IN THE SUPREME COURT OF TENNESSEE

No. E2018-01439-SC-R11-CD

STATE OF TENNESSEE,
Appellee,
v.
TYSHON BOOKER,
Appellant.

On Appeal from the Court of Criminal Appeals of Tennessee
at Knoxville, No. E2018-01439-CCA-R3-CD

BRIEF OF JUVENILE LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT TYSHON BOOKER

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STATEMENT OF INTEREST OF AMICUS CURIAE

Juvenile Law Center advocates for rights, dignity, equity and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy and submission of *amicus* briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values. 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*, 567 U.S. 460 (2012) and acting as co-counsel in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

ARGUMENT

I. MANDATORY LIFE WITHOUT PAROLE SENTENCES ARE UNCONSTITUTIONAL AS APPLIED TO YOUTH

As the United States Supreme Court has recognized, youth matters in criminal sentencing. Individuals who commit crimes while under 18 years of age are less culpable than adult offenders and are presumed to have the capacity for rehabilitation. United States Supreme Court precedent thus requires courts to consider the hallmark characteristics of youth before sentencing children to the harshest sanctions normally

imposed upon adults. *Miller v. Alabama*, 567 U.S. 460, 479 (2012) (quoting *Graham v. Florida*, 560 U.S. 48, 75 (2010)). As the Supreme Court has repeatedly held, "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471; *see also Graham*, 560 U.S. at 68-69; *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005); *see also Montgomery v. Louisiana*, 136 S. Ct. 718, 733 (2016) (holding *Miller* retroactive on collateral review.)

Miller's requirement that courts take the defendant's youth into account before imposing a life without parole sentence or its equivalent derives from longstanding U.S. Supreme Court precedent. In *Graham*, the Court emphasized that "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." 560 U.S. at 76. The Court explained that:

> Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. *Roper*, 543 U.S., at 570. It remains true that "[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. at 68 (alteration in original). *Graham* recognized that due to the salient characteristics of youth—immaturity, susceptibility to negative influences, and capacity for change—"juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* (quoting *Roper*, 543 U.S. at 569).

Nearly forty years ago, in *Eddings v. Oklahoma*, the Court observed that "youth is more than a chronological fact. It is a time and condition

of life when a person may be most susceptible to influence and to psychological damage." 455 U.S. 104, 115 (1982). Accordingly, the Court in *Miller* held, "'[j]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered' in assessing his culpability." *Miller*, 567 U.S. at 476 (quoting *Eddings*, 455 U.S. at 115).

In *Miller*, the Court barred the mandatory imposition of life without parole for all children, reserving such a sentence for only "the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery*, 136 S. Ct. at 734. Except for this small category of defendants, youth must be assured "some meaningful opportunity to obtain release," *Graham*, 560 U.S. at 75, and allowed the opportunity to retain "hope for some years of life outside prison walls," *Montgomery*, 136 S. Ct. at 736-37. *See also Graham*, 560 U.S. at 79 ("The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential."). Sentencing schemes that impose mandatory life sentences on juvenile defendants are unconstitutional because they "prevent the sentencer from taking account" of the mitigating effect of youth and its hallmark characteristics. *Miller*, 567 U.S. at 474. And, "[b]y removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—[mandatory sentencing] laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Id.*

A. Tyshon's Sentence of Fifty-One Years to Life is A De Facto Life Without Parole Sentence

Under Tennessee law, Tyshon must serve fifty-one years in prison before he will be eligible to seek parole. *See* TENN. CODE ANN. § 40-35-501(i)(1). Despite the Supreme Court's rulings in *Graham*, *Miller*, and *Montgomery*, Tennessee's sentencing scheme still precludes consideration of age and its attendant characteristics before imposing a *de facto* life sentence on youth convicted of homicide. *See* TENN. CODE ANN. § 39-13-202; TENN. CODE ANN. § 40-35-501(i)(1). Indeed, Tennessee's 51-year mandatory minimum for first-degree homicide is among the longest in the nation,[1] and it applies with equal force to youth and adults alike in criminal court.[2] *See* Juvenile Law Center Amicus Brief, filed on September 16, 2020, attached hereto for the Court's convenience as **Appendix A**.

Courts cannot circumvent *Miller*'s ban on mandatory life without parole sentences for juveniles by imposing a lengthy term-of-years sentence that cannot realistically be fulfilled during an individual's lifetime or provide a meaningful opportunity for release. While this Court has not squarely addressed whether lengthy term-of-years sentences

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[1] Anita Wadhwani, *Tennessee Life Sentencing Laws for Juveniles: What You Need to Know*, THE TENNESSEAN (Mar. 5, 2019), https://www.tennessean.com/story/news/2019/03/07/tennessee-life-sentencing-laws-juveniles-what-you-need-know/3080027002/.

2 Courts and legislatures around the country have taken different approaches to comply with *Miller*'s mandate that "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, 567 U.S. at 474. Tennessee is among the very few states that have failed to take any action. *See* Br. of *Amicus Curiae* Juvenile Law Center (June 23, 2020), at 25-33 (attached).

should be considered equivalent to life without parole sentences, the U.S. Supreme Court stated in *Sumner v. Shuman* that "there is no basis for distinguishing, for purposes of deterrence, between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy." 483 U.S. 66, 83 (1987).

Courts across the country have agreed that virtual life sentences violate the Eighth Amendment when imposed on youth. State Supreme Courts in California, Connecticut, Florida, Illinois, Iowa, Kansas, Louisiana, Missouri, Montana, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Washington, and Wyoming have all recognized that a term-of-years sentence imposed on young people can be an unconstitutional *de facto* life sentence.[3] Especially relevant here, the

[3] *See People v. Caballero*, 282 P.3d 291, 295-96 (Cal. 2012) (three attempted murder counts constituting a 110-years-to life sentence are *de facto* life without parole); *Casiano v. Comm'r of Correction*, 115 A.3d 1031, 1047-48 (Conn. 2015) (*Miller* "implicitly endorsed the notion that an individual is effectively incarcerated for 'life' if he will have no opportunity to truly reenter society or have any meaningful life outside of prison."); *People v. Reyes*, 63 N.E.3d 884, 888 (Ill. 2016) ("*Miller* makes clear that a juvenile may not be sentenced to a mandatory, unsurvivable prison term without first considering in mitigation his youth, immaturity, and potential for rehabilitation."); *Pedroza v. State*, 291 So. 3d 541, 545 (Fla. 2020) ("[T]here is no Eighth Amendment distinction between a term-of-years sentence and a sentence denominated 'life' when the term-of-years sentence is the functional equivalent of life without the possibility of parole." (citing *Henry v. State*, 175 So. 3d 675. 679-80 (Fla. 2015))); *State ex rel. Morgan v. State*, 217 So. 3d 266, 273 (La. 2016) (*Graham's* prohibition of life without parole sentences extends to sentences that effectively "bar[ ] [a defendant] from ever re-entering society.); *State ex rel. Carr v. Wallace*, 527 S.W.3d 55, 59-62 (Mo. 2017) (en banc); *Steilman v. Michael*, 407 P.3d 313, 318-20 (Mont. 2017); *State v. Boston*, 363 P.3d 453, 454, 457 (Nev. 2015) (held fourteen parole-eligible life sentences and a consecutive 92 years in prison unconstitutional under *Graham*); *State v. Zuber*, 152 A.3d 197, 211 (N.J. 2017) (The constitutionality

Iowa Supreme Court held that an aggregate mandatory minimum over 52.5 years is unconstitutional. *State v. Null*, 836 N.W.2d 41, 76 (Iowa 2013). The court wrote that "an offender sentenced to a lengthy term-of-years sentence should not be worse off than an offender sentenced to life in prison without parole who has the benefit of an individualized hearing under *Miller*." *Id.* at 72. Relying on *Null*, the Wyoming Supreme Court has also held that an aggregate sentence of 45 years is the functional equivalent of life without parole for a 16-year-old. *Bear Cloud v. State*, 334 P.3d 132, 142 (Wyo. 2014). Most recently, the Court of Appeals of Kansas ruled a mandatory 50-year sentence imposed on a 14-year-old was the functional equivalent of life without parole. *Williams v. State*, No. 121,815, 2020 WL 5996442, at *20 (Kan. Ct. App. Oct. 9, 2020). The

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of juvenile sentencing turns on whether or not the sentence "in all likelihood, will keep [the juvenile] in jail for the rest of his life."); *Ira v. Janecka*, 419 P.3d 161, 167 (N.M. 2018) ("[A] term-of-years sentence that exceeds the juvenile's life expectancy 'means that good behavior and character improvement are immaterial"); *State v. Moore*, 76 N.E.3d 1127, 1143 (Ohio 2016) ("there is no meaningful distinction between sentences of life imprisonment without parole and prison sentences that extend beyond a juvenile's life expectancy"); *Kinkel v. Persson*, 417 P.3d 401, 412 (Or. 2018) ("It follows that the reasoning in *Graham* and *Miller* permits consideration of the nature and the number of a juvenile's crimes in addition to the length of the sentence that the juvenile received and the general characteristics of juveniles in determining whether a juvenile's aggregate sentence is constitutionally disproportionate."), *cert. denied*, 139 S. Ct. 789 (Jan. 7, 2019); *State v. Ramos*, 387 P.3d 650, 658 (Wash. 2017) ("[E]very juvenile offender facing a literal or de facto life-without-parole sentence is automatically entitled to a *Miller* hearing."). *But see Veal v. State*, 810 S.E.2d 127, 129 (Ga. 2018), *cert. denied*, 139 S. Ct. 320 (Oct. 9, 2018); *State v. Ali*, 895 N.W.2d 237, 246 (Minn. 2017) ("[W]e simply hold that absent further guidance from the Court, we will not extend the *Miller*/*Montgomery* rule" to *de facto* life sentences.); *Vasquez v. Commonwealth*, 781 S.E.2d 920, 928 (Va. 2016) (Addressing *de facto* life sentences "would require a proactive exercise inconsistent with our commitment to traditional principles of judicial restraint.").

Court of Appeals of North Carolina also recently held that a sentence that includes ineligibility for parole for 50 years is in fact a *de facto* life without parole sentence. *State v. Kelliher*, No. COA19-530, 2020 WL 5901213, at *14-15 (N.C. Ct. App. Oct. 6, 2020).

Similarly, five federal courts have held *de facto* life sentences unconstitutional, while only one has declined to do so out of deference to state courts.[4] In short, the theoretical possibility of release late in life does not satisfy the constitutional requirement that a court consider a juvenile defendant's age and its hallmark characteristics before sentencing a child to a lifetime behind bars. *See Montgomery*, 136 S. Ct. at 736-37.

[4] *See McKinley v. Butler*, 809 F.3d 908, 911 (7th Cir. 2016) (concluding that "*Miller v. Alabama* cannot logically be limited to *de jure* life sentences" and that "even discretionary life sentences must be guided by consideration of age-relevant factors"); *United States v. Grant*, 887 F.3d 131 (3d Cir. 2018), *reh'g en banc granted, opinion vacated by* 905 F.3d 285 (3d Cir. Oct. 4, 2018)); *Moore v. Biter*, 725 F.3d 1184, 1191, 1192-94 (9th Cir. 2013) (holding that a 254-year sentence imposed on a 17-year-old for a nonhomicide is contrary to clearly established federal law because the sentence violated *Graham*'s requirement that a juvenile nonhomicide offender have "a chance to return to society"); *Budder v. Addison*, 851 F.3d 1047, 1057 (10th Cir. 2017) (striking down under *Graham* a *de facto* life sentence in a nonhomicide case because it did "not provide . . . a realistic opportunity for release"); *United States v. Mathurin*, 868 F.3d 921, 932-35 (11th Cir. 2017), (assuming for purposes of the appeal "that *Graham* does apply to a non-parolable term-of-years sentence that extends beyond a defendant's expected life span," and upholding the specific sentence imposed because the evidence presented suggested the defendant could be released 10 years before he would reach the projected life span for males his age). *But see Bunch v. Smith*, 685 F.3d 546, 551 (6th Cir. 2012) (holding *Graham* analysis does not apply to consecutive, fixed-term sentences for multiple nonhomicide offenses).

B. Tyshon's Sentence Precludes a Meaningful Opportunity for Release

The Supreme Court has determined that "[a] State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." *Graham*, 560 U.S. at 82. Further, "this meaningful opportunity to obtain release" should be based on "demonstrated maturity and rehabilitation." *Id.* at 75. *Montgomery* clarified that the need for a meaningful opportunity for release applies except for the "rare and uncommon" circumstance where the sentencer has determined that a child is "the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible." *Montgomery*, 136 S. Ct. at 733. These holdings establish that individuals must be afforded a meaningful opportunity for release. "Meaningful" means that release from incarceration near the likely end of one's life – assuming they even live that long – cannot satisfy this constitutional requirement. *See* Beth Caldwell, *Creating Meaningful Opportunities for Release: Miller, Graham, and California's Youth Offender Parole Hearings*, 40 BYU Rev. L. & Soc. Change 245, 281 (2016) (noting many courts have correctly interpreted the U.S. Supreme Court's holding to conclude that "mere release from prison at some age is not necessarily meaningful"). Rather, the youth "should not be deprived of the opportunity to achieve maturity of judgement and self-recognition of

human worth and potential." *Graham*, 560 U.S. at 79; *see also Miller*, 567 U.S. at 479.[5]

II. COURTS MUST CONDUCT INDIVIDUALIZED HEARINGS BEFORE SENTENCING CHILDREN TO THE EQUIVALENT OF LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE

In place of mandatory sentences, the Court in *Miller* instructed sentencing courts to engage in individualized assessments of youth defendants' "characteristics and circumstances." 567 U.S. at 476. The Court set out factors for sentencing courts to consider as part of those factual assessments. *Id.* at 477-78. The Court explained that when the factors are correctly applied, very few juvenile defendants should receive sentences of life imprisonment without parole. *Id.* at 479. In particular, the Court identified the following factors for the sentencing court to consider as part of its assessment:

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

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

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5 The undersigned *amicus curiae* supports the position of other *amici curiae* that a mandatory 51-year sentence is a *de facto* life without parole sentence because it offers no meaningful opportunity for release, but do not repeat those arguments in depth here in the interest of avoiding unnecessary duplication.

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

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

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

The inquiry into these factors should be individualized to each particular defendant. The Court also stated that life without parole sentences should be rare and "uncommon." *Miller*, 567 U.S. at 479; *see Montgomery*, 136 S. Ct. at 733-34 (same).

A. *Miller* Requires the Sentencer To Make An Individualized Assessment of Youth Defendants to Consider Developmental Differences Between Youth and Adults

A substantial and well-established body of scientific research undergirds the U.S. Supreme Court's conclusion that courts must consider the unique attributes of youth before imposing the harshest adult consequences on children. Adolescence is a period marked by "transient rashness, proclivity for risk, and inability to assess consequences." *Miller*, 567 U.S. at 472. Notably, courts must take into account these "distinctive attributes of youth" "even when [children] commit terrible crimes." *Id.* As the Court explained in *Miller*, the hallmark characteristics of youth "are evident in the same way, and to

the same degree" even when youth commit serious crimes, including homicide. *Id.* at 473.

The Court has repeatedly emphasized three characteristics that distinguish children from adult offenders and that are relevant to their constitutional rights. First, children lack the maturity of adults; they have "an underdeveloped sense of responsibility" that leads to "recklessness, impulsivity, and heedless risk-taking." *Miller*, 567 U.S. at 471 (quoting *Roper*, 543 U.S. at 569). Second, they "'are more vulnerable . . . to negative influences and outside pressures,' including from their family and peers" and "they have limited 'contro[l] over their own environment,'" meaning that they often cannot "extricate themselves from horrific, crime-producing settings." *Id.* (alterations in original) (quoting *Roper*, 543 U.S. at 569). Finally, "a child's character is not as 'well formed' as an adult's" and "his traits are 'less fixed,'" making it less likely that his actions are "evidence of irretrievabl[e] deprav[ity]." *Miller*, 567 U.S. at 471 (alterations in original) (quoting *Roper*, 543 U.S. at 570). These characteristics mean that, compared with adults, children "have diminished culpability and greater prospects for reform" that make them categorically "less deserving of the most severe punishments." *Miller*, 567 U.S. at 471 (quoting *Graham*, 560 U.S. at 68).

The Supreme Court made these findings based on settled research demonstrating the distinct emotional, psychological, and neurological attributes of youth. *Graham*, 560 U.S. at 68 (confirming that since *Roper v. Simmons*, 543 U.S. 551 (2005), "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"). As the Court explained in *Miller*, studies of adolescent

behavior have shown that "'[o]nly a relatively small proportion of adolescents' who engage in illegal activity 'develop entrenched patterns of problem behavior.'" *Miller*, 567 U.S. at 471 (alteration in original) (quoting Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2004), attached hereto as Appendix B). For instance, in one recent study of over 1,300 people who committed juvenile offenses, "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* 3 (2014), http://www.pathwaysstudy.pitt.edu/documents/MacArthur%20Brief%20Give%20Adolescents%20Time.pdf.

This finding is consistent with developmental research demonstrating that personality traits change significantly during the transition from adolescence to adulthood, and in fact the identity-formation process often continues until at least the early twenties. *See Amicus* Br. for Am. Psychol. Ass'n et al., at 20, *Miller v. Alabama*, 567 U.S. 460 (2012) (Nos. 10-9646 & 10-9647) (citing, among others, Alan Waterman, *Identity Development from Adolescence to Adulthood*, 18 DEVELOPMENTAL PSYCHOL. 341, 355 (1982); Brent Roberts et al., *Patterns of Mean-Level Change in Personality Traits Across the Life Course*, 132 PSYCHOL. BULL. 1, 14-15 (2006)). During this developmental period, teens may experiment with risky or illegal conduct, but the vast majority outgrow this behavior and desist from crime as they mature. Steinberg

& Scott, *Less Guilty by Reason of Adolescence*, *supra*, at 1014-15, Appendix B.

Neuroscience has reinforced these key findings that adolescents possess a "transient immaturity" that distinguishes them from adults. *See Roper*, 543 U.S. at 573 (citing Steinberg & Scott, *Less Guilty by Reason of Adolescence*, *supra*, at 1014-16, Appendix B). Although adolescents have the capacity to reason logically, they "are likely less capable than adults are in *using* these capacities in making real-world choices, partly because of lack of experience and partly because teens are less efficient than adults in processing information." Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 THE FUTURE OF CHILDREN 15, 20 (2008), attached hereto as Appendix C. Adolescents also have "heightened sensitivity to anticipated rewards," meaning that they may "engage in acts, even risky acts, when the potential for pleasure is high." Laurence Steinberg, *The Science of Adolescent Brain Development and Its Implications for Adolescent Rights and Responsibilities*, in HUMAN RIGHTS AND ADOLESCENCE 59, 64-65 (Jacqueline Bhabha ed., 2014). The combination of sensitivity to rewards and limited behavior control leads to the impetuosity and impulsiveness that characterize this developmental period. *See* Laurence Steinberg, *A Behavioral Scientist Looks at the Science of Adolescent Brain Development*, 72 BRAIN & COGNITION 160, 161-62 (2010), attached hereto as Appendix D (noting that "middle adolescence (roughly 14-17) should be a period of especially heightened vulnerability to risky behavior, because sensation-seeking is high and

self-regulation is still immature"); *see also Miller*, 567 U.S. at 476 (quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993)).

Finally, substantial research has confirmed adolescents' vulnerability to outside pressures, particularly peer pressure. *See Roper*, 543 U.S. at 569. Exposure to peers has been shown to double the amount of risky behavior engaged in by adolescents, while it has much less effect on adults. Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Marking in Adolescence and Adulthood: An Experimental Study*, 41 DEVELOPMENTAL PSYCHOL. 625, 626-634 (2005), attached hereto as Appendix E. Neuroimaging studies have further demonstrated that adolescents have greater activation in brain areas associated with reward processing when told that their peers are watching. Jason Chein et al., *Peers Increase Adolescent Risk Taking By Enhancing Activity in the Brain's Reward Circuitry*, 14 DEVELOPMENTAL SCI. F1, F5-F8 (2011), attached hereto as Appendix F. It is therefore unsurprising that studies of youthful offending show that teens are "far more likely than adults to commit crimes in groups." ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 39 (2008).

B. Black Youth's Experiences with Racial Stress And Trauma Are Relevant Developmental Differences Between Youth and Adults for Courts to Consider

For Black youth like Tyshon Booker and the dozens of others serving life without parole sentences in Tennessee for crimes committed

as children,[6] racial stress and trauma carry psychological and physiological effects that further enhance the mitigating characteristics of youth outlined in *Graham*, *Miller*, and *Montgomery*. "[J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered" in assessing his culpability." *Miller*, 567 U.S. at 476 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982)). Studies show that childhood trauma can lead to PTSD, anxiety, depression, anger, and aggression. The Nat'l Academies of Sciences, Engineering, and Medicine et al, THE PROMISE OF ADOLESCENCE: REALIZING OPPORTUNITY FOR ALL YOUTH 90 (2019), *available at* https://www.nap.edu/read/25388/chapter/6#90. Additionally, "early trauma can also lead to disruption of normal development, self-destructive behavior, and delinquency in adolescence." *Id.* Some children may be "continuously prepared for threat and danger," "less able to control mood and impulse and less able to take part in thoughtful decision making and proactive planning." *Id.* at 91.

Emerging research has begun to examine a specific type of trauma—racial trauma—and its effects on youth of color. Racial trauma, or race-based stress, is defined as "the events of danger related to real or perceived experience of racial discrimination. These include threats of

6 In 2019, there were 185 individuals serving life sentences for crimes they committed as youth, 73% of whom are Black. Anita Wadhwani & Adam Tamburin, *Special report: In Tennessee, 185 people are serving life for crimes committed as teens*, THE TENNESSEAN (Mar. 6, 2019), https://www.tennessean.com/story/news/2019/03/07/juvenile-sentencing-tennessee-cyntoia-brown-clemency-life/2848278002/.

harm and injury, humiliating and shaming events, and witnessing harm to other POCI [People of Color and Indigenous Individuals] due to real or perceived racism." Lillian Comas-Díaz, *Racial Trauma: Theory, Research, and Healing: Introduction to the Special Issue*, 74 AM. PSYCHOL. 1, 2 (2019), attached hereto as Appendix G. For example, individuals living with racial trauma experience effects such as "hypervigilance to threat; flashbacks; nightmares; avoidance; suspiciousness; and somatic expressions such as headaches and heart palpitations." *Id.* at 2.). *See also* Alex L. Pieterse, *Attending to racial trauma in clinical supervision: Enhancing client and supervisee outcomes*, 37 THE CLINICAL SUPERVISOR 204, 207 (2018), attached hereto as Appendix H ("[T]here is now empirical evidence to suggest that racial encounters are indeed associated with a range of emotional responses that are reflective of a trauma response, including avoidance, intrusive thoughts, hypervigilance, confusion, anger, depression, and low self-esteem."). Black youth ages 10-17 are disproportionately impacted by trauma—almost 65% of Black youth report experiencing trauma compared to just 30% for their non-Black peers. Isha W. Metzger, et al, *Healing Interpersonal and Racial Trauma: Integrating Racial Socialization into Trauma-Focused Cognitive Behavioral Therapy for African American Youth*, CHILD MALTREATMENT 1 (2020), attached hereto as Appendix I. Black youth ages 13-18 experience an average of one instance of racism *per day* which studies show impact Black youth's emotional and behavioral outcomes. *Id.* Furthermore, recent studies have found that exposure to violence on television or the internet, including viewing unarmed killing of Black and Brown children by police and

witnessing racial discrimination, can cause trauma symptoms and affect an individual's psychological adjustment. *See* Farzana T. Saleem, et al, *Addressing the "Myth" of Racial Trauma: Developmental and Ecological Considerations for Youth of Color*, 23 CLINICAL CHILD & FAMILY PSY. REV. 1, 23 (2020), attached hereto as Appendix J. Just as adolescents who are emotionally traumatized generally may subsequently act in a way that causes harm to themselves or others, The Nat'l Child Traumatic Stress Network, https://www.nctsn.org/what-is-child-trauma/trauma-types/complex-trauma/effects, research now suggests that race-related trauma amplifies the impact trauma has on Black youth's emotional and behavioral outcomes. Metzger, Appendix I at 1.

Tennessee's incarcerated population is disproportionately Black—Black residents account for 17% of the state's general population yet 40% of individuals in state prisons. *See* Mandy Pellegrin & Courtnee Melton, *Incarceration in Tennessee: Who, Where, Why, and How Long?*, THE SYCAMORE INST. (Feb. 14, 2019), https://www.sycamoreinstitutetn.org/incarceration-tn-prisoner-trends/. Black men are also incarcerated for felonies at a rate of 2,200 for every 100,000 Black men—3.5 times the rate of white men. *Id.* In 2019, of the 185 individuals serving life sentences for crimes they committed as youth, 73% were Black males. Anita Wadhwani & Adam Tamburin, *Special report: In Tennessee, 185 people are serving life for crimes committed as teens*, THE TENNESSEAN (Mar. 6, 2019), https://www.tennessean.com/story/news/2019/03/07/juvenile-sentencing-tennessee-cyntoia-brown-clemency-life/2848278002/. Court records for many of these cases documented a history of abuse experienced by the

convicted teens. *Id.* Racial stress and trauma are unquestionably relevant mitigating evidence that bear on the personal culpability of Tyshon and other youth sentenced to life imprisonment.

C. Tyshon's Case Illustrates The Importance of Individualized Sentencing Determinations

The sentencing court here was required to impose the mandatory sentence for sixteen year-old Tyshon, thus precluding consideration of prevailing research on adolescents and an individualized assessment of how Tyshon's young age and race-related trauma influenced his behavior and capacity for change.

Yet, the record includes significant evidence mitigating Tyshon's culpability and establishing his willingness to pursue treatment. Tyshon was diagnosed with PTSD, having experienced significant traumatic events "including the loss of his father before he was born, growing up in what he called a 'war zone,' witnessing family violence, being shot at, and experiencing the deaths of his aunt and his grandfather." *State v. Booker*, 2020 WL 1697367 at *3 (Tenn. Crim. App. Apr. 8, 2020). The sentencing court, if it had had the opportunity to conduct a true individualized evaluation, would have considered the effects of this background, along with other salient facts such as Tyshon's limited delinquency history, the circumstances of the crime, the "improper relationship" Tyshon had with an older woman, and expert testimony from the transfer hearing indicating that Tyshon was willing to participate in trauma-based treatment. *See id.* at *4. The court should have considered these facts in light of developmental research and racial trauma. As the Supreme Court

noted when describing the defendant's particular background in *Miller*, the sentencer here "needed to examine all these circumstances" before ordering Tyshon to serve the equivalent of life without any possibility of parole. *See* 567 U.S. at 479.

When given appropriate services and an opportunity to grow, youth like Tyshon can heal from trauma, develop impulse control and become rehabilitated. Significantly, as the Court noted in *Graham*, the "parts of the brain involved in behavior control continue to mature through late adolescence." 560 U.S. at 68 (citing *Amicus* Br. for Am. Med. Ass'n et al., at 16-24, *Graham v. Florida*, 560 U.S. 48 (2010) (No. 08-7412)); *Amicus* Br. for Am. Psychol. Ass'n et al., at 22-27, *Graham v. Florida*, 560 U.S. 48 (2010) (No. 08-7412)). Research shows that "ameliorating and redirecting an unhealthy developmental trajectory remains possible during adolescence and later developmental periods." The Nat'l Academies at 91; *see also* Scott & Steinberg, *Adolescent Development and the Regulation of Youth Crime*, Appendix C at 20. With treatment and other programming and services, Tyshon could develop and mature as typical teenagers do. Instead, he has been condemned to die in prison.

CONCLUSION

Tyshon Booker will almost certainly spend the rest of his life in prison for an offense he committed at age sixteen, under an unconstitutional sentencing scheme that barred any consideration of the mitigating effects of his age, race and other circumstances. For the

reasons described herein, we urge this Court to vacate Tyshon Booker's conviction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief consists of 7,500 words and complies with Tennessee Supreme Court Rule 46(3.02).

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Dated: November 16, 2020

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served via the electronic filing system on all parties.

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