No. 18-1259

IN THE

Supreme Court of the United States

BRETT JONES,

Petitioner,

v.

MISSISSIPPI,

Respondent.

On Writ of Certiorari to the Mississippi Court of Appeals

BRIEF FOR PETITIONER

JACOB HOWARD
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
767 North Congress Street
Jackson, MS 39202
(769) 233-7538

JEFFREY T. GREEN
DAVID A. GOLDENBERG
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, D.C. 20005
(202) 736-8000

DAVID M. SHAPIRO *
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
NORTHWESTERN PRITZKER SCHOOL OF LAW
375 E. Chicago Avenue
Chicago, IL 60611
(312) 503-0711
david.shapiro@law.northwestern.edu

Additional counsel on inside cover
Counsel for Petitioner

* Counsel of Record

June 5, 2020

AMIR H. ALI
ELIZA MCDUFFIE†
RODERICK & SOLANGE
MACARTHUR JUSTICE
CENTER
777 6th Street, NW,
11th Floor
Washington, D.C. 20001
(202) 869-3434

MARLOW SVATEK
ANDREW F. RODHEIM
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

†*Admitted only in New York; not admitted in D.C. Practicing under the supervision of the Roderick & Solange MacArthur Justice Center*

QUESTION PRESENTED

Whether the Eighth Amendment requires the sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Brett Jones. Respondent is the State of Mississippi. No party is a corporation.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

CONSTITUTION AND STATUTES

OTHER AUTHORITIES

INTRODUCTION

This case is easily resolved under the plain rule of *Miller* v. *Alabama* and *Montgomery* v. *Louisiana*: The Eighth Amendment "bar[s] 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); *Miller* v. *Alabama*, 567 U.S. 460, 479–80 (2012). To enforce that rule, a court must determine whether a juvenile homicide offender is permanently incorrigible. If the court finds that he is, then a life-without-parole sentence complies with the Eighth Amendment. If the court finds he is not permanently incorrigible, that sentence is an "unconstitutional penalty." *Montgomery*, 136 S. Ct. at 734. The Court should vacate the life-without-parole sentence in this case for the simple reason that Mississippi's courts refused to make this essential determination.

Brett Jones was barely fifteen when he killed his grandfather during a fight about Brett's girlfriend. He was convicted of murder and sentenced to life without parole. In the proceedings below, Brett presented substantial evidence of his capacity for rehabilitation—evidence supporting his claim that he is not permanently incorrigible. No court even purported to resolve that question. Instead, the Mississippi courts maintained that *Miller* and *Montgomery* only require a sentencing court to follow a procedure—considering a set of factors related to youth—before sentencing a juvenile to life without parole.

Under *Miller* and *Montgomery*, courts must "d[o] more than . . . consider a juvenile offender's youth before imposing life without parole"—they must determine whether a juvenile homicide offender is one of

"the rarest of juvenile offenders[] . . . whose crimes reflect permanent incorrigibility." *Id.* at 734. To be sure, States have some discretion to craft the procedures that apply in making that essential determination. But they cannot dispense with the finding altogether. Otherwise, state courts would be "free to sentence a child whose crime reflects transient immaturity to life without parole" and would thereby "demean the substantive character of the federal right." See *id.* at 735.

OPINIONS BELOW

The order of the Circuit Court of Lee County, Mississippi sentencing Petitioner to life in prison without eligibility for parole (Pet. App. 57a) and the court's oral statement of reasons (Joint Appendix ("J.A.") 148–53) are unpublished. The Mississippi Court of Appeals' opinion affirming the sentence (Pet. App. 31a–56a) is published at 285 So. 3d 626. The Supreme Court of Mississippi's orders granting certiorari (Pet. App. 30a) and dismissing the writ (Pet. App. 1a–29a) are unpublished.

JURISDICTION

The Supreme Court of Mississippi dismissed its previously-granted writ of certiorari on November 29, 2018. Justice Alito extended the time to petition this Court for certiorari to March 29, 2019, and Petitioner timely filed a petition on that date. This Court granted certiorari on March 9, 2020 and has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT

1. Brett Jones turned fifteen on July 17, 2004. J.A. 71. Twenty-three days later, he killed his paternal grandfather, Bertis Jones, during a fight about Brett's girlfriend, Michelle Austin. *Jones* v. *State*, 122 So. 3d 725, 728 (Miss. Ct. App. 2011). Brett had come to stay with his grandparents in Mississippi approximately two months earlier to escape his mother and stepfather's violent household in Florida. J.A. 47, 58–60, 64; Pet. App. 37a–38a. In early August, Michelle ran away from her family's home in Florida and secretly joined Brett in Mississippi. Pet. App. 13a; *Jone*s v. *State*, 938 So. 2d 312, 313 (Miss. Ct. App. 2006).

On the morning of August 9, 2004, Mr. Jones discovered Michelle in Brett's bedroom and angrily ordered her out of his house. *Jones*, 122 So. 3d at 728. Later that day, Brett was making a sandwich when his grandfather entered the kitchen. *Jones*, 938 So. 2d at 314. The two began to argue. *Id*. Brett "sassed" Mr. Jones, and Mr. Jones pushed him. *Id.* Brett pushed him back. *Id.*

Mr. Jones then swung at Brett. *Id*. Brett "had a steak knife in his hand from making [the] sandwich" and "he 'threw the knife forward,' stabbing his grandfather." *Id*. When Mr. Jones continued to come at Brett, Brett grabbed a different knife, and stabbed Mr. Jones a total of eight times. *Id.* at 314–15.

Brett later testified that he stabbed Mr. Jones because he "was afraid" and "didn't know anything else to do because he was so huge." *Id*. at 314. Brett explained that his grandfather is "not really a big looking man until he gets in your face with his hands up and swinging at you, and then he turns into a giant.

And you just feel like there's no way out, no way to get away from him." *Id.*

When the altercation ended, Brett found Michelle, and the two set out for the Walmart in nearby Tupelo, Mississippi, where Brett's grandmother worked. *Id.* at 315. Brett wanted to tell his grandmother what happened. *Id.* Brett and Michelle were arrested at a gas station while trying to get a ride to the Walmart. *Id.* Brett admitted to police officers that he stabbed his grandfather. *Jones*, 122 So. 3d at 728–29.

Brett stood trial for murder in the Circuit Court of Lee County, Mississippi. Michelle Austin testified that after Mr. Jones ordered her out of the house, Brett told her that he was in trouble and that he was going to hurt his grandfather. *Jones*, 938 So. 2d at 314. The jury rejected Brett's self-defense claim and found him guilty of murder. *Id.* at 316. The circuit court imposed the mandatory minimum penalty, under which Brett would spend the rest of his life in prison without the possibility of parole. *Jones* v. *State*, 122 So. 3d 698, 699–701 (Miss. 2013) (en banc).

2. In 2013, following this Court's decision in *Miller* v. *Alabama*, 567 U.S. 460 (2012), the Mississippi Supreme Court granted Brett's motion for post-conviction relief, vacated his mandatory life-without-parole sentence, and remanded to the circuit court for a new sentencing hearing. *Jones*, 122 So. 3d at 703.

The Mississippi Supreme Court did not interpret *Miller* to restrict life-without-parole sentences only to permanently incorrigible juvenile homicide offenders. Instead, it opined that a court may impose a life-without-parole sentence on a juvenile so long as the court considers a set of youth-related factors when making its sentencing determination: "*Miller* rendered our present sentencing scheme unconstitution-

al *if, and only if*, the sentencing authority fails to take into account characteristics and circumstances unique to juveniles." *Id*. at 702 (emphasis added). The Mississippi Supreme Court therefore directed the circuit court to hold a hearing and consider a set of "juvenile characteristics and circumstances"—not to determine whether Brett is permanently incorrigible. *Id*. at 700. The Mississippi Supreme Court calls these considerations the "*Miller* factors."[1]

3. On remand to the circuit court, the State advocated for a sentence of life without parole. J.A. 147. Brett sought a sentence of life with eligibility for parole. *Id*. The State rested on the existing record and offered no new evidence. *Id*. at 23, 136. The defense called six witnesses: Brett, his paternal grandmother (Mr. Jones' widow), his mother, his younger brother, his cousin, and a corrections officer. *Id*. at 36–135; Pet. App. 37a.

Jerome Benton, the corrections officer, described Brett's rehabilitation while incarcerated, testifying that Brett was a "good kid" who tried to "do the right thing" and "got along with everybody." J.A. 109. Ac-

---

[1] According to the Mississippi Supreme Court the "*Miller* factors" are: (1) the juvenile offender's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences," (2) his "family and home environment," and the fact that a juvenile "cannot usually extricate himself [from his home]—no matter how brutal or dysfunctional," (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him," (4) whether "he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys," and (5) "the possibility of rehabilitation." *Parker* v. *State*, 119 So. 3d 987, 998, 995–96 (Miss. 2013) (en banc).

cording to Officer Benton, Brett sought out opportunities to work and "was a very good employee." *Id.* at 106. "Every time I looked up," Officer Benton testified, "[Brett] was standing there waiting on a job to do." *Id.* Other staff, including the warden, sought Brett out for jobs around the prison. *Id.* at 109.

Officer Benton testified that Brett had learned the Bible well, and that Brett and Officer Benton would discuss it. *Id.* at 107. Brett had earned his GED while incarcerated and hoped to take college courses. *Id.* at 108–09. In a prison rife "with violence and gang violence," Brett "didn't participate in none of that." *Id.* at 115.

Brett also testified about his development in prison, explaining that he has "tr[ied] to stay out of trouble." *Id.* at 134. Despite having served nearly a decade of a sentence that offered no possibility of release, Brett was "involved in only one significant disciplinary incident." Pet. App. 39a.

Brett stated: "My grandfather was my dad in my eyes . . . . He was the stable one. . . . I mean, I loved my grandfather to death . . . . I—yeah, I regret it." J.A. 132–33. Officer Benton confirmed that Brett had expressed remorse and "regret[]" for his crime. *Id.* at 112.

The other witnesses testified about challenges Brett faced in his childhood. Brett's father, a violent alcoholic who spent part of Brett's youth in prison, "knocked teeth out of [his mother's] face [and] . . . broke [her] nose several times." *Id.* at 71–72. His mother abused alcohol and "suffered from depression, bipolar disorder, manic depressive disorder, and a self-injury disorder," and often left Brett and his brother "alone and unattended when they were young." Pet. App. 38a. Residents of their apartment

building would call Brett's grandmother, complaining that Brett, left alone as a baby, "was screaming all night long." J.A. 40–41.

Brett's mother left his father when Brett was around two and a half, but her next husband was also a violent man. *Id.* at 71, 77. He would whip Brett with "the buckle end of a belt," beat him with a switch, and smack him with a Ping Pong paddle he called "The Punisher." *Id.* at 58, 78, 81. He would "poke" Brett "in the face" and "grab [him] by the neck." Pet. App. 37a. This brutality "left marks quite a few times" and could break the skin. J.A. 52, 68, 121.

Brett's only prior contact with the criminal justice system resulted from an incident in which he punched his abusive stepfather, who had grabbed Brett by the throat, "pulled a belt," and threatened to "beat the s***" out of him. *Id.* at 93–94; Pet. App. 38a. Brett was required to attend a mediation program for first-time juvenile offenders. J.A. 91–92; Pet. App. 38a.

Brett was prescribed medication for mental health conditions including attention deficit hyperactivity disorder and depression, and he sometimes experienced psychosis. Pet. App. 39a. See also J.A. 92–93, 95, 123–24. Brett also "had issues with cutting himself." Pet. App. 39a. See also J.A. 55–56, 130. Approximately two months before Brett killed his grandfather, Brett's mother allowed him to discontinue his prescribed psychotropic medication cold turkey rather than gradually tapering the dosage. J.A. 38–39, 125–26. In prison, Brett worked with a "psych doctor" to address the mental health conditions that affected his childhood. *Id.* at 134.

At the close of the sentencing hearing, Brett's attorney argued that *Miller* precluded a life-without-parole sentence because "[t]here is nothing in this record that would support a finding that the offense reflects irreparable corruption." J.A. 143–44.

4. On April 17, 2015, the circuit court resentenced Brett to life without parole. Pet. App. 57a; J.A. 152. The court did not find Brett permanently incorrigible or address his capacity for rehabilitation. See J.A. 148–52. Instead, consistent with the instructions from the Mississippi Supreme Court, the court viewed its task as assessing aggravating and mitigating circumstances: "*Miller* requires that the sentencing authority consider both mitigating and the aggravating circumstances. And I would note that these are not really terms used in the *Miller* opinion, but I think they are an easy way for us to identify those considerations." *Id*. at 149.

The circuit court focused principally on the nature of the crime, which it described as "particularly brutal." *Id.* at 150. The court noted that the jury rejected Brett's self-defense claim, that he stabbed his grandfather eight times, that he "was forced to resort to a second knife when the first knife broke," and that he moved the body and tried to clean up the blood. *Id*.

The court made only passing references to the fact that Brett was barely fifteen years old at the time of the offense. *Id*. at 149–51. The court's only direct reference to Brett's "maturity" was a commentary on his sexual relationship with Michelle Austin. The court stated: "The evidence presented at the sentencing hearing indicates that their relationship was intimate and that at some time before the incident she thought she was pregnant. That suspicion proved to be untrue, but demonstrates that the defendant had

reached some degree of maturity in at least one area." *Id*. at 151.

Although the court noted that Brett "grew up in troubled circumstance," it found there was "no evidence of brutal or inescapable home circumstances," because his grandparents "had 'provide[d] him a home away from' his troubled family environment in Florida" some two months before the murder. Pet. App. 46a.

5. Brett appealed, and the case was assigned to the Mississippi Court of Appeals.[2] While the appeal was pending, this Court decided *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016). In concluding that *Miller* applied retroactively, *Montgomery* rejected Louisiana's argument that *Miller* "mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." 136 S. Ct. at 734. The Court explained that *Miller* "bar[red] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id*. Therefore, *Miller* announced a "substantive rule" that "prohibits 'a certain category of punishment for a class of defendants because of their status or offense.'" *Id*. at 732.

On appeal, Brett asserted that because the circuit court failed to make a finding of permanent incorrigibility, the court of appeals should vacate his sentence and remand to the circuit court. See*, e.g.*, Appellant's Ct. App. Br. 42–44; Ct. App. Reply Br. 6–14; Appellant's Supp. Ct. App. Br. 2–9. Alternatively, he ar-

---

[2] The Mississippi Rules of Appellate Procedure provide: "All appeals from final orders of trial courts shall be filed in the Supreme Court and the Supreme Court shall assign cases, as appropriate, to the Court of Appeals." Miss. R. App. P. 16(a).

gued that the Eighth Amendment exempted him from life without parole because the existing record established his corrigibility. See*, e.g.*, Appellant's Ct. App. Br. 52–57; Ct. App. Reply Br. 18–22.

In its court-ordered supplemental brief addressing *Montgomery*, the State conceded that "*Montgomery* requires . . . a proceeding in which the defendant can put on proof that he is not irreparably corrupt and permanently incorrigible." Appellee's Supp. Ct. App. Br. 4. The State, however, did not contend that Brett is permanently incorrigible, or that the circuit court had considered the question. See generally Appellee's Ct. App. Br.; Appellee's Supp. Ct. App. Br. Instead, the State argued that the sentencing court need not make any finding regarding a juvenile offender's corrigibility. Appellee's Supp. Ct. App. Br. 3–4.

The court of appeals affirmed. It concluded that "[t]he sentencing judge must consider the factors discussed in *Miller*, and the judge must 'apply [those] factors in a non-arbitrary fashion.' However, the sentencing judge is not required to make any specific 'finding of fact.'" Pet. App. 42a (second alteration in original) (citation omitted). The court found that the "[sentencing] judge expressly stated that he had 'considered each of the *Miller* factors,'" and that the judge's "bench ruling was sufficient to explain the reasons for the sentence." *Id.* at 47a. The court also opined that the "judge recognized the correct legal standard," which the court described as "the *Miller* factors." *Id.*

Two judges dissented on the ground that *Montgomery* announced a constitutional rule that forbids life-without-parole sentences "for all but the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 53a. Given this rule, the dissenting judges maintained that "[t]he entire purpose of conducting a

proper *Miller* analysis is to determine whether a juvenile defendant represents the rare juvenile offender who exhibits such irretrievable depravity and permanent incorrigibility that rehabilitation is impossible and life without parole is justified." *Id.* at 52a (footnote omitted). Because the circuit court failed to determine whether Brett "is among the *rarest* of juvenile offenders under *Miller* and *Montgomery*," the dissenting judges would have remanded for that determination. *Id.* at 56a.

6. Brett moved for rehearing in the state court of appeals. While the motion was pending, the Mississippi Supreme Court decided *Chandler* v. *State*, 242 So. 3d 65 (Miss. 2018) (en banc). In *Chandler*, the court reiterated its pre-*Montgomery* holding that *Miller* "render[s]" a life-without-parole sentence for a juvenile "unconstitutional *if, and only if,* the sentencing authority fails to take into account characteristics and circumstances unique to juveniles." *Id.* at 69 (quoting *Jones*, 122 So. 3d at 702) (emphasis added).

In *Chandler*, the Mississippi Supreme Court did not acknowledge this Court's holding that only permanently incorrigible juveniles may be sentenced to life without parole. Indeed, the court's only reference to incorrigibility was its statement that "*Montgomery* . . . confirmed that *Miller* does not require trial courts to make a finding of fact regarding a child's incorrigibility" before imposing a life-without-parole sentence. *Id.* (citing *Montgomery*, 136 S. Ct. at 735). *Chandler* affirmed the defendant's life-without-parole sentence because the circuit court "held a hearing" and "took into account the characteristics and circumstances unique to juveniles." *Id.* at 70–71.

Following *Chandler*, the court of appeals denied Brett's motion for rehearing.

7. The Supreme Court of Mississippi granted Brett's petition for certiorari. Pet. App. 30a. In that court, Brett again requested a remand "so that the circuit court may determine, in the first instance, whether [he] is permanently incorrigible and thus eligible for a [life-without-parole] sentence." Miss. Cert. Pet. 7. See also *id.* at 1–2; Appellant's Miss. Sup. Ct. Supp. Br. 1–9. He also continued to assert, in the alternative, that there was no need for a remand because the record shows he is not permanently incorrigible. Miss. Cert. Pet. 4–6.

In its briefing, the State again acknowledged that *Montgomery* held that *Miller* established a substantive rule of constitutional law and that the relevant "question" in this case is "[w]hether [Brett]'s crime reflected irreparable corruption." Appellee's Sup. Ct. Supp. Br. 4–5. Nonetheless, the State also asserted that the circuit court had no obligation to answer that question, stating that "[t]he law does not require the trial court to make specific findings of fact." *Id.* at 3. And once again, the State declined to argue that Brett is, in fact, permanently incorrigible.

After oral argument, five justices voted to dismiss the petition. Pet. App. 1a. Four justices dissented, criticizing the majority for "wav[ing] aside the United States Supreme Court's decision in *Montgomery* and allow[ing] an unconstitutional sentence to stand." *Id.* at 2a.

The dissenting justices maintained that "no state may, consistent with the Eighth Amendment, sentence a juvenile to life without parole eligibility if the crime reflects transient immaturity rather than permanent incorrigibility." *Id.* at 24a (citing *Montgomery*, 136 S. Ct. at 734). The dissenters concluded that the "evidence adduced in the circuit court fell short of establishing that [Brett] was one of those 'rare chil-

dren whose crimes reflect irreparable corruption.'" *Id.* at 25a (quoting *Montgomery*, 136 S. Ct. at 734). Therefore they would have ordered that Brett "be resentenced to life imprisonment with eligibility for parole." *Id.* at 29a.

SUMMARY OF ARGUMENT

I. *Miller* v. *Alabama*, 567 U.S. 460 (2012), and *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016), set forth the clear rule that governs this case: The Eighth Amendment prohibits life-without-parole sentences for juvenile homicide offenders unless their crimes reflect permanent incorrigibility. *Miller* established that sentencing a juvenile to life without parole requires "distinguishing . . . between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Miller*, 567 U.S. at 479–80 (2012) (quoting *Roper* v. *Simmons*, 543 U.S. 551, 573 (2005); *Graham* v. *Florida*, 560 U.S. 48, 68 (2010)).

Montgomery confirmed that "*Miller* . . . bar[red] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." 136 S. Ct. at 734. That rule—repeated seven times in *Montgomery*—constitutes its *ratio decidendi*. *Montgomery* held that *Miller* announced a substantive rule that applies retroactively precisely because *Miller* prohibited a penalty (life without parole) for a class of offenders (corrigible juvenile homicide offenders). See *id.* at 732–34.

II. As with any rule that bans a penalty for a category of offenders, *Miller* and *Montgomery*'s permanent-incorrigibility rule requires a court to resolve the question of whether an offender is, or is not, a member of the eligible class. Courts resolve questions

by making findings. Thus, to sentence a juvenile homicide offender to life without parole, a court must find him permanently incorrigible.

States certainly have discretion to craft the procedure for making this essential finding. But courts may not dispense with the permanent incorrigibility finding altogether. At a bare minimum, courts must make an "evident ruling on [the] question" of permanent incorrigibility. *United States* v. *Briones*, 890 F.3d 811, 827 (9th Cir. 2018) (O'Scannlain, J., concurring in part and dissenting part), *on reh'g en banc*, 929 F.3d 1057 (9th Cir. 2019). If that basic determination were optional, the permanent-incorrigibility rule would mean nothing, *Montgomery*'s retroactivity analysis would make no sense, and States would be "free to sentence a child whose crime reflects transient immaturity to life without parole," and thereby to "demean the substantive character of the federal right." *Montgomery*, 136 S. Ct. at 735.

III. At every stage of the proceedings below, Brett asserted that he is not permanently incorrigible and thus that life without parole is an unconstitutional sentence. He produced substantial evidence in support of this assertion. Nonetheless, no court has ever asked or answered the question of whether Brett is permanently incorrigible. Instead, the Mississippi courts maintained that *Miller* requires sentencing courts only to follow a procedure—considering a set of youth-related factors—before imposing a life-without-parole sentence.

This Court has already decided that a procedure like Mississippi's will not do: "Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'" *Id.* at 734

(quoting *Miller*, 567 U.S. at 479). Therefore, at a minimum, this Court should vacate the sentence and remand the case so Mississippi's courts can determine whether Brett is the rare, permanently incorrigible juvenile homicide offender who may be sentenced to life without parole.

IV. This unique case demands more, however, because the record conclusively demonstrates Brett's corrigibility. Thus, under *Miller* and *Montgomery*'s rule, he may not be sentenced to life without parole. The uncontroverted testimony of the State's own correctional officer makes this plain. J.A. 103–16. As Officer Benton explained, even while serving nearly a decade of a sentence that offered no meaningful opportunity for release or incentive to reform, Brett became a committed worker and model inmate.

Despite repeated opportunities in the courts below, the State has not demonstrated, or even attempted to argue, that Brett is incapable of rehabilitation. At this point, prolonging the litigation would only belabor the obvious: Brett Jones is not among "the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery*, 136 S. Ct. at 734.

ARGUMENT

I. For Juveniles, The Eighth Amendment Restricts Life Without Parole To Permanently Incorrigible Homicide Offenders.

In *Miller* v. *Alabama* and *Montgomery* v. *Louisiana*, the Court repeatedly stated the constitutional rule that governs this case: The Eighth Amendment prohibits sentencing juvenile homicide offenders to life without parole unless they are permanently incorri-

gible. See *Miller*, 567 U.S. at 479–80; *Montgomery*, 136 S. Ct. at 726, 732–34.

1. In *Miller*, the Court concluded that mandatory life-without-parole sentences for juvenile homicide offenders violate the Eighth Amendment. 567 U.S. at 465, 479. That outcome followed from the permanent-incorrigibility rule: Only "the rare juvenile offender whose crime reflects irreparable corruption" is eligible for life without parole. *Id.* at 479–80 (quoting *Roper* v. *Simmons*, 543 U.S. 551, 573 (2005); *Graham* v. *Florida*, 560 U.S. 48, 68 (2010)).

Miller "implicate[d] two strands of precedent reflecting [the Court's] concern with proportionate punishment." *Id.* at 470. One line recognizes "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Id.* The cases in this line that *Miller* cited all establish rules that exempt a class of offenders from a punishment. See *Graham* v. *Florida*, 560 U.S. 48, 82 (2010) (barring life without parole for juvenile non-homicide offenders); *Roper* v. *Simmons*, 543 U.S. 551, 578 (2005) (barring the death penalty for juvenile offenders); *Coker* v. *Georgia*, 433 U.S. 584, 592 (1977) (barring the death penalty for offenders convicted of raping an adult); *Kennedy* v. *Louisiana*, 554 U.S. 407, 437–38 (2008) (barring the death penalty for offenders convicted of nonhomicide crimes against individuals); *Atkins* v. *Virginia*, 536 U.S. 304, 321 (2002) (barring the death penalty for intellectually disabled murderers). "Several of the cases in this group," the Court noted, "have specially focused on juvenile offenders." *Miller*, 567 U.S. at 470.[3]

---

[3] Three other decisions in this line of cases, not addressed in *Miller*'s discussion, are *Ford* v. *Wainwright,* 477 U.S. 399 (1986), which bars the execution of insane defendants, *Enmund* v. *Flor-*

The second strand of precedent examined in *Miller* "require[s] individualized sentencing for defendants facing the most serious penalties." *Id.* at 465. The Court has "insisted . . . that a sentencer have the ability to consider the 'mitigating qualities of youth'" and has emphasized that youth's "'signature qualities' are all 'transient.'" *Id.* at 476 (quoting *Johnson* v. *Texas*, 509 U.S. 350, 367 (1993)). In contrast to individualized sentencing, a "mandatory punishment" of life without parole for a juvenile necessarily "disregards the possibility of rehabilitation." *Id.* at 478.

Like every case in the first strand of precedent, *Miller* identified a penalty (life without parole) and exempted a class (corrigible juveniles who commit murder) from it. As *Miller* explained, a sentencer must "distinguish[] . . . between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Id.* at 479–80 (quoting *Roper*, 543 U.S. at 573).

2. In *Montgomery*, the Court considered whether *Miller* applies retroactively and, in analyzing that question, reiterated *Miller*'s permanent-incorrigibility rule at least *seven times*. One: "[A] lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect 'irreparable corruption.'" 136 S. Ct. at 726 (quoting *Miller*, 567 U.S. at 479–80). Two: "[*Miller*] recognized that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified." *Id.* at 733. Three: "Even if a court considers a child's age

---

ida, 458 U.S. 782 (1982), and *Tison* v. *Arizona*, 481 U.S. 137 (1987), both of which restrict the death penalty for offenders convicted of felony murder who lack a sufficiently culpable mental state with respect to the homicide.

before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'" *Id.* at 734 (quoting *Miller*, 567 U.S. at 479). Four: "*Miller* determined that sentencing a child to life without parole is excessive for all but the 'rare juvenile offender whose crime reflects irreparable corruption.'" *Id.* (quoting *Miller*, 567 U.S. at 479–80). Five: "*Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." *Id*. Six: "[P]risoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Id.* at 736–37. And perhaps most bluntly, seven: "*Miller* did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id*. at 734.

The permanent-incorrigibility rule was essential to *Montgomery*'s ultimate conclusion that *Miller* applies retroactively. A rule is substantive, and thus retroactive, if it "prohibit[s] a certain category of punishment for a class of defendants because of their status or offense." *Id.* at 729 (quoting *Penry* v. *Lynaugh*, 492 U.S. 302, 330 (1989)). In *Montgomery*, the Court found *Miller*'s rule retroactive because it prohibits life-without-parole sentences for corrigible juvenile homicide offenders: "[*Miller*] rendered life without parole an unconstitutional penalty for a class of defendants because of their status—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. As a result, *Miller* announced a substantive

rule of constitutional law." *Id.* at 734 (citation and quotation marks omitted).[4]

Unsurprisingly, federal appellate decisions describe the permanent-incorrigibility rule as "clear," "stated clearly," and "clearly established."[5] Indeed, even the State acknowledged below that "*Miller* announced a substantive rule of constitutional law," and thus the "question" is "[w]hether [Brett's] crime reflected irreparable corruption." Appellee's Sup. Ct. Supp. Br. 4, 5 (quoting *Montgomery*, 136 S. Ct. at 725).

II. Sentencing A Juvenile Homicide Offender To Life Without Parole Requires Finding That He Is Permanently Incorrigible.

Miller and *Montgomery*'s permanent-incorrigibility rule operates like any other constitutional rule that "prohibits a particular form of punishment for a class

---

[4] *See also Montgomery*, 136 S. Ct. at 732 ("A substantive rule . . . prohibits 'a certain category of punishment for a class of defendants because of their status or offense.' Under this standard . . . *Miller* announced a substantive rule that is retroactive in cases on collateral review." (citations omitted)).

[5] *E.g.*, *Ali* v. *Roy*, 950 F.3d 572, 574 (8th Cir. 2020) ("We begin by laying out the 'clearly established Federal law' regarding the Eighth Amendment. According to *Montgomery* v. *Louisiana* and *Miller* v. *Alabama*, sentencing a juvenile to life-without-parole violates the Eighth Amendment 'for all but "the rare juvenile offender whose crime reflects irreparable corruption."'" (citation omitted)); *United States* v. *Briones*, 929 F.3d 1057, 1064 (9th Cir. 2019) (en banc) ("*Montgomery* made clear that, after *Miller*, juvenile defendants who are not permanently incorrigible or irreparably corrupt are *constitutionally ineligible* for a sentence of life without parole." (emphasis in original)); *Malvo* v. *Mathena*, 893 F.3d 265, 274 (4th Cir. 2018) ("*Montgomery* stated clearly that, under *Miller*, the Eighth Amendment bars life-without-parole sentences for all but those rare juvenile offenders whose crimes reflect permanent incorrigibility."), *cert. granted*, 139 S. Ct. 1317 (2019), *and cert. dismissed*, 140 S. Ct. 919 (2020).

of persons." *Montgomery*, 136 S. Ct. at 735. That is, a court has to find whether the person is, or is not, eligible under the substantive rule. For example, because the Eighth Amendment bans executing the insane, a defendant is "entitle[d] to an adjudication to determine" his sanity if he "makes the requisite preliminary showing that his current mental state would bar execution." *Panetti* v. *Quarterman*, 551 U.S. 930, 934–35 (2007). So too with the rule of *Miller* and *Montgomery*: When a juvenile homicide offender asserts that he is not permanently incorrigible, as Brett did, a court must resolve the question of corrigibility before it may impose a life-without-parole sentence.

States certainly have some discretion in crafting the procedure for making the permanent incorrigibility finding: "When a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems." *Montgomery*, 136 S. Ct. at 735. But States cannot ignore the critical permanent-incorrigibility finding altogether, as Mississippi's courts did here. That would "leave States free to sentence a child whose crime reflects transient immaturity to life without parole" in violation of the Eighth Amendment. *Id.* Power to shape procedure is not license to eviscerate a settled rule of law.

A. Eligibility Rules Require Finding That The Defendant Does Or Does Not Belong To The Eligible Class.

Where the Court has set out a substantive rule barring a punishment for a class of offenders and left the procedure for enforcing that rule to the States' discretion, the procedure must at least determine that an individual defendant is, or is not, a member of the

class of offenders for whom the punishment is permissible. This is the only way to ensure that an offender does not receive an unconstitutional sentence.

1. Like *Miller* and *Montgomery*, *Ford* v. *Wainwright*, 477 U.S. 399 (1986), prohibited a penalty for a category of offenders. Specifically, *Ford* barred execution of the insane. *Id.* at 410. The Court in *Ford* left to the States "the task of developing appropriate ways to enforce the constitutional restriction." *Id.* at 416 (plurality opinion). However, the four-Justice plurality emphasized that "ascertainment of a prisoner's sanity [i]s a predicate to lawful execution." *Id.* at 411. After all, "if the Constitution renders the fact or timing of his execution contingent upon establishment of a further fact, then that fact must be determined." *Id.* Concurring in the judgment, Justice Powell likewise acknowledged the indispensable determination: "[T]he question in this case is whether Florida's procedures for determining petitioner's sanity comport with the requirements of due process." *Id.* at 424 (Powell, J., concurring in the judgment).

2. *Atkins* barred the death penalty for intellectually disabled offenders. 536 U.S. at 321. As in *Ford*, the Court assigned States "the task" of crafting a procedure to enforce the rule. *Id.* at 317 (quoting *Ford*, 477 U.S. at 416–17). However, *Atkins* also made clear that the procedure must "determin[e] which offenders are in fact [intellectually disabled]." *Id.* Subsequent cases have refined the *Atkins* determination. For example, this Court has held that medical science must inform a "court's intellectual-disability determination," *Moore* v. *Texas*, 137 S. Ct. 1039, 1048 (2017), and that States cannot "bar[] consideration of evidence that must be considered in determining whether a defendant in a capital case has intellectual disability." *Hall* v. *Florida*, 572 U.S. 701, 723 (2014).

3. *Enmund* v. *Florida* barred the death penalty for felony-murderers who did not themselves kill, attempt to kill, or intend a killing or the use of lethal force. 458 U.S. 782, 797 (1982).[6] Once again, this Court left it to the States to craft the procedure for enforcing this rule: "*Enmund* does not impose *any* particular form of procedure upon the States. The Eighth Amendment is satisfied so long as the death penalty is not imposed upon a person ineligible under *Enmund* for such punishment." *Cabana* v. *Bullock*, 474 U.S. 376, 386 (1986) (emphasis in original), *abrogated by Pope* v. *Illinois*, 481 U.S. 497 (1987). But again, the Court has also emphasized that States "must at *some* point provide for a finding of [*Enmund*'s] factual predicate." *Id.* at 390–91.

4. Rules of the same logical form are certainly not unique to the death penalty, or even sentencing. Indeed, the fundamental principle is so commonplace it is often left unsaid: If the constitutionality of a deprivation depends on a condition, a court authorizing the deprivation must first find that the condition obtains. For example, criminal punishment "may not constitutionally be imposed prior to a determination of guilt," *Bell* v. *Wolfish*, 441 U.S. 520, 537 (1979), a magistrate must "determin[e] the existence of probable cause" before issuing a warrant to search a home, *Illinois* v. *Gates*, 462 U.S. 213, 239 (1983), and "keeping [a person] against his will in a mental institution is improper absent a determination in civil commitment proceedings of current mental illness and dangerousness," *Foucha* v. *Louisiana*, 504 U.S. 71, 78 (1992). If

---

[6] This Court later qualified *Enmund*'s rule by holding that the Eighth Amendment permits the death penalty for a felony-murderer who did not kill or attempt to kill, but who was a "major participa[nt] in the felony committed" and who demonstrated "reckless indifference to human life." *Tison*, 481 U.S. at 158.

the government could deprive people of liberty without finding that those constitutional conditions were satisfied, the conditions would mean nothing at all.

B. *Miller* And *Montgomery*'s Eligibility Rule Requires Finding That The Defendant Does Or Does Not Belong To The Eligible Class.

The same analysis that applies to the insanity rule of *Ford*, the intellectual disability rule of *Atkins*, and the killed or intended to kill rule of *Enmund*—as well as any number of other constitutional rules that depend on a condition being satisfied—also applies to the permanent-incorrigibility rule of *Miller* and *Montgomery*. To enforce the substantive constitutional rule set forth in *Ford*, a court must find that the capital offender is or is not insane. To enforce the substantive constitutional rule set forth in *Atkins*, a court must find that the defendant is or is not intellectually disabled. To enforce the substantive constitutional rule set forth in *Enmund*, a court must determine whether the defendant "killed, attempted to kill, or intended that a killing take place or that lethal force be used." *Cabana*, 474 U.S. at 386. And to enforce the substantive constitutional rule set forth in *Miller* and *Montgomery* and determine if a juvenile "falls within the category of persons" eligible for a life-without-parole sentence, a court must find that the defendant is or is not permanently incorrigible. *Montgomery*, 136 S. Ct. at 735.

1. *Miller* and *Montgomery* make plain that a court must determine that a juvenile defendant is permanently incorrigible before imposing a life-without-parole sentence. *Miller*, for example, described the necessity of "distinguishing . . . between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose

crime reflects irreparable corruption.'" *Miller*, 567 U.S. at 479–80. By definition, making such a distinction requires determining whether a particular juvenile offender is, or is not, irreparably corrupt. See *id.* A court must "make that judgment in homicide cases." *Id.*

Montgomery further explains that "*Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." *Montgomery*, 136 S. Ct. at 734. The very existence of a line implies the necessity of determining on which side of the line the defendant falls. *Montgomery* also stated that a court must "separate those juveniles who may be sentenced to life without parole from those who may not." *Id*. at 735. Again, such a separation requires finding whether a juvenile is permanently incorrigible, and therefore eligible for a life-without-parole sentence.

The very purpose of holding a hearing is to "give[] effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity" by allowing the defendant to "show that he belongs to the protected class." *Id*. at 735. Therefore, "prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; *and if it did not*, their hope for some years of life outside prison walls must be restored." *Id*. at 736–37 (emphasis added). If a court could impose life without parole without finding that the defendant belonged to the eligible class, the opportunity to "show" corrigibility would mean nothing. A juvenile could be condemned to spend the rest of his life in prison no matter how clearly he demonstrated his corrigibility.

Even the principal dissent in *Montgomery* recognized that the substantive rule requires courts to "re-

solve" the "question" of whether a juvenile is permanently incorrigible. *Id.* at 744 (Scalia, J., dissenting). Other members of this Court have reached the same conclusion post-*Montgomery*. See*, e.g., Tatum* v. *Arizona*, 137 S. Ct. 11, 12 (2016) (Sotomayor, J., concurring in the decision to grant, vacate, and remand) ("On the record before us, 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.'" (quoting *Montgomery*, 136 S. Ct. at 734)). See also *Adams* v. *Alabama*, 136 S. Ct. 1796, 1800 (2016) (Sotomayor, J., concurring in the decision to grant, vacate, and remand).

This is not to say that *Miller* and *Montgomery* require a court to "utter [some] 'magic phrase' to justify its sentence." See *Briones*, 890 F.3d at 827 (O'Scannlain, J., concurring in part and dissenting in part). Nor must a court gild its finding with a formal preface such as "I find" or "the Court hereby finds." This Court has spoken in terms including "permanent incorrigibility," "irreparable corruption," "irretrievable depravity," and "transient immaturity." See *Miller*, 567 U.S. at 471, 479–80; *Montgomery*, 136 S. Ct. at 733–34. For purposes of enforcing *Miller* and *Montgomery*'s substantive rule, however, what matters is not the precise words used by a court but a finding in the most basic sense—an "evident ruling on [the] question" of permanent incorrigibility. *Briones*, 890 F.3d at 822 (O'Scannlain, J., concurring in part and dissenting in part). If state courts were not required to find in *any form* whether a defendant is or is not permanently incorrigible, they could not possibly "separate those juveniles who may be sentenced

to life without parole from those who may not." *Montgomery*, 136 S. Ct. at 735.

2. In reaching the conclusion that a sentencing judge is not required to make a finding of permanent incorrigibility to impose a life-without-parole sentence on a juvenile, Mississippi's courts mistakenly believed that *Montgomery* held as much. See *Jones* v. *State*, 285 So. 3d 626, 632 (Miss. Ct. App. 2017) (quoting *Cook* v. *State*, 242 So. 3d 865, 876 (Miss. Ct. App. 2017) (quoting *Montgomery*, 136 S. Ct. at 735)); see also *Chandler*, 242 So. 3d at 69 (citing *Montgomery*, 136 S. Ct. at 735). But the statements Mississippi's courts relied on are not rulings of this Court. Rather, the Court made those statements in describing—and rejecting—Louisiana's argument that *Miller* would have explicitly required a finding of permanent incorrigibility had it announced a new substantive rule of constitutional law:

> Louisiana suggests that *Miller* cannot have made a constitutional distinction between children whose crimes reflect transient immaturity and those whose crimes reflect irreparable corruption because *Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility. That this finding is not required, however, speaks only to the degree of procedure *Miller* mandated in order to implement its substantive guarantee. When a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems. See *Ford* v. *Wainwright*, 477 U.S. 399, 416–17, 106 S. Ct. 2595, 91 L.Ed.2d 335 (1986) ("[W]e leave to the State[s] the task of developing appropriate ways

> to enforce the constitutional restriction upon [their] execution of sentences"). Fidelity to this important principle of federalism, however, should not be construed to demean the substantive character of the federal right at issue. That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole.

Montgomery, 136 S. Ct. at 735.

In a nutshell, Louisiana's argument was that if *Miller* had announced a substantive rule that barred life-without-parole for all but permanently incorrigible juvenile offenders, it would have expressly stated that courts must make a finding of incorrigibility before imposing such a sentence. *Id.* And since *Miller* did not explicitly impose any such finding requirement, *Miller* could not have held that only permanently incorrigible juveniles may be condemned to die in prison. *Id.*

The Court rejected Louisiana's argument: "*Miller* did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id.* at 734. The fact that *Miller* did not expressly impose a corresponding finding requirement does not undermine that conclusion. Instead, the Court explained that *Miller*'s silence with respect to a finding requirement reflects the Court's usual practice: "When a new substantive rule of constitutional law is established," this Court generally "leave[s] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.* at 735 (first alteration added) (quoting *Ford*, 477 U.S. at 416–17). Thus, rather than holding that no finding is required,

Montgomery simply made clear that *Miller* did not address the issue.

The Mississippi courts also disregarded the word "formal" in the statements excerpted above. *Id.* Even assuming for argument's sake that these statements could be divorced from their context, they refer to a "*formal* factfinding." *Id.* (emphasis added). Therefore, they still would not negate the requirement that a court find *in some way*, formal or not, that a juvenile homicide offender is permanently incorrigible before it may impose a life-without-parole sentence. That finding requires at least an "evident ruling on [the] question." See *Briones*, 890 F.3d at 822 (O'Scannlain, J., concurring in part and dissenting in part). If state courts were not required to make this essential determination, they would be "free to sentence a child whose crime reflects transient immaturity to life without out parole," *Montgomery*, 136 S. Ct. at 735, an outcome that would eviscerate the permanent incorrigibility rule.

III. At A Minimum, Petitioner Is Entitled To A Remand For A Finding As To Whether He Is Permanently Incorrigible.

At every relevant stage of the proceedings below, Brett asserted that he is not one of the "rarest of juvenile offenders . . . whose crimes reflect permanent incorrigibility," and thus the Eighth Amendment "bar[s]" the imposition of a life-without-parole sentence. *Id.* at 734. He produced substantial evidence in support of this claim. Nonetheless, *no court* has ever asked, or answered, whether Brett is eligible for a life-without-parole sentence under *Miller* and *Montgomery*'s permanent-incorrigibility rule. Thus, this Court should vacate his sentence and remand with instructions for Mississippi's courts to make this essential finding.

1. When the Mississippi Supreme Court remanded Brett's case to the circuit court in 2013, it opined: "*Miller* rendered our present sentencing scheme unconstitutional *if, and only if*, the sentencing authority fails to take into account characteristics and circumstances unique to juveniles." *Jones*, 122 So. 3d at 702 (emphasis added).[7] Under this interpretation of *Miller*, a life-without-parole sentence imposed on a juvenile satisfies the Eighth Amendment if the judge considers factors related to youth—even if the judge proceeds to sentence a corrigible juvenile to life without parole. See *id.*

Consistent with the Mississippi Supreme Court's interpretation of *Miller*, the circuit court on remand did not decide whether Brett was irreparably corrupt or capable of reform nor recognize any substantive limitation on its sentencing discretion. See J.A. 148–52. Instead, the court believed it had discretion to impose a life-without-parole sentence so long as it considered youth-related factors in making the decision: "*Miller* requires that the sentencing authority consider both mitigating and the aggravating circumstances. And I would note that these are not really terms used in the *Miller* opinion, but I think they are an easy way for us to identify those considerations." *Id*. at 149.

The court of appeals affirmed the sentence but also declined to resolve whether Brett is permanently incorrigible. Instead, the appellate court concluded that

---

[7] *See also Parker*, 119 So. 3d at 997 n.14 (A life-without-parole sentence "can constitutionally be applied to juveniles provided that the sentencing authority considers the *Miller* factors in sentencing."); *id*. at 999 ("After consideration of all circumstances required by *Miller*, the trial court may sentence [a juvenile offender], despite his age, to 'life imprisonment [without parole].'" (footnote omitted)).

the "judge recognized the correct legal standard," which it described as "the *Miller* factors," not the permanent-incorrigibility rule. Pet. App. 47a. The Mississippi Supreme Court granted certiorari, held oral argument, and dismissed the writ, prompting four justices to criticize the majority for "wav[ing] aside the United States Supreme Court's decision in *Montgomery* and allow[ing] an unconstitutional sentence to stand." *Id.* at 2a.

2. Mississippi's courts are not correct that mere consideration of youth or youth-related factors satisfies the Eighth Amendment. *Miller* and *Montgomery* make clear that only permanently incorrigible juveniles may be sentenced to life without parole. And when the Eighth Amendment bars a penalty for a class of offenders, no amount of judicial consideration of sentencing factors can make a member of the exempt category eligible for the restricted punishment. See, *e.g.*, *Montgomery*, 136 S. Ct. at 730 ("[Even] the use of flawless sentencing procedures [cannot] legitimate a punishment where the Constitution immunizes the defendant from the sentence imposed.").

For example, if an offender is insane, a court is not free to allow his execution to proceed simply because it held a hearing at which his insanity was discussed. See *Ford*, 477 U.S. at 409–10. If an offender is intellectually disabled, a court cannot merely take his intellectual disability into account and then sentence him to death anyway. See *Atkins*, 536 U.S. at 321. If an offender did not kill or intend to kill, assiduous consideration of that fact does not make him eligible for the death penalty. See *Enmund*, 458 U.S. at 801. If a juvenile commits homicide, a court cannot sentence him to death even after "consider[ing]" his youth. *Roper*, 543 U.S. at 572, 575. And if a juvenile commits a crime other than homicide, he is constitu-

tionally exempt from life without parole no matter how exhaustively the sentencing judge takes stock of the offense, and no matter what other factors the judge might believe weigh in favor of life without parole. See *Graham*, 560 U.S. at 82.

By the same token, if a juvenile homicide offender is not permanently incorrigible, a court's careful attention to his youth cannot make him eligible for a penalty the Constitution prohibits. *Montgomery*, 136 S. Ct. at 734. The Court could not have been clearer about this point: The Eighth Amendment forbids sentencing a corrigible juvenile to life without parole "[*e*]*ven if* a court considers a child's age before sentencing him or her to a lifetime in prison." *Id.* (emphasis added) (citing *Miller*, 567 U.S. at 479).

The circuit court's constitutional error resulted not from a lack of formality or magic words but from its failure to find *in any form* whether Brett is permanently incorrigible. See J.A. 148–52. There is not—in any respect—an "evident ruling on [the] question" of permanent incorrigibility. *Briones*, 890 F.3d at 822 (O'Scannlain, J., concurring in part and dissenting part). The court did not even recognize that it was required to give effect to a substantive rule barring life without parole for corrigible juveniles. In fact, the circuit court undertook a different analysis altogether—a weighing of aggravating and mitigating factors that focused on the nature of the crime itself. See J.A. 149–52. Brett presented substantial, unrebutted evidence of rehabilitation, including his evolution in prison into a model inmate. Yet the court's decision did not even mention Brett's capacity for reform, much less recognize it as the dispositive issue.

In sum: *Miller* held that only permanently incorrigible juveniles may be sentenced to life without parole, *Montgomery* repeated that rule at least seven

times, this case has been through Mississippi's appellate process twice, and despite Brett's repeated assertion that he is not permanently incorrigible, and the substantial evidence supporting that claim, no court has found whether Brett satisfies the constitutional standard established by this Court. At a minimum, the Court should remand the case so Mississippi's courts can finally answer that question.

IV. Petitioner Is Not Permanently Incorrigible.

In this extraordinary case, the record permits only one reasonable answer to the question Mississippi's courts failed to address: Brett is not one of "the rarest of juvenile offenders, . . . whose crimes reflect permanent incorrigibility." *Montgomery*, 136 S. Ct. at 734. The only jurists to consider that question—the four members of the Supreme Court of Mississippi who dissented from dismissal of the writ—reached the correct conclusion. One need look no further than the testimony of the State's own correctional officer to see Brett's capacity for change. Having served nearly a decade of a sentence that denied a meaningful opportunity for release and incentive to reform, Brett became a model inmate and a committed worker.

Despite repeated opportunities to do so in the courts below, the State has never even claimed that Brett is permanently incorrigible—a tacit concession that the record does not allow such a conclusion. Further litigation over the issue thus would serve no purpose. This Court should reach the issue head on and hold that Brett cannot be sentenced to life without parole because he does not belong to the eligible class.

Brett was barely fifteen years old at the time of the crime. Thus, as this Court repeatedly has recognized, his "character [was] not as 'well-formed' as an adult's;

his traits [we]re 'less fixed' and his actions [we]re less likely to be 'evidence of irretrievabl[e] deprav[ity].'" *Miller*, 567 U.S. at 471 (quoting *Roper*, 543 U.S. at 570). There are "fundamental differences between juvenile and adult minds—for example, in 'parts of the brain involved in behavior control.'" *Id.* at 471–72 (quotation mark omitted) (quoting *Graham*, 560 U.S. at 68). And these differences "enhance[] the prospect that, as the years go by and neurological development occurs, [a juvenile offender's] deficiencies will be reformed." *Id.* at 472 (quotation marks omitted).

Nothing in the record suggests that Brett was more mature than an average fifteen-year-old or that his brain was more developed. The circuit court's only direct reference to Brett's "maturity" at the time of the crime was its commentary on his sexual relationship with his girlfriend: "The evidence presented at the sentencing hearing indicates that [Brett's relationship with Michelle] was intimate and that at some time before the incident she thought she was pregnant. That suspicion proved to be untrue, but demonstrates that the defendant had reached some degree of maturity in at least one area." J.A. 151.

Contrary to the circuit court's absurd analysis, underage sex does not indicate anything other than biological maturity. As the dissenting Mississippi Supreme Court justices put it: "[R]ather than demonstrating his maturity, as the circuit court thought, [Brett's] participation in this adult behavior before the age of majority reflected immaturity and an utter failure to consider the consequences of his actions." Pet. App. 27a.

No one could deny that Brett committed a "heinous" and "tragic" crime. *Id.* at 29a. But "[i]n *every* case involving *Miller* sentencing, the [c]ourt will be confronted with a homicide committed by an underage

individual." *Id.* (emphasis added). And this Court repeatedly has emphasized that "[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Roper*, 543 U.S. at 570. Indeed, "*Miller*'s central intuition [is] that children who commit even heinous crimes are capable of change." *Montgomery*, 136 S. Ct. at 736.

In its analysis of the crime, the circuit court fixated on the jury's rejection of self-defense and the lesser charge of voluntary manslaughter. J.A. 149–50. But if the jury had rejected a murder conviction on either ground, Brett could not have been sentenced to life without parole (or life with parole) at all.[8] The jury's resolution of those issues against Brett was a prerequisite to either type of life sentence, but it had nothing to do with Brett' corrigibility.

The circuit court also emphasized that Brett attempted to "conceal his act" by moving his grandfather's body and trying to clean up the blood. *Id.* at 150. But as the dissenting justices explained, Brett's "efforts to hide the body were altogether inept and ineffectual, evincing little or no pre-planning or calculation. The neighbor and his yard man observed a bloody boy immediately after the deadly incident and the yard man testified that the boy was trembling and muttering 'kill, kill.'" Pet. App. 26a. Brett then attempted to "travel[] to Tupelo to explain what had happened to his grandmother so she did not have to

---

[8] If acquitted on the basis of self-defense, Brett could not have been punished at all; if convicted of voluntary manslaughter, he would have faced a maximum sentence of twenty years. *See* Miss. Code Ann. § 97-3-25(1).

discover it on her own." *Id.* These actions betray a boy terrified by his horrific deed, not the icy calm of a hardened, incorrigible killer.

Moreover, "[t]hat a teenager in trouble for having been caught concealing his girlfriend at his grandparents' home would attempt to solve the problem by resorting to violence dramatically epitomizes immaturity, impetuosity, and failure to appreciate risks or consequences," rather than permanent incorrigibility. *Id.*

Brett's lack of any significant prior criminal record indicates that his crime did not reflect a "fixed" aspect of his "character." *Miller*, 567 U.S. at 471. Prior to the murder, Brett had only one contact with the juvenile justice system: A court required him to take anger management classes for punching his abusive stepfather, who had grabbed Brett by the throat, "pulled a belt," and threatened to "beat the s***" out of him. J.A. 94; Pet. App. 38a.

Brett demonstrated that he is not permanently incorrigible through evidence of "his evolution from a troubled, misguided youth to a model member of the prison community." See *Montgomery*, 136 S. Ct. at 736. The evidence produced at Brett's sentencing hearing—much of it from Officer Benton's testimony—shows that Brett works hard, honors the rules, has expressed remorse and "regret[]" for his crime, and has become a "good kid" who "g[e]t[s] along with everybody." J.A. 109, 112.

Brett rejected the violence and gang activity that surrounded him in prison, *id.* at 115, and "tr[ied] to stay out of trouble," *id.* at 134. Despite having served nearly a decade in prison, he was "involved in only one significant disciplinary incident." Pet. App. 39a. Brett also worked to improve himself by earning his

GED, trying to take college classes, and working with a "psych doctor" to address the mental health conditions that originated in his childhood. J.A. 108–09, 134.

At least until *Miller* and *Montgomery*, Brett's sentence eliminated any external incentive to reform. "A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual." *Graham*, 560 U.S. at 79. The record plainly shows that Brett became one nonetheless. He is not the rare, permanently incorrigible juvenile who may be sentenced to life without parole.

CONCLUSION

For the reasons stated above, the judgment should be reversed and the Court should direct on remand that Brett Jones is ineligible for life without the possibility of parole.

Respectfully submitted,

JACOB HOWARD
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
767 North Congress Street
Jackson, MS 39202
(769) 233-7538

JEFFREY T. GREEN
DAVID A. GOLDENBERG
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, D.C. 20005
(202) 736-8000

MARLOW SVATEK
ANDREW F. RODHEIM
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

DAVID M. SHAPIRO *
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
NORTHWESTERN PRITZKER SCHOOL OF LAW
375 E. Chicago Avenue
Chicago, IL 60611
(312) 503-0711
david.shapiro@law.northwestern.edu

AMIR H. ALI
ELIZA MCDUFFIE†
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
777 6th Street NW, 11th Floor
Washington, D.C. 20001
(202) 869-3434

†*Admitted only in New York; not admitted in D.C. Practicing under the supervision of the Roderick & Solange MacArthur Justice Center*

Counsel for Petitioner

June 5, 2020 *Counsel of Record