IN THE
INDIANA SUPREME COURT

No. _____

Court of Appeals No. 18A05-1612-PC-2817

LARRY NEWTON, JR. Appellant/Petitioner, v. STATE OF INDIANA Appellee/Respondent.	Appeal from the Delaware Circuit Court Cause No. 18D01-9410-CF-46 The Honorable Linda Ralu Wolf, Judge.

BRIEF OF AMICI CURIAE JUVENILE LAW CENTER AND CHILDREN AND FAMILY JUSTICE CENTER ON BEHALF OF APPELLANT

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INTEREST OF *AMICI*

Juvenile Law Center, founded in 1975, is the oldest public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Among other things, Juvenile Law Center works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and; that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

The **Children and Family Justice Center (CFJC)**, part of Northwestern University Law School's Bluhm Legal Clinic, was established in 1992 as a legal service provider for children, youth, and families, as well as a research and policy center. Currently, clinical staff at the CFJC provide advocacy on policy issues affecting children in the legal system, and legal representation for children, including in the areas of delinquency and crime, immigration/asylum, and fair sentencing practices. In its 25-year history, the CFJC has filed numerous briefs as an amicus curiae in this Court and in state supreme courts based on its expertise in the representation of children in the legal system. *See, e.g.*, Amicus Br., Montgomery v. Louisiana, 135 S. Ct. 1546 (2015) (No. 14-280), 2015 WL 4624620; Amicus Br., Watson v. Illinois, 136 S. Ct. 399 (2015) (No. 14-9504), 2015 WL 3452842.

SUMMARY OF ARGUMENT

In *Miller v. Alabama*, the U.S. Supreme Court held that the mandatory imposition of life without parole sentences on juvenile offenders convicted of murder is cruel and unusual punishment. 567 U.S. 460, 465 (2012). Four years later in *Montgomery v. Louisiana*, the Court held that *Miller* created a new substantive rule of constitutional law that must apply retroactively. 136 S. Ct. 718, 729 (2016).

Miller's mandate—that a sentencing court must consider youth and the hallmark characteristics attendant to youth prior to imposing a life without parole sentence—is being implemented in courts across the country. Courts are faced with the task of reexamining hundreds, and possibly thousands of unconstitutional mandatory life without parole sentences using the specific factors set forth in *Miller* to ensure that only the rarest of juvenile offenders whose crimes reflect permanent incorrigibility may be sentenced to life without the possibility of parole. Courts are likewise using the *Miller* factors to ensure the rarity of life without parole sentences for individuals who are not subject to mandatory sentencing schemes. States across the country have also responded to the Supreme Court's mandate in *Miller* by establishing new sentencing schemes that create alternative sentences with parole eligibility, and by eliminating life without parole sentences for subsets of juvenile offenders or simply for all juveniles.

Yet in the instant case, *Miller*'s mandate has been ignored. Rather than resentencing Larry Newton, Jr. using the guidelines and considerations set forth in *Miller*, the reviewing court relied on Newton's guilty plea to a life without parole sentence years before the Supreme Court decided *Miller* or *Montgomery*. This pre-*Miller* guilty plea cannot and does not take the place of a resentencing hearing as contemplated by *Miller* because it failed to appropriately consider youth

and its attendant characteristics. This Court should review the instant case to ensure Indiana's sentencing procedures comport with *Miller* and *Montgomery*.

ARGUMENT

I. *MILLER* AND *MONTGOMERY* ESTABLISH A PRESUMPTION AGAINST SENTENCING A JUVENILE TO LIFE WITHOUT PAROLE.

The U.S. Supreme Court advises that "given all we have said in *Roper, Graham,* and [*Miller*] about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty [life without parole] will be *uncommon*." *Miller*, 567 U.S. at 479 (emphasis added). In *Montgomery*, the Court explained that *Miller* announced a new substantive rule of constitutional law: *Miller* "did bar life without parole . . . for all but the rarest of juvenile offenders, *those whose crimes reflect permanent incorrigibility*." *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (emphasis added). "*Miller* drew a line between children whose crimes reflect transient immaturity and *those rare children whose crimes reflect irreparable corruption*," *id*. (emphasis added), noting that a life without parole sentence "could [only] be a proportionate sentence for the latter kind of juvenile offender." *Id*. *Graham* acknowledged that the salient characteristics of youth—the lack of maturity, evolving character, vulnerability and susceptibility to negative influences and external pressure—would make it "difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Graham v. Florida*, 560 U.S. 48, 68 (2011) (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)). The Court recognized that the vast majority of juvenile offenses reflect transient immaturity that is a result of adolescent behavioral and neurological development. *Id.*

Read together, *Miller, Montgomery*, and their progeny establish a presumption against juvenile life without parole, limiting the sentence only to those cases where the juveniles' crimes reflect "irreparable corruption," not transient immaturity. Indeed, after *Montgomery* was remanded, the Louisiana Supreme Court held that the resentencing authority was to "determine whether [Montgomery] was 'the rare juvenile offender whose crime reflects irreparable corruption,' or he will be eligible for parole." *State v. Montgomery*, 194 So. 3d 606, 607 (La. 2016) (per curiam) (quoting *Miller*, 567 U.S. at 479–80). *See also Miller*, 567 U.S. at 471 (a juvenile's "traits are 'less fixed' and his actions are less likely to be 'evidence of irretrievabl[e] deprav[ity]'" (quoting *Roper*, 543 U.S. at 570)); *id.* at 472 ("Deciding that a 'juvenile offender forever will be a danger to society' would require 'mak[ing] a judgment that [he] is incorrigible'—but 'incorrigibility is inconsistent with youth.'" (alterations in original) (quoting *Graham*, 560 U.S. at 72–73)).

In fact, a majority of states that have considered this issue have found—either explicitly or implicitly—such a presumption against juvenile life without parole sentences. *See e.g.*, *State v. Riley*, 110 A.3d 1205, 1214 (Conn. 2015), *cert. denied*, 136 S. Ct. 1361 (2016); *State v. Seats*, 865 N.W.2d 545, 555 (Iowa 2015); *State v. Hart*, 404 S.W.3d 232, 241 (Mo. 2013) (en banc). Most recently, the Pennsylvania Supreme Court, in *Commonwealth v. Batts*, 163 A.3d 410, 416 (Pa. 2017), held that there must be a presumption against the imposition of life without parole sentences. The court reasoned that "a faithful application of the holding in *Miller*, as clarified in *Montgomery*, requires the creation of a presumption against sentencing a juvenile offender to life in prison without the possibility of parole." *Id.* at 452.

A presumption against life without parole sentences requires a sentencer to recognize that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest

sentences on juvenile offenders, even when they commit terrible crimes," *Miller*, 567 U.S. at 472 (emphasis added), and that the vast majority of juvenile offenses are a reflection of transient immaturity inherent to adolescent behavioral and neurological development. See *id*. at 473 ("[N]one of what [Graham] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. Those features are evident in the same way, and to the same degree [no matter the crime]"). Judges must ensure that, due to the inherent immaturity and reduced culpability of children, only the truly rare and uncommon juvenile whose crime reflects irreparable corruption is sentenced to life without parole. *Id*. *See also Batts*, 163 A.3d at 452 ("Only in 'exceptional circumstances' will life without the possibility of parole be a proportionate sentence for a juvenile." (quoting *Montgomery*, 136 S. Ct. at 736)).

Thus, the bar for sentencing a youth to life without parole is intentionally high and requires much more than a cursory evaluation. Mr. Newton, however, who accepted a plea to avoid the death penalty (which is itself now an unconstitutional penalty), did not have a sentencing hearing, much less one where a judge meaningfully considered Mr. Newton's youth or evaluated whether Mr. Newton's crime was one that reflected his transient immaturity or one that reflected permanent incorrigibility. Certainly, the trial court did not conduct a sentencing hearing that presumed that a life without parole sentence would be improper—a hearing that asked how Mr. Newton's youthfulness and its attendant characteristics counseled against irrevocably sentencing him to a lifetime in prison.

II. CONSIDERATION OF YOUTH AT A PRE-*MILLER* SENTENCING HEARING FAILS TO SAFEGUARD AGAINST DISPROPORTIONALITY UNDER CURRENT EIGHTH AMENDMENT JURISPRUDENCE.

Justice Sotomayor made clear in her concurrence in *Tatum v. Arizona* that a mere recitation of the age of the individual or consideration of youthful attributes in a checklist fashion is insufficient:

> It is clear after *Montgomery* that the Eighth Amendment requires more than mere consideration of a juvenile offender's age before the imposition of a sentence of life without parole. It requires that a sentencer decide whether the juvenile offender before it is a child "whose crimes reflect transient immaturity" or is one of "those rare children whose crimes reflect irreparable corruption" for whom a life without parole sentence may be appropriate.

137 S. Ct. 11, 13 (2016) (Sotomayor, J., concurring) (mem.) (quoting *Montgomery*, 136 S. Ct. at 734).[1] When "[t]here is no indication that, when the factfinders . . . considered petitioners' youth, they even asked the question *Miller* required them not only to answer, but to answer correctly: whether petitioners' crimes reflected 'transient immaturity' or 'irreparable corruption,'" remand is required. *Adams v. Alabama*, 136 S. Ct. 1796, 1800 (2016) (Sotomayor, J., concurring) (mem.) (quoting *Montgomery*, 136 S. Ct. at 734); *see also Tatum*, 137 S. Ct. at 13 (Sotomayor, J., concurring) (mem.). Justice Sotomayor reasoned that remand was required because "none of the sentencing judges addressed the question *Miller* and *Montgomery* require a sentencer to ask: whether the petitioner was among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'" *Tatum*, 137 S. Ct. at 12 (quoting *Montgomery*, 136 S. Ct. at 734). In the instant matter, as in *Tatum*, although the trial court addressed mitigating circumstances of Newton's age at the time of the offense, there is no indication that it did a meaningful analysis of

[1] The Court noted that Justice Sotomayor's concurring opinion in *Tatum* "also applies to No. 15–8842, *Purcell* v. *Arizona*; No. 15–8878, *Najar* v. *Arizona*; No. 15–9044, *Arias* v. *Arizona*; and No. 15–9057, *DeShaw* v. *Arizona*." *Tatum*, 137 S. Ct. at 11 n.1.

all of the *Miller* factors, or that it made a determination as to whether his crime was merely a reflection of "transient immaturity," or truly signified "irreparable corruption." *Id*. at 13. As the trial court sentenced Mr. Newton decades before *Miller* or *Montgomery* were decided, it was unable to benefit from the guidance that the U.S. Supreme Court has since provided on what proper consideration of youthful mitigation entails. Therefore, the life sentence the court imposed on Mr. Newton is deficient until reexamined.

State supreme courts have likewise considered the constitutionality of life without parole sentences and their decisions turn on whether the trial court considered youth and its attendant characteristics as mitigating factors in a truly meaningful manner. *See Miller*, 567 U.S. at 477. These courts have acknowledged the practical difficulties in attempting to evaluate pre-*Miller* hearings even in "discretionary" cases under post-*Miller* standards. *See e.g.*, *Riley*, 110 A.3d at 1217 (where sentencing proceeding contained only one "oblique" reference to the youth's age and did not reflect that court "considered and gave mitigating weight to the defendant's youth and its hallmark features," a new sentencing hearing was required); *State v. Long*, 8 N.E.3d 890, 899 (Ohio 2014) (resentencing ordered where sentence "did not comport with the newly announced procedural strictures of *Miller v. Alabama*"); *Aiken v. Byars*, 765 S.E.2d 572, 576–77 (S.C. 2014) (life without parole sentences were unconstitutional in cases where some hearings "touch[ed] on issues of youth," but "none of them approach[ed] the sort of hearing envisoned by *Miller* where the factors of youth are carefully and thoughtfully considered"); *People v. Gutierrez*, 324 P.3d 245, 270 (Cal. 2014) (where sentencing courts operated without *Miller*'s guidance under "a governing presumption in favor of life without parole," new sentencing hearing was required).

For example, the Florida Supreme Court held that Florida's existing, pre-*Miller* parole system was incompatible with *Miller* and *Montgomery*, despite its requirement of an opportunity for

parole after twenty-five years, because it did not provide for "individualized consideration of [the defendant's] juvenile status at the time of the murder" and required him to serve the equivalent of a life sentence. *Atwell v. State*, 197 So. 3d 1040, 1041–42 (Fla. 2016), *reh'g denied*, No. SC14–193, 2016 WL 4440673 (Fla. Aug. 23, 2016) (noting that Florida's parole process failed to recognize "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," as required by *Miller*). The Florida Supreme Court echoed *Miller*, finding that discretionary life without parole sentences are unconstitutional in violation of the Eighth Amendment for juveniles convicted of second degree murder. *Landrum v. State*, 192 So. 3d 459, 460 (Fla. 2016). *Cf. People v. Holman*, No. 120655, 2017 IL 120655, at *12 (Ill. Sept. 21, 2017) (applying *Miller* to discretionary life without parole sentences, but finding defendant's 1981 sentencing hearing "passes constitutional muster").

The Georgia Supreme Court took *Miller's* and *Montgomery's* directives even further, noting the U.S. Supreme Court's emphasis on the extreme unlikelihood that a juvenile offender is incapable of rehabilitation:

> The *Montgomery* majority explains, however, that by *uncommon, Miller* meant *exceptionally rare,* and that determining whether a juvenile falls into that exclusive realm turns not on the sentencing court's consideration of his age and the qualities that accompany youth along with all of the other circumstances of the given case, but rather on a specific determination that he is *irreparably corrupt.* Thus, *Montgomery* emphasizes that a LWOP sentence is permitted only in "*exceptional* circumstances," for "the *rare* juvenile offender who exhibits such *irretrievable depravity* that rehabilitation is *impossible* "; for those "*rarest* of juvenile offenders . . . whose crimes reflect *permanent incorrigibility* "; for "those *rare* children whose crimes reflect *irreparable corruption* "—and not, it is repeated twice, for "the vast majority of juvenile offenders."

Veal v. State, 784 S.E.2d 403, 411 (Ga. 2016) (citation omitted). In *Veal*, the Georgia Supreme Court vacated the life without parole sentence and remanded for resentencing because the trial

court had not followed *Miller* and made a specific finding of irreparable corruption or permanent incorrigibility. *Id.* at 412.

III. JUVENILE LIFE WITHOUT PAROLE SENTENCES CATEGORICALLY FAIL TO DISTINGUISH BETWEEN ACTIONS REFLECTING TRANSIENT IMMATURITY AND IRREPARABLE CORRUPTION.

Miller "did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of the distinct attributes of youth." *Montgomery*, 136 S. Ct. at 734. When applied solely on a prospective basis, *Miller*'s shortcoming is that it forces a once-and-for-all finding regarding incorrigibility even though the best evidence to make that judgment is ultimately unavailable for years, if not decades, after the original sentencing determination.

The risk of a jury or judge erroneously determining that a child is irretrievably depraved or permanently incorrigible is real and untenable under the reasoning of *Roper*, *Graham*, *Miller*, and *Montgomery.* In fact, it is more than simply a risk of an erroneous determination, as the American Psychological Association stressed:

> [T]here is no reliable way to determine that a juvenile's offenses are the result of an irredeemably corrupt character; and there is thus no reliable way to conclude that a juvenile—even one convicted of an extremely serious offense—should be sentenced to life in prison, without any opportunity to demonstrate change or reform.

Brief for the American Psychological Association et al. as Amici Curiae in Support of Petitioners at 25, *Miller v. Alabama*, 567 U.S. 460 (2012), (Nos. 10-9646 & 10-9647). *See also Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 573 (acknowledging that the salient characteristics of youth—the lack of maturity, evolving character, vulnerability and susceptibility to negative influences and external pressure—would make it "difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient

immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.")). Courts should not sanction such risk; life without parole sentences for children should be barred.[2]

A state may only incarcerate for life those whose crimes reflect permanent incorrigibility and irreparable corruption. *Montgomery*, 136 S. Ct. at 734. All other youth are exempt from this sentence. Although the Georgia Supreme Court required a specific finding of incorrigibility in *Veal*, neither it nor the United States Supreme Court elucidated how a trial court may determine that a young person convicted of a crime is incorrigible. Other states, having noted this difficulty in making determinations of whether a juvenile is "irretrievably corrupt" at the time of sentencing, have opted instead to ban all life without parole sentences for juveniles. *See, e.g., Diatchenko v. Dist. Att'y*, 1 N.E.3d 270, 281–285 (Mass. 2013) (barring life without parole sentences as violative of the Massachusetts constitution); *State v. Sweet*, 879 N.W. 2d 811 (Iowa 2016).

What should a state such as Indiana do when confronted with an individual like Larry Newton, Jr., who has since matured and taken extraordinary steps towards rehabilitation?[3] This Court should hold that any life without the possibility of parole sentence for juveniles is unconstitutional because the test outlined in *Miller* and *Montgomery* has created an unworkable standard. It is virtually impossible for judges to separate the truly incorrigible from those whose crimes reflect transient immaturity, and who will grow and mature over time.

[2] Section 18 of Article I of the Indiana Constitution recognizes that its penal code is founded on principles of reformation, and not of vindictive justice. As the U.S. Supreme Court has repeatedly stressed that potential for rehabilitation is particularly acute for youthful offenders, this Court should evaluate that potential in conformity with the philosophical principles on which this state is based.

[3] The answer cannot be, as the appellate court here suggests, to ignore any post-sentencing behavior, when such behavior answers the "central intuition" of *Miller*, *Montgomery,* and its progeny: that children who commit even heinous crimes are capable of change. *Montgomery*, 136 S. Ct. at 736.

Importantly, a constitutional requirement that juvenile offenders be afforded a meaningful opportunity for release does not rob a state of its ability to incarcerate an incorrigible criminal for his entire life or protect its law-abiding citizens from dangerous people. *Miller*, 567 U.S. at 479–80. These penological goals can still be realized through even the broadest interpretations of *Miller* and *Montgomery*. But rather than attempt to make a determination of permanent incorrigibility at the time of sentencing, trial courts or parole boards are better able to assess a juvenile offenders' growth and rehabilitation after they have had the benefit of time and maturity to distance themselves from their youthful transgressions.

Just as the Eighth Amendment now requires that states provide meaningful review and the potential for release to juveniles who commit non-homicide crimes, this Court should likewise categorically ban all juvenile life without parole sentences. To do otherwise would be to forswear the rehabilitative potential shared by youth. Moreover, as Supreme Court Justices acknowledge that the Court has made this sentence a "practical impossibility," *Montgomery*, 136 S. Ct. at 744 (Scalia, J., dissenting), this Court should find that natural life sentences for juveniles do not comport with contemporary societal norms and should be eliminated in favor of a sentencing scheme that permits meaningful review.

Legislatures as well as courts have responded to *Miller*'s mandate. In the five years since *Miller* was decided, the number of states that ban life sentences for juveniles has nearly quadrupled, reflecting a rapid rate of change and an emerging national view that all children, regardless of their offense, must have a meaningful opportunity for release. In 2012, only five states banned life without parole sentences for juveniles.[4] Today eighteen states and the District of Columbia ban juvenile life without parole sentences either through legislation or a judicial

[4] Alaska, Colorado, Kansas, Kentucky, and Montana.

determination.[5] An additional four states—California, Florida, New York, and New Jersey—ban the practice in nearly all cases and three states—Maine, New Mexico, and Rhode Island—have never sentenced a juvenile to life without parole. The Campaign for the Fair Sentencing of Youth, *Righting Wrongs: The Five-Year Groundswell of State Bans on Life without Parole for Children* 4 (2016), http://fairsentencingofyouth.org/wp-content/uploads/2016/09/Righting-Wrongs-.pdf.

The U.S. Supreme Court has "emphasized the importance of state legislative judgments in giving content to the Eighth Amendment ban on cruel and unusual punishment," *Moore v. Texas*, 137 S. Ct. 1039, 1056 (2017) (Roberts, C.J., dissenting), and considers the rate of legislative change in assessing the constitutionality of a sentencing practice. The trend toward banning juvenile life without parole underscores the constitutional impermissibility of sentencing juveniles to life in prison.

CONCLUSION

As Justice Scalia's trenchant dissent in *Montgomery* explained, "if, indeed, a State is categorically prohibited from imposing life without parole on juvenile offenders whose crimes do not 'reflect permanent incorrigibility,' then even when the procedures that *Miller* demands are provided[,] the constitutional requirement is not necessarily satisfied. It remains available for the defendant sentenced to life without parole to argue that his crimes did not in fact 'reflect permanent incorrigibility.'" *Montgomery*, 136 S. Ct. at 743–44 (Scalia, J., dissenting). Indiana's current

[5] ALASKA STAT. § 12.55.015(g) (1997); ARK. CODE ANN. § 5-4-108 (2017); COLO., REV. STAT. §§ 17-22.5-104(2)(d)(IV), 18-1.3-401(4)(b)(1)(2006); CONN. GEN. STAT. § 54-125a(f) (2015); D.C. CODE § 22-2104(a) (2001); HAW. REV. STAT. § 706-656 (2014); *Sweet*, 879 N.W. 2d 811; KAN. STAT. ANN. § 21-6618 (2010); KY. REV. STAT. ANN. § 640.040(1) (1986); *Diatchenko*, 1 N.E.3d at 286-87; MONT. CODE. ANN. § 46-18-222(1); NEV. REV. STAT. § 176.025 (2015); NORTH DAKOTA HB 1195 (2017); S.D. CODIFIED LAWS § 22-6-1 (2016); TEX. PENAL CODE ANN. § 12.31 (2013); UTAH CODE ANN. § 76-3-209 (2016); VT. STAT. ANN. tit. 13, § 7045 (2015); *State v. Bassett*, No. 47251-1-II, 2017 WL 1469240 (Wash. Ct. App. Apr. 25, 2017); W.VA. CODE § 61-11-23 (2014); WYO. STAT. ANN. § 6-2-101(b) (2013).

sentencing structure creates the risk that individuals like Mr. Newton will serve disproportionate penalties. In his dissenting opinion, Justice Scalia noted that it was impossible to determine "whether a 17-year-old who murdered an innocent sheriff's deputy half a century ago was at the time of his trial 'incorrigible.'" *Id.* at 744. Because judges can neither look to the future, nor back in time, to make accurate determinations about which children are a permanent threat to society, they are left with only guesses and speculation—neither of which comply with the standard set forth in *Miller* and *Montgomery*.

For the foregoing reasons, *Amici Curiae* respectfully request that this Court grant review of the instant case.

Respectfully submitted, this the 6th day of October, 2017.

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CERTIFICATE OF WORD COUNT

I verify that this brief contains no more than 4,200 words as calculated by the word processing software used to prepare this brief and excluding the parts of the brief excluded from length limits by Indiana Rule of Appellate Procedure 44(C).

/s/ Scott F. Bieniek
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CERTIFICATE OF SERVICE

I certify that the foregoing document was served through the IEFS upon Stephen T. Owens and Joanna Lyn Green, counsel for Appellant, and Ellen Hope Meilaender and Jodi Kathryn Stein, counsel for Appellee on October 6, 2017.

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