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No. 16-6530

In The
Supreme Court of the United States

MICHAEL WILLIAMS,

Petitioner,

v.

TROY STEELE, WARDEN,

Respondent.

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

BRIEF FOR THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY AND THE PHILLIPS BLACK PROJECT AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The Fred T. Korematsu Center for Law and Equality ("Korematsu Center"), based at Seattle University School of Law, advances justice through research, advocacy, and education. The Korematsu Center studies the racial disproportionality that exists within our criminal justice system, and has filed and helped research several briefs relating to youth sentencing in state appellate courts. The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

Nationally, the Phillips Black Project has been at the forefront of understanding and chronicling, via legal scholarship, the administration and transformation of juvenile life without parole sentencing practices after *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 132 S. Ct. 2455 (2012). In Missouri, Phillips Black has investigated the administration of parole practices of the Missouri Department of Corrections, by collecting and analyzing data on parole hearings, conducting interviews with advocates who regularly appear before the parole board, and through direct experience appearing before the board.

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae or their counsel made a monetary contribution to its preparation or submission. The requirements of Supreme Court Rule 37.2(a) have been met, with timely notice given and the amicus brief accompanied by written consent to file granted by counsel of record for petitioner and respondent.

SUMMARY OF ARGUMENT

Miller v. Alabama gave hope to youth offenders sentenced to unconstitutionally long sentences that they might experience freedom instead of dying in prison. *Miller*'s promise was twofold: first, that individualized sentencing proceedings would account for their diminished culpability, and second, that a mechanism such as parole would provide a meaningful opportunity to obtain release. In many states, including Missouri, this promise has been illusory.

Mr. Williams's sentence, as well as the sentences of four other petitioners whose certiorari petitions were filed contemporaneously,[2] imposed prior to *Miller*, were mandatory sentences of life without parole. Missouri's current parole process, enacted on the heels of *Montgomery v. Louisiana*, will not provide Mr. Williams with either an individualized sentencing proceeding or a meaningful opportunity to obtain release. Instead, Mr. Williams will receive an ill-defined, and perhaps single, opportunity to petition the parole board for release after serving twenty-five years. Missouri's parole process lacks basic procedural guarantees, predictably leading to few instances of reprieve from the board.

Missouri is not alone its failure to provide *Miller*'s guarantees. Virginia claims that geriatric release provisions, which permit the possibility of release after an

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[2] *Brown v. Bowersox*, No. 16-6474; *Clerk v. Cassady*, No. 16-6442; *Evans-Bey v. Cassady*, No. 16-6441; and *McElroy v. Cassady*, No. 16-6466.

inmate reaches the age of 60, provide a meaningful opportunity to obtain release. North Carolina provides neither notice nor an opportunity to be heard in its parole process. Maryland, in the last two decades, has never granted parole to a juvenile offender sentenced to life.

This case presents an opportunity to ensure *Miller*'s requirement that children have a meaningful opportunity for release by stopping states from giving lip service to *Miller* through inadequate parole processes. In the alternative, this Court should grant Mr. Williams's petition, vacate the Missouri Supreme Court's dismissal, and remand the case to the Missouri courts to consider in the first instance whether Mo. Rev. Stat. § 558.047.1(1) (2016) in fact provides a meaningful opportunity for release for juvenile offenders who have received unconstitutionally long sentences, as mandated by this Court in *Graham*, *Miller*, and *Montgomery*.

ARGUMENT

I. THIS CASE PRESENTS AN OPPORTUNITY TO RECTIFY SEVERAL STATES' REFUSALS TO FOLLOW *MILLER*.

This Court has not yet addressed the scope of the requirement of individualized consideration in a juvenile sentencing proceeding. Likewise, it has yet to address a related question it initially left to the states: what constitutes a "meaningful opportunity to obtain

release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75. Without this Court's guidance, several states' appellate courts have rendered *Miller* meaningless by holding that (1) *Miller* does not apply if the sentencing court had any modicum of discretion; (2) *Miller* has been satisfied if any aspect of youth was considered by the sentencing court; or (3) *Miller* is satisfied by the mere existence of the possibility for release by parole, without any consideration of whether that state's parole system provides a *meaningful* opportunity for release based on its procedures or as evidenced by results. This Court could, as it did in *Tatum v. Arizona*, 580 U.S. ___, No. 15-8850, 2016 WL 1381849 (Oct. 31, 2016), fix this on a petition-by-petition and state-by-state basis through Grant-Vacate-Remand (GVR) orders. However, amici urge this Court to provide guidance to states regarding both what individualized consideration requires as well as what constitutes a meaningful opportunity to obtain release.

A. *Miller* Requires an Individualized Consideration of Youth and a Meaningful Opportunity to Obtain Release.

In *Graham v. Florida*, this Court recognized the final condemnation that a life without parole sentence imposes: it forever denies an inmate "a chance to demonstrate growth and maturity." 560 U.S. at 73. When imposed on a juvenile offender, such a sentence requires the heightened need for reliability typically reserved for capital cases. For this reason, in 2012, the

Court prohibited all mandatory sentences of life without parole for juvenile offenses. *Miller v. Alabama*, 132 S. Ct. 2455, 2468 (2012). Before imposing "the harshest penalties" on juveniles, a court must provide individualized consideration of the juvenile, including the influence of age on the juvenile's culpability and prospects for rehabilitation.[3] *Id.* Even after such consideration, before imposing a life without parole sentence, a court must find that the juvenile is one of "those rare children whose crimes reflect irreparable corruption." *Montgomery v. Louisiana*, 136 S. Ct. 599, 734 (2016).

Individualized consideration of a juvenile's age is required because, if "youth (and all that accompanies it) [is] irrelevant to that harsh sentence, such a scheme poses too great a risk of disproportionate punishment." *Miller*, 132 S. Ct. at 2469. The risk of disproportionality flows from the inherently mitigated culpability of juvenile offenders and the uniquely long incarceration that follows from sentencing a juvenile to death in prison. *Graham*, 560 U.S. at 70. The Court explained that "youth matters for purposes of meting out the law's most serious punishments," *Miller*, 132 S. Ct. at 2471, and that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders," *id.* at 2465; *see also id.* at 2464-66, 2468-71.

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[3] The Chief Justice has noted that the principle underlying *Miller*'s requirement of individualized consideration should apply to all juvenile cases. *Miller*, 132 S. Ct. at 2482 (Roberts, C.J., dissenting).

No Missouri court has given individualized consideration of the required *Miller* factors to Mr. Williams. After *Montgomery* conclusively determined that *Miller* was retroactively applicable to sentences such as Mr. Williams's, Missouri enacted a law that made Mr. Williams eligible for parole.[4] The Missouri Supreme Court then summarily dismissed Mr. Williams's request for resentencing in light of *Miller* and *Montgomery*. *See* Pet. for Writ of Cert. at 7. Because Mr. Williams's sentence is still not the product of an individualized consideration of his youth, his petition presents the Court with an opportunity to clarify the scope of the individualized consideration requirement.

Even if this Court construes Missouri's statutory response to *Miller* as a resentencing, it is still a mandatory sentence. That is, there is a single option for persons such as Mr. Williams: an opportunity to petition for parole after twenty-five years. As a mandatory sentence, it must provide Mr. Williams with a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Miller*, 132 S. Ct. at 2469 (quoting *Graham*, 560 U.S. at 75). This Court, in *Solem v. Helm*, 463 U.S. 277, 300 (1983), expressed its understanding of parole as being a "regular part of the rehabilitative process" and, "[a]ssuming good behavior, it is the normal expectation in the vast majority of cases." But as we demonstrate below, several states'

[4] Mo. Rev. Stat. § 558.047.1(1) (2016) (youth serving life without parole sentences who were "under eighteen years of age at the time of the commission of the offense . . . may submit to the parole board a petition for a review of his sentence").

parole systems, including Missouri's, do not in fact provide a meaningful opportunity for release.

B. Some States Are Not Ensuring Individualized Consideration of *Miller* Factors.

Some jurisdictions have determined that as long as courts have any modicum of discretion when sentencing a person for a crime committed as a juvenile, *Miller* does not apply. A typical example of this is the approach taken by the Virginia Supreme Court when it found that *Miller* does not apply to Virginia's sentencing scheme because a trial court always has the ability to "suspend imposition of [a] sentence or suspend the sentence in whole or part." *Jones v. Commonwealth*, 763 S.E.2d 823, 825 (Va. 2014).[5]

Other jurisdictions continue to struggle to implement *Miller* and *Montgomery* fully, insisting that if an offender's youth was considered during sentencing at all, *Miller* is satisfied – even with no formal, individualized consideration of the juvenile or finding of irreparable corruption. *See, e.g.*, *Tatum*, 2016 WL 1381849, at *2 (a court's individualized consideration of the mitigating factors of youth must determine whether a particular offender is a child "'whose crimes reflect

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[5] Though this Court issued a GVR order on Jones's petition for certiorari, *Jones v. Virginia*, 136 S. Ct. 1358 (2016), the order speaks only to the question of *Miller*'s retroactivity. *Id.* ("Court's disposition does not . . . address . . . whether petitioner's sentence actually qualifies as a mandatory life without parole sentence").

transient immaturity' or is one of 'those rare children whose crimes reflect irreparable corruption' for whom a life without parole sentence may be appropriate." (quoting *Montgomery*, 136 S. Ct. at 734)).

C. Litigation Concerning the Adequacy of Parole Programs under *Miller* Demonstrates that States Need Guidance.

States that are attempting to remedy *Miller* violations through meaningful opportunity for release rather than resentencing face substantial uncertainty as to what a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation'" actually requires. *Miller*, 132 S. Ct. at 2469 (quoting *Graham*, 560 U.S. at 75). There is recent and pending litigation in several states to determine whether these jurisdictions' parole schemes provide the meaningful opportunity for release required by *Miller*.[6] For example, the Supreme Court of Florida recognized that Florida's parole system was entirely ill-suited to provide

[6] *See, e.g.*, *Hill v. Snyder*, 821 F.3d 763 (6th Cir. 2016) (directing district court to address appropriateness of Michigan's parole system under *Montgomery* and *Miller*); *Greiman v. Hodges*, 79 F. Supp. 3d 933, 936 (S.D. Iowa 2015) (denying motion to dismiss whether Iowa's parole system provided juvenile offender a meaningful opportunity for release); Complaint at ¶ 10, *Md. Restorative Justice Initiative v. Hogan*, 316 F.R.D. 106 (D. Md. 2016) (No. 1:16-cv-01021-ELH), 2016 WL 1403172 (alleging that Maryland's parole scheme "functions as a system of ad hoc executive clemency in which grants of release are exceptionally rare, are governed by no substantive, enforceable standards, and are masked from view by blanket assertions of executive privilege").

the meaningful opportunity for release to those juveniles serving life with possibility of parole, which made that sentence "virtually indistinguishable from a sentence of life without parole." *Atwell v. State*, 197 So. 3d 1040, 1041 (Fla. 2016). Because Florida's parole system did not comport with *Miller*, the court ordered resentencing.

Although this Court has not explicated its own views on what constitutes a meaningful opportunity to obtain release, at minimum it has counseled that some type of hearing must analyze an offender's particularized circumstances, with the presumption against lifetime imprisonment. A meaningful opportunity for review should consist of: (1) "a chance of release at a meaningful point in time"; (2) a realistic likelihood of release for the rehabilitated; and (3) a meaningful opportunity to be heard. Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 Ind. L. J. 373, 375-76 (2014).

In the context of this case, Mr. Williams and the other four petitioners will not have the *Miller* factors applied in their cases, and therefore will be provided neither an individualized determination of mitigation nor a meaningful opportunity for release. Further, because he is not entitled to resentencing under Missouri's statute, Mr. Williams's culpability will not be reassessed.

Although this Court could proceed on a petition-by-petition and state-by-state basis to issue GVR orders, judicial efficiency and the liberty interests of juvenile "lifers" to not be subject to constitutionally inadequate and infirm parole processes strongly support the grant of certiorari on this petition, as well as the petitions of Messrs. Brown, Clerk, Evans-Bey, and McElroy.

II. MISSOURI AND A HANDFUL OF OUTLIER STATES USE SHAM PAROLE PROCESSES TO SIDESTEP THE REQUIREMENT OF A MEANINGFUL OPPORTUNITY TO OBTAIN RELEASE.

Because the Court has not yet explained what protections *Graham*, *Miller*, and their progeny require, it remains unclear which procedural protections constitute a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75. Likewise, it remains unclear whether such an opportunity is foreclosed where parole is granted only rarely. Some states are apparently flouting this requirement by providing limited procedural guarantees in parole and a corresponding low probability of release. For those inmates whose *Miller*-violative sentences were only "cured" by operation of newly found eligibility for parole review, the lack of guidance from this Court, together with sham parole

processes, will keep *Miller*'s promise out of reach.[7] This is especially the case for Mr. Williams and other similarly situated persons because there is no constitutionally protected right to parole, unless release is vested by statute, *Greenholtz v. Inmates of Neb.*, 442 U.S. 1, 7 (1979), and the Missouri Supreme Court has been clear that Missouri parole statutes create no protected liberty interest whatsoever, "giving the [Parole] Board almost unlimited discretion in whether to grant parole release," *Cavallero v. Groose*, 908 S.W.2d 133, 135 (Mo. 1995) (quotation omitted).

Parole processes vary dramatically by jurisdiction, but a handful of states, including Missouri, provide little opportunity for release. Virginia has maintained that its geriatric release program provided juvenile offenders a meaningful opportunity for release, even though the considerations for release under that program bear no resemblance to the considerations required by *Miller*. *See LeBlanc v. Mathena*, No. 15-7151, 2016 WL 6652438 at *8-11 (4th Cir. Nov. 7, 2016) (reversing state-court determination that geriatric release provision satisfied *Graham* because provision did

[7] This Court should accept review now because of the very limited review available of state convictions in federal court following the Anti-Terrorism and Effective Death Penalty Act. 28 U.S.C. § 2254(d)(1) (no federal habeas corpus jurisdiction unless decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"). Although amici maintain Missouri's procedure would be reviewable in federal court under this provision, judicial economy counsels avoiding this question all together.

not require consideration of demonstrated maturity and rehabilitation; did not provide for a meaningful opportunity for release; and did not take into consideration the lesser culpability of juvenile offenders). North Carolina offenders receive no notice of when their parole decision will be made and receive no opportunity to present evidence in support of parole. *Hayden v. Butler*, 134 F. Supp. 3d 1000, 1002 (E.D. N.C. 2015).

In Maryland, a requirement that the governor explicitly approve every parole decision has resulted in no juvenile "lifers" receiving parole. Md. Code Ann., Corr. Serv. § 7-301(d)(4) (2016). After leaving office, Maryland Governor Glendening who had declared that "life means life" admitted that "his position had more to do with politics than public safety."[8] A lawsuit recently filed there alleges that "no juvenile lifer in the state has been paroled in the past two decades."[9] These three states, Maryland, North Carolina, and Virginia, along with Missouri, account for over two hundred life

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[8] Dan Rodricks, *Hogan Should Review Parole Cases Rejected by O'Malley*, Balt. Sun (June 21, 2016), http://www.baltimoresun.com/news/maryland/dan-rodricks-blog/bs-md-rodricks-0622-20160621-column.html.

[9] Alison Knezevich, *Maryland Parole Commission Says It Will Hold Hearings for Hundreds of Juvenile Lifers*, Balt. Sun (Oct. 14, 2016), http://www.baltimoresun.com/news/maryland/crime/bs-md-parole-commission-juveniles-20161014-story.html. Parole grant rates for North Carolina inmates with no release date or serving a life sentence are similarly abysmal. *Hayden*, 134 F. Supp. at 1005.

without parole sentences imposed on juvenile offenders.[10]

Though data on juvenile release rates in Missouri are harder to obtain, research conducted by The Sentencing Project shows that parole grant rates for Missouri inmates serving a life sentence are as low as 1.8 percent. Life sentenced inmates are also more than four-fold less likely than other parole-eligible inmates to be granted parole. This abysmal grant rate is a predictable result of lack of process and distinguishes Missouri from the process in other states.[11] Missouri's existing parole process will not provide Mr. Williams with a meaningful opportunity for release.

A. Missouri's Parole Board Exemplifies the Danger of Having Political Decision Makers with Functionally Unlimited Discretion.

Shortly after this Court decided *Montgomery*, the Missouri legislature amended its parole statute to allow an inmate who has served 25 years of a juvenile

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[10] John Mills, et al., *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 Am. U. L. Rev. 535, 603-04 (2016) (listing 222 inmates serving such sentences in these four states as of July 2015).

[11] In *Montgomery*, the Court noted that Wyoming provided a parole process that would meet *Miller*'s mandates. *Montgomery*, 136 S. Ct. at 736. However the parole process functions in Wyoming, the process in Missouri and a handful of other states demonstrates the need for this Court to weigh in directly on Missouri's process and clarify its dicta in *Montgomery*.

sentence to "submit to the parole board a petition for review of his or her sentence." Mo. Rev. Stat. § 558.047.1(1). Missouri's process does not provide a petitioner with a right to counsel, access to the basis for the board's decision, the ability to present or cross-examine witnesses, or judicial review of the determination.

Missouri's Parole Board is notorious for operating under a "high level of secrecy."[12] Its former operations manager of 30 years characterized it as "[c]losed to the extreme" and "paranoid closed."[13]

The members of the Missouri Parole Board are political appointees and members of the executive branch. Mo. Rev. Stat. § 217.665. The hearings are conducted by a three-person hearing panel consisting of a single board member and two "hearing officers" appointed by the board. Mo. Rev. Stat. § 217.670(2). All members of the panel are members of the executive

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[12] David Lieb, *Missouri Parole Board Works Under Shroud of Secrecy*, St. Louis Post Dispatch (Mar. 13, 2011), http://www.stltoday.com/news/state-and-regional/missouri/missouri-parole-board-works-under-shroud-of-secrecy/article_7c9beecf-3f36-574d-b436-430390ab9a38.html.

[13] Beth Schwartzapfel, *How Parole Boards Keep Prisoners in the Dark and Behind Bars*, Wash. Post (July 11, 2015), https://www.washingtonpost.com/national/the-power-and-politics-of-parole-boards/2015/07/10/49c1844e-1f71-11e5-84d5-eb37ee8eaa61_story.html.

branch, the branch responsible for carrying out the inmate's punishment.[14]

Members of the parole board are not required to ever meet with an inmate in person. Hearings may be, and frequently are, conducted remotely via videoconference at the board's discretion, unless the inmate knows to lodge an objection to this process. Mo. Rev. Stat. § 217.670(6). Parole hearings are closed to the public, and neither the public, the offender, nor the offender's representative are entitled to a record of the proceedings or any other substantive information related to the board's decision-making process. Mo. Code Regs. Ann. tit. 14, § 80-2.010(5)(E), (F). Missouri's parole process and outcomes do not provide a meaningful opportunity to obtain release.

B. Missouri's Parole Process Exemplifies the Handful of Outlier Jurisdictions with Very Limited Procedural Guarantees in the Parole Process.

Although statutory changes in response to *Miller* require the board to consider the youth of the offender

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[14] When Florida attempted to give sole authority for a competency determination to the executive branch, this Court declared such an arrangement to be impermissible, noting that in "no other circumstance of which we are aware is the vindication of a constitutional right entrusted to the unreviewable discretion of an administrative tribunal." *Ford v. Wainwright*, 477 U.S. 399, 416 (1986). At a minimum, an inmate should be provided with an impartial decision maker, someone outside of the entity charged with punishing him. *See id.*

when making a parole decision, those changes do nothing to alter the inadequate procedures that guide the board's decision-making process.

Offenders are permitted to have a single representative accompany them at the hearing who "may offer a statement on behalf of the offender, ask questions and provide any additional information that may be requested by the hearing panel." Mo. Code Regs. Ann. tit. 14, § 80-2.010(5)(A)(1). The "representative" need not be a lawyer, and in any case, an indigent inmate is not entitled to appointed counsel. *Id.*

The lack of right to counsel before the board leaves the petitioner at a significant disadvantage in creating the record and advocating for release.[15] Rather than

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[15] Missouri's process makes no effort to comply with this Court's command to provide counsel where the evidence involved is "complex or likewise difficult to develop or present" and related to a conditional liberty interest. *Gagnon v. Scarpelli*, 411 U.S. 778, 791 (1973). And Missouri's process does not recognize that juvenile offenders face unique challenges that heighten the need for counsel. Most juvenile offenders have had limited education prior to incarceration, and many have been victims of trauma or suffer from mental illness. *See* Russell, *supra*, at 434. They have limited access to their case in mitigation and are unlikely to be able to independently develop and present a plausible release plan, given their utter lack of experience living in the adult world. *Id.* at 421, 434.

As other states have acknowledged, access to counsel is an important aspect of affording juvenile offenders a meaningful opportunity to make their case for release. *See, e.g.*, Cal. Penal Code § 3041.7 (providing counsel in parole hearings for juvenile offenders serving life sentences); Conn. Gen. Stat. § 54-125a(f)(3) (juveniles facing lengthy sentences entitled to counsel in parole hearing); *Diatchenko v. Dist. Attorney for the Suffolk Dist.*, 27

having a counseled argument before the board, the petitioner meets with an Institutional Parole Officer before the hearing who prepares a report to submit to the board. Missouri Department of Probation and Parole, *Procedures Governing the Granting of Paroles and Conditional Releases* 5 (2009) (hereinafter *Blue Book*). The report "may include" information from the inmate's case, including "social history; medical, psychological and psychiatric reports; circumstances of any prior criminal history including arrests, convictions and incarcerations; past and present patterns of behavior and confidential information." *Id.* at 4.

An inmate is not entitled to have witnesses testify on his or her behalf. *See* Mo. Code Regs. Ann. tit. 14, § 80-2.010(3)(A)(1)-(6). This limitation fails to comply with the long acknowledged reality that "[t]he right to offer the testimony of witnesses" is necessary to help decision-makers determine "where the truth lies," and, as such, "is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967).

While an inmate may present information relating to the mitigating aspects of youth as outlined in *Miller*,[16] the board retains broad leeway to "limit" or "exclude" consideration of anything that it considers

N.E.3d 349, 367 (Mass. 2015) (holding that a "meaningful opportunity to obtain release" includes provision of counsel and expert services to indigent juveniles).

[16] This includes "their own versions of the present offense," any prior criminal history, "reasons why they think they should be paroled," and any plans they have made in case of release. Mo. Code Regs. Ann. tit. 14, § 80-2.010(3)(A)(1)-(5).

irrelevant. Mo. Code Regs. Ann. tit. 14, § 80-2.010(5)(D). This broad discretion, together with no record of the proceeding,[17] make it impossible to establish whether the board has meaningfully provided the inmate with an opportunity to present a case for release. *See McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) ("the lack of recordings or transcripts . . . and the inadequate opportunity for SAW applicants to call witnesses or present other evidence . . . [forecloses a] meaningful basis upon which to review application decisions.").[18]

In contrast, victims and representatives of the State are given wide latitude to make their own presentations to the board. Victims and their representatives, judges, prosecuting attorneys, and law enforcement officials may present information "regarding the offense and its impact" and offer their opinions about whether the offender should be released "with or without the offender present." This is a process wholly lacking in adversarial testing. *Polk Cty.*

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[17] "The hearing shall not be open to the public and the records of all hearings shall be treated as confidential and shall not be opened to inspection by the offender concerned, the offender's representative or any other unauthorized persons." Mo. Code Regs. Ann. tit. 14, § 80-2.010(5)(F).

[18] Further, the hearings are generally very brief, calling into question the meaningfulness of the resulting decision. One attorney who had participated in approximately twenty parole hearings noted he had "never been to one that lasted more than 20 minutes." Steve Pokin, *What Happens at a Parole Hearing?*, Springfield News-Leader (Sept. 29, 2015), http://www.news-leader.com/story/news/local/ozarks/2015/09/29/happens-parole-hearing/73050174/.

v. Dodson, 454 U.S. 312, 318 (1981) ("[Our legal] system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.").

Although inmates are statutorily afforded an opportunity to "challeng[e] allegations of fact they perceive to be false," Mo. Code Regs. Ann. tit. 14, § 80-2.010(3)(6), without access to either the basis for the board's decision or counsel, this limited right is illusory. Without such an opportunity, the process fails to provide the inmate with any meaningful right to confront the evidence being used to justify his sentence. One "immutable principle" of our criminal justice process is that where governmental action may seriously harm an individual and "the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene v. McElroy*, 360 U.S. 474, 496 (1959). Here, there is no pretense of compliance with this bedrock principle.[19]

Finally, the board has unbridled discretion to deny parole, and its decisions are isolated from judicial

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[19] Evidence of the Kafkaesque challenges this arrangement poses abounds. For example, one stunned Missouri inmate was informed by a panel member that the member thought the inmate had "been involved in other murders [he had not] been caught for" and that there were "things in [his] file I know about [that] you don't know. When asked for further information, the board simply replied that "[s]everal statutes prohibit release of this information." *See* Schwartzapfel, *supra*.

review. Although the parole board has published guidelines on its process and for determining release dates, the board is not bound to follow them. *See* Mo. Code Regs. Ann. tit. 14, § 80-2.020(1), (4)(A); *Blackburn v. Mo. Bd. of Probation & Parole*, 83 S.W.3d 585 (Mo. Ct. App. 2002) (holding that board's failure to follow its own guidelines was not unlawful because the board is vested with "wide discretion" to adopt, implement, and follow "its own rules and regulations."). In essence, the board is free to make its decisions by whatever means and for whatever reason it sees fit.[20]

The only review available is to appeal the decision of the hearing panel to the board. Mo. Rev. Stat. § 217.670(2); *Blue Book* at 9. The "appeal" does not involve any submission or further input from the inmate, does not result in any written decision, and "shall be final." Mo. Rev. Stat. § 217.670(2).

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[20] The decision to grant or deny parole is made by a majority vote among three panel hearing members, only one of whom is a member of the board. Mo. Rev. Stat. § 217.670(2). If the panel enters a decision adverse to the inmate, it must provide a reason for doing so. Mo. Code Regs. Ann. tit. 14, § 80-2.010(6)(B); *Blue Book* at 8. Although any reason will suffice, one of the two most commonly used reasons is that release "at this time would depreciate the seriousness of the offense committed or promote disrespect for the law." *Blue Book* at 8-9. The other most commonly given reason is that "there does not appear to be a reasonable probability at this time that the offender would live and remain at liberty without violating the law." *Id.* This decision is fundamentally at odds with "*Miller*'s central intuition – that children who commit even heinous crimes are capable of change." *Montgomery*, 136 S. Ct. at 736.

The Court should either grant review to clarify the scope of the requirement for states to provide a meaningful opportunity to obtain release or grant, vacate, and remand this case with instructions to the Missouri courts to squarely address the question in the first instance. A handful of other states share Missouri's reticence to meaningfully comply with this Court's mandates, further precipitating the need for this Court's intervention and acceptance of review.

C. Although Most States Have Sought to Rigorously Enforce this Court's Mandates in Juvenile Sentencing, Missouri Exemplifies a Handful of Outliers that Warrant this Court's Review.

In *Montgomery*, the Court reiterated *Miller*'s insight that "a lifetime in prison is a disproportionate sentence for all but the rarest of children." *Montgomery*, 136 S. Ct. at 726. Since *Miller*, there has been a dramatic shift away from sentencing juveniles to a lifetime in prison, with 3.33 states per year, on average, abandoning the punishment, a much higher rate than other later invalidated sentencing practices. Mills, *supra*, at 556. No state has chosen to initiate its use of the punishment, and no state has expanded its application. *Id.* Among those retaining the punishment, a handful of *counties* are responsible for ten percent of all such sentences nationwide. *Id.* at 572. States are rapidly abandoning the practice of sentencing juveniles to a lifetime in prison in law and practice.

The parole processes adopted after *Miller* have also reflected this shift. In Delaware, juvenile offenders receive judicial review of their sentence for potential modification. Del. Code Ann. tit. 11, § 4217(f) as amended by S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013). Massachusetts provides juveniles serving the state's longest sentences with counsel at the initial parole hearing (after serving 15 years); to move the court for funds to retain expert witnesses; and to seek judicial review. *Diatchenko*, 27 N.E.3d at 365, 367; *see also* Cal. Penal Code § 3041.7 (providing counsel in parole hearings for juvenile offenders serving life sentences); Conn. Gen. Stat. § 54-125a(f)(3) (juveniles facing lengthy sentences entitled to counsel in parole hearing). States have, by and large, taken *Miller*'s mandates to heart. However, some states are seeking to side-step the Court's mandates, putting scores of juveniles at risk of suffering a lifetime serving a disproportionate sentence.

This case warrants certiorari not only for judicial efficiency, but more fundamentally to ensure that youth offenders' hopes of release manifest in a manner consistent with *Miller*'s pronouncement that "children are constitutionally different than adults," 132 S. Ct. at 2464. A meaningful opportunity for release should mean that children have a realistic hope for release, rather than only the remotest possibility of release pursuant to a deeply flawed parole process. False hope is crueler than no hope.

CONCLUSION

Amici submit that this Court should grant review to hear Mr. Williams's case. In the alternative, they request that the Court grant review, vacate the decision of the Missouri Supreme Court, and remand for a determination of whether Missouri's parole process provides a meaningful opportunity to obtain release.

Respectfully submitted,

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