No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Miller v. Alabama*, this Court held that "when a juvenile confronts a sentence of life (and death) in prison," the sentencing judge must have the opportunity to consider the child's "age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"—and "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. 2455, 2468 (2012).

Petitioner Ahmad Bright was convicted of second-degree murder as a joint venturer. Although Bright was only 16 years old at the time of the offense, he was automatically tried as an adult, and the sentencing judge had no opportunity to consider Bright's age, his participation in the crime, or how familial or peer pressures may have affected him before imposing a mandatory life sentence with the possibility that the State executive branch's parole board could, in its discretion, grant early release after 15 years.

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.

PARTIES TO THE PROCEEDING

Petitioner is Ahmad Bright, defendant-appellant below.

Respondent is the Commonwealth of Massachusetts, plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ahmad Bright respectfully petitions for a writ of certiorari to review the judgment of the Massachusetts Appeals Court.

OPINIONS BELOW

The decision of the Massachusetts Appeals Court (Pet. App. 1a-5a) is unreported but is available at 2016 WL 1295044. The Massachusetts Superior Court's order denying petitioner's motion for resentencing (Pet. App. 6a-14a) is unreported.

JURISDICTION

The judgment of the Massachusetts Appeals Court denying petitioner's motion for resentencing was entered on April 4, 2016. On June 30, 2016, the Massachusetts Supreme Judicial Court ("Massachusetts SJC") denied petitioner's timely application for further appellate review. Pet. App. 15a-16a. On August 30, 2016, Justice Breyer extended the time for filing this petition for certiorari to and including October 28, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Eighth Amendment to the U.S. Constitution; Mass. Gen. Laws ch. 119, §§ 72B, 74; Mass. Gen. Laws ch. 265, § 2; and Mass. Gen. Laws ch. 279, § 24 are reprinted in the Appendix, *infra*, at 67a-72a.

INTRODUCTION

This case concerns the constitutionality of a mandatory sentencing regime under which a child who participated in a shooting that was committed by a co-defendant was automatically sentenced to spend the rest of his life in prison unless a future parole board grants discretionary early release.

Petitioner Ahmad Bright was a 16-year-old boy when he got caught up in a feud between adult drug dealers, one of whom was his older brother, that resulted in the shooting and death of Corey Davis. After being convicted of second-degree homicide as a joint venturer, Bright was never afforded any consideration of his age, the nature of his involvement in the crime, the extent to which peer and familial pressure might have affected his actions, or any other age-attendant factors before he received an automatic life sentence with the future possibility of parole. Individualized sentencing consideration is critical for children like Bright because, as this Court stated in *Miller v. Alabama*, children are vulnerable to "negative influences and outside pressures, including from their family and peers; they have limited contro[l] over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings." 132 S. Ct. 2455, 2464 (2012) (alteration in original) (quotation marks omitted). This case is a perfect example of why such a sentencing regime is inconsistent with the Court's reasoning in *Miller* and violates the Eighth Amendment.

This Court has not previously confronted this issue, although it recently assumed in *Montgomery v. Louisiana* that the opportunity for parole would ad-

dress the concerns that animated *Miller*'s individualized-sentencing requirement. 136 S. Ct. 718, 736 (2016). But the Court's statements regarding parole were made without the benefit of briefing on the role and reality of the parole system, including that (a) parole falls within the province of the executive branch, and parole boards (and parole rates) are highly susceptible to political pressure; (b) parole boards make decisions based on the risk of recidivism and the welfare of the community and not based on the offender's culpability or proportionality principles under the Eighth Amendment; (c) parole decisions are entirely discretionary and insulated from judicial review; and (d) a juvenile offender serving a life sentence has no expectation of early release. This Court should grant review to squarely consider this important issue. And it should do so *now* to resolve the confusion that has resulted from *Miller* and *Montgomery* as States struggle to conform their sentencing laws consistent with the Eighth Amendment.

STATEMENT

A. Bright Was A Good Child With No Criminal History And A Promising Future.

On June 28, 2006, Ahmad Bright returned from a trip to visit Emory University and Morehouse College and voluntarily surrendered to face charges for the murder of Corey Davis. Mass. Appeals Ct. App. 64-65, 75.[1] Bright was just 16 years old and had never had a run-in with the law. *Id.* at 69.

[1] No. 2014-P-0546.

Bright was known as a kind and shy boy who had overcome adversity to become a promising student and accomplished athlete. Bright's father, who suffered from substance abuse and physical disabilities, abandoned Bright at a young age. Bright's older brother, Sherrod, was involved in drug trafficking and moved out when Bright was 8 years old. Mass. Appeals Ct. App. 61, 68. Bright's family had limited financial means; at one point during his sophomore year, Bright and his mother shared a bedroom at his grandmother's house.

Notwithstanding these challenges, Bright excelled academically and athletically. He earned a full scholarship to attend Cambridge Friends School, a Quaker primary school in Cambridge, Massachusetts. Mass. Appeals Ct. App. 69. He then earned a full scholarship to Cambridge's Buckingham, Browne & Nichols School, which he attended while living with his mother in Dorchester. *Id.* at 60-61, 69. Bright was challenged by the academic demands there; he struggled early on but was focused on improvement in preparation for college applications and had earned his highest grades during the semester before his arrest. *Id.* at 72-73.

Bright was also a disciplined athlete. When he was 6 years old, Bright picked up tennis at a free after-school program, and he went on to compete nationally. Mass. Appeals Ct. App. 70, 72. Before his arrest, Bright had lined up a summer job teaching at a children's tennis camp. *Id.* at 75.

Bright was not a troublemaker. As the numerous letters in support of his request for release on bail demonstrated, Bright was a kind, respectful, and

ambitious child who had a bright future ahead of him when he got caught up in a feud between adults.

B. Bright Became Involved In A Feud Between Adult Drug Dealers.

On the night of March 18, 2006, a drug dealer named Corey "Gunner" Davis was shot and killed by 21-year-old Remel Ahart at the purported direction of petitioner's 23-year-old brother, Sherrod, because Davis had allegedly stolen money from Sherrod. *Commonwealth v. Bright*, 974 N.E.2d 1092, 1097-98 (Mass. 2012). Unlike petitioner, Sherrod and Ahart were adults with criminal records who were involved in drug trafficking. Mass. Appeals Ct. App. 68, 107; *Bright*, 974 N.E.2d at 1097. The other individual involved was James Miller, a 23-year-old convicted felon and aspiring drug dealer whom Ahart had befriended in jail; the two had been released only weeks earlier. Mass. Appeals Ct. App. 43-44, 104, 107; 2/18/09 Tr. 8. Miller was the initial murder suspect. *Id.* at 101-02. He was arrested after fleeing to Virginia but, after cooperating with police and testifying against Bright and Ahart, was not charged for the murder. *Id.* at 34-36.

The jury heard conflicting testimony about Bright's participation in Davis's death. The only witness to the shooting, Davis's cousin, testified that a second unidentified individual was at the scene and pointed a gun at him but did not fire it. Mass. SJC App. 36.[2] Miller was the only witness who placed Bright at the scene of the crime. Through wildly varying and contradictory testimony, Miller said that Bright was the unidentified second individ-

[2] FAR-24324.

ual but froze and did not shoot; that Bright drove the vehicle on the night of the shooting; and that Bright helped to procure a weapon from Sherrod on the night of the shooting. *Id.* at 49-50; 2/18/09 Tr. 22-32, 36-37, 55.

C. Bright Was Convicted As A Joint Venturer And Given A Mandatory Life Sentence.

Although he was only 16 when Davis was killed, Bright was automatically transferred to adult court. Mass. Gen. Laws ch. 119, § 74. At trial, the Commonwealth did not allege that Bright killed Davis. Instead, it prosecuted him as a joint venturer.[3] The jury was instructed that Bright could be found guilty of murder if it found that he "aided or assisted the commission of the murder, or that by agreement he was willing and available to assist Ahart in carrying out the murder if necessary." Pet. App. 47a-48a.

After deliberating for seven days, the jury found Bright guilty of (1) second-degree murder as a joint venturer;[4] (2) unlawful possession of a firearm; and (3) assault by means of a dangerous weapon as a joint venturer. Pet. App. 63a-66a. It did not find Bright guilty of first-degree murder, armed assault with intent to murder (as a principal or joint venturer), or assault by means of a dangerous weapon as a

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[3] A joint venturer is equivalent to an aider/abetter. *See generally Commonwealth v. Zanetti*, 910 N.E.2d 869 (Mass. 2009).

[4] "Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree." Mass. Gen. Laws ch. 265, § 1.

principal. *Id.* Furthermore, the fact that Bright was not convicted of assault as a principal means that the jury could not have found that Bright was the second unidentified individual who pointed a gun at Troy Davis but did not fire it, as the Commonwealth had alleged. *See* Pet. App. 54a (instructing jury that it could find Bright guilty as a principal if the Commonwealth proved that "Mr. Bright himself" "attempted to commit a battery" or "engaged in conduct which would put a reasonable person in fear of immediate bodily harm").

Under Massachusetts law, the trial judge had no discretion over Bright's sentence.[5] The judge said, "[T]his is a sentencing which, on one level, there isn't much for the Judge to say. By law, the sentence for murder in the second degree is life in prison, with eligibility for parole after 15 years." Mass. Appeals Ct. App. 175. Thus, the judge was not able to consider Bright's age, the nature of the crime, the nature of Bright's participation in the crime, or whether peer and familial pressures from the other adults involved in the shooting may have affected Bright's conduct.

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[5] In Massachusetts, everyone convicted of second-degree murder is automatically sentenced to life in prison with the possibility of parole. Mass. Gen. Laws ch. 265, § 2. Juvenile offenders are parole eligible after 15 years, and sentencing judges have discretion to set adult parole eligibility between 15 and 25 years. Mass. Gen. Laws ch. 279, § 24; Mass. Gen. Laws ch. 119, § 72B. All juveniles convicted of first-degree murder are automatically sentenced to life in prison with parole eligibility between 20 and 30 years. Mass. Gen. Laws ch. 279, § 24.

D. Bright Moved For Resentencing In Light Of *Miller v. Alabama*.

Following this Court's decision in *Miller v. Alabama*, Bright submitted a motion for resentencing. Among other things, he argued that Massachusetts' mandatory life-sentencing provisions violate the Eighth and Fourteenth Amendments to the U.S. Constitution. He also argued that the theoretical availability of discretionary parole does not cure these constitutional defects.

The trial court denied Mr. Bright's motion, and the Massachusetts Appeals Court affirmed. The court of appeals held that the "unconstitutional aspect" of a life sentence "is its irrevocability" through the absence of the possibility of parole. Pet. App. 4a. Citing *Miller* and *Commonwealth v. Okoro*, 26 N.E.3d 1092 (Mass. 2015)—which rejected the argument that a mandatory life sentence with parole eligibility for a juvenile offender violates the Eighth Amendment—the court of appeals stated that Bright's arguments should be "addressed to those courts whose precepts we are bound to follow." Pet. App. 5a. The Massachusetts SJC denied further appellate review.

REASONS FOR GRANTING THE PETITION

This Court has long recognized that "children are different" when it comes to Eighth Amendment proportionate sentencing requirements. The Court most recently applied that principle to prohibit mandatory sentences of life without parole for juvenile offenders, *Miller*, 132 S. Ct. at 2469, and noted that the instances in which a juvenile offender should serve an entire life sentence should be extremely rare, *Montgomery*, 136 S. Ct. at 734. This Court should grant

certiorari to determine whether, given the role and reality of parole boards, this principle should likewise prohibit mandatory life sentences with parole eligibility after a term of years—*i.e.*, statutes requiring every child convicted of particular offenses to be sentenced to spend the rest of his life in prison unless the State's executive branch elects to release him through discretionary parole.

At the very least, this Court should grant certiorari to determine whether a mandatory sentencing scheme that requires a child convicted as a joint venturer to receive the exact same mandatory life sentence as someone convicted as a principal violates the Eighth Amendment's requirement that punishment be "proportioned to both the offender and the offense." *Miller*, 132 S. Ct. at 2463 (quotation marks omitted).

I. This Court Should Grant Certiorari To Determine Whether The Eighth Amendment Permits A Child To Be Sentenced To A Mandatory Life Sentence, With The Mere Possibility Of Discretionary Parole.

In *Miller*, this Court recognized that children who commit crimes, even very serious crimes, are less culpable than adults. 132 S. Ct. at 2463-64. The Court held that a sentencing judge must have the opportunity to consider a juvenile defendant's youth and its attendant circumstances before "imposing a State's harshest penalties." *Id.* at 2468. The Court's reasoning applies fully to Massachusetts' mandatory life-sentencing scheme for children convicted of homicide, and the possibility that a State's executive

branch may grant discretionary early release is not an adequate substitute for individualized consideration by a sentencing judge.

A. A Mandatory Life Sentence For A Juvenile Offender Is Inconsistent With This Court's Precepts, Irrespective of the Possibility of Discretionary Parole.

Bright's mandatory life sentence is inconsistent with this Court's determination in *Miller* that the State cannot impose its harshest penalties on children without affording the sentencer the opportunity to conduct an individualized sentencing analysis.

1. This Court has repeatedly recognized that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 132 S. Ct. at 2464; *accord Graham v. Florida*, 560 U.S. 48, 68 (2010); *Roper v. Simmons*, 543 U.S. 551, 569-70, 572-73 (2005). As "any parent knows," and "developments in psychology and brain science continue to show," there are "fundamental differences between juvenile and adult minds." *Miller*, 132 S. Ct. at 2464 (quoting *Roper* and *Graham*).

First, children have a "proclivity for risk, and inability to assess consequences" due to a "lack of maturity and an underdeveloped sense of responsibility." *Miller*, 132 S. Ct. at 2464-65 (quoting *Roper*, 543 U.S. at 569); *see also Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988) ("The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent."). Second, children are far more vulnerable to "negative influences and outside pressures, including

from their family and peers;" they have a limited ability to control "their own environment and lack the ability to extricate themselves from horrific, crime-producing settings." *Miller*, 132 S. Ct. at 2464 (quotation mark omitted). Third, a child's immaturity is "transient," *id.* at 2469; his "character is not as 'well formed' as an adult's" and "his traits are 'less fixed.'" *Id.* at 2464 (quoting *Roper*, 543 U.S. at 570).

Because of these differences, "a sentencing rule permissible for adults may not be so for children." *Miller*, 132 S. Ct. at 2470. Children cannot be subjected to the harshest sentences in the same way that adults can, because children are inherently less culpable than adults. *See id.* at 2463 (sentencing cases "have specially focused on juvenile offenders, because of their lesser culpability"); *Graham*, 560 U.S. at 92 (Roberts, J., concurring) ("[H]is lack of prior criminal convictions, his youth and immaturity, and the difficult circumstances of his upbringing noted by the majority, all suggest that he was markedly less culpable than a typical adult who commits the same offenses." (citation omitted)).[6]

This Court has applied these principles in the sentencing context for decades. In *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982), and *Johnson v. Texas*, 509 U.S. 350, 367 (1993), this Court held that in a capital case, the sentencer must be permitted to consider the mitigating qualities of youth. A few years

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[6] The Court's acknowledgment in *Miller* that "children are different" is not unique to sentencing; it reflects a broader understanding that "children cannot be viewed simply as miniature adults" and our justice system must account for that reality. *J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011); *see id.* at 272-77 (providing examples).

after *Eddings*, a plurality held that the Constitution prohibits the execution of a person younger than 16 at the time of the offense, *Thompson*, 487 U.S. at 838, and in *Roper*, this Court held that "[t]he logic of *Thompson* extends to those who are under 18," 543 U.S. at 574. In *Graham*, the Court extended this principle to the non-capital context, holding that the Eighth Amendment prohibits children who commit non-homicide crimes from being sentenced to life without parole. 560 U.S. at 69-74.

Relying on its reasoning in *Roper* and *Graham*, this Court recognized in *Miller* that even where the Eighth Amendment does not categorically forbid the State from imposing a certain sentence on *any* child (as in *Roper* and *Graham*), it may still limit the State from automatically imposing "the most severe punishments" on *every* child convicted of a particular offense. Thus, in *Miller*, this Court held that a child who "confronts a sentence of life (and death) in prison" must receive an individualized sentencing determination that permits the sentencer to consider the child's age and the "wealth of characteristics and circumstances attendant to it," such as whether the child was from a stable or chaotic household, was a shooter or an accomplice, or was affected by peer or familial pressure. *Id.* at 2467-68. Unless the sentencer has the ability and opportunity to "examine all of these circumstances" to determine whether the harshest penalty available is appropriate for the defendant, there is simply "too great a risk of disproportionate punishment." *Id.* at 2469.

This Court further clarified in *Montgomery* that *Miller* did not simply prescribe procedural protections for children but rather "announced a substan-

tive rule of constitutional law" and must be applied retroactively. 136 S. Ct. at 734. *Montgomery* also made clear that penological justifications almost never justify an individual spending his life in prison for a crime he committed as a child. *See id.* at 726 ("[A] lifetime in prison is a disproportionate sentence for all but the rarest of children ….").

2. At sentencing, although Bright was "confront[ing] a sentence of life (and death) in prison," *Miller*, 132 S. Ct. at 2468, the sentencing judge could not not consider Bright's age, his lack of criminal history, the level of his participation as a non-shooting joint venturer, the adversity that characterized his childhood, the probable effects of peer and familial pressure from the adults who participated in the crime, whether his age made it difficult for him to "extricate" himself from a "crime-producing" situation, or any other circumstances that could have shed light on whether a life sentence was appropriate. As the Court noted in *Miller*, this scheme "misses too much":

> [E]very juvenile will receive the same sentence as every other—the 17–year–old and the 14–year–old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile … will receive the same sentence as the vast majority of adults committing similar homicide offenses ….

Id. at 2467-68.

The same concerns are present here. Bright had no criminal record and was a scholarship student and accomplished tennis player with a bright future;

he worked hard to overcome the drug dealing and criminal lifestyle that typified the lives of his peers in Dorchester—including his older brother. Yet under Massachusetts' sentencing scheme, he automatically will serve the same sentence as every other child convicted of second-degree murder—even those who, unlike Bright, are repeat offenders with long rap sheets who commit the most heinous offenses alone and not at the behest of adults. Indeed, Bright will serve the same sentence as many adults who commit similar crimes and other juveniles who commit *first-degree* murder. *See supra* note 5.

At no instance was Bright's youth *ever* taken into account—not when he was transferred to stand trial as an adult, and not when he was sentenced. Just like the sentence at issue in *Miller*, Massachusetts' mandatory sentencing scheme, which "mak[es] youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence"— life with the possibility of discretionary parole—"poses too great a risk of disproportionate punishment." 132 S. Ct. at 2469.

B. The Future Possibility Of Discretionary Parole Is Not An Adequate Substitute For Individualized Sentencing.

The Massachusetts SJC has narrowly cabined *Miller* to apply only to sentences of life without parole and held that the opportunity for a parole board to consider the unique characteristics of children provides all the protection that the Eighth Amendment requires. But this interpretation is inconsistent with the core reasoning of *Miller*. Moreover, there are many reasons why parole does not and cannot serve

as an Eighth Amendment backstop. This Court should grant certiorari to squarely consider whether the State may mandate that every child convicted of certain crimes be sentenced to spend his life in prison unless a parole board exercises its discretion to release him early.

1. The Massachusetts Appeals Court held that Bright's sentence did not implicate *Miller* because the Massachusetts SJC "has construed *Miller* and its consideration of individualized sentencing to be limited to the question whether a juvenile homicide offender can be subjected to a mandatory sentence of life in prison without parole eligibility." Pet. App. 3a (quoting *Okoro*, 26 N.E.3d at 1097). In *Okoro*, the court repeatedly noted that this Court's reasoning in *Miller* reached beyond the life-without-parole context to sentences like Bright's. 26 N.E. 2d at 1097 ("We agree with the defendant that certain language in *Miller* can be read to suggest that individualized sentencing is required whenever juvenile homicide offenders are facing a sentence of life in prison."); *id.* at 1099 ("*Miller* contains language suggesting that the requirement of individualized sentences for juveniles may extend beyond sentences of life without parole …."). It concluded, however, that "*Miller*'s actual holding was narrow and specifically tailored to the cases before the Court," and thus declined to extend the Court's reasoning beyond life without parole. *Id.* at 1097. It concluded that the Eighth Amendment was satisfied by a mandatory life-sentencing scheme in which a future parole board could "take into account 'the unique characteristics' of [children] that make them constitutionally distinct from adults" and afford the opportunity for early re-

lease "based on demonstrated maturity and rehabilitation." *Id.* at 1098 (quotation mark omitted).

But this Court has repeatedly rejected States' attempts to restrictively read its precedents that afford additional protections for juvenile offenders. Indeed, *Miller* itself recognized that the principle that "children are constitutionally different from adults for sentencing purposes" was not unique to the specific crimes or sentences at issue in *Graham* or *Roper;* instead, those cases more broadly established that "children are less deserving of the most severe punishments." 132 S. Ct. at 2464; *see id.* at 2466 ("*Graham*'s (and also *Roper*'s) foundational principal [is] that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.").

It can hardly be disputed that a life sentence, even with the potential for future discretionary parole, is one of the "most severe penalties" imposed. A 16-year-old child—who has been able to read and write for only a decade, has never lived on his own, and is not legally permitted to drink or vote or join the military—confronting such a sentence may never see his family or friends outside of prison, go on a date, have children, enjoy a celebratory dinner, or travel to another city absent a prison transfer. Indeed, the presumption is that none of these things will ever happen unless the executive branch makes the entirely discretionary decision to release him early. *See infra* pp. 23-24.

Indeed, in Massachusetts, as elsewhere, a life sentence with parole eligibility is "the most severe punishment[]" imposed on any child, and the most severe punishment imposed on any person convicted of sec-

ond-degree homicide. Imposing the same sentence on all such individuals, irrespective of their age and age-attendant characteristics, the nature of the crime, or their participation therein cannot be squared with this Court's statement that "children are constitutionally different for sentencing purposes" when that sentence could confine the child in prison forever. And, as discussed below, the realities of the parole system make parole an inadequate Eighth Amendment safeguard for the individualized sentencing that *Miller* requires.

2. By making youth and its attendant circumstances irrelevant to the imposition of a severe sentence, a mandatory sentencing scheme "poses too great a risk of disproportionate punishment." *Miller*, 132 S. Ct. at 2469. Parole does not and cannot ameliorate this risk.

First, unlike judges, who are neutral decisionmakers bound to safeguard the constitutional rights of children who come before them, parole boards are highly susceptible to political pressure. The Massachusetts Parole Board is, like most boards, part of the executive branch—the branch responsible for prosecuting defendants and pursuing lengthy prison sentences. *See Diatchenko v. Dist. Attorney for Suffolk Dist.*, 27 N.E.3d 349,369 (Mass. 2015) ("Parole is an executive action separate and distinct from a judicial sentence."); *id.* at 364 ("[T]he power to grant parole, being fundamentally related to the execution of a prisoner's sentence, lies exclusively within the province of the executive branch."). Parole board members are appointed by the governor, 120 Mass. Code Regs. 101.01, and external political dynamics can play a major role in determining who (if anyone)

is released on parole. Indeed, the American Law Institute ("ALI") recently observed when revising the Model Penal Code, "The American history of parole boards as releasing authorities has been bleak … and in recent years parole boards have proven highly susceptible to political influences," where "a telephone call from the governor can materially change release practices." ALI, Model Penal Code: Sentencing, Discussion Draft No. 2, at 90 (Apr. 8, 2009); *see also* ALI, Model Penal Code: Sentencing, Discussion Draft No. 3, at 4 (Mar. 29, 2010) (ALI 2010) ("There are many instances in which the parole-release policy of a jurisdiction has changed overnight in response to a single high-profile crime.").

Massachusetts is a perfect example. In 2011, after a parolee killed a policeman, Governor Patrick faced "intense pressure from police chiefs, rank-and-file officers, and lawmakers to take action against the Parole Board;" he responded by demanding resignations from every board member who voted for release and appointing a new board. Jonathan Saltzman, *Patrick overhauls parole*, Boston Globe, Jan. 14, 2011, http://archive.boston.com/news/politics/articles/2011/01/14/five_out_as_governor_overhauls_parole_board. Thereafter, parole rates in Massachusetts plummeted—from 78% in 2009 to just 26% under the new board.[7] The average wait time for a decision af-

[7] Patricia Garin, et al., *White Paper: The Current State of Parole in Massachusetts*, 2-3 (Feb. 2013), http://www.cjpc.org/2013/White-Paper-Addendum-2.25.13.pdf (Garin); *id.* at 4-5 (18.5% of inmates serving a life sentence who had a parole hearing were granted parole in the 18 months after the new parole board was installed, and only two individuals were actually released).

ter a parole hearing increased from 30-60 days to 262 days.[8]

A similarly dramatic, politically-initiated swing happened when the newly elected governor appointed prosecutor Paul Treseler as board chair in September 2015, replacing the prior chair, who was a forensic psychologist.[9] Between January 2014 and September 2015, 45% of juveniles serving mandatory life sentences ("juvenile lifers") received positive parole decisions; not one juvenile lifer who has had a hearing since Treseler became chair has been granted parole[10]:

	Pre-Treseler Board[11]	**Treseler Board**[12]
Granted Parole	15 (45.5%)	0 (0%)
Denied Parole	18 (54.5%)	16 (100%)
Total	33	16

The capriciousness of the parole process is not unique to Massachusetts. "What in the middle dec-

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[8] *Id.* at 6.

[9] Massachusetts Parole Board, Parole Board Members, *available at* http://www.mass.gov/eopss/agencies/parole-board/board-members.html (last visited Oct. 24, 2016).

[10] 2014-2016 data agglomerated from the Massachusetts Parole Board's website, which posts all parole decisions regarding inmates serving life sentences at http://www.mass.gov/eopss/agencies/parole-board/lifer-records-of-decision.html. Data include "initial hearings" and "review hearings" but exclude "revocation review" hearings.

[11] Decisions issued in 2014 and 2015 regarding juvenile lifers who had parole hearings before Treseler was appointed board chair.

[12] Decisions issued regarding juvenile lifers who had parole hearings after Treseler became chair.

ades of the 20th century was a meaningful process in which parole boards seriously considered individual claims of rehabilitation has become in most cases a meaningless ritual in which the form is preserved but parole is rarely granted." Sharon Dolovich, *Creating the Permanent Prisoner*, *in* Life Without Parole: America's New Death Penalty? 96, 110-11 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012) (Dolovich). In Ohio, for example, the parole grant rate was 6.9% in 2011; in Florida, the grant rate was 3.5% in 2011-2012. Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 Ind. L.J. 373, 397 (2014).

In Maryland, lifers were regularly paroled in the 1990s, but not a single juvenile lifer has received a positive parole decision in the past *two decades*. Alison Knezevich, *Maryland Parole Commission to Hold Hearings for Hundreds of Juvenile Lifers*, Washington Post, Oct. 15, 2016, http://wapo.st/2e7uEoh. In California, "[t]he grant rate has fluctuated over the last 30 years—nearing zero percent at times and never rising above 20 percent." Robert Weisberg, et al., Stanford Criminal Justice Center, *Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California* 4 (Sept. 2011) (Weisberg), *available at* http://stanford.io/2dZtCuM. And factoring in the governor's frequently-exercised power to reverse the

parole board's grant of parole,[13] the probability of actually being released is just 6%. Weisberg 13-15.[14]

A child's right to a constitutionally proportionate sentence should not be subject to institutions that shift with the political winds. But that is exactly the nature of parole boards. Indeed, the ALI recently deemed parole boards "failed institutions" and observed that "no one has come forward with an example in contemporary practice, or from any historical era, of a parole-release agency that has performed its function reasonably well." ALI 2010, at 4. The possibility of future discretionary parole simply cannot serve as an Eighth Amendment backstop.

Second, a parole board's decisionmaking process bears little resemblance to that of a judge imposing a constitutionally sound sentence. "Few, perhaps no, judicial responsibilities are more difficult than sentencing. The task is usually undertaken by trial judges who seek with diligence and professionalism to take account of the human existence of the offender and the just demands of a wronged society." *Graham*, 560 U.S. at 77. But the Massachusetts Parole Board does not exercise nearly the same "diligence and professionalism" during parole hearings. *See* Garin 11-12 (discussing the negative and confrontational attitude of parole board members, including such statements as, "[Y]ou don't have a snowball's

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[13] Cal. Const. art. V § 8(b). Other governors have similar power. Md. Code Ann., Corr. Servs. § 7–301(d); 57 Okl. St. §§ 332, 332.16.

[14] These rates are particularly concerning given this Court's statement in *Montgomery* "that a lifetime in prison is a disproportionate sentence for all but the rarest of children." 136 S. Ct. at 726 (citation omitted).

chance in hell of getting a parole board to let you walk out that door"); *cf.* Beth Schwartzapfel, *How parole boards keep prisoners in the dark and behind bars*, Washington Post, July 11, 2015, https://www.washingtonpost.com/national/the-power-and-politics-of-parole-boards/2015/07/10/49c18 44e-1f71-11e5-84d5-eb37ee8eaa61_story.html (Schwartzapfel) (average parole board makes 35 decisions per day and some members spend "two to three minutes" per decision).

Furthermore, a sentence judge has sworn to ensure that a defendant's sentence passes constitutional muster, and she does so "by applying generally accepted criteria to analyze the harm caused or threatened to the victim or society, and the culpability of the offender." *Id.* at 96 (Roberts, C.J., concurring) (quotation marks omitted). A parole board does not consider culpability or other issues of proportionality. Rather, as the Massachusetts Parole Board articulates in each of its decisions, "Parole Board Members shall only grant a parole permit if they are of the opinion that there is a reasonable probability that, if such offender is released, the offender will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society." 120 Mass. Code Regs. 300.04; *see also* Cara Lombardo, *Juvenile offenders in legal limbo despite supreme court rulings*, Milwaukee Journal Sentinel, Oct. 10, 2016, http://projects.jsonline.com/news/2016/10/22/juveniles-sentenced-to-life-in-wisconsin-have-little-chance-for-release.html ("If I have to make a call as the parole chair, I am always going to defer to public safety before I take a chance on redemption." (Wisconsin Parole Commission chair)). Thus, the parole process cannot provide a back-end

substitute for individualized sentencing by a judge who may consider a child's diminished culpability to fashion a fair and proportionate sentence.

Third, an offender serving a life sentence has no right to early release and presumptively will be imprisoned for the rest of his life. *See Greenholtz v. Inmates of the Neb. Penal & Corr. Complex,* 442 U.S. 1, 7 (1979). The Massachusetts SJC recently recognized as much, noting that "there is no constitutionally protected expectation that a juvenile homicide offender will be released to the community after serving a statutorily prescribed portion of his sentence." *Deal v. Comm'r of Corr.*, 56 N.E.3d 800, 802 (Mass. 2016); *accord Diatchenko*, 27 N.E.3d at 357 (juvenile lifer has no "expectation of release through parole").

Moreover, a decision to deny parole is an entirely discretionary decision that is insulated from judicial review. Even where, as in Massachusetts, the parole board is instructed to consider particular factors before deciding whether to parole a juvenile lifer, "[a] judge may not reverse a decision by the board denying a juvenile homicide offender parole and require that parole be granted." *Diatchenko*, 27 N.E.3d at 366. Instead, a reviewing court's role "is limited to the question whether the board has carried out its responsibility to take into account the attributes or factors just described in making its decision." *Id.* at 365.

In other words, as long as the parole board has ticked off the correct boxes by listing the factors it is required to consider, its discretionary parole decision cannot be overturned. Unsurprisingly, *pro forma* decisions that lack any analysis of the relevant factors

as applied to the parole applicant, and that lack any guidance about what the applicant can do to earn release, are the rule since the current chair took office in September 2015. *E.g.*, *In the Matter of Louis Costa*, W-44737, at 4 (July 28, 2016), http://www.mass.gov/eopss/docs/pb/lifer-decisions/2016/costarod2016.pdf;[15] *In the Matter of Thomas Young*, W-35434 3-4 (March 1, 2016), http://www.mass.gov/eopss/docs/pb/lifer-decisions/2015/youngrod2016.pdf.

A parole board's discretionary and unchallengeable parole decision, through which an offender has "no expectation of release," cannot possibly serve the Eighth Amendment safeguard function that is necessary to ameliorate the risk of disproportionate sentencing identified in *Miller*. That is not what parole was designed to do, and juvenile offenders should not be expected to rely on parole boards for this purpose. Just as it would be unthinkable to suggest that a *prosecutor's* discretion to seek a particular sentence would be an adequate Eighth Amendment substitute for a judge's considered determination, parole simply

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[15] Costa, who was convicted for murdering two individuals at the behest of adult co-defendants in 1986, *Commonwealth v. Costa*, 33 N.E.3d 412, 415 (Mass. 2015), was considered the poster child parole candidate. Costa has not received a single disciplinary report since 1989, and while in prison he received his GED, graduated *cum laude* in history from Boston University's Metropolitan College, successfully completed virtually every program the DOC offers, and founded MCI-Norfolk's Restorative Justice Program, which builds bridges between homicide offenders and families of homicide victims. Mem. in Support of Parole 4-12, *In the Matter of Louis Costa* (Feb. 18, 2016). Yet the parole board denied Costa's petition without any individualized analysis of the relevant factors—just a boilerplate statement that he is not yet rehabilitated and that his release is incompatible with the welfare of society.

involves "too great a risk" that juvenile offenders will serve disproportionate sentences. *Miller*, 132 S. Ct. at 2469.

3. In *Montgomery v. Louisiana*, this Court addressed "whether *Miller* adopts a new substantive rule that applies retroactively." 136 S. Ct. at 727. The Court answered that question in the affirmative. *Id.* at 734. In dicta, however, the Court also speculated that "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them," because "[a]llowing those offenders to be considered for 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." *Id.* at 736.

But neither the question whether resentencing is required to remedy a *Miller* violation, nor the question whether parole is an adequate Eighth Amendment safeguard for the concerns that animated *Miller*'s holding, were before the Court in *Montgomery*. Instead, the only question that was briefed and argued by the parties was *Miller*'s retroactivity.[16]

Furthermore, applying *Miller*'s individualized-sentencing requirement only if parole is prohibited ignores the reasoning that animated *Miller*'s holding. The essence of the Court's decision was that a sentence that may be permissible for an adult may not be so for children "because of their lesser culpabil-

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[16] Both parties in *Montgomery* assumed that resentencing would be necessary to remedy a *Miller* violation. *See* Br. in Opp. at 6 (Aug. 24, 2015); Reply Br. at 11 (Sept. 23, 2015).

ity." 132 S. Ct. at 2463; *see also id.* at 2467 (prior cases "insisted … that a sentencer have the ability to consider the 'mitigating qualities of youth' ... in assessing [a child's] culpability"); *id.* at 2468 (discussing mitigating factors in favor of one petitioner and noting that "[a]ll these circumstances go to [petitioner's] culpability for the offense").

To be sure, this Court in *Miller* also discussed that a life sentence that forecloses parole eligibility, much like the death penalty, forbids a sentencer from taking into account "a child's capacity for change." *Id.* at 2465. But the Court used the similarity between the death penalty and life without parole as just "another way" to demonstrate how the "mandatory" application of "a State's most severe penalties" was unconstitutional with respect to children, *id.* at 2466, and as the last in a long line of reasons why such a sentence is unconstitutional, *id.* at 2468 ("And finally, this mandatory punishment disregards the possibility of rehabilitation ...."). Elevating the rehabilitation rationale to be dispositive is inconsistent with the Court's admonition in *Miller* against a "myopic" view of juvenile sentencing matters, as well is its repeated acknowledgment that "children are different" where severe penalties are on the line. Children do not become constitutionally identical to adults just because they may come before a parole board decades down the road.

4. This Court had no opportunity to consider the attributes of parole boards before it assumed in *Montgomery* that parole is an adequate Eighth Amendment safeguard for mandatory life-sentencing schemes. The Court's assumption may have been animated by its previously-expressed belief that

"[a]ssuming good behavior, [parole] is the normal expectation in the vast majority of cases." *Solem v. Helm*, 463 U.S. 277, 300 (1983); *see also id.* at 301 ("[I]t is possible to predict, at least to some extent, when parole might be granted."). As demonstrated above, however, while that belief may have been sound thirty years ago, it is not an accurate assumption today. *See* Schwartzapfel (inmates in the 1980s were typically released when they became parole eligible but by the end of the twentieth century, "life means life" was the rule rather than the exception). And given the realities of the parole system, a rule that relies upon the adequacy of parole to "ensure[] that juveniles ... will not be forced to serve a disproportionate sentence," *Montgomery*, 136 S. Ct. at 736, gives the executive branch, and not the judiciary, the final say on whether the sentence served is proportionate "to both the offender and the offense," *Miller*, 132 S. Ct. at 2463.

This Court should grant review to squarely consider whether parole can adequately address the concerns that animated *Miller*'s holding or whether, in light of the role and reality of parole, the mandatory imposition of life with parole eligibility "poses too great a risk of disproportionate punishment." *Miller*, 132 S. Ct. at 2469.

C. The Growing Trend In Favor Of Individualized Sentencing For Children Underscores The Unconstitutionality Of Bright's Sentence.

The growing trend (both here and abroad) toward individualized sentencing for chilren who face harsh

penalties highlights the risk posed by Massachusetts' mandatory-sentencing scheme.

1. In recent years, States have shed statutes with mandatory life sentences for children and replaced them with discretion for the sentencing judge. In New Mexico, a judge must be given discretion to sentence children convicted of first- and second-degree murder to a term-of-years sentence *or* a life sentence.[17] In Montana, Washington, and Iowa, mandatory minimums and mandatory life sentences no longer apply to children.[18] In South Dakota, no child may receive a life sentence.[19] The recent revisions to the Model Penal Code likewise embrace judicial discretion for juvenile sentences, providing that "[t]he court shall have authority to impose a sentence that deviates from any mandatory-minimum term of imprisonment under state law." Model Penal Code § 6.11A(f) (Approved Tentative Draft 2011).

Several other States that still permit mandatory life sentences for children at least permit a neutral judge, rather than an arm of the executive branch, to determine whether early release is appropriate.[20] And while numerous States have increased judicial discretion over juvenile sentences, no States are countering with an *increased* use of mandatory minimums for children.

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[17] N.M. Stat. Ann. § 31-18-13 (enacted 2011).

[18] Wash. Rev. Code Ann. § 9.94A.540 (enacted 2014); Mont. Code Ann. §46-18-222 (enacted 2013); *State v. Lyle*, 854 N.W.2d 378 (Ia. 2014).

[19] S.D.C.L. § 22-6-1.3 (enacted 2016).

[20] *E.g.*, Del. Code Ann. Tit. 11, § 4209 (enacted 2013); Fla. Stat. Ann. § 921.1402 (enacted 2014).

2. The laws and treaties of other nations similarly demonstrate a trend in favor of individualized sentencing for children. The UN Convention on the Rights of the Child ("CRC"), Nov. 20, 1989, 1577 U.N.T.S. 3, which the Court looked to in *Roper*, requires that the "imprisonment of a child ... shall be used only as a measure of last resort and for the shortest appropriate period of time." CRC Art. 37(b). It mandates that a "variety of dispositions ... be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence." CRC Art. 40(4). A mandatory life sentence, even with a possibility of parole, is incompatible with the CRC's standard.

The sentencing laws of most countries afford much greater protection to children than the mandatory life-sentencing regime under which Bright was sentenced. Many nations provide judges with discretion over juvenile offenders' sentences.[21] Many other countries limit the maximum sentence that can be imposed on children to a term much shorter than life imprisonment.[22] Indeed, as several comprehensive analyses of juvenile sentencing laws demonstrate, the lengthy and mandatory juvenile-sentencing regimes of States like Massachusetts are out of step with the rest of the world. *See* Human Rights Advo-

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[21] *E.g.*, Ley Orgánica Para La Protección Del Niño y Del Adolescente, 1998, arts. 2, 528, 532, 551, 620 (Venezuelan judges retain wide discretion in sentencing children); CRC/C/8/Add.44, 27 February 2002, par. 1372 (Israeli minimum-sentencing legislation inapplicable to juveniles).

[22] *E.g.*, Juvenile Act of Japan, Act No. 168 of 1948, art. 51 (15-year maximum); Youth Courts Law (Germany), Sec. 18 (10-year maximum).

cates, *Extreme Criminal Sentencing for Juveniles: Violations of International Standards* 5 (Feb. 2014) (of 164 countries surveyed, 127 sentence children to determinate, rather than life, sentences, and 92 have determinate sentences that are 25 years or less); Connie de la Vega, et al., Univ. of S.F. Sch. of Law, *Cruel and Unusual: U.S. Sentencing Practices in a Global Context* 47-59, Appendix (May 2012), *available at* http://www.cpcjalliance.org/wp-content/uploads/2013/04/Cruel-And-Unusual.pdf; Michele Deitch, et al., LBJ Sch. of Pub. Affairs, Univ. of Tex. at Austin, *From Time Out to Hard Time*: *Young Children in the Adult Criminal Justice System* 73-75, Appendix A (2009), *available at* http://lbj.utexas.edu/archive/news/images/file/From%20Time%20Out%20to%20Hard%20Time-revised%20final.pdf.

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This Court recognized in *Miller* that if youth is irrelevant to the imposition of a State's harshest penalties, "such a scheme poses too great a risk of disproportionate punishment." 132 S. Ct. at 2469. A life sentence, with or without parole eligibility, is one "of a State's most severe penalties," *id.* at 2466, and *Miller*'s reasoning applies fully to Mr. Bright's mandatory life sentence with parole eligibility after 15 years. This Court has never had the opportunity to consider the adequacy of parole in ameliorating the risk of disproportionate punishment identified in *Miller*. The Court should grant certiorari to squarely consider this important issue.

D. This Court Should Not Delay Review Of This Critical Issue.

The time to address this issue is *now*. *Miller* and *Montgomery* have created considerable confusion for state courts and legislatures. Courts have noted that restricting *Miller* solely to life without parole sentences is in tension with much of the reasoning in *Miller*. *E.g.*, *Okoro*, 26 N.E.3d 1094, 1097-98. Consequently, they have interpreted *Miller* and *Montgomery* in divergent ways. Some courts have held that *Miller* prohibits the mandatory imposition of only an actual sentence of life without parole,[23] while others have held that *Miller* also applies to the practical equivalent of such a sentence,[24] and still others have interpreted *Miller* and its progeny to more broadly prohibit the mandatory imposition of lifetime penalties or prison time on children.[25] Such State-by-State variation in interpreting the floor set by the Eighth Amendment makes an inherently harsh sentence all the more unjust: whether a child can be automatically sentenced to spend his life in prison (with only a future opportunity for discretionary parole by the executive branch) depends on the State in which he is sentenced.

Now is the appropriate time to resolve this issue. Indeed, the Massachusetts SJC has expressed its desire for additional guidance from this Court. *See*

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[23] *E.g.*, *State v. Brown*, 118 So. 3d 332 (La. 2013) (upholding mandatory 70-year sentence).

[24] *E.g.*, *Bear Cloud v. State*, 334 P.3d 132, 141–42 (Wyo. 2014).

[25] *See State v. Lyle*, 854 N.W.2d 378 (Ia. 2014) (mandatory minimum prison sentences); *In re C.P.*, 967 N.E.2d 729 (Ohio 2012) (mandatory lifetime sex-offender registration and notification that is open to review after 25 years).

Okoro, 26 N.E.2d at 1099-1100. States are in the process of revising their juvenile-sentencing schemes in light of the Eighth Amendment issues identified in *Miller* and *Montgomery*, and they are struggling to do so consistent with the Eighth Amendment. While some States have passed legislation making all mandatory minimums inapplicable to children,[26] some States (like Massachusetts) have simply severed parole ineligibility from mandatory life-sentencing schemes as applied to children.[27] Other States are still in the process of amending their sentencing laws.[28] It makes little sense for States to expend years of effort and considerable resources revising their sentencing laws to excise parole ineligibility, only to have to undertake the same efforts several years from now if this Court determines that the availability of discretionary parole is not an adequate Eighth Amendment backstop for the concerns animating *Miller*. Denying review of this case and delaying consideration of this important issue will have precisely that result.

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[26] *E.g.*, Mont. Code Ann. § 46-18-222 (enacted 2013); N.M. Stat. Ann. § 31-18-13 (enacted 2011).

[27] *E.g.*, Mass. Gen. L. ch. 119, § 72B (enacted 2014); Wyo. Stat. Ann. § 6-10-301 (enacted 2013); Haw. Rev. Stat. § 706-656 (enacted 2014).

[28] *See* Anne Teigen, National Conference of State Legislatures, *Miller v. Alabama And Juvenile Life Without Parole Laws* (last visited Oct. 26, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/miller-v-alabama-and-juvenile-life-without-parole-laws.aspx (identifying States that have not yet revised their unconstitutional juvenile-sentencing laws).

II. This Court Should Grant Certiorari To Determine Whether A Child Who Is Convicted As A Joint Venturer Can Be Sentenced To Life In Prison With The Possibility Of Parole.

The second question presented is independently worthy of certiorari. The rationale underlying *Miller* and its progeny has special application in the joint-venture context. This Court has recognized that the diminished culpability of non-principals sometimes precludes the application of mandatory-sentencing regimes to defendants who participated in but did not commit a murder. *Tison v. Arizona*, 481 U.S. 137, 149 (1987) (culpability of non-principals must be individually examined in a capital case even though "States generally have wide discretion" to punish aiders and abetters as principals); *see also Enmund v. Florida*, 458 U.S. 782 (1982). To be sure, *Tison* and *Enmund* involved convictions under felony-murder rules and questions of transferred intent, but even more robust distinctions are warranted when sentencing a child: "a sentencing rule permissible for adults may not be so for children." *Miller*, 132 S. Ct. at 2470. As this Court has repeatedly acknowledged, children are far more vulnerable than adults to the effects of peer and familial pressure. *Miller*, 132 S. Ct. at 2468; *Eddings,* 455 U.S. at 115 (describing youth as a "condition of life when a person may be most susceptible to influence and to psychological damage"); *Schall v. Martin*, 467 U.S. 253, 266 (1984) (acknowledging "the downward spiral of criminal activity into which peer pressure may lead the child").

Moreover, children often "lack the ability to extricate themselves from horrific, crime-producing set-

tings." *Miller*, 132 S. Ct. at 2464. Thus, while it may be entirely reasonable to impose the same sentences on adult principals and joint venturers because adults should be expected to walk away when a sketchy situation turns criminal, children do not have the same capacity for independence.[29] This does not, of course, mean that a juvenile joint venturer should be "absolved of responsibility for his actions." *Graham*, 560 U.S. at 68. But it does mean that "his transgression 'is not as morally reprehensible as that of an adult,'" *id.* (citation omitted), and it should mean that for children, a mandatory sentencing scheme that treats principals and joint venturers identically "poses too great a risk of disproportionate punishment," *Miller*, 132 S. Ct. at 2469.

This case is a perfect example. Bright was surrounded by hardened criminals—all adults who were involved in gang and drug activity, including hisown brother. The State did not allege that Bright killed the victim, and he was convicted on a joint venture theory that allowed the jury to convict him based merely on a finding that he "aided or assisted the commission of the murder" or was "willing and available to assist" if necessary. Pet. App. 47a-48a. Indeed, the jury was specifically instructed that the participation requirement could be met "by agreeing to stand by, at or near the scene to render aid, assistance, or encouragement if such became necessary, or by assisting the perpetrator of the crime in making an escape from the scene." *Id.* at 38a. Yet, at sentencing, the judge was precluded from considering the nature of Bright's participation in the crime

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[29] *See Miller*, 132 S. Ct. at 2468 (petitioner's age could have affected "his willingness to walk away").

and whether his level of participation, understood in light of his youth and its attendant factors, warranted a lesser sentence than life imprisonment.

A State's most severe penalties should not be imposed equally upon an adult who shoots a victim and a child who, under pressure from adults (including family members), is "willing and available to assist" if necessary. Yet that result is precisely what Massachusetts' sentencing scheme requires. This Court should, at the very least, grant certiorari to determine whether imposing a mandatory life sentence both on children who do not kill and on children (or adults) who do violates the Eighth Amendment.

III. This Case Is An Ideal Vehicle For This Court To Consider The Questions Presented.

This case presents an excellent opportunity for this Court to address whether *Miller*'s individualized-sentencing requirement for children facing life in prison can be substituted by the potential for discretionary early release by an arm of the executive branch—either in joint venture cases or in all cases. The Massachusetts Appeals Court's decision was a clear federal constitutional holding because the court was presented with and rejected Bright's contention that his sentence violates the Eighth Amendment as applied in *Miller*. *See* Pet. App. 2a-5a. And, because this case is an appeal from a state court decision and not from a federal court's denial of a habeas petition, the Court could confront this important constitutional issue directly, applying *de novo* review.

Furthermore, this petition presents precisely the type of case in which a judge would likely decline to

impose a life sentence if he had discretion to do so. Unlike some cases involving juveniles who personally committed truly heinous acts on another person, or who demonstrated a pattern of violent behavior, Bright was an ambitious child with no criminal record and a promising future. Bright regrettably became involved in a feud between adult drug dealers at the behest of his older brother, but he indisputably did not kill Davis. Had the court considered Bright's "past criminal history," "the extent of his participation in the conduct," "the way familial and peer pressures may have affected him," and the extent to which Bright may have "lack[ed] the ability to extricate [himself] from horrific crime-producing settings," it might well have imposed a lesser sentence. *Miller*, 132 S. Ct. at 2464, 2468. Indeed, the judge noted that while there was "a great deal to say about this case, the events that led up to it and the lives that have been affected by it," he would leave such things "unsaid," as the mandatory sentencing scheme left little role for him to play. Mass. Appeals Ct. App. 175-176. In short, this is exactly the type of case in which sentencing discretion would have made a difference.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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