16-6738

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CYNTOIA BROWN,
Petitioner-Appellant,

v.

CAROLYN JORDAN, Warden,

Respondent-Appellee.

On Appeal from the United States District Court for the Middle District of Tennessee

BRIEF OF *AMICI CURIAE* JUVENILE LAW CENTER, CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, CENTER FOR LAW, BRAIN AND BEHAVIOR, CENTER ON WRONGFUL CONVICTIONS OF YOUTH, CHILDREN AND FAMILY JUSTICE CENTER, THE PHILLIPS BLACK PROJECT, ROBERT F. KENNEDY HUMAN RIGHTS, THE SENTENCING PROJECT, AND SOUTHERN POVERTY LAW CENTER IN SUPPORT OF PETITIONER-APPELLANT CYNTOIA BROWN AND REVERSAL

MARSHA L. LEVICK*
Counsel of Record for *Amici Curiae*
Riya Shah
Danielle Whiteman
Juvenile Law Center
1315 Walnut Street, 4th Floor
Philadelphia, PA 19107
(215) 625-0551
mlevick@jlc.org

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INTEREST AND IDENTITY OF AMICI[1]

Juvenile Law Center, founded in 1975, is the oldest public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Among other things, Juvenile Law Center works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and; that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights. Juvenile Law Center has worked extensively on the issue of juvenile life without parole and de facto life sentences, filing *amicus* briefs in the U.S. Supreme Court in both *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 132 S. Ct. 2455 (2012) and acting as co-counsel in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

The **Campaign for the Fair Sentencing of Youth** (CFSY) is a national coalition and clearinghouse that coordinates, develops and supports efforts to implement just alternatives to the extreme sentencing of America's youth with a

[1] No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from *Amici*, its members, or its respective counsel made a monetary contribution to the preparation or submission of this brief. *Amici* file under the authority of Fed. R. App. P. 29(a). All parties have consented to the filing of this brief.

focus on abolishing life without parole sentences for all youth. Our vision is to help create a society that respects the dignity and human rights of all children through a justice system that operates with consideration of the child's age, provides youth with opportunities to return to community, and bars the imposition of life without parole for people under age eighteen. We are advocates, lawyers, religious groups, mental health experts, victims, law enforcement, doctors, teachers, families, and people directly impacted by this sentence, who believe that young people deserve the opportunity to give evidence of their remorse and rehabilitation. Founded in February 2009, the CFSY uses a multi- pronged approach, which includes coalition-building, public education, strategic advocacy and collaboration with impact litigators—on both state and national levels—to accomplish our goal.

The Center for Law, Brain and Behavior (CLBB) of the Massachusetts General Hospital is a nonprofit organization whose goal is to provide responsible, ethical and scientifically sound translation of neuroscience into law, finance and public policy. Research findings in neurology, psychiatry, psychology, cognitive neuroscience and neuroimaging are rapidly affecting our ability to understand the relationships between brain functioning, brain development and behavior. Those findings, in turn, have substantial implications for the law in general, and criminal law, in particular, affecting concepts of competency, culpability and punishment, along with evidentiary questions about memory, eyewitness identification and even

credibility. The Center, located within the MGH Department of Psychiatry, seeks to inform the discussion of these issues by drawing upon the collaborative work of clinicians and researchers, as well as a board of advisors comprising representatives from finance, law, academia, politics, media and biotechnology. It does so through media outreach, educational programs for judges, students and practitioners, publications, a "Law and Neuroscience" course at the Harvard Law School, and *amicus* briefs. A particular focus of CLBB has been the question of what constitutes responsible and legal behavior in children and adolescence.

The **Center on Wrongful Convictions of Youth** (CWCY) is part of Northwestern University School of Law's Bluhm Legal Clinic and is a joint project of two of the Clinic's highly acclaimed Centers: the Children and Family Justice Center and the Center on Wrongful Convictions. The CWCY's unique mission is to uncover and remedy wrongful convictions of youth, as well as to promote public awareness and support for nationwide initiatives aimed at preventing future wrongful convictions in the juvenile justice system. In so doing, the CWCY works with experienced juvenile attorneys and wrongful conviction experts across the nation on a regular basis. The CWCY has authored a number of *amicus curiae* briefs on issues relating to the sentencing of juvenile offenders, false and coerced confessions of youth, and the application of the felony murder doctrine to youthful offenders. The CWCY also has raised many arguments related to the relevance of

adolescent development and neuroscience to these and other issues involving juvenile defendants.

The **Children and Family Justice Center** (CFJC), part of Northwestern University Law School's Bluhm Legal Clinic, was established in 1992 as a legal service provider for children, youth, and families, as well as a research and policy center. Currently, clinical staff at the CFJC provide advocacy on policy issues affecting children in the legal system, and legal representation for children, including in the areas of delinquency and crime, immigration/asylum, and fair sentencing practices. In its 25-year history, the CFJC has filed numerous briefs as an amicus curiae in this Court and in state supreme courts based on its expertise in the representation of children in the legal system. *See, e.g.*, Amicus Br., Montgomery v. Louisiana, 135 S. Ct. 1546 (2015) (No. 14-280), 2015 WL 4624620; Amicus Br., Watson v. Illinois, 136 S. Ct. 399 (2015) (No. 14-9504), 2015 WL 3452842.

The Phillips Black Project is a nonprofit, public-interest law office dedicated to providing the highest quality of legal representation to prisoners in the United States sentenced to the severest penalties under law, in particular, capitally-sentenced defendants and juveniles serving life without parole sentences and their equivalents. Phillips Black has also been at the forefront of collecting and analyzing data to chart the transformation of juvenile life without parole sentencing (JLWOP) resulting from the seminal Eighth Amendment decisions of *Graham v. Florida*, 560

U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. 460 (2012) and in producing legal scholarship examining the rapid changes brought about nationwide as a result of these decisions.

Robert F. Kennedy Human Rights is a nonprofit organization that was founded in 1968 to carry on Robert F. Kennedy's commitment to creating a more just and peaceful world. The organization works alongside local activists to ensure lasting positive change in governments and corporations. Its team includes leading attorneys, advocates and entrepreneurs united by a commitment to social justice. Whether in the United States or abroad, the organization's programs have pursued strategic litigation on key human rights issues, educated millions of students in human rights advocacy and fostered a social good approach to business and investment. Its advocacy and litigation program seeks to ensure that the United States respects, protects, and fulfills its international human rights obligations with respect to its juvenile and criminal justice systems, including providing enhanced protections for children in conflict with the law, ending discriminatory police practices, curbing the over reliance on incarceration, and eliminating unjust and inefficient cash bail and pre-trial detention policies that disproportionately affect the poor and communities of color. Robert F. Kennedy Human Rights has organized thematic hearings before the Inter-American Commission on Human Rights on impunity for police killings and excessive use of force by the police in the United

States. In addition to holding the United States accountable before international human rights mechanisms, Robert F. Kennedy Human Rights works with domestic activists to reform the criminal justice system via policy change, innovative disruptions that bolster the case for reform and public engagement and mobilization.

The Sentencing Project, founded in 1986, is a national nonprofit organization engaged in research and advocacy on criminal justice and juvenile justice reform. The organization is recognized for its policy research documenting trends and racial disparities within the justice system, and for developing recommendations for policy and practice to ameliorate those problems. The Sentencing Project has produced policy analyses that document the increasing use of sentences of life without parole for both juveniles and adults, and has assessed the impact of such policies on public safety, fiscal priorities, and prospects for rehabilitation. Staff of the organization are frequently called upon to testify in Congress and before a broad range of policymaking bodies and practitioner audiences.

The **Southern Poverty Law Center** ("SPLC") is a nonprofit civil rights organization, with offices in Alabama, Florida, Georgia, Louisiana and Mississippi, dedicated to protecting society's most vulnerable members through litigation, education and advocacy. SPLC has a long history of advocating on behalf of children tried as adults. The Center's work in juvenile justice and its interest in this case are

grounded in the principle that young people, even those convicted of serious offenses, are capable of change and should be treated differently than older people at sentencing. Federal law prohibits the imposition of mandatory life sentences on children and requires that they be given a meaningful opportunity for release. SPLC has an interest in ensuring that no child is incarcerated in violation of the Eighth Amendment and that all children facing extreme sentences receive meaningful consideration of their capacity for rehabilitation and reform

ARGUMENT

In 2005, Cyntoia Brown was a sixteen-year-old with a Fetal Alcohol Spectrum Disorder diagnosis when she was convicted of first-degree murder and sentenced to a mandatory term of life imprisonment. Tenn. Code Ann. § 39-13-202(c). Although the Tennessee Court of Criminal Appeals held that Cyntoia may be eligible for parole after serving 51 years of her sentence, a Tennessee Court of Appeals decision strongly calls into question whether she would ever be eligible for parole. *See* Brief of Appellant pp. 17-19. Even if she may request parole at age 68, her sentence unquestionably deprives her of a "meaningful opportunity to obtain release." *See generally* Brief of *Amicus Curiae*, American Civil Liberties Union of Tennessee in Support of Appellant.

A meaningful opportunity for release must mean more than release in the twilight of one's life with limited opportunity to experience life outside prison walls or to make meaningful contributions to one's community. Eighth Amendment jurisprudence has clarified that the constitutionality of a sentence depends on the actual impact of the sentence upon the individual, not how a sentence is labeled. *Sumner v. Shuman*, 483 U.S. 66, 83 (1987). A sentence that merely offers geriatric release or, in the alternative, ensures that Cyntoia will die in prison is a mandatory life sentence that is disproportionate when imposed on a sixteen-year old.

I. A MANDATORY LIFE SENTENCE IS DISPROPORTIONATE WHEN IMPOSED ON CHILDREN

The U.S. Supreme Court has repeatedly held that "children are constitutionally different from adults for purposes of sentencing." *Miller v. Alabama*, 567 U.S. 460, 471 (2012); *see also Roper v. Simmons*, 543 U.S. 551, 569-570 (2005); *Graham v. Florida*, 560 U.S. 48, 68-69 (2010). *Roper* and *Graham* noted three significant differences that distinguish youth from adults for culpability purposes:

> First, children have a "lack of maturity and an underdeveloped sense of responsibility," leading to recklessness, impulsivity, and heedless risk-taking. Second, children "are more vulnerable . . . to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]."

Miller, 567 U.S. at 471 (alterations in original) (citations omitted). *Graham* and *Miller* both recognized that though youth does not absolve juveniles of responsibility for their actions, it does lessen their culpability. *Graham*, 560 U.S. at 68 (a juvenile's "transgression 'is not as morally reprehensible as that of an adult.'" (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion))). The "[scientific] findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's 'moral culpability' and enhanced the

prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" *Miller*, 567 U.S. at 472 (quoting *Graham*, 560 U.S. at 68-69); *Roper*, 543 U.S. at 570. Punishments that fail to recognize these scientific findings are infirm.

When Cyntoia was sentenced in 2005, several years before the U.S. Supreme Court's decisions in *Graham*, *Miller*, and *Montgomery*, life imprisonment was the mandatory minimum sentence available. Tenn. Code Ann. § 39-13-202. The sentencing court could not and did not apply current constitutional mandates that youth sentences be proportionate and take into account the hallmark characteristics of youth. In addition to requiring Cyntoia to serve nearly all of her life behind bars, the sentencing court never reexamined her sentence in accordance with prevailing United States Supreme Court jurisprudence. On appeal, the Tennessee Court of Criminal Appeals incorrectly ruled *Miller* inapplicable to Cyntoia's sentence. *Brown v. State*, No. M2013-00825-CCA-R3-PC, 2014 WL 5780718, at *21 (Tenn. Crim. App. Nov. 6, 2014) (stating that "the Petitioner has failed to cite any mandatory authority in which a court has held that a juvenile defendant's life sentence was unconstitutional," and that *Miller* did not apply because "life without the possibility of parole is not the sentence at issue here"). Yet, the *Miller* Court held that mandatory sentencing schemes were inherently flawed because they prevent the sentencer from considering the distinct qualities of youth. *See Miller*, 567 U.S. at 472-74. "'An

offender's age,' we made clear in *Graham*, 'is relevant to the Eighth Amendment,' and so 'criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.'" *Id.* at 473-74. Because "'an offender's juvenile status can play a central role' in considering a sentence's proportionality," *id*. at 474, prior to imposing a "particular penalty" on a juvenile, the sentencer must "follow a certain process," which meaningfully considers youth, its inherent characteristics, and how these factors impact the juvenile's overall culpability. *Id*. at 483. The Supreme Court warned, "[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." *Id.* at 479. Cyntoia's mandatory life sentence must be reexamined in light of current Supreme Court jurisprudence.

II. RESEARCH IN ADOLESCENT DEVELOPMENT AND NEUROSCIENCE CONFIRMS THAT LENGTHY SENTENCES SERVE NO PENOLOGICAL PURPOSE WHEN APPLIED TO CHILDREN

The *Graham* Court found that none of the accepted goals of punishment—retribution, deterrence, incapacitation, or rehabilitation—provide an adequate justification for sentencing a juvenile to life without parole for committing a non-homicide crime. *Graham*, 560 U.S. at 71. While Cyntoia committed homicide, as the Court recognized in *Miller*, "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, *even when they commit terrible crimes,*" 567 U.S. at 472 (emphasis added). The

well-established characteristics that are inherent to youth, such as immaturity, impetuosity, vulnerability to "negative influences and outside pressures," and a greater capacity for change and rehabilitation, *Roper*, 543 U.S. at 569-570, weaken the penological justifications for imposing severe sentences on juvenile offenders. *See Miller*, 567 U.S. at 473-74. The Supreme Court explicitly found that "*Miller* . . . did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (quoting *Miller*, 567 U.S. at 472).

A. Life Sentences Exact Disproportionate Retribution When Applied To Children

As the Court observed in *Roper*, "[w]hether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult." 543 U.S. at 571. The *Roper* Court reasoned that retribution could not be proportional if the law's most severe penalty was imposed on an individual whose culpability was "diminished, to a substantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571.

In the instant case, Cyntoia's sentence was affirmed without any opportunity to request release solely because of the nature of the crime, and without regard for Cyntoia's background at the time of the offense or her post-offense rehabilitation.

But *Miller* requires that "[t]he opportunity for release . . . be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit *even heinous crimes* are capable of change." *Montgomery*, 136 S. Ct. at 736 (emphasis added). It is the ability of an individual to change even after committing a crime such as murder, not the circumstances of the crime itself, that is central to *Miller*'s holding. Allowing the facts of a crime to overwhelm the relevant research undermines *Miller* and results in the improper denial of any meaningful opportunity for release.

B. Life Sentences Are An Ineffective Deterrent For Children

"[T]he same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Roper*, 543 U.S. at 571. As the Supreme Court recognized, "[b]ecause juveniles' 'lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions,' they are less likely to take a possible punishment into consideration when making decisions." *Graham*, 560 U.S. at 72 (internal citation omitted).

1. Youth are unlikely to foresee and appreciate the consequences of their actions

In distinguishing between adults and children for sentencing, the Supreme Court has cited research confirming the distinct emotional, psychological, and neurological attributes of youth. *Graham*, 560 U.S. at 68 (since *Roper*,

"developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"); *Miller*, 567 U.S. at 471; *see generally* Laurence Steinberg, *The Influence of Neuroscience on US Supreme Court Decisions about Adolescents' Criminal Culpability*, 14 NATURE NEUROSCIENCE 513 (2013); Richard J. Bonnie & Elizabeth S. Scott, *The Teenage Brain: Adolescent Brain Research and the Law*, 22 CURRENT DIRECTIONS IN PSYCHOL. SCI. 158 (2013). These developmental differences impact adolescents' capacities to foresee and appreciate the consequences of their actions, as well as their ability to make reasoned, independent decisions about the best course of action. Although general cognitive skills improve by mid-adolescence, the development of some important cognitive functions lag, as different parts of the brain mature at different rates. Areas involved in more basic functions, such as those involved in sensory information processing and in movement control, develop first, Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA 8174, 8174 (2004), and the parts of the brain responsible for impulse control and foresight are among the last to mature. Terry A. Maroney, *The Once and Future Juvenile Brain*, *in* CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE 189, 193 (Franklin E. Zimring & David S. Tanenhaus eds., 2014). Synaptic pruning and myelination—both processes critical in the

maturation of the brain—occur relatively late in the prefrontal cortex, *id*., the brain region associated with executive functioning, which governs "the capacity . . . to control and coordinate our thoughts and behavior." Sarah-Jayne Blakemore & Suparna Choudhury, *Development of the Adolescent Brain: Implications for Executive Function and Cognition*, 47 J. OF CHILD PSYCHOL. & PSYCHIATRY 296, 301 (2006).

This later development within the prefrontal cortex affects higher-order cognitive functions, such as foresight, weighing risks and rewards, and making decisions that require the simultaneous consideration of multiple sources of information. Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. OF CLINICAL PSYCHOL. 47, 54 (2009). Because of this lag, adolescents have difficulty thinking realistically about future events, i.e. adolescents are both less likely to think about potential long-term consequences, and more likely to assign less weight to those that they *have* identified. *See* Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime,* 18 THE FUTURE OF CHILDREN 15, 20 (2008); *see also Graham,* 560 U.S. at 78 ("Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel, seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense.")

For a youth with Fetal Alcohol Spectrum Disorder (FASD), postnatal brain development does not follow the normal trajectory. Natalie Novick Brown and Paul Connor, *Executive Dysfunction and Learning in Children with Fetal Alcohol Spectrum Disorders*, 8 COGNITIVE SCIENCES 47, 66 (2014). Studies have consistently shown that youth with FASD suffer from a wide range of basic executive impairments. *Id*. at 73-74. At Cyntoia's post-conviction evidentiary hearing, three different psychologists testified regarding their conclusion that Cyntoia suffered from FASD. *Brown*, 2014 WL 5780718, at *6-10. In addition to normal developmental lags, Cyntoia's diagnosis also undoubtedly impaired her executive functioning, including her ability to engage in deliberative thinking and properly assess risks.

2. Stressful situations can further compromise youths' reasoning skills

While youths' brains are undergoing changes in cognitive control regions, brain regions responsible for emotion also change substantially. During tasks that require self-control, adults distribute the work across multiple areas of the brain. Laurence Steinberg, *The Science of Adolescent Brain Development and Its Implication for Adolescent Rights and Responsibilities*, in Human Rights and Adolescence 59, 64 (Jacqueline Bhabha ed., 2014). Because there is less communication between brain systems that regulate rational decision making and those that regulate emotional arousal during adolescence, strong feelings are less

likely to be tempered by impulse control, planning ahead, or comparing costs and benefits of alternative choices of action. *Id.* at 65.

Though studies have shown that older adolescents do not differ significantly from adults in their ability to rationally evaluate risk, Dustin Albert & Laurence Steinberg, *Judgment and Decision-making in Adolescence*, 21 J. OF RES. ON ADOLESCENCE 211, 213 (2011), research has also shown that in actual experience, teens still engage in dangerous behaviors, despite understanding the risks involved. Mariam Arain, Maliha Haque, Lina Johal, Puja Mathur, Wynand Nel, Afsha Rais, Ranbir Sandhu, & Sushil Sharma, *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 453 (2013). This disparity has led researchers to examine differences in decision-making during modes of information processing that are analytic, or "cold," with those that are experiential, or "hot." Albert & Steinberg, *supra*, at 212.

> Hot cognition is described as thinking under conditions of high arousal and intense emotion. Under these conditions, teens tend to make poorer decisions. The opposite of hot cognition is cold cognition, which is critical and over-analyzing. In cold cognition, circumstances are less intense and teens tend to make better decisions.

Arain et al., *supra*, at 455. Adolescent decision-making is particularly susceptible to influence from emotional and social factors. Sarah-Jayne Blakemore & Trevor W. Robbins, *Decision-Making in the Adolescent Brain*, 15 NATURE NEUROSCIENCE 1184, 1184 (2012). In hot emotional contexts, youth decision-making tends to be

driven more by the socio-emotional parts of the brain than by the cognitive controls, *id*. at 1188, making adolescents more likely to act emotionally and impulsively without engaging in a formal decision-making process. *See* Albert & Steinberg, *supra*, at 211. "Thus, adolescents are more likely than children and adults to make risky decisions in emotionally 'hot' contexts[.]" Blakemore & Robbins, *supra*, at 1187. These attributes of adolescent decision-making weaken the deterrence rationale for imposing lengthy sentences on juvenile offenders.

C. Given Juveniles' Distinctive Capacity For Change, Lengthy Sentences Are Incompatible With The Penological Goal Of Rehabilitation

As the Supreme Court has recognized, "[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 develop entrenched patterns of problem behavior that persist into adulthood." *Roper*, 543 U.S. at 570 (second alteration in original) (quoting Steinberg & Scott, *Less Guilty by Reason of Adolescence: Development Immaturity, Diminished Responsibility, and the Juveniles Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)). Research that has emerged post-*Miller* has further confirmed these observations. In a study of over thirteen hundred juvenile offenders, researchers found that "even among those individuals who were high-frequency offenders at the beginning of the study, the majority had stopped these behaviors by the time they were 25." Laurence Steinberg, *Give Adolescents the Time and Skills to*

Mature, and Most Offenders Will Stop. (2014) Chicago, IL: MacArthur Foundation, p. 3, *available at* http://www.pathwaysstudy.pitt.edu/documents/MacArthur%20Brief%20Give%20Adolescents%20Time.pdf. Studies have also shown that youthful criminal behavior can be distinguished from permanent personality traits, and that "it is hard to determine who will continue or escalate their antisocial acts and who will desist," as "the original offense . . . has little relation to the path the youth follows over the next seven years." *See Research on Pathways to Desistance: December 2012 Update*, Models for Change, p. 3-4, *available at* http://www.modelsforchange.net/publications/357 (finding that, of the more than 1,300 serious offenders studied for a period of seven years, only approximately 10% report continued high levels of antisocial acts). As research increasingly shows that most juvenile offenders will not be persistent public safety risks, the goal of rehabilitation cannot justify sentencing a juvenile to life, particularly if the Tennessee parole statute forbids any request for release. Because life imprisonment "forswears altogether the rehabilitative ideal," rehabilitation cannot justify such a sentence. *See Graham*, 560 U.S. at 74.

D. The Penological Goal Of Incapacitation Cannot Override All Other Considerations

Even when juveniles commit terrible crimes, "[*i*]*ncapacitation cannot override all other considerations*, lest the Eighth Amendment's rule against

disproportionate sentences be a nullity." *Graham*, 560 U.S. at 73 (emphasis added). Thus, the Court recognized the real and untenable risk that a sentencer could be so overwhelmed by the facts of a crime that they would allow the penological goal of incapacitation to outweigh all other considerations, including the mitigating characteristics that are inherent to youth. *See Roper*, 543 U.S. at 573 (cautioning that "[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death").

In insisting that youth be treated differently than adults when 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. This observation is no less true where the underlying crime is murder, and is even more true where a person has demonstrated maturity and rehabilitation post-offense. The Supreme Court requires that any sentence imposed on a juvenile reflect the youth's ability to change after committing a homicide or non-homicide crime. *See id*. at 73. ("Even if the State's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset."). 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*. In fact, as the American Psychological Association stressed:

> [T]here is no reliable way to determine that a juvenile's offenses are the result of an irredeemably corrupt character; and there is thus no reliable way to conclude that a juvenile—even one convicted of an extremely serious offense—should be sentenced to life in prison, without any opportunity to demonstrate change or reform.

Brief for the American Psychological Association et al. as *Amici Curiae* in Support of Petitioners at 25, *Miller v. Alabama*, 567 U.S. 460 (2012), (Nos. 10-9646 & 10-9647). A constitutional sentence must provide some opportunity for the offender to show growth and rehabilitation with time and maturity despite the severity of their youthful misconduct.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court reverse the district court.

/s/ Marsha L. Levick
Marsha L. Levick, Esq.
PA Attorney No. 22535
1315 Walnut St., 4th Floor
Philadelphia, PA 19107
T: (215) 625-0551
F: (215) 625-2808
mlevick@jlc.org

Dated: January 16, 2018

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29 and 32, I certify that this brief is proportionally spaced, has a typeface of 14 points or more, and contains 4, 608 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief was prepared using Microsoft Word Times New Roman font.

/s/ Marsha L. Levick
MARSHA L. LEVICK

DATED: January 16, 2018

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d) and 6th Cir. R. 25(f)(2), a copy of the foregoing Notice of Appearance and Brief of *Amici Curiae* was served by electronic mail through the Court's CM/ECF system on January 16, 2018 to the following parties:

John H. Bledsoe, III
Office of the Attorney General
John.bledsoe@ag.tn.gov

Counsel for Respondent-Appellee

C. Mark Pickrell
Mark.pickrell@pickrell.net

Charles W. Bone
Edward M. Yarbrough
Bone McAllester Norton, PLLC
cbone@bonelaw.com

Counsel for Petitioner-Appellant

/s/ Marsha L. Levick
MARSHA L. LEVICK

DATED: January 16, 2018