NO. 17-1343

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IN THE

Supreme Court of the United States

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SHAWN LABARRON DAVIS,
Petitioner,

v.

STATE OF MISSISSIPPI,
Respondent.

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On Petition For Writ Of Certiorari To The Supreme Court Of Mississippi

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BRIEF OF AMICUS CURIAE JUVENILE LAW CENTER IN SUPPORT OF PETITIONER

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Juvenile Law Center advocates for rights, dignity, equity and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy and submission of amicus briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values. Juvenile Law Center has represented hundreds of young people and filed influential amicus briefs in state and federal cases across the country.

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[1] Pursuant to Rule 37.2 counsel of record received timely notice of the intent to file this brief. Written consent of all parties has been provided. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici,* their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Juvenile life without parole sentences disregard neuroscientific and developmental research, are imposed at a rate that exceeds the "rare" and "uncommon" calculus adopted by this Court in *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016), and are imposed in a manner that disproportionately impacts children of color.

The instant case is emblematic of one state's refusal to heed this Court's directives. Shawn Davis was sentenced to die in prison for a crime he committed when he was 16 years old. Far from comporting with the "exacting limits the Eighth Amendment imposes" on sentencing children to this harshest punishment, *Adams v. Alabama*, 136 S. Ct. 1796, 1799 (2016) (Sotomayor, J., concurring) (mem.), Mr. Davis was sentenced to serve the duration of his life in prison without any finding of his permanent incorrigibility. Additionally, against the backdrop of a criminal justice system that disproportionately punishes people of color, Davis is among the sixteen individuals in Mississippi serving a life without parole sentence, more than 60 percent of whom are Black.[2]

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[2] As compared, the latest Census data reports less than 38% of the Mississippi population is Black. *See QuickFacts Mississippi*, United States Census Bureau, https://www.census.gov/quickfacts/MS.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO ENFORCE ITS PRECEDENT AND DECLARE A CATEGORICAL BAR ON ALL LIFE WITHOUT PAROLE SENTENCES FOR JUVENILES

This Court explained in *Miller* that "[b]ecause juveniles have diminished culpability and greater prospects for reform . . . 'they are [categorically] less deserving of the most severe punishments.'" *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (quoting *Graham v. Florida*, 560 U.S. 48, 68 (2010)). In support, the Court cited three significant differences that distinguish youth from adults for culpability purposes:

> First, children have a "lack of maturity and an underdeveloped sense of responsibility," leading to recklessness, impulsivity, and heedless risk-taking. Second, children "are more vulnerable . . . to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]."

Miller, 567 U.S. at 471 (alterations in original) (citations omitted) (quoting *Roper v. Simmons*, 543 U.S. 551, 569-570 (2005)). These scientific findings led this Court to hold that sentencing a child to life without parole is excessive for all but "the rare juvenile offender whose crime reflects irreparable corruption," *id.* at 479-80 (quoting *Roper*, 543 U.S. at 573), "render[ing] life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)).

Although *Miller* and *Montgomery* reserved life without parole sentences for permanently incorrigible youth, *Montgomery*, 136 S. Ct. at 734, such a classification is an oxymoron for children. Neither at the time of sentencing, nor where there is evidence of post-offense rehabilitation, can a court or factfinder make an accurate determination that a young person is so incapable of rehabilitation that he should be condemned to die in prison. "[J]ustify[ing] life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentence to make a judgment that the juvenile is incorrigible," and such judgment would be "questionable" due to the characteristics of youth and the capacity for juveniles to change. *Graham*, 560 U.S. at 72-73.

Moreover, classifying a juvenile as permanently incorrigible contradicts the prevailing scientific research on adolescence. "[J]uvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 68 (quoting *Roper*, 543 U.S. at 569-

70). *Graham* and *Miller* both recognized that although youth does not absolve juveniles of responsibility for their actions, it does lessen their culpability. *Id.* ("A juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.'") (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion)). The "[scientific] findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" *Miller*, 567 U.S. at 472 (quoting *Graham*, 560 U.S. at 68-69); *Roper*, 543 U.S. at 570. Punishments that fail to recognize these findings are constitutionally infirm.

A. Research In Adolescent Development And Neuroscience Undermines The Penological Justifications For Sentencing Juveniles To Life Without Parole

This Court has repeatedly found that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Miller*, 567 U.S. at 471-72; *see generally* Laurence Steinberg, *The Influence of Neuroscience on US Supreme Court Decisions about Adolescents' Criminal Culpability*, 14 NATURE NEUROSCIENCE 513 (2013); Richard J. Bonnie & Elizabeth S. Scott, *The Teenage Brain: Adolescent Brain Research and the Law,* 22 CURRENT DIRECTIONS IN PSYCHOL. SCI. 158 (2013). These "distinctive attributes of youth diminish the penological

justifications for imposing the harshest sentences on juvenile offenders, *even when they commit terrible crimes*," *Miller,* 567 U.S. at 472 (emphasis added). *See also Montgomery,* 136 S. Ct. at 734 ("*Miller* . . . did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'")

1. Retribution cannot justify sentencing juveniles to life without parole

At "[t]he heart of the retribution rationale is [the idea] that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Graham*, 560 U.S. at 71 (first alteration in original) (quoting *Tison v. Arizona*, 560 U.S. 137, 149 (1987)). "Retribution is not proportional if the law's most severe penalty is imposed on [an individual] whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571. ("Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult.") *See also Montgomery*, 136 S. Ct. at 733; *Miller*, 567 U.S. at 472; *Graham,* 560 U.S. at 71.

2. Life without parole sentences are an ineffective deterrent for children

As this Court has noted multiple times, "'the same characteristics that render juveniles less

culpable than adults'—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment," and as such, less susceptible to deterrence. *Miller*, 567 U.S. at 472. *See also Roper*, 543 U.S. at 571 ("Even the normal 16-year-old customarily lacks the maturity of an adult."); *Graham*, 560 U.S. at 72 ("Because juveniles' 'lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions,' they are less likely to take a possible punishment into consideration when making decisions.") (citation omitted).

We now know that developmental differences impact adolescents' capacities to foresee and appreciate the consequences of their actions, as well as their ability to make reasoned, independent decisions about the best course of action. Although general cognitive skills improve by mid-adolescence, the development of other important cognitive functions lag, as different parts of the brain mature at different rates. Areas involved in more basic functions, such as those involved in sensory information processing and in movement control, develop first, Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA 8174, 8174 (2004), and the parts of the brain responsible for impulse control and foresight are among the last to mature. Sarah-Jayne Blakemore & Suparna Choudhury, *Development of the Adolescent Brain: Implications for Executive Function and Cognition*, 47 J. CHILD PSYCHOL. & PSYCHIATRY 296, 301 (2006). Adolescents have difficulty thinking realistically about future events and are both less

likely to think about potential long-term consequences, and more likely to assign less weight to those that they *have* identified. *See* Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime,* 18 THE FUTURE OF CHILDREN 15, 20 (2008).

Moreover, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Roper*, 543 U.S. at 569 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)). Adolescent decision making is particularly susceptible to influence from emotional and social factors, Sarah-Jayne Blakemore & Trevor W. Robbins, *Decision-Making in the Adolescent Brain*, 15 NATURE NEUROSCIENCE 1184, 1184 (2012), which can result in adolescents having even greater difficulty with decision-making when peers are present than when they are not. Moreover, as teens seek peer approval, especially in group situations, fear of rejection and the desire to gain approval can heavily influence the choices they make. *See* Scott & Steinberg, *supra*, at 21.

Although "[n]o evidence was presented that Davis 'succumbed to any peer pressure in committing the crime,'" *Davis v. State*, 234 So. 3d 440, 442 (Miss. Ct. App. 2017), *reh'g denied* (Oct. 10, 2017), *cert. denied,* 233 So. 3d 821 (Miss. 2018), Mr. Davis' susceptibility to peer influence was readily apparent. Extensive evidence was presented regarding Mr. Davis' poor self-image, the ridicule that he endured at the hands of his peers, (Trial Tr. 71), and that Mr. Davis would do what other kids told him to do in the hope of making friends. (Trial Tr. 95.) A psychological report found that Mr. Davis was highly susceptible to "negative peer influence," had suicidal ideations,

(Trial Exhibit S-1.10 at 2), and that he feared alienating people that he depended on. (*Id*. at 3.) Mr. Davis' desperation to maintain his relationship with Ms. Scarborough and obtain her approval undoubtedly contributed to his poor decision-making.

3. Incapacitation cannot override all other considerations

Even when juveniles commit terrible crimes, the desire for "[*i*]*ncapacitation cannot override all other considerations*, lest the Eighth Amendment's rule against disproportionate sentences be a nullity." *Graham*, 560 U.S. at 73 (emphasis added). This Court has cautioned against imposing sentences that reflect a premature decision about a juveniles' incorrigibility "because ordinary adolescent development diminishes the likelihood that a juvenile offender 'forever will be a danger to society.'" *Montgomery*, 136 S. Ct. at 733 (quoting *Miller*, 567 U.S. at 472-73). Simply because an individual must be separated from society for a period of time does not mean that they will be a risk to society for the rest of their lives. *Graham*, 560 U.S. at 73. As this Court noted,

> [t]o justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable. "It is difficult even for expert psychologists to differentiate between the juvenile offender whose

> crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." As one court concluded in a challenge to a life without parole sentence for a 14-year-old, "incorrigibility is inconsistent with youth."

Id. at 72-73 (citations omitted). Thus, even if misbehavior in prison or a demonstrated failure to mature corroborated an earlier judgment about a juvenile's incorrigibility, the sentence would still be inappropriate because the judgment was made at the outset. As the American Psychological Association stressed:

> [T]here is no reliable way to determine that a juvenile's offenses are the result of an irredeemably corrupt character; and there is thus no reliable way to conclude that a juvenile—even one convicted of an extremely serious offense—should be sentenced to life in prison, without any opportunity to demonstrate change or reform.

Brief for the American Psychological Association et al. as *Amici Curiae* in Support of Petitioners at 25, *Miller v. Alabama*, 567 U.S. 460 (2012), (Nos. 10-9646 & 10-9647). Studies have shown that youthful criminal behavior can be distinguished from permanent personality traits, and that "it is hard to determine who will continue or escalate their antisocial acts and who will desist," as "the original offense . . . has little

relation to the path the youth follows over the next seven years." *See Research on Pathways to Desistance: December 2012 Update*, Models for Change, p. 3-4, *available at* http://www.modelsforchange.net/publications/357 (finding that, of the more than 1,300 serious offenders studied for a period of seven years, only approximately 10% report continued high levels of antisocial acts). As research increasingly shows that most juvenile offenders will not persist as public safety risks, the goal of incapacitation cannot override all other considerations. *See* Graham, 560 U.S. at 73.

4. In light of youths' distinctive capacity for change, life without parole sentences are incompatible with the penological goal of rehabilitation

A constitutional sentence must provide some opportunity for the offender to show growth and rehabilitation with time and maturity, despite the severity of their youthful misconduct. Life without parole sentences cannot provide this opportunity because they "forswear[ ] altogether the rehabilitative ideal." *Graham*, 560 U.S. at 74. As this Court has stated, denying a juvenile offender the right to reenter the community is to make an "irrevocable judgment about that person's value and place in society." *Id.* Such a judgment is incompatible with this Court's recognition that "[f]or most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood."

Roper, 543 U.S. at 570 (second alteration in original) (quoting Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Development Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)).

Research that has emerged post-*Miller* has further confirmed these observations. As referenced above, a study of over thirteen hundred juvenile offenders found that "even among those individuals who were high-frequency offenders at the beginning of the study, the majority had stopped these behaviors by the time they were 25." Laurence Steinberg, *Give Adolescents the Time and Skills to Mature, and Most Offenders Will Stop*, p. 3, MacArthur Foundation (2014), *available at* http://www.pathwaysstudy.pitt.edu/documents/MacArthur%20Brief%20Give%20Adolescents%20Time.pdf (referencing *Research on Pathways to Desistance: December 2012 Update*). As this Court recognized in *Montgomery*, if extending parole eligibility will allow the "opportunity for release . . . [to] be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit *even heinous crimes* are capable of change," and those who show an inability to reform will continue to serve life sentences, extending parole eligibility to juvenile offenders can do no harm. 136 S. Ct. at 736 (emphasis added).

B. Juvenile Life Without Parole Sentences Are Constitutionally Disproportionate

Children are "constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471; *see also Roper*, 543 U.S. at 569-570; *Graham*, 560 U.S. at 68-69. In *Graham*, this Court's holding that juveniles convicted of non-homicide crimes could not be sentenced to life without parole rested on the incongruity of imposing a final and irrevocable penalty that afforded no opportunity for release on an adolescent who had capacity to change and grow. *See* 560 U.S. at 68. This Court recognized that:

> Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. *Roper*, 543 U.S. at 570. It remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."

Id. (quoting *Roper*, 543 U.S. at 570). In *Miller*, this Court warned about the "great . . . risk of disproportionate punishment" posed by sentencing schemes that made "youth (and all that accompanies it) irrelevant to the imposition of that harshest prison sentence [of life without parole]." 567 U.S. at 479. The Court explicitly stated that "*Graham* and *Roper* and our individualized sentencing cases alike teach that in

imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult." *Id.* at 477. Thus, while the Court did not categorically bar the practice of sentencing juveniles to life without parole, it mandated that "a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* at 483.

This "process," as later explained by the Court, did not refer literally to the procedures necessary to determine the culpability of those convicted for offenses they committed as juveniles, but to how sentencing courts were expected to think about youth as a class following *Roper* and its progeny. *See Montgomery*, 136 S. Ct. at 733. In holding that *Miller* articulated a new substantive rule of constitutional law that must be applied retroactively, this Court explained that

> The "foundation stone" for *Miller*'s analysis was this Court's line of precedent holding certain punishments disproportionate when applied to juveniles. Those cases include *Graham v. Florida,* which held that the Eighth Amendment bars life without parole for juvenile nonhomicide offenders, and *Roper v. Simmons,* which held that the Eighth Amendment prohibits capital punishment for those under the age of 18 at the time of their crimes. Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and goes far beyond the manner of determining a defendant's

> sentence. See *Graham, supra,* at 59 ("The concept of proportionality is central to the Eighth Amendment.").

136 S. Ct. at 732-33 (citations omitted). It was left to sentencing courts to think differently about youth as a class of defendants that must be protected against disproportionate punishment and to "take into account 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" *Id.* at 733-34. As explicitly noted, protection against disproportionate punishment goes far beyond the manner of determining a defendant's sentence (i.e. whether it is mandatory or discretionary): it is the core of the Eighth Amendment's substantive guarantee. *Id.* at 732-33.

In Mississippi, this Eighth Amendment analysis has looked very different. In contravention of this Court's mandates, the Court of Appeals of Mississippi has stated that "proportionality in sentencing is desirable," but not required. *Cook v. State*, No. 2016-CA-00687-COA, 2017 WL 3424877, at *8 (Miss. Ct. App. Aug. 8, 2017), *reh'g denied* (Nov. 28, 2017), *cert. denied,* 237 So. 3d 1269, (Miss. Mar. 22, 2018) (reasoning that the proportionality of a sentence rests on how an individual is sentenced as compared to his codefendants and not based on the individual's level of culpability). Similarly, the sentencing court conducted its own analysis of proportionality, looking merely at the facts and circumstances of the crime and not the other considerations this Court set forth in *Miller*. The sentencing court did not explicitly find that Mr. Davis was one of "those rare children whose crimes reflect irreparable corruption," 136 S. Ct. at

734, for whom a life without parole sentence may be appropriate; rather, the court stated that Davis' 'depravity' reflected that "an entire generation of our youth was possibly being raised without any vestige of human kindness whatsoever." (App. to Pet. Cert. 13a.)

This flagrant disregard for this Court's analysis is reflected in the Court of Appeals of Mississippi's recent decision, which reasoned that the term "irreparable corruption" "sounds more like a theological concept than a rule of law to be applied by an earthly judge," *Cook*, 2017 WL 3424877, at *6, but stated that finding any murder to be a reflection of "transient immaturity" would be to "effectively absolve the offender of culpability." *Id.* ("Apparently, there are only two possibilities: either the murder reflects only youthful immaturity, or else the offender is irreparably corrupt. We note that there probably are few murders that 'reflect[ ] *only* transient immaturity' and nothing else, a description that seems to effectively absolve the offender of culpability.") Furthermore, the sentencing court failed to consider Mr. Davis' age at the time of the crime, let alone engage in a meaningful analysis of his "chronological age and its hallmark features" as contemplated by this Court. (App. to Pet. Cert. 11a-16a.) The sentencing court did, however, give great weight to the facts of the crime and the effect on the victim's family. (App. to Pet. Cert. 11a-16a.)

Mr. Davis' sentencing demonstrates the realization of the precise risk that this Court envisioned—and aimed to guard against—in its prior sentencing cases: that a sentencing court could be so overwhelmed by the facts of a crime that it would allow the penological goal of incapacitation to

outweigh all other considerations, including the mitigating characteristics that are inherent to youth. *See Roper*, 543 U.S. at 573 (cautioning that "[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death").

Recent remands from this Court have underscored this view, clarifying that even the "gruesomeness of a crime is not sufficient" to conclude a defendant is the rare child offender who can constitutionally receive the harshest punishment. *Adams v. Alabama*, 136 S. Ct. 1796, 1800 (2016) (Sotomayor, J., concurring) (mem.). Youth alone shall be the "dispositive consideration" for the vast majority of youth sentencings—requiring a finding that the conduct was a reflection of "transient immaturity" or "irreparable corruption" prior to the imposition of a life without parole sentence. *Id.*; *see also Tatum v. Arizona*, 137 S. Ct. 11 (2016) (Sotomayor, J., concurring) (mem.).

C. Juvenile Life Without Parole Sentences Are Imposed In Racially Discriminatory Ways

At every stage of the criminal justice system, from interrogation through arrests, prosecutions and plea negotiations, trials, and sentencing, people of color—particularly Black males—are treated more harshly than their White counterparts. *See, e.g.*, Marc Mauer, *Addressing Racial Disparities in*

Incarceration, 91 PRISON JOURNAL 87S, 91S-95S (2011). This is true for Black boys in the juvenile justice system as well: as early as 1979, scholars found "consistent evidence of a racial differential operating at each decision level." Allen E. Liska & Mark Tausig, *Theoretical Interpretations of Social Class and Racial Differentials in Legal Decision-Making for Juveniles*, 20 THE SOC. Q. 197, 205 (1979). This disparate treatment resulted in the transformation of a "more or less heterogeneous racial arrest population into a homogeneous institutionalized [B]lack population." *Id.* These cumulative racial differences were confirmed in later studies. *See* CARL E. POPE ET AL., U.S. DEP'T OF JUST. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE JUSTICE BULLETIN, DISPROPORTIONATE MINORITY CONFINEMENT: A REVIEW OF THE LITERATURE FROM 1989 THROUGH 2001 2 (2002) (finding that approximately two-thirds of the 46 research articles reviewed indicated that a youth's race could cause differential outcomes at any stage of juvenile processing, and that in some instances, results were cumulative); *See also* JOSHUA ROVNER, THE SENTENCING PROJECT, RACIAL DISPARITIES IN YOUTH COMMITMENTS AND ARRESTS 8 (2016), *available at* https://www.sentencingproject.org/wp-content/uploads/2016/04/Racial-Disparities-in-Youth-Commitments-and-Arrests.pdf. ("Black youth are more likely to be arrested, and are then treated with disproportionate harshness as they go deeper into the juvenile justice system."). In 2012, the U.S. Department of Justice's Office of Juvenile Justice and Delinquency Prevention (OJJDP) reported that "disproportionate juvenile minority representation is not limited only to secure detention and confinement;

it is evident at nearly all contact points on the juvenile justice system continuum." *See* MELODEE HANES., U.S. DEP'T OF JUST. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, IN FOCUS: DISPROPORTIONATE MINORITY CONTACT 1 (NOV. 2012).

Though youth commitment rates have fallen nationally, racial disparities have not improved: as of 2013, Black youth were 2.3 times more likely to be arrested than White youth, regardless of the crime. ROVNER, RACIAL DISPARITIES, *supra,* at 7. Among youth who are arrested, Black children are more likely to be referred to a juvenile court and processed rather than having their cases diverted. JOSHUA ROVNER, THE SENTENCING PROJECT, DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM 2 (2014), *available at* https://sentencingproject.org/wp-content/uploads/2015/11/Disproportionate-Minority-Contact-in-the-Juvenile-Justice-System.pdf.
Nationwide, Black youth are more than five times as likely to be committed to secure placements as White youth. THE SENTENCING PROJECT, BLACK DISPARITIES IN YOUTH INCARCERATION 1 (Sep. 2017), *available at* https://www.sentencingproject.org/publications/black-disparities-youth-incarceration/.

In Mississippi, Black youth are more than four times as likely to be placed than White youth; in six states, Black youth are at least 10 times as likely to be placed as White youth. *Id.* (Per every 100,000 youth in the general population, Mississippi detained 131 Black youth as compared to 32 White youth. The worst racial disparities were found in New Jersey, where Black youth were **thirty** times as likely to be placed than White youth: per every 100,000 youth in the general population, New Jersey detained 337 Black youth versus 11 White youth). Overall, the

racial disparity between Black and White youth in custody has increased 22% since 2001. BLACK DISPARITIES IN YOUTH INCARCERATION, *supra*, at 2.

The cause of these disparities has been attributed to policies and practices, implicit biases, and the structural disadvantage of communities of color.

> When looking at juvenile crime, it is not necessarily the case that youth of color have a greater tendency to engage in delinquency, but that the uneven playing field from the start, a part of larger American society, creates inequalities which are related to who goes on to commit crime and who is equipped to desist from crime. . . . as a result of structural differences by race and class, youth of color are more likely to experience unstable family systems, exposure to family and/or community violence, elevated rates of unemployment, and more school dropout. All of these factors are more likely to exist in communities of color and play a role in one's proclivity toward crime.

ASHLEY NELLIS, THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 11 (2016), *available at* https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/. These same factors have led to a disproprtionate number of Black youth serving life

without parole sentences for crimes they committed as children.

1. Mandatory sentences, including life without parole sentences, disproportionately punish Black boys

Following an increase in juvenile violent crime in the late 1980s and early 1990s, state legislatures enacted laws imposing adult prosecution and more severe penalties for young people, thereby exposing them to harsher criminal consequences, including lengthier periods of incarceration. ASHLEY NELLIS, THE SENTENCING PROJECT, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 5-6 (2012), *available at* https://www.sentencingproject.org/publications/the-lives-of-juvenile-lifers-findings-from-a-national-survey/. Despite steady declines in juvenile violent crime since 1993, these laws require children to remain subject to adult prosecution and sentencing schemes. *Id.* at 6. To this day, Black children are more likely to be prosecuted as adults and incarcerated with adults. Black youth comprise 35% of youth judicially waived to adult criminal courts and 58% of youth sent to adult prisons. ASHLEY NELLIS & RYAN S. KING, THE SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 19 (2009), *available at* https://www.sentencingproject.org/publications/no-exit-the-expanding-use-of-life-sentences-in-america/; NATIONAL COUNCIL ON CRIME AND DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 16,34 (2007), *available at*

http://www.nccdglobal.org/sites/default/files/publication_pdf/justice-for-some.pdf.

Greater numbers of Black youth tried in the adult criminal justice system results in the systematic, long-term incarceration of thousands of Black children. In 2009 nearly *half* of all individuals serving life sentences for crimes committed when they were youth were Black; *over* half of all individuals serving life without parole sentences for crimes committed when they were youth were Black. NELLIS & KING, NO EXIT, *supra*, at 19-23 (noting that 47.3% of all individuals serving life sentences for crimes committed when they were juveniles, 3,219 people, are Black; 56.1% of all individuals serving life without parole sentences for crimes committed when they were juveniles, 984 people, are Black). In 18 states, over 60% of all individuals serving life without parole sentences for crimes committed as juveniles are Black. *Id.* at 22. (Alabama, Arkansas, Connecticut, Delaware, Florida, Illinois, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, North Carolina, Pennsylvania, Rhode Island, South Carolina, Texas, and Virginia). In 12 of these states, the sentence of life without parole was mandatory upon conviction for the specific offense. NELLIS, THE LIVES OF JUVENILE LIFERS, *supra*, at 28.

Importantly, the 2009 study was conducted one year prior to this Court's ruling in *Graham v. Florida*, and three years prior to its ruling in *Miller v. Alabama*. This Court no longer condones the mandatory imposition of life without parole sentences. Yet as disproportionate numbers of Black men are still serving life without parole sentences for crimes they committed as children, they are the individuals

who have been most aggrieved by the mandatory sentencing schemes.

2. *Even discretionary life without parole sentences can result in racial disparities*

Although many have posited that the systemic racial disparities in the criminal justice system stem from the imposition of mandatory sentencing schemes, Written Submission of the American Civil Liberties Union on Racial Disparities in Sentencing, Hearing on Reports of Racism in the Justice System of the United States, Inter-American Commission on Human Rights, 153rd Session, Oct. 27, 2014, even when prosecutors and judges have discretion to bring charges and impose punishments, the resulting sentences still demonstrate racial disparities. According to one scholar, "implicit racial bias is now the most pervasive problem affecting the criminal justice system." Mark W. Bennett, *The Implicit Racial Bias in Sentencing: The Next Frontier*, 126 YALE L. J. F. 391, 392 (2017).

Implicit biases, which impact a person's decision making and behavior regardless of "that person's awareness of possessing these attitudes or stereotypes" are distinct from explicit biases, which are attitudes and stereotypes that are "consciously accessible through introspection and endorsed as appropriate." Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1129 (2012). Social psychologists developed a set of Implicit Association Tests (IAT) to understand attitudes that cannot be measured through explicit self-reporting methods due to a lack of self-awareness or social-desirability bias, which is the tendency to answer questions in a

manner that will be viewed favorably by others. *See id.* at 1132 ("If no social norm against these biases exists within a given context, a person will freely broadcast them to others. But if such a norm exists, then explicit biases can be concealed to manage the impressions that others have of us.") Using IAT, social psychologists from hundreds of laboratories have shown that implicit bias is widely held as compared to explicit bias, and is disassociated from explicit bias, meaning that it is not consciously accessible through introspection. *Id.* at 1130.

Prosecutors, judges, and juries are not immune from bias. Kang, *supra*, at 1139-48. In the criminal justice system, implicit bias impacts the charges filed against an individual, whether the child will be tried as an adult, the likelihood that he will be detained prior to his trial, plea offers, the ruling on his guilt or innocence, and the length of his sentence. These decision points rest on a range of assumptions about the child, his family, and his criminality. For example, in one study, the average age overestimation for Black boys suspected of committing felonies was calculated at four-and-a-half years. Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 531 (2014) at https://www.apa.org/pubs/journals/releases/psp-a0035663.pdf. Viewing Black boys as older than their White peers leads to assumptions about their criminality and to harsher treatment. *Id.* at 539 ("Black children are less likely to be afforded the full essence of childhood and its definitional protections. As a result, Black boys were more likely to be seen as older and more responsible for their actions relative to White boys.").

Individual implicit biases underlie the structural forces that led to these conclusions about Black children's culpability. In one study, White judges showed strong implicit attitudes favoring White defendants and disfavoring Black defendants. *See* Kang, *supra*, at 1146 (citing Jeffrey J. Rachlinski et al., Does Unconscious Racial Bias Affect Trial Judges?, 84 NOTRE DAME L. REV. 1195, 1210 (2009)). In the context of youth sentenced to life without parole, the disparities clearly demonstrate bias in sentencing. Black youth are sentenced to life without parole at a per capita rate that is ten times that of White youth. *See* HUMAN RIGHTS WATCH, SUBMISSION TO THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION DURING ITS CONSIDERATION OF THE FOURTH, FIFTH, AND SIXTH PERIODIC REPORTS OF THE UNITED STATES OF AMERICA (2008) 21, *available at* https://www.hrw.org/report/2008/02/06/submission-committee-elimination-racial-discrimination/during-its-consideration.

In the instant case, the sentencing court relied on its own biases to determine that Mr. Davis was in the class of individuals for whom a sentence of life without parole was appropriate. The court used racialized language, finding that Mr. Davis was exposed to "the unseemly life of public housing," (App. to Pet. Cert. 11a), and referred to Mr. Davis as a "wild animal." (App. to Pet. Cert. 15a.) (stating that the victim looked "as if he had been attacked by a wild animal and perhaps he had been").

In discretionary sentencing schemes, a wide range of considerations are factored into the sentence. For example, recent research shows that the races of victims and offenders may be a factor in determining which juvenile offenders are sentenced to life without

parole, as Black youth whose victims were White are far more likely to be sentenced to life without parole than White youth whose victims were Black. NELLIS, THE LIVES OF JUVENILE LIFERS, *supra*, at 15. The percentage of Black juvenile offenders serving life without parole for the homicide of a White victim (43.4 percent) is nearly twice the rate at which Black juveniles are arrested for suspected homicide of a White person (23.2 percent). *Id.* In contrast, White juvenile offenders with Black victims are only about half as likely (3.6 percent) to be sentenced to LWOP for the homicide crime as their proportion of arrests for suspected homicide of a Black victim (6.4 percent). *Id.*

Mississippi's juvenile life without parole sentencing trends further demonstrate how discretionary life without parole sentences can be imposed in a biased and racially discriminatory manner. Of the ten people in Mississippi initially sentenced to life without parole before *Miller* was decided, five were Black and five were White: all ten were re-sentenced to life without parole. OFFICE OF THE STATE PUBLIC DEFENDER, JUVENILE LIFE WITHOUT PAROLE: THE EFFECT OF *MILLER V. ALABAMA* ON THE DELIVERY OF INDIGENT DEFENSE SERVICES IN MISSISSIPPI (2018). Since this Court's decision in *Miller*, Mississippi has sentenced six people to life without parole. *Id.* Of those six, five are Black and only one of them is White. *Id.*

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that this Court grant the petition for a *writ of certiorari* and categorically bar all juvenile life without parole sentences because they are disproportionate, developmentally inappropriate, and racially discriminatory.

Respectfully Submitted,

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