No. 20-

In The
SUPREME COURT OF THE UNITED STATES
October Term 2020

Ihab Masalmani,
***Petitioner*,**

v.

State of Michigan,
***Respondent*.**

On Petition for Writ of Certiorari to the Supreme Court of the State of Michigan

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the government must bear the burden of proof at a *Miller* hearing that a juvenile is irreparably corrupt, consistent with juveniles' rights to due process and to be free from cruel and unusual punishment?

II. Whether there is a presumption against life without parole sentences for juveniles?

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PETITION FOR A WRIT OF CERTORARI

Petitioner Ihab Masalmani respectfully petitions this Court for a writ of certiorari to review the judgment of the Michigan Supreme Court in this case.

OPINIONS AND ORDERS BELOW

The Michigan Supreme Court's Order denying Petitioner's application for leave to appeal, dated May 29, 2020, is published at 943 N.W.2d 359 (Mich. 2020) (Pet. App. A, 1a-7a). The Order denying reconsideration, dated July 15, 2020, is published at 944 N.W.2d 92 (Mich. 2020) (Pet. App. B, 8a).

The March 19, 2013, opinion of the Court of Appeals of Michigan, affirming Petitioner's convictions and reversing his mandatory sentence of life without parole is unpublished. (Pet. App. C, 9a-15a). Following remand for resentencing, on his life without parole (LWOP) sentence, on January 6, 2015, the trial court again sentenced Mr. Masalmani to LWOP. (Pet. App. D, 16a-24a). On appeal, the Court of Appeals of Michigan affirmed the sentence of LWOP, in an unpublished opinion, on September 22, 2016. (Pet. App. E, 25a-32a). The April 5, 2019, Order of the Michigan Supreme Court, granting leave to appeal, is published at 924 N.W.2d 585 (Mich. 2019) (Pet. App. F, 33a).

JURISDICTION

This Court has jurisdiction over any timely-filed petition for certiorari in this case pursuant to 28 U.S.C. §1257. Pursuant to this Court's March 19, 2020 Order this Petition is timely filed on or before December 11, 2020.

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment of the U.S. Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Under the Fourteenth Amendment to the U.S. Constitution, "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

This case meets the Court's criteria for granting review. The questions presented have produced a marked split among state supreme courts. These are continuing issues of national importance. First, without a burden on the government to demonstrate that a juvenile is the rare, irreparably corrupt or incorrigible[1] individual who should be sentenced to life without parole, individuals who do not meet those criteria will continue to suffer that fate. Second, this Court's repeated insistence that life without parole for juvenile homicide offenders must be "rare" is tantamount to a presumption against a life without parole sentence and in favor of a term of years sentence. This case provides an excellent vehicle for consideration of these two related issues. Petitioner preserved the issues below and briefed the issues in the Michigan Supreme Court, which then did not reach the issues despite the well-

[1] The terms "permanent incorrigibility," "irreparable corruption," and "irretrievable depravity" are used synonymously in this Court's jurisprudence. *See, e.g., Montgomery v. Louisiana,* 136 S. Ct. 718, 726, 733-35 (2016); *Miller v. Alabama,* 567 U.S. 460, 471, 479-80 (2012); *Graham v. Florida,* 560 U.S. 48, 68, 76-77 (2010); *Roper v. Simmons,* 543 U.S. 551, 570, 573 (2005).

reasoned dissent by the Chief Justice of that Court, joined by two other Justices, resulting in a 4-3 split.

Additionally, these issues go hand-in-glove with the issue currently before this Court in *Jones v. Mississippi,* 2018 WL 10700848 (2018), *cert. granted,* No. 18-1259. Because this Court's resolution of *Jones* may clarify the constitutional parameters of juvenile LWOP sentences, the Court may wish to hold this petition pending disposition of *Jones.*

STATEMENT OF THE CASE

Ihab Masalmani came to the United States from Lebanon as a small child and without his parents. He and his sister stayed with relatives, including an aunt where there were allegations of physical and sexual abuse, and neglect. Mr. Masalmani was placed in foster care, where he had a language barrier, lived with foster mothers who smoked marijuana and who had inappropriate sexual relations in front of him, as well as a host of other negative and traumatic experiences. (Pet. App. D, 19a-20a). At the age of 17, Mr. Masalmani had left the last of his [at least] ten foster care placements, and was on the streets of Detroit, participating in gang life. On August 9, 2009, Mr. Masalmani and Robert Taylor kidnapped Matthew Landry, stealing his car. Over the next few days, Mr. Masalmani used Mr. Landry's ATM card and car, bought, and used crack cocaine, robbed a bank, and made an unsuccessful attempt to commit a carjacking. Ultimately, Mr. Masalmani killed Mr. Landry by shooting him in the head. (Pet. App. C, 9a-10a).

A jury convicted Mr. Masalmani of eighteen charges in three consolidated cases, including one count of felony murder. (Pet. App. C, 9a-10a). The trial court sentenced him to a prison term of life without the possibility of parole ("LWOP") for the murder conviction. At the time, this sentence was mandatory, though Mr. Masalmani was 17 years old at the time of his offense. The sentencing court lacked any discretion to consider the mitigating factors of youth or to impose any sentence other than LWOP.

Mr. Masalmani's convictions were not final for the purposes of appeal when *Miller v. Alabama*[2] was decided. The Court of Appeals affirmed Mr. Masalmani's convictions, but vacated the mandatory LWOP sentence and remanded the case to the trial court for a resentencing pursuant to *Miller*. (Pet. App. C, 9a-15a).

In 2014, the trial court held a *Miller* hearing pursuant to Mich. Comp. L. 769.25.[3] The defense presented testimony from witnesses who knew Mr. Masalmani during his childhood and teenage years and from expert witnesses in adolescent brain development, psychology, and Michigan's foster care system. The court received hundreds of pages of records into evidence and considered Mr. Masalmani's sentencing memorandum, including a social worker report. The trial court then resentenced Mr. Masalmani to a prison term of life without the possibility of parole. Among other things, the trial court concluded:

- "There was nothing in the testimony or evidence presented which suggests that treating defendant differently from an 18 year old (sic) would be warranted in this case. Upon careful consideration, the Court finds that this factor favors imposing a sentence of life without the possibility of parole."

- "The very difficulty of defendant's upbringing — the only factor which could be said to weigh in favor of an indeterminate sentence — also suggests that defendant's prospects for rehabilitation are minimal."

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2 *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455 (2012).

3 In response to *Miller,* the Michigan legislature passed Mich. Comp. L. 769.25 and Mich. Comp. L. 769.25a. These statutes gave prosecutors the ability to seek or re-seek a life without parole sentence for juveniles by filing a motion within the time allowed by the statutes. Mich. Comp. L. 769.25(3); Mich. Comp. L. 769.25a(4)(b).

- [T]he Court notes that even if defendant is experiencing the embryonic development of a rudimentary moral sensibility, it is implausible that he will experience full rehabilitation without intensive professional assistance — assistance which he is very unlikely to receive in prison.

(Pet. App. D, 23a).

On appeal, Mr. Masalmani asserted that his LWOP sentence was invalid because the trial court made a number of legal errors when analyzing the *Miller* factors and imposing its sentence. On September 22, 2016, the Michigan Court of Appeals affirmed Mr. Masalmani's sentence in an unpublished per curiam opinion. (Pet. App. E, 25a-32a).

On November 17, 2016, Mr. Masalmani sought leave to appeal to the Michigan Supreme Court. On April 5, 2019, that Court granted Mr. Masalmani's Application for Leave to Appeal, in part. (Pet. App. F, 33a). The Michigan Supreme Court ordered the parties to address the following questions:

> (1) which party, if any, bears the burden of proof of showing that a *Miller* factor does or does not suggest a LWOP sentence;
>
> (2) whether the sentencing court gave proper consideration to the defendant's "chronological age and its hallmark features," *Miller*, 567 US at 477-478, by focusing on his proximity to the bright line age of 18 rather than his individual characteristics; and
>
> (3) whether the court properly considered the defendant's family and home environment, which the court characterized as "terrible," and the lack of available treatment programs in the Department of Corrections as weighing against his potential for rehabilitation.

(*Id.*).

After briefing and after hearing oral argument on the above issues, the Michigan Supreme Court reversed course, and denied leave to appeal without explanation, with the Chief Justice dissenting, joined by two other Justices.

REASONS FOR GRANTING THE PETITION

I. The Court should decide whether the government must bear the burden of proof that a juvenile is irreparably corrupt at a *Miller* hearing, consistent with juveniles' rights to due process and to be free from cruel and unusual punishment.

This Court has established two categories of juveniles convicted of murder: (1) the "vast majority" for whom a life without parole sentence is unconstitutional and (2) the "rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified." *Montgomery*, 136 S.Ct. at 733-34.

States responded in different ways to *Miller*. In Michigan, the legislature passed Mich. Comp. L. 769.25 and Mich. Comp. L. 769.25a. These statutes gave prosecutors the ability to seek or re-seek a life without parole sentence for juveniles by filing a motion within the time allowed by the statutes. Mich. Comp. L. 769.25(3); Mich. Comp. L. 769.25a(4)(b). If the prosecutor does not file such a motion, then the default sentence for juveniles convicted of first-degree murder is a term of years. *Id.; and see People v. Skinner*, 917 N.W.2d 292, 298 (2018) (citation omitted).

Only if the prosecution files a motion seeking an LWOP sentence does it become necessary for the trial court to hold a *Miller* hearing, at which it must consider each of the *Miller* factors. Mich. Comp. L. 769.25(6); Mich. Comp. L. 769.25a(4)(b).

By filing a motion seeking a life without parole sentence in a particular case, the prosecution is necessarily alleging that the juvenile is one of the "rare" juveniles "who exhibits such irretrievable depravity that rehabilitation is impossible…" *Montgomery*, 136 S.Ct. 718, 733-34.

In the absence of a burden on the government, courts in Michigan and throughout the country are free to do what this Court has prohibited: sentence "a child whose crime reflects transient immaturity" to die in prison. *Montgomery,* 136 S.Ct. at 735.

A. The majority of jurisdictions that have considered this question have concluded that the prosecution bears the burden of proof at a *miller* hearing.

Mr. Masalmani's position that the government bears the burden of proof at a *Miller* hearing is the majority rule in the states that have considered the question.

23 states and Washington D.C. have banned juvenile life without parole. Six states have no one serving juvenile life without parole.[4] So, there are 21 states

[4] *See States that Ban Life Without Parole for Children*, The Campaign for the Fair Sentencing of Youth, *available at* https://www.fairsentencingofyouth.org/media-resources/states-that-ban-life/ (accessed 12/5/20). And the United States is alone on the global stage in imposing life without parole sentences on children. Connie De La Vega, et al, *Cruel and Unusual: U.S. Sentencing Practices in a Global Context*, 58 (2012) *available at* https://www.usfca.edu/sites/default/files/law/cruel-and-unusual.pdf (accessed 8/30/2019).

remaining that both authorize and actually impose LWOP for juveniles convicted of homicide. Among the states that have addressed the question of which party bears the burden of proof at a *Miller* hearing, there is a split in state courts of last resort, with a majority determining that the government bears the burden.

Of the ten state courts of last resort that have decided the issue, seven—the highest courts of Indiana, Iowa, Missouri, Oklahoma, Pennsylvania, Utah, and Wyoming—have found that the burden at a *Miller* hearing properly rests with the government

- Indiana: The Indiana Supreme Court held that the government bears the burden of proof at a *Miller* hearing. *Conley v. State*, 972 N.E. 2d 864, 871 (Ind. 2012). "The penalty phase of an LWOP trial requires introduction of evidence with the burden on the State to prove its case beyond a reasonable doubt." *Conley*, 972 N.E.2d at 871.

- Iowa: Before categorically barring LWOP for juveniles[5], the Iowa Supreme Court held that the "burden was on the state to show that an individual offender manifested 'irreparable corruption.'" *State v. Seats*, 865 N.W.2d 545, 556 (Iowa 2015) (quotation omitted).

- Missouri: The Missouri Supreme Court held that "a juvenile offender cannot be sentenced to life without parole for first-degree murder unless the state persuades the sentencer beyond a reasonable doubt that this sentence is just and appropriate under all the circumstances." *State v. Hart*, 404 S.W.3d 232, 241 (Mo. 2013) (*en banc*).

- Oklahoma: The Court of Criminal Appeals of Oklahoma held that "[i]t is the State's burden to prove, beyond a reasonable doubt, that the defendant is irreparably corrupt and permanently incorrigible." *Stevens v. State*, 422 P.3d 741, 750 (Okla. Crim. App. 2018).

- Pennsylvania: The Pennsylvania Supreme Court held that "the Commonwealth must prove that the juvenile is constitutionally

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5 See *State v. Sweet*, 879 N.W.2d 811 (Iowa 2016).

eligible for [LWOP] beyond a reasonable doubt." *Commonwealth v. Batts*, 163 A.3d 410, 455 (Pa. 2017).

- Utah: The Utah Supreme Court held that the burden is on the government to show that a juvenile defendant should receive LWOP. *State v. Houston*, 353 P3d 55, 69-70; 781 Utah Adv Rep 33 (Utah 2015). This decision was based on a Utah statute that places the burden on the government to demonstrate that LWOP is appropriate. Utah Code § 76-3-207(5)(c) (2008).

- Wyoming: The Wyoming Supreme Court held that the government bears the burden of proving beyond a reasonable doubt that a juvenile "is irreparably corrupt, in other words, beyond the possibility of rehabilitation." *Davis v. State*, 415 P.3d 666, 682 (Wyo. 2018).

Some of these states concluded that "'any suggestion of placing the burden on the juvenile offender is belied by the central premise of *Roper*, *Graham*, *Miller* and *Montgomery* - that as a matter of law, juveniles are categorically less culpable than adults.'" *E.g. Davis*, 415 P.3d at 681; *Batts,* 163 A.3d at 452. In other words, their conclusion that the government bears the burden is based on the central holdings of *Miller* and *Montgomery*.

Some states also recognized that the burden of proof at a *Miller* hearing implicates due process concerns and applied the four-part balancing test established in *Mathews v. Eldridge*, 424 U.S. 319, 334-335; 96 S.Ct. 893 (1976). *E.g. Davis*, 415 P.3d at 682; *Batts,* 163 A.3d at 475. Ultimately, states have concluded that "the risk of an erroneous decision against the juvenile results in the irrevocable loss of that liberty for the rest of his life," *Id*. (cleaned up), while the risk of an erroneous decision in favor of the juvenile presents a much lesser risk. *Id*.

1. The majority rule is better grounded in the Constitution than the decisions of the minority of states which have found the defense bears the burden at a *Miller* hearing.

As discussed above, a majority of the states that have considered this issue have determined that the government bears the burden of proving a juvenile defendant is irreparably corrupt at a *Miller* hearing. Their decisions are grounded in a juvenile's Eighth Amendment rights, as discussed in *Miller* and *Montgomery*, as well as a juvenile's due process rights.

Two states currently apply a rule that the defense bears the burden at a *Miller* hearing.

- Mississippi: The Mississippi Supreme Court held that LWOP may be imposed constitutionally "to juveniles who fail to convince the sentencing authority that *Miller* considerations are sufficient to prohibit [it]." *Jones v. State*, 122 So.3d 698, 702 (2013).[6] This language has been interpreted by the Mississippi Court of Appeals to mean that there is no presumption against LWOP and the burden is on the defense "to persuade the judge that he is entitled to relief under *Miller*." *Cook v. State*, 242 So.3d 865, 873 (2017).

- Arizona: The Arizona Supreme Court held that the burden is on juvenile defendants "to establish, by a preponderance of the evidence, that their crimes did not reflect irreparable corruption but instead transient immaturity." *State v. Valencia*, 386 P.3d 392, 396 (2016), citing Ariz. R. Crim. P. 32.8. The rule cited is a state rule of criminal procedure that places the burden of proving factual allegations by a preponderance of the evidence in state post-conviction proceedings. The Court also noted but did not discuss language in *Montgomery* requiring that juvenile defendants "be given the opportunity to show that their crime did not reflect irreparable corruption." See *Montgomery,* 136 S. Ct. at 736-737.

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6 As mentioned above, *Jones* is currently pending in this Court.

The Washington Supreme Court held the burden of proof lies with the defense based on state law establishing that "the offender carries the burden of proving that an exceptional sentence below the standard range is justified." *State v. Ramos*, 387 P.3d 650, 662 (2017). The Washington Supreme Court subsequently abolished LWOP sentences for all juveniles on state constitutional grounds. *State v. Bassett,* 428 P.3d 343 (2018).

B. The circumstances of a *Miller* hearing and a juvenile's due process rights require that the prosecution bear the burden of proving that a sentence of life without parole is appropriate.

The allocation of burden is not a mere formality. Rather, it is a critical factor controlling the structure of court proceedings, a tool for ensuring fairness, and one that implicates due process and fundamental fairness considerations in criminal cases.

In criminal proceedings, "[t]he consequences to the life, liberty, and good name of the accused from an erroneous conviction of a crime are usually more serious than the effects of an erroneous judgment in a civil case." 2 McCormick on Evidence § 341 (8th ed. 2020). Due process protects the accused from being convicted in the absence of proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364; 90 S.Ct. 1068 (1970).

In general, "[w]here one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden … of persuading the factfinder at the

conclusion of the trial of his guilt beyond a reasonable doubt." *Speiser v. Randall*, 357 U.S. 513, 525-526; 78 S.Ct. 1332 (1958). And while the present issue involves the imposition of a sentence, rather than a finding of guilt, a criminal defendant's due process rights extend beyond trial and through sentencing. E.g. *Betterman v. Montana*, __ U.S. __; 136 S.Ct. 1609, 1617 (2016) ("After conviction, a defendant's due process right to liberty, while diminished, is still present. He retains an interest in a sentencing proceeding that is fundamentally fair."); see also, U.S. Const., Am. XIV; Mich. Const. 1963, art. 1, § 17.

Applying the *Mathews* balancing test leads to the conclusion that due process requires the prosecution to bear the burden of proof at a *Miller* hearing. Under *Mathews*:

> (1) the private interest is one of our most treasured – liberty;
>
> (2) the risk of the erroneous deprivation of liberty (i.e. an unconstitutional LWOP sentence for a juvenile who is not irreparably corrupt) is significantly greater if defendants are required to carry the burden at *Miller* hearings;
>
> (3) the risk of an erroneous deprivation of liberty is significantly lesser if the government bears the burden; and
>
> (4) the government has no interest in winning for the sake of winning, but rather has an interest in doing justice (i.e. obtaining accurate and constitutional sentences) which is served where the government bears the burden [see *Berger v. United States*, 295 US 78, 88; 55 S Ct 629 (1935) (noting that the government's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done.")].

C.f. *Mathews*, 424 U.S. at 334-335. Each of the factors suggests that allocating the burden of proof at a *Miller* hearing to the government is necessary as a matter of due

process and will serve to ensure that *Miller* hearings are fundamentally fair and result in accurate, constitutional sentences.

II. The Court should decide whether there is a presumption against life without parole sentences for juveniles.

In *People v. Skinner,* the Michigan Supreme Court erred in determining that "neither *Miller* nor *Montgomery* imposes a presumption *against* life without parole." *Skinner*, 917 N.W.2d 292, 314 (Mich. 2018) (emphasis in original). Such a holding violates a juvenile homicide defendant's rights to due process and a constitutionally proportionate sentence. As stated in the dissent in *Skinner,* "[A] faithful application of the holding in *Miller*, as clarified in *Montgomery*, requires the creation of a presumption against sentencing a juvenile offender to life in prison without the possibility of parole…" *Skinner,* 917 N.W.2d at 323 (McCormack, J., dissenting) (citations omitted). However, a split has developed on whether *Miller* and *Montgomery* endorse such a presumption.

A presumption against life without parole sentences for juveniles has been recognized by the following state courts:

- California: A presumption in favor of life without parole would be "in serious tension with *Miller*'s categorical reasoning about the differences between juveniles and adults." *People v. Gutierrez*, 324 P.3d 245, 263 (Cal. 2014).

- Connecticut: The language in *Miller* "suggests that the mitigating factors of youth establish, in effect, a presumption against imposing a life sentence without parole on a juvenile offender." *State v. Riley*, 110 A.3d 1205, 1214 (Conn. 2015).

- Iowa: "First, the court must start with the Supreme Court's pronouncement that sentencing a juvenile to life in prison without the possibility of parole should be rare and uncommon. Thus, the presumption for any sentencing judge is that the judge should sentence juveniles to life in prison with the possibility of parole for murder unless the other factors require a different sentence." *Seats,* 865 N.W.2d at 555. "[T]he judge must make specific findings of fact discussing why the record rebuts the presumption." *Id.* at 557.

- Pennsylvania: "[T]he central premise of *Roper*, *Graham*, *Miller* and *Montgomery* – that as a matter of law, juveniles are categorically less culpable than adults.…[necessitates that] a faithful application of the holding in *Miller*, as clarified in *Montgomery*, requires the creation of a presumption against sentencing a juvenile offender to life in prison without the possibility of parole." *Batts*,163 A.3d at 452.

- Wyoming: "A sentencing court must begin its analysis with the premise that in all but the rarest of circumstances, a life-without-parole (or the functional equivalent thereof) sentence will most likely be disproportionate to the juvenile." *Davis*, 415 P.3d at 681.

Further, the Supreme Court of North Carolina has interpreted that state's post-*Miller* legislation and ruled that no presumption exists in favor of life without parole sentences, stating that such a statutory interpretation would be at odds with the state and *"Miller's* directive that sentences of life imprisonment without the possibility of parole should be the exception, rather than the rule..." *State v. James,* 813 S.E.2d 195 (N.C. 2018).

A split has developed. In addition to Michigan's *Skinner* decision, *supra,* the Court of Criminal Appeals of Alabama has held that *Miller* and *Montgomery* do not require a presumption against LWOP sentences for juveniles convicted of murder. *Wilkerson v. State,* 284 So. 3d 937, 955 (Ala. Crim. App. 2018), *cert. denied,* 140 S.Ct. 2768 (2020). And those states that have placed a burden of proof on the juvenile at a

Miller hearing (Arizona and Mississippi, as discussed above) implicitly stand in opposition to a presumption against juvenile LWOP.

The issue has also begun to percolate in Louisiana. *State v. Hauser*, __ So.3d __ 2019-341 (La. App. 3 Cir 12/30/19) ("…*Miller/Montgomery* do not necessarily presume a juvenile should be eligible for parole.").

This Case Is An Ideal Vehicle To Decide These Important And Recurring Questions Of Law.

The record in this case includes reasoned briefing and opinions on the questions presented, and the opinion, denying relief in the Michigan Supreme Court, was the result of a 4-3 split. The case is on direct appeal and no procedural issues detract from the questions presented.

This Court's resolution of the questions will provide profoundly needed clarity, certainty, and guidance, as juvenile life without parole cases continue to be litigated in Michigan[7] and throughout the country. Meaningful and reasoned application of *Miller* and *Montgomery* is an issue of national importance. This Court has recognized that very few juveniles who commit homicide lack the potential for rehabilitation, and that the vast majority of such juveniles are not irreparably corrupt or permanently incorrigible. *Montgomery,* 136 S.Ct. at 734. Nonetheless, lacking

[7] Michigan still has well over 150 *Montgomery* cases pending resentencing in which prosecutors throughout the state are seeking life without parole again.

guidance on the two questions outlined above, states continue to sentence such juveniles to LWOP, even when potential for rehabilitation exists.[8]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[8] *See* NY Times Opinion, *Michigan Prosecutors Defy the Supreme Court*, NEW YORK TIMES (Sep. 11, 2016) (noting, for example, that Oakland County prosecutor was seeking life without parole for 44 of 49 juvenile lifers).