COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
CASE NUMBER: 2016-SC-000468

SOPHAL PHON *APPELLANT*

Appeal from Warren Circuit Court
VS. Hon. John R. Grise, Judge
Case No: 96-CR-00599-005

COMMONWEALTH OF KENTUCKY *APPELLEE*

AMICUS BRIEF

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July, 2017, the foregoing Brief was served by first-class postage to the following:

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INTEREST AND IDENTITY OF AMICI CURIAE

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. FPP's mission is to address the ways in which our laws and criminal justice system contribute to excessive punishment for offenders. We believe 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. To that end, FPP conducts research and advocacy and works with stakeholders to seek meaningful, consensus-driven criminal justice reform. As part of its advocacy mission, FPP has submitted briefs as amicus curiae to courts across the nation, providing its perspective on emerging issues in criminal law and procedure.

The Institute for Compassion in Justice, Inc. is a Kentucky legal services organization dedicated to advocating for the rights of young people across the Commonwealth, including young adults, in the arenas of juvenile justice, criminal courts, health care, education and child welfare.

ARGUMENT

Amici file this brief in support of Sophal Phon's challenge to his juvenile life-without-parole sentence under the Kentucky and United States Constitutions. There is a clear consensus in Kentucky, and a growing national consensus as well, rejecting juvenile life without parole. It has been nearly fifty years since the Commonwealth's statutes have permitted the punishment. When the Kentucky legislature authorized

life-without-parole sentences for adults convicted of murder in 1996, it did not do so for children. Only two children in the Commonwealth are serving this sentence. It is apparent that, within the Commonwealth, the punishment is cruel, is prohibited by the Kentucky Constitution, and cannot stand in this case.

The punishment is also unconstitutional under the Eighth Amendment. This consensus against juvenile life without parole, which has always been apparent within the Commonwealth, is growing throughout the nation. The United States Supreme Court's recent juvenile sentencing jurisprudence has entirely transformed the manner in which children may be prosecuted and punished in the adult criminal justice system. Over the past decade, the Court has increasingly and repeatedly recognized that "children are constitutionally different from adults for purposes of sentencing." *Miller v. Alabama*, 567 U.S. 460, ____, 132 S.Ct. 2455, 2464 (2012); *see also Graham v. Florida*, 560 U.S. 48 (2010)(prohibiting life-without-parole sentences for juvenile nonhomicide offenders). What began with *Graham* and *Miller* has ballooned into a seismic shift in national consciousness. A consensus rejecting this extreme sentence has rapidly developed across the country, and it continues to deepen by the year.

I. The United States and Kentucky Constitutions forbid penalties that violate evolving standards of decency

The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. This "standard of extreme cruelty" remains stable over time; yet, "its applicability must change as the basic mores of society change." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008), quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C. J.,

dissenting). Therefore, the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

Similarly, section 17 of Kentucky's Constitution provides, in part, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel punishment inflicted." As with its federal counterpart, a punishment is "cruel" under the Kentucky Constitution if it is "contrary to evolving standards of decency that mark the progress of a maturing society." *Baze v. Rees*, 217 S.W.3d 207, 211 (Ky. 2006), *aff'd*, 553 U.S. 35 (2008), citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958). *See also Turpin v. Commonwealth*, 350 S.W.3d 444, 448 (Ky. 2011)("Section 17 of the Kentucky Constitution accords protections parallel to those accorded by the Eighth Amendment to the U.S. Constitution."); *Harrison v. Commonwealth*, 858 S.W.2d 172, 177 (Ky. 1993)(employing same analysis to claims brought under Section 17 of the Kentucky Constitution and claims brought under the Eighth Amendment to the U.S. Constitution); *Hampton v. Commonwealth*, 666 S.W.2d 737, 740-41 (Ky. 1984)(same); *Workman v. Commonwealth*, 429 S.W.2d 374, 377 (Ky. 1968)("[w]hat constitutes cruel and unusual punishment .... changes with the continual development of society and with sociological views concerning the punishment for crime.").

Because the relevant provisions of the Kentucky and U.S. constitutions are essentially identical and subject to the same interpretation, the U.S. Supreme Court's framework for resolving Eighth Amendment challenges to a particular punishment guides this Court's analysis of the constitutional question presented. *See Harrison*,

858 S.W.2d at 177 (relying on federal precedent to reject defendant's cruel punishment claim brought under Section 17 of the Kentucky Constitution).

To gauge whether a punishment practice comports with the Constitution, the Court first looks to objective indicia of societal consensus. *See Atkins v. Virginia*, 536 U.S. 304, 312 (2002). Legislative action provides "the 'clearest and most reliable objective evidence of contemporary values.'" *Id.* In addition, "actual sentencing practices are an important part of the Court's inquiry into consensus." *Graham*, 560 U.S. at 62. After the Court reviews the societal consensus in favor of or against a punishment, it applies its own judgment and independently "ask[s] whether there is reason to disagree with the judgment reached by the citizenry and its legislators." *Atkins*, 536 U.S. at 313.

II. Objective indicators of the consensus within Kentucky demonstrate juvenile life without parole is cruel punishment

The issue presented under the Kentucky Constitution requires an analysis of the objective indicia of consensus currently existing within the Commonwealth. The focus of this examination is necessarily local: only the moral judgments of the citizenry of this Commonwealth can define the bounds of its constitutional guarantees. *See State v. Santiago*, 318 Conn. 1, 20-29 (2015)(examining the societal consensus against the death penalty within Connecticut in holding the death penalty violates the state constitution); *State v. Lyle*, 854 N.W.2d 378, 389 (Iowa 2014)(relying, in part, on the consensus "building in Iowa in the direction of eliminating mandatory minimum sentencing" in holding the application of mandatory minimums to juvenile offenders violates the Iowa Constitution); *Van Tran v. State*, 66 S.W.3d 790, 804 (Tenn. 2001)(examining consensus within

Tennessee to determine the execution of mentally retarded persons violates the Tennessee State Constitution), *State v. Campbell*, 691 P.2d 929, 947-48 (Wash. 1984) (looking to "current community standards" within Washington in analyzing a state constitutional challenge to Washington's death penalty). When this Court examines these objective factors at the local level, it is clear that, within Kentucky's borders, there is a consensus against juvenile life without parole.

A. For fifty years, Kentucky has prohibited juvenile life without parole.

It has been half a century since the Kentucky legislature permitted children, under the age of eighteen at the time of their offenses, to be sentenced to life without parole. *Workman v. Commonwealth*, 429 S.W.2d 374 (Ky. 1968)(holding a life-without-parole sentence for rape, when imposed upon a juvenile, violates the Kentucky constitution); K.R.S. 640.040(1). Section 640.040 governs the permissible sentences for children charged with intentional murder in Kentucky. Those possible sentences are, "twenty to fifty years, life in prison, or life without parole for twenty-five years." *Shepherd v. Commonwealth*, 251 S.W.3d 309, 321 (Ky. 2008). Although the Kentucky legislature added life-without-parole as a sentencing option for intentional murder in 1998, 1998 Kentucky Laws Ch. 606 (H.B. 455), amending K.R.S. 532.030, those changes were never made applicable to Kentucky's juvenile offenders, even when prosecuted in adult court, *see Shepherd*; K.R.S. 640.040(1). Kentucky's legislation on this subject presents "the 'clearest and most reliable objective evidence of contemporary values,' " *Atkins*, 536 U.S. at 312, within the Commonwealth.

Even where a State legislative enactment has recently abolished a punishment once authorized by statute, several State Supreme Courts have relied on these changes as strong evidence of a consensus against the punishment. The Connecticut Supreme Court applied this analysis in *State v. Santiago*, 318 Conn. 1, 24, 122 A.3d 1 (2015), where it ruled that capital punishment, which had been prospectively abolished by the legislature, was inconsistent with the evolving standards of decency within the State. The Iowa Supreme Court relied on prospective legislative abolition as well when it determined that minimum mandatory sentences, when imposed upon juvenile offenders, were categorically prohibited by the Iowa State Constitution. *State v. Lyle*, 854 N.W.2d 378, 387-88 (Iowa 2014); *see also Fleming v. Zant*, 259 Ga. 687, 690, 386 S.E.2d 339 (1989)(relying, in part, on legislative enactments to find that the execution of the mentally retarded is contrary to state-wide consensus and, therefore, violates the Georgia State Constitution); *Van Tran v. State*, 66 S.W.3d 790, 804 (Tenn.2001)(same).

The history of juvenile life-without-parole in Kentucky presents an even stronger case. It has been nearly fifty years since the Kentucky legislature permitted sentencing a child to a guaranteed lifetime of incarceration, *see Workman*, 429 S.W.2d at 377 (noting that forcible rape was the only offense for which a life-without-parole sentence was legislatively authorized), and the legislature has never concluded it is an appropriate penalty for murder.

B. There are only two individuals sentenced to juvenile life without parole in Kentucky

Because the sentence has never been permitted by statute in the Kentucky Penal Code era, there are only two inmates currently serving juvenile life without parole sentences for murder in Kentucky. The Commonwealth sought the death penalty against both children prior to *Roper v. Simmons*, 543 U.S. 551 (2005). The first is Kevin Stanford, who was originally sentenced to death in 1982. *Stanford v. Commonwealth*, 248 S.W.3d 579, 580 (Ky. Ct. App. 2007). Following his unsuccessful Eighth Amendment challenge to his sentence, *see Stanford v. Kentucky*, 492 U.S. 361 (1989), Kentucky Governor Paul Patton commuted Stanford's sentence from death to life-without-parole in 2003. *Stanford v. Commonwealth*, 248 S.W.3d at 580.

Sophal Phon, the petitioner here, is the second. His sentence, like Stanford's, was a product of capital sentencing proceedings brought against him by the Commonwealth nearly twenty years ago. Although life-without-parole was not authorized by statute at the time of Phon's crime, Phon requested the jury be instructed on the penalty during his capital trial. *Phon v. Commonwealth*, 51 S.W.3d 456, 457 (Ky. Ct. App. 2001). Phon's motion, which the Commonwealth opposed, was an apparent effort to avoid what was then a constitutionally-permitted sentence of death. *Id.* The trial court granted Phon's request, and his sentencing jury imposed the lesser penalty. *Id.* at 458. Phon's choice between two now-unconstitutional alternatives: a death sentence, or juvenile life without parole, was clearly a product of its time, a holdover from an era of juvenile sentencing that has

since been abandoned. The sea change in juvenile sentencing jurisprudence since Phon's 1998 trial reveals that these circumstances could never repeat themselves.

Given the complete lack of legislative authorization, and the miniscule number of children sentenced to juvenile life without parole in Kentucky, there can be no doubt that, within the Commonwealth, there is a consensus against the punishment.

III. A national consensus is developing against imposing life without parole sentences on juvenile offenders

A. States are rapidly prohibiting juvenile life without parole

Eighteen states and the District of Columbia currently prohibit JLWOP sentences. Prior to the Court's decision in *Miller* in 2012, only four states prohibited the practice: Alaska, Colorado, Kansas, and Kentucky.[1] In the past five years, an additional fifteen jurisdictions have banned the imposition of JLWOP by statute or court ruling, raising the current number of abolitionist jurisdictions to nineteen. Arkansas, Connecticut, the District of Columbia, Hawaii, Nevada, North Dakota, South Dakota, Texas, Utah, Vermont, West Virginia, and Wyoming abolished JLWOP by statute;[2] Massachusetts and Iowa abolished by court ruling;[3] and Delaware,

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[1] 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).

[2] *See* Ark. S.B. 294, 91st Gen. Assemb. (Reg. Sess. 2017) (amending Ark. Code §§ 5-4-104(b), 5-4-602(3), 5-10-101(c), 5-10-102(c), 16-93-612(e), 16-93-613, 16-93-614, 16-93-618, and enacting new sections), http://www.arkleg.state.ar.us/assembly/2017/2017R/Bills/SB294.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); B21-0683, D.C. Act 21-568 (D.C. 2016) (amending, in relevant part, D.C. Code §§ 24-403 et seq.); 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; N.D. H.B. 1195, 65th Leg. Assemb. (N.D. 2017) (amending N.D. Cent. Code § 12.1-20-03 and enacting a new section in ch. 12.1-32), http://www.legis.nd.gov/assembly/65-2017/documents/17-0583-04000.pdf; S.B. 140, 2016 S.D. Sess. Laws (S.D. 2016), amending S.D. Codified Laws § 22-6-1 and enacting a new section; S.B. 2, 83rd Leg. Special Sess. (Texas 2013), enacting Tex. Penal Code Ann. § 12.31, Tex. Code Crim. Proc. Ann. art. 37.071; H.B. 405 (Utah 2016),

although nominally retaining the punishment, provides every juvenile sentenced to life without parole with the opportunity to petition for a sentence reduction after the sentence is imposed.[4] Thus in these 19 jurisdictions, every child has a meaningful opportunity to demonstrate to a parole board or judge that he has rehabilitated himself in prison and should be released.

In addition to those states which 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 have passed legislation that directly limits the availability of JLWOP: California, Florida, North Carolina, Pennsylvania and Washington. 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.[5] California now 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.[6] 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

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amending Laws of Utah §§ 76-3-203.6, -206, -207, -207.5, -207-.7 and enacting § 76-3-209; H. 62, 73rd Sess. (Vt. 2015), enacting Vt. Stat. Ann. tit. 13, § 7045; 5 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).

[3] *Diatchenko v. District Attorney for Suffolk Dist.*, 1 N.E.3d 270 (2013) (holding that JLWOP sentences violate the Massachusetts Constitution); *State v. Sweet*, 879 N.W.2d 811 (Ia. 2016)(JLWOP sentences violate the Iowa Constitution).

[4] S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013), *amending* Del. Code Ann. tit. 11, §§ 4209, 4209-A, 4209-217(f), 3901(d).

[5] *See* Human Rights Watch, *State Distribution of Estimated 2,589 Juvenile Offenders Serving Juvenile Life Without Parole*, http://www.hrw.org/sites/default/files/related_material /updatedJLWOP10.09_final.pdf.

[6] Cal. Penal Code § 1170 (2015).

violent felony.[7] North Carolina no longer allows JLWOP for felony-murder convictions.[8] Pennsylvania moved from imposing mandatory life without parole for juvenile offenders convicted of second-degree murder to eliminating JLWOP for that crime.[9] In addition, the Pennsylvania Supreme Court recently held JLWOP is unconstitutional unless the State proves, beyond a reasonable doubt, that the child is irreparably corrupt, *see Commonwealth v. Batts*, No. 45 MAP 2016, __ A.3d __, 2017 WL 2735411 (Pa. June 26, 2017), a decision that is likely to effectively eliminate the sentencing practice within its borders.[10] Finally, Washington State has abolished the penalty for defendants younger than sixteen.[11]

Meanwhile, other states have taken steps that limit JLWOP by paring back severe juvenile sentencing generally or adding additional process. Illinois and New Hampshire both raised the jurisdictional age for adult court, thereby restricting the availability of any severe sentence, including JLWOP.[12] The Missouri and Colorado legislatures recently passed laws granting parole eligibility to every one of their

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[7] Fla. Stat. § 921.1402(2). 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. Fl. Stat. § 921.1402(2)(a).

[8] 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).

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

[10] *See* Riley Yaes, *Pennsylvania Supreme Court throws out life without parole sentence for juvenile*, PITTSBURGH POST-GAZETTE (June 26, 2017), available at http://www.post-gazette.com/news/state/2017/06/26/Qu-eed-Batts-case-pennsylvania-supreme-court-juvenile-parole/stories/201706260160.

[11] 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. In addition, an intermediate appellate court in Washington recently held that JLWOP categorically violates the Washington State constitutional prohibition of cruel punishment. *State v. Bassett*, No. 47251-1-II, 2017 WL 1469240 (Wash. Ct. App. April 25, 2017).

[12] *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 (N.H. 2015) (changing jurisdictional age from sixteen to seventeen).

inmates previously sentenced to JLWOP, [13] and the Minnesota Supreme Court did the same.[14] Several additional states have moved to require consideration of the mitigating factors of youth before imposing any extreme sentence upon a juvenile.[15]

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

Looking beyond JLWOP abolition as a matter of law and to its application in practice, as the Court did in *Graham*, the movement away from imposing this sentence is even more striking. *See* 560 U.S. at 64. In addition to the nineteen jurisdictions that have 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.[16] Six more states have five or fewer individuals serving JLWOP sentences: Idaho, Montana, New Hampshire, Ohio, Oregon, and Wisconsin.[17] In total, thirty-one jurisdictions are either abolitionist, or functionally so.[18] As the Court explained in *Graham*, "It becomes all the more clear how rare these sentences are, even within the jurisdictions that do sometimes

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[13] S.B. 590, Gen. Assemb. Reg. Sess. (Mo. 2016); S.B. 16-181, Gen. Assemb. Reg. Sess. (Co. 2016).

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

[15] *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); *People v. Sanders*, 2014 Ill. App. 21732-U, at *30 2014 WL 7530330 (Ill. Ct. App. 2014) (unpublished); *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 a lesser sentence 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* and *Miller*.").

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

[17] *See id.*

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

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, four additional states—Alabama, Arkansas, Maryland, and Minnesota—have sentenced no more than one juvenile to life in prison without parole over the past five years.[19]

Taken together, the trend is clear: in much of the United States, 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. Today, the use of JLWOP is limited to a dramatically shrinking number of states. Our standard of decency has evolved: sentencing children to die in prison is cruel and unusual.

IV. This court should independently conclude that juvenile life without parole violates the Kentucky and United States Constitutions.

In addition to evaluating national consensus against a particular punishment, the United States Supreme Court independently evaluates whether a punishment is disproportionate. *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," *Miller*, 132 S. Ct. at 2465, demonstrates that life without parole should be declared a categorically excessive punishment with respect to children.

[19] John R. Mills, Anna M. Dorn, & Amelia Courtney Hritz, *Juvenile Life Without Parole in Law and Practice: The End of Superpredator Era Sentencing* (2015).

Kentucky recognized the reduced culpability of children nearly fifty years ago in *Workman v. Commonwealth*, 429 S.W.2d 374 (Ky. 1968). There, the Court held that a life-without-parole sentence was unconstitutional when imposed upon a child convicted of rape. *Id.* at 378. Because a life-without-parole sentence would only be appropriate for "dangerous and incorrigible individuals who would be a constant threat to society," the Court held that the sentence, when imposed upon a child, was "intolerable to fundamental fairness." *Id.* The Court observed, "We believe incorrigibility is inconsistent with youth; that it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life." *Id.*

In recent years, the United States Supreme Court has repeatedly confirmed what reason and scientific inquiry demonstrate to be true: children are categorically different from adults in ways that undermine the rationale for imposing a life without parole sentence. While some period of incarceration may be appropriate for children convicted of serious crimes like murder, because of the diminished culpability and capacity for change inherent in youth, the touchstones of juvenile incarceration must be rehabilitation and reform.

Miller affirmed this principle, recognizing that "the distinctive attributes of youth diminish the penological justifications" for JLWOP. *Miller*, 132 S. Ct. at 2465. 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 punishment for their actions, and incapacitation must be

tempered because children are unlikely to "forever . . . be a danger to society." *Id.*, quoting *Graham*, 560 U.S. at 72.

Children are more likely to be successfully rehabilitated into contributing members of our community, even after committing terrible acts. Because there is no way to distinguish at the time of sentencing 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), every child, even those convicted of the most heinous crimes, must be given an opportunity to demonstrate reform. "A categorical rule avoids the risk that ... a court or jury will erroneously conclude that a particular juvenile is sufficiently culpable to deserve life without parole ..." *Graham*, 560 U.S. at 78-79.

The alternate sentence the Kentucky legislature has deemed appropriate, life with parole eligibility after 25 years, adequately protects the community, better serves the penological purposes of punishment, and respects the constitutional rights of Kentucky's children. *See Montgomery*, 136 S. Ct. at 736 (citing with approval Wyo. Stat. Ann. § 6–10–301(c) (2013), which gives juvenile homicide offenders parole eligibility after 25 years). As the Pennsylvania Supreme Court recently acknowledged, granting a juvenile offender <u>eligibility</u> for parole

> carries minimal risk [for the Commonwealth]; if the juvenile offender is one of the very rare individuals who is incapable of rehabilitation, he or she simply serves the rest of the life sentence without ever obtaining release on parole. Although the Commonwealth certainly has an interest in ensuring criminals are punished for their actions and that society is protected from further harm committed by them, this interest remains protected by a life-with-parole sentence because there are no guarantees that parole will ever be granted.

Batts, 2017 WL 2735411, at *33.

The substantive right sought here does not require that every juvenile offender be released; indeed, some may never show themselves to be deserving of reintegration into law-abiding society. However, the Kentucky and United States Constitutions and the law developed by *Roper*, *Graham*, *Miller* and *Montgomery* make clear that there is no way to justify sentencing children to die in prison without affording a meaningful opportunity to demonstrate change over the course of decades behind bars.

V. Conclusion

There is a societal consensus within the Commonwealth and the nation rejecting juvenile life without parole sentences; juveniles are categorically less culpable than adult offenders; these punishments serve a limited penological purpose, and there are irremediable difficulties in determining who is, in fact, "irreparably corrupt." Therefore, the punishment violates section 17 of the Kentucky Constitution and the Eighth Amendment to the United States Constitution.

Respectfully Submitted,

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