No. 15-8050

IN THE

Supreme Court of the United States

ALBERT D. BELL,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

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

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

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INTEREST OF THE *AMICUS CURIAE*[1]

The Fair Punishment Project ("FPP") is a joint project of the Charles Hamilton Houston Institute for Race and Justice and the Criminal Justice Institute, both at Harvard Law School. The mission of the Fair Punishment Project is to address ways in which our laws and criminal justice system contribute to excessive punishment for offenders. 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

Albert Bell seeks review of the judgment of the Arkansas Supreme Court, which affirmed his juvenile life without parole ("JLWOP") sentence for two homicides committed by an accomplice in a 1993 grocery store robbery.

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[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.

FPP urges the Court to grant Bell's petition and answer the question explicitly left open by *Miller v. Alabama*: whether "the Eighth Amendment requires a categorical bar on life without parole for juveniles." 132 S. Ct. 2455, 2469 (2012). The answer to that question is now clearly yes. In the three years since *Miller*, nine states have banned the imposition of life without parole sentences on juveniles, and use of the punishment has become exceedingly rare in the jurisdictions formally retaining it. Evolving standards of decency have crystallized into national consensus against sentencing youth to die in prison without any hope for release. *Cf. Atkins v. Virginia*, 536 U.S. 304, 304 (2002).

Should the Court choose to leave open the categorical question, it should nevertheless grant Bell's petition in order to apply the substantive rule set out by *Miller*, which draws "a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016). As a child convicted of felony-murder who neither killed nor intended to kill, Albert Bell clearly falls outside the "rare" category of child whose crime could conceivably demonstrate irreparable corruption as contemplated by *Miller*.

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, 100-101 (1958) (plurality opinion)). The Court measures "evolving standards of decency" by assessing whether a "national consensus" supports the categorical prohibition of a particular punishment. *See Atkins v. Virginia*, 536 U.S. 304, 304 (2002). Where consensus has rejected a particular punishment, the Court applies its independent judgment to determine whether that punishment is "so disproportionate as to be cruel and unusual." *Roper,* 543 U.S. at 560-61.

Since 2005, the Court has struck down five extreme sentencing practices because a national consensus had developed against them.[2] Three of those five cases narrowed the range of permissible juvenile sentencing by prohibiting the application of extreme sentences against children. In particular, the Court has struck down the application of the death penalty against juveniles, *Roper*, 543 U.S. 551, life without parole sentences for juveniles convicted of non-homicide offenses, *Graham v. Florida*, 560 U.S. 48 (2010), and most recently, in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), simultaneously prohibited mandatory juvenile life without parole sentencing and limited the application of JLWOP to

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[2] *Roper* 543 U.S. 551 (prohibiting imposition of the death penalty on those under age eighteen at the time of the offense); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (prohibiting imposition of the death penalty for non-homicide offenses); *Graham v. Florida*, 560 U.S. 48 (2010) (prohibiting LWOP sentences for non-homicide offenses committed by persons under age eighteen at the time of the offense); *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (prohibiting mandatory imposition of JLWOP and limiting the application of JLWOP to only those juveniles whose crimes demonstrate irreparable corruption); *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). *See also* John R. Mills, Anna M. Dorn & Amelia Courtney Hritz, *Juvenile Life Without Parole in Law and Practice: The End of Superpredator Era Sentencing*, 65 AM. U. L. REV. (forthcoming 2016) (manuscript at 4) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2663834.

only those children whose crimes demonstrate "irreparable corruption." *See also Montgomery v. Louisiana*, 136 S. Ct 718, 734 (2016).

In determining whether 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, as well as the punishment's acceptance in the international community.[3]

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

Fifteen states and the District of Columbia currently prohibit JLWOP sentences. Prior to this Court's decision in *Miller* in 2012, only six states prohibited the practice: Alaska, Colorado, Kansas,

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[3] *See Graham v. Florida*, 560 U.S. 48, 62 (2010). *See also Kennedy v. Louisiana*, 554 U.S. 407, 433 (2007) ("Statistics about . . . executions may inform the consideration of whether capital punishment . . . is regarded as unacceptable in our society."); *Roper v. Simmons*, 543 U.S. 551, 575 (2005) ("[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 v. Dulles*, 356 U.S. 86, 102-03 (1958)).

Kentucky, Montana and Oregon.[4] Following *Miller*, an additional nine states and the District of Columbia barred the imposition of JLWOP by statute or court ruling, raising the current number of jurisdictions banning JLWOP to 16.[5] Connecticut, Hawaii, Nevada, Texas, Vermont, West Virginia, and Wyoming abolished JLWOP by statute;[6] Massachusetts abolished the sentence by court

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[4] Alaska Stat. § 12.55.125; Colo. Rev. Stat. §§ 17-22.5-104(IV), 18-1.3-401(4)(b)(1); Kan. Stat. Ann. § 21-6618; Ky. Rev. Stat. 640.040(1); Mont. Code Ann. §§ 46-18-222 45-5-102(2); Or. Rev. Stat. Ann. § 161.620.

[5] The Sentencing Project, *Slow to Act: State Responses to 2012 Supreme Court Mandate on Life Without Parole* (2014), http://sentencingproject.org/doc/publications/jj_State_responses_to_Miller.pdf; S.B. 796, Jan. Sess. (Conn. 2015), *amending* Conn. Gen. Stat. §§ 54-125a, 46b-127, 46b-133c, 46b-133d, 53a-46a, 53a-54b, 53a-54d, 53a-54a; H.B. 2116, 27th Leg. Sess. (Haw. 2014), *amending* Haw. Rev. Stat. §§ 706-656(1), -657 (2014); A.B. 267, 78th Reg. Sess. (Nev. 2015), *enacting* Nev. Rev. Stat. §§ 176, 176.025, 213, 213.107; S.B. 2, 83rd Leg. Special Sess. (Tex. 2013), *enacting* Tex. Penal Code Ann. § 12.31, Tex. Code Crim. Proc. Ann. art. 37.071; H. 62, 73rd Sess. (Vt. 2015), *enacting* Vt. Stat. Ann. tit. 13, § 7045 (2015); H.B. 4210, 81 Leg., 2d Sess. (W.V. 2014), *enacting* W. Va. Code §§ 61-2-2, -14a, 62-3-15, -22, -23, 62-12-13b; H.B. 23, 62nd Leg., Gen. Sess. (Wy. 2013), *enacting* Wyo. Stat. Ann. §§ 6-2-101, 6-2-306, 6-10-201, 6-10-301, 7-13-402; *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270 (Mass. 2013).

[6] *See* S.B. 796 (Conn. 2015), H.B. 2116 (Haw. 2014), A.B. 267 (Nev. 2015), S.B. 2 (Tex. 2013), H. 62 (Vt. 2015), H.B. 4210 (W.V. 2014), H.B. 23 (Wy. 2013).

ruling;[7] and Delaware, although nominally retaining the punishment, provides every juvenile sentenced to life without parole with the opportunity to seek resentencing after serving a portion of the initial sentence.[8] Thus in these 16 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 acted to narrow the availability of JLWOP and other extreme juvenile sentencing practices. Since *Miller*, five states—California, Florida, North Carolina, Pennsylvania and Washington—have passed legislation that directly limits the availability of JLWOP. California and Florida, both states that, prior to *Miller*, were among the country's most frequent imposers of the sentence, have dramatically curtailed the availability of JLWOP.[9] California now

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

[8] S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013), *amending* Del. Code Ann. tit. 11, §§ 4209, 4209-A, 4209-217(f), 3901(d). A request for resentencing may be filed after 30 years for juveniles convicted of first-degree murder, and after 20 years for all other crimes. Del. Code Ann. tit. 11, § 4204A(d)(1).

[9] *See* Human Rights Watch, *State Distribution of Estimated 2,589 Juvenile Offenders Serving Juvenile Life*

(continued)

allows JLWOP sentencing only in two narrow categories: homicide offenses where the defendant tortured the victim and homicide offenses where the victim was a public safety official.[10] Florida now only allows JLWOP sentencing where "defendant actually killed, intended to kill, or attempted to kill the victim" and was previously convicted of an enumerated felony.[11] North Carolina no longer allows JLWOP for felony-murder convictions.[12] Pennsylvania moved from imposing mandatory life without parole for juvenile offenders convicted of second-degree murder to eliminating JLWOP for that crime.[13] As a result, a juvenile felony-murder homicide offender cannot receive a JLWOP sentence

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Without Parole, http://www.hrw.org/sites/default/files/related_material/updatedJLWOP10.09_final.pdf (last visited Mar. 1, 2016).

[10] Cal. Penal Code § 1170 (West 2015). California's post-*Miller* statute is explicitly retroactive. Cal. Penal Code § 1170(d)(2)(J).

[11] Fla. Stat. § 921.1402(2) (2015). The enumerated felonies include: 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. Fla. Stat. § 921.1402(2)(a).

[12] S.B. 635, 2011 Gen. Assemb. Reg. Sess. (N.C. 2012), *enacting* N.C. Gen. Stat. §§ 15A-1340.19A, 15A-1340.19B, 15A-1340.19C (2012).

[13] S.B. 850, 2011 Gen. Assemb. Reg. Sess. (Pa. 2012), *enacting* 18 Pa. Cons. Stat. §§ 1102, 1102.1, 9122, 9123, 9401, 9402, 6301, 6302, 6303, 6307, 6336, 9711.1, 9714, 6139.

in Pennsylvania.[14] Finally, Washington has abolished the penalty for defendants younger than sixteen.[15]

Meanwhile, other states have taken steps to limit JLWOP by paring back severe juvenile sentencing generally or adding procedural constraints. Illinois and New Hampshire both raised the jurisdictional age for adult court, which could have the effect of limiting the availability of JLWOP and other severe sentences for juveniles.[16] In addition, Iowa recently eliminated mandatory minimum sentences for juveniles,[17] while other states have moved to require consideration of the

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[14] *See* 18 Pa. Cons. Stat. § 2501 (defining murder of the first degree to require "an intentional killing" and murder of the second degree to include felony-murder homicides).

[15] S.B. 5064, 63d Leg., 2013 Reg. Sess. (Wash. 2014), *amending* Wash. Rev. Code §§ 9.94A.510, -.540, -.6332, -.729, 9.95.425, -.430, -.435, -.440, 10.95.030.

[16] *See* H.B. 2404, 98th Gen. Assemb. (Ill. 2013), *amending* 705 Ill. Comp. Stat. Ann. 404/5-120 (changing jurisdictional age from seventeen to eighteen); H.B. 305, Reg. Sess. Ch. 250 (N.H. 2015) *amending* N.H. Rev. Stat. Ann. 6230:1 (2015) (changing jurisdictional age from sixteen to seventeen).

[17] *See State v. Lyle*, 854 N.W.2d 378, 389 (Iowa 2014) ("[T]he legal disqualifications placed on children as a class . . . exhibit the settled understanding that the differentiating characteristics of youth are universal.") (quoting *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403-04 (2011)); *see also State v. Taylor*, 854 N.W.2d 420 (Iowa 2014).

mitigating factors of youth before entering an extreme sentence against a juvenile.[18]

This trend away from JLWOP is both rapid and uninterrupted. Since *Miller,* an average of three jurisdictions per year have abandoned juvenile life without parole, while no state has passed legislation broadening its scope.

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 imposing this extreme sentence is even more striking.[19] In addition to the fifteen states that have

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[18] *See Casiano v. Comm'r of Corr.*, 115 A.3d 1031 (Conn. 2015) (holding court must consider mitigating features of youth before imposing fifty-year sentence); *State v. Null*, 836 N.W.2d 41 (Iowa 2013) (holding sentencing court required to consider same for sentence that would end when juvenile was in his sixties, explaining "[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 half a century of incarceration sufficient to escape the rationales of *Graham* or *Miller*.").

[19] In *Graham*, Justice Kennedy, writing for the Court, identified a national consensus against the punishment through (continued)

formally abandoned JLWOP sentencing, six states appear to have zero individuals serving a JLWOP sentence: Indiana, Maine, New Jersey, New Mexico, New York, and Rhode Island.[20] Seven more states have fewer than five individuals serving JLWOP sentences: Idaho, New Hampshire, North Dakota, Ohio, South Dakota, Utah, and Wisconsin.[21] 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.

Recently, even more states have curtailed the imposition of life sentences without parole for juveniles. Indeed, five additional states—Alabama, Arkansas, Iowa, Maryland, and Minnesota—have sentenced no more than one juvenile to life in prison without parole over the past five years.[22]

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evidence of infrequent use in states where JLWOP was permitted by law. 560 U.S. 48, 62 (2010).

[20] *See Juvenile Life Without Parole After Miller v. Alabama, A Report of the Phillips Black Project* at 35, 44, 65, 68, 79 (July 2015) (setting out JLWOP statistics provided by state Departments of Corrections and attorneys familiar with JLWOP in each jurisdiction).

[21] *See id.*

[22] *See* Mills, Dorn & Hritz *supra* note 10, at 42.

As a result of the rapid abandonment of JLWOP by many states since *Miller*, the geographic concentration of JLWOP sentencing in the United States is remarkably narrow. In *Graham*, 560 U.S. at 65, the Court pointed to the extreme geographic concentration of the states that imposed JLWOP for non-homicide offenses as evidence that the practice violated contemporary standards of decency and the Eighth Amendment: similar concentration exists in the current use of JLWOP in general.

Currently, only nine states account for over eighty percent of all JLWOP sentences.[23] Even within those states, JLWOP sentencing is concentrated within a handful of counties.[24] Since 2011, seven counties, making up less than five

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[23] *See id.* at 41. Within those nine states, only five—California, Florida, Pennsylvania, Louisiana, and Michigan—accounted for 64% of pre-*Miller* JLWOP sentences. As discussed, California and Florida have eliminated JLWOP as a possible sentence for all but a small fraction of aggravated first-degree murders, underscoring Pennsylvania, Louisiana and Michigan's status as outliers. *See also* Human Rights Watch, *State Distribution of Estimated 2,589 Juvenile Offenders Serving Juvenile Life Without Parole* (2004), http://www.hrw.org/sites/default/files/related_material/updated JLWOP10.09_final.pdf (last visited Mar. 1, 2016).

[24] Philadelphia, PA; Los Angeles, CA; Orleans, LA; Cook, IL; and St. Louis, MO counties alone account for over 20% of all JLWOP sentences. Mills, Dorn & Hritz, *supra* note 10, at 38.

percent of the total U.S. population, have accounted for over a quarter of all JLWOP sentences.[25]

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

In *Roper v. Simmons*, 543 U.S. 551, 575 (2005), 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.[26] JLWOP constitutes a violation of several widely adopted international treaties, most notably, the U.N. Convention of the Rights of the Child, which the United States signed, but failed to ratify, in part because of the Convention's binding obligation on party states to prohibit JLWOP. One hundred ninety-six countries

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[25] Los Angeles, CA; Orleans, LA; Jefferson, LA; Miami-Dade, FL; Philadelphia, PA; Tulare, CA; and East Baton Rouge, LA account for 27% of all JLWOP sentences since 2011. *Id.* at 41.

[26] Amnesty Int'l, *Demand Juvenile Justice*, http://www.amnestyusa.org/our-work/issues/children-s-rights/juvenile-life-without-parole (last visited Mar. 1, 2016).

are party to the Convention, including every U.N. Member State except the United States.[27]

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

Taken together, the trend is clear: in much of the United States and in the rest of the world, sentencing children to die in prison is no longer an acceptable practice. A substantial majority of states have abandoned JLWOP in law or practice, and others have acted to narrow its application. 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 standard of decency has evolved: sentencing children to die in prison is cruel and unusual.

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[27] United Nations Treaty Collection, *Convention on the Rights of the Child*, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en (last visited Mar. 1, 2016); *see also*, Mental Health America, *Position Statement 58: Life Without Parole for Juvenile Offenders* 1-2 (2009), http://www.mentalhealthamerica.net/positions/life-without-parole-juveniles.

B. *Miller* announced a substantive rule that prohibits life without parole sentences for juveniles convicted of a felony-murder homicide.

In addition to evaluating national consensus against a particular punishment, the Court exercises its independent judgment to evaluate the proportionality of a punishment in light of its penological justifications. *See Graham*, 560 U.S. at 71. The logic of *Miller* and *Graham*, "that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders," means that life without parole should be declared a categorically excessive punishment with respect to children. *Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012). Yet even barring such a categorical rule, *Miller* and *Graham* make clear that sentencing sixteen-year-old Albert Bell—convicted of felony-murder without a finding of intent to kill—to die in prison violates the substantive right against cruel and unusual punishment guaranteed by the Eighth Amendment.[28]

This term, in *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016), the Court confirmed that *Miller* narrowed the scope of constitutional JLWOP: "Before *Miller*, every juvenile convicted of a homicide offense could be sentenced to life without parole. After

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[28] *See* Ark. Code Ann. § 5-10-102 (LexisNexis 1993).

Miller, it will be the rare juvenile offender who can receive that same sentence." Specifically, *Miller* draws "a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." *Id.* For its part, *Graham v. Florida*, 560 U.S. 48, 69 (2010), recognized "that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment." Read together, the cases make clear that a felony-murder conviction, particularly one in which a juvenile defendant did not intend to kill the victim, cannot foreclose the possibility that the crime reflects "the transient immaturity of youth." *Montgomery*, 136 S. Ct. at 735. For Albert Bell, and similarly situated individuals who clearly do not fall within the exceedingly narrow category of "irreparably corrupt" juvenile offenders, a JLWOP sentence serves no penological purpose and violates the Eighth Amendment.[29]

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[29] Unfortunately, Bell is not alone. While the use of JLWOP has been reduced dramatically in recent years, an estimated 2,700 individuals sentenced to life without parole as juveniles remain incarcerated. *See* The Sentencing Project, *Juvenile Life Without Parole: An Overview* (2015), http://sentencingproject.org/doc/publications/jj_Juvenile_Life_Without_Parole.pdf (last visited Mar. 1, 2016). As of 2005, over 500 of those individuals were sentenced on the basis of a felony-murder homicide conviction. *See* Human Rights Watch & Amnesty International, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States* (2005) (continued)

Because *Miller* announced a substantive rule, *Montgomery* held that it must be given retroactive effect.[30] Thus, the fact that Bell was sentenced nearly two decades before *Miller* was decided does not bar reconsideration of his sentence. "*Miller's* conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders raises a grave risk that many are being held in violation of the Constitution." *Id.* at 736. Albert Bell is among those juvenile offenders being held in violation of the Constitution.

1. "Irreparable corruption" is rare – if not non-existent – and cannot be reliably identified among juvenile offenders.

The 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

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https://www.hrw.org/report/2005/10/11/rest-their-lives/life-without-parole-child-offenders-united-states.

[30] *Montgomery*, 136 S. Ct at 734 (*"Miller* announced a substantive rule of constitutional law. Like other substantive rules, *Miller* is retroactive because it 'necessarily carr[ies] a significant risk that a defendant'—here, the vast majority of juvenile offenders—'faces a punishment that the law cannot impose upon him.'") (citing *Schiriro v. Summerlin*, 542 U.S. 348, 352 (2004) (alteration in original)).

incarceration is appropriate for children convicted of serious crimes like murder, because of the diminished culpability and the capacity for change inherent in youth, a state should not be permitted to permanently foreclose the hope of rehabilitation and reform.

Miller, 132 S. Ct. at 2464-65, affirmed this principle, recognizing that "the distinctive attributes of youth diminish the penological justifications" for JLWOP, and reiterating the Court's understanding of the reduced culpability of children:

> *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 'contro[l] 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 irretrievabl[e] deprav[ity].'* 132 S. Ct. at 2464 (alteration in original) (internal citations omitted) (quoting *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005).

These three characteristics of youth undermine the penological rationales for the most severe punishments, including life 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." *Id.* at 2465 (quoting *Graham*, 560 U.S. at 72).

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."

The body of scientific evidence relied upon in *Roper* has only grown larger in the decade since that decision. The Court noted in *Graham*, 560 U.S. at 68, that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," and concluded in *Miller*, 132 S. Ct. at 2465 (first alteration in original) (quoting *id.* 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."[31] Even those children convicted of the most heinous crimes must therefore be given an opportunity to demonstrate reform by virtue of their greater capacity for change and the fact that neither medical professionals nor triers of fact can reliably assess irreparable corruption in a child.

2. Defendants convicted of felony-murder homicides are less culpable than those convicted of other homicide offenses, particularly in the absence a finding of intent to kill.

As compared to an individual with the specific intent to commit a murder, an individual convicted of felony-murder bears less moral culpability.[32] The

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[31] *See also*, Brief for American Psychological Association *et al.* as *Amicus Curiae* Supporting Petitioner, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (No. 10-9646) (discussing scientific findings regarding juvenile brain development and its relationship to sentencing).

[32] *See* Sarah French Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*, 56 B.C. L. REV. 553, 565-66 (2015) (discussing contexts in which felony-murder homicide is assessed as less culpable than traditional homicide); *see also Miller v. Alabama*, 132 S. Ct. 2455, 2476 (2012) (Breyer, J., concurring) (asserting culpability attendant to a felony-murder homicide is insufficient to justify JLWOP sentencing). Felony-murder is disfavored (continued)

unique characteristics of youth repeatedly identified by the Court in its Eighth Amendment jurisprudence make this point especially true for juveniles. While the felony-murder doctrine should, in principle, encourage a would-be felon to "consider the full consequences of a course of action" and discourage him from committing a felony based on the knowledge that he could be held equally accountable for any harm to a victim, this is "precisely [the type of critical reasoning] we know juveniles lack the capacity to do." *Miller*, 132 S. Ct. at 2476 (Breyer, J., concurring).

The Court's opinions agree. In *Graham*, 560 U.S. at 69, the Court drew the basic distinction between offenders who intended to kill and those who did not: "When compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." This principle applies with equal force to individuals convicted of felony-murder homicide as to those

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outside the United States because it "violate[s] 'the principle that punishment must be proportionate to the moral blameworthiness of the offender.'" Adam Liptak, Serving Life for Providing Car to Killers, *N.Y. Times* (Dec. 4, 2007) http://www.nytimes.com/2007/12/04/us/04felony.html (quoting *R. v. Martineau*, [1990] 2 S.C.R. 633 (Can.)); s*ee also Enmund v. Florida*, 458 U.S. 782, 797 n.22 (1982) ("[T]he doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.").

convicted of non-homicide offenses. *See Miller*, 132 S. Ct. at 2475 (Breyer, J., concurring). In the context of juvenile felony murder, culpability is diminished once by the "lack of maturity and underdeveloped sense of responsibility" inherent in youth, and again by the construct of "transferred intent," which allows a fact finder to assign the full culpability of a homicide to an accomplice who did not participate in the killing. *Graham,* 560 U.S. at 72. The twice-reduced culpability of a juvenile convicted of felony-murder homicide—particularly one convicted without a finding of intent to kill—cannot fall within the category of "rare juvenile offender[s]" for whom JLWOP is currently permitted. *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016).

In Bell's case, his accomplice was also a juvenile. Assigning culpability through transferred intent is even less tenable in this situation, because it suggests not only that Bell should have been able to contemplate his choices with the same precision and thoughtfulness as an adult, but that Bell should have properly assessed the risks of his teenage co-conspirator's choices, which were subject to the same "lack of maturity and an underdeveloped sense of responsibility" that the Court has repeatedly confirmed leads to reckless, impulsive, and heedless risk-taking. *Miller*, 132 S. Ct. at 2464. While the actions of an adult might arguably be foreseeable to another adult, the actions of an armed child in a volatile robbery approach the unknowable, particularly to another child.

Elsewhere in the context of the Eighth Amendment, the Court has distinguished between transferred intent and the specific intent of a "triggerman" who engages in the physical act of killing. *Id.* For instance, in *Enmund v. Florida*, 458 U.S. 782, 788 (1982), the Court held that the Eighth Amendment forbids imposing the death penalty on an adult accomplice to a robbery where that accomplice was "in the car by the side of the road . . . waiting to help the robbers escape."[33]

The Court should clarify that the harshest possible sentences, including life without parole, shall not be imposed on juvenile offenders who did not intentionally commit the physical act of murder. Simply put, a child convicted of homicide who did not physically commit the act leading to the death of the victim is less culpable than a defendant convicted of intentionally killing another person.

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[33] Although the Court has upheld the application of the death penalty against an adult aider and abettor who showed "reckless disregard for human life" while committing a crime that carried "a grave risk of death," *see Tison v. Arizona*, 481 U.S. 137, 138 (1987), a child who showed "reckless disregard" for human life but did not actually kill or intend to kill clearly does not meet the exceedingly narrow "irreparably corrupt" standard laid out in *Miller*.

C. The appropriate remedy is to provide inmates sentenced to JLWOP with a meaningful opportunity for release based on demonstrated maturity and rehabilitation.

Having established that JLWOP is an unconstitutional violation of the Eighth Amendment, all juvenile offenders 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. 48 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 Albert Bell and others sentenced to JLWOP the same consideration.

A crucial element of the fundamental right to human dignity protected by the Constitution is that a person must, wherever 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.[34] 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. As such, adolescents must be given the opportunity to demonstrate that they are not deserving of the punishment to which they have been sentenced. The character of a child at sixteen may meaningfully change by the time that child reaches twenty-five, forty, or sixty years of age.[35]

The substantive right defined in *Miller* does not require that juvenile offenders be released; indeed, some, and perhaps many, may never show themselves to be deserving of reintegration into law-abiding society. However, the Constitution and the law developed in *Graham*, *Roper*, *Miller* and *Montgomery* make clear that we can no longer justify sentencing children to die without affording a meaningful opportunity to demonstrate change over the course of time behind bars.

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[34] *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.")

[35] *See id.* 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.

At a minimum, the Court should apply the clear holding of *Miller* and rule that a child convicted of felony-murder cannot be determined to be irreparably corrupt and therefore cannot be subjected to a lifetime in confinement without a meaningful opportunity for release.

CONCLUSION

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

Respectfully submitted,

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