No. 18-1259

IN THE

Supreme Court of the United States

BRETT JONES,

Petitioner,

v.

MISSISSIPPI,

Respondent.

On Writ of Certiorari to the Mississippi Court of Appeals

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Mississippi's quarrel is with settled law. The State concedes—as it must—that a substantive rule limiting life without parole to permanently incorrigible juvenile homicide offenders would require sentencing courts to determine whether or not a given juvenile is permanently incorrigible. Resp. Br. 38. Mississippi therefore attacks the constitutional rule itself, articulated in *Miller* and affirmed in *Montgomery*. See *Miller* v. *Alabama*, 567 U.S. 460, 479–80 (2012); *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 735 (2016). Mississippi insists that "'permanent incorrigibility' is not the substantive Eighth Amendment standard for juvenile life-without-parole sentences," Resp. Br. 2, and thereby disavows any obligation to "distinguish[] . . . between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Miller*, 567 U.S. at 479–80 (quoting *Roper* v. *Simmons*, 543 U.S. 551, 573 (2005)).

Mississippi contends that *Miller* only requires "a sentencer [to] consider[] 'youth and its attendant characteristics' before sentencing a juvenile to life without parole," Resp. Br. 1 (citation omitted), but the Court has already rejected this reading of *Miller*'s holding. If Mississippi were correct, *Miller* would have announced a purely procedural rule, and *Montgomery* would have reached a different result on the issue of retroactivity. Instead, *Montgomery* held that *Miller* applies retroactively because *Miller* announced a substantive rule—only permanently incorrigible juvenile homicide offenders may be sentenced to life without parole.

The permanent-incorrigibility rule is no rule at all unless sentencing courts are required to find whether

a juvenile offender is, or is not, permanently incorrigible. That requires an "evident ruling on [the] question." *United States* v. *Briones*, 890 F.3d 811, 822 (9th Cir. 2018) (O'Scannlain, J., concurring in part and dissenting in part), *on reh'g en banc*, 929 F.3d 1057 (9th Cir. 2019)). This requirement does not, however, automatically assign the burden to prove permanent incorrigibility to the prosecution, demand that judges use "particular verbiage," or mandate a "formal," "express," or "affirmative" finding. See U.S. Br. i, 25–26; Resp. Br. i, 1, 35–37.

Following instructions from the Mississippi Supreme Court, the sentencing judge in this case did not mention Brett's capacity for reform at all, let alone recognize it as dispositive. The judge instead considered youth as a collection of "mitigating and . . . aggravating circumstances." J.A. 149. That exercise failed to answer the question necessary to constitutionally guarantee death in prison for a fifteen-year-old boy: Is Brett Jones permanently incorrigible?

ARGUMENT

I. *Miller*'s Substantive Rule Bans Life Without Parole For Juvenile Homicide Offenders Who Are Not Permanently Incorrigible.

1. Mississippi's denial of the permanent-incorrigibility rule amounts to open revolt against settled law. Mississippi's brief envisions an alternate reality in which *Miller* did not state that imposing life without parole requires "distinguishing . . . between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Miller*, 567 U.S. at 479–80 (quoting *Roper*, 543 U.S.

at 573). And in that alternate reality, *Montgomery* does not exist at all.[1]

Montgomery could not be clearer about *Miller*'s permanent-incorrigibility rule—it repeats the rule *seven times*. See Pet. Br. 17–18. The principal dissent, joined by every Justice outside the majority, also recognized that the substantive rule identified by the Court is "the 'incorrigibility' requirement." *Montgomery*, 136 S. Ct. at 744 (Scalia, J., dissenting). Thus, each and every member of the *Montgomery* Court acknowledged that the majority opinion read *Miller* as setting out the permanent-incorrigibility rule.

2. Mississippi incorrectly suggests that *Montgomery*'s repeated references to *Miller*'s substantive rule are dicta. See Resp. Br. 33. On the contrary, the rule was essential to *Montgomery*'s result.

The question presented in *Montgomery* was "whether *Miller* adopts a new substantive rule that applies retroactively on collateral review." *Montgomery*, 136 S. Ct. at 727. In the sentencing context, a rule is substantive if it "prohibits 'a certain category of punishment for a class of defendants because of their status or offense.'" *Id.* *Montgomery* expressly held that "[u]nder this standard, . . . *Miller* announced a substantive rule that is retroactive in cases on collateral review." *Id.* The Court defined the content of that substantive rule just as explicitly: "*Miller* . . . rendered life without parole an unconsti-

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[1] This is a new position for Mississippi, which acknowledged below that "*Miller* announced a substantive rule of constitutional law," and that the "question" is "[w]hether [Brett's] crime reflected irreparable corruption." Appellee's Sup. Ct. Supp. Br. 4, 5 (quoting *Montgomery*, 136 S. Ct. at 725).

tutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. As a result, *Miller* announced a substantive rule of constitutional law. Like other substantive rules, *Miller* is retroactive." *Id.* at 734 (citing *Penry* v. *Lynaugh*, 492 U.S. 302, 330 (1989)); see also *id.* ("*Miller* . . . bar[red] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. For that reason, *Miller* is no less substantive than are *Roper* and *Graham*.").

The permanent-incorrigibility rule therefore represents a bedrock holding of *Montgomery*. "[I]t is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 67 (1996); see also *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1416 n.6 (2020) (Kavanaugh, J., concurring in part) ("[C]ourts are . . . bound to follow both the result and the reasoning of a prior decision."); Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 385–86 (1964) ("[A] court's stated and, on its view, necessary basis for deciding does not become dictum because a critic would have decided on another basis.").

To be sure, as Mississippi points out, *Miller* and *Montgomery* held that mandatory life-without-parole sentences violate the Eighth Amendment. Resp. Br. 15–21, 29–30. No one disputes that. But these cases *also* clearly held that the Eighth Amendment limits life without parole to permanently incorrigible offenders. Establishing that a holding *includes* a given proposition does not show that the holding *is limited*

to that proposition.[2] Here, the fact that *Miller* and *Montgomery* declared mandatory sentences unlawful cannot negate the fact that they also held the Eighth Amendment prohibits sentencing corrigible juvenile homicide offenders to life without parole. Quite the contrary: *Montgomery* concluded that *Miller* applied retroactively *because* it exempted corrigible juveniles from life-without-parole sentences. *Montgomery*, 136 S. Ct. at 734.

3. Mississippi proposes an alternative reading of *Miller*—but the Court has already disavowed it. Mississippi captions an entire section of its brief (Section IV) as follows: "The Eighth Amendment Requires Only That a Sentencer Consider the Mitigating Circumstances of Youth and Its Attendant Characteristics Before Imposing a Life-Without-Parole Sentence." Resp. Br. 36. Not so. In this Court's own words, "*Miller* . . . did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole." *Montgomery*, 136 S. Ct. at 734.

In *Montgomery*, Louisiana unsuccessfully advanced the same argument Mississippi makes now, contending that *Miller* "mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* The Court explicitly rejected this argument: "Even if a court considers a child's age before sentencing him or her to a lifetime in prison,

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[2] Mississippi wonders: "[W]hy did this Court [in *Miller*] survey the number of jurisdictions that it believed had mandatory life-without-parole sentences for juvenile homicide offenders? And why did the Court spend time confirming that one of the petitioners' sentences was actually mandatory?" Resp. Br. 19 (internal citation omitted). These questions have a simple answer: *Miller*'s holding includes the proposition that mandatory life-without-parole sentences violate the Eighth Amendment.

that sentence still violates the Eighth Amendment for a child whose crime reflects "unfortunate yet transient immaturity." *Id.* (quoting *Miller*, 567 U.S. at 479–80).

4. Mississippi's position would render *Montgomery* incoherent and create confusion in this Court's retroactivity jurisprudence. If, as Mississippi contends, *Miller* only required sentencers to "consider youth and its attendant characteristics before sentencing a juvenile to life without parole," see Resp. Br. 37, then it would have made no sense to conclude that *Miller* set out a substantive rule that applies retroactively. Rules requiring consideration of factors are procedural rather than substantive because they "regulate only the manner of determining the defendant's culpability." *Schriro* v. *Summerlin*, 542 U.S. 348, 353 (2004).

For example, Mississippi's position conflicts with *Graham* v. *Collins*, where a habeas petitioner retroactively attacking his sentence put forth a rule similar to Mississippi's understanding of *Miller*. See 506 U.S. 461, 495 (1993). The rule considered in *Graham* would have required jury instructions in a capital case to permit consideration of mitigating evidence of "youth, unstable childhood, and positive character traits." *Id.* at 466. As the Court recognized, such a rule would "plainly" be non-substantive because it "would neither decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons." *Id.* at 477.

The Court has also rejected retroactive application of other Eighth Amendment rules regarding consideration of factors or evidence in mitigation of punishment. *E.g.*, *Saffle* v. *Parks*, 494 U.S. 484, 486, 494–495 (1990) (proposed rule against instructing jury not to decide the case based on sympathy for the defend-

ant); *Beard* v. *Banks*, 542 U.S. 406, 408, 417 (2004) (rule allowing jury's consideration of mitigating factors not found unanimously); *O'Dell* v. *Netherland*, 521 U.S. 151, 153, 167 (1997) (rule regarding evidence of parole ineligibility used to rebut prosecution's claim of future dangerousness).

Nor would a rule that simply bans mandatory life without parole for juveniles, in favor of discretion, be a substantive rule. Requiring discretion does not "prohibit[] 'a certain category of punishment for a class of defendants because of their status or offense.'" *Montgomery*, 136 S. Ct. at 732 (citation omitted). It simply changes the procedure through which the sentence of life without parole may be imposed.[3]

Mississippi also appears to argue that *Miller* applies retroactively only because it turns on general "Eighth Amendment principles of proportionality." Resp. Br. 31. *Miller*, however, adopted a rule both "substantive" and "new." *Montgomery*, 136 S. Ct. at 732. General proportionality principles were not newly discovered in *Miller*. See *Weems* v. *United States*, 217 U.S. 349, 367 (1910) ("[I]t is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense."); *Atkins* v. *Virginia*, 536 U.S. 304, 311 (2002) ("We have repeatedly applied [the] proportionality precept in . . . cases interpreting the Eighth Amendment.").

A procedural rule also does not turn into a substantive rule when it poses a "grave or significant risk of

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[3] If new rules making mandatory sentencing regimes advisory were held substantive, then *United States* v. *Booker* would apply retroactively—a result that would authorize a torrent of habeas petitions. *See United States* v. *Booker*, 543 U.S. 220, 245 (2005) (holding that sentencing judges must "consider Guidelines ranges" and treat them as "advisory").

disproportionate punishment." Resp. Br. 14. Such a doctrine would undermine the distinction between procedural and substantive rules and produce inconsistent results by forcing courts to guess about which procedural rules prevent "significant" risks. Contrary to Mississippi, "decisions alter[ing] the processes in which States must engage before sentencing a person to death" do not apply retroactively even if they have "some effect on the likelihood that [a] punishment would be imposed." *Montgomery*, 136 S. Ct. at 736. Such decisions do not "render[] a certain penalty unconstitutionally excessive for a category of offenders." *Id.*

5. Despite the clarity of *Montgomery*'s analysis, Mississippi contends that *Montgomery* cannot mean what it repeatedly says because "[t]his Court does not announce new rules in cases, like *Montgomery*, that involve final sentences." Resp. Br. 24. But again, *Montgomery* did not establish the permanent-incorrigibility rule. *Miller* did, when it held that sentencing courts must "distinguish[] . . . between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Miller*, 567 U.S. at 479–80 (quoting *Roper*, 543 U.S. at 573).

Like Mississippi, the dissent in *Montgomery* insisted that the Court's identification of the permanent-incorrigibility rule amounted to a "rewriting" of *Miller*. *Montgomery* 136 S. Ct. at 743 (Scalia, J., dissenting). But that ship has sailed: *Montgomery*'s construction of *Miller* is now settled law.

6. Although the question of whether *Montgomery* expanded *Miller*'s holding figured prominently last term in *Mathena* v. *Malvo*, it does not matter here. *Mathena* came to this Court on collateral review of a

federal habeas petition based solely on *Miller*. Petition at 28–29, *Mathena* v. *Malvo*, No. 18-217 (U.S. Aug. 16, 2018). In contrast, this is a direct appeal. The outcome does not depend on reading *Miller* in isolation, as if *Montgomery* had never happened. Brett enjoys the full benefit and prospective application not only of *Miller*, but also of *Montgomery*'s construction of *Miller*. *Montgomery* settled any question of what this Court meant in *Miller*. Mississippi just happens to disagree with it.

II. Sentencing A Juvenile Homicide Offender To Life Without Parole Requires Finding Him Permanently Incorrigible.

1. Mississippi acknowledges that "if the Eighth Amendment requires, as a substantive matter, that a juvenile actually be 'permanently incorrigible' before a sentencer may impose a life-without-parole sentence," then the Constitution necessarily requires a determination of permanent incorrigibility. Resp. Br. 38. Because permanent incorrigibility is indeed a substantive constitutional requirement, Mississippi's concession suffices to decide the case in Brett's favor.

2. *Montgomery* does not "reject[]" the argument that a "finding of incorrigibility is required." Resp. Br. 37. The Court made it clear that sentencers must "separate those juveniles who may be sentenced to life without parole" because they are permanently incorrigible "from those who may not." *Montgomery*, 136 S. Ct. at 735. If no determination of permanent incorrigibility were required, states would be "free to sentence a child whose crime reflects transient immaturity to life without parole"—the very outcome *Montgomery* explicitly repudiates in the same paragraph that discusses a "formal factfinding requirement." See *id.*

The *Montgomery* Court referred to a "formal factfinding requirement" in describing—and rejecting—Louisiana's argument that *Miller* did not announce a substantive rule: "Louisiana suggest[ed] that *Miller* cannot have made a constitutional distinction between children whose crimes reflect transient immaturity and those whose crimes reflect irreparable corruption because *Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility." *Id.*

Montgomery explained that the absence of a factfinding requirement in *Miller* itself simply reflects the Court's usual practice not to mandate accompanying procedures at the same time it announces a new substantive rule: "When a new substantive rule of constitutional law is established," this Court generally "leave[s] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.* (first alteration added) (quoting *Ford* v *Wainwright*, 477 U.S. 399, 416–17 (1986)). Thus, rather than holding that no finding is required, *Montgomery* simply made clear that *Miller* did not address the issue.

3. Even assuming for argument's sake that *Montgomery*'s statements could be divorced from their context, Mississippi and various amici manufacture tension between these statements and Brett's position in two ways. First, they ignore *Montgomery*'s use of the adjective "formal" to cabin its discussion of a factfinding requirement. See *id.* ("That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole."). Second, they falsely suggest that the required determination Brett advocates would demand formality—in addition to heightened explicitness and even particular vocab-

ulary. Resp. Br. 1, 36, 40, 42; U.S. Br. I; Indiana Br. i, 5, 25.

All of this just knocks down a straw man. States may opt for additional requirements of formality and explicitness, or not, as a matter of their own procedural law. But the Eighth Amendment does not mandate these special features. As Petitioner's brief explained, *Miller* requires a determination that the defendant is permanently incorrigible—and thus eligible for a life-without-parole sentence—not formality or magic words. See Pet. Br. 25. See also *Brumfield* v. *Cain*, 576 U.S. 305, 322 (2015) (equating "finding" and "determination" in reviewing a court's denial of an *Atkins* hearing); *Legal Definition of Finding*, Merriam-Webster's Dictionary (2020) ("a determination resulting from judicial or administrative examination or inquiry"); *Finding*, Oxford English Dictionary (3d ed. 2016) ("the result of a judicial examination or inquiry").

In making that determination, it does not matter if the court describes the defendant as permanently incorrigible, irreparably corrupt, irredeemably depraved, destined for a lifetime of criminality, forever beyond rehabilitation, or immutably criminal—or if the court chooses another way to convey the same conclusion.

Nor does federal law require state courts to determine permanent incorrigibility through "factfinding." The Eighth Amendment requires an answer to the question of permanent incorrigibility but leaves the type of determination state courts must make—legal question, factual question, or mixed question, for example—to state procedure and discretion. See, *e.g.*, *Commonwealth* v. *Batts*, 163 A.3d 410, 435–36 (Pa. 2017) (mixed question); *People* v. *Skinner*, 917

N.W.2d 292, 324 (Mich. 2018) (McCormack, J., dissenting) (legal question).

The record must, however, intelligibly reflect a determination of permanent incorrigibility. The sentencing court must actually do what *Miller* requires—"distinguish . . . between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Miller*, 567 U.S. at 479–80 (quoting *Roper*, 543 U.S. at 573). States cannot flout the permanent-incorrigibility rule by imposing juvenile life-without-parole sentences without an "evident ruling on [the] question." See *Briones*, 890 F.3d at 822 (O'Scannlain, J., concurring in part and dissenting in part).

4. To rule for Brett, this Court need not hold that states would bear the burden to prove permanent incorrigibility, as the United States incorrectly claims. U.S. Br. 25–26. At the outset, and contrary to the United States, Petitioner's brief did not assert any such thing. Rather, it explicitly recognized that "States certainly have some discretion in crafting the procedure for making the permanent incorrigibility finding." Pet. Br. 20.

Thus, as the United States suggests, a "State could, if it chose, convert 'permanent incorrigibility' into an aggravating factor, which the prosecution would have to prove in order for a juvenile offender to be eligible for life without parole." U.S. Br. 26–27. As the United States also notes, "nothing in *Miller* or *Montgomery* compels a State to do so, or forecloses a State from treating [corrigibility] as a mitigating factor that a juvenile must himself establish," *id.* at 27, mirroring the usual procedure in *Atkins* and *Ford* hearings, see, *e.g.*, *Winston* v. *Commonwealth*, 604 S.E.2d 21, 50

(Va. 2004).[4] What states cannot do, however, is refuse to address the question of permanent incorrigibility altogether.

"*Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." *Montgomery*, 136 S. Ct. at 734. To hold that no answer to the question of permanent incorrigibility is necessary before imposing a life-without-parole sentence is to erase that line.

III. This Court Used The Phrase "Permanent Incorrigibility" To Mean Permanent Incorrigibility.

In contrast to Mississippi, the United States does not contest that *Miller*'s substantive rule requires sentencing courts "to distinguish offenders 'whose crimes reflect transient immaturity' from those whose crimes reflect 'incorrigibility.'" U.S. Br. 13 (citations omitted). The United States makes a different analytical error, however, by stripping the permanent-incorrigibility rule of content.

According to the United States, *Miller* announced a substantive rule that is neither substantive nor a rule. Instead, "[t]he terms 'transient immaturity' and 'irreparable corruption' (or 'permanent incorrigibil-

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[4] As in *Ford* and *Atkins* cases, *Apprendi* requirements would not attach to *Miller*'s eligibility rule if state law assigned the burden to the defendant. "Not surprisingly, courts that have considered the possible intersection of *Apprendi* and *Atkins* have unanimously rejected it, finding the *Atkins* exemption acts as a conclusive sentence mitigator rather than as a sentence enhancer." *In re Davis*, 395 P.3d 998, 1005–06 (Wash. 2017) (collecting cases). *See also Winston*, 604 S.E.2d at 50 (rejecting application of *Apprendi* requirements to *Atkins* claim because "the burden of such proof is on the defendant").

ity') are descriptive labels for the '*judgment*' a sentencer necessarily reaches about the 'crime' through a . . . process that includes the consideration of youth." U.S. Br. 20 (citation omitted) (emphasis in original). That is, "[t]he terms serve as shorthand for the sentencer's assessment of whether 'the distinctive attributes of youth diminish the penological justifications' for a life-without-parole sentence." *Id.* (citation omitted).[5]

1. In the United States' new position in this case, *Miller*'s substantive rule is entirely circular: "If the sentencer . . . reaches the conclusion that a life-without-parole sentence is . . . warranted, that is a judgment that the offender's crime reflects 'irreparable corruption' or 'permanent incorrigibility.'" *Id.* In other words, we know a judge applied the substantive rule of permanent incorrigibility in imposing life without parole if the judge imposed life without parole. Under this logic, if a trial court ignored an *Atkins* claim and sentenced a defendant to death, reviewing courts would affirm, explaining that the in-

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[5] The United States' fluctuating interpretation of *Miller* and *Montgomery* undermines its credibility on the issue. First, a few years ago the United States correctly recognized the permanent-incorrigibility rule: "*Miller* and *Montgomery* stand for the proposition that a court must affirmatively consider . . . whether a juvenile's homicide crime reflects the 'transient immaturity of youth' (in which case a sentence of life imprisonment violates the Eighth Amendment) or 'irreparable corruption' (in which case a sentence of life imprisonment is permissible)." U.S. Letter Resp. Br. at 2, *Velez* v. *United States*, No. 1:13-cv-3372 (E.D.N.Y. July 24, 2017). Last year, the United States changed its mind, arguing that *Miller* "held only that the Eighth Amendment forbids 'mandatory' sentences of life without parole for homicides committed by juveniles." U.S. Br. at 11, *Mathena* v. *Malvo*, No. 18-217 (U.S. June 18, 2019). Now the United States has changed its position again.

tellectual disability determination is "not an inquiry distinct from the judgment that such a [capital] sentence represents." *Id.* at 12.

2. Given the number of times *Miller* and *Montgomery* refer to transient immaturity, irreparable corruption, and permanent incorrigibility, one might have expected the Court to say so if it meant to use these terms as a substitute for something else—considering youth and deciding that a defendant should be sentenced to life without parole. And surely the United States would have detected the Court's shorthand earlier, say when it briefed *Mathena*, last term, or petitioned even more recently for certiorari in *United States* v. *Briones*, No. 19-720 (U.S. Dec. 6, 2019).

Contrary to the United States, the Court has not created new meanings for the term "permanent incorrigibility," or its synonyms "irreparable corruption" and "irretrievable depravity." "Incorrigible" means "incapable of being corrected or amended." *Incorrigible*, Merriam-Webster's Dictionary (2020). The concept has a long pedigree in the history of juvenile justice in America: "[T]he primary meaning of the word 'incorrigible' is: '1. Not corrigible; incapable of being corrected or amended; not reformable.'" *Shinn* v. *Barrow*, 121 S.W.2d 450, 451 (Tex. Civ. App. 1938); see also *Scott* v. *Flowers*, 84 N.W. 81, 82 (Neb. 1900), *on reh'g*, 85 N.W. 857 (1901) (describing a youth charged with incorrigibility as "incapable of being corrected or amended, bad beyond correction, irreclaimable").

Consistent with that accepted meaning, "life without parole is justified" under *Miller*'s substantive rule only for the "rare juvenile offender who exhibits such irretrievable depravity that *rehabilitation is impossible*." *Montgomery*, 136 S. Ct. at 733 (emphasis added). Thus, the Court has already rejected the United States' argument that the "judgment" required by

Miller "is simply a judgment about the appropriate sentence" rather than a conclusion about the juvenile offender's capacity for rehabilitation. See U.S. Br. 24. The Court has also followed the dictionary definition of "incorrigible" by contrasting "the few incorrigible juvenile offenders" on the one hand and "the many that have the capacity for change" on the other. *Graham* v. *Florida*, 560 U.S. 48, 77 (2010). See also *id.* at 72 ("To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible.").

Montgomery expressly stated that "[p]risoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, *if it did not*, their hope for some years of life outside prison walls must be restored." 136 S. Ct. at 736–37 (emphasis added). The Court even provided "an example of one kind of evidence that prisoners might use to demonstrate rehabilitation," *id.* at 736, which matches the evidence Brett presented at his hearing, where he demonstrated his "evolution from a troubled, misguided youth to a model member of the prison community." *Id.*

3. Both Mississippi and the United States mistakenly contend that the permanent-incorrigibility determination focuses on the crime itself rather than the defendant's capacity for rehabilitation. Resp. Br. 41–42; U.S. Br. 12, 14–15, 19–20. That makes no sense: Crimes are not mature, immature, corrigible, or incorrigible—people are. A crime cannot reflect the incorrigibility of a person who is corrigible.

The nature and circumstances of a crime can inform—but not replace—a court's determination of a juvenile defendant's capacity for rehabilitation. The Court repeatedly has warned that an exclusive focus

on the crime in juvenile cases creates "an 'unacceptable likelihood . . . that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course.'" *Graham*, 560 U.S. at 78 (quoting *Roper*, 543 U.S. at 573). Focusing on the crime alone disregards "*Miller*'s central intuition—that children who commit even heinous crimes are capable of change." *Montgomery*, 136 S. Ct. at 736.

IV. Mississippi's Position Would Burden State And Federal Courts And Disrupt Their Implementation Of *Miller*.

1. Mississippi contends that under the permanent-incorrigibility rule, federal courts will be "drawn into" states' permanent-incorrigibility determinations and forced to "review [their] correctness." Resp. Br. 38. But Mississippi itself asserts that federal habeas courts cannot entertain petitions from many juvenile offenders currently serving life-without-parole sentences due to AEDPA's one-year limitations period, which began running in 2012 when this Court decided *Miller*. *Id.* at 27; see 28 U.S.C. § 2244(d)(1)(C). Additionally, AEDPA's requirement that federal habeas petitioners exhaust state post-conviction remedies would further narrow the number of claims that would wend their way to federal court. See 28 U.S.C. § 2254(d). And federal courts would inquire only whether the state court "*unreasonabl[y]*" applied "clearly established Federal law," see 28 U.S.C. § 2254(d)(1) (emphasis added), not assess the "correctness" of state court determinations. See Resp. Br. 38.

2. Four years into implementing *Montgomery*, Mississippi and amici do not provide even one example of a case where the permanent-incorrigibility rule and finding requirement caused an actual problem. A

clear majority of states that authorize life without parole for juvenile offenders recognize the permanent-incorrigibility rule,[6] while federal appellate courts have described it as "clear," "stated clearly," and "clearly established."[7] And of the state supreme courts that have decided the finding question, most require a finding of permanent incorrigibility.[8] That

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[6] In the twenty-seven states that authorize life without parole for juvenile offenders, fifteen state courts of last resort have recognized that *Miller* announced a substantive rule that bars life without parole for all but the rare juvenile offender whose crime reflects permanent incorrigibility. *State* v. *Valencia*, 386 P.3d 392, 395 (Ariz. 2016); *Landrum* v. *State*, 192 So. 3d 459, 469 (Fla. 2016); *Veal* v. *State*, 784 S.E.2d 403, 412 (Ga. 2016); *State* v. *Shanahan*, 445 P.3d 152, 158 (Idaho 2019); *People* v. *Buffer*, 137 N.E.3d 763, 770 (Ill. 2019); *State* v. *Montgomery*, 194 So. 3d 606, 607 (La. 2016); *Carter* v. *State*, 192 A.3d 695, 708 (Md. 2018); *Skinner*, 917 N.W.2d at 308; *Jackson* v. *State*, 883 N.W.2d 272, 280 (Minn. 2016); *State ex rel. Carr* v. *Wallace*, 527 S.W.3d 55, 59 (Mo. 2017); *Steilman* v. *Michael*, 407 P.3d 313, 318 (Mont. 2017); *State* v. *Garza*, 888 N.W.2d 526, 535 (Neb. 2016); *State* v. *James*, 813 S.E.2d 195, 206–07 (N.C. 2018); *Luna* v. *State*, 387 P.3d 956, 960 (Okla. Crim. App. 2016); *Batts*, 163 A.3d at 443. In the remaining twelve states that authorize life without parole for juvenile offenders, intermediate appellate courts in seven states recognize the permanent-incorrigibility rule. *Wilkerson* v. *State*, 284 So. 3d 937, 947–48 (Ala. Crim. App. 2018); *Newton* v. *State*, 83 N.E.3d 726, 737 (Ind. Ct. App. 2017); *Hawkins* v. *N.Y. State Dep't of Corr. & Cmty. Supervision*, 140 A.D.3d 34, 37 (N.Y. App. Div. 2016); *State* v. *Brown*, No. L–16–1181, 2018 WL 388537, at *5 (Ohio Ct. App. Jan. 12, 2018) (unpublished); *State* v. *Finley*, 831 S.E.2d 158, 161 (S.C. Ct. App. 2019); *Brown* v. *State*, No. W2015–00887–CCA–R3–PC, 2016 WL 1562981, at *6 (Tenn. Crim. App. Apr. 15, 2016); *State* v. *Walker*, Nos. 2016AP1058, 2016AP2098, 2018 WL 3326694, at *4 (Wis. Ct. App. Mar. 6, 2018).

[7] *See* Pet. Br. 19 n.5 (quoting cases).

[8] *See* Pet. 10–13 (citing cases on both sides).

reality undercuts any suggestion that Brett's position would significantly complicate state proceedings.

3. Fretting that "[i]t is not at all clear how States would even begin to make . . . a showing" of permanent incorrigibility, Indiana imagines that a finding requirement would force categorical abolition of juvenile life without parole. Indiana Br. 14. Not so. Reality has already debunked this speculation. Oklahoma, which practices jury sentencing, instructs that the jury must find "that the defendant is irreparably corrupt and permanently incorrigible," Oklahoma Unified Jury Instruction (Criminal) 4-87B, while appellate courts in other states that require a ruling affirm determinations of permanent incorrigibility. See, *e.g.*, *White* v. *State*, 837 S.E.2d 838, 845 (Ga. 2020) ("The record evidence that the trial court laid out in detail supports the trial court's determination that [the defendant] is irreparably corrupt."); *People* v. *Holman*, 91 N.E.3d 849, 865 (Ill. 2017) ("The [trial] court concluded that the defendant's conduct placed him beyond rehabilitation and sentenced him to life without parole. The defendant's sentence passes constitutional muster under *Miller*."); *Commonwealth* v. *Smith*, No. 3599 EDA 2016, 2018 WL 3133669, at *2, *9 (Pa. Super. Ct. June 27, 2018) (affirming trial court's conclusion that the defendant, "the leader of a [neo Nazi] prison gang," was an "uncommon and rare and an unusual juvenile who would likely kill in the future").

4. That mental health experts sometimes disagree about a juvenile defendant's capacity for reform, see Indiana Br. 14, does not justify a retreat from *Miller*'s permanent-incorrigibility rule. Courts enforce the *Ford* rule even though "psychiatrists disagree widely and frequently" on the topic of insanity. *Ake* v. *Oklahoma*, 470 U.S. 68, 81 (1985). Courts "must resolve

differences in opinion within the psychiatric profession on the basis of the evidence offered by each party." *Id.* By the same token, courts can and do make predictive judgments about defendants' future behavior: "The fact that such a determination is difficult . . . does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system." *Jurek* v. *Texas,* 428 U.S. 262, 274–76 (1976) (plurality opinion) (footnotes omitted).

5. Treating consideration of youth and its attendant characteristics as a substantive rule would not make it easier to administer juvenile-life-without-parole sentencing regimes. As the United States explains, "a reviewing court . . . might later conclude that the sentencer's case-specific judgment" about a defendant's youth and its attendant characteristics "was erroneous." U.S. Br. 23. Thus, if the Court designated consideration of youth as a substantive rule, habeas petitioners could attack their sentences retroactively, arguing that their juvenile-life-without-parole sentences were erroneous because a court considered youth in an incorrect or improper manner. See *Teague* v. *Lane*, 489 U.S. 288, 307 (1989).

V. At A Minimum, Petitioner Is Entitled To A Remand For A Finding As To Whether He Is Permanently Incorrigible.

1. No court has ever decided whether Brett is or is not permanently incorrigible. Mississippi asserts that its "state sentencing courts [are required] to consider[] age-related characteristics—including a juvenile's 'possibility' of rehabilitation and 'capacity' for change" —and maintains that this Court "'must assume that the trial judge considered all th[e] evidence before

passing sentence,' particularly when 'he said he did.'" Resp. Br. 48–49 (citations omitted).

That does not cut it. A court cannot sentence a corrigible juvenile to life without parole after considering his corrigibility any more than it can sentence an intellectually-disabled defendant to death after considering his intellectual disability. See *Atkins*, 536 U.S. at 320–21. The court must decide whether the defendant is permanently incorrigible and thus eligible for life without parole at all. Considering corrigibility as one factor among several is wholly distinct from recognizing that only permanently incorrigible juveniles may be sentenced to life without parole.

In any event, no one has any idea what, if anything, the circuit court might have concluded about Brett's capacity for reform. The court did not mention it *at all* when explaining its reasons for imposing a life-without-parole sentence.

2. The United States maintains that "[e]ven assuming that 'transient immaturity' were a distinct fact," the circuit court's discussion of some of the factors attendant to youth "makes clear that it found the evidence underlying the petitioner's 'transient immaturity' argument to be insufficient." U.S. Br. 25, 31. But again, the circuit court did not say a single word about Brett's capacity for rehabilitation, much less express a conclusion that Brett had failed to show that he is capable of reform. The circuit court's finding that Brett, at age fifteen, "'had reached some degree of maturity' in his relationship with his girlfriend," *id.* at 32, is not in any way equivalent to a determination that he is beyond redemption. Nor are the court's statements—alone or in combination—on other youth-related considerations. J.A. 148–52.

To be sure, trial counsel argued that Brett could not be sentenced to life without parole because "[t]here is nothing in this record that would support a finding that the offense reflects irreparable corruption." *Id.* at 143–44. But the United States is simply wrong when it asserts that "[t]he [circuit] court's explanation of its sentence indicates that the court disagreed" with trial counsel on the question of irreparable corruption. U.S. Br. 31. Rather, the circuit court's explanation of its sentence indicates that it disagreed with trial counsel's argument that irreparable corruption was the dispositive issue. J.A. 143–44, 148–52.

The circuit court did not acknowledge *any* substantive limitation on its discretion to impose a life-without-parole sentence. Instead, the court wrongly believed—as the Mississippi Supreme Court had instructed on remand, and as Mississippi continues to maintain in this Court—that it was merely required to "consider[] youth and its attendant characteristics before imposing a life-without-parole sentence." Resp. Br. 49. No "evident ruling on [the] question" of permanent incorrigibility, see *Briones*, 890 F.3d at 822 (O'Scannlain, J., concurring in part and dissenting in part), can be inferred from the circuit court's judgment. At minimum, the Court should remand this case for Mississippi's courts to determine whether Brett is permanently incorrigible.

VI. Petitioner Is Not Permanently Incorrigible.

Mississippi still does not even attempt to show that Brett is permanently incorrigible. In this rare case, the record plainly establishes Brett's capacity for reform, and the Court should order him sentenced to life in prison with the possibility of parole.

CONCLUSION

For the reasons stated above, and those in the opening brief, the judgment should be reversed and the Court should direct on remand that Brett Jones is ineligible for life in prison without the possibility of parole.

Respectfully submitted,

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September 14, 2020