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

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

CHRISTOPHER M. MURPHY
LAWRENCE A. WOJCIK
MICHAEL S. STANEK
ETHAN H. TOWNSEND
GARRET R. ATHERTON
McDermott Will & Emery LLP
444 W Lake St
Chicago, IL 60606

JUDY PERRY MARTINEZ
Counsel of Record
American Bar Association
321 North Clark Street
Chicago, IL 60654
(312) 988-5000
abapresident@americanbar.org

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

Cases—continued

Other Authorities

Other Authorities—continued

INTEREST OF THE *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association (ABA), as *amicus curiae*, respectfully submits this brief in support of the Petitioner. The ABA is the largest voluntary organization of attorneys and legal professionals in the world. Its members come from all fifty States and other jurisdictions. They include prosecutors, public defenders, and private defense counsel, as well as attorneys in law firms, corporations, non-profit organizations, and government agencies. The ABA's membership also includes judges, legislators, law professors, law students, and non-lawyer associates in related fields.[2]

Promoting the rule of law is central to the ABA's mission. Specifically, Goal IV of the ABA is to advance the rule of law.[3] In furtherance of this goal, in 2006, the ABA adopted as policy a commitment to core rule-of-law principles.[4]

---

[1] All parties to this matter have provided written consent for this *amicus curiae* brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] Neither this brief nor the decision to file it should be interpreted as reflecting the views of any judicial member. No member of the ABA Judicial Division Council participated in this brief's preparation or in the adoption or endorsement of its positions.

[3] See, *e.g.*, Goal IV, *available at* https://perma.cc/5UFF-JX2Q**.**

[4] ABA Policy #111 (adopted midyear 2006), *available at* https://perma.cc/Z6YX-AJJ8. In addition, the ABA has established a Rule of Law Initiative that works, particularly in developing countries, to "promote justice, economic opportunity

The rule of law is enforced when States adopt procedures that give effect to the substantive rule of constitutional law the Court announced in *Miller* v. *Alabama*, 567 U.S. 460 (2012), and reaffirmed in *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016), that a sentence of life without parole is a disproportionate sentence for all but the rarest of children whose crimes reflect irreparable corruption. A ruling reversing the Mississippi Supreme Court decision below and prohibiting States from adopting procedures that would allow them to circumvent the *Miller* rule would be consistent not only with the rule of law, but also with the ABA policy of supporting juvenile justice. For over 40 years, the ABA has worked to ensure appropriate protections for juvenile defendants when transferred to the adult criminal justice system and has taken positions against imposing capital punishment and life without the possibility of parole on juvenile offenders. In 1980, after ten years of work, the ABA promulgated a comprehensive body of Juvenile Justice Standards, addressing the entire juvenile justice continuum, from police handling and intake to adjudication, disposition, and juvenile corrections.[5]

Concerned with the growing imposition of capital punishment on juvenile offenders, the ABA adopted policy in 1983 that opposed "the imposition of capital punishment upon any person for an offense committed

---

and human dignity through the rule of law." ABA, Rule of Law Initiative Program Book 4 (2016).

[5] Merril Sobe & John D. Elliott, *The IJA-ABA Juvenile Justice Standards*, Crim. Justice, 24 (Fall 2014). The ABA policies dating from 1988 onward that are discussed in this brief are available online at https://perma.cc/22CZ-C5Q4. Policies dated prior to 1988 are available from the ABA.

while under the age of eighteen."[6] The ABA did so while maintaining its long-standing policy of taking no position on the death penalty as a general matter, after concluding that the arguments used to support capital punishment for adults, including retribution and deterrence, did not apply in the same manner to juveniles.

The ABA has repeatedly reaffirmed its position that "children are different."[7] And the ABA drew upon its expertise and efforts to protect children in the

---

[6] ABA Policy #117A (adopted Aug. 1983) and its accompanying report are available from the ABA. The policy was cited in *Stanford* v. *Kentucky*, 492 U.S. 361, 388 (1989) (Brennan, J., dissenting), and in *Thompson* v. *Oklahoma*, 487 U.S. 815, 830 (1988).

[7] ABA Policy #119 (adopted Feb. 1991) (endorsing the United Nations Convention on the Rights of the Child), *available at* https://perma.cc/RMM7-N97G; ABA Policy #107 (adopted Feb. 1997) (supporting moratorium on death penalty until jurisdictions implemented procedures that, *inter alia*, "prevent[ed] execution of * * * persons who were under the age of 18 at the time of their offenses."), *available at* https://perma.cc/CAR5-Y7GV; ABA, *Youth in the Criminal Justice System: An ABA Task Force Report* (2002) (citing ABA, *Youth in the Criminal Justice System: Guidelines for Policymakers and Practitioners* (2001)), *available at* https://perma.cc/MH5M-97LP; ABA Policy #105C (adopted Feb. 2008) (urging that all jurisdictions implement sentencing laws and procedures that appropriately recognize the mitigating considerations of age and maturity of offenders under the age of 18 at the time of their offenses), *available at* https://perma.cc/3ZLV-PBTV; ABA Policy #107C (adopted Feb. 2015) (urging that all jurisdictions "[e]liminate life without the possibility of release or parole for youthful offenders both prospectively and retroactively," and provide them "with meaningful periodic opportunities for release based on demonstrated maturity and rehabilitation beginning at a reasonable point into their incarceration, considering the needs of the victims."), *available at* https://perma.cc/4BKH-NQ6Z.

juvenile justice system when it filed its *amicus curiae* briefs in *Roper* v. *Simmons*, 543 U.S. 551 (2005);[8] *Graham* v. *Florida*, 560 U.S. 48 (2010);[9] *Miller*;[10] *Montgomery*;[11] and *Mathena* v. *Malvo*, No. 18-217.[12] ABA support for adherence to previously articulated standards in this case fosters the rule of law and continues the ABA's consistent support for what the Court recognized in *Miller*—that juveniles' diminished culpability and greater prospects for reform make them different from adults for sentencing purposes, and that juveniles whose crimes reflect transient immaturity, rather than irreparable corruption, should not be subject to life imprisonment without parole.

SUMMARY OF THE ARGUMENT

Under *Miller* and *Montgomery*, the Eighth Amendment prohibits a sentence of life without parole for juvenile offenders except for the rare juvenile whose crime reflects irreparable corruption rather than transient immaturity of youth. This case concerns the procedures States must adopt to "separate those juveniles who may be sentenced to life without parole from those who may not." *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 735 (2016). To implement the substantive guarantee of the Eighth Amendment, without intruding more than necessary upon the

---

[8] The ABA's *amicus curiae* brief is available at https://perma.cc/6FJ9-APFA.

[9] The ABA's *amicus curiae* brief is available at https://perma.cc/DPZ8-TEUU.

[10] The ABA's *amicus cu*riae brief is available at https://perma.cc/4YJY-CLU3.

[11] The ABA's *amicus curiae* brief is available at https://perma.cc/HH6Y-HBTK.

[12] The ABA's *amicus curiae* brief is available at https://perma.cc/JW4H-CXDV.

States' sovereign administration of their criminal justice systems, the Court should require that sentencing courts at a minimum, must ask and answer correctly the question whether a juvenile offender's "crime reflects irreparable corruption." *Adams* v. *Alabama*, 136 S. Ct. 1796, 1799 (2016) (Sotomayor, J., concurring in the decision to grant, vacate, and remand).

Important rule of law considerations underpin the conclusion that lower courts must focus their inquiry on the specific distinction between transient immaturity and irreparable corruption. Mere consideration of the juvenile offender's age "poses too great a risk of disproportionate punishment." *Miller*, 567 U.S. at 479. And although States "have some flexibility" in the design of their own procedures, their "'discretion'" is "not 'unfettered.'" *Moore* v. *Texas*, 137 S. Ct. 1039, 1052 (2017) (quoting *Hall* v. *Florida*, 572 U.S. 701, 719 (2014)). A sentencing court's failure to decide whether the juvenile defendant before it is among those rare children whose crimes reflect irreparable corruption carries the too great risk that this Court's substantive constitutional rule in *Miller* will go unheeded.

Thus, to ensure compliance with the *Miller* rule in accordance with the rule of law, the Court should impose a guardrail on the States' discretion to design their own procedures by requiring sentencers to ask the "essential question whether [the defendant is] among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'" *Adams*, 136 S. Ct. at 1800–1801 (Sotomayor, J., concurring in the decision to grant, vacate, and remand) (quoting *Montgomery*, 577 U.S. at 734). Sentencing courts can answer that essential question by make a finding on the record of permanent

incorrigibility—indeed, that is the best way to ensure adherence to the holding of *Miller* and *Montgomery*. Alternatively, States may assign the prosecution the burden of rebutting a presumption against permanent incorrigibility. Regardless, States still will retain considerable leeway in the "task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Ford* v. *Wainwright*, 477 U.S. 399, 416–417 (1986).

The ABA urges the Court to reverse the judgment below because there is no indication that the sentencing judge even asked the question *Miller* required him to answer correctly: whether Mr. Jones' crime reflected irreparable corruption.

ARGUMENT

I. Sentencing courts must ask and answer the question whether a juvenile's crime reflects irreparable corruption before sentencing that juvenile to life without parole.

In *Miller*, the Court required sentencing courts "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" and concluded that that no juvenile may be sentenced to life without parole for a crime that reflects "unfortunate yet transient immaturity," rather than "irreparable corruption." *Miller*, 567 U.S. at 479-480. *Miller* also announced the Court's belief that "appropriate occasions for sentencing juveniles to" life in prison without parole "will be uncommon." *Id*. at 479. The States can impose this "harshest possible penalty" on only the "rare juvenile offender whose crime reflects irreparable corruption" as opposed to "unfortunate yet transient immaturity." *Id*. at 479-480.

Montgomery confirmed that life without parole was an unconstitutional penalty for a class of defendants "whose crimes reflect the transient immaturity of youth." See *Montgomery*, 136 S. Ct. at 734; *id*. at 726 ("*Miller* * * * explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect 'irreparable corruption.'") (quoting *Miller*, 567 U.S. at 479–480); *id.* at 734 ("*Miller* did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."); *ibid.* ("*Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption."). As *Montgomery* explained, *Miller*'s standard for separating the class of defendants whose crimes reflect the transient immaturity of youth from the irreparably corrupt thus embodies a "substantive rule of constitutional law." *Id*. at 732.

The Court has, so far, left to the States the task of developing appropriate procedures to implement *Miller*'s substantive constitutional rule. But giving the States unfettered leeway to fashion procedures to implement the *Miller* rule creates the risk that *Miller*'s substantive guarantee is not guaranteed at all. The Court must now instruct the States in their procedural developments, or "risk" the "disproportionate punishment" of "children" by "irrevocably sentencing them to a lifetime in prison." *Miller*, 567 U.S. at 479–480.

To avoid doubt as to the constitutionality of juvenile life without parole sentences, the "substantive change in the law" announced in *Miller* "must be attended by a procedure that enables" sentencing courts to determine whether a defendant

"falls within the category of persons whom the law may no longer punish." *Montgomery*, 136 S. Ct. at 735. Indeed, "ascertainment of a prisoner's" eligibility for punishment "[i]s a predicate to lawful" imposition of that punishment. *Ford* v. *Wainwright,* 477 U.S. 399, 411 (1986); see also *id.* at 424 ("[T]he question in this case is whether Florida's procedures for *determining* petitioner's [eligibility for punishment is constitutional]."") (Powell, J., concurring) (emphasis added); *Atkins* v. *Virginia*, 536 U.S. 304, 317 (2002) (examining procedure for "determining which offenders are in fact" ineligible for punishment).

Any procedure for determining constitutional eligibility for punishment must be robust enough to "implement [that] substantive guarantee." *Montgomery*, 136 S. Ct. at 734. Mere consideration of age does not suffice, because the Eighth Amendment prohibits sentencing a juvenile to life without parole "[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison." *Ibid*. (citing *Miller*, 567 U.S. at 479). Rather, a sentence violates the Eighth Amendment unless it "distinguish[es] . . . between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Miller*, 467 U.S. at 479–480 (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)). In other words, a sentencer must "ask[]" and "answer correctly" into which constitutional category the juvenile defendant belongs. *Adams*, 136 S. Ct. at 1800 (Sotomayor, J., concurring in the decision to grant, vacate, and remand).

A requirement that sentencing courts ask and answer correctly the question as to whether the juvenile's crime reflects irreparable corruption is

consistent with three rule of law principles. First, distinguishing transiently immature juveniles from the irreparably corrupt decreases the likelihood that the sentencer will arbitrarily sentence a defendant in a manner the Eighth Amendment prohibits. The Founders recognized: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." Alexander Hamilton, The Federalist No. 78. The Court endorsed this foundational standard by its elaboration on the "principles of law." *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009) (quoting *Republican Party of Minn.* v. *White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring)). "[U]niformity" in courts' adherence to *Miller*'s substantive guarantee "is critical to prevent erosion of public confidence in the rule of law." *United States* v. *Barkley*, 369 F. Supp.2d 1309, 1316 (N.D. Okla. 2005).

Second, the rule of law only prevails if "a lower court in a system of absolute vertical stare decisis headed by one Supreme Court * * * follow[s] both the words and the music of Supreme Court opinions." *United States* v. *Martinez-Cruz*, 736 F.3d 999, 1006 (D.C. Cir. 2013) (Kavanaugh, J., dissenting). The legitimacy of the Court's teachings rests "in the end, upon the respect accorded to its judgments." *Caperton*, 556 U.S. at 889. It is axiomatic that "respect for the rule of law must start with those who are responsible for pronouncing the law." *McCleskey* v. *Zant*, 499 U.S. 467, 529 (1991) (Marshall, J., dissenting). State procedures that do not require a sentencing court to answer the question of whether a juvenile offender is irreparably corrupt ignore "the words and the music" of *Miller* and *Montgomery*.

Third, appellate review is facilitated when the "record * * * reflect[s] that the court meaningfully engaged in *Miller*'s central inquiry." *United States* v. *Briones*, 929 F.3d 1057, 1067 (9th Cir. 2019) (en banc). This is not to suggest that the sentencer must "use any specific words," *ibid*, to answer the *Miller* question, but the sentencer "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Gall* v. *United States*, 552 U.S. 38, 50 (2007).

To avoid a "risk of disproportionate punishment" greater than the Constitution tolerates, *Miller*, 567 U.S. at 479, the Court must instruct lower courts that a sentencer's task is to "decide whether the juvenile offender before it is a child 'whose crimes reflect transient immaturity' or is one of 'those rare children whose crimes reflect irreparable corruption.'" *Tatum* v. *Arizona*, 137 S. Ct. 11, 13 (2016) (quoting *Montgomery*, 136 S. Ct. at 734). Until then, "[f]ail[ure] to make this distinction * * * w[ill] mean life sentences for juveniles w[ill] not be exceedingly rare, but possibly commonplace." *Landrum* v. *State,* 192 So.3d 459, 467 (Fla. 2016).[13]

[13] The ABA thus agrees with Petitioner Jones that a determination of irreparable corruption must be made on the record to ensure that the question of irreparable corruption be asked and answered correctly before a sentence of life without parole is imposed on a juvenile offender. As discussed below, States can fulfill that mandate by requiring an express finding of fact on the record of irreparable corruption or, at the very least, by imposing a rebuttable presumption of transient immaturity. Either course would ensure that the necessary determination has been made.

II. The Court can prescribe boundaries for State procedures to make the *Miller* inquiry without encroaching on federalism interests.

The Court can clarify the *Miller* inquiry for the States without encroaching upon federalism interests. When the Court recognized in *Montgomery* that *Miller* had announced a substantive rule, it followed the pattern of two earlier cases that had announced similar substantive rules: *Ford* v. *Wainwright*, 477 U.S. 399 (1986) (holding the Eighth Amendment barred capital punishment of insane individuals), and *Atkins* v. *Virginia*, 536 U.S. 304 (2002) (holding the same with respect to the intellectually disabled). Like *Miller*, *Ford* and *Atkins* each "prohibit[ed] a certain category of punishment for a class of defendants because of their status or offense." *Montgomery*, 136 S. Ct. at 728 (quoting *Perry* v. *Lynaugh*, 492 U.S. 302, 330 (1989)).[14] Therefore, when *Montgomery* announced that lower courts were required to uphold *Miller*'s substantive guarantee, it followed the pattern of respecting state sovereignty set by the capital cases *Ford* and *Atkins* and allowed the States to "develop[] appropriate ways to enforce" the new constitutional rule. *Id*. at 735 (quoting *Ford*, 477 U.S. at 416).

---

[14] *Miller* drew parallels from the Court's death penalty jurisprudence, *Miller*, 567 U.S. at 474, because "life without parole sentences share some characteristics with death sentences that are shared by no other sentences." *Graham* v. *Florida*, 560 U.S. 48, 69 (2010). That is fitting, as a sentence to life in prison without the possibility of parole is itself a form of death sentence. See*, e.g.*, Jessica S. Henry, *Death-in-Prison Sentences: Overutilized and Underscrutinized*, in Charles J. Ogletree, Jr. & Austin Sarat, Life Without Parole: America's New Death Penalty? 69 (2012).

But, while "States have some flexibility" in how to implement *Ford* and *Atkins*, they do not have "unfettered discretion." *Moore*, 137 S. Ct. at 1052. The Court has prescribed the limits of that discretion in both lines of cases. It has directed that lower courts, in making their *Ford* inquiry, are not free to ignore certain evidence of a prisoner's inability to understand their punishment. *Panetti* v. *Quarterman*, 551 U.S. 930, 950 (2007). It has also twice curtailed States' procedures for making the *Atkins* inquiry when those procedures "create[d] an unacceptable risk that persons with intellectual disability w[ould] be executed." *Moore*, 137 S. Ct. at 1051 (States must observe current medical standards); *Hall*, 572 U.S. at 704 (States cannot employ an overly restrictive definition of intellectual disability).

The Court should again follow the pattern of *Ford* and *Atkins* by limiting the discretion of the States to implement procedures that "pose[] too great a risk" that juveniles who are not irreparably corrupt are being sentenced to die in prison. The Court need not feel torn between federalism and the rule of law. *Miller*, 567 U.S. at 479. "Fidelity to th[e] important principle of federalism * * * does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole." *Montgomery*, 136 S. Ct. at 735. If, as it should, this Court instructed lower courts to ask and answer correctly whether a defendant's crime reflected transient immaturity or irreparable corruption, states would still maintain considerable leeway to decide how that crucial question is asked and answered.

A. Courts can answer the *Miller* question by making a factual finding as to whether a juvenile defendant is irreparably corrupt.

The simplest and best way to ensure that a sentencing court has asked and answered correctly the *Miller* question is to require the sentencing court to make a finding of fact regarding a child's incorrigibility and whether the crime reflects the transient immaturity of youth. For over 50 years, the ABA has drawn upon its expertise in criminal justice to urge that "that the sentencing court make express findings on all disputed issues of fact material to the determination of the sentence imposed." Standards for Criminal Justice Sentencing, Standard 18-5.18(b) (Am. Bar Ass'n 1994). A formal finding of fact increases the chances the sentencer correctly answers whether the defendant is irreparably corrupt by fostering "the discipline of thought necessary for a court's reasoned determination." Standard 18-5.18 cmt. Further, without a finding of fact, "meaningful appellate review" of the sentencer's *Miller* inquiry is not possible. *Ibid.*

While *Montgomery* stated "this finding is not required," it did not hold that a formal factfinding is incompatible with *Miller*. *Montgomery*, 136 S. Ct. at 735. This statement in *Montgomery* is better read as the Court not directing the States exactly *how* they must make this determination. Alice Reichman Hoesterey, *Confusion in* Montgomery*'s Wake: State Responses, the Mandates of* Montgomery*, and Why a Complete Categorical Ban on Life Without Parole for Juveniles Is the Only Constitutional Option*, 45 Fordham Urb. L.J. 149, 174 (2017). Many courts and commentators have found it impossible for sentencers

to perform their *Miller* duties without making a formal finding of fact.

For example, the Supreme Court of Pennsylvania held under *Miller* and *Montgomery* that "a sentencing court has no discretion to sentence a juvenile offender to life without parole unless it *finds* that the defendant is one of the 'rare' and 'uncommon' children possessing the [requisite] characteristics, permitting its imposition." *Commonwealth* v. *Batts*, 163 A.3d 410, 435 (Pa. 2017).

The highest courts of Georgia and Oklahoma similarly concluded that sentencing courts must make a formal finding of fact of irreparable corruption before sentencing a juvenile to life without parole. *Veal* v. *State*, 784 S.E. 2d 403, 412 (Ga. 2016) (sentencer must make a "distinct determination on the record that [a juvenile] is irreparably corrupt or permanently incorrigible, as necessary to put him in the narrow class of juvenile murderers for whom an LWOP sentence is proportional under the Eighth Amendment as interpreted in *Miller* as refined by *Montgomery*."); *Luna* v. *State*, 387 P.3d 956, 963 & n.11 (Okla. Crim. App. 2016) (factfinder at sentencing may not impose a life without parole sentence on a juvenile "unless [it] find[s] beyond a reasonable doubt that the defendant is irreparably corrupt and permanently incorrigible."); accord *Malvo* v. *Mathena*, 893 F.3d 265, 275 (4th Cir. 2018) (requiring a finding of permanent corruption before imposing a life-without-parole sentence on a juvenile).

Other States have required sentencing courts to make a determination of irreparable corruption without any formal magic words. For example, the Supreme Court of Wyoming has concluded that because "*Montgomery* * * * emphasized that States are not 'free to sentence a child whose crime reflects

transient immaturity to life without parole' * * * [t]his constitutional standard cannot be satisfied unless the sentencing court * * * make[s] a *finding* that in light of all the *Miller* factors, the juvenile offender's crime reflects irreparable corruption resulting in permanent incorrigibility, rather than transient immaturity." *Davis* v. *State*, 415 P.3d 666, 683–684 (Wyo. 2018) (quoting *Montgomery*, 136 S. Ct. at 735) (emphasis added). See also *Landrum* v. *State*, 192 So. 3d 459, 466 (Fla. 2016); *State* v. *Sweet*, 879 N.W.2d 811, 833 (Iowa 2016).

Scholars likewise have interpreted *Miller* and *Montgomery* as implicitly necessitating a factfinding requirement. See*, e.g.*, Hoesterey, *supra* at 173–175; Zachary Crawford-Pechukas, *Sentence for the Damned: Using* Atkins *to Understand the "Irreparable Corruption" Standard for Juvenile Life Without Parole*, 75 Wash. & Lee L. Rev. 2147, 2182 (2018) ("*Montgomery* made clear that the sentencer had to do more than simply consider the mitigating effects of youth, they had to make the factual determination that the offender was irreparably corrupt.").

Consistent with these authorities, the ABA has long extolled the virtues of a formal finding of fact, particularly the procedure's beneficial impact on the rule of law. Since 1968, the Sentencing Standards require: "The rules should provide that the sentencing court make express findings on all disputed issues of fact material to the determination of the sentence imposed." Standards for Criminal Justice Sentencing, Standard 18-5.18(b) (Am. Bar Ass'n 1994).

The Commentary to this Sentencing Standard explains its rule of law foundation. "[T]he discipline of thought necessary for a court's reasoned determination of a sentence is fostered by the process of articulation of the factual bases for the judgment,"

and "findings of fact are essential to meaningful appellate review of sentences." Standard 18-5.18 cmt.

ABA Sentencing Standard 18-5.19(b) likewise requires a finding on the record, especially in a case where a sentencing court is considering imposing a sentence beyond the presumptive sentence for the crime:

> (b) * * * [A] sentencing court, when imposing sentence, should state or summarize the court's findings of fact, should state with care the precise terms of the sentence imposed, and should state the reasons for selection of the type of sanction and the level of severity of the sanction in the sentence,
>
> (i) The statement of reasons may be relatively concise when the level of severity and type of sanction are consistent with the presumptive sentence, but the sentencing court should always provide an explanation of the court's reasons sufficient to inform the parties, appellate courts, and the public of the basis for the sentence.

Standard 18-5.19(b), (b)(i).

The Commentary to this Standard explains it relevance to the rule of law and this matter in particular:

> A more extensive statement would be necessary to explain the reasons for a sentence that departs from the presumptive sentence. Explanations given by sentencing courts are vital to achievement of appropriate individualization of sentences with a sentencing system that is reasonably determinate and that seeks to avoid

> unwarranted disparities in sentences imposed.

Standard 18-5.19 cmt.

For these reasons, the ABA advocates for a requirement that sentencing courts fulfill their *Miller* duty by making a formal fact finding of irreparable corruption on the record. Such a procedure is the most reliable means of ensuring that States do not sentence juveniles whose crimes merely reflect the transient immaturity of youth to die in prison.

B. Alternatively, courts can answer the *Miller* question by requiring the prosecution to rebut the presumption that a juvenile is not irreparably corrupt.

In the absence of a formal fact finding, state sentencing courts can implement the *Miller* substantive rule by adopting a rebuttable presumption that juveniles are not irreparably corrupt and by assigning the State the burden of overcoming that presumption.[15] Such a presumption has the benefit of being faithful to *Miller* and easy to administer.

In both *Miller* and *Montgomery*, the Court repeatedly recognized the rarity of the juvenile who could be sentenced to life without parole. *Montgomery*, 136 S. Ct. at 726 ("*Miller* * * * explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect

---

[15] A presumption is a "legal mechanism," to operate as proof of an ultimate fact, which "unless sufficient evidence is introduced to render the presumption inoperative, deems one fact to be true when the truth of another fact has been established." Harold A. Ashford & D. Michael Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 Yale L.J. 165 (1969).

'irreparable corruption.'") (quoting *Miller*, 567 U.S. at 479–480); *id.* at 734 ("*Miller* did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."). A presumption is apt because the *Miller* rule requires the sentencing court to separate the vast majority of juvenile offenders whose crimes reflect the transient immaturity of youth from the rare juveniles who are irreparably corrupt. *Id*. at 732.

The Court has acknowledged the "brutality or cold-blooded nature" of a homicide may make it difficult to "distinguish the few incorrigible juvenile offenders from the many that have the capacity for change" "with sufficient accuracy." *Graham*, 560 U.S. at 77–78 (internal quotation marks omitted). Accordingly, the sentencer is therefore aided by the use of a presumption as to whether any given juvenile is permanently corrupt.

The burden of proof on the presumption should depend on the likely frequency of irreparably corrupt juveniles in the population. As noted above, *Montgomery* emphasized that life without parole is unconstitutional for the "vast majority" of juvenile homicide defendants and should only be used in "exceptional circumstances." *Montgomery*, 136 S. Ct. at 734, 736. The rarity of irreparably corrupt juveniles means that a juvenile offender can be presumed not to be among them.

This presumption is not inconsistent with the burdens imposed on the States in *Atkins* and *Ford* because those cases recognized that the vast majority of the country's population is neither intellectually disabled nor insane. See, *e.g., Atkins*, 536 U.S. at 309 n.5 (finding it is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower). The Court therefore allowed States to

place the burden on defendants to show that they are different from the majority of their peers and thus constitutionally ineligible for the death penalty due to mental disability or insanity. See *Ford*, 477 U.S. at 417 ("It may be that some high threshold showing on behalf of the prisoner will be found a necessary means to control the number of nonmeritorious or repetitive claims of insanity."); see also *Hall*, 572 U.S. at 741 (Alito, J., dissenting) ("As Hall concedes, the Eighth Amendment permits States to assign to a defendant the burden of establishing intellectual disability by at least a preponderance of the evidence."). The Court has found the opposite with respect to sentencing juveniles. In this class of defendants, the vast majority is constitutionally ineligible for a category of punishment. See *Montgomery*, 136 S. Ct. at 734. Accordingly, the opposite presumption and burden must follow: States, not juvenile offenders, must rebut the presumption that arises from *Miller* and *Montgomery*.

Because of the rarity of irreparably corrupt juvenile offenders, several state high courts have adopted rebuttable presumptions against the imposition of life without parole for juvenile offenders. The Supreme Court of Iowa held that because *Miller* dictates that life in prison without the possibility of parole should be uncommon for juveniles, the "presumption for any sentencing judge is that the judge should sentence juveniles to life in prison with the possibility of parole for murder * * * ." *State* v. *Seats*, 865 N.W.2d 545, 555 (Iowa 2015). Pennsylvania's Supreme Court, noting the flexibility *Montgomery* left to the states, announced that "in Pennsylvania, a faithful application of the holding in *Miller*, as clarified in *Montgomery*, requires the creation of a presumption against sentencing a

juvenile offender to life in prison without the possibility of parole." *Batts*, 163 A.3d at 452. And the highest courts of Connecticut, Indiana, Missouri, Pennsylvania, and Utah have adopted similar presumptions. See *State* v. *Riley*, 110 A.3d 1205, 1214 (Conn. 2015); *Conley* v. *State*, 972 N.E.2d 864, 871 (Ind. 2012); *State* v. *Hart*, 404 S.W.3d 232, 241 (Mo. 2013); *State* v. *Houston*, 353 P.3d 55, 77, 83 (Utah 2015).

If a juvenile is presumed not to be irreparably corrupt, then the State should bear the burden of rebutting that presumption.[16] As the Pennsylvania Supreme Court recognized, "any suggestion of placing the burden on the juvenile offender is belied by the central premise of *Roper*, *Graham*, *Miller* and *Montgomery*—that as a matter of law, juveniles are categorically less culpable than adults." *Batts*, 163 A.3d at 452. Indeed, the "features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings." *Graham*, 560 U.S. at 78. It would defy *Miller* and *Montgomery*'s core holdings and the Court's longstanding teachings in *Roper* and *Graham* if juvenile defendants were required to prove that they were not irreparably corrupt. Juveniles should not bear such a burden, due in part to their inherent youth that the Court sought to protect in *Graham*. See *ibid.;* see also *Miller*, 567

[16] Any statement in *Montgomery* that may imply the burden should be on the juvenile offender to show irreparable corruption, see, e.g., *Montgomery*, 136 S. Ct. at 736-737 ("prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption * * *"), is dicta because it was not a necessary step in the result of that opinion. See *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 66-67 (1996) (explaining that when the Court issues an opinion, it is the result and portions of the opinion necessary to that result which bind the Court).

U.S. at 478 (recognizing juveniles' unique "incapacity to assist [their] own attorneys"). Imposing a "rigid rule" that required juvenile offenders to prove they were not the rare juvenile whose crime reflected irreparable corruption rather than transient maturity would create an "unacceptable risk" that these defendants would be subject to an unconstitutional punishment. Cf. *Hall*, 572 U.S. at 704 (holding Florida's "rigid rule" for determining intellectual disability created "an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional."). And such a rule would violate the longstanding proposition that a presumption cannot operate to violate a substantive constitutional right. See*, e.g.*, *Bailey* v. *Alabama*, 219 U.S. 219 (1911). The State must therefore bear the burden of rebutting the presumption that a juvenile defendant is ineligible for life imprisonment without parole. Accord, *State* v. *Sweet*, 879 N.W.2d 811, 833 (Iowa 2016) ("[T]he burden [is] on the state to show that an individual offender manifest[s] 'irreparable corruption.'").

Because children are "constitutionally different from adults for purposes of sentencing," see *Miller*, 567 U.S. at 471, either States must develop procedures that recognize this presumption, or sentencing courts must address it through an express finding of fact. Courts must—at the very least under the Eight Amendment—ask the question that *Miller* requires them "not only to answer, but to answer correctly:" whether a juvenile's crimes reflected "transient immaturity," or was a rare instance reflecting "irreparable corruption." See *Adams*, 136 S. Ct. at 1800 (Sotomayor, J., concurring in the decision to grant, vacate and remand).

III. The Mississippi courts below failed to answer the question whether Jones is irreparably corrupt before sentencing him to life without parole.

The problem giving rise to this case is that nobody knows if the Mississippi courts have complied with *Miller*'s substantive rule. As Judge Westbrooks of the Mississippi Court of Appeals noted in his partial dissent, the trial judge in this case "failed to analyze on the record whether [Mr.] Jones was among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'" Pet. App. at 55a. Simply put, "[t]here is no indication that, when the factfinder[] in th[is] case[] considered petitioner['s] youth, [he] even asked the question *Miller* required [him] not only to answer, but to answer correctly: whether petitioner['s] crime[] reflected 'transient immaturity' or 'irreparable corruption.'" *Adams*, 136 S. Ct. at 1800 (Sotomayor, J., concurring in the decision to grant, vacate, and remand). That uncertainty "necessarily carr[ies] a significant risk that" Mr. Jones is enduring "a punishment that the law cannot impose upon him." *Montgomery*, 136 S. Ct. at 734 (quotation marks and citation omitted).

Although *Miller* and *Montgomery* clarified that the Eighth Amendment requires more than mere consideration of a juvenile's age before imposing a sentence of life without parole, Mr. Jones' sentencing judge merely considered Jones' age and other mitigating factors in sentencing him to life without parole. In the original sentencing order, the Court stated: "the Court, having considered each of the *Miller* factors, finds that the defendant, Brett Jones, does not qualify as a minor convicted and sentenced to life imprisonment without possibility of parole consideration and entitled to be sentenced in such a

manner as to make him eligible for parole consideration." Pet. App. at 18a. On resentencing, the court interpreted the *Miller* factors as merely grounds for consideration of "leniency" for Mr. Jones. Pet. App. at 57a ("The Court having conducted an evidentiary hearing and considered those factors in *Jones* and *Miller*, as to *whether or not defendant is entitled to the benefit of the leniency provided* * * * .") (emphasis added). The substantive constitutional rule in *Miller* is not about whether a juvenile is entitled to leniency; rather, the rule is that only the rarest juvenile whose crime reflects permanently incorrigibility can be sentenced to the maximum penalty for a juvenile offender, life without parole, which is essentially death in prison. In fact, there is no reference in the sentencing order to any evidence as to whether Mr. Jones is irreparably corrupt. On the contrary, despite the introduction of extensive evidence of rehabilitation by Mr. Jones, the sentencing court did not address the issue of rehabilitation. The sentencing judge instead relied on the heinous facts of the murder and Mr. Jones' youth at the time of the murder.

This case demonstrates that there is a substantial risk that lower courts will continue to fail to ask and answer *Miller*'s constitutionally required question until this Court explicitly instructs them to do so.

CONCLUSION

The Court should reverse the judgment entered below.

Respectfully submitted.

CHRISTOPHER M. MURPHY
LAWRENCE A. WOJCIK
MICHAEL S. STANEK
ETHAN H. TOWNSEND
GARRET R. ATHERTON
McDermott Will & Emery LLP
444 W Lake St
Chicago, IL 60606

JUDY PERRY MARTINEZ
Counsel of Record
American Bar Association
321 North Clark Street
Chicago, IL 60654
(312) 988-5000
abapresident@americanbar.org

Counsel for Amicus Curiae