing Project
61. Southern Juvenile Defender Center

62. Southern Poverty Law Center
63. TeamChild
64. Washington Defender Association
65. Voices for Children in Nebraska
66. Youth, Rights & Justice
67. Youth Sentencing & Reentry Project
68. Tina M. Zottoli, Ph.D., Assistant Professor of Psychology, Montclair State University