No. 18-1259

IN THE

Supreme Court of the United States

BRETT JONES,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

ON WRIT OF CERTIORARI TO THE MISSISSIPPI COURT OF APPEALS

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, MISSISSIPPI OFFICE OF THE STATE PUBLIC DEFENDER, AND MISSISSIPPI PUBLIC DEFENDERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are the National Association of Criminal Defense Lawyers, the Mississippi Office of State Public Defender, and the Mississippi Public Defenders Association. *Amici* have a strong interest in the consistent and reliable application of the Eighth Amendment's prohibition on disproportionate punishment, as interpreted in *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016); and in ensuring that juvenile life-without-parole sentences are imposed only in the rare case where that harsh sentence is constitutional.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme

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[1] Pursuant to Rule 37.3, counsel of record for the parties have consented in writing to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici*, their members, and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The Mississippi Office of the State Public Defender (OSPD) is a state agency created by the Mississippi Legislature to "act as spokesperson for all matters relating to indigent defense representation," among other things. Miss. Code § 99-18-1 (7). OSPD is also required to provide "information for the Legislature pertaining to the needs of public defenders practicing in all state, county, municipal, and youth courts," Miss. Code § 99-40-1 (4)(a), and is expected to speak out on issues affecting the criminal legal system, including sentencing policy. In particular, and in accord with OSPD's statutory mandate, the agency was a founding member of the Mississippi coalition for the implementation of this Court's decision in *Miller v. Alabama*. Through that work, OSPD housed the Juvenile Sentencing Resource Counsel Project, which was created to assist pro bono counsel and public defenders handling juvenile life without parole cases.

The Mississippi Public Defenders Association (MPDA) is Mississippi's only professional association of attorneys, investigators, and social workers practicing in the area of indigent defense. MPDA's mission is to improve the quality of client-centered representation of Mississippi's indigent defendants while rigorously defending the bedrock constitutional right to counsel. In the over three decades since its founding, MPDA members have served on various task forces and committees essential to the development of criminal law and sentencing in Mississippi, including the Mississippi Supreme Court Advisory Committee on

Rules, the Mississippi Public Defender Task Force, the Mississippi Corrections and Criminal Justice Oversight Task Force, the Mississippi Model Jury Instructions Commission, the Commission for Study of Domestic Abuse Proceedings, the Sentencing Disparity Task Force, and the Uniform Criminal Rules Study Committee.

INTRODUCTION AND SUMMARY OF ARGUMENT

Miller v. Alabama held that a court considering whether to sentence a juvenile to life without parole must "distinguish[] … between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' " 567 U.S. 460, 479–80 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)). While the Court "d[id] not foreclose a sentencer's ability to make th[e] judgment" that a juvenile is irreparably corrupt, thereby justifying a life-without-parole sentence, the Court warned that the sentence would be "uncommon"—because "children's diminished culpability" and "heightened capacity for change" create "great difficulty" in concluding, at the outset, that a child is beyond rehabilitation. *Id.*

Montgomery v. Louisiana confirmed that "irreparable corruption" (or "irretrievable depravity," or "permanent incorrigibility"—terms the Court has used interchangeably) is a gating requirement for a constitutional sentence of life without parole for a juvenile offender. 136 S. Ct. 718, 733, 734 (2016). *Montgomery* explained that *Miller* announced a substantive rule because it "rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." *Id.* at 734 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)). Consistent with precedent, that substantive rule was retroactive "because it necessarily carries a significant risk that a defendant—here, the vast majority of juvenile offenders—faces a punishment that the law cannot impose." *Id.* (quoting *Schriro v. Summerlin*, 542

U.S. 348, 352 (2004)) (alterations and quotation marks omitted).

Montgomery also addressed the procedural component of *Miller*'s rule, explaining that a sentencing hearing in which "youth and its attendant characteristics are considered" would be necessary to "separate those juveniles who may be sentenced to life without parole from those who may not." 136 S. Ct. at 735 (citation omitted). Addressing Louisiana's argument that *Miller* did not require trial courts to make a factual finding of permanent incorrigibility, the Court confirmed that it would "limit the scope" of procedural requirements that "intrud[e] more than necessary" on the States' criminal justice systems. *Id.* At the same time, the substantive rule of *Miller* would be paramount: States are not "free to sentence a child whose crime reflects transient immaturity to life without parole" because "this punishment is disproportionate under the Eighth Amendment." *Id.*

Four years after *Montgomery*, states that do not require a determination of permanent incorrigibility in order to sentence a child to life without parole are not reliably implementing the substantive rule of *Miller*. Mississippi cases illustrate the problems with that approach. Generally speaking, Mississippi courts presume a life-without-parole sentence is justified, and either avoid the question of permanent incorrigibility altogether, or require the juvenile offender to prove he will never reoffend. The resulting sentences of life without parole violate *Miller*'s substantive rule because they do not rest on a finding that the offender is more likely than not "permanently incorrigible."

The safeguard of a finding of permanent incorrigibility is necessary to ensure that juvenile offenders receive life-without-parole sentences only when that

sentence is proportionate and lawful. The finding requirement brings purpose and structure to a sentencer's review of the juvenile offender's individualized circumstances, ensuring that the sentencing analysis is not overwhelmed by the heinousness of the crime, or by the potential risk of immediate release (a consideration that should be left to a later parole board). Sentencers retain discretion to impose life-without-parole sentences on juvenile offenders, but that discretion is properly bounded by "*Miller*'s central intuition—that children who commit even heinous crimes are capable of change." *Montgomery*, 136 S. Ct. at 736.

ARGUMENT

I. MISSISSIPPI COURTS SENTENCE JUVENILE OFFENDERS TO LIFE WITHOUT PAROLE REGARDLESS OF PERMANENT INCORRIGIBILITY

The Mississippi Supreme Court holds that "*Miller* does not require trial courts to make a finding of fact regarding a child's incorrigibility" in order to sentence him to life in prison without the opportunity for parole. *Chandler v. State*, 242 So. 3d 65, 69 (Miss. 2018). All that a Mississippi court must do to impose that sentence is hold a hearing to consider the so-called "*Miller* factors": chronological age; family and home environment; circumstances of the offense; the effect of youth on interactions with the justice system; and the possibility of rehabilitation. *Id.*

A review of Mississippi decisions sentencing juvenile offenders after *Miller* and *Montgomery* reveals that *Miller* hearings alone are insufficient to provide juvenile offenders with the full protection of the Eighth Amendment. Without a required determination of permanent incorrigibility, life without parole is

not reserved for the "rare juvenile" who "exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified." *Montgomery*, 136 S. Ct. at 733. Instead, the baseline in Mississippi is that imposing life without parole is constitutional, and the burden is on the juvenile offender to prove otherwise. *See Jones v. State*, 122 So. 3d 698, 703 (Miss. 2013); *Wharton v. State*, 2019 WL 6605871, *4 (Miss. Dec. 5, 2019) ("[T]he burden rests with the juvenile offender to convince the sentencing authority that *Miller* considerations are sufficient to prohibit a sentence of life without parole") (citation and internal quotation marks omitted).

Mississippi sentencers are thus free to impose life-without-parole sentences on juvenile offenders regardless of permanent incorrigibility. If the issue of incorrigibility is considered at all, mere uncertainty about the possibility of recidivism can justify a sentence of life without parole. Courts tick through the *Miller* factors, but do not focus on the permanent incorrigibility prerequisite. There also is no rubric to reconcile *Miller* factors that conflict—for example, when a juvenile had an abusive family, but committed a crime free from peer pressure; or when the juvenile's plea agreement seems fair, but the offender has already begun to rehabilitate himself. In those circumstances, the sentencer's whim controls.

Courts in Mississippi even may base a life-without-parole sentence on considerations that undermine *Miller*'s premise altogether—such as the fact that the defendant committed homicide, though that is a prerequisite for a juvenile life-without-parole sentence, or the fact that a juvenile was already seventeen when he offended, though *Roper* and its progeny treat that age as reflecting immaturity.

The following examples show that the existing procedure in Mississippi is inadequate to limit life-without-parole sentences to the rare juvenile offender who is permanently incorrigible.

A. Mississippi Courts Ignore Permanent Incorrigibility Altogether

1. Joey Chandler murdered his cousin in 2005, when he was seventeen years old, and then spent a decade in prison, during which he enrolled in prison training programs and had a near-spotless disciplinary record. Nonetheless, in 2015, a trial court resentenced him to life without parole without even mentioning that sentence's prerequisite of permanent incorrigibility. The court's analysis was flawed in at least three ways.

First, the court's analysis centered on generic attributes of all seventeen-year-olds. The judge noted that seventeen-year-olds can join the United States military and can drive in most states. Order, *Chandler v. State*, No. 08491 (Miss. Cir. Ct. Oct. 9, 2015), available at App. to Pet. for Writ of Cert., *Chandler v. Mississippi*, No. 18-203 (U.S. Aug. 15, 2018) ("Chandler Pet. App."), 23a. The judge further reasoned that a different seventeen-year-old won a Congressional Medal of Honor for his conduct at Iwo Jima, several decades before Joey Chandler was born. *Id.* 23a n.4.

But the privileges generally allowed to seventeen-year-olds could not possibly illuminate whether Chandler individually was the rare juvenile offender who was permanently incorrigible and thus deserving of life in prison without parole. If anything, the court's emphasis on the age of seventeen as reflecting maturity was in tension with the long line of Supreme Court precedent reflecting that "children are different." *Miller*, 567 U.S. at 480; *see also Roper*, 543 U.S.

at 574; *Graham v. Florida*, 560 U.S. 48, 68 (2010). *Roper* drew a line at eighteen years of age, notwithstanding "the objections always raised against categorical rules," because of the "general differences between juveniles under 18 and adults." 543 U.S. at 569, 574. *Miller* and *Montgomery* recognized that those differences require a special judgment of permanent incorrigibility in sentencing any offender under 18 to life without parole—even though there may be differences among defendants and among crimes. *Miller*, 567 U.S. at 480 n.8. Yet the Mississippi trial court in Joey Chandler's case took a contrary position, assuming that all seventeen-year-olds are mature enough to be treated as adults.

As to Chandler individually, the court stated only that "nothing in the record … reflect[s] that [Chandler] suffered from a lack of maturity," noting Chandler had fathered a child and sold marijuana. Chandler Pet. App. 23a. Those sparse facts shed no light on Chandler's individual character, emotional development, or any other attribute relevant to his corrigibility. The reference to Chandler's sexual activity was also a disturbing echo of the trial court's reasoning in Brett Jones's case that his girlfriend's belief she might be pregnant showed Jones "had reached some degree of maturity." J.A. 151.

Second, the court focused excessively on the existence and facts of Chandler's homicide. The court recited that Chandler shot his cousin twice and had not acted in self-defense. Chandler Pet. App. 24a. The court also reasoned that the victim's "family is forever deprived of the companionship and love and interaction with him." *Id.* 25a.

To be sure, the "circumstances of the homicide offense," including "the extent of [the offender's] participation in the conduct and the way familial and peer pressures may have affected him," are relevant to the defendant's culpability. *Miller*, 567 U.S. at 477. But *Miller* framed those considerations as relevant to the overarching question of the offender's incorrigibility. Without that frame, "the brutality or cold-blooded nature" of the homicide retains the potential to "overpower mitigating arguments based on youth … even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe." *See Roper*, 543 U.S. at 572–73.

Indeed, because juvenile life-without-parole sentences are only available for homicide in the first place, the fact that a murder occurred cannot independently justify that sentence. In *Miller* and *Montgomery* themselves, the offenders' horrific crimes did not preclude the Court's inquiry into the children's individualized circumstances and potential for rehabilitation. *See* 567 U.S. at 468 (Evan Miller declared, "I am God, I've come to take your life," as he beat his neighbor to death with a baseball bat). By contrast, in Joey Chandler's case, the trial court's focus on the crime supplanted the inquiry whether Chandler was permanently incorrigible.

The court further observed that Chandler's crime was "no less heinous" than the unrelated killing of the son of a federal judge, for which a seventeen-year-old perpetrator was executed in 2002. The court did not mention that three years later, *Roper* had outlawed the death penalty for juveniles. Chandler Pet. App. 26a n.10. That comment, and the accompanying omis-

sion, confirmed that the court generally rejected principles of lesser culpability and different sentencing considerations for juveniles.

Third, the court noted that "[t]he United States Supreme Court also talks about rehabilitation." Chandler Pet. App. 26a–27a. Chandler introduced evidence that he earned his GED, "excelled in job training programs," and maintained a near-perfect disciplinary record while in prison. *Chandler v. State*, 242 So. 3d 65, 72 (Miss. 2018) (Waller, C.J., dissenting); Pet. for Writ of Cert., *Chandler v. Mississippi*, No. 18-203 (U.S. Aug. 15, 2018) ("Chandler Pet."), 4–5. He also showed that he would have a job and a place to live if he were ultimately released. *Chandler*, 242 So. 3d at 72 (Waller, C.J., dissenting). But the court did not mention any of that evidence—though it should have negated a finding of permanent incorrigibility and precluded the sentence of life without parole. Instead the trial court only "note[d] that the Executive Branch has the ability to pardon and commute sentences." Chandler Pet. App. 26a–27a.

At the very least, Chandler's progress while in prison merited consideration by a court tasked with determining whether he "exhibits such irretrievable depravity that rehabilitation is impossible." *Montgomery*, 136 S. Ct. at 733. Indeed, Chandler's showing resembled Henry Montgomery's "evolution ... to a model member of the prison community," which this Court held up as "relevant … to demonstrate rehabilitation." *Id.* Moreover, the court's reliance on executive clemency was misguided, as *Graham* recognized that "remote possibility … does not mitigate the harshness" of a life-without-parole sentence for a juvenile. 560 U.S. at 70.

The Mississippi Supreme Court affirmed Chandler's sentence without acknowledging that only a permanently incorrigible juvenile may be sentenced to life without parole. The supreme court claimed it could not "say that the trial court's decision … was an abuse of discretion"; instead, the trial court "exceeded the minimum requirements" under law "by specifically identifying every *Miller* factor in its order." *Chandler*, 242 So. 3d at 68, 70. Yet Joey Chandler's resentencing to life without parole was widely criticized as irreconcilable with this court's Eighth Amendment jurisprudence.[2]

2. In 2002, Shawn Davis and two other teens participated in a murder. *Scarborough v. State*, 956 So. 2d 382, 383 (Miss. Ct. App. 2007). In 2015, Shawn Davis was resentenced to life without parole by a court that did not consider whether he was permanently incorrigible, but erroneously analyzed whether he was ready for immediate release instead. Transcript of Proceedings, *State v. Davis*, No. 2003-10,660 (Miss. Cir. Ct. Aug. 3, 2015), available at App. to Pet. for Writ of Cert. in *Davis v. Mississippi*, No. 17-1343 (U.S. Mar. 23, 2018) ("Davis Pet. App."), 16a.

This Court has carefully distinguished between the "judgment at the outset" that a juvenile offender "never will be fit to reenter society" and the later deci-

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[2] *See* George Will, *Mississippi Resident Deserves Opportunity to Rehabilitate*, National Review (Nov. 11, 2018), https://www.nationalreview.com/2018/11/joey-chandler-sentence-mississippi-prison-system-rehabilitation/; Michael B. Mukasey & Mary B. McCord, *What Punishment Is Cruel and Unusual for a Crime Committed at 17?*, Wall Street Journal (Sept. 21, 2018), https://www.wsj.com/articles/what-punishment-is-cruel-and-unusual-for-a-crime-committed-at-17-1537567051.

sion whether "to release that offender during his natural life." *Graham*, 560 U.S. at 75. The former judgment requires special care, and must rest on a finding of permanent incorrigibility—but the latter determination is largely left to the States, as "[t]he Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life." *Id.* Yet the sentencing court in Davis's case asked the wrong question—whether Davis was ready for *immediate* release, not whether future rehabilitation was possible. The court concluded: "The nature of this offense, pitiless, prolonged agony of the victim, the family, caused as a result of your planning convinces me that your release into society through parole would constitute a danger to the public in general and especially to vulnerable citizens in particular." Davis Pet. App. 15a–16a.

As in *Chandler*, the court's fixation on the existence of the crime and the harm to the victim was also improper. The court did not, for instance, attempt to use those facts to distinguish Davis from other juvenile offenders, instead lamenting that Davis's conduct was symptomatic of "an entire generation of our youth … being raised without any vestige of human kindness whatsoever." Davis Pet. App. 13a. At the same time, the court gave short shrift to other evidence suggesting Davis was not irredeemable—like the fact that, despite his "difficult and dysfunctional family life," Davis's grades improved when he briefly lived with an uncle who imposed "structure, discipline, and stability." Davis Pet. App. 11a.

The court of appeals affirmed Davis's sentence in a cursory opinion that ignored the critical issue of per-

manent incorrigibility and, instead, repeated the details of the crime and concluded the trial court had not "abused its discretion in applying the *Miller* sentencing factors." Order, *Davis v. State*, No. 2016-CA-00638 (Miss. Ct. App. Oct. 10, 2017), Davis Pet. App. 8a.

B. Mississippi Courts Assume Life Without Parole Is An Appropriate Sentence for Juveniles

This Court's Eighth Amendment precedents addressing juvenile sentencing hold that permanent incapacitation is usually inappropriate for juveniles because "[t]he characteristics of juveniles" make a judgment of permanent incorrigibility at least "questionable." *Graham*, 560 U.S. at 72–73. As a general matter, "incorrigibility is inconsistent with youth." *Miller*, 567 U.S. at 473 (quoting *Graham*, 560 U.S. at 73); *see also Roper*, 543 U.S. at 573 ("It is difficult even for expert psychologists to differentiate … the rare juvenile offender whose crime reflects irreparable corruption"). Thus, although a judgment of permanent incorrigibility is the only way to "justify life without parole," *Graham*, 560 U.S. at 72, the Court has recognized it may be challenging to determine that a child is permanently incorrigible.

But if a sentencer cannot conclude the offender is permanently incorrigible, his doubt must result in a parole-eligible sentence—because by law, the only juvenile offender who is eligible for life without parole is one "who exhibits such irretrievable depravity that rehabilitation is impossible." *Montgomery*, 136 S. Ct. at 733. In view of that demanding standard, *Miller* recognized that "appropriate occasions" for life-without-parole sentences would be "uncommon." 567 U.S. at 479.

Yet in Mississippi, the sentencer is permitted to start from the assumption that life without parole is justified. And often, the sentencer requires the offender to do the impossible to prove otherwise, *guaranteeing* he will never reoffend. The State may have discretion to require such a showing in the context of the actual parole determination, where the offender's immediate release is on the table. But *Miller* does not permit courts to reimpose life without parole on that basis.

1. At Jerrard Cook's resentencing, the trial court reimposed a sentence of life without parole without finding that Cook was permanently incorrigible. The appellate court affirmed, dismissing the permanent incorrigibility concept as unworkable.

Weighing the possibility of rehabilitation merely as one of the *Miller* factors, the court reasoned that Cook had received rule violations while imprisoned, but ignored other evidence demonstrating that Cook was not permanently incorrigible. A court-appointed psychologist testified that Cook "does not represent one of those rare offenders who could not be rehabilitated." Record Transcript (on file with the Mississippi Court of Appeals) 203, No. 2016-CA-00687-COA, cited at Pet. for Writ of Cert. in *Cook v. Mississippi*, No. 18-98 (U.S. July 20, 2018) ("Cook Pet."), 7. Other witnesses, including Cook's pastor, testified that Cook had "matured a lot" while in prison and had "taken responsibility" for his crime. Tr. 123, 135, 164, 170, cited at Cook Pet. 6. Cook also spoke in allocution and "ask[ed] for forgiveness" from the victim's family. *Cook v. State*, 242 So. 3d 865, 875 (Miss. Ct. App. 2017). The trial court did not discuss any of that evidence, but it apparently concluded that it did not suffice to show a "*significant* possibility of rehabilitation," *id.* (emphasis

added)—falling short of the necessary determination that "rehabilitation is impossible," *Montgomery*, 136 S. Ct. at 733.

The appellate court flouted this Court's holding that a life-without-parole sentence is unconstitutional for a juvenile who is not permanently incorrigible. The court observed: "According to the Supreme Court, the judge is supposed to determine whether the offender's 'crimes reflected *only* transient immaturity' or instead 'reflect irreparable corruption.' " *Cook*, 242 So. 3d at 873 (quoting *Montgomery*, 136 S. Ct. at 736) (emphasis in *Cook*). But, the court criticized, "there probably are few murders that reflect *only* transient immaturity," and the term "irreparable corruption" "sounds more like a theological concept than a rule of law to be applied by an earthly judge." *Id.* (internal quotation marks and alterations omitted).

The court affirmed because it was sufficient the trial court discussed the *Miller* factors. 242 So. 3d at 876. The court acknowledged the expert testimony that there was *no* "data … to suggest" that Cook would reoffend, and noted Cook's allocution. 242 So. 3d at 875. But the court emphasized that Cook "did not provide any additional testimony or evidence to demonstrate that rehabilitation was likely." *Id.* The court did not explain what evidence could have sufficed, given that Cook had offered expert testimony, witness testimony, and Cook's own allocution, all supporting his capacity for change. Nor did the court attempt to reconcile the burden it imposed on Cook with *Montgomery*'s requirement that rehabilitation must be "impossible." 136 S. Ct. at 733.

Untethered to the inquiry into permanent incorrigibility, the courts adjudicating Cook's sentence also were free (as in *Chandler* and *Davis*) to undermine the

basic precepts of *Miller*. The resentencing court assumed that Cook, at seventeen, was close enough to eighteen "such that this factor should not weigh against the imposition of a sentence of life without parole." Order Denying Re-Sentencing, *Cook v. State*, No. CI2013-0219 (Miss. Cir. Ct. Apr. 1, 2016), available at App. to Pet. for Writ of Cert., *Cook v. Mississippi*, No. 18-98 (U.S. July 20, 2018), 29a. The appellate court took a similar tack, reasoning (in two places) that life without parole was appropriate because Cook's accomplice—*who was over eighteen at the time of the crime*—received that sentence. 242 So. 3d at 874, 876.

2. *Cook* is one of a number of cases in which juvenile offenders were given life-without-parole sentences after the courts required virtual certainty that the defendants would be rehabilitated.

Darren Lee Wharton received a sentence of life without parole under such circumstances. *Wharton v. State*, 2019 WL 6605871, *8 (Miss. Dec. 5, 2019). The trial court found Wharton "made efforts to better himself without the motivation of possible parole," but noted expert testimony that "no future behavior is *guaranteed*," and concluded it was too difficult "to predict whether Wharton's future behavior will conform to his behavior while incarcerated." *Id.* (quoting trial court; emphasis added). The state supreme court found "no abuse of discretion" because the trial court considered the *Miller* factors. *Id.* at *9.

Charles Dalton Shoemake received a sentence of life without parole even though his expert and the State's expert *agreed* he was not permanently incorrigible. *Shoemake v. State*, 2019 WL 5884479, *12, *14 (Miss. Ct. App. Nov. 12, 2019) (Westbrooks, J., concur-

ring in part and dissenting in part) (quoting expert testimony describing rehabilitation as "probable" and "reintegration" as "likely"). But the trial court discounted the expert testimony, stating: "Clearly this court does not have the clairvoyance to know if Shoemake can, in fact, be rehabilitated." *Id.* *8. The court of appeals affirmed, reasoning that although the trial court acknowledged the possibility of Shoemake's rehabilitation, the other *Miller* factors cut against him. "There is no Mississippi precedent for the proposition that the possibility of rehabilitation overrides the other *Miller* factors—or even that it is the preeminent factor." *Id.* *8.

The trial court in *Shoemake* repeated language from the resentencing of Lois Hudspeth. There, the court also disclaimed "clairvoyance" about Hudspeth's prospects for rehabilitation, and entered a sentence of life without parole which the appellate court affirmed. *Hudspeth v. State*, 179 So. 3d 1226, 1228 (Miss. Ct. App. 2015) (quoting trial court).

Most recently, in Joshua Miller's case, the court of appeals affirmed a life-without-parole sentence also premised on the lack of "clairvoyance" about Miller's future rehabilitation. *Miller v. State*, 2020 WL 2892820, *7 (Miss. Ct. App. June 2, 2020). Two judges specially concurred, asserting that a trial court should have to make a finding of permanent incorrigibility—"free of doubt or guessing"—before imposing that sentence. *Id.* at *9 (Lawrence, J., specially concurring). And three judges dissented, faulting the trial court's failure to weigh expert testimony showing Miller's capacity for change. *Id.*

C. When Mississippi Courts Apply The Correct Framework, They Find That Life Without Parole Is Rarely Appropriate, As *Miller* Contemplated

1. Since *Miller*, Mississippi courts have generally resentenced defendants to life without parole when the State has sought that result. As a result, parole-eligible sentences for juvenile offenders in Mississippi generally arise from agreed-upon resolutions with the State, rather than contested resentencing proceedings. *E.g.*, *State v. Williams*, Cause No. 1998-10, 421 (2) (Miss. Cir. Ct. Feb. 12, 2020); *Stewart v. State*, No. 2013-0027 432 (21) (Miss. Cir. Ct. Sept. 6, 2017). Even so, *twenty-five percent* of Mississippi juveniles eligible for a life-without-parole sentence have received that sentence after *Miller*—a proportion that cannot be reconciled with this Court's call for the sentence to be limited to "rare" and "uncommon" cases. *See* Office of State Public Defender, *Juvenile Life Without Parole in Mississippi, February 2020*, at 3, http://www.ospd.ms.gov/REPORTS/Juvenile%20Life%20without%20Parole%20report%2002-2020.pdf.

Occasionally, however, trial courts have correctly employed *Miller*'s framework and have required a showing that rehabilitation would be impossible. For example, Jamario Brady was resentenced to life with the opportunity for parole, even though the court recognized that "Brady has not been a model prisoner" and "any guess as to [his] chances of successful rehabilitation would be just that—a guess." *Brady v. Mississippi*, Order at 6–7, Cause No. 14-CI-15-0033-CEW (Miss. Cir. Ct. Dec. 2, 2015). Nonetheless, Brady was "not that rare and uncommon juvenile that is deserving of a sentence of life with no possibility for parole."

Id. 7. The court refused to conflate its sentencing judgment with the role of a parole board, reasoning "Brady is entitled to at least be considered for parole" even though it could not "say when or even if" parole would be granted. *Id.* 7–8.

A similar framework has yielded the same result in other cases. For example, in Ricky Bell's resentencing, the court restated *Miller*'s command that life-without-parole sentences should be "*rare*" and "*uncommon*" in light of "the great difficulty" of distinguishing the juvenile offender who is irreparably corrupt. *Bell v. State*, Order at 2, Cause No. 2013-00155 (Miss. Feb. 18, 2014). The court found Bell's sentence of life without parole violated the Eighth Amendment because it found "no evidence … that Mr. Bell is one of those 'uncommon' and 'rare' juvenile homicide offenders who may be sentenced to life without eligibility for parole." Order at 3. In Jerrian Horne's case, the court imposed a parole-eligible sentence using the same reasoning. *Horne v. State*, Order at 3, Cause No. CI15-0038 (Miss. Cir. Ct. Oct. 26, 2015) (finding "no evidence … that Mr. Horne is one of those 'uncommon' and 'rare' juvenile homicide offenders").

2. Because trial courts in Mississippi are free to ignore the permanent incorrigibility question and weigh the "*Miller* factors" as they see fit, sentencing outcomes in Mississippi do not reveal any rational distinction between those offenders who are permanently incorrigible and those who are not.

Joey Chandler introduced copious evidence of his capacity for rehabilitation—including the character change he *already* had experienced—yet was sentenced to life without parole by a court that did not even acknowledge that sentence should be rare and

uncommon. Jerrard Cook introduced similar evidence, but the trial court imposed life without parole after identifying each *Miller* factor and concluding that none barred that sentence; on appeal, the reviewing court insisted it was incapable of evaluating Cook's corrigibility. Charles Shoemake received a sentence of life without parole despite unanimous expert testimony supporting his ability to change, because the court said the issue of rehabilitation should receive no special weight.

Yet Jamario Brady, Ricky Bell, and Jerrian Horne received sentences that allow the possibility of release. The courts that imposed those more lenient sentences did not rely on a superior showing of personal transformations or some other evidentiary trump card. Instead, those resentencing courts went beyond the floor established by the Mississippi Supreme Court and properly evaluated whether the offender was the *rare* individual eligible for a life-without-parole sentence. By contrast, the trial and appellate courts in Chandler, Cook, and Shoemake's sentencings assumed their task was—as the Mississippi Supreme Court has said—only to consider the *Miller* factors and impose a sentence at their discretion.

Thus the Mississippi Supreme Court's faulty interpretation of *Miller* produces arbitrary juvenile sentencing outcomes. A juvenile whose sentencer independently comprehends *Miller* may receive a parole-eligible sentence, unless he is rare and irretrievably depraved. But a juvenile whose sentencer hews only to the state supreme court's guidance may—and often does—receive a life-without-parole sentence that is not tied to any consideration of corrigibility whatsoever.

II. STATE COURTS THAT REQUIRE A FINDING OF PERMANENT INCORRIGIBILITY RELIABLY IMPLEMENT *MILLER*

The foregoing cases demonstrate that Mississippi's current practice is inadequate to effectuate the constitutional rule that a life without parole punishment is disproportionate for "the vast majority of juvenile offenders" who are not "permanently incorrigible." *Montgomery*, 136 S. Ct. at 734, 735; *Miller*, 567 U.S. at 479. The best, and perhaps the only way, to carry out that command is to require an express ruling that a juvenile is permanently incorrigible as a condition of a life-without-parole sentence.

State supreme courts that require a finding of permanent incorrigibility to justify life without parole enable the meaningful and consistent application of *Miller*. Instead of superficially nodding to the attributes of childhood identified in *Miller*, the sentencer must consider those attributes in the context of the central inquiry into incorrigibility. The finding requirement ensures courts do not give outsized importance to considerations like the seriousness of the crime, which has the potential to "overpower" the analysis simply because of its gravity. *Roper*, 543 U.S. at 553. It also reduces the risk that the sentencer will wrongly focus on the danger to the public from immediate release, instead of asking whether the court can conclude at sentencing that parole will never be appropriate, even decades in the future.

Requiring the sentencer to reach a conclusion of permanent incorrigibility ensures that the *Miller* factors function as this Court intended: they enable the sentencer to distinguish between the relatively rare juvenile who may constitutionally be sentenced to life without parole and the majority of juveniles who may

not. That inquiry may be challenging but it is far from impossible. Sentencers in states with a required finding of permanent incorrigibility still can and do impose sentences without the possibility of parole on juvenile offenders. But they do so only in the "uncommon" case in which the evidence—whether expert testimony or clear facts—reveals the "rare juvenile offender" who is incapable of change. *Miller*, 567 U.S. at 479. The resulting sentences are substantively consistent with the Eighth Amendment.

A. A Required Determination Of Permanent Incorrigibility Reduces The Risk Of Unconstitutional Life-Without-Parole Sentences

1. The Pennsylvania Supreme Court recognizes that *Miller* requires life-without-parole sentences for juveniles to be accompanied by "a conclusion, supported by competent evidence, that the defendant will forever be incorrigible." *Commonwealth v. Batts*, 163 A.3d 410, 444, 472 (Pa. 2017). The court also holds that "faithful application" of *Miller* further dictates a presumption against life-without-parole sentences for juveniles. *Id.*

In *Batts*, the Pennsylvania Supreme Court used those procedural tools to reverse a life-without-parole sentence, which the trial court imposed after reasoning that the factors cutting against the offender outweighed those in the offender's favor. 163 A.3d at 428. At the same time, the trial court "repeatedly made the conflicting finding that there remained a possibility that Batts could be rehabilitated." *Id.* The state supreme court recognized that the trial court's own findings could not support a determination of permanent incorrigibility, and thus could not support a sentence with no chance for release. *Id.* at 445–46 (citing trial

court statement that Batts "may ultimately prove to be amenable to treatment"). Importantly, *Batts* expressly distinguished the sentencing decision from the ultimate propriety of release: "[A]n erroneous decision in favor of the offender … carries minimal risk," because if the offender is never rehabilitated, "he or she simply serves the rest of the life sentence without ever obtaining release on parole." *Id.* at 475.

Similarly, requiring a finding of incorrigibility ensures that, as *Miller* contemplated, the circumstances of the crime will not improperly dominate the analysis. In *Commonwealth v. Moye*, the Pennsylvania appellate court reversed where the trial court claimed to have found the offender permanently incorrigible. 224 A.3d 48, 57 (Pa. Super. Ct. 2019). But the trial court also found expert testimony that "Moye could be successfully rehabilitated" to be "credible," "informative" and "good guidance." *Id.* at 54, 57. The court of appeals reversed, because the trial court's purported judgment of permanent incorrigibility could not be reconciled with its favorable assessment of the expert testimony. *Id.* The appellate court also noted the trial court had "overly focused" on "the nature of the crimes" and the victim impact statement—which were the only evidence offered by the State, but were not in themselves sufficient to establish Moye's incorrigibility. *Id.*

2. In Illinois, the required finding of permanent incorrigibility ensures that Illinois juveniles are not subject to life-without-parole sentences based on mere uncertainty about corrigibility. In *People v. Hixson*, the court of appeals reversed a sentence of "de facto life without parole," treated as life without parole under Illinois law. 2019 WL 2488015, *8 (Ill. App. Ct. Jun.

7, 2019). The trial court had not found irreparable corruption, but had merely characterized the offender's rehabilitative potential as "low." *Id.* at *5. Falanzo Hixson—who earned his GED, took college classes, and completed drug treatment, all while in prison—was later resentenced to a sentence of 35 years with the opportunity for parole. Jim Dey, *Resentencing a new lease on life for Champaign man*, The Champaign News-Gazette (Jan. 12, 2020), https://www.news-gazette.com/opinion/columns/jim-dey-resentencing-a-new-lease-on-life-for-champaign-man/article_81e097f8-f048-5702-935c-641ec2a5c2af.html.

In other Illinois cases, the finding requirement appropriately restrained trial courts that "focused on the brutality of the crime and the need to protect the public, with no corresponding consideration given to defendant's opportunity for rehabilitation." *People v. Paige*, 2020 WL 1330418, *8 (Ill. App. Ct. Mar. 20, 2020). In *Paige*, the court reversed because the trial court had overweighed its horror at the offender's crime (a home invasion) while giving insufficient attention to expert testimony that Paige could be rehabilitated through treatment and counseling. 2020 WL 1330418, *7. Similarly, in *People v. Morris*, resentencing was warranted because the trial court equivocated on the defendant's incorrigibility, asking: "Is there room for rehabilitation for Pharoah Morris? That's up to him." 78 N.E.3d 429, 437 (Ill. App. Ct. 2017).

3. In Oklahoma, the court of criminal appeals likewise has remanded sentences of life without parole when there is no underlying finding of permanent incorrigibility. *See Stevens v. State*, 422 P.3d 741 (Okla. Crim. App. 2018); *Luna v. State*, 387 P.3d 956, 963 (Okla. Crim. App. 2016).

That court also has imposed other procedural protections to effectuate *Miller*'s substantive rule. Unlike the Mississippi judge in *Cook* who insisted that permanent incorrigibility was hopelessly abstract, the Oklahoma Court of Criminal Appeals identified specific considerations that may be relevant to incorrigibility: "the defendant's: (1) sophistication and maturity; (2) capability of distinguishing right from wrong; (3) family and home environments; (4) emotional attitude; (5) pattern of living; (6) record and past history, including previous contacts with law enforcement agencies and juvenile or criminal courts, prior periods of probation and commitments to juvenile institutions; and (7) the likelihood of the defendant's rehabilitation during adulthood." *Stevens*, 422 P.3d at 750.[3]

4. In Georgia, too, the required finding of permanent incorrigibility serves as a check on improper trial court reasoning. In *Veal v. State*, the supreme court reversed the trial court's sentence of life without parole, which rested on "the overall brutality of the crimes for which [the defendant] was convicted" and arose after the testimony of "many, many victims" at the original sentencing hearing. 784 S.E.2d 403, 408–09, 412 (Ga. 2016).

5. Wyoming also requires and enforces a requirement of a finding of irreparable corruption. In *Sen v. State*, the Wyoming Supreme Court reversed the offender's sentence of life without parole and announced the finding requirement. The court noted the "manifold" structural benefits of that requirement, which

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[3] The guidance in *Stevens* is only intended to guide trial court practitioners until the Oklahoma Legislature acts to address the procedural implementation of *Miller*. 422 P.3d at 749.

would "promote more thoughtful consideration of relevant factors," "enhance the court's legitimacy," "aid courts in attaining their institutional objective of dispensing equal and impartial justice," and "aid[] appellate courts to ascertain whether the sentence imposed was based upon accurate, sufficient and proper information." 301 P.3d 106, 127 (Wyo. 2013) (citation omitted). The supreme court's decision also paved the way for Dharminder Sen's resentencing, at which he expressed remorse for his crime and received a parole-eligible sentence. Associated Press, *Judge resentences man in Sheridan killing*, Casper Star-Tribune (Jan. 17, 2014), https://trib.com/ap/state/judge-resentences-man-in-sheridan-killing/article_de831056-915e-500f-a6b9-ee31065283bf.html.

B. Sentencers Retain Discretion To Impose Constitutional Life-Without-Parole Sentences

In states that require a finding of permanent incorrigibility, sentencers still can and do impose sentences of life in prison without the possibility of parole. But those sentences are procedurally sound and, because they reflect the sentencing authority's conclusion that the defendant is permanently incorrigible, constitutionally permissible.

For example, in *Commonwealth v. Smith*, the appellate court affirmed such a sentence of life without parole. 2018 WL 3133669, *13 (Pa. Super. Ct. June 27, 2018). The sentencing court made a judgment that the defendant was "uncommon and rare and an unusual juvenile who would likely kill in the future," based on evidence that the offender, while in prison, had become the leader of a neo-Nazi prison gang, plotted a detailed escape involving numerous inmates, and threatened to kill a confidential informant. *Id.* *2, *5.

The court also heard expert testimony which "concluded with a reasonable degree of medical certainty" that Smith "was a rare and uncommon juvenile." *Id.* *11.

In *People v. Holman*, the defendant had an extensive criminal history, committed murder while released on parole, expressed no remorse, and declined to present any evidence "to show that his criminal conduct was the product of immaturity and not incorrigibility." 91 N.E.3d 849, 865 (Ill. 2017). On that record, the trial court expressly found "that th[e] Defendant cannot be rehabilitated," and the Illinois Supreme Court affirmed the sentence of life without parole. *Id.* at 855.

Similarly, in *People v. Guye*, the trial court imposed a sentence of life without parole after making an explicit finding that the offender "ha[d] zero chance of successfully rehabilitating himself," based in part on the offender's extensive and violent criminal history. 2019 WL 7246447, *10 (Ill. App. Ct. Dec. 26, 2019). The appellate court expressly recognized the discretion retained by the trial court under *Miller*. It "acknowledge[d] that a different sentencing court could have reached a different sentence based on the evidence presented at petitioner's sentencing hearing." *Id.* at *11. But it reasoned: "[N]othing in *Miller* or [*People v.*] *Holman*[, 91 N.E.3d 849 (Ill. 2017),] suggests that we are free to substitute our judgment for that of the sentencing court." *Id.*

Finally, in *White v. State*, the trial court "entered a detailed order making findings of fact and conclusions of law in support of its decision to impose a sentence of life without parole." 837 S.E.2d 838, 843 (Ga. 2020). The court specifically found that White "is in fact ir-

reparably corrupt." *Id.* In addition to White's initiation of the murder at issue and his troubling behavior even when living in a "normal supportive environment," the court found the defense expert's conclusion that White was not permanently incorrigible was not supported by credible evidence. *Id.* The state supreme court affirmed: "The record evidence that the trial court laid out in detail" was sufficient to support its judgment of irreparable corruption. *Id.* at 845.

III. A DETERMINATION OF PERMANENT INCORRIGIBILITY IS CRITICAL TO CONSISTENTLY IMPOSE LIFE-WITHOUT-PAROLE SENTENCES

A. Mississippi's current sentencing framework falls short of securing the substantive constitutional rights articulated in *Miller* and causes at least two systemic harms. First, Mississippi's failure to require evaluation of incorrigibility creates a significant risk that juvenile offenders are sentenced to life without the possibility of parole regardless whether they are in fact permanently incorrigible. That result is intolerable under this Court's precedents.

Montgomery held that *Miller* was retroactive because its substantive rule, barring constitutional life-without-parole punishments for most juveniles, "necessarily carries a significant risk that a defendant—here, the vast majority of juvenile offenders—faces a punishment that the law cannot impose." 136 S. Ct. at 734 (citation and alterations omitted). But under current procedure, a juvenile offender in Mississippi remains at risk of receiving an unconstitutional sentence because there is no assurance that he will be found permanently incorrigible before receiving a life-without-parole sentence. Instead, trial courts in Mis-

sissippi are free to impose life-without-parole sentences at their discretion as long as they address the *Miller* factors first. See pp. 20–21, *supra*.

By contrast, in states that require a finding of incorrigibility, sentencers must and do make the judgment that a juvenile cannot be rehabilitated before sentencing him to life without parole. That required procedure has the salutary purpose of ensuring that life-without-parole sentences are administered consistent with the constitution—*and* that offenders and the public *know* how and why life-without-parole sentences are lawfully imposed.

Second, because Mississippi's juvenile resentencing framework requires so little of the trial court, state appellate courts lack any real ability to correct disparate sentencing outcomes. In *Miller* cases, Mississippi courts review the sentencer's legal conclusions de novo, but review the application of law to facts for abuse of discretion. *Chandler*, 242 So. 3d at 68. In practice, as long as the sentencer mentions the "*Miller* factors," the appellate court cannot reverse unless the discussion of those factors is somehow "grossly unsound, unreasonable, illegal, or unsupported by the evidence." *See Nunnery v. Nunnery*, 195 So. 3d 747, 752 (Miss. 2016) (quoting *Abuse of Discretion*, Black's Law Dictionary (10th ed. 2014)). As a result, the judgment whether to impose the grave punishment of life without parole is left almost entirely to the discretion of the trial court.

By contrast, a required determination of permanent incorrigibility would enable appellate courts to meaningfully police arbitrary sentencing outcomes. Appellate courts would have the tools to require a ruling on permanent incorrigibility where the trial court has failed to make one (*e.g.*, *Hixson*, 2019 WL 2488015)

and have further authority to evaluate whether the evidence reasonably supports a sentencer's finding on that point (*cf. Batts*, 163 A.3d 410). When trial courts address incorrigibility on the record, appellate courts reviewing for abuse of discretion can detect and reverse those outcomes that fall outside the sentencer's reasonable discretion. Federal and state courts alike have recognized that requiring a sentencer to explain why an offender is incapable of change is essential "to permit meaningful appellate review." *United States v. Briones*, 929 F.3d 1057, 1067 (9th Cir. 2019) (en banc); *Sen*, 301 P.3d at 127.

B. The Court should be particularly concerned with those deleterious effects of Mississippi's current approach (an approach shared by Idaho and Michigan, Pet. for Writ of Cert. at 12–13) because of the severity of juvenile life-without-parole sentences. Those sentences "share some characteristics with death sentences that are shared by no other sentences," and are "especially harsh" punishments for juveniles. *Graham*, 560 U.S. at 70. In particular, both sentences "alter[] the offender's life by a forfeiture that is irrevocable." *Id.* at 69–70.

The Court "has repeatedly emphasized that meaningful appellate review of death sentences promotes reliability and consistency," *Clemons v. Mississippi*, 494 U.S. 738, 749 (1990), and is an essential "safeguard … to ensure that death sentences are not imposed capriciously or in a freakish manner," *Gregg v. Georgia*, 428 U.S. 153, 195 (1976). In a similar way, the lax approach that Mississippi (and other states) use in juvenile resentencing cases undermines the power of state appellate courts to ensure the correct and even-handed application of *Miller*. *Cf. Campbell v. Ohio*, 138 S. Ct. 1059, 1061 (2018) (Sotomayor, J.,

statement respecting the denial of certiorari) (reasoning that the need for meaningful appellate review of capital sentences might likewise apply to life-without-parole sentences, even for adults).

Additionally, the Court has repeatedly declared that the Constitution requires "measured, consistent application" of the death penalty. *Eddings v. Oklahoma*, 455 U.S. 104, 111 (1982). The same imperative should apply to juvenile life-without-parole sentences. *Gregg*, 428 U.S. 153, held that capital sentencing procedures designed to ensure that the sentencer weighed both aggravating and mitigating factors and to create a record for appellate review provided a sufficient safeguard against arbitrariness and caprice. By analogy, *Miller* and *Montgomery* did not outlaw juvenile life-without-parole sentences altogether, but held the punishment must be reserved for a narrow group of offenders because of its unusual severity and limited penological justification. Yet Mississippi continues to apply the punishment unevenly and arbitrarily. That result, and the contrast with states that require additional procedural safeguards, shows that a clear determination of permanent incorrigibility is necessary to ensure that juvenile life-without-parole sentences are imposed in a consistent, constitutional manner.

CONCLUSION

For the foregoing reasons, the judgment of the Mississippi Supreme Court should be reversed.

Respectfully submitted,

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