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IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 598 EDA 2017

SHERMAN MCCOY,

Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee.

BRIEF OF *AMICI CURIAE* THE ARC OF PENNSYLVANIA, DISABILITY RIGHTS PENNSYLVANIA, AND VISIONS FOR EQUALITY INC., IN SUPPORT OF APPELLANT

Appeal of Sherman McCoy from the Order of the Honorable Steven R. Geroff, Judge, Philadelphia County Court of Common Pleas, dated October 27, 2017, and docketed to No. CP-51-CR-0002501-2014

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INTEREST OF *AMICI CURIAE*

Pursuant to Pennsylvania Rule of Appellate Procedure 531, *Amici Curiae* The Arc of Pennsylvania, Disability Rights Pennsylvania, and Visions For Equality, Inc., are non-profit civic and community organizations dedicated to supporting and protecting persons in need, including persons with intellectual disability.[1]

The Arc of Pennsylvania ("The Arc-PA"). The Arc-PA, an affiliate of The Arc of the United States, is a non-profit organization that for decades has protected the civil and human rights of persons with intellectual disability through systems advocacy, policy analysis, and educational outreach. By challenging prevailing assumptions, and demonstrating the nuance and particularity of intellectual disabilities, The Arc-PA has transformed societal and judicial understanding of persons with these disabilities. In *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania* and *Halderman v. Pennhurst,* The Arc-PA (then known as PARC) helped to expand the understanding of intellectual disability and secure the right to education and community-based services for individuals with that disability. The Arc-PA

[1] This brief was written entirely by counsel for *amici*, and neither counsel to any party nor any party contributed money to fund the preparation or submission of this brief. No person other than the members of *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

continues to advocate for laws based on an understanding of the empirical abilities and needs of persons with intellectual disability, and for those reasons, joins in this brief.

Disability Rights Pennsylvania ("DRP"). DRP is a non-profit organization that has been designated by the Commonwealth of Pennsylvania to protect and advocate for the rights of individuals with developmental disabilities, including those with intellectual disability, pursuant to the Developmental Disabilities Assistance and Bill of Rights Act. 42 U.S.C. §§ 15041-45. DRP works to ensure that people with intellectual disability are able to participate as equals in their communities and to overcome the unfortunate stereotypes that have long relegated such individuals to institutions where they were invisible from society. Because DRP has long recognized that adequate and comprehensive services can help to develop the skills of persons with intellectual disability, DRP joins in this brief.

Visions for Equality, Inc. ("VFE"). VFE is a non-profit organization that supports persons with intellectual disability and autism in their daily life, including by advocating for services on their behalf while promoting public policies that will end the discriminatory treatment such persons have historically faced. VFE provides comprehensive programs for persons with intellectual disability living in the community, which has given it firsthand insight into the impact of

discriminatory stereotyping against persons with intellectual disability and the challenges such individuals face, arising from their trusting nature and vulnerability. Protecting persons with intellectual disability is one of the organization's central missions, and the reason it joins in this brief.

Collectively, The Arc-PA, DRP, and VFE have a strong interest in ensuring that courts do not base their rulings on stereotypes about persons with intellectual disability, but instead understand what science reveals about such disabilities including how these disabilities can affect a person's behavior, their moral culpability, and their capacity for rehabilitation. When that science is properly understood and applied to current law, it is clear that mandatory imposition of sentences of life without parole on individuals with intellectual disabilities is unconstitutional; courts should not only be permitted, but required, to consider the particular traits of each intellectually disabled individual in formulating a sentence.

Accordingly, *amici* submit this brief in support of Appellant, Sherman McCoy, and seek for this Court to hold that Pennsylvania statutes 18 Pa.C.S. § 1102(A) and 61 Pa.C.S. § 6137(a)(1), which require the mandatory imposition of sentences of life without parole, are unconstitutional as applied to persons with intellectual disability.

INTRODUCTION

"The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). As part of a society that values the "dignity of man," courts have a moral and legal imperative to ensure that punishment is proportionate to the culpability of the individual being sentenced and is not based on stereotypes of some disfavored group. In the past three decades, this country has made great strides in remedying its history of unfortunate mistreatment of individuals with intellectual disability ("ID").[2] In the context of the criminal justice system, the United States Supreme Court has recognized that as a class, individuals with ID possess "hallmark" characteristics that make them less morally culpable for their misconduct, and decrease the reliability and fairness of proceedings against them. Given these concerns, this Court is presented with the question of whether it is constitutional to impose, on a ***mandatory*** basis, sentences of life without parole ("LWOP") on persons with ID. Such statutory schemes preclude the sentencing authority from considering each individual's traits, their lesser culpability, or their capacity for reform. Legal

[2] This brief uses the term "intellectual disability," or "ID," in place of the term previously employed by courts (including the Supreme Court) to describe the same phenomenon, "mental retardation." *See, e.g.*, *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014) (noting the change in literature and U.S. statutes from "mental retardation" to "intellectual disability"). Mental retardation was itself a replacement for other more derogatory terms. *See, e.g. Buck v. Bell,* 274 U.S. 200, 207 (1927) ("Three generations of imbeciles are enough.").

precedent and modern science confirm what our conscience tells us to be true: that mandatory LWOP sentences imposed on persons with ID are unconstitutional under the Eighth Amendment to the U.S. Constitution. *Amici* therefore request that this Court hold that Pennsylvania statutes 18 Pa.C.S. § 1102(A) and 61 Pa.C.S. § 6137(a)(1), which require the mandatory imposition of LWOP sentences, violate the Eighth Amendment as applied to the class of individuals with ID.

There is no question that individuals with ID have been feared and abused on the one hand and their vulnerabilities exploited on the other. They "have been subject to a 'lengthy and tragic history' ... of segregation and discrimination that can only be called grotesque." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 461 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part). Recent Supreme Court decisions have laid the groundwork for protecting these more vulnerable classes of offenders, who are less morally culpable for their conduct and who can be rehabilitated, including persons with ID. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court found that persons with ID have certain impairments that render them less morally culpable for their crimes and jeopardize their chance for a fair criminal proceeding. *Id*. at 306-07. These findings are supported by well-accepted science. The American Association on Intellectual and Developmental Disabilities ("AAIDD"), the oldest professional association advocating on behalf of persons with ID and a publisher of highly

regarded evidenced-based assessments, reports that such persons show inadequate intellectual and adaptive abilities that impair problem solving and limit flexible thinking, which make individuals with ID, as a class, more susceptible to dangerous situations. Schalock, Robert L., Borthwick-Duffy, Sharon A., Buntinx, Wil H.E., *Intellectual Disability—Definition Classification, and Systems of Supports*. AAIDD, at 159 (11th ed. 2010) (internal citations omitted) (hereafter, "*Intellectual Disability—Definition Classification*"). Because these characteristics diminish the culpability of persons with ID, the *Atkins* Court concluded that the retributive and deterrent goals of the death penalty are not satisfied against persons with ID compared to the average adult offender. *Id.* at 319-20. That analysis compels the same conclusion regarding mandatory LWOP sentences.

The Supreme Court has also recognized that LWOP is "the second most severe sentence" and that it shares characteristics with the death penalty in that it "alters the offender's life by a forfeiture that is irrevocable." *Graham v. Florida*, 560 U.S. 48, 69-70 (2010). While the Supreme Court has not yet addressed whether mandatory LWOP sentences are unconstitutional when imposed on persons with ID, its pronouncements in *Miller v. Alabama*, 567 U.S. 460 (2012), which deemed such sentences unconstitutional when mandatorily imposed on juveniles, are applicable. The critical considerations underlying the Court's decision in *Miller*—(i) that by virtue of their particular characteristics and

impairments, a class of offenders is less morally culpable for their conduct such that the penological justifications for imposing more severe penalties are weakened; and (ii) that the class shows the potential for reform and rehabilitation—are present with respect to the class of persons with ID.

Based on these decisions and modern science, there is no question that persons with ID are less morally culpable for their crimes and have the capacity for rehabilitation. In fact, research confirms that with appropriate support systems, persons with ID can be rehabilitated, including by reducing or eliminating the aggressive behavior that may have played a role in their offenses.

To be clear, *amici* do not contend that LWOP sentences should be categorically banned as to persons with ID. Rather, it is the ***mandatory*** imposition of these sentences on persons with ID that is unconstitutional, because it precludes the consideration of the particular characteristics of such individuals. As the Supreme Court held in *Miller*, mandatory sentencing renders an offender's condition and the hallmark characteristics attendant thereto "irrelevant to imposition of that harshest prison sentence," which in turn "poses too great a risk of disproportionate punishment." *Miller*, 567 U.S. at 479. Consequently, Supreme Court precedent compels the conclusion that mandatory imposition of LWOP sentences on persons with ID is unconstitutional. Pennsylvania's mandatory sentencing scheme should thus be replaced as to persons with ID with a process

that assesses each individual's characteristics and capacity for reform. This individualized approach to punishment is consistent both with *Miller* and with federal legislation that is designed to support persons with disabilities.

Accordingly, the Court should deem 18 Pa.C.S. § 1102(A) and 61 Pa.C.S. § 6137(a)(1) unconstitutional as applied to persons with ID, and instead should require sentencing authorities to consider each individual's particular characteristics during sentencing.

ARGUMENT

I. IMPOSING MANDATORY LWOP SENTENCES ON PERSONS WITH ID IS UNCONSTITUTIONAL UNDER THE EIGHTH AMENDMENT AND SUPREME COURT PRECEDENT

Imposing mandatory sentences of life without parole on individuals with ID is a disproportionate punishment that violates the Eighth Amendment to the United States Constitution. The Eighth Amendment's prohibition against cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions." *Roper v. Simmons*, 543 U.S. 551, 560 (2005). This idea flows from the fundamental concept that punishment for a crime should be "graduated and proportioned" to the offense. *Atkins*, 536 U.S. at 311. Whether punishment is proportionate is judged not by historical standards, but by "the evolving standards of decency that mark the progress of a maturing society." *Id*. at 311-12 (internal quotes omitted). Accordingly, the Eighth Amendment requires

the state to exercise its power to punish "within the limits of civilized standards." *Trop*, 356 U.S. at 100.

The Supreme Court has categorically banned sentencing practices where there are "mismatches between the culpability of a class of offenders and the severity of a penalty." *See Miller*, 567 U.S. at 470, 480. The Court has also prohibited sentencing schemes that impose mandatory capital punishment and instead required that "sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death." *Id.* at 470. These strands of precedent converge to form the foundation of the four intertwined Supreme Court cases—*Atkins*, *Roper*, *Graham*, and *Miller*—relevant to assessing whether LWOP sentences should be mandatorily imposed on persons with ID.

In the first instance, in *Atkins*, 536 U.S. at 306-07, the Supreme Court categorically banned as unconstitutional imposing the death penalty on individuals with ID. Relying in part on modern science, the Court found that persons with ID "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id.* at 318. Due to these impairments, the Court concluded, persons with ID "do not act with the level of moral culpability that characterizes the most serious adult

criminal conduct," and that these impairments "can jeopardize the reliability and fairness of capital proceedings" against them. *Id*. at 306-07. While the Court took up this question in assessing the execution of individuals with ID, its findings with respect to such individuals are both material and relevant to evaluating other sentencing practices involving this class of persons.

The Supreme Court has also addressed the constitutionality of sentencing practices as applied to juveniles, and several of those recent cases strongly align with the decision in *Atkins*. In *Roper*, 543 U.S. at 569, the Court found it unconstitutional to execute defendants who were juveniles when they committed their crimes because juveniles "cannot with reliability be classified among the worst offenders." Relying in part on science submitted by *amici*, the Court acknowledged that a "lack of maturity and [] underdeveloped sense of responsibility are found in youth more often than in adults," and that "'[t]hese qualities often result in impetuous and ill-considered actions and decisions.'" *Id.* (citation omitted). The Court also found that juveniles are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Id.* (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)). In short, the Court determined that juveniles' "susceptibility … to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that

of an adult.'" *Id.* at 570 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)).

Taken together, these characteristics reflect that juveniles have "diminished culpability" for their conduct, which in turn weakens "the penological justifications" for subjecting juveniles to the death penalty. *Id.* at 571. Not surprisingly, the *Roper* Court favorably cited *Atkins* in comparing juveniles and persons with ID with respect to both class's diminished culpability and the weaker justifications supporting imposition of the death penalty against each class. *Roper*, 543 U.S. at 571 (quoting *Atkins*, 536 U.S. at 319).

Five years later, in *Graham v. Florida*, 560 U.S. 48, 69 (2010), the Supreme Court again addressed sentencing practices as applied to juvenile offenders, and, relying on its reasoning in *Roper*, banned the imposition of LWOP sentences on juveniles who committed non-homicidal crimes. Critically, the Court recognized the harshness of LWOP sentences, noting that:

> life without parole sentences share some characteristics with death sentences that are shared by no other sentences … the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence … this sentence 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 convict], he will remain in prison for the rest of his days.

Graham, 560 U.S. at 69-70 (internal quotations omitted). The Court thus found that LWOP sentences are the "second most severe penalty" that can be imposed. *Id*. at 69.

Finally, in *Miller*, the Supreme Court banned the imposition of ***mandatory*** LWOP sentences on juveniles for any crime, because the mandatory nature of the sentence precluded consideration of juveniles' "hallmark features" and external environment. 567 U.S. at 477-78. In describing these hallmark features, the Court listed several that are also often possessed by persons with ID, including their "failure to appreciate risks and consequences," their "recklessness, impulsivity, and heedless risk-taking," their vulnerability "'to negative influences and outside pressures,'" and their inability to deal with police or their own attorneys. *Id.* at 477-78. The Court determined that because mandatory sentencing schemes render these hallmark features "irrelevant to imposition of that harshest prison sentence," they "pose[] too great a risk of disproportionate punishment." *Id.* at 479.

Extrapolating from *Miller*, two factors are relevant to determining the constitutionality of imposing mandatory LWOP sentences on a particular class of offenders: (i) whether class members have characteristics that make them less culpable for their crimes and that jeopardize the reliability and fairness of criminal proceedings, thereby weakening the penological goals of imposing mandatory LWOP; and (ii) whether offenders in the class are capable of rehabilitation. *See id.*

at 471-72, 477-78. Where a class of offenders has diminished culpability such that the goals of mandatory LWOP sentences cannot be justified when applied to them, and where the offenders are capable of reform, then imposing mandatory LWOP sentences that render the class's mitigating traits "irrelevant," will "pose[] too great a risk of disproportionate punishment." *Id.* at 479. Under this framework, the mandatory imposition of LWOP sentences on individuals with ID violates the Eighth Amendment prohibition against cruel and unusual punishment.[3]

A. *Persons with ID Have Diminished Culpability and the Justifications for Mandatory LWOP Sentences Are Weakened as Applied to Them*

1. **Persons with ID possess characteristics that make them less culpable for their crimes and jeopardize the reliability of proceedings against them.**

It is indisputable that individuals with ID have characteristics that make them less culpable for their crimes. The Supreme Court so held in *Atkins*, in which it identified many of these characteristics. For example, the Court noted that "clinical definitions of [ID] require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care,

[3] *Miller* did not categorically ban imposition of a particular penalty as against a particular class of offenders; rather, "it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." 567 U.S. at 483. In the same vein, *amici* do not seek a categorical ban against imposition of LWOP sentences as against persons with ID. Instead, they seek only to have this Court (and those throughout Pennsylvania) do precisely what the Supreme Court instructed in *Miller*: consider a particular offender's ID and its attendant characteristics. Consequently, the Court need not consider legislative enactments across states or undertake the broader analysis required for categorical bans of particular sentences against particular classes of offenders. *Id.*

and self-direction that" manifest in youth. *Atkins*, 304 U.S. at 318. Further, because of their impairments, people with ID, "by definition [] have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id*. And while there is no proof that persons with ID are more likely to engage in criminal conduct than others, "there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers, rather than leaders." *Id*.

The Court also found that the same impairments that diminish the culpability of persons with ID also jeopardize the reliability of proceedings against them. *Atkins*, 536 U.S. at 320-321. Indeed, the Court observed that persons with ID "in the aggregate face a special risk of wrongful execution," including because their impairments make them susceptible to false confessions. *Id*. at 320-21. Such individuals also have a "lesser ability" to "make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors," and they also "may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Id.* at 320-21. Finally, the Court found that a defendant's reliance on ID as a mitigating factor

during trial is a "two-edged sword" because jurors may wrongly perceive the disability as an indicator of "future dangerousness." *Id*. at 321.

These findings are consistent with, and supported by, recent scientific data regarding ID. The AAIDD reports that persons with ID are "exceedingly vulnerable (socially, academically, practically) unless they are given formal or informal supports and systematic backup protections." *Intellectual Disability—Definition Classification,* AAIDD, 162. They often have "inadequate response systems, interpersonal competence, social judgment, or decision-making skills … [which] are linked to reduced intellectual and adaptive abilities that make it difficult to problem solve and to be flexible in thinking," and these "limitations create a susceptibility to dangers that is shared" among the class. *Id*. at 159 (internal citations omitted).

AAIDD also has pinpointed several factors that contribute to these limitations on the judgment of persons with ID. *Id*. at 160. For instance, persons with ID may have a desire to please that will lead them "to do what others want in an effort to be accepted or liked by them," or to acquiesce "[i]n stressful situations or under pressure … [out of] a desire to please or because of inexperience, communication difficulties, or fear," both of which in turn can lead to undertaking "risky or inappropriate" activities. *Id*. (internal citations omitted). Persons with ID are also often gullible, which makes them susceptible to "being taken advantage of,

being made fun of without realizing it, or being talked into doing things without understanding the potential consequences." *Id*. (internal citations omitted). Persons with ID also may be "overly trusting, immature, innocent, or inexperienced … [which can] result in making poor choices." *Id*. at 161. Combinations of these factors "may increase an individual's vulnerability … [and] one's risk of making poor choices," including where consequences of a particular action may be very serious. *See id*. at 160-61.

Because these characteristics, which echo those identified by the *Atkins* Court, lessen the moral culpability of persons with ID, and "can jeopardize the reliability and fairness of capital proceedings" against them, *id*. at 306-07, the penological justifications for imposing the death penalty on such individuals are substantially weakened, *id.* at 318-20. As shown below, these impairments compel the same determination with regard to mandatory LWOP sentences.

2. Mandatory LWOP sentences do not satisfy the goal of retribution as against persons with ID.

In *Atkins*, the Supreme Court noted that "[w]ith respect to retribution—the interest in seeing that the offender gets his 'just deserts'—the severity of the appropriate punishment necessarily depends on the culpability of the offender." 536 U.S. at 319. The Court recognized that capital punishment is reserved for the most depraved offenders, and that if capital punishment is not warranted as a

measure of retribution for the average murderer, then it is certainly not warranted for the less morally culpable class of offenders with ID. *Id*.

The Supreme Court built on *Atkins* in *Roper*, *Graham*, and *Miller* to hold that juveniles also have characteristics that diminish their culpability and jeopardize the reliability of proceedings against them, and that as a result, certain sentencing practices are unconstitutional as applied to juveniles. The Court drew several parallels between juveniles and persons with ID in reaching its conclusions. In *Roper*, 543 U.S. at 569-570, for instance, the Court found that juveniles have lesser culpability because they (i) lack maturity and have an underdeveloped sense of responsibility, which results in impetuousness and ill-considered actions and decisions; and (ii) are more susceptible to negative influence and peer pressure, giving them less control over their own environment. In *Graham*, 560 U.S. at 68, the Court similarly found that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.” And in *Miller*, 567 U.S. at 477-78, the Court recognized that a juvenile “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 … or his incapacity to assist his own attorneys.” Ultimately, the Court in *Miller* extended all of these principles to bar the imposition of mandatory LWOP sentences—the second most severe penalty that shares characteristics with the

death penalty—"because the heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult." *Id.* at 472 (internal quotations omitted).

The reasoning in these decisions applies with equal (if not greater) force to persons with ID. Thus, under the combined principles of *Atkins* and *Miller*, the retributive justification for imposing LWOP on a person with ID, especially on a mandatory basis that does not permit consideration of the person's characteristics and situation, is substantially decreased, if present at all.[4]

3. Mandatory LWOP sentences are not a reliable deterrent for persons with ID.

The Supreme Court also found in *Atkins* that, as to persons with ID, the penalty's intended effect as a deterrent is not served. The Court recognized "it is

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[4] A few courts have rejected the position that *Atkins* should be extended in the same manner as *Roper*. *See, e.g.*, *Commonwealth v. Yasipour*, 957 A.2d 734, 744 (Pa. Super. Ct 2008) (decided prior to *Graham v. Florida*). Those decisions were based on the proposition that the *Roper/Atkins* diminished-culpability analysis was dependent upon a defendant facing death. *See, e.g.*, *id.* at 743-44 ("the *Roper* decision bars only the imposition of the death penalty in cases involving juvenile offenders . . . Moreover, Appellant, unlike the defendant in *Atkins,* is not subject to a sentence of execution for his crime. Thus, we fail to see how *Atkins* supports Appellant's position."). But this position was explicitly rejected by the *Graham* and *Miller* Courts. *Graham*, 560 U.S. at 69 (likening LWOP to the death penalty); *Miller*, 567 U.S. at 470, 474-76 (recognizing the *Graham* Court's extension of Eighth Amendment death penalty jurisprudence to LWOP). Given the Supreme Court's statement that the "mental traits and environmental vulnerabilities" attendant to youth are not "crime specific" it logically follows that those same traits and vulnerabilities, when attendant to ID, are likewise not "crime specific." *See Miller*, 567 U.S. at 473. Moreover, because LWOP sentences and the death penalty share characteristics "that are shared by no other sentences," *Graham*, 560 U.S. at 70, and persons with ID and juveniles share many of the same traits that result in lesser culpability and decreased reliability of proceedings against them, this Court should not artificially silo the decisions in *Atkins* and *Miller*.

the same cognitive and behavioral impairments that make [the intellectually disabled] less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty, and, as a result, control their conduct based upon that information." *Atkins*, 536 U.S. at 320. This logic compels the same conclusion with respect to the deterrent effect of LWOP sentences. Any impairments that would render it unlikely for individuals with ID to consider the deterrent effect of the death penalty would have an equal impact on their ability to consider LWOP sentences. Those impairments do not disappear in the presence of different sentencing schemes.

The Court's reasoning in *Miller* effectively confirms this conclusion. There, the Court concluded based on similar characteristics that juveniles are "less likely to consider potential punishment" like a mandatory LWOP sentence. *Miller*, 567 U.S. at 472; *see also Graham*, 560 U.S. at 72. Thus, the Court has already concluded that juveniles are not likely to consider LWOP sentences before committing crimes, and it has done so based on the consideration of characteristics that are the same or nearly the same as those possessed by individuals with ID. Accordingly, both *Atkins* and *Miller* support, if not compel, the conclusion that persons with ID are less likely to consider LWOP sentences before acting, and

therefore, that those sentences are less likely to deter their conduct. The penological justification of deterrence for subjecting persons with ID to mandatory LWOP sentences is also substantially weakened, if present at all.

B. *Persons with ID Are Capable of Rehabilitation and Cases Finding to the Contrary are based on Outmoded Stereotypes*

1. **Mandatory LWOP sentences incapacitate persons with ID without considering their individual characteristics or potential for reform.**

While *Atkins* did not address the issues of incapacitating and rehabilitating individuals with ID, the Court's decisions in *Graham* and *Miller* address these competing goals in the context of sentencing juveniles, who as a class, possess characteristics similar to persons with ID. The *Graham* Court noted that while life-long incapacitation can be an "important goal" with respect to public safety, deciding whether "a juvenile offender forever will be a danger to society would require making a judgment that he is incorrigible …." *Graham*, 560 U.S. at 72-73; *see also Miller*, 567 U.S. at 476. Conversely, the *Graham* Court also found that rehabilitation is a "penological goal that forms the basis of parole systems … [and LWOP] cannot be justified by the goal of rehabilitation. The penalty forswears altogether the rehabilitative ideal." *Graham*, 560 U.S. at 73. What is clear from *Miller*, however, is that an offender's ability to reform is a relevant factor in assessing the constitutionality of a LWOP sentence.

As with juveniles, when a mandatory LWOP sentence is imposed on a person with ID, it assumes that he or she is incorrigible and will forever be a danger to society. But modern science (and common sense) confirm that this is a faulty assumption about the class of persons with ID.

2. Substantial scientific data shows that persons with ID can be rehabilitated.

Historically, society has "widely endorsed negative stereotypes" about persons with ID, including that their characteristics are immutable and that they "lack [the] potential to change." *See, e.g.*, Scior, Katrina, *Intellectual Disability and Stigma: Stepping out from the Margins*, at p. 5 (Palgrave Macmillan, 2016) (internal citations omitted). But these stereotypes are outdated and have been undermined, if not refuted, by ample scientific data showing that persons with ID are capable of behavioral change and improvement.

One of the overarching conclusions in modern science has been that persons with ID can grow, learn, and given the proper support, correct problematic behavior. For example, research has identified "strategies that greatly impact the frequency and severity of aggression emitted by persons with ID." Sturmey, Peter, *Evidence-Based Practice and Intellectual Disabilities*, at p. 103 (Wiley Blackwell, 2014). "Mixed treatment packages," which involve the use of multiple behavioral interventions, "are clearly effective in ***eliminating and significantly reducing aggression***, and this has been reported by 17 experiments conducted by

independent researchers." *Id.* at pp. 114-115 (emphasis added) (internal scientific study citations omitted).[5] Another type of support, called "non-function-based interventions," has also shown positive results; three studies reported the elimination of aggressive behaviors, one reported the reduction of aggression to near-zero levels, and five others reported reduced rates of aggression. *Id.* at pp. 114-115. Yet another study determined that positive behavioral support "has evolved as an effective and socially acceptable means of helping prevent and reduce challenging behavior" in persons with ID. Wehman, Paul, et al., *Intellectual and Developmental Disabilities: Toward Full Community Inclusion*, at p. 407 (Pro-Ed, 2005). Indeed, "ID is no longer considered an absolute, invariant trait of the person," and focusing on "individualized supports" can play a vital role "in enhancing individual functioning." Schalock, Robert L. and Luckasson, Ruth, *What's at Stake in the Lives of People with Intellectual Disability? Part I: The Power of Naming, Defining, Diagnosing, Classifying, and Planning Supports*, 51 Intellectual and Developmental Disabilities 86-93 (Issue 2, Apr. 2013).[6] The

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[5] Sturmey also notes other studies reflecting the reduction of violent or aggressive tendencies in persons with ID through behavioral support groups and practices. *Id.* at 284-85.

[6] The quotations reproduced herein present only a limited selection of research showing that given support, problem behaviors of individuals with ID are not immutable, but can be reduced and reformed. *See, e.g.*, Sturmey, *Evidence-Based Practice and Intellectual Disabilities* at p. 116 (noting experiments employing "functional communication training (FCT) functionally decreased aggression"); *id.* at p. 119 (citing experiment involving "three participants with ID and mental illness in which aggression was the target behavior for two participants," and showing, in response that "the frequency of aggressive behaviors (verbal and physical aggression and property destruction) decreased to zero levels for both participants during the training period"

AAIDD has similarly reported that "[m]any people with significantly limited intellectual functioning and adaptable behavior may be competent learners in some supported settings in which learning is strategically and formally designed and appropriate supports are provided, especially in settings with regular routines." *Intellectual Disability—Definition Classification*, at p. 162. Thus, given the proper support, science shows that even individuals with severe ID have the capacity to reform—a trait the *Miller* Court found relevant in evaluating whether mandatory LWOP sentences were constitutional as to juveniles—which, in turn, lessens the penological goal of incapacitation for imposing mandatory LWOP sentences on persons with ID.

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and fair maintenance thereof after); Thompson, James R., Bradley, Valerie J., Buntinx, Wil H. E. Valerie J. Bradley, Wil H. E. Buntinx, et al., *Conceptualizing Supports and the Support Needs of People with Intellectual Disability*, 47 Intellectual and Developmental Disabilities, at pp. 135-146 (Issue 2, April 2009)(noting thoughtful "individualized [behavior] supports" are more likely to lead to improved human functioning and personal outcomes"); Wehmeyer, Michael L. and James R. Patton, *Mental Retardation in the 21st Century* at pp. 184, 189 (Pro-ED, 2000) (noting that in the 15 years preceding publication, one of "the most important changes to occur … has been an expansion in the outcomes expected from behavior support," noting reports that individuals "with very extreme histories of problem behavior have changed as their problem behaviors were reduced," and that there "is now a wide and compelling literature" documenting the positive impact of behavior support on modifying problem behaviors in those with ID) (internal study citation omitted); Fletcher, Robert J., *Psychotherapy for Individuals with Intellectual Disability*, at pp. 38 (NADD, 2011) ("DBT (Dialectical Behavior Therapy) has demonstrated success in inpatient units and with assertive community treatment teams."); Luckasson, Ruth, "*Intellectual Disability*," The SAGE Encyclopedia of Abnormal and Clinical Psychology (Amy Wenzel, SAGE Publications, 2017) ("Although ID is a lifelong condition, appropriate supports over sustained periods of time allow individuals … to improve their functioning and engage in all aspects of community life appropriate to their age.").

This same science disproves the outmoded stereotype that ID and its attendant characteristics are inherently immutable, and thus not subject to reform or rehabilitation, which has been used by a few courts that have attempted to limit the reach of the holdings in *Atkins* and *Miller*. *See, e.g.*, *Martinez v. State*, No. 08-14-00130-CR, 2016 WL 4447660, at *15-16 (Tex. App. Aug. 24, 2016), *cert. denied*, 137 S. Ct. 2170, 198 L. Ed. 2d 241 (2017) ("no showing that [] prospect for improvement applies to intellectual disabilities"); *Turner v. Coleman*, No. CV 13-1787, 2016 WL 3999837, at *8 (W.D. Pa. July 26, 2016) (same).

These cases rely on the erroneous assumption that persons with ID lack the capacity for rehabilitation because their overarching condition cannot change. *See Turner*, 2016 WL 3999837, at *8.[7] But that approach oversimplifies the issue and misses a central point from *Miller*. There, the Court did not deem the condition of youth to mean that in ***all*** circumstances an offender will reform. Rather, *Miller* acknowledged that the "condition" of youth carries certain hallmark characteristics that, if disregarded, can result in disproportionate punishment. That is why *Miller* requires individualized sentencing decisions.

[7] The *Martinez* court implied that if it had been presented with evidence that persons with ID could change or reform, or that the particular defendant with ID could have done so, the court might have reached a different conclusion. 2016 WL 4447660, at *16. Such an approach is consistent with what *amici* believe should be instituted in Pennsylvania—one that enables the sentencing authority to consider the individual circumstances of each defendant with ID.

Courts should not myopically treat the overarching condition of intellectual disability as precluding rehabilitation without considering the characteristics and capabilities of each individual defendant. A substantial body of scientific evidence confirms that persons with ID can grow, learn, and reform, and that problem-behaviors can be addressed with appropriate support. Thus, any attempt to distinguish *Miller* and *Atkins* based on the purported inability of persons with ID to "reform" is fundamentally wrong. Failing to look deeper at the particular individual traits of defendants with ID is inconsistent with *Miller*, which calls for an individualized assessment based on each defendant's unique circumstances. *See* 567 U.S. at 476-78. "In imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult," *id.*, and the same is no less true where courts treat every person with ID as an average adult.

C. *The Court Should Replace Mandatory LWOP Sentences with an Individualized Approach*

In view of the characteristics possessed by the class of persons with ID, mandatory LWOP schemes present a particular danger under the Eighth Amendment of imposing disproportionate punishment. As the Supreme Court held in *Miller*, "[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." 567 U.S. at 479. The logic undergirding the need

for individualized assessment in sentencing juveniles applies with at least equal force with respect to persons with ID.

As noted above, mandatory LWOP schemes preclude consideration of the hallmark characteristics of persons with ID, including their various "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Atkins*, 536 U.S. at 318. It also ignores the wide range of behaviors and characteristics that ID manifests that can be discerned only through individualized examination. Because intellectual disability "and all that accompanies it" renders individuals with ID likely less morally culpable for their actions, and prevents them from recognizing the consequences of their actions, *Miller* compels an individualized approach to their sentencing. *See* 567 U.S. at 473, 479.

Major federal statutes reflect overarching policies of treating persons with disabilities on an individualized basis that is consistent with *Miller*. The Americans with Disabilities Act ("ADA") and the Individuals with Disabilities Education Act ("IDEA") are federal statutes premised heavily on the notion that, given their specific circumstances, persons with physical and intellectual disabilities should receive individualized assistance or treatment in the workplace, (*see* 42 U.S.C. § 12112(a), (b)(5) (requiring "reasonable accommodations" suited

to the individualized needs of “an otherwise qualified individual with a disability”)); 29 C.F.R. § 1630.2(j)(1)(iv) (determining whether a physical or mental impairment “substantially limits” a person such that they are covered by the ADA requires an “individualized assessment”)), and in schools, (*see* 20 U.S.C. § 1414(d) (requiring state and local education agencies to prepare an “individualized education program” for each child with a disability in the agency’s jurisdiction)).

Thus, our society has recognized a moral and practical imperative to afford individualized consideration to those with ID. Pennsylvania’s sentencing scheme does not reflect this principle, however, as it prevents sentencers from considering the particular characteristics of an offender with ID by mandating the imposition of the second-harshest sentence in our society against all individuals with ID. This scheme runs counter to the national approach to individualized treatment of persons with ID, and violates the Eighth Amendment under the reasoning of *Atkins* and *Miller*.

CONCLUSION

Under Supreme Court precedent and based on modern science regarding how ID affects behavior, imposing mandatory sentences of life without parole—the second most severe form of criminal punishment—is unconstitutional as applied to persons with ID. As a class, such persons have characteristics that

render them less culpable for their conduct and decrease, if not eliminate, the penological justifications for imposing such sentences. And contrary to outdated stereotypes, persons with ID are certainly capable of reform. Accordingly, the Court should hold 18 Pa.C.S. § 1102(A) and 61 Pa.C.S. § 6137(a)(1) unconstitutional as applied to individuals with ID and instead order an individualized approach to sentencing such persons.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations of Pa.R.A.P. 531(b)(1) and (3) because this brief contains **6,626 words**, excluding the parts of the brief exempted by Pa.R.A.P. 2135(b). The word count was measured by the word-processing program used to prepare the brief, Microsoft Word 2013.

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