No. 17-1343

IN THE
Supreme Court of the United States

SHAWN L. DAVIS,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

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

BRIEF OF FAIR PUNISHMENT PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

RONALD SULLIVAN
Fair Punishment Project
1557 Mass. Ave.
Lewis Hall, 203
Cambridge, MA 02138

SHARON KATZ
Counsel of Record
RUSSELL M. ANELLO
REAGAN T. LYNCH
KELSEY CLARK
Davis Polk & Wardwell LLP
450 Lexington Avenue
New York, NY 10017
(202) 450-4508
sharon.katz@davispolk.com

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

RULES

BRIEFS

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

INTEREST OF THE *AMICUS CURIAE*[1]

Fair Punishment Project ("FPP") is a project of The Advocacy Fund and works with Harvard Law School's Criminal Justice Institute. The mission of FPP is to address ways in which our laws and criminal justice system contribute to the imposition of excessive punishment. FPP believes that punishment can be carried out in a way that holds offenders accountable and keeps communities safe, while still affirming the inherent dignity that all people possess.

SUMMARY OF ARGUMENT

Shawn Davis seeks review of the judgment of the Supreme Court of Mississippi, which denied his petition for certiorari to the Court of Appeals of Mississippi. The Court of Appeals affirmed Mr. Davis's sentence of life in prison without parole for his involvement in a homicide committed in 2004, shortly after his sixteenth birthday, despite the fact that the sentencing court did not find that Mr. Davis is permanently incorrigible. *See Davis v. State*, 234 So. 3d 440 (Miss. Ct. App. 2017), *cert. denied*, 233 So. 3d 821 (Miss. 2018).

FPP urges the Court to grant Mr. Davis's petition and answer the question explicitly left open by *Miller v. Alabama*: whether "the Eighth

---

[1] This *amicus curiae* brief is filed with the consent of the parties. Pursuant to Supreme Court Rule 37, *amicus curiae* states that counsel for *amicus* authored this brief in its entirety. No person or entity other than *amicus*, its supporting organizations, and its counsel made a monetary contribution to the preparation of this brief. This brief does not purport to convey the position of Harvard Law School.

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. In the five years since *Miller*, sixteen states and the District of Columbia have banned the imposition of life-without-parole sentences on juveniles, the number of individuals serving juvenile life without parole ("JLWOP") sentences has fallen by more than half, and use of the punishment has become exceedingly rare in the jurisdictions formally retaining it. Evolving standards of decency have crystallized into a national consensus against sentencing children to die in prison without any hope for release.

Moreover, because "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders," *Miller*, 567 U.S. at 472; *see also Graham v. Florida*, 560 U.S. 48 (2010), the imposition of a life-without-parole sentence on a child violates the Eighth Amendment's substantive guarantee of proportional sentencing. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016) (affirming the principle that proportionality is a substantive guarantee of the Eighth Amendment). The Court should declare JLWOP a categorically excessive punishment.

ARGUMENT

A. Evolving standards of decency support a categorical rule barring life-without-parole sentences for children.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The protection against cruel and unusual punishment applies to the states by incorporation through the Fourteenth Amendment. *See Robinson v. California*, 370 U.S. 660 (1962).

As articulated in *Roper v. Simmons*, the Court looks to "'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual" under the Eighth Amendment. 543 U.S. 551, 560-61 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)). To measure "evolving standards of decency," the Court assesses whether a "national consensus" supports the categorical prohibition of a particular punishment. *See Atkins v. Virginia*, 536 U.S. 304, 312, 316 (2002).

In determining whether a national consensus has evolved away from a particular punishment, the Court has looked to a number of factors, including the number of states authorizing the punishment, the extent and direction of legislative change in relation to the punishment, the frequency with which the punishment is actually imposed, and the punishment's acceptance in the international

community.[2] After the Court reviews the societal consensus in favor of or against a punishment, it independently "ask[s] whether there is reason to disagree with the judgment reached by the citizenry and its legislators." *Atkins*, 536 U.S. at 313. "[T]he Constitution contemplates that in the end [the Court's] own judgment will be brought to bear on the question of the acceptability of [a punishment] under the Eighth Amendment." *Coker v. Georgia*, 433 U.S. 584, 597 (1977).

Since 2005, the Court has struck down five extreme sentencing practices as constitutionally disproportionate. In three cases, the Court prohibited the application of extreme sentences against children. In particular, the Court has imposed categorical bans on sentencing juveniles to death, *Roper*, 543 U.S. 551, life-without-parole sentences for juveniles convicted of non-homicide offenses, *Graham*, 560 U.S. 48, and most recently, in *Miller*, 567 U.S. at 479-80, simultaneously prohibited mandatory JLWOP and limited the application of JLWOP to only those children whose crimes demonstrate "irreparable corruption." *See also Montgomery*, 136 S. Ct at 734.[3]

---

[2] *See Graham*, 560 U.S. at 62, 80; *see also Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008) ("Statistics about . . . executions may inform the consideration whether capital punishment . . . is regarded as unacceptable in our society."); *Roper*, 543 U.S. at 575 ("[A]t least from the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'" (citing *Trop*, 356 U.S. at 102-03)).

[3] The other two cases invalidated extreme sentencing practices for adults. *See Kennedy*, 554 U.S. 407 (prohibiting

1. States are rapidly abandoning life without parole sentencing for children.

Twenty states and the District of Columbia currently prohibit JLWOP sentences. Prior to this Court's decision in *Miller* in 2012, only four states prohibited the practice: Alaska, Colorado, Kansas, and Kentucky. [4] Following *Miller*, an additional seventeen jurisdictions have prohibited the imposition of JLWOP by statute or court ruling: Arkansas, Connecticut, the District of Columbia, Hawaii, Nevada, New Jersey, North Dakota, South Dakota, Texas, Utah, Vermont, West Virginia, and Wyoming abolished JLWOP by statute; [5] Massachusetts and Iowa abolished JLWOP by court ruling; [6] and California and Delaware, although

---

imposition of the death penalty for non-homicide offenses); *Hall v. Florida*, 134 S. Ct. 1986 (2014) (invalidating strict cutoff score of seventy to measure intellectual disability relevant to eligibility for the death penalty).

[4] Alaska Stat. Ann. § 12.55.125; Colo. Rev. Stat. Ann. §§ 17-22.5-104(IV), 18-1.3-401(4)(b)(1); Kan. Stat. Ann. § 21-6618; Ky. Rev. Stat. § 640.040(1).

[5] *See* Ark. Code §§ 5-4-104(b), 16-93-621 (enacted 2017); Conn. Gen. Stat. Ann. § 54-125a(f)(1) (enacted 2015); D.C. Code Ann. §§ 24-403.01(c)(2), 24-403.03 (enacted 2016); Haw. Rev. Stat. Ann. § 706-656(1) (enacted 2014); N.J. Stat. Ann. § 2C:11-3(b)(5) (enacted 2017); Nev. Rev. Stat. Ann. § 176.025; N.D. Cent. Code Ann. § 12.1-32-13.1 (enacted 2017); S.D. Codified Laws § 22-6-1.3 (enacted 2016); Tex. Penal Code Ann. § 12.31 (enacted 2013); Utah Code Ann. § 76-3-209 (enacted 2016); Vt. Stat. Ann. tit. 13, § 7045 (enacted 2015); W. Va. Code § 62-12-13b (enacted 2014); Wyo. Stat. Ann. §§ 6-2-101, 6-10-301 (enacted 2013).

[6] *Diatchenko v. District Attorney for Suffolk Dist.*, 1 N.E.3d 270 (Mass. 2013) (holding that JLWOP sentences violate the Massachusetts Constitution); *State v. Sweet*, 879

nominally retaining the punishment, provide every juvenile sentenced to "life without parole" with the opportunity to petition for a sentence reduction or release by the parole board after serving a given term of years.[7] In these 21 jurisdictions, every child who receives a life sentence has an opportunity to demonstrate to a parole board or judge that he has rehabilitated himself in prison and deserves to be released.

In addition to those states that now prohibit the practice outright, several states have narrowed the availability of JLWOP and other extreme juvenile sentencing practices. Since *Miller*, five additional states have passed legislation that directly limits the availability of JLWOP: Florida, Pennsylvania, North Carolina, Louisiana, and Washington. Florida and Pennsylvania, two of the jurisdictions that most frequently imposed the sentence prior to *Miller*,[8] have dramatically curtailed the availability of JLWOP.

Under its revised statutes, Florida only allows JLWOP sentencing in the extremely narrow circumstances when a defendant "actually killed,

---

N.W.2d 811 (Iowa 2016) (finding JLWOP sentences violate the Iowa Constitution).

[7] Cal. Penal Code §§ 3051, 4801 (enacted 2017); Del. Code Ann. tit. 11, § 4204A(d) (enacted 2013) (allowing juveniles convicted of first-degree murder to file a request for resentencing after 30 years, and allowing juveniles convicted of all other crimes to file after 20 years).

[8] *See State Distribution of Youth Offenders Serving Juvenile Life Without Parole*, HUMAN RIGHTS WATCH (Oct. 2, 2009), https://www.hrw.org/news/2009/10/02/state-distribution-youth-offenders-serving-juvenile-life-without-parole-jlwop.

intended to kill, or attempted to kill the victim" *and* was previously convicted as an adult of an enumerated violent felony.[9] In the four years since this law has been in effect, only one person has been sentenced to JLWOP in Florida.[10] Pennsylvania moved from imposing mandatory life without parole for juveniles convicted of second-degree murder to eliminating JLWOP for that crime, leaving first-degree murder as the only possible basis for imposing JLWOP.[11] In addition, the Pennsylvania Supreme Court recently held that JLWOP is unconstitutional unless the State establishes with competent evidence, and beyond a reasonable doubt, that the child is irreparably corrupt.[12] Because of the substantial evidentiary burden it imposes on prosecutors, this decision is likely to effectively

---

[9] Fla. Stat. § 775.082; *see also id.* § 921.1402(2)(a) (listing the relevant felonies as: murder; manslaughter; sexual battery; armed burglary; armed robbery; armed carjacking; home-invasion robbery; human trafficking for commercial sexual activity with a child under 18 years of age; false imprisonment; or kidnapping).

[10] *State v. Rivera*, 2015-CF-000942-A-0 (Fla. 9th Jud. Cir. Apr. 7, 2017), *appeal docketed*, No. 5D17-1397 (Fla. 5th Dist. Ct. App. May 8, 2017).

[11] Pa. Cons. Stat. § 1102.1 (enacted 2012).

[12] The Pennsylvania Supreme Court held that "for a sentence of life without parole to be proportional as applied to a juvenile murderer, the sentencing court must first find, based on competent evidence, that the offender is entirely unable to change. It must find that there is no possibility that the offender could be rehabilitated at any point later in his life, no matter how much time he spends in prison and regardless of the amount of therapeutic interventions he receives, and that the crime committed reflects the juvenile's true and unchangeable personality and character." *Commonwealth v. Batts*, 163 A.3d 410, 435 (Pa. 2017).

eliminate the sentencing practice in Pennsylvania.[13] North Carolina revised its sentencing statutes to prohibit JLWOP for felony-murder convictions,[14] and Louisiana, like Pennsylvania, has prohibited JLWOP sentences for second-degree murder.[15] Finally, Washington has abolished the penalty for defendants younger than sixteen.[16]

Still other states have provided parole eligibility to previously sentenced juveniles, even while JLWOP is nominally available. The Missouri legislature passed a law granting eligibility for release to every one of the state's inmates previously sentenced to JLWOP,[17] and the Minnesota Supreme Court granted parole eligibility to all inmates sentenced pre-*Miller*.[18]

Separately, several states have added safeguards with respect to the imposition of any extreme sentence against a juvenile, even if it is short of life in prison without parole. A number of

---

[13] *See* Riley Yaes, *Pennsylvania Supreme Court Throws out Life Without Parole Sentence for Juvenile*, PITTSBURGH POST-GAZETTE (June 26, 2017), http://www.post-gazette.com/news/state/2017/06/26/Qu-eed-Batts-case-pennsylvania-supreme-court-juvenile-parole/stories/201706260160 (quoting Northampton County First Deputy District Attorney Terence Houck stating that the high evidentiary burden "[i]n practical terms . . . ends life without parole [for youths]" (second alteration in original)).

[14] N.C. Gen. Stat. §§ 15A-1340.19A, 15A-1340.19B, 15A-1340.19C (enacted 2012).

[15] La. Stat. Ann. § 15:574.4 (enacted 2017).

[16] Wash. Rev. Code Ann. § 10.95.030 (enacted 2014).

[17] Mo. Ann. Stat. § 558.047 (enacted 2016).

[18] *Jackson v. State*, 883 N.W.2d 272 (Minn. 2016).

states require consideration of the mitigating factors of youth before imposing lengthy prison sentences,[19] and other states, including Iowa and Washington, have eliminated, or nearly eliminated, mandatory punishments of any length for juveniles.[20]

---

[19] *See Casiano v. Comm'r of Corr.*, 115 A.3d 1031 (Conn. 2015) (holding that a court must consider mitigating features of youth before imposing a 50-year sentence); *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) (holding a sentencing court is required to consider mitigating features of youth for a sentence that would end when the juvenile was in his sixties, explaining that "[e]ven if lesser sentences than life without parole might be less problematic, we do not regard the juvenile's potential future release in his or her late sixties after a half century of incarceration sufficient to escape the rationales of *Graham* or *Miller*"); *State v. Wallace*, 527 S.W.3d 55, 61-62 (Mo. 2017) (finding that a court must consider mitigating factors when imposing a mandatory sentence of 50 years without possibility of parole); *State v. Zuber*, 152 A.3d 197, 212-13 (N.J. 2017) (finding sentences of 55 years and 68 years and 3 months were sufficient to invoke the protections under *Miller*).

A number of other courts have held that the protections of *Miller* and *Graham* apply when there is a term-of-years sentence that is the functional equivalent of life without parole. *See, e.g.*, *State v. Ramos*, 387 P.3d 650, 658 (Wash. 2017) (finding a sentence of 80 years was the functional equivalent of life without parole); *State v. Moore*, 76 N.E.3d 1127, 1134 (Ohio 2016) (finding the same for a term of 77 years); *State v. Boston*, 363 P.3d 453, 458 (Nev. 2015) (finding the same for a term of approximately 100 years); *Henry v. State*, 175 So. 3d 675, 679-80 (Fla. 2015) (finding the same for a term of 90 years); *Morgan v. State*, 217 So. 3d 266, 274 (La. 2016) (finding the same for a term of 99 years); *Bear Cloud v. State*, 334 P.3d 132, 144 (Wyo. 2014) (finding the same for a term of 45 years); *People v. Contreras*, 411 P.3d 445, 454-55, 464 (Ca. 2018) (finding the same for a term of 50 years).

[20] *See* Iowa Code Ann. § 901.5(14) (enacted 2013) (eliminating mandatory minimums for all non-Class "A" felonies); *State v. Lyle*, 854 N.W.2d 378, 389 (Iowa 2014)

This trend away from JLWOP is both rapid and uninterrupted. Since *Miller,* an average of three jurisdictions per year have abandoned JLWOP, while no state has passed legislation broadening its scope. These changes reflect clear evidence of a national consensus against the practice. *See Atkins*, 536 U.S. at 312 (noting that legislative action provides "the 'clearest and most reliable objective evidence of contemporary values'"); *see also Hall v. Florida*, 134 S. Ct. 1986, 1997 (2014) (examining state consensus by looking at, *inter alia*, decisions of state high courts). Legislative abolition of a punishment is even more significant where, as here, there is a noticeable, broad trend away from the imposition of the penalty. *See Atkins*, 536 U.S. at 315 ("It is not so much the number of these States that is significant, but the consistency of the direction of change.").

2. In most states that have not yet banned juvenile life without parole sentencing, its application is either rare or nonexistent.

Looking beyond the abolition of JLWOP as a matter of law and to its application in practice, as the Court did in *Graham*, the movement away from

---

(concluding that "the sentencing of juveniles according to statutorily required mandatory minimums does not adequately serve the legitimate penological objectives in light of the child's categorically diminished culpability"); *State v. Houston-Scioners*, 391 P.3d 409, 420 (Wash. 2017) ("Trial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable [state Sentencing Reform Act] range and/or sentence enhancements.").

imposing this extreme sentence is even more striking.[21] Since *Miller*, the number of individuals serving JLWOP sentences has dropped by nearly sixty percent.[22] In the approximately two years since this Court decided *Montgomery*, over half of individuals sentenced to JLWOP have had their sentences reduced through resentencing hearings and legislative reforms, with approximately ten percent of individuals having since been released.[23] Hundreds more so-called juvenile "lifers" await resentencing.

In addition to the 21 jurisdictions that have formally abandoned JLWOP sentencing, six states apparently have zero individuals serving a JLWOP sentence: Maine, Minnesota, Missouri, New Mexico,

---

[21] In *Graham*, Justice Kennedy, writing for the Court, identified a national consensus against the use of JLWOP for children involving non-homicide offenses through evidence of infrequent use in states where JLWOP was permitted by law, in addition to those states that had abolished JLWOP for non-homicide offenses by law. 560 U.S. at 62.

[22] JUVENILE SENTENCING PROJECT, JUVENILE LIFE WITHOUT PAROLE SENTENCES IN THE UNITED STATES: NOVEMBER 2017 SNAPSHOT (Nov. 20, 2017), https://www.juvenilelwop.org/wp-content/uploads/November%202017%20Snapshot%20of%20JLWOP%20Sentences%2011.20.17.pdf (setting out JLWOP statistics determined through legal research and provided by attorneys familiar with JLWOP in each jurisdiction); *50-state Examination*, ASSOCIATED PRESS (July 31, 2017), https://www.ap.org/explore/locked-up-for-life/50-states.

[23] THE CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, *MONTGOMERY* MOMENTUM: TWO YEARS OF PROGRESS SINCE *MONTGOMERY V. LOUISIANA* 2-3 (Jan. 25, 2018), https://www.fairsentencingofyouth.org/wp-content/uploads/Montgomery-Anniversary-2018-Snapshot1.pdf.

New York, and Rhode Island.[24] Six additional states have five or fewer individuals serving JLWOP sentences: Idaho, Indiana, Montana, Nebraska, New Hampshire, and Oregon.[25] In total, thirty-three jurisdictions are either abolitionist, or functionally so, with another five jurisdictions limiting JLWOP's application.[26] As the Court explained in *Graham*, "It becomes all the more clear how rare these sentences are, even within the jurisdictions that do sometimes impose them, when one considers that a juvenile sentenced to life without parole is likely to live in prison for decades." 560 U.S. at 65.

In part due to the rapid abandonment of JLWOP by many states since *Miller*, the geographic concentration of JLWOP sentencing in the United States is remarkably restricted. Indeed, only three states account for over fifty percent of all JLWOP sentences: Pennsylvania, Michigan, and Louisiana,[27] and as mentioned above, two of those states have dramatically curtailed the availability of JLWOP.[28]

---

[24] *See* JUVENILE SENTENCING PROJECT, *supra* note 22.

[25] *See id.*

[26] *See* notes 9-16 and accompanying text, *supra*; *see also Atkins*, 536 U.S. at 316 (including jurisdictions where the laws "continue to authorize executions, but none have been carried out in decades" in consensus rejecting the execution of the intellectually disabled); *Hall v. Florida*, 134 S. Ct. 1986, 1997 (2014) (finding Oregon was on the abolitionist side of the ledger because it has "suspended the death penalty and executed only two individuals in the past 40 years").

[27] *See* JUVENILE SENTENCING PROJECT, *supra* note 22; *see also 50-state Examination*, *supra* note 22.

[28] *See* notes 11-13, 15 and accompanying text, *supra*.

Further, ten states account for over eighty-five percent of JLWOP sentences. [29]

3. International consensus is firmly against juvenile life without parole sentencing.

In *Roper*, 543 U.S. at 575, the Court confronted "the stark reality that the United States [was] the only country in the world that . . . [gave] official sanction to the juvenile death penalty." Here the Court should confront another stark reality: The United States is the only country in the world that imposes life-without-parole sentences on juveniles.[30]

The global norm against JLWOP is reflected in several treaties. The U.N. Convention on the Rights of the Child ("CRC") requires its signatories to prohibit JLWOP.[31] The CRC counts one hundred ninety-six states parties—every U.N. Member State *except* the United States.[32] The United States signed,

---

[29] In addition to Pennsylvania (333 individuals), Michigan (229 individuals), and Louisiana (112 individuals), the other seven states are Alabama (70 individuals), Mississippi (61 individuals), Illinois (57 individuals), North Carolina (51 individuals), Virginia (48 individuals), Oklahoma (41 individuals), and South Carolina (40 individuals). *See* JUVENILE SENTENCING PROJECT, *supra* note 22; *50-state Examination*, *supra* note 22.

[30] Josh Rovner, *Juvenile Life Without Parole*, SENTENCING PROJECT (Oct. 13, 2017), https://www.sentencingproject.org/publications/juvenile-life-without-parole/.

[31] Convention on the Rights of the Child art. 37(a), Nov. 20, 1989, 1577 U.N.T.S. 3.

[32] Convention on the Rights of the Child, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang

but failed to ratify the CRC, in part because of its binding obligation on state parties to prohibit JLWOP. Moreover, the governing committees of three widely adopted treaties—the International Convention on the Elimination of all Forms of Racial Discrimination ("ICERD"), the International Covenant on Civil and Political Rights ("ICCPR"), and the Convention against Torture ("CAT")—have found that JLWOP violates their respective treaties.[33]

=en (last visited Apr. 16, 2018); *see also* Juan E. Méndez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 37, U.N. Doc. A/HRC/28/68 (Mar. 15, 2015), http://antitorture.org/wp-content/uploads/2015/03/Children_Report.pdf.

[33] The governing committee overseeing the ICERD found JLWOP violated Article 5(a) of the ICERD because of "the disproportionate imposition of life imprisonment without parole on young offenders, including children, belonging to racial, ethnic and national minorities." Committee on the Elimination of Racial Discrimination, Concluding Observation of the Committee on the Elimination of Racial Discrimination: United States of America, ¶ 21, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008), http://undocs.org/CERD/C/USA/CO/6. The ICERD counts 179 states parties, including the United States, which has no relevant reservation or declaration regarding Article 5(a).

The ICCPR's governing committee also found JLWOP violated its treaty. Human Rights Committee, Concluding Observations of the Human Rights Committee: United States of America, ¶ 34, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006), https://www.state.gov/documents/organization/133837.pdf. The ICCPR counts 170 states parties, including the United States. The United States lodged a reservation on the provisions of the ICCPR that apply to JLWOP.

The governing committee overseeing the CAT found JLWOP could violate the CAT because it constitutes cruel, inhuman, or degrading treatment. Committee Against Torture,

4. These trends show that a clear consensus has emerged against juvenile life without parole sentencing.

Taken together, the trend is clear: across most of the United States and in the rest of the world, sentencing children to die in prison is no longer an acceptable practice. As discussed in greater detail above, a substantial majority of states have ended their use of the sentence, either by law or practice, and other states have acted to narrow its application. Twenty-one jurisdictions have abolished JLWOP by law; in comparison, in *Graham* only 13 jurisdictions had prohibited JLWOP for non-homicide offenses.[34] Another 12 states have effectively abandoned JLWOP with either zero or fewer than five juvenile lifers. Of the remaining states, five have imposed limitations on the application of JLWOP.[35]

The United States has thereby moved closer to the otherwise-unanimous international consensus against the use of this severe sentence. Today, JLWOP is sought only by a handful of prosecutors and imposed in a shrinking number of states. The

---

Conclusions and Recommendations of the Committee Against Torture: United States of America, ¶ 34, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006), http://undocs.org/CAT/C/USA/CO/2. The CAT has 163 states parties, including the United States, though the United States lodged a reservation similar to that for the ICCPR.

[34] *Graham*, 560 U.S. at 62.

[35] *See* notes 9-16 and accompanying text, *supra* (discussing legal developments in Florida, Pennsylvania, North Carolina, Louisiana, and Washington that have curtailed the application of JLWOP).

standard of decency has evolved: sentencing children to die in prison without a meaningful opportunity for release is cruel and unusual.

B. Juvenile life without parole violates the Eighth Amendment's substantive guarantee of proportional punishment.

"Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment." *Montgomery*, 136 S. Ct. at 732. In addition to evaluating national consensus against a particular punishment, this Court must exercise its independent judgment to evaluate the proportionality of a punishment in light of its penological justifications. *See Graham*, 560 U.S. at 61. Applying the logic of *Graham* and *Miller* "that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders," *Miller*, 567 U.S. at 472, life without parole should be declared a categorically excessive punishment with respect to children.

1. Children possess unique characteristics that distinguish juvenile offenders from adult offenders and undermine the penological rationales for severe sentences.

This Court has repeatedly confirmed what reason and scientific inquiry demonstrate to be true: children are categorically different from adults in ways that undermine the rationale for imposing a life-without-parole sentence. While some period of

incarceration may be appropriate for children convicted of serious crimes like murder, youth have diminished culpability and an inherent capacity for change. As a result, a state should not be permitted to permanently foreclose a child's hope of rehabilitation and reform.

Beginning with *Roper* in 2005, and extending through *Montgomery* in 2016, this Court has articulated three significant ways in which children are constitutionally different from adults. "First, children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking." *Miller*, 567 U.S. at 471 (quoting *Roper*, 543 U.S. at 569). "The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'" *Roper*, 543 U.S. 570 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion)).

"Second, children 'are more vulnerable . . . to negative influences and outside pressures,' including from their family and peers; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings." *Miller*, 567 U.S. at 471 (alterations in original) (quoting *Roper*, 543 U.S. at 569). "Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." *Roper*, 543 U.S. at 570 (citing *Stanford v. Kentucky*, 492 U.S. 361, 395 (1989) (Brennan, J., dissenting)).

Third, "the character of a juvenile is not as well formed as that of an adult." *Id.*

> *The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.*

Id.

These three characteristics of youth undermine the penological rationales for the most severe punishments, including life in prison without parole. The need for retribution is blunted because children are less blameworthy for their actions; deterrence is less effective because children are less likely to consider the consequences and potential punishment for their actions; and incapacitation must be tempered because children are unlikely to "forever . . . be a danger to society." *Miller*, 567 U.S. at 472 (quoting *Graham*, 560 U.S. at 72).

2. "Irreparable corruption" in children is exceedingly rare—if not nonexistent—and cannot be reliably identified by either medical professionals or triers of fact.

Not only are children more likely to be successfully rehabilitated into contributing members of society, even after committing terrible acts, but it is impossible to distinguish at the time of sentencing between children whose crimes "reflect transient immaturity" and "those rare children whose crimes reflect irreparable corruption." *Montgomery*, 136 S. Ct. at 734. In *Roper*, 543 U.S. at 573, the Court assessed this task as "difficult even for expert psychologists," and held accordingly that "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 569.

The body of scientific research relied upon in *Roper* has only grown larger in the decade since that decision. Available evidence suggests the confluence of two developmental processes results in what is commonly recognized as adolescent behavior. B.J. Casey et al., *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62 (2008). First, the systems and areas of the brain that promote risk-taking and sensation-seeking behavior reach full maturity early in adolescence. Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCHOL. 459, 466-67 (2009). This maturation process coincides with hormonal changes attendant to puberty, and the two forces act together to promote behavior that an adult would consider reckless, short-sighted, and often ill-advised. *Id.*

Second, the prefrontal cortex, the portion of the brain that controls risk assessment, impulse control, emotional regulation, decision-making, and planning, does not fully develop until much later. Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174, 8177 (2004).

Therefore, at the same time there are powerful forces promoting recklessness, there is also a diminished capacity to self-regulate, comprehend consequences, and make responsible decisions. Casey et al., *supra.* This imbalance in brain function, which creates the "fundamental differences between juvenile and adult minds," *Graham*, 560 U.S. at 68, is not resolved until the brain reaches full maturity around age 25, Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DIS. TREAT. 449 (2013), making an assessment of an individual's capacity for positive change impossible until that age.

Identity formation—the process of "figuring out who [an individual] wish[es] to be and what they wish to do with their lives"—is similarly incomplete in children and young adults, further complicating any meaningful assessment of a child's capacity for change. Seth J. Schwartz et al., *Identity Around the World: An Overview*, 138 NEW DIRECTIONS FOR CHILD & ADOLESCENT DEV. 1, 2 (2012). For children, this process is incomplete because "most identity development takes place during the late teens and early twenties." Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE

ON JUVENILE JUSTICE 9, 27 (Thomas Grisso & Robert G. Schwartz eds., 2000).

Based on this evidence, the Court concluded in *Miller*, 567 U.S. at 473 (first alteration in original) (quoting *Graham*, 560 U.S. at 74) that "'an irrevocable judgment about [an offender's] value and place in society[]' [is] at odds with a child's capacity for change,"[36] *see also Montgomery*, 136 S. Ct at 736 ("Miller's central intuition" is "that children who commit even heinous crimes are capable of change."). In light of the body of evidence long-recognized by this Court—which has grown more substantial in the five years since *Miller* [37] —even those children convicted of the most heinous crimes must be given an opportunity to demonstrate reform by virtue of their greater capacity for change and the fact that

---

[36] *See also* Brief for Am. Psychological Ass'n *et al.* as *Amicus Curiae* Supporting Petitioner, *Miller v. Alabama*, 567 U.S. 460 (2012) (No. 10-9646) (discussing scientific findings regarding juvenile brain development and its relationship to sentencing).

[37] Research into juvenile psychology and neuroscience continues to advance. *See, e.g.*, Elizabeth P. Shulman et al., *The Dual Systems Model: Review, Reappraisal, and Reaffirmation*, 17 DEVELOPMENTAL COGNITIVE NEUROSCIENCE 103, 113 (2016) (concluding that available evidence supports the "dual systems model," which posits that adolescent recklessness can be attributed to an imbalance in brain development between the areas of the brain that control risk assessment and impulse control); Laurence Steinberg et al., *Around the World, Adolescence Is a Time of Heightened Sensation Seeking and Immature Self-regulation*, 21 DEVELOPMENTAL SCI. 2 (2018) (confirming prior research conducted in the United States and Western Europe on adolescent risk taking with subject populations in 11 countries in Africa, Asia, Europe, and the Americas, representing a broader range of economic and cultural backgrounds).

neither medical professionals nor triers of fact can reliably assess irreparable corruption in a child due to the ongoing process of juvenile brain development and identity formation.

C. Individuals sentenced to life without parole for acts committed as children must be provided a meaningful opportunity for release based on demonstrated maturity and rehabilitation upon reaching an age when these characteristics can accurately be assessed.

A growing national consensus has formed against JLWOP for good reason: The sentence is categorically disproportionate in light of the unique characteristics of youth, which make juvenile offenders less culpable and more likely to be successfully rehabilitated. All children—including those juvenile offenders incarcerated in the handful of remaining jurisdictions that retain JLWOP—must be afforded a meaningful opportunity to demonstrate their maturation and rehabilitation after their sentencing. Providing such an opportunity effectively defers the assessment of whether a child who has committed a heinous crime is capable of rejoining society until a point in time when that assessment can be made with some degree of accuracy.

The Court's opinions all but require this outcome. As Justice Kennedy wrote in *Graham*, 560 U.S. at 75, states must give juvenile offenders sentenced to life in prison for non-homicide offenses "some meaningful opportunity to obtain release

based on demonstrated maturity and rehabilitation." There is no principled basis on which to deny the same consideration to Shawn Davis and others sentenced to die in prison for homicide offenses committed as children.

A crucial element of the fundamental right to human dignity protected by the Constitution is that a person must, whenever not outweighed by considerations of order and equity, be allowed to manifest his personality, and to attempt to reach his full potential as a member of society.[38] To sentence children to a lifetime of confinement without the possibility of release is to deny that fundamental right, instead dictating that a child will never be more than he is at the time of his sentencing. Adolescents must be given the opportunity to demonstrate their capacity for change. The character of a child at sixteen may meaningfully change by the time that child reaches twenty-five, forty, or sixty years of age.[39]

The Constitution and the law developed in *Roper, Graham*, *Miller*, and *Montgomery* make clear that we can no longer justify sentencing children to die behind bars without affording them a meaningful opportunity to demonstrate change over the course of time.

---

[38] *See Trop v. Dulles*, 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.").

[39] *See Roper*, 543 U.S. at 570 ("The character of a juvenile is not as well formed as that of an adult.").

The Court can ensure every child is afforded this basic right by acknowledging the national consensus that has emerged against JLWOP and concluding that the Eighth Amendment prohibits its continued application.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted and Mr. Davis's case heard before the Supreme Court of the United States.

Respectfully submitted,

SHARON KATZ
Counsel of Record

RUSSELL M. ANELLO
REAGAN T. LYNCH
KELSEY CLARK
Davis Polk & Wardwell LLP
450 Lexington Ave.
New York, NY 10017
(212) 450-4508
sharon.katz@davispolk.com

RONALD SULLIVAN
Fair Punishment Project
1557 Massachusetts Ave.
Lewis Hall, 203
Cambridge, MA 02138

Attorneys for Amicus Curiae