No. 14-280

IN THE

Supreme Court of the United States

HENRY MONTGOMERY,

Petitioner,

—v.—

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF LOUISIANA, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The ACLU is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding more than 90 years ago, the ACLU has appeared before this Court in numerous cases, both as direct counsel and as *amicus curiae*, including cases implicating the constitutional rights of juvenile offenders, such as *Roper v. Simmons*, 543 U.S. 551 (2005), and cases involving the application of new sentencing rules, such as *Dorsey v. U.S.*, 132 S.Ct. 2321 (2013).

The ACLU of Louisiana is a statewide affiliate of the national ACLU.

SUMMARY OF THE ARGUMENT

Amici agree with Petitioner that *Miller v. Alabama*, 132 S. Ct. 2455 (2012), is a substantive rule of criminal law because it categorically prohibits a mandatory sentence of life without parole for juvenile offenders. *Miller* therefore is not subject to *Teague*'s bar against applying new procedural rules on collateral review. *Amici* write separately to assert that, even if the Court classifies *Miller* as procedural, the decision is still retroactive as a watershed rule of criminal procedure. Under *Teague v. Lane*, 489 U.S.

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[1] The parties have lodged blanket letters of consent to the filing of *amicus* briefs in this case. No party has authored this brief in whole or in part, and no one other than *amici*, their members, and their counsel have paid for the preparation or submission of this brief.

288 (1989), watershed rules of criminal procedure are exempted from the Court's general ban on enforcing new criminal procedure rules in habeas.

In requiring an individualized sentencing hearing that provides consideration of a defendant's youth and its attendant circumstances before sentencing juvenile offenders to die in prison, the *Miller* Court made clear its belief that such sentences would and should be rare. *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012). The inescapable corollary of this assumption is that mandatorily sentencing juvenile offenders to life without parole is fundamentally unfair and impermissibly unreliable. *Miller*'s new rule of individualized sentencing is therefore cognizable on collateral review. *See Teague v. Lane*, 489 U.S. 288, 311 (1989).

ARGUMENT

Teague makes an exception to non-retroactivity for watershed rules of criminal procedure. The Court has narrowly defined watershed rules as those "implicating the fundamental fairness and accuracy of the criminal proceeding." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (citation omitted). *Miller* satisfies both components of this rigorous test. The Court's requirement of individualized sentencing for youth facing life imprisonment is a bedrock procedural guarantee necessary for fundamentally fair sentencings. That guarantee is more than fundamental "in some abstract sense," *id.*; it necessarily improves the reliability with which states identify the uncommon juvenile that society may condemn to a death in prison.

I. *MILLER* IS AN ACCURACY-ENHANCING RULE.

Miller's commitment and contribution to sentencing accuracy for juveniles is beyond doubt. *Miller* struck down systems in 29 jurisdictions where the legislature mandated life without parole sentences for every offender, based strictly on the offense. *See Miller v. Alabama*, 132 S. Ct. 2455, 2479 (2012) (Roberts, C.J., dissenting) ("The sentence at issue is statutorily mandated life without parole."). Juveniles were most often subjected to these schemes due to the convergence of several independent statutes. *Miller*, 132 S. Ct. at 2473. The Court took this as strong indicia that juveniles were "possibly (or probably)" swept into these schemes without any consideration of whether they belonged. *Id.*

The threshold question for retroactivity, then, is whether such inadvertent legislative sentencing so "*seriously* diminishe[s] accuracy that there is an 'impermissibly large risk'" of disproportionately sentencing youth to die in prison. *Summerlin*, 542 U.S. at 355-56 (quoting *Teague v. Lane*, 489 U.S. 288, 312-13 (1989)). *Miller* assuredly answered "yes" to this question. It is now abundantly clear that youth always matters in deciding whether to deny a juvenile any hope of release from prison. *Miller*, 132 S. Ct. at 2465. The fatal vice of mandatory schemes is that "[b]y removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Id.* at 2466. In support of this proposition, *Miller* catalogued the critical sentencing considerations a mandatory system

precludes. *Id.* at 2468 ("recapping" discussion). "[S]uch a scheme" the Court concluded, "poses too great a risk of disproportionate punishment" for juveniles. *Id.* at 2469.

To replace these mandatory schemes, *Miller* implemented individualized sentencing. This requirement eliminates the impermissibly high risk of disproportionate sentencing occasioned by mandatory schemes. *Id.* at 2468 ("So *Graham* [*v. Florida*, 560 U.S. 48 (2010)] and *Roper* [*v. Simmons*] and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult."). A legislature can no longer dictate that life imprisonment without release is the appropriate sentence for any juvenile for any offense. A state must instead always make available to juveniles at least one sentencing option that carries the possibility of release. If the state chooses to pursue an irrevocable life sentence, *Miller* transfers ultimate sentencing authority from the legislature to an independent sentencer. The *Miller* rule tightly cabins that sentencer's discretion with the obligation to consider the juvenile's youth and related mitigation before denying all possibility of release. These protections are meant to ensure that the ultimate penalty for juveniles is "reserved only for the most culpable defendants committing the most serious offenses." *Id.* at 2467.

Removing any doubt that individualized sentencing is intimately concerned with accurate sentencing outcomes for youth, the *Miller* Court conclusively declared: "given all we have said in *Roper, Graham*, and this decision about children's diminished culpability and heightened capacity for

change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* at 2469. The Court's announcement accords with the fact that in jurisdictions already eschewing mandatory schemes, "sentencers impose life without parole on children relatively rarely." *Id.* at 2472, n.10.

This observation confirms *Miller*'s critical contribution to sentencing accuracy. At the time of *Miller*, life without parole sentences for juveniles were hardly rare. This circumstance overwhelmingly resulted from mandatory schemes. Of the 2,500 juveniles then imprisoned for life, over 2,000 had been mandatorily sentenced. *Id.* at 2477 (Roberts, C.J., dissenting). The inevitable conclusion is that most of these 2,000 juveniles were being disproportionately punished.

Miller's impact on the accuracy of juvenile sentencing is analogous to *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court's paradigmatic example of a watershed rule. *See Whorton v. Bockting*, 549 U.S. 406, 419 (2007). In guaranteeing the right to counsel in felony cases, *Gideon* sought to remedy the unacceptably high risk of wrongfully convicting innocent defendants denied counsel at their criminal trials. *Id.* *Miller* of course speaks to criminal sentencing, not the criminal trial. But by requiring individualized sentencing hearings, the decision likewise eradicates an unacceptable risk of wrongfully sentencing juveniles to irrevocable life terms under mandatory sentencing schemes.

All of the sentencing procedures that failed the *Gideon* comparison involved procedural rules connected to the capital jury's individualized

sentencing decision.[2] None involved the imposition of the death penalty in the absence of *any* individualized determination that the sentence was warranted. The Court was thus unwilling to conclude that any of the procedures sufficiently enhanced the accuracy of capital sentencing to qualify as watershed.

In *Summerlin*, for example, the Court denied watershed status to the rule from *Ring v. Arizona*, 536 U.S. 584 (2002), that a jury, rather than a judge, must find any aggravating factor required to impose a death sentence. *Summerlin*, 542 U.S. at 358. Reviewing what it deemed inconclusive evidence that juries are more accurate factfinders than judges, the

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[2] *Schriro v. Summerlin*, 542 U.S. 348 (2004) (holding that new rule of *Ring v. Arizona*, 536 U.S. 584 (2002), requiring jury to find aggravating factor making defendant eligible for the death penalty, is not watershed); *Beard v. Banks*, 542 U.S. 406 (2004) (holding that new rule of *Mills v. Maryland*, 486 U.S. 367 (1988), invalidating capital sentencing scheme that required juries to disregard mitigating factors not unanimously found, is not watershed); *O'Dell v. Netherland*, 521 U.S. 151 (1997) (holding that new rule of *Simmons v. South Carolina*, 512 U.S. 154 (1994), providing capital defendant the right to inform sentencing jury that he is not eligible for parole, is not watershed); *Graham v. Collins*, 506 U.S. 461 (1993) (denying watershed status to a proposed new rule barring Texas' three special issues for capital juries on grounds that scheme prevented adequate consideration of mitigating evidence); *Sawyer v. Smith*, 497 U.S. 227, 242-43 (1990) (holding that new rule of *Caldwell v. Mississippi*, 472 U.S. 320, (1985), invalidating death sentence where jury was falsely informed that ultimate responsibility for sentencing decision rested elsewhere, is not watershed); *Saffle v. Parks*, 494 U.S. 484, 486 (1990) (denying watershed status to a proposed new rule forbidding trial court from prohibiting jury to avoid influence of sympathy).

Summerlin Court resolved that, even in the death penalty context, it could not confidently conclude that judicial factfinding "*seriously* diminishes" sentencing accuracy. *Id.* at 356. The Court consequently was unwilling to hold that "a defendant may never be as fairly treated by a judge as he would be by a jury." *Id.* at 357. (quotations and citations omitted).

For *Teague*'s accuracy prong, the difference between these jury cases and *Miller* is one of kind, not degree. *Miller* is based on the premise that legislatively imposing a mandatory sentence of life without parole on juveniles will almost always result in constitutionally disproportionate sentences. Rather than merely reforming this unconstitutional scheme, *Miller* entirely eliminates it in favor of individualized sentencing. It is the difference between addressing a flawed sentencing hearing and no sentencing hearing at all.

II. *MILLER*'S INDIVIDUALIZED SENTENCING REQUIREMENT FOR JUVENILES IS A BEDROCK PROCEDURAL GUARANTEE.

Miller's individualized sentencing mandate also satisfies *Teague*'s insistence that a watershed rule "implicate the fundamental fairness" of a sentencing proceeding. *Teague*, 489 U.S. at 312. As with a criminal trial, a sentencing free from constitutional error at the time it became final may typically be presumed fundamentally fair. *Teague* recognized, however, "that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock

procedural elements that must be found to vitiate the fairness of a particular [sentence]." *Id.* at 311 (1989) (citations and quotations omitted).

Precisely such an alteration occurred in *Miller*. Given *Miller*'s recognition that society's "evolving standards of decency" for humane punishment have come to reject automatically sentencing juveniles to life imprisonment without parole,[3] 132 S. Ct. at 2463, courts can no longer take for granted the fairness of a mandatory life sentence, regardless of when the sentence became final. Quite the opposite, these sentences must be regarded as fundamentally unfair, since no sentencer had an opportunity to consider the juvenile's youth and mitigation.

Again, *Miller* compares favorably with *Gideon*. *Gideon* held that the right to felony counsel is an indispensable component of a fair trial. *Gideon*, 372 U.S. at 344 ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."). *Miller* addresses an antecedent question. Previously, whether a juvenile facing life imprisonment without parole had a right to a sentencing hearing of any sort was entirely a matter of state discretion. States could, and twenty-eight did, dispense with the need for a hearing by mandating life sentences. *Miller* abolished this discretion. In so doing, *Miller* did not simply establish a protection necessary for a fair hearing, as did *Gideon*. *Miller* instead established the foundational right to a fair hearing in the first place.

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[3] *Cf. Miller*, 132 S. Ct. at 2478 (Roberts, C.J., dissenting) (taking issue with majority's assessment of evolving standards).

States that precluded sentencing hearings must now afford an individualized procedure before denying a juvenile any hope of release.

Other decisions from this Court applying *Teague*'s fundamental fairness prong all involved incremental protections that the Court found lacked *Gideon*'s sweep and import. *See, e.g.*, *Beard v. Banks*, 542 U.S. 406, 418-19 (2004) ("[W]e have not hesitated to hold that less sweeping and fundamental rules [than *Gideon*] do not fall within *Teague's* second exception."). *Whorton v. Bockting* illustrates the pattern well. 549 U.S. 406 (2007). There the Court denied retroactive effect to the rule in *Crawford v. Washington*, 541 U.S. 36 (2004), which placed new restrictions on the admission of testimonial out-of-court statements in criminal trials. Though acknowledging *Crawford*'s significance, the Court observed that the rule was merely an extension of the bedrock right to cross examination. *Bockting*, 549 U.S. at 420-21. *Crawford*, notwithstanding its importance, therefore could not qualify as bedrock because "a new rule must itself constitute a previously unrecognized bedrock procedural element." *Id.* at 421.

Miller is as transformational as cases like *Crawford* are incremental. Before *Miller*, no constitutional rule prevented a juvenile convicted of homicide from mandatorily receiving life without parole. *Miller* changed all this with an unprecedented innovation. Invoking *Graham's* comparison of juvenile life without parole to the death penalty, the Court imported its decisions requiring individualized sentencing in capital cases. *Miller*, 132 S. Ct. at 2467.

This move was truly a sea change. The Court had never before recognized the right to individualized sentencing for any class of noncapital defendants. *See Harmelin v. Michigan*, 501 U.S. 957, 995 (1991) ("Our cases creating and clarifying the 'individualized capital sentencing doctrine' have repeatedly suggested that there is no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties." (citation omitted)). Indeed, the Court had squarely rejected in *Harmelin* the contention that a noncapital sentence could become cruel and unusual by virtue of being mandatory. *Id.* Justice Thomas, in a dissent to *Miller* joined by Justice Scalia, objected that the Court's decision in *Harmelin* precluded the result in *Miller*. *Miller*, 132 S. Ct. at 2485-86 (Thomas, J., dissenting). The *Miller* majority cleaved through this barrier with the revelation – forged from *Graham* and *Roper* – that "if (as *Harmelin* recognized) 'death is different,' children are different too." *Id.* at 2470.

Comparing *Miller*'s pedigree with that of *Gideon* reveals the groundbreaking nature of both decisions. Thirty years prior to *Gideon*, the Court appeared to already recognize the fundamental character of the right to counsel in *Powell v. Alabama*, a death penalty case. 287 U.S. 45, 68 (1932). Yet the Court retreated from this position just ten years later in *Betts v. Brady*. 316 U.S. 455 (1942). The *Betts* Court surveyed the provision of counsel in the states prior to the Bill of Rights and up through the present. *Id.* at 465. This data persuaded the Court that the right to counsel was not a fundamental component of state prosecutions. *Id.* at 471. *Betts* limited *Powell* to its facts and held

that whether a denial of counsel in a state prosecution was fundamentally unfair turned on the unique circumstances of each case. *Id.* at 463.

Along came *Gideon*. The *Gideon* Court dismissed *Betts* as "an abrupt break with its own well-considered precedents." *Gideon*, 372 U.S. at 344. Those precedents, along with the fact that 22 of 24 state amici urged *Betts*' demise, led the Court to hold that the Sixth Amendment's guarantee of counsel is binding in state felony prosecutions. *Id.* at 345.

Three parallels between *Miller* and *Gideon* are especially striking. Both received their start in the death penalty context before transitioning to serious noncapital cases. In both, the Court faced significant precedential hurdles that arguably foreclosed relief; for *Gideon*, *Betts* and for *Miller*, *Harmelin*. And in both, the Court broke with this precedent by relying heavily on a changed national consensus and a fundamental reappraisal of robust norms newly adapted from prior decisions. While *Gideon* overruled *Betts* outright, *Miller* essentially carved out a juvenile exception to *Harmelin*. *Miller*, 132 S. Ct. at 2470. For retroactivity purposes, the distinction is trivial. Both decisions represent watershed moments in criminal procedure. *See Teague*, 489 U.S. at 311-12.

III. ENFORCING *MILLER* RETROACTIVELY DOES NOT THREATEN THE COURT'S FINALITY CONCERNS.

As discussed above, *Miller* satisfies the letter of *Teague* for declaring watershed rules of criminal procedure. Recognizing *Miller* as a watershed rule also accords with the spirit of *Teague*'s finality

concerns with enforcing new procedural rules on collateral review.

The *Teague* plurality found that federal collateral review exists mainly to incentivize state compliance with contemporary constitutional procedure. *Teague*, 489 U.S. at 306-07. With the limited provenance of habeas review, the "costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus thus generally far outweigh the benefits of this application." *Sawyer v. Smith*, 497 U.S. 227, 242 (1990) (citation omitted).

This balance of interests does not hold with *Miller*. The decision's roots in society's "evolving standards" of decency tip the scales decisively against finality and in favor of sentencing fairness. The Court's evolving standards rulings periodically force states to abandon sentences on direct and collateral review that were not only legally imposed, but were also socially accepted at the time. *Compare Penry v. Lynaugh*, 492 U.S. 302, 333-35 (1989) (holding that evolving standards of decency did not bar execution of the mentally disabled), *with Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that evolving standards of decency barred the execution of the mentally disabled). These forfeitures are a necessary cost to the states of compliance with the Eighth Amendment.[4]

[4] Though, because these decisions only invalidate sentencing practices that have gone out of favor, they are a cost the states are rarely required to pay.

Because the *Miller* Court drew an explicit analogy between life without parole and the death penalty, *Miller*, 132 S. Ct. at 2466-67, the Court's death penalty jurisprudence offers a useful guide. In *Furman v. Georgia*, 408 U.S. 238 (1972), the Court struck down that state's death penalty law on the ground that it allowed sentencers unconstrained discretion, resulting in impermissibly arbitrary death sentences. The Court did not, however, rule the death penalty *per se* unconstitutional. Nonetheless, subsequent decisions of the Court addressing *Furman*'s retroactivity treated the decision as substantive, as that term would likely be understood under *Teague*. *See, e.g.*, *United States v. Johnson*, 457 U.S. 537, 550 (1982) (finding that sentence violating *Furman* was void *ab initio*) (citing *Moore v. Illinois*, 408 U.S. 786, 800 (1972)); *Robinson v. Neil*, 409 U.S. 505, 508 (1973) (classifying *Furman* as a "nonprocedural guarantee" not subject to retroactivity analysis). As noted earlier, amici agree with petitioner that *Miller* should also be understood as adopting a substantive rule. But whether *Miller* is ultimately designated as substantive or procedural, finality should no more impede retroactivity in this case than in *Furman*.

The same reasoning applies to *Woodson v. North Carolina*, 428 U.S. 280 (1976), whose individualized sentencing mandate the Court applied in *Miller*. *Woodson* invalidated North Carolina's mandatory death penalty scheme for nearly the opposite reason of *Furman*: the procedure did not allow the sentencer adequate discretion to tailor the punishment to the offender, thus also yielding impermissibly arbitrary death sentences. *See generally* 428 U.S. 280. As in *Furman*, the *Woodson*

Court did not rule the death penalty *per se* unconstitutional. The Court has not squarely addressed *Woodson*'s retroactivity, either pre- or post-*Teague*. Still, little sense can be made of a retroactivity analysis that would reach different results in *Furman*, *Woodson*, and *Miller*.

Under *Miller*, a sentence of life without parole for a juvenile, as with a death sentence for an adult, "is cruel and unusual under the Eighth Amendment if it is imposed without an individualized determination that that punishment is appropriate.'" *Harmelin*, 501 U.S. at 995 (citing, *inter alia*, *Woodson*, 428 U.S. 280) (internal quotation marks omitted). Juveniles punished under these unconstitutional mandatory systems therefore have an undeniably significant liberty interest in collateral review to reduce their inherently disproportionate sentences. And most should succeed if allowed the chance. *Miller*, 132 S. Ct. at 2469.

The costs to the states of retroactively enforcing *Miller* cannot outweigh this fundamental interest in freedom from cruel and unusual punishments. *See Kelley v. Gordon*, No. CV-14-1082, 2015 WL 3814285, 2015 Ark. 277, at *7 (June 18, 2015) (applying *Miller* on state collateral review in part because "the Eighth Amendment's ban on cruel and unusual punishment outweighs the factors favoring finality"). In fact, the states' finality interests in avoiding these costs are substantially lower in this context. No state impacted by *Miller* made a single individualized judgment that any juvenile serving life imprisonment without parole actually deserved that punishment. Many of these states also made no legislative judgment that juveniles as a class should automatically receive life

without parole. *Miller*, 132 S. Ct. at 2473. A plea for finality certainly loses its force when the prevalence of the sentence at issue more likely resulted from "inadvertent legislative outcomes," *id.*, than from states "faithfully apply[ing] existing constitutional law." *Teague*, 489 U.S. at 310.

The states' ability to mitigate the costs of retroactively applying *Miller* further reduces their finality interests. *Miller* required that a sentencer follow a "certain process" before imposing life without parole on a juvenile. *Miller*, 132 S. Ct. at 2471. Otherwise, the Court left compliance to the states. *Cf. Graham v. Florida*, 560 U.S. 48, 75 (2010) *as modified* July 6, 2010 ("It is for the State, in the first instance, to explore the means and mechanisms for compliance."). Unlike a retroactive new rule for criminal trials that requires states to retry all affected defendants, like *Gideon*, states are under no such obligation to satisfy *Miller*. States are free to convert the sentences of all or certain classes of juvenile offenders to life with parole or a term of years. *See, e.g., Diatchenko v. Dist. Att'y*, 1 N.E.3d 270, 286 (Mass. 2013) (retroactively invalidating provision denying parole eligibility to make defendant's life sentence parole eligible); *State v. Mares*, 335 P.3d 487, 498 (Wyo. 2014) (retroactively applying state's amended parole statute to convert defendant's sentence of life without parole to a sentence of life with the possibility of parole after 25 years). So long as these alternatives allow meaningful opportunities for release based on juvenile status, they are permissible under *Miller*.[5]

[5] Should states opt for resentencings, local district attorneys can still mitigate costs. Serving their usual gatekeeping role,

Cf. Miller, 132 S. Ct. at 2470; *see also State v. Ragland*, 836 N.W.2d 107, 121-22 (Iowa 2013) (holding that life sentence commuted to 60 years violated *Miller*); *Parker v. State*, 119 So. 3d 987, 997 (Miss. 2013) (holding that resentencing to life with possibility of conditional release at age 65 violated *Miller*).[6]

Further, enforcing *Miller* on collateral review would not raise the same reliability concerns that have influenced the Court's approach to finality. *See McCleskey v. Zant*, 499 U.S. 467, 491 (1991). In other contexts, the Court has worried that retrying an individual on collateral review unduly risks obtaining a result less reliable than the original, error-free trial. *Id.* However, that concern does not translate well when the issue is not guilt or innocence, but whether a juvenile should receive

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prosecutors can proactively screen for the bulk of cases undeserving of life imprisonment. Performing this function could in many instances open the possibility for a negotiated sentence, thereby reducing or eliminating the number of contested issues for sentencing.

[6] As a practical matter, applying *Miller* on collateral review will often yield cost *savings*. Life without parole is not just especially harsh on a juvenile; it is uniquely costly to the state. Both propositions hold because "a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender." *Graham v. Florida*, 560 U.S. 48, 70 (2010). *Miller* found that states drastically over-sentenced juveniles to life imprisonment. By affording juveniles a realistic opportunity for release through resentencing, states, particularly those with large populations of juveniles serving mandatory life sentences, would alleviate a sizable carceral burden.

the most severe allowable sentence. Under these circumstances, it is difficult to imagine how an individualized resentencing could ever produce a result less reliable than a mandatorily imposed punishment, regardless of when the sentence became final.

Moreover, certain features of a *Miller*-compliant sentencing may ameliorate the usual difficulties of arriving at a proportional sentence on collateral review. Of greatest significance, the hearings should proceed on the presumption, evident throughout *Miller*, that most juveniles will receive a reduced sentence carrying the possibility of release. *Miller*, 132 S. Ct. at 2469; *see also State v. Riley*, 110 A.3d 1205, 1214 (Conn. 2015) (finding *Miller* establishes "a presumption against imposing a life sentence without parole on a juvenile offender that must be overcome by evidence of unusual circumstances"). As the incidence of juveniles too incorrigible to earn this possibility will be minimal, *Miller* further suggests that the hearings should center on a juvenile's mitigation. *See Miller*, 132 S. Ct. at 2475. This orientation favoring eventual release could ease the difficult fact-finding and decisional burdens on sentencers.

Additionally, sentencers will have a distinct advantage in arriving at sufficiently-tailored sentences on collateral review: contemporaneous evidence of the juvenile offender's rehabilitation. *Cf. Pepper v. U.S.*, 562 U.S. 476, 493 (2011) (mandating admission of postsentencing rehabilitation under the Sentencing Reform Act when a sentence is set aside on appeal). Evidence that a juvenile has reformed, despite being denied any hope of freedom under a sentence that "forswears altogether the rehabilitative

ideal," should prove acutely persuasive to the sentencer.[7] *Miller*, 132 S. Ct. at 2465 (quotation omitted).

Finally, finding *Miller* retroactive would give meaningful effect to Justice Harlan's teaching that "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in part and dissenting in part). Though this statement was directly addressing the need for habeas relief on substantive claims, it is amply true for *Miller*. Public confidence in the criminal justice system would be disastrously undermined were the Court to recognize that most juvenile life sentences were imposed under a patently unjust procedure, to acknowledge that the sentences resulting from this procedure are cruel and unusual, but to allow the overwhelming majority of these sentences to stand merely because society's standards of decency did not evolve soon enough. *Cf. Solem v. Stumes*, 465 U.S. 638, 653, n.4 (1984) (Powell, J., concurring) ("Releasing on habeas prisoners who have been convicted [or sentenced] by fundamentally unfair procedures . . . would give effect to our decisions in those rare cases where a conviction [or sentence] fully in accord with the law

[7] One critical proviso is that sentencers must carefully weigh this evidence against the fact that many states deny reformative programming to those serving life sentences, obscuring their path to redemption. *See* Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 Federal Sentencing Reporter 1, p. 29 (2010).

governing at the time of conviction is nonetheless plainly unjust.").

The Court's comparison of juvenile life without parole with the death penalty is again instructive. Finality concerns did not prevent the Court from retroactively voiding death sentences after *Furman v. Georgia*, 408 U.S. 238 (1972), and they surely would not have prevented the Court from retroactively halting the execution of mandatory death sentences after *Woodson*, despite the institution of capital punishment surviving both decisions. It is similarly unfathomable that the Court would allow a juvenile to die in prison after *Miller*, simply because that juvenile had the misfortune of being on collateral review.

CONCLUSION

The Court should reverse the Louisiana Supreme Court's judgment that *Miller v. Alabama* does not apply retroactively.

Respectfully submitted,

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