SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 19954

STATE OF CONNECTICUT

v.

TAUREN WILLIAMS-BEY

BRIEF of *AMICUS CURIAE*

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Juvenile Law Center, founded in 1975, advocates on behalf of youth in the child welfare, criminal, and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Juvenile Law Center works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through appeal, and that the unique developmental differences between youth and adults are considered in enforcing these rights. Juvenile Law Center has extensive experience and expertise working with children involved in the criminal justice system and in analyzing juvenile justice policy in states nationwide. Its deep familiarity with juvenile sentencing and parole practices across the country gives it a significant interest in the outcome of this litigation, as well as a unique comparative lens with which to assist the Court in determining the adequacy, or lack thereof, of the parole system in Connecticut.

ARGUMENT

I. INDIVIDUALS CONVICTED OF CRIMES COMMITTED UNDER AGE 18 MUST BE GIVEN AN INDIVIDUALIZED SENTENCING HEARING WHERE YOUTH IS CONSIDERED AS A MITIGATING FACTOR

The U.S. Supreme Court has repeatedly held that "children are constitutionally different from adults for purposes of sentencing." *Miller v. Alabama*, 567 U.S. 460, 471 (2012); *see also Roper v. Simmons*, 543 U.S. 551, 569-570 (2005); *Graham v. Florida*, 560 U.S. 48, 68-69 (2010). "[T]he 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). As explained in *Miller*,

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[1] 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.

"[b]ecause juveniles have diminished culpability and greater prospects for reform . . . 'they are [categorically] less deserving of the most severe punishments.'" 567 U.S. at 471 (quoting *Graham*, 560 U.S. at 68).

Roper and *Graham* noted 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). The Court found that "those [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.'" *Id.* at 472 (quoting *Graham*, 560 U.S. at 68-69); *Roper*, 543 U.S. at 570.

Prior to imposing a life without parole sentence on a juvenile, the sentencer must "follow a certain process," which meaningfully considers youth and how it impacts the juvenile's overall culpability. *Miller*, 567 U.S. at 483. These factors include: (1) the juvenile's "chronological age" and related "immaturity, impetuosity, and failure to appreciate risks and consequences;" (2) the juvenile's "family and home environment that surrounds him;" (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him;" (4) the "incompetencies associated with youth" in dealing with law enforcement and a criminal justice system designed for adults; and (5) "the possibility of rehabilitation." *Id.* at 477-78.

The Supreme Court warned, "[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." *Id.* at 479. As the lower court sentenced Mr. Williams-Bey before *Miller* or *Montgomery* were decided, it could not and did not follow the Supreme Court's guidance on what a proper consideration of the *Miller* factors entails. As such, the sentence the court imposed is deficient until reexamined.

II. A PAROLE HEARING PURSUANT TO CONN. GEN. STAT. § 54-125A IS NOT EQUIVALENT TO AN INDIVIDUALIZED RESENTENCING HEARING AS REQUIRED BY *MILLER* AND *MONTGOMERY*

"Our system depends upon sentencing judges applying their reasoned judgment to each case that comes before them," *Graham,* 560 U.S. at 96 (Roberts, C.J., concurring). One federal court interpreting *Miller* found a life sentence constitutionally infirm when there was no opportunity for a judicial resentencing hearing:

> Placing the decision with the Parole Board, with its limited resources and lack of sentencing expertise, is not a substitute for a judicially imposed sentence. Passing off the ultimate decision to the Parole Board in every case reflects an abdication of judicial responsibility and ignores the *Miller* mandate.

Songster v. Beard, 201 F. Supp. 3d 639, 642 (E.D. Pa. 2016).

A. Connecticut's Parole Hearings Do Not Provide A Meaningful Opportunity For Release

A sentence imposed on a child in a nonhomicide case, whether formally labeled life without parole or not, is unconstitutional if it fails to provide a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75. This meaningful opportunity for release must also be provided to juvenile homicide offenders—except in the rarest of cases where the court has determined, after giving mitigating effect to the circumstances and characteristics of youth, that the child is

irreparably corrupt. *Montgomery v. Louisiana*, 136 S. Ct. 718, 733 (2016).

Although the Supreme Court has not fully defined what constitutes a "meaningful opportunity," it made clear that, to be meaningful, this opportunity must be "realistic." *Graham,* 560 U.S. at 82. Under Public Act 15-84, however, release is only permissible if the Board of Pardons and Parole (BOPP) finds that such release would be consistent with the factors set forth in Section 54-300(c). *See* Conn. Gen. Stat. §§ 54-125a(f) and 54-300(c) ("[t]he primary purpose of sentencing . . . is to enhance public safety while holding the offender accountable to the community," and "sentencing should reflect the seriousness of the offense and be proportional to the harm to victims and the community"). The statute further requires that the benefits of release must outweigh the benefits from continued incarceration. § 54-125a(f)(4). BOPP therefore has full discretion to deny release, even if an applicant has been fully rehabilitated. Because the seriousness of the offense or impact on the victim can always supersede any proof of rehabilitation, Public Act 15-84 fails to provide a meaningful opportunity for release *based on demonstrated maturity and rehabilitation*, as the Eighth Amendment requires.[2]

Various courts have held that parole reviews fail *Graham*'s mandate. *See Hayden v. Keller*, 134 F. Supp. 3d 1000, 1009 (E.D.N.C. 2015) (North Carolina fails to provide meaningful opportunity for release because, *inter alia*, the board fails "to consider 'children's diminished culpability and heightened capacity for change'" (quoting *Miller*, 567

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[2] *See also, e.g., Atwell v. State*, 197 So. 3d 1040, 1049-50 (Fla. 2016) (Florida's system fails to provide meaningful opportunity for release because, *inter alia*, the board is not required to consider *Miller* factors and must "give primary weight to the seriousness of the offender's present criminal offense and the offender's past criminal record"); *Greiman v. Hodges*, 79 F. Supp. 3d 933, 944 (S.D. Iowa 2015) (Board denied parole based solely on the seriousness of the offense, depriving inmate of meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation).

U.S. at 479)), *appeal filed, sub nom. Hayden v. Fowler*, No. 17-7582 (4th Cir. Dec. 4, 2017); *Hawkins v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 30 N.Y.S. 3d 397, 400-01 (N.Y. App. Div. 2016) ("petitioner was denied his constitutional right to a meaningful opportunity for release when the Board failed to consider the significance of petitioner's youth and its attendant circumstances at the time of the commission of the crime").

The California Supreme Court approved the state's parole statute after observing that it requires the board to "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." *People v. Franklin*, 370 P.3d 1053, 1065-66 (Cal. 2016). Unlike California, Connecticut does not require BOPP to give great weight to the mitigating circumstance of youth or determine the extent of change and growth since the offense. Rather, the statute directs BOPP to rely on presentence reports and sentencing transcripts that likely lack mitigating information.[3]

B. The Connecticut Board Of Pardons And Paroles Considers Characteristics Inherent To Youth As Aggravating Factors, In Violation Of *Roper, Graham, Miller,* And *Montgomery*

In concluding that youth have diminished culpability, the U.S. Supreme Court has relied upon an increasingly settled body of research confirming the distinct emotional, psychological, and neurological attributes of youth. *Graham*, 560 U.S. at 68 (confirming that

[3] The BOPP is required to consider the presentence report and sentencing transcript, which, for sentences imposed before *Miller*, are unlikely to consider the diminished culpability of juveniles or the youth-related characteristics required by *Miller*. It is also unlikely that such presentence reports contain the mitigation information that is now required by statute. *See* Conn. Gen. Stat. § 54-91g (mandating that the presentence report of a juvenile convicted of a class A or B felony address "the defendant's age at the time of the offense, the hallmark features of adolescence, and any scientific and psychological evidence showing the differences between a child's brain development and an adult's brain development.")

since *Roper*, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"). For example, one 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.* (2014) Chicago, IL: MacArthur Foundation, p. 3, *available at* http://www.pathwaysstudy.pitt.edu/documents/MacArthur%20Brief%20Give%20Adolescents%20Time.pdf. Most juvenile offenders would no longer be a public safety risk once they reached their mid-twenties, let alone their thirties, forties, fifties, or sixties. *See, e.g., 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; also finding 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").

Contrary to these findings, Conn. Gen. Stat. § 54-125a does not provide an opportunity to assess an individual's maturity and rehabilitation until a minimum of 12 years have passed.[4] While the new statute contains factors that assess an individual's character, background, and history, it does not require meaningful consideration of all of the factors that the Court set forth in *Miller*. *See* Conn. Gen. Stat. § 54-125a(f)(1). *See also Miller*, 567

[4] For juveniles who were sentenced to less than 50 years, Conn. Gen. Stat. § 54-125a provides parole eligibility after they have served 60% of their sentence or after 12 years, whichever is longer, and for juveniles sentenced to more than 50 years, the statute provides parole eligibility after 30 years.

U.S. at 477-78. It also does not require that the Board use instruments designed specifically to assess the risk profiles of those who committed crimes as juveniles. To determine who will be granted parole, the BOPP uses the Reentry Tool (RT)/ Supplement Reentry Tool (SRT) of the Ohio Risk Assessment Instrument. State of Connecticut Board of Pardons and Paroles, http://www.ct.gov/bopp/cwp/view.asp?a=4344&q=510364 (last visited December 12, 2017). The RT assesses the current age of the offender and 18 additional scored items across three domains: 1) criminal history, 2) social bonds, and 3) criminal attitudes and behavioral patterns. University of Cincinnati Center for Criminal Justice, The Ohio Risk Assessment System, p.5-7 *available at* http://www.occaonline.org/pdf/MembersOnly/committees/ORAS%20Complete%20Binder%202-7-10[1].pdf

The tool inappropriately gives weight to categories that unfairly disadvantage young people. For example, Factor 1.1, 'Most Serious Arrest Under Age 18', gives 1 point if the offender was arrested/charged under the age of 18 for a misdemeanor, and 2 points if the first arrest/charge under 18 was for a felony, meaning that all individuals who committed crimes as juveniles eligible for parole under § 54-125a will automatically begin the evaluation with 2 points. *Id.* at 5-9. Similarly, Factor 1.2, 'Age at First Arrest or Charge', allots more points if the individual's first arrest was prior to age 16. Thus, these two factors alone cause all young people to begin the evaluation of their criminal history with at least 3 or 4 points, *id.*, and a score of 4 puts incarcerated individuals into the 'medium risk' category. *Id.*

This scoring system further disadvantages individuals convicted when they were juveniles in the second domain of the instrument, 'social bonds.' Individuals receive a point if they were unemployed at the time of their arrest, *id.* at 5-10, yet young people aged 19

and younger have the highest rates of unemployment in the United States. United States Department of Labor, Bureau of Labor Statistics, October 2017, available at https://www.bls.gov/web/empsit/cpseea10.htm. Factor 2.3, 'Ever Quit a Job Prior to Having Another One,' also disadvantages youth: 0 points are given if the potential parolee has never quit a job without having another one, and 1 point if the potential parolee has quit a job without having another one. *Id.* at 5-11. Quitting a job without first securing another one may indicate one thing when considering adult behavior, but likely means something very different for teenagers who are highly likely to work more periodically rather than have long-term steady employment.

As the RT fails to consider the "mitigating qualities of youth," *see Miller*, 567 U.S. at 476, and instead uses youth as an aggravating factor in two of the three domains considered, it is flawed as applied to those who committed crimes as juveniles, and its scoring is inconsistent with the Supreme Court's mandates.

C. Parole Hearings Do Not Provide Individuals Who Were Convicted As Juveniles With The Protections Present In A Resentencing Hearing

The BOPP is clear, "parole is a privilege and not a right." *See* State of Connecticut, Board of Pardons and Paroles, Parole: An Informational Brochure at 3, *available at* http://www.ct.gov/doc/lib/doc/pdf/paroleGuide.pdf. It is in the sole discretion of the BOPP whether to grant parole, as well as whether or not to allow an incarcerated individual to be considered at another time. *Id.* at 4. Section 54-125a did not change this. The Board can deny a potential parolee for any reason, regardless of the existence of the mitigating circumstances of youth, or proof of rehabilitation, and that individual would have no recompense, as there is no constitutional right to parole release. *See Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 7 (1979).

Nor do the petitioner, or those similarly situated, have a protected liberty interest entitling them to due process during parole hearings. *Id.* While the statute allows for appointment of counsel, it does not explicitly state that counsel may present evidence at the parole hearing. Conn. Gen. Stat. § 54-125a(f)(3). The board may "request testimony from mental health professionals or other relevant witnesses, and reports from the Commissioner of Correction or other persons, as the board may require," *id.*, but if the board doesn't request it, potential parolees have no right to offer evidence, cross-examine opposing witnesses, or call or present witnesses on their own behalf.

Pursuant to the statute, BOPP decisions are final, and individuals who are denied have no right to appeal. Conn. Gen. Stat. § 54-125a(f)(6). Furthermore, Williams-Bey, and others like him, may only have *one* opportunity to seek parole, as it is solely within the discretion of the BOPP whether to grant a new hearing to an individual who has been denied parole. *Id.* at (f)(5). Unlike the finality of a sentence given by a resentencing court, any decisions made by the board are subject to reversal: prior to release, the Board has the authority to rescind or modify a previously granted parole. Parole: An Informational Brochure at 4. Finally, as the current mandates are statutory, they are subject to change based on changes in the legislative body. It follows that petitioners like Williams-Bey, and those similarly situated, will not be guaranteed the hearing *Miller* requires unless a resentencing hearing is mandated.

D. The Substitution Of A Parole Board Review For A Judicial Resentencing Offends The Separation Of Powers Doctrine

Unlike judges, who are neutral decision-makers bound to safeguard the constitutional rights of defendants who come before them, parole boards are bound by no such mandates. Therefore, their decision-making process bears little resemblance to that of

a judge imposing a constitutionally-sound sentence. "Few, perhaps no, judicial responsibilities are more difficult than sentencing. The task is usually undertaken by trial judges who seek with diligence and professionalism to take account of the human existence of the offender and the just demands of a wronged society." *Graham*, 560 U.S. at 77. *Graham* explained that "[o]ur system depends upon sentencing judges applying their reasoned judgment to each case that comes before them," and that "the whole enterprise of proportionality review is premised on the 'justified' assumption that 'courts are competent to judge the gravity of an offense, at least on a relative scale.'" *Id.* at 96 (citing *Solem v. Helm*, 463 U.S. 277, 292 (1983)). The Supreme Court rightfully assumed that sentencing is an essential judicial function, which judges are specially qualified to undertake. Attempting to place this power in the hands of the parole board undermines the legitimacy of the process. The Connecticut legislature's attempt to assign a judicial function to the parole board through Section 54-125a offends the separation of powers doctrine.

III. CONCLUSION

For the foregoing reasons, Juvenile Law Center respectfully requests that this Court overturn the lower court's ruling and hold that a juvenile offender's parole eligibility under Public Act 15-84 does not adequately remedy the constitutional harm.

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CERTIFICATION

Pursuant to Conn. Prac. Bk. §§ 62-7 and 67-2 the undersigned certifies that the attached brief is a true copy of the electronically submitted brief, and that true copies were mailed first class postage prepaid this 21st day of December, 2017, to:

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It also is certified that the brief and appendix comply with all the provisions of Conn. Prac. Bk. §67-2 including electronic delivery to all counsel of record.

The undersigned attorney hereby certifies that this brief does not contain any name or other identifying information that is prohibited from disclosure by rule, statute, court order or case law; and that the brief complies with all provisions of this rule pursuant to Conn. Prac. Bk.§67-2.

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