Case No. 16-6738

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CYNTOIA BROWN,
Petitioner–Appellant,

v.

CAROLYN JORDAN, Warden,
Respondent–Appellee.

On Appeal from the United States District Court
for the Middle District of Tennessee

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF TENNESSEE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae American Civil Liberties Union of Tennessee is a non-profit entity that do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in *amicus curie*.

/s/ *Thomas H. Castelli*

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STATEMENT REGARDING ORAL ARGUMENT

Amicus curiae submit that oral argument is appropriate in this case because the Eighth Amendment question on appeal is an issue of significant importance and is situated in a rapidly evolving landscape of federal jurisprudence. *Amicus curiae* respectfully seeks leave to participate in oral argument on the Eighth Amendment question because its participation may be helpful to the Court in addressing the important issues presented by this appeal. *See* 6 Cir. R. 29.

INTEREST OF AMICUS CURIAE[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan public interest organization of more than one million members dedicated to defending the civil liberties guaranteed by the Constitution. The American Civil Liberties Union of Tennessee ("ACLU-TN") is a state affiliate of the national ACLU with more than eleven thousand members throughout Tennessee. The protection of young people from excessive sentences and extreme punishments is of paramount importance to both organizations. The ACLU and its affiliates have been at the forefront of numerous state and federal cases addressing the treatment of juveniles in the criminal justice system.

ACLU-TN is dedicated to the principles of liberty and equality embodied in the United States Constitution and the Tennessee Constitution. The above-styled case and controversy squarely implicates the ACLU-TN's mission to ensure that the criminal justice system keeps communities safe, treats people fairly, and uses fiscal resources wisely. ACLU-TN regularly participates in cases in state and federal court involving constitutional and civil rights questions, as counsel and amicus curiae.

[1] Pursuant to Rule 29(a), counsel for *amicus curie* certifies that counsel for Cyntoia Brown has consented to the filing of this brief. Pursuant to Rule 29(c)(5), counsel for *amicus curie* state that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curie*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The Eighth Amendment's prohibition of cruel and unusual punishment guarantees individuals "the right not to be subjected to excessive sanctions." *Miller v. Alabama*, 567 U.S. 460, 469 (2012). In the context of children who have committed crimes, the Eighth Amendment protects young offenders by requiring youth itself to be considered as a factor in sentencing. Significant scientific and social science research has served as the foundation of the Court's findings that the gaps between the maturity and decision-making of children and that of adults are constitutionally significant.

Children cannot be subjected to a life sentence without the possibility of parole or its functional equivalent without first providing a meaningful opportunity to obtain release. In *Graham v. Florida* and *Miller v. Alabama*, the Supreme Court held that, in situations where life without the possibility of parole is unconstitutional, youth must be given "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Miller v. Alabama*, 567 U.S. 460, 479 (2012) (quoting *Graham v. Florida*, 560 U.S. 48, 75 (2010)); *see also Starks v. Easterling*, 659 F. App'x 277, 281 (6th Cir. 2016) (White, J., concurring) ("Together, Graham and Miller establish that the Eighth Amendment prohibits a sentencing regime that mandates a term of life imprisonment for juvenile homicide offenders without a meaningful opportunity to obtain release.").

Cyntoia Brown is serving such a *de facto* life sentence that is unconstitutional. Her lengthy sentence of between 51 and 60 years offers no meaningful opportunity for release within her lifetime. Her sentence was imposed by the mechanical operation of statute, without consideration of her age or background. Cyntoia was sentenced without the benefit of any *Miller*-type protections, and she will likely die in prison without any assessment of her growth, maturity, or rehabilitation, either at sentencing or during the course of her sentence.

Amicus curie respectfully submits that the Court should hold that *de facto* life sentences imposed upon juveniles, such as Cyntoia Brown, violate the Eighth Amendment under *Miller v. Alabama*, 567 U.S. 460 (2012).

ARGUMENT

Cyntoia Brown was a 16-year-old victim of sexual trafficking when she killed a man more than twice her age, a stranger who had picked her up for sex. Upon her conviction for felony murder, Cyntoia received a statutorily-imposed, mandatory life sentence of between 51 and 60 years. The Tennessee statutory sentencing scheme operates automatically, without regard for circumstances of youth or background. Cyntoia's sentence provides no meaningful opportunity for release in her lifetime and was imposed without consideration of *Miller*-type protections, it is, thus, unconstitutional.

I. CHILDREN ARE DIFFERENT AND THEIR YOUTH MUST BE CONSIDERED IN SENTENCING.

"Youth is more than a chronological fact." *Miller v. Alabama*, 567 U.S. 460, 476 (2012). The Eighth Amendment's prohibition of cruel and unusual punishment guarantees individuals "the right not to be subjected to excessive sanctions." *Miller*, 567 U.S. at 469. In the context of children who have committed crimes, the Eighth Amendment protects young offenders by requiring youth itself to be considered as a factor in sentencing. *Id.* at 471.

Significant scientific and social science research — as well as common sense — has informed the Supreme Court's finding that there are large gaps between the maturity and decision-making of children and that of adults, and that these gaps are constitutionally significant. *Id.* Contrary to adults, only a relatively small proportion

of adolescents' who engage in illegal activity "develop entrenched patterns of problem behavior." *See Roper v. Simmons*, 543 U.S. 551, 570 (2005) (quoting Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003)). "[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," *i.e.* in "parts of the brain involved in behavior control." *Graham v. Florida*, 560 U.S. 48, 68 (2010).

Indeed, the Court noted in *Miller* that the body of scientific and social science research supporting *Roper's* and *Graham's* conclusions has become even stronger over time. *Miller*, 567 U.S. at 472, n.5 (citing Brief for American Psychological Association et al. as *Amici Curie* 3 ("[A]n ever-growing body of research in developmental psychology and neuroscience continues to confirm and strengthen the Court's conclusions"); *id.* at 4 ("It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance.")).

Children's diminished culpability and greater prospects for reform are demonstrated by: (1) lack of maturity and underdeveloped sense of responsibility which leads to "recklessness, impulsivity, and heedless risk-taking"; (2) vulnerability to "negative influences and outside pressures," lack of control over

environment, and inability to "extricate themselves from horrific crime-producing settings"; and (3) character that is not as "well formed" as an adult's and whose actions are less likely to prove "irretrievable depravity." *Id.* at 471.

The lack of maturity, vulnerability, and transient character of youth make children "constitutionally different" from adults. *Montgomery v. Louisiana*, 136 S.Ct. 718, 733 (2016). These differences between children and adult offenders must be considered in sentencing because the penological justifications for the harshest sentences — retribution, deterrence, need for incapacitation, rehabilitation — "collapse in light of 'the distinctive attributes of youth." *Montgomery*, 136 S.Ct. at 733–34.

The foundational principal underlying the Supreme Court jurisprudence regarding juvenile sentencing is that "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children. *Miller*, 567 U.S. 503. Because an offender's age "is relevant to the Eighth Amendment," "criminal procedure laws that fail to take defendants' youthfulness into account at all" are flawed. *Id.* at 467 (quoting *Graham*, 560 U.S. at 68) (quotes omitted).

Miller proscribes a procedural requirement for the consideration of youth during sentencing. *Montgomery*, 136 S.Ct. at 734. The hearing ensures that children are given a meaningful opportunity to obtain release in their lifetime because of the differences between child and adult offenders and in particular a child's lesser

culpability than an adult, and their greater capacity for change, growth and rehabilitation. *Id.* at 735. The hearing "gives effect to *Miller's* substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Id.* at 735.

In *Graham v. Florida* and *Miller v. Alabama*, the Supreme Court held that, in situations where life without the possibility of parole is unconstitutional, youth must be given "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Miller*, 567 U.S. at 479 (quoting *Graham v. Florida*, 560 U.S. 48, 75 (2010)); *see also Starks v. Easterling*, 659 F. App'x 277, 281 (6th Cir. 2016) (White, J., concurring) ("Together, Graham and Miller establish that the Eighth Amendment prohibits a sentencing regime that mandates a term of life imprisonment for juvenile homicide offenders without a meaningful opportunity to obtain release.").

Failure to consider the protections set forth in *Miller* reflects an unconstitutional depravation of a substantive right. *Id.* at 734.

II. *DE FACTO* LIFE SENTENCES FOR JUVENILES ARE UNCONSTITUTIONAL BECAUSE THEY DO NOT PROVIDE A MEANINGFUL OPPORTUNITY FOR RELEASE.

What the Supreme Court has said about children — "about their distinctive (and transitory) mental traits and environmental vulnerabilities" — is neither "crime specific" nor rigidly reliant on sentence labels. *Miller v. Alabama*, 567 U.S. 460, 473 (2012). In recognition of that fact, a growing majority of courts have held that lengthy term-of-years sentences for youth are the functional equivalent of the life-without-parole sentence that cannot be imposed on a child without a *Miller*-type hearing.

A. Cyntoia Brown's Sentence Violates the Eighth Amendment.

Cyntoia Brown's mandatory life sentence offers no meaningful opportunity for release and she was afforded no *Miller*-type protections, either at sentencing or at some future date. Accordingly, her sentence is unconstitutional.

Under Tennessee law, a defendant who has been sentenced to life in prison must serve 60 years of her sentence before she is eligible for release. Tenn. Code Ann. §§ 39-13-202(c), 40-35-501(i). This term can be reduced by good-time credit, at most, by 9 years to a sentence of 51 years. Tenn. Code Ann. §§ 40-35-501(i), 41-21-236.

While Tennessee's statutory scheme theoretically provides for an opportunity for Cyntoia to obtain release, that opportunity is remote and not meaningful. "Data

from the Department of Justice show that state prisoners age 55 to 64 had death rates 56% higher than the general population from 2001 to 2004." *Starks v. Easterling*, 659 Fed. Appx. 277, 282–83 (6th Cir. 2016) (White, J., concurring) (citing Christopher J. Mumola, Bureau of Justice Statistics, No. NCJ 216340, Medical Causes of Death in State Prisons, 2001-2004 (Jan. 2007)). In considering the average life expectancy of those serving prison sentences in federal prison, the United States Sentencing Commission has defined a life sentence as 470 months (or just over 39 years). *See, e.g.*, *United States v. Nelson*, 491 F.3d 344, 349-50 (7th Cir. 2007); U.S. Sentencing Commission Quarterly Data Report (through Mar. 31, 2017) at A-7.[2] Likewise, in Michigan, the life expectancy for youth sentenced to a life sentence prior to the age of 18, the life expectancy is little more than fifty years (50.6). Cummings, Adele, et al., *There is no Meaningful Opportunity in Meaningless Data: Why It is Unconstitutional to Use Life Expectancy Tables in Post–Graham Sentences* (2014), 18 U.C. Davis J. Juv. L. & Policy 267, 279–285.; *Kelly v. Brown*, 851 F.3d 686 (7th Cir. 2017) (Posner, J., dissenting); *People v. Sanders*, 56 N.E.3d 563, 571 (App. Ct. Ill. 2016).

Because a 51-year sentence significantly exceeds Cyntoia's expected life span, her opportunity for release is neither meaningful nor realistic. *See Starks*, 659

[2] *Available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC_Quarter_Report_2nd_FY17.pdf (last visited Jan. 14, 2018).

Fed. Appx. at 283 ("Here, where Starks would become eligible for release at age 68 at the earliest . . . he has been deprived of a 'meaningful opportunity to obtain release' during his lifetime.").

Cyntoia's mandatory life sentence, is thus, unconstitutional because it was imposed without the benefit of *Miller*-type protections. Her sentence was imposed automatically and without consideration of her youth or her background. The constitutional requirement that a minor's chronological age as well as "background and mental and emotional development" must be duly considered at sentencing was not met. This deficit is especially pressing in Cyntoia's case due to her diagnosis of fetal alcohol syndrome, which served to compound the limitations of her chronological age on decision-making and mental development. (RE 24, Page ID # 9.)

As Cyntoia's sentence is effectively a mandatory life sentence imposed without consideration of her youth, it violates *Miller* and the Eighth Amendment's protections.

B. *De Facto* Life Sentences Are Unconstitutional Regardless of Label in the Absence of *Miller*-Type Protections.

Courts, in increasing numbers, have set aside sentences that approach or exceed a juvenile defendant's life expectancy. Courts have acknowledged that states cannot escape the Eighth Amendment's requirements by providing a theoretical possibility of release for youths who are serving sentences that are the functional

equivalent of life without parole. *Miller*-type protections are constitutionally required regardless of the label states place upon such sentences.

Indeed, a growing number of courts agree that when imposed on youths, long term-of-years sentences constitute *de facto* life without parole sentences that require youth to be taken into account. *See, e.g.*, *Starks v. Easterling*, 659 Fed. Appx. 277, 280 (6th Cir. 2016) (White, J., concurring); *People v. Caballero*, 282 P.3d 291 (2012) (juvenile defendant's term-of-years sentence constituted cruel and unusual punishment); *Casiano v. Comm'r of Corr.*, 115 A.3d 1031, 1047–48 (Conn. 2015) (holding that 50-year sentence was subject to the sentencing procedures set forth in *Miller*); *Henry v. State*, 175 So.3d 675, 676, 680 (Fla. 2015) (aggregate sentence did not afford meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, and thus was unconstitutional); *Kelsey v. State*, 206 So. 3d 5 (Fla. 2016) (45-year prison term for juvenile did not provide meaningful opportunity for release in respective lifetime); *People v. Reyes*, 63 N.E.3d 884, 888 (Ill. 2016); *State v. Null*, 836 N.W.2d 41, 72 (Iowa 2013) (52.5–year minimum prison term for juvenile defendant based on the aggregation of mandatory minimum sentences for second-degree murder and first-degree robbery triggered the protections to be afforded under *Miller*); *Parker v. State*, 119 So.3d 987, 997 (Miss. 2013) (legislative mandates were tantamount to life-without-parole sentence and failed to consider youth in contravention of *Miller*); *State v. Zuber*, 152 A.3d 197 (N.J. 2017); *State v.*

Ronquillo, 190 Wash. App. 765, 361 P.3d 779, 784–85 (2015) (*Miller* applied to *de facto* life sentences); *Bear Cloud v. State*, 334 P.3d 132, 136 (Wyo. 2014); *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016); *Moore v. Biter*, 725 F.3d 1184, 1194 (9th Cir. 2013).

In *Null v. State*, 836 N.W.2d 41, 71 (Iowa 2013), a juvenile offender was sentenced to a mandatory minimum of 52.5 years imprisonment for second-degree murder and first-degree robbery. The Iowa Supreme Court held that while "not technically a life-without-parole sentence, such a lengthy sentence imposed on a juvenile is sufficient to trigger *Miller*-type protections." *Id.* The Court further held:

> Even if lesser sentences than life without parole might be less problematic, we do not regard the juvenile's potential future release in his or her late sixties after a half century of incarceration sufficient to escape the rationales of *Graham* or *Miller*. The prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a "meaningful opportunity" to demonstrate the "maturity and rehabilitation" required to obtain release and reenter society as required by *Graham*, 560 U.S. at ——, 130 S.Ct. at 2030, 176 L.Ed.2d at 845–46.

Null, 836 N.W.2d at 71.

Similarly, in *Bear Cloud v. Wyoming*, 334 P.3d 132 (Wyo. 2014), the Wyoming Supreme Court set aside the life sentence of a juvenile offender with possibility of parole after serving 25 years for first-degree murder, which was ordered to run consecutively to sentence of 20 to 25 years for aggravated burglary, for aggregate sentence of just over 45 years. The Court held that the sentence was

the *de facto* equivalent of life sentence without parole that triggered Eighth Amendment prohibition against mandatory sentence of life without parole for a juvenile offender without benefit of individualized sentencing hearing to consider factors going to juvenile's lessened culpability and greater capacity for change. *Id.*

The Sixth Circuit has recognized that *Roper*, *Graham*, *Miller*, and *Montgomery*, "illustrate the Court's growing unease with draconian sentences imposed upon juveniles, even for serious crimes." *Starks v. Easterling*, 659 Fed. Appx. 277, 280 (6th Cir. 2016). As this line of jurisprudence has continued to evolve, the time has come for the Court to hold that fixed-term sentences that are the functional equivalent of life without parole are unconstitutional, in cases such as Cyntoia's, where the sentencing court did not take her youth into consideration.

CONCLUSION

This Court should hold that *de facto* life sentences imposed upon juveniles, like Cyntoia Brown's sentence, violate the Eighth Amendment under *Miller v. Alabama*, 567 U.S. 460 (2012).

Respectfully Submitted,

Dated: January 16, 2018

By: /s/ *Thomas H. Castelli*

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a) because this brief contains 2,896 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally space typeface using Microsoft Word 2010 in 14 point Times New Roman.

/s/ *Thomas H. Castelli*
Thomas H. Castelli
January 16, 2018

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of January, 2018, the foregoing Amicus Curie Brief for the American Civil Liberties Union of Tennessee was filed electronically through the Court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system.

/s/ *Thomas H. Castelli*
Thomas H. Castelli