No. 18-1259

IN THE

Supreme Court of the United States

BRETT JONES,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Writ of Certiorari to the Supreme Court of Mississippi

BRIEF OF AMICI CURIAE CURRENT AND FORMER PROSECUTORS, DEPARTMENT OF JUSTICE OFFICIALS, AND JUDGES IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici are current and former federal, state, and local prosecutors, Department of Justice officials, and judges with experience prosecuting, establishing policy for prosecuting, and sentencing for violent crimes, including those committed by juveniles.[1] Amici recognize the importance of fair, proportionate, and transparent sentencing to the credibility of the criminal justice system, as well as the need to balance the impact of a crime on victims and survivors with the characteristics of the offender, including youth and the possibility of rehabilitation. Amici believe that states have an obligation to provide sufficient procedural safeguards to effectuate this Court's direction to reserve the ultimate penalty of life without possibility of parole for only the rare juvenile homicide offender for whom rehabilitation is impossible. The procedures used by the state court below, which failed to determine whether petitioner Brett Jones falls within the rare class of juvenile offenders eligible for life without the possibility of parole, were constitutionally insufficient and undermine confidence that juveniles will be treated fairly in the criminal justice system.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici and their counsel, made a monetary contribution intended to fund this brief's preparation or submission. Counsel of record for all parties received timely notice of the filing of this brief and consented to its filing.

SUMMARY OF ARGUMENT

Prosecutors and judges recognize that every homicide is tragic for the victims and survivors and that the punishment for those found guilty of such crimes should be substantial. But prosecutors and judges also have an interest in ensuring that those punishments are fair and proportionate, taking into account not only the circumstances of the crime and its impact on victims and survivors, but also the characteristics of the offender. This Court has recognized that juveniles are "constitutionally different from adults for purposes of sentencing," and that a sentencing scheme that imposes mandatory life without parole on juvenile homicide offenders "poses too great a risk of disproportionate punishment." *Miller v. Alabama*, 567 U.S. 460, 471, 479 (2012). Indeed, the Court has required that sentences of life imprisonment without the possibility of parole be reserved solely for "the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified." *Montgomery v. Louisiana*, 136 S. Ct. 718, 733 (2016). Accordingly, the Court expects that sentencing juveniles "to this harshest possible penalty will be uncommon." *Miller*, 567 U.S. at 479.

The trial court's handling of Brett's resentencing in this case, and its approval by the Mississippi Supreme Court over the vigorous dissent of four justices, fail to effectuate this Court's mandate and undermine confidence in the fairness of the criminal justice system. The trial court resentenced Brett to life without parole without determining whether he falls within the category of irretrievably depraved

offenders or even evaluating in any meaningful way his "youth and attendant characteristics" and his "possibility of rehabilitation." *Miller*, 567 U.S. at 483, 478. If left undisturbed, the Mississippi Supreme Court's approval of such an approach would allow courts in the state to sentence almost any juvenile homicide offender to life without parole—including those who possess the capacity for rehabilitation—without a meaningful opportunity for appellate review, so long as the trial court makes some acknowledgement of the *Miller* factors. This type of disproportionate and *sub silentio* sentencing does not satisfy the constitutional limitations imposed by this Court on juvenile punishment and undermines public confidence in the administration of justice. *Amici* urge this Court to reverse the Mississippi Supreme Court's decision and require sentencing courts to find permanent incorrigibility before a juvenile homicide offender may be sentenced to life without parole.

ARGUMENT

I. PROPORTIONATE SENTENCING PRINCIPLES FORBID THE MOST SEVERE PUNISHMENTS FOR MOST JUVENILE OFFENDERS

The Eighth Amendment's prohibition of cruel and unusual punishment "'flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned'" to both the offender and the offense." *Miller*, 567 U.S. at 469 (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005)). Therefore, when proscribing a particular punishment for a particular category of offenders, this Court considers "the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question," and "whether the challenged sentencing practice serves legitimate penological goals." *Graham v. Florida*, 560 U.S. 48, 67 (2010).

As experienced prosecutors and judges, amici understand that proportionality in sentencing is important to the credibility of the criminal justice system. Although homicide is the ultimate crime—permanently ending a person's life and forever altering the lives of others—amici also understand that the culpability of juveniles is often different than that of adults. Disproportionate sentences undermine the perception that justice has been done in a particular case and give the impression of unfairness on a broader scale. As Justice Frankfurter put it, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954).

In a series of decisions spanning just over a decade, this Court has recognized that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471. Thus, some sentences that may be appropriate for adults are invalid under the Eighth Amendment when imposed on juvenile offenders. First, in *Roper v. Simmons*, the Court held that the Eighth Amendment prohibits capital punishment for crimes committed by juveniles because "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." 543 U.S. at 572–73. The Court extended the logic of *Roper* in *Graham v. Florida* to bar sentences of life imprisonment without the possibility of parole for non-homicide offenses committed by juveniles. 560 U.S. 48 (2010). In doing so, the Court noted that, like a capital sentence, a sentence of life without parole "alters the offender's life by a forfeiture that is irrevocable" and that the "twice diminished moral culpability" of a juvenile non-homicide offender undermines the justification for such a severe sentence. 560 U.S. at 69. Finally, in *Miller v. Alabama*, as further explained in *Montgomery v. Louisiana*, the Court held that life-without-parole sentences are disproportionate for "the vast majority" of juvenile homicide offenders. 136 S. Ct. at 734.

These limitations on juvenile sentencing derive from the fact that, due to their "diminished culpability and greater prospects for reform," children "are less deserving of the most severe punishments." *Miller*, 567 U.S. at 471 (quoting *Graham*, 560 U.S. at 68). In particular, this Court has identified three crucial differences between children and adults for purposes of sentencing:

> First, children have a "lack of maturity and an underdeveloped sense of responsibility," leading to recklessness, impulsivity, and heedless risk-taking. Second, children "are more vulnerable . . . to negative influences and outside pressures," including from their family and peers; they have limited "control over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as "well formed" as an adult's; his traits are less fixed and his actions less likely to be "evidence of irretrievable depravity."

Miller, 567 U.S. at 471 (quoting *Roper*, 543 U.S. at 569–70) (brackets and citations omitted).

The Court's recognition that children are different accords with evolving understandings of child psychology and the neuroscience of adolescent development. In recent years, "studies of adolescent brain anatomy clearly indicate that regions of the brain that regulate such things as foresight, impulse

control, and resistance to peer pressure" are not fully developed at age 17. Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, Issues in Sci. & Tech., Spring 2012, http://issues.org/28-3/steinberg/. At that time, a child is still growing into who she will become as an adult. *See, e.g.*, *id.* ("Adolescence . . . is a time when people are, on average, not as mature as they will be when they become adults."); Mass. Inst. Of Tech., *Brain Changes*, Young Adult Dev. Project (2008), https://hr.mit.edu/static/worklife/youngadult/brain.html ("The brain isn't fully mature . . . at 18.").

Considering the ways in which juveniles are different from adults, *Miller* and *Montgomery* concluded that, under the Eighth Amendment, a life sentence without the possibility of parole must be reserved for "the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified." *Montgomery*, 136 S. Ct. at 733. In other words, because adolescents' "transient rashness, proclivity for risk, and inability to assess consequences" lessen their "'moral culpability' and enhance[] the prospect that, as the years go by . . . , [their] 'deficiencies will be reformed,'" *Miller*, 567 U.S. at 472 (quoting *Graham*, 560 U.S. at 68), "a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect 'irreparable corruption.'" *Montgomery*, 136 S. Ct. at 726. Therefore, applying this Court's rule, a sentencing court deciding whether life without parole is constitutionally permissible must determine whether rehabilitation is possible for the juvenile being sentenced.

II. CONSTITUTIONALLY ADEQUATE PROCEDURES ARE REQUIRED TO PROTECT *MILLER*'S SUBSTANTIVE GUARANTEE

Although *Miller*'s primary holding is its substantive guarantee, *Miller* and *Montgomery* also recognize that procedural safeguards are necessary to effectuate that guarantee—that is, to minimize the risk that a juvenile offender whose crimes reflect "transient immaturity," rather than "permanent incorrigibility," will be erroneously subject to an unconstitutionally harsh sentence. *Montgomery*, 136 S. Ct. at 734. *Miller* therefore "requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence." *Id.* In particular, the sentencing court must "consider a child's 'diminished culpability and heightened capacity for change.'" *Id.* at 726 (quoting *Miller*, 567 U.S. at 479).

It is true that, to "avoid intruding more than necessary" on state sovereignty, this Court in *Miller* did not dictate specific procedures that state courts must follow. *Montgomery*, 136 S. Ct. at 735. Nonetheless, in amici's view, certain minimum procedures are constitutionally required to effectuate *Miller*'s substantive guarantee and ensure proportionate sentences. Specifically, the sentencing court must make a finding on the record that the juvenile being sentenced has demonstrated irreparable corruption, and thus that rehabilitation is impossible. Any lesser procedure would impermissibly increase the risk that juveniles who may be rehabilitated would receive sentences of life without parole, encourages sub silentio findings that

curtail appellate review and fail to satisfy the "appearance of justice," and damages public confidence in the juvenile justice system.

The Court has identified similar procedural safeguards as necessary to protect a substantive constitutional right in the closest adult analogue to *Miller* sentencing: the death penalty. *See Miller*, 567 U.S. at 475 (This Court "view[s] this ultimate penalty for juveniles as akin to the death penalty."). In that context, state sentencing regimes must meet certain constitutional requirements, even though states generally have flexibility to create their own procedures within the confines of those rules. *See, e.g.*, *Moore v. Texas*, 137 S. Ct. 1039, 1048 (2017) ("Although *Atkins* and *Hall* left to the States 'the task of developing appropriate ways to enforce' the restriction on executing the intellectually disabled, States' discretion, we cautioned, is not 'unfettered[.]'" (citations omitted) (quoting *Hall v. Florida*, 572 U.S. 701, 719 (2014))).

Among these minimum procedures is the requirement that the sentencing authority must determine that an offender falls within the class who may receive the death penalty. For example, under the Eighth Amendment, an offender convicted of felony murder is not eligible for the death penalty unless he has killed, attempted to kill, or intended a killing or the use of lethal force. *Enmund v. Florida*,

458 U.S. 782, 797 (1982).[2] This is a "categorical rule" and a "substantive limitation on sentencing" absent the necessary "factual predicate." *Cabana v. Bullock*, 474 U.S. 386, 390 (1986), *abrogated on other grounds by Pope v. Illinois*, 481 U.S. 497 (1987). Although states remain free to determine many of the procedural aspects of making this determination, this Court has made clear that the state must "provide for a finding of that factual predicate." *Cabana*, 474 U.S. at 391. The same is true for other factual circumstances that preclude execution, including insanity, *see Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (plurality op.) ("[I]f the Constitution renders the fact or timing of his execution contingent upon establishment of a further fact ([sanity]), then that fact must be determined . . . ."), and intellectual disability, *see, e.g.*, *Brumfield v. Cain*, 576 U.S. 305, 322 (2015) (sentencing court's procedures insufficient to determine question of intellectual disability for imposition of the death penalty).

As with the death penalty for adult offenders, the Eighth Amendment makes a particular sentence (life without parole) permissible for only a particular category of juvenile homicide offenders (those who cannot be rehabilitated), and therefore demands procedural protections to safeguard that distinction.

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[2] In *Tison v. Arizona*, 481 U.S. 137, 158 (1987), the Court expanded the category of felony-murder offenders eligible for the death penalty to include those who were "major participa[nts] in the felony committed" who demonstrated "reckless indifference to human life." The *Tison-Enmund* category of death-eligible offenders remains narrower than the general rule for felony-murder culpability.

See Montgomery, 136 S. Ct. at 735 ("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."). These protections cannot be anything less than a finding that the juvenile being sentenced falls within the category that may constitutionally receive the sentence being imposed. To hold otherwise would allow courts, following a *pro forma* acknowledgement of *Miller*, to sentence every juvenile homicide offender to life without parole. This would violate the Eighth Amendment's requirement that sentencing schemes meaningfully distinguish between offenders who fall within and without the class eligible for a certain punishment. *See Arave v. Creech*, 507 U.S. 463, 474 (1993) ("If the sentencer fairly could conclude that a[] [necessary factual circumstance] applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm."). It also would run afoul of this Court's admonishment that life without parole sentences for juvenile offenders should be "uncommon" and reserved for only the "rare juvenile offender" who cannot be rehabilitated. *Miller*, 567 U.S. at 479 (quoting *Roper*, 543 U.S. at 573).

Moreover, such a finding must be made on the record. This Court has for more than a century recognized the necessity of findings on the record to support judicial decision-making. *Insurance Co. v. Boon*, 95 U.S. 117, 124 (1877) ("[T]here must be a finding of facts . . . in order to authorize a judgment; and that finding must appear on the record."). A *sub silentio* finding by a court is deficient for two reasons. First, it prevents meaningful appellate review, for higher courts are unable to determine whether, and

on what basis, the trial court found that the juvenile fell within the irreparably corrupt class eligible for life without parole. *See Proffitt v. Florida*, 428 U.S. 242, 251 (1976) (plurality op.) (recognizing that a requirement that a trial judge issue findings justifying a death sentence promotes "meaningful appellate review of each such sentence"). In the absence of on-the-record findings, appellate courts necessarily must speculate about the lower court's determinations, potentially harming not only the juvenile seeking to challenge a sentence, but also the state seeking to defend it. Unlike discretionary sentencing decisions that may merit deference to a trial judge, imposition of life without parole on a juvenile is an issue of great constitutional import with irrevocable consequences for the child. Granting virtually unreviewable discretion to the sentencing court in these cases is insufficient to preserve *Miller*'s Eighth Amendment guarantee.

Second, and particularly relevant to amici, failing to memorialize—transparently and on the record—the outcome-determinative finding that drives a juvenile life-without-parole sentence hides from the public a decision of immense importance to the community at large. "Confidence in a judge's use of reason underlies the public's trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates that trust." *Rita v. United States*, 551 U.S. 338, 356 (2007). Moreover, "a presumption of openness inheres in the very nature of a criminal trial under our system of justice." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 (1980). An unrecorded finding denies public access to criminal proceedings just as denying

disclosure of a public court record or closing a courtroom does, and with the same attendant negative consequences: "where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted." *Id.* at 571.

When public confidence in the criminal justice system is undermined, so too is the work of prosecutors and judges. The willingness of victims and witnesses to report crimes to law enforcement, cooperate with prosecutors, show up for court proceedings, and testify truthfully depends in part on their confidence that the judicial system will treat them and others fairly. Unexplained, unreasoned decisions regarding the sentencing of children are detrimental to the legitimacy of the criminal justice system as a whole and the credibility of those entrusted to prosecute and adjudicate crimes within it.

As prosecutors and judges, amici appreciate that determining whether a child may be rehabilitated as an adult is a difficult predictive judgment. Because of that challenge, consistent minimum procedural requirements—including an on-the-record determination of eligibility through evaluation of rehabilitative potential—are necessary to ensure the fair application of the Eighth Amendment to juvenile homicide offenders and satisfy the appearance of the equitable administration of justice. When, as here, state-court procedures fail to ensure that sentencers impose life-without-parole sentences on juveniles only in the rare circumstances envisioned by this Court,

those procedures fail to meaningfully fulfill *Miller*'s constitutional promise.

III. THE STATE COURT'S PROCEDURES WERE CONSTITUTIONALLY INSUFFICIENT

At issue in this case is whether state courts like Mississippi's have fulfilled this Court's direction to ensure that sentencing practices sufficiently minimize the risk that juveniles whose crimes reflect only "transient immaturity" will receive sentences that are constitutionally disproportionate. As evidenced by the facts of this case, the answer to that question is *no*.

For the families of homicide victims, every murder is a profound tragedy. Amici have witnessed firsthand the enormous toll that the crime exacts on survivors. Under *Miller* and *Montgomery,* however, it is only "the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified." *Montgomery*, 136 S. Ct. at 733. Here, the facts in the record do not suggest that Brett Jones is one of those offenders.

A. Facts and Procedural History

Three weeks after turning 15, Brett Jones killed his paternal grandfather, Bertis Jones.[3] Pet. App.

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[3] Except as otherwise noted, the facts of this case are drawn from Petitioner's direct appeal of his criminal conviction. *See Jones v. State*, 938 So. 2d 312 (Miss. Ct. App. 2005). Amici adopt the *(cont'd)*

11a. Brett had recently moved to Mississippi to escape his home in Florida, where he lived with his mother and stepfather. Brett's girlfriend, Michelle Austin, had followed Brett to Mississippi after running away from home. Bertis discovered Austin in Brett's bedroom and told her to get out of the house. Later that day, Bertis confronted Brett in the kitchen. There was a confrontation about Austin, and according to Brett's testimony, Bertis pushed him, Brett pushed back, and then Bertis swung at Brett. Brett had a steak knife in his hand from making a sandwich, and "threw the knife forward," stabbing his grandfather. Brett testified that they fought more, and Brett stabbed his grandfather several times, including after grabbing a second knife. After killing his grandfather, Brett tried to administer CPR, then pulled Bertis's body into the laundry room.

Brett made several ineffective attempts to conceal the blood in the house and on his body before leaving and encountering a neighbor, who called 911 when he saw Brett covered in blood and carrying a knife, trembling and saying "kill, kill." Brett and Austin were arrested at a gas station trying to get a ride to Wal-Mart, where Brett planned to tell his grandmother, who worked there, what had happened. After being arrested, Brett gave an interview to three police detectives without invoking his rights to silence or counsel, and without a parent or guardian present. The interview provided "damning evidence to the

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usage of "Brett" to refer to the petitioner when discussing proceedings in the sentencing court, to distinguish him from his grandfather Bertis Jones, whom amici refer to as "Bertis."

State[.]" Pet. App. 28a (Waller, C.J., dissenting). The jury rejected Brett's claim of self-defense, and he was convicted of murder in the Circuit Court of Lee County, Mississippi, and sentenced to life imprisonment. Because of his charges, he was ineligible for parole under state law.

Following the Court's decision in *Miller*, Brett moved to be resentenced to life with the possibility of parole. The trial court denied his motion, but the Mississippi Supreme Court reversed and remanded for a sentencing hearing. *Jones v. State*, 122 So. 3d 698, 703 (Miss. 2013). At the ensuing hearing, Brett introduced significant evidence that he was "vulnerable to negative influences and outside pressures, including from [his] family and peers" and had "limited control over [his] own environment and lack[ed] the ability to extricate [himself] from horrific, crime-producing settings." *Miller*, 567 U.S. at 461 (quoting *Roper*, 543 U.S. at 570) (internal punctuation omitted). Specifically, he presented multiple witnesses who testified about his traumatic childhood before killing his grandfather. First, Brett's grandmother, Lawanda Madge Jones, Bertis's widow, testified on Brett's behalf. She stated that Brett's stepfather, Dan, was physically abusive toward Brett, including beating him with a belt, "buckle and all." J.A. 58. She further testified that Brett's mother had "emotional problems" that put her in an "emotional breakdown, drink whiskey state . . . [f]rom once a week to once a month." J.A. 40. Brett's mother had a number of mental health issues that led her to leave the family several times while Brett was a child. J.A. 43–44.

Brett's mother, Enette Wigginton, also testified. She explained that Brett's father, Tony, had a drinking problem, would "disappear for days on end," and physically abused her, including knocking out her teeth and breaking her nose. J.A. 72. Tony spent several years in prison. *Id*. Enette further testified that she has several mental health disorders, and that in the years before Bertis was killed, the family had moved nine times, with Brett never spending one entire year at the same school. J.A. 74, 77. Enette testified that Brett's stepfather "hated Brett because he looks like his father," J.A. 77, and as a result would call Brett and his brother foul names and tell them that they were "never going to be anything." *Id*. She confirmed that Dan would lock Brett and his brother in their rooms; hit them with a belt, paddle, or switch for small infractions; and grab them and shake them while yelling and screaming in their faces, beginning when Brett was seven years old. J.A. 78–79.

Brett's younger brother, Marty, also testified about his stepfather's abuse, including physical attacks that "left marks quite a few times," J.A. 52, beatings with the buckle end of a belt, J.A. 58, and Dan placing his hand around Brett's throat. J.A. 59. Marty testified that Brett developed mental health issues that Marty believed were brought on by their stepfather. J.A. 54. Marty further testified that Brett's girlfriend, Austin, was also physically abusive toward Brett, that she "slapped and beat him down," and told him to cut himself, which he did. J.A. 56.

Sharon Frost, Brett's mother's cousin, corroborated Brett's mistreatment by Dan, testifying that living with Dan was "traumatic" for the children,

J.A. 101, and that Dan's "favorite thing to call them was little motherfuckers." *Id*. When separated from the environment with Dan, Ms. Frost testified that Brett was "a good kid." J.A. 102.

Brett's mother and grandmother also provided evidence that Brett could function well when removed from his traumatic environment, as they both testified that he was intelligent, J.A. 49, 88, and despite moving multiple times, he was an excellent student who had at one time been placed in gifted classes, J.A. 88, and was "on the honor roll most of the time." J.A. 91.

As a result of his mental health difficulties, Brett was prescribed medication. After a single incident where Brett was arrested after being accosted by his stepfather and reacting physically, resulting in a small cut on his stepfather's ear, Brett was prescribed additional mental health medication. J.A. 92. Brett's grandmother testified that before moving to Mississippi to live with her and Brett's grandfather, Brett's mother—against the advice of doctors—had abruptly taken him off the prescription medication he had been taking "to keep him calmed down" and for depression. J.A. 38–39.

Brett also introduced evidence of his rehabilitation while incarcerated, including the testimony of Jerome Benton, a corrections official at Walnut Grove Correctional Facility where Brett was incarcerated from ages 15–21. Benton testified that Brett was "a real nice kid" and that the prison did not have any trouble with Brett the whole time that Benton knew him. Pet. App. 60a. Brett sought out employment in

the prison, cleaning and waxing floors, and was "a very good employee." Pet. App. 61a. Benton testified that he considered Brett almost a son, and that they would have regular talks about life and the Bible. Pet. App. 61a–62a. When Brett had a personal problem, he would come and sit down with Benton and they would talk about it. Pet. App. 62a–63a. While in prison, Brett completed his GED and was working on getting enrolled in college courses. Pet. App. 63a. Brett "got along with everybody," including other prison employees. Pet. App. 63a. Although there was gang activity at the prison, Brett did not participate in any of it. Pet. App. 69a.

Finally, Brett himself testified. He described being "terrorized" by his stepfather, including being cursed at, grabbed, choked, and hit, sometimes leaving bruises. J.A. 121. He stated that the abuse escalated when he was 10 or 11 years old, and continued until he moved to Mississippi shortly before the incident with his grandfather. J.A. 121–22. Brett stated that he had "really bad" mental health issues while living with his stepfather and was prescribed medicine for hyperactive disorder, depression, and some type of psychosis. J.A. 123. He described cutting himself with knives, razorblades, and box cutters, starting at age 11 or 12, and that his girlfriend at the time would encourage him to do it to prove his love for her. J.A. 130–31. He testified that he had stopped taking his mental health medication shortly before moving to Mississippi, and that he had experienced withdrawal. J.A. 126.

Brett also testified about the incident in which he killed his grandfather. He said that he felt regret and

that he tried to go to where his grandmother worked to tell her what he had done, but was arrested on the way. J.A. 133.

Brett further described his experiences after being incarcerated. Shortly after arrest he attempted suicide, but after seeing a psychiatrist in the prison he "started eventually learning how to cope." J.A. 134. He testified that his only disciplinary incidents while in prison were using a curse word and an incident that involved a group of other inmates in 2007. J.A. 134–35.

The state presented no evidence in rebuttal, arguing instead that Brett was an intelligent and mature child at the time of the offense, and restating the facts of the offense. J.A. 140–43.

The sentencing court read its opinion into the record on April 17, 2015, before this Court's decision in *Montgomery*. The sentencing court acknowledged *Miller*, explaining that, in the trial court's understanding, it "requires the sentencing authority to consider both mitigating and aggravating circumstances," although, the court recognized, "these are not really terms used in the *Miller* opinion[.]" Pet. App. 71a. The majority of the court's opinion recounted the facts of the offense, which the court characterized as "particularly brutal," Pet. App. 72a, without applying the correct analytical framework under *Miller* or discussing how those facts might have suggested the "hallmark features" of youth, including "immaturity, impetuosity, and failure to appreciate risks and consequences." *Miller*, 567 U.S. at 477. The court instead emphasized that

the trial jury had been properly instructed and had rejected Brett's argument that he had acted in self-defense. Pet. App. 71a–72a. The court also referred to a lack of evidence that Brett was pressured by family or peers to kill his grandfather. Pet. App. 72a.

Despite mentioning the testimony about Brett's traumatic childhood, the court concluded that there was "no evidence of brutal or inescapable home circumstances," reasoning that escape was possible because his move to Mississippi "was to provide him with a home away from the circumstances existing in Florida." Pet. App. 73a. The court mentioned that it was "cognizant of the fact that children are generally different," Pet. App. 70a, but its sole discussion of Brett's maturity at the time of the offense was noting that Brett's girlfriend had, "at some time before the incident" thought she was pregnant. Pet. App. 73a. Although the suspicion "proved to be untrue," the court stated that it "demonstrates that the defendant had reached some degree of maturity in at least one area." Pet. App. 73a.

At no point did the court address Brett's capacity for rehabilitation; his model behavior while incarcerated, including obtaining his GED and seeking other educational opportunities; or Benton's testimony. Indeed, the sentencing court did not even acknowledge that the potential for rehabilitation is a factor that must be considered when determining whether a sentence of life without parole could be constitutionally imposed. Nevertheless, the court conclusively stated that it "considered each of the *Miller* factors" and resentenced Brett to life without parole. Pet. App. 74a.

Brett appealed to the Mississippi Court of Appeals. Over the dissent of three judges, the en banc Court of Appeals issued an opinion on December 14, 2017, affirming the sentencing court's ruling. In support, the majority pointed to the fact that "the judge expressly stated that he had 'considered each of the Miller factors'" as evidence that the trial court had applied the correct legal standard, while acknowledging that "[t]he judge did not specifically discuss on the record each and every factor mentioned in the Miller opinion." Pet. App. 47a. Like the sentencing court, the majority made no mention of Brett's capacity for rehabilitation. The dissent expressed that "the trial court did not conduct a thorough on-the-record analysis to determine whether Brett was among the 'very rarest of juvenile offenders who is irreparably corrupt, irretrievably broken, and incapable of rehabilitation,' which I would find is required under *Miller*." Pet. App. 48a.

Brett petitioned for review in the Supreme Court of Mississippi. On November 27, 2019, the court summarily dismissed his writ in a 5-4 decision, affirming the sentencing court's decision to reimpose a life-without-parole sentence without opinion. Chief Justice Waller and three other justices dissented. They concluded that the facts adduced in the circuit court demonstrated "immaturity, impetuosity, and failure to appreciate risks and consequences" "at every [turn]." Pet. App. 26a. These facts included Brett's impulsive resort to violence, Pet. App. 26a; his inept and ineffective behavior in the immediate aftermath of the offense, Pet. App. 26a–27a; his participation in sexual relations before the age of majority, Pet. App. 27a; and his voluntary interview

with three police detectives without invoking his rights to silence or counsel, providing "damning evidence" that diminished his chance of plea bargain. Pet. App. 28a.[4] All of these, the dissenters concluded, demonstrated a "fundamental immaturity" and "an utter failure to consider the consequences of his actions." Pet. App. 27a. The dissenting justices emphasized that the sentencing court did not have the benefit of *Montgomery* at the time it issued its decision, and thus could not have known that *Miller* "drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." Pet. App. 22a (quoting *Montgomery*, 136 S. Ct. at 734).

Acknowledging that it previously had held in *Chandler v. State*, 242 So. 3d 65 (Miss. 2018), that this Court's opinion in *Miller* did not impose a specific factfinding requirement on lower courts, the dissenting justices nevertheless argued that "Mississippi should exercise its authority to impose a formal fact finding requirement for *Miller* decisions," including the "ultimate question of whether the juvenile's crime reflects transient immaturity or permanent incorrigibility," emphasizing that "the decision whether to impose the penalty is of the utmost seriousness." Pet. App. 24a. As the dissenting

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[4] *Cf.* Marsha Levick & Neha Desai, *Still Waiting: The Elusive Quest to Ensure Juveniles a Constitutional Right to Counsel at All Stages of the Juvenile Court Process*, 60 RUTGERS L. REV. 175 (2007) (arguing that juveniles need counsel at all points in legal proceedings as they generally do not understand their rights or the proceedings well enough to make informed decisions).

justices pointed out, the Mississippi Supreme Court has imposed strict fact finding requirements for child custody determinations, and "[n]o reason exists to eschew formal fact findings in the context of determining whether a juvenile offender will suffer the harshest penalty imposed by law for a crime committed as a child." *Id.*

Having reviewed the sentencing court record, the dissenting justices concluded that Brett's "criminal actions reflected transient immaturity," and that accordingly, the "Eighth Amendment prohibits a life without parole sentence." Pet. App. 28a. The dissenting justices urged that Brett's sentence be vacated and he be resentenced to life imprisonment with eligibility for parole. Pet. App. 29a.

B. The Record Does Not Support the Trial Court's Conclusion that a Life-Without-Parole Sentence Was Warranted.

As prosecutors and judges, amici appreciate that for those who knew and loved a victim of murder, each case is rare and exceptional. The act of taking a life is necessarily an extreme departure from the norms we expect of every person living in society. But "*Miller*'s central intuition" is "that children who commit even heinous crimes are capable of change." *Montgomery*, 136 S. Ct. at 736. Indeed, *Miller* applies only to homicide cases—as *Graham* bars life-without-parole sentences for all juvenile non-homicide offenses—and makes clear that only the rare juvenile homicide offender may be denied the opportunity to seek parole. Therefore, under this Court's case law, more than an intentional killing is required to

constitutionally impose a life-without-parole sentence on a juvenile.

The trial court's handling of Brett's resentencing, and its approval by the Mississippi Court of Appeal and Mississippi Supreme Court, fail to effectuate this Court's direction and, in turn, undermine confidence in the fairness of the criminal justice system. The trial court did not evaluate in any meaningful way Brett's "youth and attendant characteristics," and failed to determine if he falls within the category of offenders who exhibit "such irretrievable depravity that rehabilitation is impossible and life without parole is justified." *Montgomery,* 136 S. Ct. at 733–34. As a result, despite the court's assertion to the contrary, it is apparent from the record that the trial court failed to consider each of the *Miller* factors, or make the necessary determination required by the Eighth Amendment. Even if the trial court had considered each of the factors *sub silentio*, its decision was clearly mistaken.

First, the trial court's reasoning contradicts the growing body of scientific evidence that many adolescent brains are not fully developed at age 17, much less 15, as Brett was at the time of the offense. *See supra* at 7. In amici's experience, and as explained by the four dissenting justices in the Mississippi Supreme Court, the facts of Brett's case suggest the very immaturity that the trial court failed to recognize. For example, resorting to violence during an argument with his grandfather—in whose house he was living in order to escape an abusive household—may reflect adolescent impulsive decision-making and a lack of appreciation of

consequences. Brett's ineffectual and haphazard attempts to move his grandfather's body and clean up the blood; his attempt to find a ride to his grandmother's place of work and tell her what happened; and his uncounseled inculpatory statement to police suggest a lack of appreciation of consequences and foresight characteristic of youth of his age. *See Miller*, 567 U.S. at 477 ("hallmark features" of juveniles include "immaturity, impetuosity, and failure to appreciate risks and consequences"). And the fact that Brett had experienced two abrupt transitions shortly before the offense—first, moving out of an abusive and traumatic home and second, being abruptly removed from mental health medication against medical advice—may suggest that his mental state at that time was a "transient" one that might be remedied by growth and treatment.

Second, and most importantly, the sentencing court's failure even to mention, much less meaningfully consider, Brett's possibility of reform and demonstrated evidence of rehabilitation suggests that it did not find, even *sub silentio*, that Brett fell within the uncommon class of offenders who may be sentenced to life without parole. A sentence of life without parole is permitted only when "rehabilitation is impossible." *Montgomery*, 136 S. Ct. at 733. But rather than consider whether the evidence indicated the possibility that Brett could become a productive member of society were he to be released on parole someday, as *Miller* requires, the sentencing court appeared to focus on the validity of his conviction—which Brett did not dispute.

The court's complete failure to consider Brett's potential for rehabilitation highlights what is at stake in this case. Brett sought resentencing merely to be allowed the *possibility* of parole should he prove himself worthy of release at some point in the future. As this Court recognized in *Graham*, the possibility of parole does not "guarantee eventual freedom to a juvenile offender." 560 U.S. at 75. But for the vast majority of juvenile homicide offenders, the State must give the defendant "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* In amici's experience, the unrefuted evidence that Brett introduced at his resentencing—after 10 years of incarceration—suggests that, now long removed from his abusive and traumatic upbringing and having received mental health treatment, he has already begun the process of maturing and rehabilitating himself.

In sum, nothing in the record suggests that Brett is hopelessly and permanently incorrigible. With only a nod to *Miller* and without the benefit of *Montgomery*, the sentencing court failed to appropriately distinguish Brett from an offender whose crime reflects irretrievable depravity.

C. The Procedures Approved by the Mississippi Supreme Court Are Constitutionally Insufficient.

As evidenced by this case, the Mississippi Supreme Court's summary approval of the sentencing court's perfunctory review under *Miller* does not adequately ensure that juvenile homicide offenders in Mississippi will receive constitutionally permissible

sentences. Should Mississippi's procedures be left undisturbed, sentencing courts in the state would be allowed to sentence any juvenile homicide offender to life without parole so long as the court holds a hearing and professes to have considered the *Miller* factors, even when the record suggests otherwise. Under this scenario, children whose crimes reflect transient immaturity inevitably will be sentenced to life without parole, without the possibility of meaningful appellate review of their sentencing decision.

This cannot be what this Court intended in *Miller* and *Montgomery*. Such a procedure effectively would nullify the Eighth Amendment's substantive limitations on juvenile sentencing. If a punishment that the Constitution considers cruel and unusual for most children threatens to become the norm, rather than the exception, the integrity of the criminal justice system is compromised. Amici urge this Court to reverse the Mississippi courts' decisions, and make clear that the procedures approved by the Mississippi Supreme Court are constitutionally inadequate to ensure that the most severe penalty available for children is reserved for only the "rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified." *Montgomery*, 136 S. Ct. at 733.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to reverse the judgment of the Mississippi Supreme Court.

Respectfully submitted,

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