No. 16-579

IN THE
Supreme Court of the United States

AHMAD BRIGHT,
Petitioner,
v.
COMMONWEALTH OF MASSACHUSETTS
Respondent.

On Petition for a Writ of Certiorari
to the Massachusetts Appeals Court

BRIEF OF THE SENTENCING PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The questions presented are:

1. Whether the Eighth Amendment's requirement of individualized sentencing for a child who confronts a sentence of life in prison is satisfied by the possibility that a future parole board may exercise its discretion to release him early.

2. Whether the imposition of a mandatory life sentence on a child convicted on a joint venture theory, without any individualized sentencing consideration, violates the Eighth Amendment's prohibition of cruel and unusual punishment.

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INTEREST OF THE *AMICUS CURIAE*

The Sentencing Project is a thirty-year-old national nonprofit organization engaged in research and advocacy on criminal-justice and juvenile-justice reform. The organization is recognized for its policy research documenting problems within the justice system, and for developing recommendations for policy and practice to ameliorate those problems. The Sentencing Project has produced policy analyses that document the increasing use of mandatory life sentences for both juveniles and adults, and has assessed the impact of such policies on the criminal-justice system. Staff of the organization are frequently called upon to testify in Congress and before a broad range of policymaking bodies and practitioner audiences. The Sentencing Project has filed *amicus curiae* briefs in prior juvenile-justice and sentencing cases before this Court, including *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), *Alleyne v. United States*, 133 S. Ct. 2151 (2013), *Miller v. Alabama*, 132 S. Ct. 2455 (2012), *J.D.B. v. North Carolina*, 564 U.S. 261 (2011), and *Graham v. Florida*, 560 U.S. 48 (2010).[1]

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2, the parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Sentencing Project's decades of experience in juvenile justice resoundingly confirms the central insight of *Miller v. Alabama*, 132 S. Ct. 2455 (2012): Children are "constitutionally different from adults for purposes of sentencing" because the defining characteristics of children—their lack of maturity, greater vulnerability to negative influences, and limited control over their environment, among others—make them "'less deserving of the most severe punishments.'" *Id.* at 2464 (citation omitted). *Miller* properly applied this principle to hold that mandatory life-without-parole sentences for children violate the Eighth Amendment's "requirement of individualized sentencing for defendants facing the most serious penalties." *Id.* at 2460.

The Sentencing Project's decades of experience likewise teaches that the same principles apply to children, like Petitioner, who receive a mandatory life sentence, even if the sentence leaves open the possibility of parole. The Sentencing Project's research confirms that thousands of children nationwide receive such sentences even though they have the same hallmarks of diminished culpability that were dispositive in *Miller*: As the case studies presented below illustrate, many of these children were themselves first victimized by violence. They often came from broken homes in which one or both parents were absent or in prison. And they often fell in with negative peer groups, but were unable to extricate themselves given the vulnerabilities and immaturities of youth. While these children may have

participated in serious crimes, many are not culpable enough to justify exposing them to a lifetime in prison. That is especially true for children, like Petitioner, who were convicted not as principals but via felony murder, joint venture, and other derivative-liability theories.

No other mechanism in the criminal-justice system avoids the constitutional injury these children suffer. The process of transfer from juvenile to adult court is often mandatory, as it was for Petitioner, and it is never sufficient to take account of children's lesser culpability.

Likewise, the parole system is no answer for these children. The possibility of parole does nothing to change the fact that many children, in light of their "diminished culpability," did not deserve to be exposed to life sentences in the first place. *Miller*, 132 S. Ct. at 2464. Parole's practical realities, too, confirm that it is no adequate safeguard. Parole is entirely discretionary, and parole boards are executive-branch bodies whose decisions often reflect the influence of politics, not individual equities. Particularly for prisoners like Petitioner with murder convictions, these boards and their members often apply express or implied policies that "life means life"—so that juvenile offenders may spend decades in prison for reasons having nothing to do with their individual culpability.

ARGUMENT

I. MANDATORY LIFE SENTENCES FOR CHILDREN VIOLATE *MILLER* BECAUSE THEY DISREGARD CHILDREN'S DIMINISHED AND INDIVIDUALIZED CULPABILITY.

Miller recognized that children's "diminished culpability" renders them "constitutionally different from adults for purposes of sentencing." *Miller*, 132 S. Ct. at 2464. When a state imposes the "harshest penalties" on children, it may not "preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it"—by making those harsh punishments mandatory too. *Miller*, 132 S. Ct. at 2467-68. The Court thus held that mandatory sentences of life without parole for children violate the Eighth Amendment. *Id.* at 2475. The same considerations that drove *Miller* likewise apply to mandatory life sentences that expose children to a lifetime in prison, limited only by the remote possibility that the state's executive branch will exercise its unrestrained discretion to grant parole decades later.

A. *Miller* Held That, In View Of Children's "Diminished Culpability," Individualized Consideration Is Required Before Children Receive The Law's Harshest Penalties.

At *Miller*'s heart was its recognition of children's "diminished culpability," even "when they commit terrible crimes." *Id.* at 2464-65. Children and adults, *Miller* explained, have "three significant gaps." *Id.* at 2464. First, children "have a 'lack of maturity and an

underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking." *Id.* (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)). Second, children are "'more vulnerable ... to negative influences' … including from their family and peers," and they "lack the ability to extricate themselves from horrific, crime-producing settings." *Id.* (quoting *Roper*, 543 U.S. at 569). Third, "a child's character is not as 'well formed'" and his conduct is "less likely to be 'evidence of irretrievabl[e] deprav[ity].'" *Id.* (quoting *Roper*, 543 U.S. at 570). These differences rested not only "on common sense" and "what any parent knows," but also on "science and social science" demonstrating that "transient rashness, proclivity for risk, and inability to assess consequences" are innate characteristics of "juvenile … minds," which "lessen[s] a child's 'moral culpability.'" *Id.* at 2464-65 (some quotation marks omitted).

Because of these distinctive characteristics of youth, *Miller* reaffirmed that "youth matters" in sentencing, and that "in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult," or if he treats every child alike. *Id.* at 2465, 2468. Instead, when a child "fac[es] the most serious penalties," he or she must receive "individualized sentencing" that acknowledges the possibility that "youth and its attendant characteristics, along with the nature of [the] crime, ma[k]e a lesser sentence … more appropriate." *Id.* at 2460. Accordingly, the Court held that mandatory sentences of life without parole for children violate the Eighth Amendment. *Id.*

B. *Miller*'s Reasoning Applies To Mandatory Life Sentences, Regardless Of The Theoretical Availability Of Future Discretionary Parole.

The same considerations that drove *Miller* apply to mandatory sentences, like Petitioner's, that condemn children to life in prison, tempered only by the all-too-uncertain possibility of parole via a favorable exercise of discretion by the executive branch.

Miller's square holding, of course, was limited to invalidating mandatory sentences of life without parole. As with the Court's other juvenile-sentencing precedents, however, *Miller*'s facts do not limit the reach of the principles it establishes. This Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005), once was only a case about the death penalty. Likewise, at one time *Graham v. Florida*, 560 U.S. 48 (2010), was limited to its holding that the Constitution forbids a "juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime." *Id.* at 52-53. But in *Miller*, this Court recognized that "the confluence of … lines of precedent" compelled applying the principles of *Roper* and *Graham* to a new domain. 132 S. Ct. at 2464. And so it is again here.

As in *Miller*, a mandatory life sentence assuredly is one of the law's "most severe penalties." *Miller*, 132 S. Ct. at 2466. When "the sentencer"—"the judge or jury"—imposes that sentence, he authorizes the state to detain the child until he dies. *Id.* at 2468, 2474. The child may never again see friends or family outside of prison, may never get a job and support himself, and may never have children. He may never leave prison *at all*. Indeed, when a child receives a life sentence, there is every

chance that this is what will actually occur. *Infra* at 18-25.

When this most severe of penalties is also mandatory, it triggers the same concerns that were dispositive in *Miller*. Just as in *Miller*, the children facing these penalties have the same "diminished culpability" due to their "chronological age and its hallmark features"—children's "immaturity," their inability to extricate themselves from potentially "brutal or dysfunctional" "family and home environment[s]," and the way that "the circumstances of the homicide offense, including the extent of [their] participation in the conduct" may render children less blameworthy. 132 S. Ct. at 2468.

Yet despite these children's diminished and individualized culpability, mandatory life sentences require that children be treated *the same* with respect to this harshest of punishments. When the sentencer imposes a life sentence, this is a determination that the child is *culpable enough* to authorize that child's lifelong detention. Statutes imposing mandatory life sentences make that determination across the board, "preclud[ing] a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at 2467. As in *Miller*, those categorical statutes violate the precept that "a sentencer misses too much if he treats every child as an adult." *Id.* at 2468. And as in *Miller*, mandatory life sentences "violate … the Eighth Amendment's ban on cruel and unusual punishment" by imposing the same harsh punishment on all children "regardless of their age and

age-related characteristics and the nature of their crimes." *Id.* at 2475.

The only difference between Petitioner's sentence and those invalidated in *Miller* is the possibility of parole by the executive branch. Pet. i. Many states, like Massachusetts, sentence children to mandatory life sentences tempered only by the possibility of parole after a lengthy term of years—for example, 40 years in Nebraska and Texas, 35 years in Florida, Louisiana, and Pennsylvania, and terms from 15 to 25 years in myriad other states.[2] As shown below, however, parole cannot cure the constitutional injury in cases like Petitioner's. *Infra* Section III.

II. THE QUESTIONS PRESENTED AFFECT THOUSANDS OF CHILDREN SERVING MANDATORY LIFE SENTENCES, WITHOUT THE INDIVIDUAL ASSESSMENT OF CULPABILITY THAT *MILLER* DEMANDS.

A. Thousands Of Children Are Serving Mandatory Life Sentences.

Nationwide, thousands of individuals are serving life sentences for crimes they committed as children, and for which they may not have received the individualized consideration *Miller* demands—7,862 individuals in total, 7,651 men and 211 women. Ashley Nellis, The

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[2] *See* The Sentencing Project, *Slow to Act: State Responses to 2012 Supreme Court Mandate on Life Without Parole* 2 (2014), http://sentencingproject.org/wp-content/uploads/2015/11/Slow-to-Act-State-Responses-to-Miller.pdf ("*Slow to Act*").

Sentencing Project, *Life Goes On: The Historical Rise In Life Sentences In America* 11-12 (2013) ("*Life Goes On*"), http://sentencingproject.org/wpcontent/uploads/2015/12/Life-Goes-On.pdf. Child offenders account for 6.5% of all individuals serving life sentences, and in some states—for example, Nevada, Wisconsin, Maryland, and Georgia—that number is above 10%. *Id.* at 12. Among these children, the life sentence was likely mandatory in a very high proportion of cases, as it was for Petitioner: Of children sentenced to life without parole before *Miller*, 85% came from jurisdictions that mandated this sentence, *Miller*, 132 S. Ct. at 2472 n.10, and there is every reason to believe the proportion is similar for parole-eligible life sentences.

Statistics from Massachusetts bear out these points. There, 142 people are serving life sentences with the possibility of parole for crimes committed as children, putting Massachusetts among the states in which 10% or more of inmates serving life received their sentences for crimes committed as children.[3] And more than 90% of those people received *mandatory* life sentences, with no consideration of their individual circumstances.[4]

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[3] The Massachusetts figures cited in this section are for 2016 and come from Massachusetts Department of Corrections data obtained by The Sentencing Project.

[4] In particular, 134 of those 142 people were convicted of first- or second-degree murder. Those convicted of first-degree murder received mandatory life-without-parole sentences that the Massachusetts Supreme Judicial Court converted to mandatory life-with-parole sentences in *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270, 286 (Mass. 2013). *See also* Mass. Gen. Laws ch. 265, § 2(a). Those convicted of second-degree murder

The narrower issue raised by Petitioner—mandatory life sentences for children convicted on a "joint venture" theory, Pet. i—likewise is critically important. In Massachusetts, a high proportion of life-sentenced children received that sentence for second-degree murder (134 of 142, or 94%), many of whom would have been convicted on a joint venture or similar theory—because those who themselves took a life as triggermen will often receive first-degree murder sentences. Such children are not just numerous, but *Miller*'s holding applies to them with special force. As the next section details, children convicted on joint venture, felony murder, or similar derivative-liability theories are particularly likely to exhibit "diminished culpability" in view of the limited "extent of [their] participation in the conduct" and the negative effects of "familial and peer pressures." *Miller*, 132 S. Ct. at 2464, 2468.

B. The Children Serving Mandatory Life Sentences Deserve Individualized Assessments Of Culpability.

In *Miller*, this Court recognized that "a sentencer misses too much" when life sentences are "[m]andatory" for "every child" without "consideration of his chronological age and its hallmark features." 132 S. Ct. at 2468. Such mandatory sentences, the Court explained, "prevent[] taking into account the family and home environment that surrounds [a child]—and from which he cannot usually extricate himself—no matter

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likewise received mandatory sentences. *See* Mass. Gen. Laws ch. 265, § 2(b).

how brutal or dysfunctional." *Id.* And it "neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him." *Id.* Today, the evidence—the data of sociology, and the stories of children sentenced to life in prison—confirms that many children are serving mandatory life sentences even though they have precisely these "hallmark features" of diminished culpability. *Id.*[5]

The children today serving mandatory life sentences tend to suffer from exactly the "environmental vulnerabilities" *Miller* found "'particularly relevant' … in assessing … culpability." *Id.* at 2465, 2467 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)). Here is what the statistics show:

- Many of these children were themselves first victims of violence and crime. Nearly 80% witnessed violence at home, and half experienced physical abuse. *See* Ashley Nellis, The Sentencing Project, *The Lives of Juvenile Lifers: Findings from a National Survey* 10 (Mar. 2012) ("*Juvenile Lifers*"),

[5] While some data and accounts in this section concern children sentenced to life without parole, they are indicative of the children who receive mandatory life sentences, with the possibility of parole, after *Miller*. In Massachusetts, life sentences are now mandatory for any first- or second-degree murder conviction. Mass. Gen. Laws ch. 265, § 2; *id.* ch. 279, § 24. Likewise, in Massachusetts and elsewhere, courts have responded to *Miller* by severing the prohibition on parole and imposing a mandatory life-with-parole sentence. *See Diatchenko*, 1 N.E.3d at 286; Sarah F. Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 Ind. L. J. 373, 384 & nn. 78-80 (2014) (citing cases); *see generally Slow to Act*, *supra* p. 8.

http://sentencingproject.org/wp-content/uploads/2016/01/The-Lives-of-Juvenile-Lifers.pdf. One in five was sexually abused. *Id.* Seventy percent saw drugs sold openly where they lived, and 54% reported witnessing acts of violence *every week*. *Id.* at 11. When children are exposed to violence, but do not receive the interventions they need to deal with these experiences, they are at grave risk of engaging in violent acts themselves. *Id.* at 10; *see* Cathy Spatz Widom, *Child Abuse, Neglect, And Violent Criminal Behavior*, 27 Criminology 251-71 (1989).

- Many of these children suffered from difficult family histories. More than 25% had a parent in prison, and 60% had a close relative in prison. *Juvenile Lifers*, *supra* pp. 11-12, at 12. Social science shows that children of imprisoned parents are vulnerable to greater aggression, violence, cognitive and developmental delays, and antisocial behavior. *Id.*

- Many of these children lacked supportive two-parent households. Barely one in five lived with both parents. *Id.* at 9-10. Half lived with just one parent, 15% were raised by grandparents, and nearly 20% did not live with *any* close adult relative, but rather were homeless, living with friends, or were housed in a detention facility or group home. *Id.*

- Many of these children fell in with the wrong crowd: More than 40% reported that *most* of their friends had been in trouble with the law, and over 80% reported that some of their friends had been in trouble with the law. *Id.* at 13; *cf. Miller*, 132 S. Ct. at 2468 (noting relevance of "the way familial and peer pressures may have affected" the defendant).

Many children serving mandatory life sentences, moreover, were convicted via felony murder, joint venture, or other forms of liability that did not require that these children themselves have taken a life. Such children's stories vividly confirm the wisdom of *Miller*'s observation that mandatory life sentences "neglect[] the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him." 132 S. Ct. at 2468. The children who committed these acts assuredly are culpable, and assuredly deserve the punishment that their actions merit. Their experiences, however, underscore the cruelty of subjecting these children to a uniform life sentence, without consideration of what punishment their actions and their circumstances justly merit.

Barbara. At fourteen, Barbara ran away from home to escape sexual abuse. *See* ACLU of Mich., *Second Chances* 13 (2004), http://www.aclumich.org/sites/default/files/pdfs/Juv%20Lifers%20V8.pdf. She moved in with an older man, who forced her into prostitution and beat her if she resisted. *Id.* One night, he instructed Barbara to bring a man home so that he could rob the man. *Id.* Barbara complied. *Id.* After she left the room, he stabbed the man to death. *Id.* Barbara was charged as an adult, convicted of felony murder, and sentenced to a mandatory life sentence—the same sentence received by the adult boyfriend who stabbed the victim. *Id.*

Peter. Peter, aged fifteen, looked up to his older brother, but his brother took advantage of that fact to enlist Peter as a drug courier from a young age. Amnesty Int'l & Human Watch Rights, *The Rest of*

Their Lives, at 11 (2005). After a theft of drugs and money from the brother's apartment, the brother told Peter to steal a van to help get the stolen goods back. *Id.* Peter did so, and he waited—unarmed—in the van as a twenty-one year-old and eighteen-year-old entered a house. *Id.* at 11-12. Shortly thereafter, Peter heard shots, and one of the older men came running out of the house and jumped in the car. *Id.* at 12. Only after returning to his brother's apartment did Peter learn that two people had been shot to death in the botched robbery. *Id.*

After Peter's arrest, police questioned him for eight hours without his mother or an attorney present. *Id.* Peter readily admitted to helping steal the van, but denied involvement in the murders. *Id.* The triggerman was convicted of murder, but the other older man was acquitted. *Id.* at 12-13. Peter, however, was convicted of two counts of felony murder and received a mandatory life sentence. *Id.* at 12; *cf. J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011) ("inherently compelling pressures" of interrogation are "all the more acute" for juveniles) (quotation marks omitted)).

Donald. When Donald was just two, his father was shot to death. His mother was imprisoned for armed robbery after losing her job of ten years at a General Motors plant. *See* Ted Roelofs, *Michigan prosecutors defying U.S. Supreme Court on 'juvenile lifers*,' Bridge, Aug. 2016, at 4, http://bridgemi.com/2016/08/michigan-prosecutors-defying-u-s-supreme-court-on-juvenile-lifers/. Donald was raised by his blind, wheelchair-bound grandmother. *Id.*

When Donald was sixteen, he and Antonio Payne decided to steal a car from a gas station. *Id.* Donald had known Payne for just two days. *Id.* During the theft, Payne "just snapped" and shot the car's owner as he attempted to flee. *Id.* Donald had no idea that Payne might do so. *Id.*

After his arrest, the teenage Donald—like Peter—compounded his poor choices. Prosecutors recognized Donald's lesser culpability and offered to charge him only with armed robbery, in return for testimony against Payne. *Id.* But Donald turned the offer down. He was convicted of felony murder and sentenced to life. *Id.*; *cf. Miller*, 132 S. Ct. at 2468 (mandatory sentences for children "ignore[] that [they] might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.").

Shaina. At sixteen years old, and borderline mentally retarded, Shaina finally told her mother that her step-father was sexually abusing her, after years of secrecy. Meagan Flynn, HoustonPress, *Sorry for Life?: Ashley Ervin Didn't Kill Anyone, But She Drove Home the Boys Who Did* (Jan. 12, 2016), http://www.houstonpress.com/news/sorry-for-life-ashley-ervin-didn-t-kill-anyone-but-she-drove-home-the-boys-who-did-8064300. Her mother was so furious she decided to hire someone to kill the step-father, choosing Shaina's seventeen-year-old boyfriend. Shaina was present, but did not participate. *Id.* None of the circumstances surrounding her crime—the sexual abuse, her mental

capacity, her age, or her level of involvement—mattered at her trial. *Id.* Shaina was convicted of capital murder and received a life sentence. *See* 9KTRE, *Nacogdoches woman convicted in murder-for-hire plot gets life with option of parole* (Jan. 21, 2015), http://www.ktre.com/story/27907062/nacogdoches-woman-convicted-in-murder-for-hire-plot-gets-life-with-option-of-parole.

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The harm that mandatory life sentences inflict on these children is more than theoretical. As *Miller* noted, the evidence shows that when sentencers have discretion to impose less harsh punishments, they usually *do so*. *Miller*, 132 S. Ct. at 2472 n.10; *see* Ashley Nellis, *A Return to Justice: Rethinking Our Approach to Juveniles in the System* 59-60 (2015). Accordingly, when children receive particularly severe sentences, those sentences generally reflect not the children's greater culpability, but rather sentencing schemes that make severe punishments mandatory.

III. NO OTHER MECHANISM IN THE CRIMINAL JUSTICE SYSTEM PROTECTS CHILDREN FROM UNCONSTITUTIONAL MANDATORY LIFE SENTENCES.

Children like those described in the previous section, whose conduct leads to a conviction that carries a mandatory life sentence, have just two chances to avoid spending the rest of their lives in prison: On the front end, they may avoid transfer to adult court in the first place. And on the back end, they may obtain parole some time before they die. Neither mechanism, however,

eliminates the constitutional violation that mandatory life sentences inflict.

A. As *Miller* Held, Transfer Statutes Cannot Avoid The Constitutional Violation That Mandatory Life Sentences Inflict.

One way a child might evade a mandatory life sentence is to avoid transfer from juvenile court to adult court. *Miller*, however, squarely holds that the transfer process cannot avoid the constitutional violation that mandatory sentences inflict. The Constitution requires "individualized consideration" of the child's circumstances, 132 S. Ct. at 2469-70, which the transfer process cannot provide.

First, many jurisdictions, including Massachusetts, "place at least some juvenile homicide offenders in adult court automatically, with no apparent opportunity to seek transfer to juvenile court." *Id.* at 2474 & n.15 (citing, *inter alia*, Mass. Gen Laws, ch. 119, § 74). Children in these jurisdictions thus face mandatory transfer to adult court, followed by mandatory life sentences in adult court.

Second, many other jurisdictions lodge the transfer decision "exclusively in the hands of prosecutors, again with no statutory mechanism for judicial reevaluation." *Miller*, 132 S. Ct. at 2474. These laws "'are usually silent regarding standards, protocols, or appropriate considerations for decisionmaking.'" *Id.* (quoting Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, P. Griffin, et al., Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting 5 (2011)).

Third, even when judges have some role in transfer, "it has limited utility." *Id.* The judge has "only partial information at this early, pretrial stage about either the child or the circumstances of his offense." *Id.* For example, the evidence showing a child's limited involvement in a felony resulting in death may not yet have been developed. And mental health experts who could testify about mitigating circumstances may not yet be available. *Id.*

More important, "the question at transfer hearings may differ dramatically from the issue at a post-trial sentencing." *Id.* As *Miller* explained, transfer decisions "often present a choice between extremes: light punishment as a child or standard sentencing as an adult"—because "many juvenile systems require that the offender be released at a particular age or after a certain number of years." *Id.* A judge might well decide that a child deserves a harsher sentence than would be available in juvenile court, without believing that the life sentence mandatory in adult court is appropriate. *Id.* Accordingly, "the discretion available to a judge at the transfer stage cannot substitute for discretion at post-trial sentencing in adult court—and so cannot satisfy the Eighth Amendment." *Id.* at 2475.

B. The Possibility Of Parole Cannot Remedy The Constitutional Violation That Mandatory Life Sentences Inflict.

Parole is no more adequate than transfer to eliminate the constitutional violation from imposing mandatory life sentences on children. As *Miller* recognizes, a sentencing scheme that binds "those meting out punishment" to authorize a life sentence is

unconstitutional because it ignores children's "'lessened culpability.'" 132 S. Ct. at 2460 (quoting *Graham*, 130 S. Ct. at 2026-27). That "lessened culpability," *id.*, means some children do not *deserve* to be exposed to the possibility of spending the rest of their lives in prison. *See id.* at 2464 (children "'are less deserving of the most severe punishments'" (quoting *Graham*, 130 S. Ct. at 2026)).

Neither in principle nor in practice can parole remedy the constitutional violation that occurs when children nonetheless receive mandatory life sentences. If parole works *perfectly*, it provides an "opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 130 S. Ct. at 2030; *see Miller*, 132 S. Ct. at 2469. But if "those meting out punishment"—the judge or jury—would have found that a child never deserved to spend life behind bars *in the first place*, then it is no answer to tell that child that he might some day obtain release if he can convince a parole board that he has demonstrated sufficient rehabilitation. This child never should have been exposed to a life sentence to begin with.

Parole's on-the-ground realities make the point even clearer. "There is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence" via parole. *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011). Rather, parole "depends on an amalgam of elements, … many of which are purely subjective appraisals by the Board members." *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 10 (1979). There "is no set of facts which, if

shown, mandate a decision favorable to the individual." *Id.*

Such standardless discretion, which this Court described decades ago, remains the law in most states. *See, e.g.*, Richard A. Bierschbach, *Proportionality and Parole*, 160 U. Pa. L. Rev. 1745, 1750-51 (2012). And this standardless discretion has not led to parole systems that could possibly remedy the injury from subjecting children to mandatory life sentences. The Model Penal Code puts the point starkly: "[N]o one has documented an example in contemporary practice, or from any historical era, of a parole-release system that has performed reasonably well in discharging its goals." American Law Institute, *Model Penal Code: Sentencing. Tentative Draft No. 2* (Mar. 25, 2011) §6.06, "Comment," p. 9.

One failing is especially fatal when parole is the only hope for children who receive life sentences they do not deserve. When parole boards apply their unchecked discretion, they often "reevaluate any and all aspects of the judge's original sentence, including how much time a prisoner *deserves* to spend in prison for his or her offense." Edward E. Rhine, Joan Petersilia, and Kevin R. Reitz, *Improving Parole Release in America*, 28 Fed. Sentencing Rep. 98 (2015) (emphasis in original). As a result, the "nature of the crime of conviction is often the driving force in parole decisions." Sarah F. Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 Ind. L. J. 373, 397 (2014). In particular, conviction of certain crimes—especially murders carrying life sentences—often operates as a *per se* barrier to parole. In Michigan, for

example, the parole board adopted a "life means life" policy, under which "something exceptional must occur" before a life-sentenced inmate may be paroled. *People v. Hill*, 705 N.W.2d 139, 142 (Mich. Ct. App. 2005); *see* Marc Mauer & Ashley Nellis, The Impact of Life Imprisonment on Prospects for Criminal Justice Reform in the United States 15, *in* Dirk van Zyl Smit & Catherine Appleton, eds., *Life Imprisonment and Human Rights* (2016). Likewise, the Second Circuit has repeatedly rejected challenges to New York's unofficial policy "to deny parole to violent felony offenders solely on the basis of the violent nature of their convictions." *Graziano v. Pataki*, 689 F.3d 110, 115 (2d Cir. 2012).

The constitutional harm to life-sentenced children is plain. If a child had received "individualized consideration," *Miller*, 132 S. Ct. at 2469-70, the judge or jury might well have decided that his crime and background did not merit a lifetime in prison. But when the law mandates that the sentencer impose a life sentence, a parole board may later deny parole based *solely* on the child's crime. So "life means life." *Hill*, 705 N.W.2d at 142. The child's crime remains a lifelong shackle, despite this Court's recognition of children's "'lessened culpability' and greater 'capacity for change.'" *Miller*, 132 S. Ct. at 2460 (quoting *Graham*, 130 S. Ct. at 2026-27, 2029-30).

The danger is all the greater because parole boards are so badly politicized. In forty-four states, parole boards are wholly appointed by the governor, who "use[s] the[se] well-paid positions" as "patronage jobs" and "rewards for former aides, legislators, and other political allies." Beth Schwartzapfel, *Parole Boards:*

Problems and Promise, 28 Fed. Sentencing Rep. 79, 82 (Dec. 1, 2015), 2015 WL 10015148. And parole's politicization shapes the results.

In New York, two board members lost their jobs when they voted to parole a 1960s leftist sentenced to twenty-to-life for her involvement in a truck robbery that resulted in the deaths of two police officers. The defendant had been a model inmate, even earning a Ph.D. *Id.* at 81. But nonetheless, the governor's emissary told the board's chairman, "[d]on't even try to advocate for those two—they're gone,'" because the governor "was very upset they let out [the defendant], and he's not going to reappoint them.'" *Id.* Parole board members thus readily came to understand that "[i]t's always safer to deny than to parole; it takes no courage and is the safest route to job security." *Id.* at 80-81 (quoting Barbara Hanson Treen, *Geranium Justice: The Other Side of the Table* 150 (2014)).

Similar events transpired in Massachusetts, the site of Petitioner's conviction. After a parolee killed a police officer in 2010, Governor Deval Patrick replaced five parole board members who had voted for release, with four of the five new members having backgrounds in law enforcement. Leslie Walker et al., *White Paper: The Current State of Parole in Massachusetts* 2 (2013) ("White Paper"), http://www.cjpc.org/2013/White-Paper-Addendum-2.25.13.pdf. Again, the message to these board members was unmistakable.

The influence of politics is even more direct in Maryland. There, only the governor can grant parole to life-sentenced inmates. Alison Knezevich, *Maryland parole commission says it will hold hearings for*

hundreds of juvenile lifers, The Baltimore Sun, Oct. 14, 2016, http://www.baltimoresun.com/news/maryland/crime/bs-md-parole-commission-juveniles-20161014-story.html. In 1995, Maryland's governor instructed his parole board to "'not even recommend—to not even send to my desk—a request for murders…' unless they are suffering from a terminal illness or are 'very old.'" *Life Goes On*, *supra* pp. 8-9, at 14.

The numbers confirm that the parole system that results from these politicized processes is no panacea for children who never should have been exposed to life sentences in the first place. During the 1990s *alone*, average time served among life-sentenced inmates jumped 37%. *Id.* Data from California shows that life-sentenced inmates have only an 18% chance of release. *Id.* The situation in Massachusetts is even more dire: After the governor's mass replacement of the parole board, Massachusetts' overall parole rate fell from 42% in 2010 to 26% in 2011. Walker, White Paper, *supra* p. 22, at 2-3. And among life-sentenced inmates, parole is rare indeed: The new board held 219 parole hearings for life-sentenced inmates from April 2011 to October 2012. *Id.* at 4. Just *two* individuals were released from prison as a result—a rate of 0.9%. *Id.* at 5. The story is the same in Maryland, where in the two decades since the governor's pronouncement *not one* life-sentenced inmate has received parole, including hundreds incarcerated for crimes committed as juveniles. *See* Knezevich, *supra* pp. 22-23. For these children, "life" indeed means life.

Here is the bottom line. Life-sentenced children, even when eligible for parole, may be denied parole—

may spend their entire lives in prison—for reasons having nothing to do with their own culpability or rehabilitation. That injustice is possible only because of mandatory sentences authorizing life, like the one Petitioner received.

C. The Court Should Not Regard *Montgomery* As Establishing That Parole Is Adequate To Avoid The Constitutional Injury That Mandatory Life Sentences Inflict.

In *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), this Court held that *Miller*'s rule applies retroactively. *Id.* at 725. In dicta, the Court stated that a "State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." *Id.* at 736. The Sentencing Project agrees with Petitioner that, if that dicta were understood as establishing that no Eighth Amendment violation occurs so long as parole is available, that dicta—on a question unbriefed in *Montgomery*—would be irreconcilable with *Miller*'s logic and with parole's practice realities. *See* Pet. 25-27.

But there is a more basic reason why *Montgomery* did not address the questions presented here. *Montgomery*, again, was a retroactivity case that concerned only whether *Miller*'s narrowest holding—that mandatory life *without* parole sentences for juveniles are unconstitutional—is a ground for relief on collateral review. *Montgomery*, 136 S. Ct. at 732, 736. This dicta at most recognized that "a *Miller* violation" in this narrow sense might not arise if parole were available. *Id.* at 736. That does not address, much less resolve, whether the principles announced in *Miller*

likewise invalidate mandatory life sentences with the possibility of parole—a rule that, if this Court granted certiorari here and reversed, would be a "*Bright* violation."[6]

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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[6] *Montgomery* also stated that parole "ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." 136 S. Ct. at 736. This dicta, however, at most recognizes that children whose sentences include the possibility of parole may not suffer *one particular* type of Eighth Amendment violation that arises when children have no opportunity to show "rehabilitation" in prison via their "greater capacity for change." *Miller*, 132 S. Ct. at 2460, 2468 (quotation marks omitted). It does not address the Eighth Amendment violation that occurs when children, like Petitioner, receive mandatory life sentences that are unwarranted in light of their "lessened culpability." *Id.* at 2460 (quotation marks omitted).