No. 17-1343

IN THE

Supreme Court of the United States

SHAWN LABARRON DAVIS,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

BRIEF OF PHILLIPS BLACK PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF OF *AMICUS CURIAE*[1]

INTEREST OF THE *AMICUS*

Amicus curiae—Phillips Black Project—have extensive familiarity and experience with the administration of the harshest penalties under law and the imposition of life without parole upon juveniles in particular. Phillips Black consists of independent practitioners collectively dedicated to providing the highest quality of legal representation to prisoners in the United States sentenced to the severest penalties under law. Phillips Black further contributes to the rule of law by consulting with counsel, conducing clinical training, and developing research on the administration of criminal justice.

Phillips Black has conducted leading research on the administration of juvenile life without parole sentences and has served as counsel for *amici* and inmates serving such sentences in the state and federal courts across the United States.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Shawn Davis's sentencing judge called him a "wild animal" and sentenced him to die in prison for helping his friend, a seventeen year old girl, kill the forty year old man who had stalked her after she refused to accept cigarettes and money for sex any

[1] *Amici* certify that no party or party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. All counsel of record received timely notice of *Amici*'s intent to file this brief more than 10 days prior to its due date and all parties consented to filing of this brief.

longer. The lower courts, like the sentencing judge, refused to make a finding regarding whether Mr. Davis is irreparably corrupt.

"Underlying the eighth amendment is a fundamental premise that [defendants] are not to be treated as less than human beings." *Spain v. Procunier*, 600 F.2d 189, 200 (9th Cir. 1979) (Kennedy, J.). All but the rarest juvenile offenders are ineligible for the sentence of life without parole. "*Miller* [*v. Alabama*, 567 U.S. 460 (2012)] drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016). Only the latter, those who are irreparably corrupt, may be lawfully sentenced to life without the possibility of parole (JLWOP). *Miller*, 567 U.S. at 465.

Although states have wide latitude to implement constitutional protections, these substantive guarantees provide the lines within which the states must color. Otherwise, the protections may become meaningless. *See Hall v. Florida*, 134 S. Ct. 1986, 1999 (2014). Failing to require a finding of eligibility for JLWOP "creat[es] an unacceptable risk that persons" who are categorically less deserving will be sentenced to die in prison. *Montgomery*, 136 S. Ct. at 734.

At Mr. Davis's sentencing proceeding, his counsel had requested for a life with parole sentence and the sentencing court had before it evidence that Mr. Davis's youth played a substantial role in his life at the time of the offense.

The sentencing court's decision to impose a sentence of life without parole, particularly without first

making explicit findings about whether Mr. Davis is eligible for that sentence, created unnecessary risk that he was wrongly sentenced to die in prison.

ARGUMENT

I. *MILLER* EXCLUDES MOST JUVENILES FROM ELIGIBILITY FOR JLWOP SENTENCES.

Since 2005, the Court has recognized that the justifications for punishment—retribution, deterrence, incapacitation, and rehabilitation—are insufficient to warrant imposing the most severe punishments on most juveniles. On this basis, *Roper v. Simmons*, 543 U.S. 551 (2005) excluded juveniles from capital punishment. *Graham v. Florida*, 560 U.S. 48 (2010) foreclosed life without parole for juveniles convicted of nonhomicide offenses. And, while reserving judgment on whether JLWOP was ever warranted, *Miller v. Alabama*, 567 U.S. 460 (2012) definitely foreclosed JLWOP for most (if not all) juveniles. While avoiding the question of whether JLWOP could ever be constitutional, the Court made it clear that, at a minimum, that sentence must be limited to the rare juvenile offender who is irreparably corrupt. *Id.* at 479 (declining to address whether "the Eighth Amendment requires a categorical ban on life without parole for juveniles"). Each of these holdings recognizes what every parent knows: that juveniles are fundamentally less culpable than their adult counterparts.

A. *Miller*'s Holding Is Premised On The Acknowledgment That The Characteristics Of Juveniles Rarely, If Ever, Justify An Irrevocable Sentence To Die In Prison.

Three characteristics of juvenile offenders establish their "lessened culpability": "[1] a lack of maturity and an underdeveloped sense of responsibility; [2] they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and [3] their characters are not as well formed." *Graham*, 560 U.S. at 68 (quotations omitted). All three characteristics undermine culpability and, therefore, lessen the penological justifications for imposing the harshest penalties on juvenile offenders. *Id.* at 71-72 (quoting *Roper*, 543 U.S. at 571).

The first characteristic "often result[s] in impetuous and ill-considered actions and decisions," and this fact, along with the second characteristic—susceptibility to outside pressures—undermine both retribution and deterrence. *Id.* at 72 (quotation omitted). The third characteristic reflects the understanding that juveniles are more capable of change than adults, making it difficult at sentencing to distinguish between juveniles whose crimes are the result of "unfortunate yet transient immaturity" and the "rare" irreparably corrupt or incorrigible juvenile offender. *Id.* at 72-73. Therefore the goal of incapacitation does not require a sentence guaranteeing the juvenile offender will die in prison. *Id.* Finally, the third factor also underscores a juve-

nile's "capacity for change"—and rehabilitation, making an irrevocable sentence to die in prison inconsistent with the rehabilitative ideal. *Id.* at 74. A defendant's status as a juvenile alters the balance for assessing culpability and undermines, perhaps fatally, the justification for irrevocably sentencing juveniles to die in prison.

B. *Miller* Excludes JLWOP As A Potential Sentence For All But The Rare Juvenile Who Is Irreparably Corrupt.

In recognition of juveniles' diminished culpability, they must be excluded from JLWOP if their "crime reflects unfortunate yet transient immaturity, [rather than] . . . irreparable corruption." *Miller*, 567 U.S. at 479. Put another way, juveniles who are not irreparably corrupt, are not eligible for JLWOP.

This high bar for imposing such a sentence flows directly from the Court's recognition that juveniles are, as a category, "less deserving of the most severe punishments." *Graham*, 560 U.S. at 67. In light of this recognition, "the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" *Montgomery*, 136 S. Ct. at 734.

The Court has consistently recognized that it "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." *Roper*, 543 U.S. at 573. Nonetheless, in *Miller*, it limited the reach of JLWOP precisely based on this differentiation.

It is undoubtedly for this reason that the Court expressed its view that only the "rarest of juvenile

offenders" would be subjected to such a sentence. *Montgomery*, 136 S. Ct. at 734. If even experts in psychology have difficult differentiating youthful impulsivity from permanent depravity, so to would the courts. The humility required in human decisionmaking requires restraint before imposing this severest sanction. Limiting its application as the Court has reflects this humility.

II. A FINDING OF IRREPARABLE CORRUPTION IS REQUIRED FOR THE RELIABLE ADMINISTRATION OF JLWOP.

Precisely because of the difficulty in making such a distinction, among other reasons, the better view would be to categorically exclude juveniles from JLWOP. Parole boards, who will have decades of information about the juvenile offender's adjustment as an adult, are far better suited to assessing whether an offender is irreparably corrupt.

However, if the Court again defers final resolution of the constitutionality of JLWOP, several considerations strongly weigh in favor of imposing a requirement that the juvenile being subject to the sentence is eligible for it. That is, for requiring the sentencer to determine whether the juvenile is irreparably corrupt.

First, imposing such a requirement will reduce the risk that someone is wrongly sentenced to JLWOP. This Court's treatment of *Atkins v. Virginia*, 536 U.S. 304 (2002) claims is demonstrative: "If the States were to have complete autonomy [. . .] *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *See Hall*, 134 S. Ct. at 1999. Without such procedural limitations, the risk of unconstitutional

sentences is manifest. *See Moore v. Texas*, 134 S. Ct. 1986, 1990 (2014). Thus, the Court has required states to fully account for who is, under *Atkins*, ineligible for the death penalty. To hold otherwise would "create[] an unacceptable risk that persons with intellectual disability will be executed, and thus [would be] unconstitutional." *Hall*, 134 S. Ct. at 1990.

Likewise, it strains the imagination to think that states would be permitted to forgo determining whether a defendant is less than age eighteen before imposing the death penalty. *Roper*, 543 U.S. at 574. Where "[a] line must be drawn," states must respect it. In the context of JLWOP, this means finding whether a juvenile is irreparably corrupt before determining whether to impose JLWOP.

Next, requiring such a finding will improve judicial economy by reducing at the outset the number of cases where JLWOP is potentially applicable. Prosecutors will not seek JLWOP sentences absent a firm conviction that their proof will establish the difficult to meet standard. American Bar Association, Criminal Justice Standards for the Prosecution Function 3-4.3(a) (Fourth Edition). The high bar for establishing irreparable corruption will limit the instances in which the state will seek such a sentence.

Limiting the reach of JLWOP in this way will also alleviate some of the distortions presently apparent in its administration. That is, a handful of *counties* are overwhelmingly responsible the imposition of JLWOP. John R. Mills, et al., 65 Am. U. L. Rev. 535, 573 (2016) ("Three counties account for over twenty percent of all JLWOP sentences [nationwide]."). Imposing a requirement that a factfinder be persuaded that the juvenile before it is irreparably

corrupt will bring greater uniformity to the administration of this sentence.

Again, it may be that factfinders are unable to reliably determine *any* juvenile is irreparably corrupt. For that reason, unequivocally holding that JWLOP is unconstitutional is justified. However, if the Court does not take this opportunity to so hold, reliably administering that punishment requires, at a minimum, ensuring those subject to it are actually eligible for JLWOP. This means requiring that sentencers find whether the juvenile is irreparably corrupt before determining the appropriate sentence.

III. MR. DAVIS EXEMPLIFIES WHY SUCH A FINDING WOULD EXCLUDE THOSE INELIGIBLE FOR JLWOP.

Mr. Davis is not a "wild animal." He is a human being who deserves to be accorded the dignity our constitution requires. Yet the sentencing court bluntly dehumanized him, referring to him as an animal when it irrevocably sentenced Mr. Davis to die in prison.

When it did so, the court had substantial evidence that Mr. Davis was not among the most deserving of punishment. More specifically, Mr. Davis's circumstances reflect why requiring a determination of irreparable corruption Mr. Davis's parents and guardians affirmatively undermined his ability to have a healthy childhood. His father was absent, and his mother used drugs and alcohol daily. His uncle would beat him with an extension cord as his mother encouraged him. He lived in a building associated with the drug and sex trades.

Nonetheless, Mr. Davis participated in team sports and church. He did what he could to rise above his circumstances.

Because of the depravations in his homelife, he was ridiculed among his peers, who mocked his hygiene and poverty. A psychological report noted his susceptibility to "negative peer influence" and that he was "driven by immediate impulses."

These characteristics are the "hallmark features" of youth. It accounting for Mr. Davis's culpability, his "brutal [and] dysfunctional" home environment, from which he was unable to "extricate himself" weighs against finding him among the worst offenders. *See Miller*, 567 U.S. at 477. Likewise, impulsivity and susceptibility to peer influence are distinctive aspects of youth. *Id.* In light of his efforts to rise above these circumstances, it is doubtful that Mr. Davis is irreparably corrupt.

Even the crime suggests transient immaturity. Alienated among his peers, and brutalized at home, Mr. Davis took solace in his relationship with Mary Scarborough. Ms. Scarborough, seventeen at the time, had been abused by the forty-year-old victim, who would provide her with money and drugs in exchange for sex. When she attempted to end the relationship, he started stalking Ms. Scarborough. Mr. Davis joined Ms. Scarborough and her ex-boyfriend in a plot to kill the victim and ultimately played a substantial role in the brutal murder.

Mr. Davis's ill-considered attempts at heroism must be situated in the larger context of his youth. *See Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) ("youth is more than chronological fact."). When so assessed, even the offense he committed is sugges-

tive of youthfulness and that he is not irreparably corrupt.

Had the sentencing court been required to make a finding of whether Mr. Davis was irreparably corrupt, Mr. Davis's impulsivity, susceptibility to peer influence, devastating homelife, and efforts to rise above his circumstances would have greatly limited or foreclosed a finding of eligibility for JLWOP. Instead he was subjected to a sentence that is unconstitutional for all but the rarest juvenile offender.

CONCLUSION

The Court should grant the petition for certiorari.

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