No. 18-203

IN THE

Supreme Court of the United States

JOEY M. CHANDLER,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

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

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is the nation's first and foremost civil rights law organization. Since its incorporation in 1940, LDF has fought to eliminate the arbitrary role of race in the administration of the criminal justice system by challenging laws, policies, and practices that discriminate against African Americans and other communities of color. LDF has served as counsel and/or as *amicus curiae* in this Court in many landmark cases affecting the rights of both adults and minors in the criminal justice system, including *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Batson v. Kentucky*, 476 U.S. 79 (1986); *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Ham v. South Carolina*, 409 U.S. 524 (1973); *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Furman v. Georgia*, 408 U.S. 238 (1972); and *Swain v. Alabama*, 380 U.S. 202 (1965). Moreover, in *Brister v. Mississippi*, LDF served as lead counsel and litigated the first case in Mississippi—and one of the first cases in the country—applying this Court's ruling in *Miller* that mandatory life without the possibility of parole is unconstitutional for children. Nos. 251-11-696, 12-0-949 (Miss. July 26, 2012). [1]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, both parties have been timely notified of our intent file this brief and have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court's precedent is clear that children may be sentenced to die in prison only if they are among the "rarest of juvenile offenders" "whose crimes reflect permanent incorrigibility."[2] In this case, the Mississippi Supreme Court failed to adhere to this precedent. It held that a judge need not make an incorrigibility finding before sentencing a defendant to life without parole for a crime he committed as a child and need not consider evidence of his capacity for rehabilitation. Without requiring such a finding, there is a real risk judges will sentence youth to spend their lives behind bars arbitrarily. With this arbitrariness comes another risk: the likelihood of judges disproportionately imposing life without parole sentences against African American youth.

The facts of this case highlight these risks and make it an ideal vehicle for this Court to address the proper application of *Miller v. Alabama* and *Montgomery v. Louisiana*. Joey Chandler, who is Black, was sentenced to life without the possibility of parole for a murder that he committed when he was seventeen years old. Mr. Chandler's crime undoubtedly warranted a serious sentence, but nothing about the circumstances of his crime suggested permanent incorrigibility. Indeed, over the next ten-plus years in prison, Mr. Chandler proved his capacity for rehabilitation by taking advantage of educational and rehabilitative programs in prison, building a strong relationship with his son and

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[2] *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016).

family, and maintaining a nearly spotless record. Yet, at a post-*Miller* resentencing, a trial judge again sentenced Mr. Chandler to life without parole. The judge did so without addressing whether Mr. Chandler's crime reflected "permanent incorrigibility" and without meaningfully reviewing the relevant factors this Court established in *Miller* or considering the evidence of Mr. Chandler's rehabilitation.

The Court should grant certiorari and hold that a judge must find permanent incorrigibility before sentencing a child to life without parole. The Court should do so to: (1) ensure juvenile life without parole sentences remain the rare exception and not the rule; (2) protect against racial biases affecting sentencing decisions; (3) guarantee meaningful appellate review; and (4) maintain the public's faith in the judiciary and norms of procedural justice. Consistent with *Miller* and *Montgomery*, this Court should ensure that judges consider the relevant factors before sentencing children to life without parole, especially the child's ability to live a productive adult life.

ARGUMENT

I. THE EIGHTH AMENDMENT REQUIRES JUDGES TO MAKE A PERMANENT INCORRIGIBILITY FINDING BEFORE SENTENCING A CHILD TO LIFE WITHOUT THE POSSIBILITY OF PAROLE.

The concept of "proportionality is central to the Eighth Amendment,"[3] and children are constitutionally different than adults in analyzing whether a sentence is proportional. This difference is rooted in the fact that children possess three characteristics that make them less culpable and blameworthy than adults. First, a "lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults."[4] Second, children "are more vulnerable or susceptible to negative influences," which, in turn, means they have less control over their environments.[5] Third, a child's character is "less formed and his personality traits are less fixed when compared to adults."[6]

Because of these differences, the Court in *Roper v. Simmons* held that the Eighth Amendment categorically forbids states from executing persons for crimes they committed before the age of eighteen.[7]

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[3] *Graham v. Florida*, 560 U.S. 48, 59 (2010).
[4] *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (citing *Johnson v. Texas*, 509 U.S. 350, 367 (1993)) (per curiam); *see also J.B.D. v. North Carolina*, 564 U.S. 261, 271-72 (2011).
[5] *Roper*, 543 U.S. at 569.
[6] *Id.* at 570.
[7] *Id.* at 574-75.

The Court reasoned that sentencing a child to death would not adequately serve any legitimate penological purpose.[8] And it was concerned that the disturbing circumstances of a crime would prevent sentencers from fully considering the child's youthfulness and other mitigating evidence.[9] The Court therefore concluded that a categorical ban on the death penalty for juveniles was necessary because the differences between children and adults are "too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."[10]

Expanding on *Roper*, the Court in *Graham v. Florida* held it unconstitutional to sentence juveniles to life without parole for non-homicide offenses.[11] The *Graham* Court found that no penological theory was "adequate to justify" such a sentence.[12] The Court explained that life without parole sentences are second only to death sentences in their severity and irrevocability.[13] The Court again held that a categorical ban was warranted, explaining that "discretionary, subjective judgment by a judge or jury that the offender is irredeemably depraved, are

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[8] *Id.* at 567.
[9] *See id.* at 573.
[10] *Id.* at 572-73.
[11] *Graham*, 560 U.S. at 82.
[12] *Id.* at 74.
[13] *Id.* at 69.

insufficient to prevent the possibility" of a disproportionate sentence.[14]

In *Miller v. Alabama*, the Court reviewed the constitutionality of sentencing schemes mandating life without parole for juveniles convicted of homicide offenses. Relying on the principles established in *Roper* and *Graham*, *Miller* held that such mandatory sentencing schemes violated the Eighth Amendment because they do not provide an opportunity for courts to consider a child's age, the nature of the crime, and other mitigating factors before imposing the harshest available sentence for children.[15] The Court reiterated that "children are different" and "youth matters for purposes of meting out the law's most serious punishments."[16] The Court further made clear that sentencing judges are required to consider mitigating factors to evaluate how "children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[17] And the Court opined that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon," because it will be the "rare juvenile offender whose crime reflects irreparable corruption."[18]

Finally, in *Montgomery v. Louisiana*, this Court clarified that the rule it announced in *Miller* was a

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[14] *Id.* at 77.
[15] *Miller*, 567 U.S. at 488.
[16] *Id.* at 484.
[17] *Id.* at 480.
[18] *Id.* at 479-80 (quotation marks omitted).

substantive rule that had retroactive effect.[19] In *Montgomery*, the Court again emphasized that "children's diminished culpability and heightened capacity for change" means that "sentencing juveniles to this harshest possible penalty will be uncommon."[20] The *Montgomery* Court explained that "*Miller requires* a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence."[21] Indeed, a sentencing judge must hold a hearing where "youth and its attendant characteristics are considered as sentencing factors" to ensure that a life without parole sentence is not constitutionally excessive.[22] These special procedures are necessary, this Court held, to ensure that life without parole sentences are reserved only for "those rare children whose crime reflects irreparable corruption."[23] The *Montgomery* Court made this point more than once: under *Miller*, life without parole is available only "for the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."[24]

Despite this unequivocal language, some courts—including the Mississippi Supreme Court in the decision below—have held that neither *Miller* nor *Montgomery* requires a finding of "permanent

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[19] *Montgomery*, 136 S. Ct. at 732.
[20] *Id.* at 733-34 (quoting *Miller*, 567 U.S. at 479).
[21] *Id.* at 734 (emphasis added).
[22] *Id.* at 735 (quotation marks omitted).
[23] *Id.* at 734.
[24] *Id.*

incorrigibility" or "irreparable corruption" before sentencing a defendant to life without parole for a crime he committed as a child.[25] But without requiring such a finding, there is no way to ensure that life without parole will in fact be reserved for only "the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."[26] Without an incorrigibility finding, judges could arbitrarily impose the harshest sentence available against juveniles, even without considering all the relevant evidence, and even though the sentence does not serve a legitimate penological purpose. This invites the arbitrary and standardless imposition of the most serious sentence a child defendant can face.

Joey Chandler's case illustrates the grave dangers of dispensing with the permanent incorrigibility finding requirement. After *Miller* was decided, Mr. Chandler, then twenty-six years old, filed a motion to have his sentence set aside. At a hearing on the motion, the sentencing judge made no attempt to assess whether Mr. Chandler's crime reflected permanent incorrigibility. Had he done so,

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[25] *Chandler v. Mississippi*, 242 So. 3d 65, 70 (Miss. 2018); *see also United States v. Briones*, 890 F.3d 811, 818-19 (9th Cir. 2018); *Michigan v. Skinner*, Nos. 152448, 153081, 153345, 2018 WL 3059768, at 15* (Mich. June 20, 2018); *Johnson v. Idaho*, 395 P.3d 1246, 1259 (Idaho 2017); *Washington v. Ramos*, 387 P.3d 650, 665 (Wash. 2017); *Arizona v. Valencia*, 386 P.3d 392, 393, 394-95 (Ariz. 2016). Other states, applying *Miller* and *Montgomery,* require an incorrigibility finding. *See, e.g.*, *Davis v. Wyoming*, 2018 415 P.3d 666, 680 (Wyo. 2018); *Landrum v. Florida*, 192 So. 3d 459, 465-66 (Fla. 2016).

[26] *Montgomery*, 136 S. Ct. at 734.

the evidence of rehabilitation would have made clear that Mr. Chandler's juvenile homicide offense reflected immaturity, not permanent incorrigibility. Following his conviction, Mr. Chandler completed anger-management and drug-counseling sessions, obtained his GED, completed college-level courses in Bible studies, and earned several certifications in construction-related trade skills.[27] Mr. Chandler also developed a "great bond" with his son and married a woman from the community that he lived in prior to prison.[28]

Mr. Chandler has a virtually spotless disciplinary record, with not one rule violation in the five years before the hearing.[29] Several people who knew Mr. Chandler sent letters to the circuit court in support of a reduced sentence. Although he did not condone the terrible crime Mr. Chandler committed as a juvenile, Tommy Coleman, a retired Mississippi State Trooper, wrote, "given a second chance Joey could be an [asset] to the community."[30]

As recognized by the four dissenting Justices of the Mississippi Supreme Court, Mr. Chandler's educational achievements, strong familial

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[27] All references to "R." and "Supp. Tr." hereinafter are to the record clerk's papers and record transcript on file with the Supreme Court of Mississippi, No. 2015-KA-01636-SCT. Supp. Tr. 60-63; *see also Chandler v. Mississippi*, 242 So. 3d 65, 73 (Miss. 2018) (Wall, J., dissenting).
[28] Supp. Tr. 57, 59.
[29] Supp. Tr. 28, 62; *see also Chandler*, 242 So. 3d at 72-73 (Wall, J., dissenting).
[30] R. 23.

relationships, disciplinary record, and letters of support constitute "substantial evidence of Chandler's rehabilitation in prison."[31] In many ways, this evidence of rehabilitation exemplifies the "evolution from a troubled, misguided youth to a model member of the prison community" that this Court recognized as demonstrating rehabilitation in *Montgomery*.[32]

The sentencing judge, however, did not assess or consider this substantial evidence of Mr. Chandler's rehabilitation. Nor did he acknowledge that such evidence made clear that Mr. Chandler was not among the rare offenders whose crime reflected permanent incorrigibility. Instead, the judge concluded that Mr. Chandler was, at the time of the crime, "mature enough to father a child with his girlfriend and [] was selling drugs to help pay for the expenses" associated with his child.[33] As a point of comparison to Mr. Chandler at seventeen years old, the judge cited the heroism of a seventeen-year-old who was awarded the Congressional Medal of Honor for throwing his body upon a "Japanese grenade" during World War II. This display of maturity by an individual seventeen-year-old army member, according to the circuit court, countered arguments that Mr. Chandler's conduct at the "age of seventeen

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[31] *Chandler*, 242 So. 3d at 72 (Wall, J., dissenting).
[32] *Montgomery*, 136 S. Ct. at 736.
[33] *Chandler v. Mississippi*, No. 8491, 2015 WL 13744176 at *2 (Cir. Ct. Oct. 9, 2015).

is a per se sign of immaturity."[34] The judge made no attempt to address whether Mr. Chandler was permanently incorrigible, even though it is the touchstone under *Miller* and *Montgomery*.

The circuit court also concluded that the State's ability to pardon and commute a sentence is sufficient to resolve concerns about Mr. Chandler's prospect for continued rehabilitation.[35] But in *Graham*, this Court rejected the "remote possibility" of executive clemency as a justification to disregard evidence of rehabilitation.[36] *Miller* and *Montgomery* thus mandate that sentencing authorities must first consider whether a life without parole sentence for juveniles should be imposed at all. In this case, the sentencing judge's misplaced reliance on a possible commutation, and focus on subjective indicia of maturity, contravenes the substantive guarantee in *Miller* and *Montgomery* that permanent incarceration may be only imposed on "the rarest juvenile offenders" who show no capacity for rehabilitation.

The risks of disregarding *Miller* and *Montgomery*'s principles have manifested in cases outside of Mississippi, too. For example, in *Veal v. Georgia*, the sentencing judge exercised unfettered

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[34] *Id.* at *3 n.4.

[35] *Id.* at *3. ("The United States Supreme Court also talks about rehabilitation and the defendant's prospects for future rehabilitation. This Court notes that the Executive Branch has the ability to pardon and commute sentences in this State should it deem such action warranted.").

[36] *Graham*, 560 U.S. at 69-70.

discretion when sentencing Robert Veal to life without parole for a crime he committed as a juvenile by looking only at the circumstances of the crime, ignoring Mr. Veal's youthful characteristics, and disregarding the evidence he presented showing his capacity for change.[37] Similarly, a Florida judge sentenced Laisha Landrum to life without parole for a crime she committed as a juvenile by stating only that she was guilty and would be "confined in state prison for the remainder of her natural life."[38] Without requiring a permanent incorrigibility finding, juvenile offenders will serve a life sentence even though they—like Mr. Chandler—have shown a demonstrated capacity for change.

II. JUDGES MUST MAKE A PERMANENT INCORRIGIBILITY FINDING TO AVOID ARBITRARY AND RACIALLY DISCRIMINATORY DECISIONMAKING AND TO ENSURE MEANINGFUL APPELLATE REVIEW.

Not only is the lack of an incorrigibility finding contrary to the tenets of *Roper*, *Graham*, *Miller*, and *Montgomery*, as a structural matter, the absence of such fact-finding invites arbitrary and racially biased sentencing. Sentencing judges must make a permanent incorrigibility finding before sentencing a juvenile to life without parole to avoid impermissibly arbitrary sentencing. Without this fact-finding

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[37] 784 S.E.2d 403, 412 (Ga. 2016).
[38] *Landrum*, 192 So. 3d at 466-68.

requirement, judges are more likely to take improper factors into account (whether consciously or subconsciously), disregard relevant information, and allow their biases, including racial biases, to influence their sentencing decisions. If this Court does not grant review and reverse the decision below, juvenile life without parole sentences will not be reserved for only the rarest cases where rehabilitation is truly impossible, but instead will be (and already have been) imposed against juveniles who are capable of reform, and who are disproportionately Black.

Mississippi has been one of the most punitive states in the nation when it comes to resentencing post-*Miller*—over a quarter of people were again sentenced to life without parole for offenses they committed as children.[39] In other words, Mississippi courts apparently consider over a quarter of defendants at post-*Miller* resentencings to be among the "rarest" of offenders who have no capacity for change and for whom rehabilitation is impossible—even, in instances such as Joey Chandler's case, where there is ample evidence of rehabilitation.

Moreover, failing to require fact-finding related to permanent incorrigibility introduces a serious risk that racial discrimination will infect the sentencing of juvenile offenders who committed homicide crimes. The racial disparities that plague the criminal justice system start at a young age and have a particularly

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[39] OFF. OF STATE PUBLIC DEF., MISS., JUVENILE LIFE WITHOUT PAROLE IN MISSISSIPPI 3 (2018).

severe impact on Black boys. While Black children comprise less than 14 percent of all youth under the age of 18 in the United States, Black boys make up 43 percent of the male population confined in juvenile facilities.[40] In Mississippi, Black children are six times more likely than white children to receive adjudications or sentences causing them to be locked up in juvenile facilities, a racial gap that increased by 79 percent between 2003 and 2013.[41] This racial disparity cannot be explained by differences in offending status or delinquent behaviors, which are minimal between Black and white youth.[42]

The federal government has long recognized the racial disparities in the juvenile justice system. In 1988, "in response to overwhelming evidence that minority youth were disproportionately confined in the nation's secure facilities," Congress amended the Juvenile Justice and Delinquency Prevention Act (42 U.S.C. § 5601, *et seq*.) to require that states address racial inequality—referred to as "Disproportionate Minority Contact" or "DMC"—in their juvenile

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[40] WENDY SAWYER, PRION POLICY INST., YOUTH CONFINEMENT: THE WHOLE PIE (Feb. 27, 2018), https://www.prisonpolicy.org/reports/youth2018.html.

[41] THE SENTENCING PROJECT, POLICY BRIEF: RACIAL DISPARITIES IN YOUTH COMMITMENTS AND ARRESTS 10, 12 (2016).

[42] *See id.* at 6 ("Researchers have found few group differences between youth of color and white youth regarding the most common categories of youth arrests. While behavioral differences exist, black and white youth are roughly as likely to get into fights, carry weapons, steal property, use and sell illicit substances, and commit status offenses, like skipping school.").

systems.[43] In 1992, DMC was elevated to a "core requirement," with the mandate that "each state must address efforts to reduce the proportion of youth . . . confined in secure detention facilities . . . who are members of minority groups if it exceeds the proportion of such groups in the general population."[44]

Racial disparities have been especially pronounced with respect to life without parole sentences for children. Shortly before *Graham* and *Miller*, Black youth were subject to such sentences at a rate ten times higher than that of white children.[45] And for Black youth convicted of killing a white victim, the odds of being sentenced to life without parole are even higher, particularly when compared to a white defendant convicted of killing a Black victim.[46]

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[43] HEIDI HSIA, OFF. OF JUV. JUST. & DELINQ. PREVENTION, DEP'T OF JUST., DISPROPORTIONATE MINORITY CONTACT TECHNICAL ASSISTANCE MANUAL 1 (4th ed. 2009).

[44] OFF. OF JUV. JUST. & DELINQ. PREVENTION, DEP'T OF JUSTICE, A DISPROPORTIONATE MINORITY CONTACT (DMC) CHRONOLOGY: 1988 TO DATE, https://www.ojjdp.gov/dmc/chronology.html (last visited September 30, 2018).

[45] Letter from the United States & Int'l Human Rights Orgs. to the Comm'n on the Elimination of Racial Discrimination 2 (June 4, 2009), http://www.aclu.org/files/pdfs/humanrights/jlwop_cerd_cmte.pdf.

[46] *See* THE SENTENCING PROJECT, SHADOW REPORT OF THE SENTENCING PROJECT TO THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION 3 (2014).

Such disparities result in part from racial stereotypes, which perpetuate biases that inflict harms on Black lives. One stereotype that has plagued Black boys is the myth of the "super-predator"—an especially depraved, immoral, relentless, and dangerous class of teenage offenders, molded in stereotypes of racial criminality, who are responsible for the most heinous crimes.[47] In 1995, John J. DiLulio, Jr., then a professor of criminology at Princeton University, coined the term "super-predator," which he described as "tens of thousands of severely morally impoverished" and "super crime-prone young males . . . on the horizon."[48] For "super-predators," according to DiLulio, committing acts like "murder [and] rape" comes "naturally."[49] And if there were any doubt as to whom DiLulio was describing, he clarified that "the trouble will be greatest in black inner-city neighborhoods."[50] The myth of the super-predator spread across the country, influencing policies locally and nationally,[51] shaping harsh

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[47] *See, e.g.*, Peter Annin, *Superpredators' Arrive*, NEWSWEEK, Jan. 22, 1996, at 57; David Gergen, Editorial, *Taming Teenage Wolf Packs*, U.S. NEWS & WORLD REP., Mar. 17, 1996, at 68; Richard Zoglin, *Now for the Bad News: A Teenage Time Bomb*, TIME, Jan. 15, 1996, at 52.

[48] John DiLuluio, *The Coming of the Super-Predators*, WEEKLY STANDARD (Nov. 27, 1995), https://www.weeklystandard.com/john-j-dilulio-jr/the-coming-of-the-super-predators.

[49] *Id.*

[50] *Id.*

[51] At the end of 1995, President Clinton called "juvenile violence" "the number one crime problem in America." William J. Clinton,

juvenile justice laws and contributing to a climate that encouraged life without parole sentences for children.[52] Many of these punitive measures, which included laws to remove discretion from juvenile court judges and to make it easier to sentence children as adults,[53] have continued despite the thorough discrediting of the "super-predator" myth and the sharp decline in the juvenile crime rate.[54]

If this Court permits judges to sentence juveniles to life without parole without requiring an incorrigibility finding or consideration on the record of all the relevant factors, there is a serious risk that these racist stereotypes could either explicitly or implicitly affect the sentencing decision. The disparities in the criminal justice system generally, and juvenile justice system in particular, are driven by harmful stereotypes about the dangerousness of Black people, and especially Black males. This Court

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Statement on the Report on Juvenile Crime (Nov. 11, 1995), http://www.presidency.ucsb.edu/ws/index.php?pid=50761.

[52] The Campaign for the Fair Sentencing of Youth, *From the Desk of the Director: Black History Month* (Feb. 28, 2018), https://www.fairsentencingofyouth.org/desk-director-black-history-month/.

[53] *See* David S. Tanenhaus & Steven A. Drizin, *"Owing to the Extreme Youth of the Accused": The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 642 (2002).

[54] *See, e.g.*, OFF. OF SURGEON GEN., YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL (2001), https://www.ncbi.nlm.nih.gov/books/NBK44294/ (debunking the "super-predator" myth and repudiating the racial mythology that youth of color were more likely to become involved in youth violence).

has sought to eradicate the pernicious influence of such stereotypes in the criminal justice system.[55] In *Buck v. Davis*, for example, this Court reversed a death penalty sentence because testimony was introduced at trial relying on the false and repugnant stereotype that the defendant was more prone to commit criminal acts of violence because he was Black.[56]

With respect to implicit biases in the criminal justice system, studies have shown that such biases directly affect people's views of Black men and boys. Perhaps one of the most famous examples of this is the "shooter bias" studies.[57] These studies involve "custom-designed video games" where "participants are instructed to shoot the bad guys, regardless of race, but not to fire at the innocent bystanders."[58] The studies found that participants have a "propensity to shoot Black perpetrators more quickly and more frequently than White perpetrators and to decide not to shoot White bystanders more quickly and frequently than Black bystanders."[59]

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[55] *Rose v. Mitchell*, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.").
[56] 137 S. Ct. 759 (2017).
[57] Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 155 (2010).
[58] *Id.*
[59] *Id.*

Another study demonstrated that, as compared to similarly situated white children, people are likely to perceive Black children as older, less innocent, and more culpable.[60] Yet another study found that simply bringing to mind a Black juvenile defendant as opposed to a white juvenile defendant led participants to be significantly more likely to consider a child's inherent culpability as similar to that of an adult and to favor more severe sentencing.[61]

Judges are not immune from these racial biases. In one study, researchers "found a strong white preference among white [trial] judges," stronger even than that observed among a sample of white subjects from the general population obtained online.[62] By contrast, Black judges did not show a clear racial preference.[63] Another study of trial judges found that trial judges often rely on intuitive, rather than deliberative, decisionmaking processes, which risks leading to reflexive, automatic judgments, such as intuitively "associat[ing] . . . African Americans with violence."[64] Yet another study found that "judges harbor the same kinds of implicit biases as others [and] that these biases can influence their

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[60] *See* Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 540 (2014).

[61] Aneeta Rattan et al., *Race and the Fragility of the Legal Distinction between Juveniles and Adults*, 7 PLOS ONE 5 (May 2012).

[62] Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1210 (2009).

[63] *Id.*

[64] Bennett, *supra* note 57, at 156-57.

judgment."[65] Judges' biases undoubtedly contribute to the fact that "at virtually every stage of the juvenile justice process, Black youth receive harsher treatment than white youth, even when faced with identical charges and offending histories."[66]

Requiring specific fact-finding—such as a finding about incorrigibility—based on a full review of the relevant evidence mitigates the risk that these biases will affect judicial decisionmaking. In a publication advising judges on how to "combat implicit bias on the bench," for example, the American Bar Association recommends the strategy of "Individuation," which includes "gathering very specific information about a person's background, tastes, hobbies and family so that your judgment will consider the particulars of that person, rather than group characteristics."[67] Research demonstrates that "individuation, or the process of seeing others as being more than stereotypes, requires both having and focusing on 'individuating information.'"[68] When judges lack

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[65] *Id.* at 157.

[66] Ellen Marrus & Nadia N. Seeratan, *What's Race Got to Do with It? Just About Everything: Challenging Implicit Bias to Reduce Minority Youth Incarceration in America*, 8 J. MARSHALL L. J. 437, 440 (2015).

[67] Am. Bar Ass'n, *Judges: 6 Strategies to Combat Implicit Bias on the Bench* (Sept. 2016), https://www.americanbar.org/publications/youraba/2016/september-2016/strategies-on-implicit-bias-and-de-biasing-for-judges-and-lawyer.html.

[68] Sean Darling-Hammond, *Designed to Fail: Implicit Bias in Our Nation's Juvenile Courts*, 21 U.C. DAVIS J. JUV. L. & POL'Y 169, 186 (2017) (quoting Kurt Hugenberg et al., *The Categorization Individuation Model: An Integrative Account of*

factual individuating information, or choose to not consider it, they "may struggle to view out-group members (like Black juveniles) through non-stereotypical lenses."[69]

The persistence of racist stereotypes about Black boys, culpability, and dangerousness highlights the importance of requiring a permanent incorrigibility finding before sentencing a juvenile offender to life without parole. While not a foolproof bulwark, permanent incorrigibility findings direct judges to make sentencing decisions grounded in the record and predicated on proper considerations. That reduces the risk of arbitrariness and racial bias.

Finally, the permanent incorrigibility finding required by this Court's precedent is necessary to ensure meaningful appellate review and encourage public confidence in the judicial system.[70] Without such a finding, appellate judges are not in a position to determine whether and why a trial judge determined that a child was among those few defendants whose crime reflects incorrigibility. Nor can appellate judges ensure uniformity in such sentencing decisions. This, in turn, harms public confidence in the judicial system, particularly given

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the Other-Race Recognition Deficit, 117 PSYCHOL. REV. 1168 (2010)).

[69] *Id.*

[70] *Cf. Gall v. United States*, 552 U.S. 38, 50 (2007) ("After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.").

the severity of the sentence and the risk of it being imposed in a biased and arbitrary fashion.

CONCLUSION

This Court should grant certiorari to resolve the divide among the courts about whether the Eighth Amendment requires judges to find permanent incorrigibility before sentencing a juvenile offender to life without parole. The jurisdictions that do not require a permanent incorrigibility finding, including Mississippi, have failed to heed *Montgomery* and *Miller*—which clearly require such a finding—and therefore are failing to ensure that life without parole sentences are reserved for the "rarest of juvenile offenders."

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