

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE,)
)
Appellee,) Knox County Criminal 108568
)
v.) C.C.A. No. E2018-01439-CCA-R3-CD
)
TYSHON BOOKER,) S. Ct. No. E2018-01439-SC-R11-CD
)
Appellant.)

BRIEF OF *AMICI CURIAE* NACDL, TACDL,
AMOS BROWN, AND CHARLES LOWE-KELLEY

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Amici Curiae the National Association of Criminal Defense Attorneys (“NACDL”), the Tennessee Association of Criminal Defense Attorneys (“TACDL”), Amos Brown, and Charles Lowe-Kelley submit this brief in support of Appellant Tyshon Booker’s application for permission to appeal under Tenn. R. App. P. 11.

I. STATEMENT OF THE ISSUE

Amici urge the Court to address the following issue:

Whether a minimum 51-year term of prison confinement mandatorily imposed on a juvenile, without consideration of the juvenile’s youth, immaturity, or other mitigating circumstances, violates the Cruel and Unusual Punishments Clauses and other provisions of the federal and state constitutions, in that it deprives the juvenile of a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”

II. INTERESTS OF *AMICI*

The interests of *Amici* are more fully described in their *Motion for Leave to File Amici Curiae Brief*, filed contemporaneously herewith. Their interests can be briefly summarized as follows:

NACDL is the leading national bar association for criminal defense attorneys. NACDL’s mission includes working for improvement in the criminal justice system. To fulfill this mission, NACDL submits amicus briefs on important criminal justice issues of national significance.

TACDL is the leading bar association for Tennessee criminal defense attorneys whose mission includes working for improvement in the criminal justice system. To fulfill this mission, TACDL submits amicus briefs on important issues that affect the administration of criminal justice in Tennessee.

Amos Brown is serving a life sentence for felony murder for a crime that occurred when he was 16 years old and will not be eligible for release until he is at least 69 years old. He is challenging the constitutionality of his 51-year mandatory minimum life sentence in a post-conviction proceeding that is pending in McMinn County. *Amos Brown v. State*, No. 4-CR-64 (McMinn Cnty. Cir. Ct.). In support of his petition, Mr. Brown filed the *Declaration of Dr. Julie A. Gallagher*, a forensic psychologist who summarized the current scientific research (as of May 2018) on adolescent psychology and brain development that the Supreme Court has deemed relevant in addressing issues concerning juvenile sentencing under the Eighth Amendment. Dr. Gallagher's Declaration is attached hereto as Appendix A. Mr. Brown also filed the *Declaration of Dr. Michael Freeman*, an epidemiologist who reviewed demographic data from the Tennessee Department of Correction to ascertain that Tennessee inmates confined in the Tennessee prison system have an average life expectancy of 52 years old. Dr. Freeman's Declaration is attached hereto as Appendix B.

Charles Lowe-Kelley is currently serving two consecutive life sentences for crimes that occurred when he was 16 years old. Under current Tennessee law, he will be ineligible for release until he is well over 100 years old, which means that he will certainly die in prison. The sentencing judge expressly stated that Mr. Lowe-Kelley's youth would not be considered as a mitigating factor in his sentencing. Mr. Lowe-Kelley is challenging the constitutionality of his sentence in a pending federal habeas corpus proceeding in the Middle District of Tennessee. *Lowe-Kelley v. Washburn*, No. 1:16-cv-00082 (M.D. Tenn.).

III. REASONS TO GRANT THE APPEAL

In *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the United States Supreme Court, declaring that juveniles are constitutionally different from adults, invalidated mandatory life without parole (“LWOP”) sentences imposed on juveniles convicted of murder. The Supreme Court held that, in light of our contemporary understanding of adolescent psychology and brain development, it is unconstitutional to mandatorily deprive a juvenile offender of “a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” Tennessee’s mandatory life sentence for first-degree murder deprives juvenile defendants of such a “meaningful opportunity” and is therefore unconstitutional.

Tennessee’s life sentence requires a minimum of 51 years in prison, making it among the most extreme in the country.¹ It is mandatorily imposed on juveniles—the minimum sentence any juvenile convicted of first-degree homicide can receive is life. This sentencing structure entirely forecloses consideration of the characteristics of youth the Supreme Court has dictated must be examined under the Constitution. This sentence also exceeds the average life expectancy of

¹ See *False Hope: How Parole Systems Fail Youth Serving Extreme Sentences*, Appendix A at 160-61 (ACLU, Nov. 2016) (listing Tennessee’s mandatory life sentence as the most extreme among the states).

Tennessee juveniles serving life sentences.² A 51 year sentence is in fact more extreme for teens than adults, because the average teenager sentenced to life will spend more time and a greater percentage of his life in prison before he dies. This violates the constitutional principle that juveniles are less culpable and more amendable to rehabilitation, and therefore should be treated less harshly than adult offenders.³

Amici acknowledge that the Tennessee Court of Criminal Appeals has previously rejected this claim, and on prior occasions this Court has denied permission to appeal on this issue. But, *Amici* respectfully contend that the Court of Criminal Appeals has erroneously applied a narrow, formulaic rule that misconstrues the holdings in *Miller* and *Montgomery*. Finding that *Miller* and *Montgomery* only apply when the sentence is expressed as “life without parole,” the Court of Criminal Appeals has concluded that because Tennessee’s life sentence theoretically allows for some remote chance of release after 51 years, *Miller* and *Montgomery* do not apply in Tennessee. This is wholly out of step with jurisdictions across the country, which have held that even a

² According to the evidence submitted in Amos Brown’s case, average life expectancy in prison is 52 years of age. *See Freeman Declaration* attached at Appendix B, at 4. Moreover, research shows that juveniles sentenced to life in prison have an even lower life expectancy. *See id.* at 5.

³ *See Miller*, 567 U.S. at 475 (“And this lengthiest possible incarceration is an especially harsh punishment for a juvenile, because he will almost inevitably serve more years and a greater percentage of his life in prison than an adult offender.” (quoting *Graham*, 560 U.S. at 70)).

term-of-years sentence (as opposed to the life sentence at issue here) operates as a *de facto* LWOP sentence, raising *Miller* constitutional issues.⁴

The essential holding of *Miller* and *Montgomery* is that a mandatory sentence violates the Constitution if it deprives a juvenile of a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” The critical determination is: What amounts to a “meaningful opportunity” in this context? The extremely remote and highly unlikely possibility of a geriatric release after a half-century of incarceration, if a person can survive that long in prison, is not “meaningful.”

For at least four reasons, in order to secure settlement of questions of public interest and of important questions of law, this issue is ripe for review by this Court under Tenn. R. App. P. 11(a)(2) and (3).

First, this issue is of profound public interest because it concerns our conception and treatment of juveniles, who have always received protection under the law and who have been shown, by contemporary science, to be less culpable and more capable of rehabilitation than adults.

Second, this issue raises fundamental questions of federal and state constitutional interpretation including how states provide the “meaningful opportunity” guaranteed by the federal Constitution.

⁴ See cases cited in Section V.D., *infra*.

Third, because Tennessee’s 51 year mandatory minimum sentence for juveniles convicted of murder is among the most extreme in the nation,⁵ this Court should reconsider Tennessee’s outlier position. Courts across the country have held that excessively long mandatory sentences deprive juveniles of a “meaningful opportunity.” This case offers the Court the opportunity to consider whether Tennessee should align itself with these other jurisdictions.

And fourth, even members of the Tennessee Court of Criminal Appeals have recently expressed concern about the severity of a 51-year mandatory minimum sentence for a juvenile, pointing out that, in reality, such a sentence deprives a juvenile of a “meaningful opportunity.” As Judge Thomas explained:

[A]lthough Tennessee's sentencing scheme allows for possible release of a defendant convicted of first degree murder after the service of fifty-one years, it is only in the rare instance, if ever, that a *juvenile* so sentenced would be released back into society. Even if the judge or jury decides that the features of the juvenile or the circumstances of the homicide require a sentence other than life without parole, the effect of the sentence is still the same. *The juvenile has no meaningful opportunity for release whether you name the sentence imprisonment for life or imprisonment for life without the possibility of parole, and the juvenile will likely die in prison. “While the logical next step may be to extend protection to these types of sentences, that is not the precedent which now exists” in this State.*

⁵ See section V.E., *infra*.

State v. Zachary Everett Davis, No M2016-01579-CCA-R3-CD (Tenn. Crim. App. Dec. 11, 2017) (Thomas, J. and McMullen, J., concurring) (quoting *Floyd Lee Perry, Jr., v. State*, No. W2013-00901-CCA-R3-PC, 2014 WL 1377579, at *4 (Tenn. Crim. App. Apr. 7, 2014), *perm. app. denied* (Tenn. Sept. 18, 2014)) (emphasis added).⁶ *See, also, Jacob Brown v. State*, No. W2015-00887-CCA-R3-PC, 2016 WL 1562981, at *7 (Tenn. Crim. App. Apr. 15, 2016), *perm. app. denied* (Aug. 19, 2016), *cert. denied*, 137 S. Ct. 1331 (2017) (expressing “misgivings” about consecutive life sentences for a juvenile).

Despite a pattern of doubt over whether a juvenile can ever have a meaningful opportunity for release under Tennessee’s scheme, the Court of Criminal Appeals has adhered to its narrow view. This Court should now consider modern developments in brain science and adolescent psychology confirming that children are less culpable and more amenable to rehabilitation, as well as evolving community standards of punishment, to determine whether Tennessee’s mandatory life sentence is inconsistent with the holdings of *Miller* and *Montgomery*.

IV. STATEMENT OF THE CASE

Tyshon Booker’s case provides this Court with an ideal opportunity to review the issue presented, because it is a textbook case of how

⁶ *See, also, State v. Henderson*, No. W2016-00911-CCA-R3-CD, 2018 WL 1100972, at *6-7 (Tenn. Crim. App. Feb. 26, 2018); *State v. Collins*, No. W201601819CCAR3CD, 2018 WL 1876333, at *20–21 (Tenn. Crim. App. Apr. 18, 2018), *appeal denied* (Aug. 8, 2018), *cert. denied*, 139 S. Ct. 649 (2018) (both opinions quoting Judge Thomas’s concurring opinion at length).

Tennessee’s mandatory sentencing scheme in Tennessee fails juveniles. First, juveniles are less culpable than adults. Because of their young age, juveniles have a developmentally limited ability to self-regulate and resist outside peer influences. Second, for similar developmental reasons, juveniles are more likely to rehabilitate than adults. The record below includes expert testimony on the modern science of adolescent psychology and brain development, mitigating circumstances concerning Tyshon’s traumatic childhood, and reasons why Tyshon is amenable to rehabilitation - the exact kinds of factors that the Supreme Court has found relevant in considering the constitutionality of mandatory sentencing for juveniles.

V. ARGUMENT

A. Juveniles are constitutionally different for sentencing purposes.

Beginning in 2005, the United States Supreme Court recognized that the Constitution requires states to distinguish juveniles from adults for sentencing purposes, “tak[ing] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Miller*, 567 U.S. at 480. Absent a finding that a child is “irreparab[ly] corrupt[]” and incapable of rehabilitation, a child cannot be denied “hope for some years of life outside prison walls.” *Montgomery*, 136 S. Ct. at 736-37. Children must be given “a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Miller*, 567 U.S. at 479 (quoting *Graham*, 560 U.S. at 75.

The Supreme Court first ruled in *Roper v. Simmons*, 543 U.S. 551 (2005), that the Eighth Amendment prohibits the death penalty for juveniles, based on advancing scientific understanding of developmental psychology and neuroscience. The *Roper* Court recognized three general differences between juveniles and adults, relevant to criminal sentencing.

First, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions. ... In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.” *Id.* at 569 (citations and internal quotations omitted).

Second, “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure....This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment....‘[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting.’” *Id.* (internal citations omitted).

Third, “the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.” *Id.* at 570. Accordingly, “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be

reformed.” *Id.* Indeed, “[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.” *Id.* (citation and internal quotations omitted).

Then, in *Graham v. Florida*, 560 U.S. 48 (2010), the Court extended *Roper’s* reasoning to invalidate mandatory LWOP sentences for juveniles convicted of non-homicide offenses. After *Graham*, while a “[s]tate is not required to guarantee eventual freedom to a offender,” it “must impose a sentence that provides some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Id.* at 75 (emphasis added). In *Graham*, the Court compared LWOP terms to “death sentences,” because imprisoning an offender until he dies “alters the offender’s life by a forfeiture that is irrevocable,” and such a sentence “is an especially harsh punishment for a juvenile, because he will almost inevitably serve more years and a greater percentage of his life in prison than an adult offender.” *Id.* at 69-70. The *Graham* Court reiterated *Roper’s* three “salient” characteristics that distinguish juveniles from adults and also noted that juveniles have a reduced capacity to assist in their own defense, which puts them “at a significant disadvantage in criminal proceedings.” *Id.* at 68, 78.

In *Miller*, the Supreme Court invalidated mandatory LWOP sentences for juvenile *homicide* offenders. The Court reiterated that under the Eighth Amendment “children are constitutionally different from adults for purposes of sentencing, and a system that fails to recognize those differences, “[b]y removing youth from the balance—by

subjecting a juvenile to the same life-without-parole sentence applicable to an adult...prohibit[s] a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender.” *Miller*, 567 U.S. at 471, 474. The Court went on to explain:

Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he 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.... And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Id. at 477-78.

Finally, in *Montgomery*, the Supreme Court held that *Miller* had announced a new “substantive rule” of constitutional law, meaning that a conviction or sentence that violates the rule “is, by definition, unlawful,” and that the rule must be retroactively applied in state collateral proceedings. *Montgomery v. Louisiana*, 136 S. Ct. 718, 723 (2016), *as revised* (Jan. 27, 2016). In establishing this jurisprudence, the Supreme Court explained that its decisions were based on common sense, “what any parent knows,” but also on the science and social science

indicating that juveniles exhibit a “transient rashness, proclivity for risk, and inability to assess consequences,” both of which lessen a child's “moral culpability” and enhance the prospect that, as the years go by and neurological development occurs, his/her “deficiencies will be reformed.” *Miller*, 567 U.S. at 472 (internal citations omitted). The science of adolescent brain development and psychology continues to progress, as was explained by the testimony of forensic psychologist Dr. Keith Cruise in the instant case. Transcript of Evidence Vol. 38 at 19-45. *See, also*, Declaration of forensic psychologist Dr. Gallagher, attached hereto as Appendix A (noting that the amicus briefs filed in *Miller* by the American Psychological Association and the American Medical Association “offer good descriptions of the state of research as of that point in time. Research in this area continues, and the most recent scientific findings add further support to the Court’s holdings in *Roper*, *Graham*, *Miller* and *Montgomery*.”).

B. Tennessee’s sentencing scheme for first-degree murder offers no flexibility to account for the circumstances of youth as required by *Miller* and its progeny.

Tennessee’s sentencing scheme for first-degree murder violates the Constitution because it mandates a minimum sentence of life imprisonment, even for juvenile offenders, and forecloses the sentencing court from considering the characteristics of youth, which, according to the Supreme Court, must be analyzed. For a first-degree homicide conviction, the minimum sentence for any defendant, including a juvenile, is life, with no possibility of release until after he has served 51 years in prison. Tenn. Code Ann. § 39–13–204; *Brown v. Jordan*, 563

S.W.3d 196, 202 (Tenn. 2018). This is among the most severe sentences imposed in the country for homicide.⁷

Given juveniles' distinctive capacity for change, such lengthy mandatory sentences are incompatible with the penological goal of rehabilitation. As the Supreme Court explained in *Roper*, “[f]or most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities developed entrenched patterns of problem behavior that persist into adulthood.” 543 U.S. at 570.

In insisting that youth be treated differently than adults in sentencing, the Supreme Court has cautioned against imposing sentences that reflect a premature decision about a juvenile's incorrigibility. *See Graham*, 560 U.S. at 72. Instead, the Eighth Amendment requires that any sentence imposed on a juvenile reflect the youth's ability to change. *See id.* at 73. Juveniles “must be given the opportunity to show their crime did not reflect irreparable corruption” before being stripped of “hope for some years of life outside prison walls.” *Montgomery*, 136 S. Ct. at 736-37.

The conclusion that a child must be irretrievably depraved or permanently incorrigible based on the crime alone, is untenable under the reasoning of *Roper*, *Graham*, *Miller*, and *Montgomery*. A constitutional sentence must provide some opportunity for the offender

⁷ *See False Hope: How Parole Systems Fail Youth Serving Extreme Sentences*, note 1, *supra*.

to show the potential for growth and rehabilitation with time and maturity despite the severity of his youthful misconduct. Tennessee’s first-degree murder sentencing scheme flies in the face of these constitutional requirements, allowing for no consideration of youth at all.

C. Imposition of a mandatory minimum fifty-one-year sentence on a juvenile is unconstitutional because it deprives him of “a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”

The central holding of *Graham, Miller, and Montgomery* is that, for the reasons outlined above, the state may not deny a juvenile offender a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” The prospect of release after 51 years of continuous prison confinement is not meaningful to any juvenile, so Tennessee’s mandatory minimum life sentence violates the constitutional prohibition against cruel and unusual punishment.

(1) A 51-year mandatory minimum life sentence is a *de facto* LWOP sentence.

Tyshon will not be eligible for release until he is at least 67 years old. This is well past average life expectancy in prison, and there is little chance that he will live that long. Effectively, he has been condemned to die in prison.

The average life expectancy for a Tennessee resident at birth is 76 years,⁸ and the “healthy life expectancy at birth”⁹ is 65 years. But the average juvenile who is serving a life sentence in Tennessee will not live nearly that long. *See* Dr. Michael Freeman’s Declaration attached hereto as Appendix B. Dr. Freeman, an epidemiologist, analyzed prison demographic statistics furnished by TDOC and concluded that individuals serving life sentences in Tennessee have a probable life expectancy of 52 years old. An incarcerated juvenile is likely to have an even shorter life because of the adverse effects of lengthy imprisonment beginning at such a young age. The chance that a juvenile serving a life sentence in Tennessee could survive 51 years of continuous incarceration is less than 10%.

Dr. Freeman’s conclusions are consistent with published studies and other authorities. For example, a study conducted by Campaign for the Fair Sentencing of Youth found that Michigan juveniles with life sentences have average life expectancy of 50.6 years, much lower than the general population.¹⁰ One reason for this life expectancy disparity

⁸ See U.S. Burden of Disease Collaborators, *The State of US Health, 1990-2016*, J. Am. Med. Ass’n (*JAMA*) 2018:319(14):1444, Table 3 at 1452.

⁹ “Healthy life expectancy” is defined as “the number years that a person at a given age can expect to live in good health, taking into account mortality and disability.” *Id.* at 1446.

¹⁰ Deborah LaBelle, *Michigan Life Expectancy Data for Youth Serving Natural Life Sentences 2* (2012-2015), available at <http://www.lb7.uscourts.gov/documents/1712441.pdf>.

may be that a large number of incarcerated defendants come from impoverished and traumatic backgrounds that diminish longevity—circumstances that are common among juvenile defendants. But the harsh conditions of prison life also contribute to this discrepancy. One study of inmate life expectancy in New York, for example, found that a “person suffers a 2 year decline of life expectancy for every year served in prison.”¹¹

Additionally, the United States Sentencing Commission has defined a life sentence as 470 months (or just over 39 years).¹² “This figure [of 470 months] reflects the average life expectancy of federal defendants at the time of sentencing as determined by the United States Census Bureau.” *United States v. Nelson*, 491 F.3d 344, 349-50 (7th Cir. 2007). Courts too have acknowledged the reduced life expectancy of the incarcerated. *See, e.g., United States v. Taveras*, 436 F. Supp.2d 493, 500 (E.D.N.Y. 2006) (acknowledging that life expectancy within federal prison is “considerably shortened”), *vacated in part on other grounds sub nom, United States v. Pepin*, 514 F.3d 193 (2d Cir. 2008); *People v. Buffer*, 137 N.E.3d 763, 778 (Ill. 2019) (Burke, J., specially concurring)

¹¹ Evelyn J. Patterson, *The Dose-Response of Time Served in Prison on Mortality: New York State, 1989-2003*, 103 Am. J. Pub. Health 523-28 (2013). *See also* Christopher J. Mumola, Bureau of Justice Statistics, No. NCJ 216340, *Medical Causes of Death in State Prisons, 2001-2004* (Jan. 2007) (concluding that state prisoners age 55 to 64 had death rates 56% higher than the general population).

¹² United States Sentencing Commission, *Life Sentences in the Federal System*, at 10 & n. 52 (Feb. 2015).

(noting that “the life expectancy of a minor sentenced to a lengthy prison term is ... diminished”); *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) (acknowledging that “long-term incarceration [may present] health and safety risks that tend to decrease life expectancy as compared to the general population”).

Indeed, after an intensive review of the available data, undersigned counsel are not aware of any Tennessee prisoner who has survived 51 years of continuous incarceration. Given the average life expectancy of Tennessee prisoners, a life sentence with a 51 year mandatory minimum is the functional equivalent of life without parole, meaning that juveniles sentenced to life in Tennessee are effectively and almost certainly condemned to die in prison.

(2) Release after 51 years offers virtually no opportunity to meaningfully engage in free society.

The *Miller* and *Graham* “meaningful opportunity” standard invokes not only an opportunity for release, but also an opportunity for a meaningful life outside of prison. The Supreme Court intended

more than to simply allow juveniles-turned-nonagenarians the opportunity to breath their last breaths as free people. The intent was not to eventually allow juvenile offenders the opportunity to leave prison in order to die but to live part of their lives in society.

State v. Moore, 76 N.E.3d 1127, 1137 (Ohio 2016). Assuming that a juvenile defendant could defeat the staggering odds and survive 51 years of continuous incarceration in Tennessee’s prison system, and assuming that he then could obtain a release from prison in his late 60’s, he

nevertheless would be deprived of any opportunity to meaningfully engage in free society for several reasons.

First, if he survives that long, his remaining life expectancy would be quite short. He would have little time to adjust to the outside world in order to pursue any kind of meaningful life.

Second, in all likelihood he would be suffering from the burdens of old age and ill health, severely limiting his physical capacity to “get on with his life.”

Third, anyone reentering society after a long incarceration finds himself in a strange new world and faces enormous practical and legal obstacles, and those obstacles are greater for an elderly person. It takes time for a newly freed individual to negotiate these obstacles. In addition to dealing with a myriad of “collateral consequences” of a conviction, those reentering society from prison face challenges related to many of the basic necessities of life, such as finding employment and housing and obtaining access to healthcare and other public benefits.¹³ These obstacles to meaningful reentry are compounded in the case of an elderly person released from prison after spending 51 years, his entire adult life, in confinement.

¹³ See, e.g., Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 Boston L. Rev. 255, 272-73 (2004). For an inventory of legally imposed collateral consequences of conviction, see The Counsel of State Governments Justice Center, *National Inventory of the Collateral Consequences of Conviction*, available at <https://niccc.csgjusticecenter.org>.

Fourth, spending one's entire adult life subject to the institutionalizing effects of the highly structured and authoritarian prison environment makes it psychologically difficult to adjust to the pressures and demands of living free in society, especially at such an old age. See Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment*, available at <https://aspe.hhs.gov/basic-report/psychological-impact-incarceration-implications-post-prison-adjustment> (U.S. Dep't of Health & Human Servs., 2001). Professor Haney explains how inmates psychologically adapt to the harsh conditions of prison life, in ways that enable them to survive in prison but impair their capacity to adjust to the free world upon release. It stands to reason that the adverse psychological impact of incarceration is more pronounced (i) when the incarceration begins at a young age, especially if it begins while the prisoner is a juvenile, and (ii) when the incarceration is for a longer period of time. *Id.* at 5.

Finally, it is well known that “persons who return to the free world lacking a network of close, personal contacts with people who know them well” have an especially difficult time adjusting. As Professor Haney points out, “Eventually...when severely institutionalized persons confront complicated problems or conflicts, especially in the form of unexpected events that cannot be planned for in advance, the myriad of challenges that the non-institutionalized confront in their everyday lives outside the institution may become overwhelming.” *Id.* at 8-9. A person who has been continuously incarcerated for 51 years is not likely to have any remaining connections to family or community upon release. After

spending half a century in prison, he will be “lost” in a foreign, complex, and stressful environment without a stable social network for support.

By withholding release eligibility until the twilight of a juvenile offender’s life, requiring him to spend his entire adult life undergoing the institutionalizing and stigmatizing effects of incarceration, a 51-year mandatory minimum sentence “gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.” *Graham*, 560 U.S. at 79.

(3) Imposing a 51-year mandatory minimum forswears altogether the rehabilitative ideal.

A fundamental scientific principle underlying the constitutional premise that “juveniles are different” is that—because a juvenile’s mental traits and vulnerabilities are merely “transitory”—juveniles have great potential to rehabilitate as their minds and bodies mature. *Miller*, 567 U.S. at 473. Fifty-one years of detention, however, extends far beyond the period within which a juvenile will mature and rehabilitate. Forcing a juvenile offender to wait beyond his life expectancy, until he is a geriatric with virtually no prospect for a meaningful and productive life in the free world, defeats the entire purpose of the requirement that juvenile offenders be given “a meaningful opportunity for release based upon demonstrated maturity and rehabilitation.” Such a sentence “means a denial of hope” and “share[s] . . . characteristics with death sentences” because it denies any chance for a maturing youthful offender to work toward a brighter future; despite “good behavior and character improvement,” he will remain in prison for the rest of his days.” *Graham*,

516 U.S. at 69-70 (citation and internal quotations omitted). In a word, this kind of sentence “forfeits altogether the rehabilitative ideal.” *Miller*, 567 U.S. at 473 (citing *Graham*, 560 U.S. at 74).

D. Many other jurisdictions hold that similarly lengthy mandatory minimum sentences for juveniles violate the Eighth Amendment under *Miller* and *Montgomery*.

A majority of state courts have employed the principles embodied in *Roper*, *Miller*, *Graham*, and *Montgomery* to invalidate minimum mandatory life sentences, constituting a lengthy minimum term of years, because they deprive juvenile offenders of a “meaningful opportunity” for release.¹⁴ In 2013, Iowa became one of the first jurisdictions to hold that a juvenile sentenced to a *de facto* LWOP sentence is constitutionally entitled to *Miller*-type protections affording a “meaningful opportunity for release based on demonstrated maturity and rehabilitation.” *Null*, 836 N.W.2d at 63 (quoting *Graham*, 560 U.S. at 75). The defendant in *Null* received a mandatory minimum aggregate sentence of 52.5 years for second-degree murder and first-degree robbery for an offense that occurred when he was sixteen years old. *Id.* at 45. Under the Iowa

¹⁴ In addition, several federal courts have applied these principles to mandatory sentences expressed as a term of years. The Seventh Circuit has opined that courts should apply a “children are different” approach to sentencing to both traditionally defined life sentences as well as *de facto* life sentences. *McKinley v. Butler*, 809 F.3d 908, 914 (7th Cir. 2016) (Posner, J.). The Ninth Circuit has adopted similar reasoning, holding that a lengthy term of years sentence violates *Miller* and *Graham*’s requirement that juveniles be given a meaningful opportunity to re-enter society. *Moore v. Biter*, 725 F.3d 1184, 1191–92 (9th Cir. 2013).

sentencing scheme, he would not be eligible for parole until was sixty-nine. *Id.* The court, in a thorough and well-reasoned discussion, applied *Graham* and *Miller* to hold that this kind of punishment for a juvenile offender violates the Eighth Amendment and the Iowa constitution. *Id.* at 60-77.

The *Null* court based its decision in great part on the scientific evidence discussed in *Roper*, reasoning that juveniles have not fully developed cognitive structures for risk evaluation, self-management, and impulse control. *Id.* at 55. The court noted that juveniles are also much more prone to peer influence, and their development runs part and parcel with experimentation with “risky, illegal, or dangerous activities.” *Id.* And while the adolescent brain can tend toward criminal behavior, it is also highly transformable. As the young person develops into an adult, science confirms that the impulse control and risk assessment issues fade away. *See id.* There are no strong penological justifications for lengthy juvenile sentences, because juveniles have the ability, and indeed proclivity, for change in a positive direction.

The *Null* court, and many others, have construed *Graham* and *Miller* to require a juvenile sentence to provide more time outside of prison than a few years of freedom at the end of one’s life. The *Null* court declared that “[t]he prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a ‘meaningful opportunity’ to demonstrate the ‘maturity and rehabilitation’ required to obtain release and reenter society as required by *Graham*.” *Id.* at 71. Similarly, the Connecticut Supreme Court held that under *Miller*, a mandatory minimum 50-year sentence for a juvenile offender was

unconstitutional, because it did not allow for a “meaningful opportunity” for release, which requires a chance to engage with civic society, to be employed, and to have a family. *Casiano v. Comm’r of Correction*, 115 A.3d 1037, 1046-47 (Conn. 2015). Analysis of what constitutes a “meaningful opportunity” must also take into consideration that a juvenile offender, released from prison at the end of his/her life will also have a diminished quality of life, having an increased risk for age-related health disorders, such as heart disease, hypertension, stroke, asthma, cancer, and arthritis. *Id.* According to the Supreme Courts of Iowa and Connecticut, such a degraded experience is not meaningful, under the mandates of *Graham* and *Miller*.

A groundswell of recent decisions confirms the principle that mandatory long-term sentences for juveniles convicted of homicide do not pass constitutional muster. *See State v. Davilla*, 462 P. 3d 748, 752 (Or. Ct. App. 2020) (50 year sentence required modification er); *Buffer*, 137 N.E.3d at 774 (50 year sentence); *Davis v. State*, 415 P.3d 666, 676 (Wyo. 2018) (homicide sentence of approximately 45 years before parole eligibility); *Carter v. State*, 192 A.3d 695, 702 (Md. 2018), *reconsideration denied* (Oct. 4, 2018) (100 year sentence with eligibility for parole in 50 years); *State ex rel. Carr v. Wallace*, 527 S.W.3d 55, 60–62 (Mo. 2017) (50 years until eligibility for parole); *State v. Zuber*, 152 A.3d 197, 216 (N.J. 2017) (55 year sentence); *California v. Ramirez*, 2017 WL 5824286 (Cal. Ct. App. Nov. 29, 2017) (40 year sentence); *California v. Fernandez*, 2015 WL 1283486 (Cal. Ct. Ap. Mar. 18, 2015) (50 year sentence); *Washington v. Ronquillo*, 361 P.3d 779, 789 (Wash. Ct. App. 2015) (51.3 year sentence); *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014) (homicide

sentence of 45 years prior to parole); *Adams v. Florida*, 188 So.3d 849 (Fla. St. App. 2012) (50 year sentence).

These cases reveal a pattern. For juveniles, mandatory sentences with no eligibility for parole until after 50 years offend the teachings of both *Graham* and *Miller*. Recently, the Maryland Supreme Court noted that “[m]any courts have concluded that a sentence of a term of years that precludes parole consideration for a half century or more is equivalent to a sentence of life without parole.” *Carter*, 92 A.3d at 729; *see also, White v. Premo*, 443 P.3d 597, 605 (Or. 2019), *cert. dismissed sub nom. Kelly v. White*, 140 S. Ct. 993 (2020) (“We know of no state high court that has held that a sentence in excess of 50 years for a single homicide provides a juvenile with a meaningful opportunity for release.”). The Maryland Supreme Court noted that the fifty-year benchmark likely originated from *Graham’s* description, as constitutionally problematic, of a defendant not being eligible for release “even if he spends the *next half century* attempting to atone for his crimes and learn from his mistakes.” *Carter*, 192 A.3d at 728-29 (quoting *Graham*, 560 U.S. at 79 (emphasis added)). The “meaningful opportunity” standard “means a sentence with parole eligibility significantly short of the 50-year mark.” *Id.* at 735. The undeniable trend in the case law confirms that a term-of-years sentence longer than 50 years does not comply with the strictures of *Graham* and *Miller*. Based on the reasoning of these decisions, Tennessee’s mandatory scheme does not give vulnerable and cognitively underdeveloped juvenile offenders any hope for a rehabilitated and productive life in civic society beyond the prison walls.

E. Evidencing our nation’s evolving standard of decency, a large number of states have enacted new sentencing schemes in response to *Graham, Miller* and *Montgomery*, leaving Tennessee as an outlier.

In addition to the many state court decisions voiding lengthy prison terms for children, in the wake of *Graham* and *Miller*, twenty-five states have adopted legislation limiting juvenile homicide sentences and providing within the regulatory scheme a meaningful opportunity for the inmate to demonstrate rehabilitation and maturity. Some states have capped sentences for juvenile homicide while other approaches redefine parole eligibility for juveniles previously sentenced to LWOP. *See* Ariz. Rev. Stat. Ann. §§ 13-751, 13-752 (juvenile sentences for homicide limited to 25 to 35 years); Ark. Code Ann. § 16-93-621(a)(2)(a) (juvenile homicide offenders eligible for parole after 25 years); Cal. Penal Code § 3051 (juveniles sentenced to LWOP entitled to a parole hearing no later than twenty-five years of incarceration); Colo. Rev. Stat. Ann. § 18-1.3-401(4)(c)(I)(A) & (B) (juvenile offenders sentenced to LWOP for first degree murder entitled to a re-sentencing hearing and a sentence between 30 to 50 years); Conn. Gen. Stat. Ann. § 54-125a(f)(1) (juvenile offenders sentenced to over 50 years eligible for parole after 30 years, and juvenile offenders sentenced to between 10 and 50 years eligible for parole after the greater of 12 years or 60% of the sentence); Del. Code Ann. tit. 11, § 4204A(d)(2) (juvenile offenders convicted of first-degree murder eligible for resentencing after 30 years); D.C. Code Ann. § 24-403.03(a) (juvenile offenders eligible for sentence reduction after 20 years)]; Fla. Stat. Ann. § 921.1402(2)(b) (juvenile offenders sentenced to over 25 years entitled to review of sentence after 25 years); Haw. Rev.

Stat. § 706-656(1) (all juvenile offenders entitled to life with the possibility of parole on a date to be established through a rehabilitation plan); Ky. Rev. Stat. Ann. § 640.040 (statute pre-dating *Graham* and *Miller* provides that youthful offenders convicted of a capital crime are eligible for parole after 25 years); La. Code Crim. Proc. Ann. Art 878.1 (generally, juveniles convicted of homicide eligible for parole after serving 25 years unless a special hearing is conducted determining that LWOP is appropriate); Mass. Gen. Laws Ann. ch. 279, § 24 (juveniles convicted of first-degree murder are eligible for parole in 20 or 30 years, as determined by the court); Mich. Comp. Laws Ann. §§ 769.25 (juvenile homicide offenders limited to a sentence of 25 to 40 years); Mo. Ann. Stat. § 558.047(1) (juvenile offenders sentenced to LWOP eligible for review of sentence after 25 years); Neb. Rev. Stat. Ann. § 28-105.02 (juvenile LWOP sentences become eligible for parole after 40 years); Nev. Rev. Stat. Ann. § 213.12135 (juvenile offenders for a homicide of [only one victim] eligible for parole after 20 years); N.C. Gen. Stat. Ann. §15A-1340.19A (juvenile LWOP sentences allow parole eligibility after 25 years); N.J. Stat. Ann. §2C:11-3 (juveniles convicted of first degree murder eligible for parole within 30 years); N.D. Cent. Code Ann. § 12.1-32-13.1 (juvenile offenders eligible for sentence reduction after 20 years); Or. Rev. Stat. Ann. §163.115 (juveniles sentenced to a life sentence for homicide eligible for parole in twenty-five years); Tex. Govt. Code Ann. § 508.145 (all juvenile offenders serving a life sentence are eligible for parole in 40 years); Utah Code Ann. § 76-3-206 (juvenile homicide sentence limited to 25 years); W.Va. Code § 61-11-23(b) (juvenile offenders eligible for parole after 15 years); Wyo. Stat. Ann. § 6-10-301(c)

(juvenile offenders sentenced to life eligible for parole after 25 years); Wash. Rev. Code § 9.94A.730(1) (juvenile offenders eligible for release after 20 years, except for those serving sentences for aggravated first degree murder or certain sex offenses).

The legislative history rests on the consensus that children are different and that a lengthy sentence should not be imposed on a child in the same way as upon adults. *See, e.g.*, Ark. Code Revision Comm'n, Notes on Ark. Code Ann. § 16-93-621(a)(2)(a) (“The General Assembly acknowledges and recognizes that minors are constitutionally different from adults and that these differences must be taken into account when minors are sentenced for adult crimes.”); Statutory Notes for Haw. Rev. Stat. § 706-656(1) (“The legislature acknowledges and recognizes that children are constitutionally different from adults and that these differences must be taken into account when children are sentenced for adult crimes.”). *See also*, Conf. Comm. Rpt. La. Code Crim. Proc. Ann. Art 878.1 (June 6, 2017) (noting that a change in Louisiana’s sentencing law was necessary in response to *Miller*, *Graham*, and *Montgomery*).

These recent sentencing reforms confirm a changed community standard recognizing that juvenile sentences of more than 50 years without parole eligibility are not consistent with the Eighth Amendment. *See Carter*, 192 A.3d at 729 n.43 (noting an emerging legislative consensus that a fifty plus year sentence for juveniles offends the constitution in relation to *Graham* and/or *Miller*). Tennessee’s mandatory sentencing scheme, which treats juvenile defendants exactly the same as adults and forecloses parole until after 51 years, is plainly an outlier among the states. Tennessee’s mandatory sentencing approach is out-of-

step with prevailing community standards for what is appropriate punishment for juvenile offenders, who do not carry the same attributes of culpability as adult offenders.

F. Tennessee’s Constitution, Art. I, §§ 13, 16 and 32, provides greater protection than the federal constitution against the unnecessary rigor and inhumanity of imposing a 51-year mandatory minimum prison term on a juvenile.

The Tennessee Constitution creates additional protections against excessive punishment and, viewed independently from the federal Constitution, should also be construed to invalidate a mandatory minimum 51-year sentence for a juvenile.

This Court has long recognized that, “as the final arbiter of the Tennessee Constitution, [it] is always free to expand the minimum level of protection mandated by the federal constitution.” *State v. Ferguson*, 2 S.W.3d 912, 916 (Tenn. 1999) (citation and internal quotations omitted). *See also, Miller v. State*, 584 S.W.2d 758, 760 (Tenn. 1979), *overruled by State v. Pruitt*, 510 S.W. 3d 398, 416 (Tenn. 2016) (“[A]s to Tennessee’s Constitution, we sit as a court of last resort, subject solely to the qualification that we may not impinge upon the minimum level of protection established by the Supreme Court interpretation of the federal constitutional guarantees. But state supreme courts, interpreting state constitutional provisions, may impose higher standards and stronger protections than those set by the federal constitution.”) (emphasis added).

Following these principles, Art. I, § 16, Tennessee’s Cruel and Unusual Punishments Clause, should be independently construed to

protect juveniles against mandatory minimum 51-year sentences. The Tennessee Constitution’s special concern about excessive punishment is further set forth in Art. I, § 13, which provides “[t]hat no person arrested and confined in jail shall be treated with unnecessary rigor”; and in Art. I, 32, which provides “[t]hat the erection of safe prisons, the inspection of prisons, and the humane treatment of prisoners, shall be provided for.” Given these additional provisions against excessive punishments, strong grounds exist for independently applying the Tennessee Constitution to protect against the kind of mandatory life sentence that was imposed on Appellant Tyshon Booker.

VI. CONCLUSION

For the foregoing reasons, *amici curiae* Amos Brown, Charles Lowe-Kelley, the Tennessee Association of Criminal Defense Lawyers, and the National Association of Criminal Defense Lawyers urge the Court to grant Tyshon’s application for permission to appeal.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Under Tennessee Supreme Court Rule 46, § 3.02, I hereby certify that this brief contains 7,496 words as calculated by Microsoft Word, and it was prepared using 14-point Century font with 1.5x line spacing.

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CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing motion was served electronically or mailed via U.S. first class mail, postage prepaid, this 9th day of June, 2020, to:

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