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Juvenile Life Without Parole: How the Supreme Court of Ohio Should Interpret *Montgomery v. Louisiana*

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JUVENILE LIFE WITHOUT PAROLE: HOW THE SUPREME COURT OF OHIO SHOULD INTERPRET *MONTGOMERY V. LOUISIANA*

GRACE O. HURLEY*

ABSTRACT

Regardless of the numerous differences between juveniles and adults, some states, including the State of Ohio, continue to impose upon juvenile homicide offenders one of the harshest forms of punishment: life without parole. In 2016, the United States Supreme Court decided *Montgomery v. Louisiana*, and in doing so, the Court reiterated its previous contention that a sentence of juvenile life without parole should only be imposed upon juvenile homicide offenders whose crimes reflect “irreparable corruption.” The Supreme Court of Ohio has yet to apply the Court’s *Montgomery* decision, but this Note suggests that if it does, the court should utilize the case as a way to end the imposition of this type of sentence on juveniles in Ohio.

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I. INTRODUCTION

The United States of America has routinely recognized that there are differences between juveniles and adults.¹ These differences are evidenced by juveniles' proclivity for risks, inability to assess consequences, underdeveloped senses of responsibility, lack of maturity, and vulnerability and susceptibility to negative influences and outside pressures.² In recognition of these differences, almost every state in the U.S. prohibits juveniles from voting, enlisting to serve in the military, buying cigarettes and alcohol, serving on juries, getting married without legal consent, and driving before the age of sixteen.³ Nonetheless, some states, including the State of Ohio, continue to impose upon juvenile homicide offenders one of the harshest forms of punishment reserved for the nation's most egregious adult criminals: life without parole ("LWOP").⁴

The U.S. is the only country in the world that sentences its children to LWOP for crimes they committed before the age of eighteen.⁵ As of 2017, there were eight

¹ See Josh Rovner, *Juvenile Life Without Parole: An Overview*, THE SENTENCING PROJECT 1 (Oct. 22, 2018), <https://www.sentencingproject.org/publications/juvenile-life-without-parole/>.

² *Miller v. Alabama*, 567 U.S. 460, 472, 490 (2012); *Graham v. Florida*, 560 U.S. 48, 68 (2010); see also *Position Statement 58: Life Without Parole for Juvenile Offenders*, MENTAL HEALTH AMERICA, <http://www.mentalhealthamerica.net/positions/life-without-parole-juveniles> (last visited Sept. 17, 2019) ("Developments in psychology and neuroscience support this distinction and have continued to demonstrate fundamental differences between juveniles and adults. Adolescents consistently score lower than adults in both 'impulse' control and 'suppression of aggression.' In evaluating decisions, adolescents are less likely than adults to examine alternative options. Adolescents are also less 'future-oriented' than adults and have less of an 'ability to see short and long term consequences' or to 'take other people's perspectives into account.' These findings, along with the ever-growing body of research confirms that compared to adults, juveniles are less able to exercise self-control, less capable of avoiding risky behaviors by considering alternative actions, and less attentive to the consequences of impulsive actions.").

³ Rovner, *supra* note 1, at 4.

⁴ For a list of adult criminals serving life sentences for their heinous crimes, see *Famous Serial Killers Who Are Still Alive*, RANKER, <https://www.ranker.com/list/famous-serial-killers-who-are-still-alive/ranker-crime> (last visited Sept. 18, 2019) (discussing serial killers like David Berkowitz, also known as "The Son of Sam," who claimed that a demon dog told him to shoot all of his victims. Berkowitz received six life sentences for killing six people and wounding seven before being caught in 1977. Charles Cullen was sentenced to 127 years in prison after being convicted of murdering at least 35 victims over the course of his sixteen-year nursing career. It is suspected that Cullen is actually responsible for the deaths of hundreds of people).

⁵ Saki Knafo, *Here Are All the Countries Where Children Are Sentenced to Die in Prison*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffingtonpost.com/2013/09/20/juvenile-life-without-parole_n_3962983.html ("The United States is the only country in the world that

inmates serving LWOP sentences in Ohio for homicides that they committed, or were involved in, when they were juveniles.⁶ The United States Supreme Court's 2016 decision in *Montgomery v. Louisiana* is the latest in a series of Supreme Court cases that have whittled away at the imposition of LWOP sentences on juvenile homicide offenders.⁷ The Supreme Court of Ohio has yet to apply the Court's *Montgomery* decision, but if it does, it should utilize the case as a way to end the imposition of this type of sentence on juveniles in Ohio. If the court does so, Ohio will join twenty-one other states and the District of Columbia in banning LWOP sentences for all juveniles.⁸ Such a decision would also rid Ohio of the dangers associated with leaving such a severe and debilitating sentence up to the discretion of trial court judges.

A number of U.S. Supreme Court cases serve as the background to this Note and demonstrate the way in which the Court has nearly done away with the imposition of juvenile LWOP. Beginning in 2005, in *Roper v. Simmons*, the Court held that sentencing juveniles to death constitutes cruel and unusual punishment in violation of the United States Constitution.⁹ In 2010, in *Graham v. Florida*, the Court ruled that the Eighth Amendment prohibits the imposition of LWOP sentences on juveniles convicted of non-homicide offenses.¹⁰ In 2012, in *Miller v. Alabama*, the Court held that sentencing juvenile homicide offenders to mandatory LWOP violates their constitutional rights and constitutes cruel and unusual punishment.¹¹ Most recently, in its 2016 decision in *Montgomery*, the Court held that *Miller* applies retroactively.¹² In doing so, the Court reiterated that this line of cases only rarely permits sentencing of LWOP for juvenile homicide offenders whose crimes reflect "irreparable corruption" and prohibits such sentencing for offenders whose crimes reflect "the transient immaturity of youth."¹³

This Note argues that Ohio should no longer allow its courts to sentence juveniles to life imprisonment for four critical reasons. First, at the time of their offenses,

condemns people to spend their lives behind bars for crimes they committed before they turned 18."); see also *Juvenile Life Without Parole*, JUVENILE LAW CENTER, <https://jlc.org/issues/juvenile-life-without-parole> (last visited Sept. 18, 2019).

⁶ See *50-State Examination*, ASSOCIATED PRESS (July 31, 2017), <https://www.ap.org/explore/locked-up-for-life/50-states>; see also *End Juvenile Life Without Parole*, ACLU, <https://www.aclu.org/end-juvenile-life-without-parole> (last visited Sept. 18, 2019) ("Approximately 2,570 children are sentenced to juvenile life without parole or 'JLWOP' in the United States. Despite a global consensus that children cannot be held to the same standards of responsibility as adults and recognition that children are entitled to special protection and treatment, the United States allows children to be treated and punished as adults.").

⁷ 136 S. Ct. 718, 736–37 (2016).

⁸ See Mark Joseph Stern, *Washington Supreme Court Prohibits Juvenile Life Without Parole*, SLATE (Oct. 18, 2018), <https://slate.com/news-and-politics/2018/10/washington-juvenile-life-without-parole.html>.

⁹ 543 U.S. 551, 551 (2005).

¹⁰ 560 U.S. 48, 75 (2010).

¹¹ 567 U.S. 460, 489 (2012).

¹² *Montgomery*, 136 S. Ct. at 724.

¹³ *Id.*

juveniles are far more underdeveloped physically, mentally, and socially in comparison to adults, making the imposition of this sentence on any juvenile cruel and unjust. Second, the costs associated with juvenile LWOP sentencings are astronomical and harmful to the state's economy. Third, leaving the decision to impose such a sentence to the discretion of trial court judges is dangerous, given that experienced psychotherapists find making this determination nearly impossible. Finally, banning juvenile LWOP would align Ohio with a growing number of states that have done away with this type of sentence completely.

Part II of this Note provides a detailed background of the line of cases, both from the United States Supreme Court and the Supreme Court of Ohio, that have continuously limited juvenile LWOP sentences. Part III analyzes this trend in case law and argues that Ohio should use the Court's latest decision in *Montgomery* to do away with the sentence in this state. Part IV offers a solution to this unconstitutional type of sentencing and suggests that the Supreme Court of Ohio allow the possibility of parole for all juvenile offenders, no matter their crime. Part V briefly concludes.

II. BACKGROUND

A. *The Eighth Amendment and Juvenile LWOP*

The Eighth Amendment to the United States Constitution prohibits the use of cruel and unusual punishment.¹⁴ The death penalty and LWOP are the two types of sentences that are regularly challenged under this amendment. The U.S. Supreme Court has historically upheld these forms of punishment as consistent with the Eighth Amendment.¹⁵ However, since the early 2000s, the Court has called into question the constitutionality of imposing these types of sentencings on *juveniles*. As discussed below, four notable U.S. Supreme Court cases have limited the imposition of juvenile LWOP sentencings, without ever banning the sentence completely.

B. *Roper v. Simmons: Banning the Imposition of the Death Penalty on Juveniles*

In its 2005 decision in *Roper v. Simmons*, the U.S. Supreme Court held that sentencing individuals to death who were under the age of eighteen at the time of their capital crimes violates the Eighth Amendment's Cruel and Unusual Punishment Clause and the Fourteenth Amendment to the United States Constitution.¹⁶ At the age of seventeen, respondent Christopher Simmons and his friend broke into Shirley Crook's home, drove her to a nearby state park, bound her hands and feet with electrical wire, wrapped her face in duct tape, and then threw her from a bridge, drowning her to death in the water below.¹⁷ After Simmons confessed to the murder, the State of Missouri charged him with burglary, kidnapping, stealing, and murder in the first degree.¹⁸

¹⁴ U.S. CONST. amend. VIII. In *Roper*, the U.S. Supreme Court recognized that the Eighth Amendment "guarantees individuals the right not to be subjected to excessive sanctions." 543 U.S. at 560.

¹⁵ *Graham*, 560 U.S. at 59–60.

¹⁶ 543 U.S. at 551.

¹⁷ *Id.* at 556–57.

¹⁸ *Id.* at 557.

At trial, Simmons was tried as an adult and found guilty of murder. The prosecution sought the death penalty, and Simmons was sentenced to death. He eventually appealed his sentence to the Missouri Supreme Court.¹⁹ There, the court set aside Simmons' death sentence and resentenced him to LWOP.²⁰ The State of Missouri appealed the case to the United States Supreme Court, which affirmed the Missouri Supreme Court's holding.²¹ The Court reasoned that the Eighth Amendment applies to the death penalty, as the most severe form of punishment, with special force.²² In banning the imposition of the death penalty on juveniles, the Court distinguished between children under the age of eighteen and adults, concluding that there are three notable differences between these two groups that "render suspect any conclusion that a juvenile falls among the worst offenders."²³ First, the Court noted that juveniles do not have the same level of maturity and responsibility as adults.²⁴ Second, the Court found that juveniles are more susceptible to negative, outside pressures than adults.²⁵ Lastly, the Court reasoned that juveniles' personalities are not formed as well as adults'.²⁶

The Court then went on to explain that the two main theories of punishment, retribution and deterrence, do not apply to juveniles.²⁷ The Court reasoned that this is because the way minors respond to punishment differs from adults.²⁸ As for retribution, the Court remarked that "[w]hether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult."²⁹ As for deterrence, the Court warned that the "same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence."³⁰ In reaching its ultimate conclusion, the Court also addressed its concern with the fact that the United States was the only country that still allowed juveniles to be sentenced to death.³¹ For these reasons, the Court held that the Eighth and Fourteenth Amendments to the Constitution forbid the imposition of the death penalty

¹⁹ *Id.* at 558–60.

²⁰ *Id.* at 561.

²¹ *Id.*

²² *Id.* at 560 (citing *Thompson v. Oklahoma*, 487 U.S. 815, 856 (1988)).

²³ *Id.* at 568–70.

²⁴ *Id.* at 569.

²⁵ *Id.*

²⁶ *Id.* at 570.

²⁷ *Id.* at 571–72.

²⁸ *Id.*

²⁹ *Id.* at 571.

³⁰ *Id.*

³¹ *Id.* at 575.

on offenders who were under the age of eighteen at the time they committed their crimes.³²

C. *Graham v. Florida: Banning the Imposition of LWOP on Juveniles Convicted of Non-Homicide Offenses*

In 2010, in *Graham v. Florida*, the United States Supreme Court held that the Eighth Amendment prohibits the imposition of LWOP sentences on juveniles convicted of non-homicide offenses.³³ At the age of sixteen, petitioner Terrance Jamar Graham and three other school-aged youths attempted to rob a restaurant located in Jacksonville, Florida.³⁴ Following his arrest, Graham was tried as an adult for attempted robbery. Pursuant to a plea agreement, he was sentenced and served concurrent three-year terms of probation, serving his first twelve months of probation in the county jail.³⁵ Less than six months after his release from jail, however, Graham was arrested again for his participation in an armed home invasion robbery.³⁶ The State also alleged that Graham had participated in a second attempted robbery that same evening, which resulted in one of his accomplices getting shot.³⁷ On the night of these events, Graham was thirty-four days shy of his eighteenth birthday.³⁸

At trial, a jury found Graham guilty of armed burglary and attempted armed robbery and sentenced him to the maximum sentence authorized by the law: LWOP.³⁹ The Florida Supreme Court denied review of Graham's appeal, but the U.S. Supreme Court granted certiorari.⁴⁰ Upon review, the Court analyzed controlling precedents regarding the Eighth Amendment and ultimately determined that the punishment in *Graham* violated the Constitution.⁴¹ In doing so, the Court first considered the "objective indicia of society's standards" in determining that there is a national consensus against sentencing juveniles to LWOP for non-homicide offenses.⁴² Although the Court noted that a majority of states still allow this level of sentencing for juveniles, it found that such a sentence is rarely imposed and has been "rejected the world over."⁴³ In reaching its ultimate holding, the Court also considered the

³² *Id.* at 578–79.

³³ 560 U.S. 48, 75 (2010).

³⁴ *Id.* at 53.

³⁵ *Id.* at 53–54.

³⁶ *Id.* at 54.

³⁷ *Id.* at 54–55.

³⁸ *Id.* at 55.

³⁹ *Id.* at 57.

⁴⁰ *Id.* at 58.

⁴¹ *Id.* at 61, 67–75.

⁴² *Id.* at 61, 67 (“[A]n examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use The sentencing practice now under consideration is exceedingly rare. And ‘it is fair to say that a national consensus has developed against it.’”).

⁴³ *Id.* at 62–63, 80 (“There is support for our conclusion in the fact that, in continuing to impose life without parole on juveniles who did not commit homicide, the United States adheres

differences between juveniles and adults detailed in *Roper*, the various theories of punishment, and the fact that such a sentence prevents juveniles from receiving rehabilitation.⁴⁴

D. Miller v. Alabama: Banning Mandatory Juvenile LWOP

In 2012, in *Miller v. Alabama*, the United States Supreme Court held that mandatory sentences of LWOP for juvenile homicide offenders constitute cruel and unusual punishment under the Eighth Amendment.⁴⁵ Petitioner Evan Miller was convicted and sentenced to mandatory LWOP for murder in the course of arson after killing his neighbor, Cole Cannon, at the age of fourteen.⁴⁶ Throughout his youth, Miller had been in and out of foster care due to his mother's alcoholism and drug addiction and his stepfather's abuse.⁴⁷ Miller also regularly used drugs and alcohol and, by the age of fourteen, he had attempted suicide four times.⁴⁸

After his case was removed from juvenile court, Miller was charged as an adult with murder in the course of arson, a charge that carried a mandatory sentence of LWOP in Alabama.⁴⁹ Thus, when a jury found Miller guilty of the offense, he was mandatorily sentenced to LWOP.⁵⁰ The Alabama Court of Criminal Appeals affirmed his sentence and the Alabama Supreme Court denied review of his appeal.⁵¹ Thereafter, the U.S. Supreme Court granted certiorari and ultimately reversed his sentence.⁵²

In reaching its holding, the Court once again reiterated the need to sentence adults and juveniles differently because of the noted differences between the two groups.⁵³

to a sentencing practice rejected the world over. This observation does not control our decision. The judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment. But '[t]he climate of international opinion concerning the acceptability of a particular punishment' is also 'not irrelevant.'").

⁴⁴ See *id.* at 71–74; see also *id.* at 70 (stating “[l]ife without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.”).

⁴⁵ 567 U.S. 460, 489 (2012).

⁴⁶ *Id.* at 467–68.

⁴⁷ *Id.* at 467.

⁴⁸ *Id.*

⁴⁹ *Id.* at 469.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 471 (“*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, ‘they are less deserving of the most severe punishments.’ Those cases relied on three significant gaps between juveniles and adults. First, children have a ‘lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking. Second, children ‘are more vulnerable . . . to negative influences and outside pressures,’ including from their family and peers; they have limited

The Court also addressed the importance of distinguishing between “the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption” when imposing a sentence of LWOP.⁵⁴ To aide courts in making this distinction, the Court held that “youth matters in determining the appropriateness” of a LWOP sentence.⁵⁵ Thus, when sentencing a juvenile convicted of homicide, a judge must be allowed to consider the mitigating factors that accompany youth, such as the juvenile’s age, their age-related characteristics, and the nature of their crime.⁵⁶ Although the Court did not ban juvenile LWOP in *Miller*, it cautioned that “appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.”⁵⁷

E. Montgomery v. Louisiana: The U.S. Supreme Court’s Most Recent Interpretation of Juvenile LWOP

The Court’s 2016 *Montgomery v. Louisiana* decision is the latest in the series of U.S. Supreme Court cases that have limited the imposition of juvenile LWOP sentences.⁵⁸ In *Montgomery*, petitioner Henry Montgomery was seventeen years old in 1963 when he killed a deputy sheriff in Louisiana.⁵⁹ At his initial trial, Montgomery was convicted of murder and sentenced to death, but the Louisiana Supreme Court reversed his conviction and ordered a retrial.⁶⁰ The jury then returned a verdict of “guilty without capital punishment,” which carried an automatic sentence of LWOP.⁶¹ By the time Montgomery’s case reached the U.S. Supreme Court, he was sixty-nine years old and had spent almost his entire life in prison.⁶²

In *Montgomery*, the majority held that the Court’s *Miller* decision, prohibiting the imposition of mandatory LWOP sentences on juveniles, was a substantive rule of constitutional law and, as such, the rule applied retroactively.⁶³ In its opinion, the Court reiterated that a juvenile offender’s youth and attendant characteristics are to be

‘control over their own environment’ and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child’s character is not as ‘well formed’ as an adult’s; his traits are ‘less fixed’ and his actions less likely to be ‘evidence of irretrievable depravity.’” (citations omitted)).

⁵⁴ *Id.* at 479–80 (first citing *Roper v. Simmons*, 543 U.S. 551, 573 (2005); and then citing *Graham v. Florida*, 560 U.S. 48, 68 (2010)).

⁵⁵ *Id.* at 473.

⁵⁶ *Id.* at 489.

⁵⁷ *Id.* at 479.

⁵⁸ 136 S. Ct. 718, 736–37 (2016).

⁵⁹ *Id.* at 725.

⁶⁰ *Id.*

⁶¹ *Id.* at 725–26.

⁶² *Id.*

⁶³ *Id.* at 734 (“*Miller* announced a substantive rule of constitutional law. Like other substantive rules, *Miller* is retroactive because it ‘necessarily carr[ies] a significant risk that a defendant’—here, the vast majority of juvenile offenders—‘faces a punishment that the law cannot impose upon him.’”).

considered prior to imposing a LWOP sentence.⁶⁴ Emphasizing that such sentences should be uncommon, the Court again noted that its *Miller* decision only rarely permitted sentencing of LWOP for juvenile offenders whose crimes reflect “irreparable corruption” and prohibited such sentences for offenders whose crimes reflect “the transient immaturity of youth.”⁶⁵ Thus, the Court explained that its *Miller* decision effectively barred the imposition of juvenile LWOP for any juvenile whose crime does not reflect permanent and irreparable corruption.⁶⁶ Ultimately, the Court did not make a final decision regarding Montgomery’s release, but it made it clear that if a juvenile offender’s crime resulted from their transient immaturity, then their LWOP sentence may be a violation of their Eighth Amendment right against cruel and unusual punishment.⁶⁷

F. Juvenile LWOP in Ohio

As of 2017, there were eight inmates serving LWOP sentences in the State of Ohio for homicides they committed or were involved in when they were juveniles.⁶⁸ Several more are serving de facto life sentences, terms so long that they amount to death behind bars.⁶⁹ In recent years, the Supreme Court of Ohio has interpreted all of the above U.S. Supreme Court decisions regarding the imposition of juvenile LWOP, with the exception of *Montgomery*. Two cases represent the court’s current understanding of the sentence.

First, in *State v. Long*, the Supreme Court of Ohio reversed and remanded a juvenile homicide offender’s LWOP sentence after finding that the trial court erred in failing to consider the defendant’s juvenile status as a mitigating factor prior to sentencing him to LWOP.⁷⁰ The court, interpreting *Roper*, *Graham*, and *Miller*,

⁶⁴ *Id.* (“*Miller*, then, did more than require a sentence 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 distinctive attributes of youth.’ 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.’ Because *Miller* determined that sentencing a child to life without parole is excessive for all but ‘the rare juvenile offender whose crime reflects irreparable corruption,’ it 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.’”).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 736–37. Although the Court did not make a final decision regarding Montgomery’s release, it explained “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.”

⁶⁸ Andrew Welsh-Huggins, 8 *Ohio Men Serving Life Without Parole for Homicide as Teens*, AP NEWS (July 31, 2017), <https://apnews.com/81172c6602cc4f92810b5b44e8c6c22f>. Welsh-Huggins explains that T.J. Lane is one of the eight Ohio men serving LWOP sentences for homicides they committed or were involved in when they were under the age of eighteen. Lane was convicted of killing three students in a 2012 high school shooting that occurred in Chardon, Ohio. He was seventeen at the time of his offense. *Id.*

⁶⁹ *Id.*

⁷⁰ 8 N.E.3d 890, 899 (Ohio 2014).

reasoned that “juveniles who commit criminal offenses are not as culpable for their acts as adults are and are more amendable to reform.”⁷¹ Regardless of such a finding, the court suggested that since “*Miller* did not go so far as to bar courts from imposing the sentence of life without the possibility of parole on a juvenile,” its finding that courts must consider youth and attendant circumstances as strong mitigating factors was sufficient to ensure that the sentence “rarely be imposed on juveniles.”⁷²

Second, the court’s 2016 decision in *State v. Moore* represents its most recent interpretation of juvenile LWOP.⁷³ In *Moore*, the defendant appealed his conviction pursuant to *Graham* after having been sentenced to an aggregate 112-year prison term for non-homicide offenses that he committed at fifteen years old.⁷⁴ In finding that the appellate court abused its discretion in not granting the defendant’s application for delayed reconsideration, the court stated that “the United States Supreme Court has all but abolished life-without-parole sentences even for those juveniles who commit homicide.”⁷⁵ The court’s decision also included a state-by-state analysis detailing how other high courts throughout the country have interpreted both *Graham* and *Miller*.⁷⁶ In doing so, the court reasoned that their holding in *Moore* “is consistent with those of other high courts that have held that for the purposes of applying the Eighth Amendment protections set forth in *Graham* and *Miller*, there is no meaningful distinction between sentences of life imprisonment without parole and prison sentences that extend beyond a juvenile’s life expectancy.”⁷⁷

III. DISCUSSION

The Supreme Court of Ohio’s recent interpretations of juvenile LWOP lead to two notable inferences. First, the court understands and values the important distinctions between juveniles and adults in imposing this harsh sentence, and second, the court deems persuasive the ways in which other state high courts have interpreted the sentence. In light of these findings, the court must utilize *Montgomery* as a means of doing away with juvenile LWOP in the State of Ohio.

As of October 2018, twenty-one states and the District of Columbia have abolished LWOP for juveniles.⁷⁸ This change reflects a rapid trend since the U.S. Supreme Court’s decisions in *Miller* and *Montgomery*, considering that before those cases, only four states had banned the sentence completely.⁷⁹ A deeper analysis into the Court’s major decisions dealing with juvenile LWOP suggests that states have banned the sentence in light of the Court’s discussion of the noted differences between children

⁷¹ *Id.*

⁷² *Id.*

⁷³ 76 N.E.3d 1127 (Ohio 2016).

⁷⁴ *Id.* at 1131.

⁷⁵ *Id.* at 1140.

⁷⁶ *Id.* at 1143–47.

⁷⁷ *Id.*

⁷⁸ See Stern, *supra* note 8.

⁷⁹ See *Does Your State Still Use Life-Without-Parole Sentences for Kids?*, CAMPAIGN FOR FAIR SENTENCING OF YOUTH (Feb. 1, 2018), <https://www.fairsentencingofyouth.org/does-your-state-use-jvenile-life-without-parole-jlwop/>.

and adults in relation to their culpability, the costs and severity of a LWOP sentence for the nation's children, and the dangers associated with leaving such sentences up to the discretion of judges.

A. Juveniles Are Underdeveloped Physically, Mentally, and Socially Compared to Adults, Making the Imposition of LWOP on Any Juvenile Cruel and Unjust

In *Miller*, the Court described a sentence of LWOP as one that “foreswears altogether the rehabilitative ideal.”⁸⁰ Similarly, in *Graham*, the Court described this type of sentence as one that “alters the offender’s life by a forfeiture that is irrevocable” and that deprives youth of “the most basic liberties without giving a hope of restoration.”⁸¹ The *Graham* Court went on to note that the punishment “means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the child], he will remain in prison for the rest of his days.”⁸² In light of the Court’s somber description of what a sentence of LWOP holds for juvenile offenders, the noted differences between children and adults further a finding of the need to ban the sentence completely.

In every U.S. Supreme Court case that has whittled away at the imposition of juvenile LWOP, the Court has cited to the characteristics of children in rationalizing each new limitation on imposing the sentence. For example, in banning mandatory sentences of LWOP for juvenile homicide offenders in *Miller*, the Court reasoned that a child’s “transient rashness, proclivity for risk, and inability to assess consequences” lessens their culpability for the crimes that they commit.⁸³ With a lessened culpability, the Court explained, a child’s “immaturity, recklessness, and impetuosity” also “make[s] them less likely to consider potential punishment.”⁸⁴ With these characteristics in mind, the Court further noted that another difference between adults and children is that children have a “heightened capacity for change,” thus strengthening the argument against sentencing juveniles to LWOP given that such a sentence essentially makes rehabilitation an impossibility.⁸⁵

Similarly, in *Graham*, the Court addressed this idea of culpability, explaining that because children have a “lessened culpability they are less deserving of the most severe punishments.”⁸⁶ In rationalizing its new limitation on the imposition of the sentence, the Court further noted the differences between children and adults, explaining that “[a]s compared to adults, juveniles have a ‘lack of maturity and an underdeveloped sense of responsibility;’ they ‘are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure;’ and their characters are ‘not well formed.’”⁸⁷ While the differences between juveniles and adults

⁸⁰ *Miller v. Alabama*, 567 U.S. 460, 473 (2012).

⁸¹ *Graham v. Florida*, 560 U.S. 48, 69–70 (2010).

⁸² *Id.* (quoting *Naovarath v. State*, 779 P.2d 944, 944 (Nev. 1989)).

⁸³ *Miller*, 567 U.S. at 472.

⁸⁴ *Id.*

⁸⁵ *Id.* at 479.

⁸⁶ *Graham*, 560 U.S. at 68.

⁸⁷ *Id.* (emphasis added) (quoting *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005)).

are reason enough to ban juvenile LWOP, the negative economic costs associated with such sentences is further justification for doing so.

B. Banning Juvenile LWOP Is Fiscally Responsible Because of the Astronomical Economic Costs Associated with the Sentence

In the 2018 fiscal year, the State of Ohio spent nearly \$2 billion on the state's correctional system.⁸⁸ From that cost, \$206 million was spent on the Department of Youth Services ("DYS").⁸⁹ Since 2006, almost half of the \$195.3 million reduction in funding for Ohio's correctional system came from the DHS as a direct result of policy changes that increased community supervision for youth and closed institutional facilities.⁹⁰ This outcome stems from the state's appreciation of the fact that less severe sentences are beneficial not only for the youth, but for Ohio's budget as well.⁹¹ Thus, banning the imposition of juvenile LWOP will not only alleviate the injustices associated with such a sentence, but will also serve as a fiscally responsible policy in shrinking the costs that Ohio spends on the state's correctional system.

The economic effects associated with juvenile LWOP also impose heavy burdens on families and communities in states throughout the U.S.⁹² In 2016, the average cost to house a prisoner in Ohio was \$25,814.⁹³ Nationally, the cost is nearly \$35,000 a year to house a prisoner and this number doubles when that prisoner passes the age of fifty.⁹⁴ Therefore, a fifty-year sentence for a sixteen-year-old sentenced to LWOP will cost a state at least \$2 to \$2.5 million.⁹⁵

The costs associated with juveniles serving life sentences are higher compared to adults due to the harsh prison environments that they grow up in, accompanied by the inadequate treatment that they receive while behind bars.⁹⁶ Because life in prison

⁸⁸ Wendy Patton, *Ohio Budget Basics*, POLICY MATTERS OHIO (Jan. 30, 2019), <https://www.policymattersohio.org/research-policy/quality-ohio/revenue-budget/budget-policy/ohio-budget-basics>.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Justice Policy Institute, *Sticker Shock: Calculating the Full Price Tag for Youth Incarceration 3 (2014)* ("Policies that needlessly confine youth have an immediate cost for taxpayers and our communities: across the states, taxpayers foot the bill for youth confinement to the tune of hundreds of dollars per day and hundreds of thousands of dollars per year.").

⁹³ Kelsey Warner, *State by State: How Much Does It Cost to Keep Someone in Prison?*, TIMES NEWS (May 3, 2016), <https://www.thetimesnews.com/article/20160503/NEWS/160509836>.

⁹⁴ Rovner, *supra* note 1, at 4.

⁹⁵ Emily Luhrs, *Life Without Parole: Costly for Juveniles and Taxpayers*, CENTER ON JUVENILE AND CRIMINAL JUSTICE (June 30, 2011), <http://www.cjcj.org/news/5379> ("According to a 2007 study conducted by UC Berkeley and Tulane University researchers, each new youth sentenced to LWOP would cost the state at least \$2 to \$2.5 million.").

⁹⁶ Ashley Nellis, *Still Life: America's Increasing Use of Life and Long-Term Sentences*, SENTENCING PROJECT (May 3, 2017), <https://www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences/> ("The cost for life imprisonment is high, in the range of \$1 million per adult prisoner, with prison expenses rising precipitously after middle age. A partial cause of the eventual doubling of expenses as prisoners age is the heavy toll that

exacerbates juveniles' health status and accelerates their aging process, the costs associated with their sentences are astronomical and have a detrimental effect on taxpayers and states in general.⁹⁷ Thus, the Supreme Court of Ohio must also consider these costs when tasked with banning juvenile LWOP. While the costs associated with imposing this sentence are concerning, an even greater cause for concern stems from leaving the determination of whether a juvenile is capable of rehabilitation up to the discretion of trial court judges.

C. Leaving the Imposition of Juvenile LWOP Sentences Up to the Discretion of Trial Court Judges Is Dangerous and Potentially Harmful

As the law stands today, before sentencing a juvenile homicide offender to LWOP, courts are expected to consider the youth's chances of being rehabilitated and make a finding as to whether or not their crime reflects "irreparable corruption" or "the transient immaturity of youth."⁹⁸ Pursuant to this process, experts are typically called upon to testify as to whether or not they believe a juvenile offender is capable of rehabilitation, and, in turn, this testimony is meant to serve as an aid to the trial court in making its sentencing determination.⁹⁹ As the Court pointed out in *Roper*, however, "[i]t is difficult *even for expert psychologists* to differentiate between the juvenile offender whose crimes reflect unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."¹⁰⁰

In 2012, in its amicus brief in support of the petitioners in *Miller*, the American Psychological Association ("APA") 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.¹⁰¹

Admittedly, even experienced psychologists find predicting a youth's ability to rehabilitate impossible. Thus, it is inconceivable and harmful to this nation's youth to expect trial court judges to make this same determination before sentencing a juvenile homicide offender to prison for the rest of their life.

prison itself has on human health. Typically, people entering incarceration already exhibit poorer health compared to the general public, but the harsh prison environment, accompanied by inadequate treatment, exacerbates prisoners' health status and accelerates the aging process. People in prison experience higher rates of both chronic and infectious diseases as compared to the general population.").

⁹⁷ *Id.*

⁹⁸ *Miller v. Alabama*, 567 U.S. 460, 479–80 (2012).

⁹⁹ *See, e.g., State v. Sweet*, 879 N.W.2d 811, 812–14 (Iowa 2016).

¹⁰⁰ *Roper v. Simmons*, 543 U.S. 551, 573 (2005). Another cause for concern, specific to the state of Ohio, is the fact that state judges are elected to the bench. This means that sentencing judges may lack experience as members of the judiciary, with a potential for some to have little to no trial court experience whatsoever. *See Bradley Link, Had Enough in Ohio? Time to Reform Ohio's Judicial Selection Process*, 51 CLEV. ST. L. REV. 123, 149 (2004).

¹⁰¹ Brief of the Am. Psychological Ass'n et al. as Amicus Curiae in Support of Petitioners, *Miller*, 567 U.S. 460 (Nos. 10-9646, 10-9647).

In another amicus brief filed in support of the petitioners in *Miller*, a group of former juvenile court judges stressed the difficulties associated with predicting a juvenile offender's chances for rehabilitation.¹⁰² The judges urged that the best time to evaluate whether a juvenile has the capacity for reform is "after they have had time to mature, not when they are initially sentenced."¹⁰³ Taking these warnings into consideration, it is apparent that there is no solution to this danger other than banning the imposition of LWOP completely. An example of a trial court abusing its discretion and violating a juvenile's constitutional right against cruel and unusual punishment stems from the facts and findings in the Iowa Supreme Court's decision in *State v. Sweet*.¹⁰⁴

In *State v. Sweet*, a court sentenced a sixteen-year-old to LWOP after he pleaded guilty to two counts of first-degree murder.¹⁰⁵ Prior to imposing this severe sentence upon the juvenile, the court analyzed a pre-sentence investigation report ("PSI") that was prepared in anticipation for the hearing.¹⁰⁶ The report extensively outlined the facts surrounding the juvenile's crime, his failure to obtain his GED, his tumultuous family dynamics, his unfortunate childhood circumstances, and his emotional and personal health, where it was reported that Sweet had attempted suicide several times in the past.¹⁰⁷ State psychologists testified at the youth's trial and explained that his prospects for rehabilitation were "mixed."¹⁰⁸ Regardless of all of these findings and noted cautions, the court sentenced the juvenile to LWOP.¹⁰⁹

Because the judge in *Sweet* seemingly disregarded the mitigating circumstances addressed in both the PSI and testimony of state psychologists, the case serves as a perfect example of the dangers associated with leaving the imposition of juvenile LWOP sentences up to the nation's trial court judges. In finding Sweet's sentence constitutionally impermissible, the Iowa Supreme Court explained that it is wrong to "ask our district court judges to predict future prospects for maturation and rehabilitation when highly trained professionals say such predictions are impossible."¹¹⁰ With the above understanding of the dangers associated with trial courts determining whether a LWOP sentence is appropriate for juveniles, it becomes clear why a near majority of this nation's states have banned this sentence entirely.

D. Banning Juvenile LWOP Would Align the State of Ohio With a Growing Number of States That Have Done Away with the Sentence

In the Supreme Court of Ohio's *Moore* decision, it deemed persuasive the ways in which other state high courts throughout the U.S. were interpreting the imposition of

¹⁰² Brief of Former Juvenile Court Judges as Amicus Curiae in Support of Petitioners, *Miller*, 567 U.S. 460 (No. 18-217).

¹⁰³ *Id.*

¹⁰⁴ *Sweet*, 879 N.W.2d at 839.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 816.

¹⁰⁷ *Id.* at 813–14.

¹⁰⁸ *Id.* at 816.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 839.

juvenile LWOP.¹¹¹ The court recognized the importance of such an analysis even before the U.S. Supreme Court's *Montgomery* decision and before numerous states throughout the U.S. banned the imposition of the sentence completely. Alaska, Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Iowa, Kansas, Kentucky, Massachusetts, Nevada, New Jersey, North Dakota, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, and Wyoming have all banned the imposition of juvenile LWOP in their respective states.¹¹² Understanding that this list is extensive, it is imperative to note that a growing number of states throughout the country are taking the necessary and appropriate steps towards banning this sentence, a trend that the Supreme Court of Ohio should follow. When it does so, the court must first grasp the numerous ways that states have interpreted the U.S. Supreme Court's most recent juvenile LWOP decision, because each interpretation has led the country towards the direction of ending the imposition of the sentence for good.

1. State-by-State Interpretation of *Montgomery v. Louisiana*

Since the U.S. Supreme Court's *Miller* and *Montgomery* decisions relating to juvenile LWOP, numerous state legislatures throughout the U.S. have responded to the Court's rulings by changing their laws pertaining to the sentence. All of these changes incorporate the mitigating qualities of youth that the *Miller* Court identified in its decision. For example, in Nevada, the legislature revised the state's juvenile sentencing statute to require that courts "consider the differences between juvenile and adult offenders, including, without limitation, the diminished culpability of juveniles as compared to that of adults and the typical characteristics of youth."¹¹³ State legislatures in Florida, Pennsylvania, Louisiana, and Missouri have all required that trial courts only determine that LWOP is appropriate for a juvenile homicide offender after they have considered factors like the effect of the defendant's crime on the victim and community, the offender's maturity, intellectual capacity, impetuosity, possibility

¹¹¹ *State v. Moore*, 76 N.E.3d 1127, 1143 (Ohio 2016). In the section of its opinion titled "Consistency with Other States," the Supreme Court of Ohio engaged in a state-by-state analysis, ultimately concluding that its holding "is consistent with those of other high courts that have held that for purposes of applying the Eighth Amendment protections set forth in *Graham* and *Miller*, there is no meaningful distinction between sentences of life imprisonment without parole and prison sentences that extend beyond a juvenile's life expectancy. *Id.* at 1143. Within this section, the court analyzed cases from the California Supreme Court, Florida Supreme Court, Supreme Court of Louisiana, Iowa Supreme Court, Wyoming Supreme Court, Supreme Court of Connecticut, and the Supreme Court of Illinois. *Id.* at 1143–46.

¹¹² ALASKA STAT. § 12.55.015(g) (1996); ARK. CODE ANN. § 5-4-108 (2019); CAL. PENAL CODE §§ 3051, 4801 (Deering 2019); COLO. REV. STAT. §§ 17-22.5-104(2)(d)(IV), 18-1.3-401(4)(b)(I) (2018); CONN. GEN. STAT. § 54-125a(f) (2019); DEL. CODE ANN. tit. 11, §§ 4209A, 4204A(d)(2013); D.C. CODE § 22-2104(a) (2019); HAW. REV. STAT. § 706-656 (2019); KAN. STAT. ANN. 21-6618 (2019); KY. REV. STAT. ANN. § 640.040(1) (LexisNexis 2019); NEV. REV. STAT. § 176.025 (2019); N.J. REV. STAT. § 2C:11-3 (2013); N.D. CENT. CODE §§ 12.1-20-03(4), 12.1-32-13.1 (2019); S.D. CODIFIED LAWS § 22-6-1 (2019); TEX. PENAL CODE ANN. § 12.31 (West 2019); UTAH CODE ANN. § 76-3-209 (LexisNexis 2019); VT. STAT. ANN. tit. 13, § 7045 (2019); W. VA. CODE ANN. § 61-1-1-23(a)(2) (2019); WYO. STAT. ANN. § 6-2-101(b) (2019); *Sweet*, 879 N.W.2d 811, 839 (Iowa 2016); *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270, 284–85 (Mass. 2013); *State v. Bassett*, 428 P.3d 343 (Wash. 2018).

¹¹³ NEV. REV. STAT. § 176.017 (2019).

of rehabilitation, prior record, and family, home, and community environment.¹¹⁴ In Iowa, judges must consider the youth's inability to cooperate with the police or prosecution in addition to the other factors adopted by the state legislators of Florida, Pennsylvania, Louisiana, and Missouri.¹¹⁵ Further, West Virginia legislators have required that judges consider the juvenile defendant's faith and community involvement, participation in the child welfare system, school records, and trauma as additional mitigating qualities associated with youth that the *Miller* and *Montgomery* Courts reiterated throughout their opinions.¹¹⁶ Although it is necessary for the Supreme Court of Ohio to understand how other states have restricted the imposition of juvenile LWOP statutorily, the court should also look to recent decisions from judiciaries throughout the U.S. to better understand the various ways in which state high courts have analyzed and applied *Montgomery* since the decision was released.

In *Landrum v. State*, the Supreme Court of Florida interpreted and applied *Montgomery* as an amplifier of *Miller*.¹¹⁷ In doing so, the court found the defendant's LWOP sentence unconstitutional and remanded the case for resentencing.¹¹⁸ The court explained, "*Miller* and *Montgomery* . . . require a sentence to consider age-related evidence as mitigation, and permit the sentencing of a juvenile offender to life imprisonment only in the most 'uncommon' and 'rare' case where the juvenile offender's crime reflects 'irreparable corruption.'"¹¹⁹ Similarly, in *Atwell v. State*, another Florida Supreme Court case interpreting juvenile LWOP, the court quashed a juvenile defendant's mandatory LWOP sentence after finding that the trial court failed to provide the type of individualized sentencing consideration that *Miller* required and that *Montgomery* reiterated.¹²⁰ The court explained that *Montgomery* emphasized that *Miller* required prisoners sentenced as juveniles to 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."¹²¹

In *State v. Valencia*, the Supreme Court of Arizona applied *Montgomery* in reversing a trial court's holding that denied numerous juvenile defendants' petitions for post-conviction relief.¹²² The court held that because *Montgomery* clarified that "*Miller* is a new substantive rule of constitutional law that must be given retroactive effect by state courts," the defendants were entitled to evidentiary hearings on their petitions because "they made colorable claims for relief based on *Miller*."¹²³ The court also explained that prior to the Supreme Court's decisions in both *Miller* and

¹¹⁴ FLA. STAT. § 921.1401 (2019); LA. CODE CRIM. PROC. ANN. art 878.1 (2019); MO. REV. STAT. § 565.033 (2019); 18 PA. CONS. STAT. § 1102.1 (2019).

¹¹⁵ IOWA CODE §902.1 (2018).

¹¹⁶ W. VA. CODE § 61-11-23 (2019).

¹¹⁷ 192 So. 3d 495, 467 (Fla. 2016).

¹¹⁸ *Id.* at 469.

¹¹⁹ *Id.*

¹²⁰ 197 So. 3d 1040, 1042–43 (Fla. 2016).

¹²¹ *Id.* at 1042.

¹²² 386 P.3d 392, 393 (Ariz. 2016).

¹²³ *Id.* at 395–96.

Montgomery, when defendants were first being sentenced, trial courts were allowed to impose LWOP sentences on juveniles convicted of first degree murder “without distinguishing crimes that reflected ‘irreparable corruption’ rather than the ‘transient immaturity of youth,’” suggesting that such a finding is now required in the State of Arizona.¹²⁴

In *Veal v. State*, the Supreme Court of Georgia reversed and remanded a juvenile defendant’s LWOP sentence pursuant to *Montgomery*.¹²⁵ In this case, the court explained “*Montgomery* holds that ‘*Miller* announced a substantive rule of constitutional law’ that ‘the sentence of life without parole is disproportionate for the vast majority of juvenile offenders,’ with sentencing courts utilizing the process that *Miller* set forth to determine whether a particular defendant falls into this *almost-all* juvenile murderer category for which LWOP sentences are banned.”¹²⁶ The court explained that *Montgomery* made clear that “LWOP sentences may be constitutionally imposed only on the worst-of-the-worst juvenile murderers.”¹²⁷ Further, the court held that trial courts are required to make distinct determinations on the record that a juvenile offender is “irreparably corrupt or permanently incorrigible, as necessary to put him in the narrow class of juvenile murderers for whom [a] LWOP sentence is proportional under the Eighth Amendment as interpreted in *Miller* and refined by *Montgomery*.”¹²⁸

In *Windom v. State*, the Supreme Court of Idaho held that the trial court abused its discretion when it denied a defendant’s motion to amend his petition for post-conviction relief to add a claim pursuant to *Montgomery* and *Miller*.¹²⁹ The court’s 2017 decision utilized *Montgomery* in determining whether or not the defendant’s motion to amend was filed within a reasonable time following the issuance of the decision, which made *Miller* applicable to his sentence of LWOP.¹³⁰ In finding that the defendant’s sentencing hearing did not include evidence of the factors required by *Miller* and *Montgomery*, the court held that his sentencing did not comport with the requirements of the two U.S. Supreme Court decisions.¹³¹ The court further explained that because the record from the sentencing hearing was devoid of the terms “transient immaturity of youth” and “irreparable corruption,” the defendant’s petition was incorrectly dismissed because such terms needed to be explicitly proven pursuant to *Miller* and *Montgomery*.¹³²

In 2017, in *Commonwealth v. Batts*, the Supreme Court of Pennsylvania reversed and remanded a juvenile defendant’s LWOP sentence after finding that the trial court failed to prove that the defendant was irreparably corrupt and incapable of

¹²⁴ *Id.* at 395.

¹²⁵ 784 S.E.2d 403, 405 (Ga. 2016).

¹²⁶ *Id.* at 411.

¹²⁷ *Id.* at 412.

¹²⁸ *Id.*

¹²⁹ 398 P.3d 150, 158 (Idaho 2017).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 157.

rehabilitation.¹³³ In doing so, the court recognized a presumption against the imposition of a sentence of LWOP for a juvenile offender and categorized *Miller* and *Montgomery* as safeguards “to ensure that life-without-parole sentences are meted out only to ‘the rarest of juvenile offenders’ whose crimes reflect ‘permanent incorrigibility,’ ‘irreparable corruption,’ and ‘irretrievable depravity.’”¹³⁴ The court concluded, “in the absence of the sentencing court reaching a conclusion, supported by competent evidence, that the defendant will forever be incorrigible, without any hope for rehabilitation, a life-without-parole sentence imposed on a juvenile is illegal, as it is beyond the court’s power to impose.”¹³⁵

Lastly, in *Davis v. State*, the Supreme Court of Wyoming reversed and remanded a LWOP sentence imposed upon a juvenile homicide offender.¹³⁶ The court, interpreting both *Miller* and *Montgomery*, emphasized that “[t]he Supreme Court made clear that a sentencing court must determine that a juvenile is irreparably corrupt or permanently incorrigible prior to a sentence of life without parole.”¹³⁷ Further, the court held that “if the sentencing court sentences a juvenile to life or its functional equivalent, it must make a finding that, in light of all the *Miller* factors, the juvenile offender’s crime reflects irreparable corruption resulting in permanent incorrigibility, rather than transient immaturity.”¹³⁸ While understanding the ways in which state high courts throughout the U.S. have interpreted and applied *Montgomery* is useful, the Supreme Court of Ohio should look to the recent decisions from the Supreme Courts of Washington and Iowa to better understand how and why it is essential that Ohio bans the imposition of this unconstitutional sentence.

2. How the Supreme Courts of Washington and Iowa Utilized *Montgomery v. Louisiana* to End Juvenile LWOP in Their Respective States

In October of 2018, the State of Washington became the most recent state in the U.S to ban sentencing juveniles to LWOP.¹³⁹ In *Washington v. Bassett*, the Supreme Court of Washington held that juvenile LWOP constitutes cruel punishment in violation of the state’s constitution.¹⁴⁰ At sixteen years old, Brian Bassett was sentenced to mandatory LWOP for murdering his mother, father, and brother after they kicked him out of their house.¹⁴¹ Following the U.S. Supreme Court’s decisions

¹³³ 163 A.3d 410, 459–60 (Pa. 2017).

¹³⁴ *Id.* at 415–16.

¹³⁵ *Id.* at 435.

¹³⁶ 415 P.3d 666, 696 (Wyo. 2018).

¹³⁷ *Id.* at 680.

¹³⁸ *Id.* at 684.

¹³⁹ *State v. Bassett*, 428 P.3d 343 (Wash. 2018).

¹⁴⁰ *Id.* at 346 (affirming the lower court’s decision and holding that “sentencing juvenile offenders to life without parole or early release constitutes cruel punishment and therefore is unconstitutional . . . under article I, section 14 of the Washington Constitution.”).

¹⁴¹ *Id.*

in *Miller* and *Montgomery*, Bassett appealed his conviction at the age of thirty-five.¹⁴²

On appeal, Bassett referenced a recent statute that the Washington state legislature had enacted, requiring courts to take into consideration the mitigating factors that account for the diminished culpability of youth pursuant to *Miller*.¹⁴³ In support of his argument that his sentence of LWOP was unconstitutional, Bassett provided the court with a number of factors suggesting that, while in prison, he had rehabilitated and matured emotionally and behaviorally since his days as a teenager.¹⁴⁴ Bassett set forth that since his conviction and sentence of LWOP, he had successfully completed courses that examined stress and family violence in an attempt to better understand his crimes.¹⁴⁵ He received his general equivalency diploma (“GED”) and a full tuition scholarship for college, where he was placed on the honor roll.¹⁴⁶ Further, while still behind bars, Bassett served as a mentor to others, and in 2010, he got married after receiving premarital counseling.¹⁴⁷

In agreeing with Bassett that sentencing juveniles to LWOP was violative of its state constitution, the Washington Supreme Court reasoned that “the direction of change in this country is unmistakably and steadily moving toward abandoning the practice of putting child offenders in prison for their entire lives.”¹⁴⁸ In reaching its holding, the court discussed *Miller*, *Roper*, and *Graham* extensively, suggesting that the U.S. Supreme Court has established a clear connection between youth and a decreased moral culpability for criminal conduct, making this type of sentence unduly harsh.¹⁴⁹ In conclusion, the court held that because “states are rapidly abandoning juvenile life without parole sentences, children are less criminally culpable than adults, and the characteristics of youth do not support the penological goals of a life without parole sentence,” such a sentence constitutes cruel punishment that is unconstitutional in the State of Washington.¹⁵⁰

¹⁴² *Id.*

¹⁴³ *Id.* (“In response to *Miller*, our state legislature enacted what is referred to as the *Miller*-fix statute. It requires sentencing courts to consider the *Miller* factors before sentencing a 16- or 17-year-old convicted of aggravated first degree murder to life without parole. The statute provides that ‘the court must take into account the mitigating factors that amount for the diminished culpability of youth as provided in *Miller v. Alabama* including, but not limited to, the age of the individual, the youth’s childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth’s chances of becoming rehabilitated.’ The statute mandated that individuals who had been sentenced to juvenile life without parole under the former mandatory scheme, such as Bassett, be resentenced under this new statute.” (citations omitted)).

¹⁴⁴ *Id.* at 346–47.

¹⁴⁵ *Id.* at 347.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 352.

¹⁴⁹ *Id.* at 352–53.

¹⁵⁰ *Id.* at 353. The court expounded on these “penological goals” in their opinion, explaining that they pertain to “retribution, deterrence, incapacitation, and rehabilitation,” all of which are supposed to be served through the imposition of a LWOP sentence. *Id.* (“First, the case for

Another case that the Supreme Court of Ohio should consider in banning juvenile LWOP comes from the Supreme Court of Iowa. In its 2016 decision in *State v. Sweet*, as discussed above, the highest court in Iowa reversed a juvenile defendant's LWOP sentence and held that juvenile offenders may not be sentenced to LWOP in the state.¹⁵¹ In *Sweet*, sixteen-year-old Isaiah Sweet shot and killed his grandfather and his grandfather's wife, whom he had lived with since he was four years old.¹⁵² According to Sweet, his grandfather's wife was dying of cancer and every night his grandfather would call him expletives and "told [him] to just kill [himself] and fall off the earth."¹⁵³ After pleading guilty to two counts of first-degree murder, a sentencing court reviewed a PSI report that was prepared in anticipation of the hearing.¹⁵⁴ The report detailed the facts surrounding Sweet's crime, his tumultuous family dynamics, his unfortunate childhood circumstances, and his emotional and personal health.¹⁵⁵ The report also documented that over the course of Sweet's short life, he had already attempted suicide several times.¹⁵⁶ Regardless, and even after state psychologists testified at Sweet's trial that his prospects for rehabilitation were "mixed," the court sentenced him to LWOP.¹⁵⁷

On appeal to the Iowa Supreme Court, Sweet asserted his age, immaturity, impetuosity, family and home environment, and prospects for rehabilitation in arguing that his LWOP sentence was constitutionally impermissible.¹⁵⁸ In agreeing with Sweet, the court explained, "[t]he *Montgomery* Court stressed that *Miller* barred life in prison without the possibility of parole for 'all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'"¹⁵⁹ Today, in the State of Iowa, a juvenile can remain in prison without the possibility of parole only after he or she has spent time in prison and still shows signs of irreparable and irredeemable corruption.¹⁶⁰ Ultimately, the court concluded that making the

retribution is weakened for children because [t]he heart of the retribution rationale relates to an offender's blameworthiness and children have diminished culpability. Nor can deterrence do the work in this context, because the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment. Rehabilitation is not supported by a juvenile life without parole sentence because the sentence forswears altogether the rehabilitative ideal." (citations omitted).

¹⁵¹ 879 N.W.2d 811, 839 (Iowa 2016).

¹⁵² *Id.* at 812.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 813–14.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 816.

¹⁵⁸ *Id.* at 817.

¹⁵⁹ *Id.* at 830.

¹⁶⁰ *Id.* at 836–37 ("In reviewing the caselaw development, we believe, in the exercise of our independent judgment, that the enterprise of identifying which juvenile offenders are irretrievable at the time of trial is simply too speculative and likely impossible given what we now know about the timeline of brain development and related prospects for self-regulation and rehabilitation . . . a district court at the time of trial cannot apply the *Miller* factors in any

determination that a juvenile is irredeemably corrupt *at the time of sentencing* is a finding that violates that juvenile's rights that are protected under the state's constitution.¹⁶¹ Both *Bassett* and *Sweet* serve as perfect examples for how the Supreme Court of Ohio should go about banning the imposition of juvenile LWOP in the State of Ohio.

As noted above, the Supreme Court of Ohio deems persuasive the ways in which other state high courts throughout the U.S. have interpreted the imposition of juvenile LWOP.¹⁶² It made this recognition even before *Montgomery* and before a near majority of states throughout the U.S. banned the imposition of the sentence. Thus, the next time the Supreme Court of Ohio is tasked with analyzing juvenile LWOP, the only outcome in such a case is for the court to ban the sentence and require that all juveniles, no matter their crime, be given the possibility of parole at the time of their sentence.

IV. THE SOLUTION

When the Supreme Court of Ohio is tasked with interpreting the U.S. Supreme Court's most recent juvenile LWOP case, the court should use that opportunity to ban the imposition of this unconstitutional sentence in Ohio. In its place, the court should require that juveniles be sentenced with the possibility of parole, no matter their crimes.¹⁶³ As addressed above, a sentence of LWOP for juveniles inflicts astronomical economic costs upon states that permit the imposition of the sentence. Such a sentence also suggests that rehabilitation is an impossibility. Further, as evidenced by the examples provided in this Note, sentencing courts can incorrectly predict irreparable corruption, and thereby violate a juvenile's constitutional rights by imposing a sentence upon them that is cruel and unjust. Taking these concerns into consideration, the Supreme Court of Ohio should also note the growing and near majority number of states that have banned this sentence, and utilize this recognized need for change as grounds for joining them.

One counterargument to banning the imposition of juvenile LWOP is that the U.S. Supreme Court's line of cases already serve as a satisfactory safeguard for the nation's children. That is, because the current law only allows courts to sentence juveniles to LWOP if their crimes reflect irreparable corruption, placing them amongst the worst offenders, then this standard is sufficient to protect juveniles from this unconstitutional sentence. As evidenced by the U.S. Supreme Court's decisions and the cases decided in state courts of last resort throughout the nation, however, sentencing courts can still

principled way to identify with assurance those very few adolescent offenders that might later be proven to be irretrievably depraved. In short, we are asking the sentencer to do the impossible, namely, to determine whether the offender is 'irretrievably corrupt' at a time when even trained professionals with years of clinical experience would not attempt to make such a determination.").

¹⁶¹ *Id.*

¹⁶² *State v. Moore*, 76 N.E.3d 1127, 1143 (Ohio 2016).

¹⁶³ OHIO REV. CODE § 2967.01(E) (2018) ("‘Parole’ means, regarding a prisoner who is serving a prison term for aggravated murder or murder, who is serving a prison term of life imprisonment for rape or for felonious sexual penetration . . . or who was sentenced prior to July 1, 1996, a release of the prisoner from confinement in any state correctional institution by the adult parole authority that is subject to the eligibility criteria specified in this chapter . . .").

get it wrong. As it is evident that an incorrect prediction that a juvenile is incapable of rehabilitation can result in a lifetime spent in prison, courts can no longer be given the power to make such perilous mistakes.

Another counterargument is that banning juvenile LWOP would pose too great a danger to society because courts will no longer be able to impose this harsh sentence on juveniles, no matter how troubling their crimes. In the alternative to a sentence of LWOP, however, this Note does not suggest that juveniles be given a definitive release date when being sentenced. Rather, it simply urges Ohio courts to provide juveniles at least the *possibility* of parole. That is, if a juvenile has committed a horrific crime, rather than sentencing them to LWOP, a sentencing court would be expected to impose a prison term on that defendant and provide them with a later date that they would be eligible to be considered for parole. When that date comes, it would be the task of the sentencing court to determine whether or not the defendant should be released and placed on parole, or receive an extended sentence.¹⁶⁴ No matter the argument, the lives of Ohio's children depend on the Supreme Court of Ohio finding juvenile LWOP sentences unconstitutional. Such a decision will place Ohio in line with a growing number of states that have already banned this unconstitutional sentence and will further protect the most vulnerable age group in this country by recognizing the critical value of the words "cruel and unusual punishment."

V. CONCLUSION

In *Moore*, the Supreme Court of Ohio stressed that "the United States Supreme Court has all but abolished life-without-parole sentences."¹⁶⁵ Given that the court recognized this trend in case law even *before* the Court's *Montgomery* decision, it is now compellingly necessary for the Supreme Court of Ohio to join the growing and near majority of states that are banning the imposition of juvenile LWOP. Not only would doing so place Ohio in line with these states, but such a decision would alleviate the state of the costly burdens imposed by these sentences. Even more importantly, such a decision would ensure that no trial judge would be tasked with determining the impossible: whether a child will be capable of rehabilitation throughout the course of his or her life.

¹⁶⁴ Ohio Revised Code § 2967.03 explains the process through which a defendant may be placed on parole. OHIO REV. CODE § 2967.03 (2018) ("The adult parole authority . . . may exercise its functions and duties in relation to the parole of a prisoner who is eligible for parole upon the initiative of the head of the institution in which the prisoner is confined or upon its own initiative. When a prisoner becomes eligible for parole, the head of the institution in which the prisoner is confined shall notify the authority in the manner prescribed by the authority. The authority may investigate and examine, or cause the investigation and examination of, prisoners confined in state correctional institutions concerning their conduct in the institutions, their mental and moral qualities and characteristics, their knowledge of a trade or profession, their former means of livelihood, their family relationships, and any other matters affecting their fitness to be at liberty without being a threat to society If a victim, victim's representative, or the victim's spouse, parent, sibling, or child appears at a full board hearing of the parole board and gives testimony as authorized by section 5149.101 of the Revised Code, the authority shall consider the testimony in determining whether to grant a parole The trial judge, the prosecuting attorney, specified law enforcement agency members, and a representative of the prisoner may appear at a full board hearing of the parole board and give testimony in regard to the grant of a parole to the prisoner as authorized by section 5149.101 of the Revised Code.").

¹⁶⁵ *Moore*, 76 N.E.3d at 1140.

Banning the imposition of juvenile LWOP protects juveniles' constitutional guarantee against cruel and unusual punishment. More importantly, doing so will allow prisoners that have rehabilitated since being sentenced as juveniles to re-enter civilization and contribute to society. Although the Supreme Court of the United States has yet to ban juvenile LWOP, the Supreme Court of Ohio must not wait to protect its state's juveniles and do away with the sentence once and for all.