No. 17-236

IN THE

Supreme Court of the United States

SARAH MARIE JOHNSON,

Petitioner,

—v.—

STATE OF IDAHO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE IDAHO SUPREME COURT

BRIEF FOR *AMICUS CURIAE* FAIR PUNISHMENT PROJECT IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST AND IDENTITY OF *AMICUS CURIAE*[1]

The Fair Punishment Project ("FPP") is a joint project of the Charles Hamilton Houston Institute for Race & Justice and the Criminal Justice Institute, both at Harvard Law School. FPP's mission is to address the ways in which our laws and criminal justice system contribute to excessive punishment. FPP believes that punishment can be carried out in a way that holds those who commit crimes accountable and keeps communities safe, while still affirming the inherent dignity that all people possess. To that end, FPP conducts research and advocacy and works with stakeholders to seek meaningful, consensus-driven criminal justice reform. As part of its advocacy mission, FPP has submitted briefs as *amicus curiae* to courts across the nation, providing its perspective on emerging issues in criminal law and procedure.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

This Court should grant the petition and answer the question explicitly left open by *Miller v. Alabama*: whether "the Eighth Amendment requires a categorical bar on life without parole for juveniles." 567 U.S. 460, 479 (2012). The answer to that question is now clearly yes, and the Court should hold that the U.S. Constitution categorically bars life without parole ("LWOP") sentences for children.

The Court has previously recognized that imposing an LWOP sentence on a child violates the Eighth Amendment's prohibition against cruel and unusual punishment "for all but the rare juvenile offender whose crime reflects irreparable corruption." *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (quoting *Miller*, 567 U.S. at 479-80) (internal quotation marks omitted). Neither courts nor experts can accurately determine at the time of sentencing whether a particular child's crime reflects "irreparable corruption" as opposed to merely "transient immaturity." The brains of teenagers and young adults are still developing, a process that continues into the mid-twenties in many cases. It is apparent that any determination about how that process will continue and what its result will be is inherently speculative. In addition, scientific studies confirm that there are no identifiable factors that even psychological experts can examine to accurately predict how a child's or young adult's character might be reformed. Because of the impossibility of this determination, some lower courts have found any juvenile life without parole sentence violates their state constitutions, while others have reached inconsistent and arbitrary conclusions when reviewing juvenile life-without-parole sentences. It is

critical that this Court resolve this question now, before more juveniles are sentenced to life based on unscientific and arbitrary standards.

ARGUMENT

I. In *Roper* and *Graham*, This Court Recognized The Inherent Difficulty In Differentiating Between The Child Whose Crime Reflects Transient Immaturity And The Rare Child Whose Crime Reflects Irreparable Corruption.

This Court should declare LWOP sentences for children categorically unconstitutional because it is impossible to distinguish between the "juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption," a difficulty already recognized by this Court in *Roper* and *Graham*. *Roper v. Simmons*, 543 U.S. 551, 573 (2005); *Graham v. Florida*, 560 U.S. 48, 68 (2010).

In *Roper*, this Court held that the Eighth Amendment categorically "forbid[s] . . . imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." *Id.* at 578. This Court in *Roper* relied on "[t]hree general differences between juveniles under 18 and adults [that] demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders," for which the death penalty is reserved:

(i) "'a lack of maturity and an underdeveloped sense of responsibility;'"

(ii) "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure;" and

(iii) "[t]he personality traits of juveniles are more transitory, less fixed [than those of adults]."

Id. at 569-70.

Roper categorically prohibited the "imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed," *id.* at 578, in large part because of the "unacceptable likelihood" that a court or sentencing jury could sentence a child to die "despite insufficient culpability." *Id.* at 573. In doing so, *Roper* acknowledged that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 573.

In *Graham*, this Court also relied on the fundamental differences between juveniles and adults, and a court's inability to distinguish between children with a depraved character and those who are simply immature, to categorically bar LWOP sentences for children convicted of non-homicide offenses. *Graham*, 560 U.S. at 68. This Court explained that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Id.* Moreover, "[j]uveniles 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. . . . a greater possibility exists that a minor's character deficiencies will be reformed [than those of an adult]." *Id.* at 68-69 (quoting *Roper*, 543 U.S. at 570). This Court found that "'the differences between juvenile and adult offenders'" were "'too marked and well understood to

risk allowing a youthful person to receive' a sentence of life without parole for a nonhomicide crime 'despite insufficient culpability.'" *Id.* at 78 (quoting *Roper*, 543 U.S. at 572-573).

Critically, the Court in *Graham* rejected the "case-by-case" approach to imposing LWOP sentences for children for non-homicide offenses, recognizing the impossibility of such an exercise. *Id.* at 77. This Court held that "taking a case-by-case" approach to LWOP sentences for children would not allow courts to "distinguish the few incorrigible juvenile offenders from the many that have the capacity for change" "with sufficient accuracy." *Id.* at 77. The Court recognized that judges were particularly ill-equipped to make such a determination, holding that state laws permitting LWOP sentences for children for non-homicide offenses "based only on a discretionary, subjective judgment by a judge or jury that the offender is irredeemably depraved, [were] insufficient to prevent the possibility that the offender will receive a life without parole sentence for which he or she lacks the moral culpability." *Id.*

These same considerations also apply to discretionary LWOP sentences for children convicted of homicide offenses. Courts are equally ill-equipped to "differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption" in the discretionary juvenile LWOP context. *Roper*, 543 U.S. at 573.

II. Courts and Experts Cannot Accurately Determine Which Children Are "Irreparably Corrupt" And Incapable Of Rehabilitation At The Time of Sentencing.

This Court already has held that sentencing a child to life without parole is permissible only where a factfinder determines that a crime committed by the child reflects the child's "irreparable corruption," rather than "transient immaturity." *Montgomery*, 136 S. Ct. at 734 (quoting *Miller*, 567 U.S. at 479-80 (internal quotation marks omitted)). Therefore, making a reliable factual determination about a child offender's character is constitutionally significant, because sentencing a child who is not irreparably corrupt to LWOP violates the Eighth Amendment.

A growing body of scientific and medical research shows that (a) children's brains are not fully developed, and (b) it is impossible to know in advance how a particular child's brain will develop in the future. Accordingly, a court cannot accurately determine at the time of sentencing whether a child is irreparably corrupt and incapable of rehabilitation. For this reason, this Court should find that imposing LWOP sentences on children is cruel and unusual.

In short:

(i) the brains of children and young adults are different from those of adults and are not fully developed, leading to more impulsive and risky behavior;

(ii) due to the incomplete developmental status of adolescent brains, even experts cannot reliably predict the future trajectory of an individual child, so as to accurately identify the rare children who are irreparably corrupt; and

(iii) it is not necessary to make such determinations at the time of sentencing; later assessments of child offenders in connection with parole hearings or judicial sentence review should be permitted to assess the extent of a child offender's rehabilitation and weigh the appropriateness of his or her extended sentence and the possibility of release.

A. Scientific And Medical Evidence Show Children's Brains Are Not Fully Developed Until Their Mid-Twenties.

As this Court acknowledged in *Roper* more than a decade ago, compared to adults, children lack maturity and have an underdeveloped sense of responsibility. *Roper*, 543 U.S. at 598. More recently, this Court, after evaluating scientific studies regarding the development of children's brains, explained the neuroscience is "increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance." *Miller*, 567 U.S. at 472 n.5 (internal quotation marks and citation omitted).

"[A]dolescence is a period of substantial brain maturation with respect to both structure and function."[2] "[T]he most important conclusion to emerge from recent research is that important changes in brain anatomy and activity take place far

[2] Steinberg, Laurence, *Should the Science of Adolescent Brain Development Inform Public Policy?*, Issues in Science and Technology (p. 1) (Spring 2012).

longer into development than had been previously thought."[3]

It is now well established that "[b]oth white and gray [brain] matter undergo critical changes throughout the period of adolescence" *i.e.*, "the transitional period marked by the beginning of puberty through the late teens and into the early 20's."[4] "These changes, which include pruning, myelination, and neurotransmitter availability . . . affect the range of control of behaviors – and as such are relevant to adolescent limitations in decision making."[5] "The different timetables followed by these different brain systems create a vulnerability to risky and reckless behavior that is greater in middle adolescence… [*i.e.*,] "peak between ages 15 and 17…"[6] **"It's as if the brain's accelerator is pressed to the floor before a good braking system is in**

[3] *Id.*

[4] Luna, Beatriz and Catherine Wright, *Adolescent Brain Development: Implications for the Juvenile Criminal Justice System*, APA Handbook of Psychology and Juvenile Justice (pp. 91, 97). Washington, DC, US (2016).

[5] *Id*. at 97.

[6] Steinberg, Laurence, *Should the Science of Adolescent Brain Development Inform Public Policy?*, Issues in Science and Technology (pp. 4, 7) (Spring 2012).

place.”[7] The “brake” of self-regulatory competence “is not complete until the mid-20s, mak[ing] mid-adolescence a time of heightened vulnerability to risky and reckless behavior.”[8]

Even in early adulthood, when many juvenile offenders are before a court for sentencing, adolescents’ psychosocial and emotional development is incomplete, negatively impacting their decision making abilities. “Although youths in mid-adolescence have cognitive capacities for reasoning and understanding that approximate those of adults, even at age eighteen adolescents are immature in

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[7] *Id.* at 4 (emphasis added); *Id.* at 2 (Four important structural changes in the brain occur during adolescence. “First, there is a decrease in gray matter in prefrontal regions of the brain, reflective of synaptic pruning, … during pre-adolescence and early adolescence, the period during which major improvements in basic cognitive abilities and logical reasoning are seen, in part due to these very anatomical changes. Second, … there are substantial changes in the density and distribution of dopamine receptors in pathways that connect the limbic system, which is where emotions are processed and rewards and punishments experienced, and the prefrontal cortex, which is the brain’s chief executive officer…. Third, there is an increase in the white matter in the prefrontal cortex during adolescence. This is largely the result of myelination, … [which] continues well into late adolescence and early adulthood. [These] [m]ore efficient neural connections within the prefrontal cortex are important for higher-order cognitive functions–planning ahead, weighing risks and rewards, and making complicated decisions, among others–that are regulated by multiple prefrontal areas working in concert. Fourth, there is an increase in the strength of connections between the prefrontal cortex and the limbic system…. [which] is especially important for emotion regulation, … and … self-control. These … gains … are ongoing well into late adolescence.”).

[8] Steinberg, Laurence, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, (p. 5) NCBI (Mar. 2008).

their psychosocial and emotional development, and this likely affects their decisions about involvement in crime in ways that distinguish them from adults."[9] "They also tend to focus on short-term rather than long-term consequences" of their actions.[10] Adolescents "are less capable of anticipating future consequences, and they are more impulsive and volatile in their emotional responses."[11]

This increasing body of research regarding neurological development consistently shows adolescents' brains are fundamentally different from those of adults.

B. It Is Impossible To Know At The Time Of Sentencing Which Children Are Irreparably Corrupt And Incapable Of Rehabilitation.

As experts and this Court have recognized, it is difficult, if not impossible, to distinguish "with sufficient accuracy" the "rare," incorrigibly corrupt child "from the many that have the capacity for change" before their brains are fully developed. *Graham*, 560 U.S. at 77. Immaturities in children's brains impact their culpability and also their prospects for rehabilitation. "[M]ost adolescents who display delinquent behavior do not persist in their criminal behavior."[12] The "predisposition to

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[9] Steinberg, Laurence, *Adolescent Development and Juvenile Justice*, Annu. Rev. Clin. Psychol. 5:47-73, 52, 60-61 (2009).

[10] *Id.*

[11] *Id.*

[12] Luna, Beatriz and Catherine Wright, *Adolescent Brain Development: Implications for the Juvenile Criminal Justice System,* APA Handbook of Psychology and Juvenile Justice (p. 108), Washington, DC, US (2016) (internal citation omitted).

impulsivity or risk taking in adolescence due to still-maturing brain processes underlying executive control and motivation" is not indicative of future decision-making.[13] "The key issue is that [a child's criminal act] may have been due, in part, to brain immaturities that enhance risk taking, and that at a later time in life the decision would not have been made."[14]

Even with the assistance of brain science, experts acknowledge the limitations of predicting the future paths of children who are still developing.[15] The APA, in its *amicus* brief to this Court in *Miller*, stated: "The positive predictive power of juvenile psychotherapy assessments . . . remains poor." Brief for the American Psychological Association, American Psychiatric Association, and National Association of Social Workers as Amici Curiae in Support of Petitioners, *Miller v. Alabama*, Nos. 10-9646, 10-9647, 2012 WL 174239, at *21 (S. Ct. Jan. 17, 2012).

While there is no crystal ball to predict the path a child offender may take in adulthood, science shows that children will be better equipped for decision-making after their brains fully mature and have greater propensity than adults to be rehabilitated.[16]

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[13] *Id.*

[14] *Id.*

[15] *Id.* at 109 ("Brain evidence … cannot inform the trajectory of an individual who is predisposed to crime, regardless of age.").

[16] Luna, Beatriz and Catherine Wright, *Adolescent Brain Development: Implications for the Juvenile Criminal Justice System,* APA Handbook of Psychology and Juvenile Justice (p. 110), Washington, DC, US (2016) ("What neuroscience evidence can do is inform how adolescents constitute a special population with respect to culpability and extended sentencing. In regard to culpability, immaturities in the adolescent brain can provide evidence that the defendant may have acted in an impulsive and

Adolescence involves "plasticity in brain maturation" that is "qualitatively different from that of the adult."[17] In light of this, and the "rapid change in brain processes during adolescence, **who the[se children] will become as adults is not yet clear**."[18] Another "implication is that proper rehabilitation may be more effective during adolescence than later in life."[19] "[G]iven that the adolescent may change into a responsible member of society during the transition into adulthood," "[t]hese implications are important to extended sentences such as death penalty and life without parole."[20]

It is well-established that the characteristics of youth are likely to change as a child matures. This capacity for change exists even in children convicted of the worst offenses. For example, "most individuals identified as psychopaths at age 13 will not receive such a diagnosis at age 24."[21] Making a final determination at sentencing that a child is irreparably corrupt and incapable of rehabilitation disregards what science and behavioral experts have found – children are not only capable of change but likely to change.

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impassioned manner that might not have occurred had that individual reached full maturity with optimal executive control and dampened motivational reactivity.").

[17] *Id.* at 109.

[18] *Id.* (emphasis added).

[19] *Id.*

[20] *Id.*

[21] Semel, Robert, *Limitations of Extending Juvenile Psychopathy Research Assessment Tools and Methods to Forensic Settings*, Journal of Psychology and Clinical Psychiatry (p. 1) (Vol. 4, Issue 1, 2015).

As the growing body of developmental research has shown, the time of sentencing is too early to determine whether a child is incorrigible and incapable of change. "[M]ost youths who become violent do so in adolescence and their violent involvement is limited to the late teens/early 20s."[22] "[A]ttempts to correctly predict the violent recidivist are virtually impossible regardless of the make-up of individual risk and protective factors available to researchers and policy-makers."[23] Even if LWOP sentences were to be imposed on adolescents only on rare occasions, as envisioned in *Miller*, it is impossible to know at the time of sentencing whether any specific adolescent may properly be considered incorrigible and incapable of change. This knowledge guided this Court's acknowledgment in *Miller* that the inherent characteristics of child offenders – even those who have committed homicide – will typically render a sentence of life without parole unconstitutionally disproportionate. *Miller*, 567 U.S. at 479.

Given children's capacity for change and the inability of courts and experts alike to make accurate predictions about children's incorrigibility, the risk of disproportionate punishment is impermissibly large every single time a child is sentenced to die in prison with an LWOP sentence. Developmental research has shown the majority of children that have committed a crime will not remain violent criminals

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[22] Piquero, Alex et.al. *Violence in Criminal Careers: A Review of the Literature form a Developmental Life-Course Perspective*, Aggression & Violent Behav. (2012).

[23] *Id*.

for the remainder of their lives.[24] The task of predicting which children will fall into the minority is untenable, even for expert behaviorists.[25] As a result, is impossible to know at the time of sentencing whether a specific adolescent may properly be considered one of the "rare" offenders who is incorrigible and incapable of change. Requiring courts to make such a prediction creates too great a risk of disproportionate punishment.

Therefore, when a child is sentenced to life imprisonment, at a minimum, further assessment of the child should be required after the child's maturation and development process is complete to consider the individual's rehabilitation prospects and the potential for release at that time.[26] Recognizing that the Eighth Amendment precludes life without parole for child offenders would allow a parole board or reviewing court to accurately determine, after a child's brain has fully developed, whether that child is truly the rare offender incapable of rehabilitation, or the far more common child whose natural maturation makes him or her a prime prospect for reform.

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[24] Piquero, Alex et.al. *Violence in Criminal Careers: A Review of the Literature form a Developmental Life-Course Perspective*, Aggression & Violent Behav. (2012).

[25] *Id.*

[26] Luna, Beatriz and Catherine Wright, *Adolescent Brain Development: Implications for the Juvenile Criminal Justice System,* APA Handbook of Psychology and Juvenile Justice (p. 109). Washington, DC, US (2016) ("Given the lack of knowledge regarding individual trajectories, with most juveniles likely maturing into productive decision makers, periodic assessments of their behavioral maturation would be justified to identify those who have been rehabilitated.").

Because of characteristics inherent in children, including children's lack of development and propensity for change, as well as the recognized difficulties even experts have in differentiating incorrigibly corrupt children from those who are redeemable, this Court should categorically bar LWOP sentences for child offenders. The risk of wrongly sentencing children to die in prison is simply too grave in the face of recent neuroscience and behavioral research, which have shown that such determinations about children are premature and cannot be made with sufficient accuracy.

This danger can be entirely avoided only by requiring that every child offender's development and rehabilitation be reassessed at a later stage, after development is complete. Requiring determinations as to whether a child offender is irreparably corrupt to be made at a parole hearing, or at a statutory sentence review, after the individual's brain has fully developed, will ensure that courts do not wrongly sentence children to die in prison.

III. Courts Have Failed to Limit LWOP Sentences to Children Who are Truly Irreparably Corrupt.

Following *Miller* and *Montgomery*, several lower courts have recognized that identifying which children are irreparably corrupt cannot be done with accuracy or integrity at the time of sentencing, and, as a result, have found that LWOP sentences categorically violate their state constitutions. *See, e.g., State v. Sweet*, 879 N.W.2d 811, 836-837 (Iowa 2016); *Diatchenko v. DA*, 1 N.E.3d 270, 275-76, 466

Mass. 655, 658-659 (Mass. 2013).[27] Others have imposed high evidentiary burdens on the prosecution to conclusively establish irreparable corruption, rulings likely to effectively eliminate juvenile LWOP in those jurisdictions. *See, e.g., Commonwealth v. Batts*, No. 45 MAP 2016, 2017 Pa. LEXIS 1477, *97, 163 A.3d 410, 2017 WL 2735411 (Pa. June 26, 2017); *State v. Hart*, 404 S.W.3d 232, 241 (Mo. 2013).[28] On

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[27] In addition to State courts, State legislatures in the wake of *Miller* have passed legislation abolishing LWOP sentences for children. *See* Brief for Charles Hamilton Houston Inst. for Race & Justice & Criminal Justice Inst. as *Amici Curiae* Supporting Neither Party, *Montgomery*, 136 S. Ct. 718, 193 L.Ed.2d 599 (No. 14–280), 2015 WL 4624172, at *4–5 (S. Ct. Jul. 29, 2015) (identifying nine states that have abolished LWOP sentences for children after *Miller*). Twenty States and the District of Columbia have now banned LWOP sentences for children, and a number of other States have no individuals currently serving a LWOP sentence for juvenile offenses.

[28] The Missouri Legislature passed a bill granting parole eligibility to every juvenile sentenced to life-without-parole prior to *Miller*. *See* S.B. 590, Gen. Assem. Reg. Sess. (Mo. 2016). No new JLWOP sentences have been imposed in the four years since the Missouri Supreme Court's decision in *Hart*. *See* Juvenile Sentencing Project at Quinnipiac University School of Law and the Vital Projects Fund, *Juvenile Life Without Parole Sentences in the United States, June 2017 snapshot* ("June 2017 snapshot"), available at https://www.juvenilelwop.org/wp-content/uploads/June%202017%20Snapshot%20of%20JLWOP%20Sentences_01.pdf (documenting that zero individuals are serving juvenile LWOP sentences in Missouri).

The outcome in Pennsylvania is likely to be similar. *See, e.g.,* Riley Yaes, *Pennsylvania Supreme Court Throws Out Life Without Parole Sentence for Juvenile*, Pittsburgh Post-Gazette (June 26, 2017) (quoting the prosecutor in *Batts*, "'In practical terms, [the *Batts* decision] ends life without parole [for youths], that is my opinion,'"), available at http://www.post-gazette.com/news/state/2017/06/26/Qu-eed-Batts-case-pennsylvania-supreme-court-juvenile-parole/stories/201706260160.

the other hand, where courts have attempted to impose LWOP sentences on children pursuant to the *Miller* factors, the results have been arbitrary and inconsistent.

A. State Courts Have Adopted Categorical Bans On LWOP Sentences For Children Because Courts Cannot Accurately Differentiate Between The Child Whose Crime Reflects Transient Immaturity And The Rare Child Whose Crime Reflects Irreparable Corruption.

In the wake of *Miller*, multiple States have recognized that courts cannot determine whether a particular child offender is "irreparably corrupt" with a sufficient degree of accuracy or integrity to avoid constitutional violations. As a result, several state courts have adopted categorical bans on LWOP sentences for children.

In *State v. Sweet*, the Iowa Supreme Court categorically banned LWOP sentences for children, "conclud[ing] that sentencing courts should not be required to make speculative up-front decisions on juvenile offenders' prospects for rehabilitation because they lack adequate predictive information supporting such a decision." *Sweet*, 879 N.W.2d at 838-839. The *Sweet* Court held "that the enterprise of identifying which juvenile offenders are irretrievable at the time of trial is simply too speculative and likely impossible." *Id.* at 836-837 (Iowa 2016). Reviewing the factors promulgated by this Court in *Miller*, the *Sweet* Court found that "a district court at the time of trial cannot apply the *Miller* factors in any principled way to identify with assurance those very few adolescent offenders that

might later be proven to be irretrievably depraved." *Id*. at 837. Indeed, the *Sweet* Court found a "fundamental problem" with the application of the *Miller* factors: *Miller* requires "the sentencer to do the impossible, namely, to determine whether the offender is 'irretrievably corrupt' at a time when even trained professionals with years of clinical experience would not attempt to make such a determination." *Id*. The *Sweet* Court concluded that **"[n]o structural or procedural approach, including a provision of a death-penalty-type legal defense, will cure this fundamental problem."** *Id.* (emphasis supplied).[29]

In imposing a categorical ban on LWOP sentences for children, the Iowa Supreme Court also expressly rejected the case-by-case approach to imposing juvenile LWOP sentences because "the trial court simply will not have adequate information and the risk of error is unacceptably high … Because of the difficulty of applying the individual *Miller* factors, the likelihood that the multifactor test can be consistently applied by our district courts is doubtful at best." *Id.* at 838. The Iowa Supreme Court reasoned, "[w]e should not ask our district court judges to predict future prospects for maturation and

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[29] The consideration of defenses similar to those in death penalty cases is appropriate in the LWOP context for children because, as this Court has recognized, LWOP sentences for children share certain characteristics with death sentences. Imposition of LWOP on a child is "a forfeiture that is irrevocable," depriving the child of liberty without even the possibility of its restoration. This sentence is particularly harsh when imposed on a child, who, due to typical life expectancy, will generally serve more years and a larger percentage of his or her life in prison than an adult given an LWOP sentence. *See Miller*, 567 U.S. at 474-75; *Graham*, 560 U.S. at 69-70.

rehabilitation when highly trained professionals say such predictions are impossible." *Id.* at 839.

Less than a year later, the Court of Appeals of Washington followed suit and similarly imposed a categorical ban on LWOP sentences for children. *State v. Bassett*, 198 Wash. App. 714, 744, 394 P.3d 430, 446 (Wash. Ct. App. 2017) ("a life without parole or early release sentence is unconstitutional"). The Court of Appeals of Washington similarly held that "the speculative and uncertain nature of the *Miller* analysis . . . creates a risk of misidentifying juveniles with hope of rehabilitation for those who are irretrievably corrupt." *Id.* at 743, 445.

The Massachusetts Supreme Court also adopted a categorical ban on LWOP sentences for children after determining that "a conclusive showing of traits such as an 'irretrievably depraved character,' can never be made, with integrity." *Diatchenko*, 1 N.E.3d at 284, 466 Mass. at 659-670. The Massachusetts Supreme Court explained that, "because the brain of a juvenile is not fully developed . . . by the age of eighteen, a judge cannot find with confidence that a particular offender, at that point in time, is irretrievably depraved." *Id.* at 284, 670.

B. State Courts Have Imposed High Evidentiary Burdens On The Prosecution, Effectively Ending LWOP Sentences For Children.

Multiple states grappling with this Court's decisions in *Miller* and *Montgomery* have effectively ended the imposition of LWOP sentences for children by establishing high evidentiary burdens on the prosecution in instances where such sentences are sought.

The Supreme Court of Pennsylvania, applying this Court's decisions in *Miller* and *Montgomery*, held that "in Pennsylvania, a faithful application of the holding in *Miller*, as clarified in *Montgomery*, requires the creation of a presumption against sentencing a juvenile offender to life in prison without the possibility of parole." *Batts*, 2017 Pa. LEXIS 1477, at *97, 163 A.3d at 452, 2017 WL 2735411, at *31. The *Batts* Court reasoned that, pursuant to this Court's decisions in *Roper, Graham, Miller* and *Montgomery*, "juveniles are categorically less culpable than adults" because "the vast majority of adolescents change as they age and, despite their involvement in illegal activity, do not 'develop entrenched patterns of problem behavior.'" *Id.* at *95 (citing *Miller*, 567 U.S. at 471). As conceded by the prosecutor in *Batts*, "[i]n practical terms, [the *Batts* decision] ends life without parole" for juveniles.[30]

Similarly, in *Hart*, the Supreme Court of Missouri held that "a juvenile offender cannot be sentenced to life without parole for first-degree murder unless the state persuades the sentencer beyond a reasonable doubt that this sentence is just and appropriate under all the circumstances." *Hart*, 404 S.W.3d at 241. In doing so, the Missouri Supreme Court emphasized that "no consensus has emerged in the wake of *Miller* regarding: (a) whether the state or the defendant should bear the risk of non-persuasion on the determination that *Miller* requires the sentencer

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[30] Riley Yaes, *Pennsylvania Supreme Court Throws Out Life Without Parole Sentence for Juvenile*, Pittsburgh Post-Gazette (June 26, 2017) (quoting the prosecutor in *Batts*, "'In practical terms, [the *Batts* decision] ends life without parole [for youths], that is my opinion'"), available at http://www.post-gazette.com/news/state/2017/06/26/Qu-eed-Batts-case-pennsylvania-supreme-court-juvenile-parole/stories/201706260160.

to make, and (b) the burden of proof applicable to that determination." *Id*.

The high bars to imposition of LWOP sentences for children required by *Batts* and *Hart* are insufficient to eliminate the possibility of arbitrary and inconsistent LWOP sentencing decisions. As courts and experts alike have repeatedly recognized, neither courts nor experts can accurately determine at the time of sentencing whether a particular child's crime reflects "irreparable corruption," as opposed to merely "transient immaturity." Because research has shown that even adolescents convicted of the most heinous crimes can be rehabilitated, the imposition of LWOP sentences for children – regardless of where the bar for such sentences is set – is essentially a guessing game.

C. The Miller Factors Have Been Applied Inconsistently And Arbitrarily, Creating Disagreement Among Courts.

The arbitrary and inconsistent results reached by jurisdictions attempting to salvage LWOP sentences for children only underscores and highlights the impossibility of predicting incorrigibility and the need to end the practice. Courts reviewing the *Miller* factors in connection with the imposition of an LWOP sentence for a child have reached conflicting conclusions **even when considering the same case**.

Notably, two months after the Supreme Court of Idaho denied Sarah Johnson's Eighth Amendment challenge to her juvenile LWOP sentences, which were imposed before this Court's rulings in *Miller* and *Montgomery*, the Supreme Court of Idaho vacated and remanded a decision sentencing a

different child to life without parole for brutally murdering his mother. *Windom v. State*, 162 Idaho 417, 398 P.3d 150 (Idaho 2017). In doing so, the *Windom* Court overturned the district court's finding that the sentencing court had adequately considered the *Miller* factors. *Id.*

In *Brown v. State*, the Court of Criminal Appeals of Tennessee held that the lower court's sentencing of a child offender to consecutive LWOP sentences "was sufficient to protect the petitioner's constitutional rights in light of the expanded reading of *Miller* offered in *Montgomery*." No. W2015-00887-CCA-R3-PC, 2016 Tenn. Crim. App. LEXIS 281, *21, 2016 WL 1562981 (Tenn. Crim. App. Apr. 15, 2016). Despite this finding, the *Brown* Court vacated and remanded the matter for resentencing because it had "misgivings about the consecutive nature of the petitioner's sentences in light of the Supreme Court's repeated emphasis that 'children are constitutionally different than adults'… and 'life without parole is excessive for all but the rare juvenile offender,'" and found the imposition of consecutive LWOP sentences to be "suspect." *Id.* (*quoting Montgomery*, 136 S. Ct. at 734).

The Court has already held that a finding of incorrigibility is an absolute constitutional prerequisite for application of an LWOP sentence to a child. As recognized in *Graham*, courts cannot "with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change." Graham, 560 U.S. at 77.

This Court should not permit courts to continue this futile effort for two simple reasons: 1) there is no scientific basis upon which courts could make such determinations with any reasonable degree of

accuracy; and 2) this Court already has recognized that each error is a violation of the Eighth Amendment. This Court should categorically bar the imposition of LWOP sentences on children.

CONCLUSION

For the foregoing reasons, amicus curiae FPP respectfully urges the Court to grant Petitioner's Petition.

Respectfully submitted,

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