No. 16-3820

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA

Appellee,

v.

COREY GRANT,

Defendant/Appellant.

On Appeal from the United States District Court for the District of New Jersey
(No. 2:90-cr-00328-JLL)

On Rehearing En Banc from the Decision in United States v. Grant, 887 F.3d 131
(3d Cir. 2018)

BRIEF OF *AMICUS CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF APPELLANT COREY GRANT

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity. The Lawyers' Committee's principal mission is to secure equal justice for all through the rule of law, targeting in particular the inequities confronting African-Americans and other racial and ethnic minorities. The Lawyers' Committee's Criminal Justice Project seeks to remedy racial disparities within the criminal justice system that fuel mass incarceration.[1]

ARGUMENT

The Eighth Amendment forbids a life without parole sentence for a crime committed as a child unless an individualized consideration finds the child to be permanently incorrigible. *Miller v. Alabama*, 567 U.S 460 (2012). Many juvenile life without parole sentences, however, have been marred by racial bias. From the late 1980s to the late 1990s, a "super-predator" myth posited that a new generation of mostly African-American children would be uniquely depraved and violent,

[1] Pursuant to Fed. R. App. P. 29(a)(4), all parties have consented to this brief's filing. No party's counsel authored this brief in whole or in part. No party or party's counsel, or any other person, other than the *amicus curiae* or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

spurring extreme juvenile sentencing laws and practices that dramatically increased both the overall number of children serving such sentences and the racial disparities in such sentences. The theory, however, has proved false, with its own proponents publicly recanting and calling for constitutional regulation of juvenile life without parole sentences, and the Supreme Court responded accordingly in *Miller*. For these reasons, courts undermine the individualized sentencing requirement of *Miller* when, as the district court in this case, they leave such sentences, whether technical or "de facto," in place for defendants not found to be "permanently incorrigible."

I. A Racialized "Super-Predator" Myth Produced the Legislative Changes That Led to the Explosion of Life Without Parole Sentences for Children

Beginning in the mid-1980s and continuing through the mid-1990s, after generations of moving towards a non-punitive system for child offenders, *see In re Gault*, 387 U.S. 1, 15 (1967), the focus of juvenile justice began reverting away from rehabilitation and back towards punitiveness. Responding to a perceived increase in juvenile homicides, academics theorized that children were becoming increasingly violent and morally depraved and predicted that the trends would grow even more severe in the coming years. John Dilulio, a prominent Princeton political scientist, famously dubbed the coming generation "super-predators." *The Coming of the Super-Predators*, The Weekly Standard (Nov. 27, 1995). The next

generation of American children, Dilulio warned, would be "perfectly capable of committing the most heinous acts of physical violence for the most trivial reasons . . . they will do what comes 'naturally:' murder, rape, rob, assault, burglarize, deal deadly drugs." *Id.* James Alan Fox, the Dean of the College of Criminal Justice at Northeastern University, drafted a report for the Department of Justice in 1996 that warned of a "wave of youth violence that will be even worse than that of the past ten years," suggesting that the wave would be a result of inner-city America's purported moral decay. James Alan Fox, Bureau of Just. Stat., *Trends In Juvenile Violence: A Report to the United States Attorney General on Current and Future Rates of Juvenile Offending* (1996).

The "super-predator" theory was explicitly racial. Dilulio predicted that the problem of super-predators would start in "black inner-city neighborhoods" and then "spill over into upscale central-city districts, inner-ring suburbs, and even the rural heartland." Dilulio, *The Coming of the Super-Predators*. He posited that an increase in "moral poverty" was the explanation for an increase in youth crime, claiming that African-American families of the Jim Crow South "never experienced anything remotely like the tragic levels of homicidal youth and gang violence that plague some of today's black inner-city neighborhoods." *Id.* His proposed solution was, in addition to incarceration, "religion," arguing that African-American churches "remain the last best hope for rebuilding the social and

spiritual capital of inner-city America," which was where the super-predator problem would be concentrated. *Id.* Fox's report also relied on explicitly racial theories, as his report predicted a "wave of youth violence" in part because the overall population growth of African-American teenagers was rising faster than the rate of white teenagers, which he projected to result in more murders. Fox, *Trends In Juvenile Violence*.

Dilulio elaborated on why he believed the coming wave of super-predators would be mostly African-American in an essay the following year, *My Black Crime Problem, and Ours*:

> My black crime problem, and ours, is that for most Americans, especially for average white Americans, the distance is not merely great but almost unfathomable, the fear is enormous and largely justifiable, and the black kids who inspire the fear seem not merely unrecognizable but alien. . . . [T]hink how many inner-city black children are without parents, relatives, neighbors, teachers, coaches, or clergymen to teach them right from wrong, give them loving and consistent discipline, show them the moral and material value of hard work and study, and bring them to cherish the self-respect that comes only from respecting the life, liberty, and property of others. Think how many black children grow up where parents neglect and abuse them, where other adults and teenagers harass and harm them, where drug dealers exploit them. Not surprisingly, in return for the favor, some of these children kill, rape, maim, and steal without remorse.

City Journal, (Spring 1996).

Politicians adopted Dilulio's theory and echoed and amplified his rhetoric. First Lady Hillary Clinton spoke in favor of more punitive criminal laws, saying of young street gang participants, "They are often the kinds of kids that are called

superpredators. No conscience, no empathy. We can talk about why they ended up that way, but first, we have to bring them to heel." Jonathan Capehart, *Hillary Clinton on 'Superpredator' Remarks*, The Washington Post (Feb. 25, 2016). Congressman Bill McCollum of Florida testified, "[B]race yourself for the coming generation of 'super-predators.'" Juvenile Justice and Delinquency Prevention Act: Hearing Before the House Subcomm. on Early Childhood, Youth and Families, 104th Cong. 90 (1996). Presidential candidate Bob Dole proclaimed in a 1996 radio address, "Unless something is done soon, some of today's newborns will become tomorrow's super-predators—merciless criminals capable of committing the most vicious acts for the most trivial of reasons." Associated Press, *Dole Seeks to Get Tough on Young Criminals* (July 7, 1996). Dilulio was invited to the White House to discuss his theories of juvenile crime with the president over dinner. Kevin Drum, *A Very Brief History of Super-Predators*, Mother Jones (Mar. 3, 2016).

Legislators acted on these theories, enacting sweeping policy changes in response to the purported coming wave of child super-predators. "Between 1992 and 1999, 49 states and the District of Columbia passed laws making it easier for juveniles to be tried as adults." Jessica Sharp & Christy Sharp, *Disproportionate Minority Contact in the Juvenile Justice System* (2005); *see also* Brief of Jeffrey Fagan, et al., *Miller v. Alabama*, 10-9646, 10-9647 at 15-18 (2012). Moreover,

between 1992 and 1995, 48 states and the District of Columbia made substantive changes to criminal laws governing juveniles who committed violent crimes. Patricia Torbet, et al., *State Responses to Serious and Violent Juvenile Crime* at xv (1996). By 1999, most states had *mandatory* transfer of juvenile cases to adult criminal court for certain serious offenses, such as the ones that could lead to a life without parole sentence. Barry Feld, *A Slower Form of Death: Implications of* Roper v. Simmons *for Juveniles Sentenced to Life Without Parole*, 22 Notre Dame J. L. Ethics & Pub. Pol'y 9, 13 (2008).

Although judges were often forced to give children new and lengthy mandatory minimums as a result of these legislative changes, even insomuch as they maintained discretion they too were influenced by the "super-predator" theory. In one example, Keith Belcher of Connecticut committed a serious but non-homicide offense at the age of fourteen in December 1993. *State v. Belcher*, No. CR940100508, 2017 WL 4508623, at *1 (Conn. Super. Ct. Aug. 24, 2017). At sentencing, his judge described the research of Dilulio and categorized Belcher as a "superpredator" on the basis of Dilulio's work. *Id.* at 3. Citing Dilulio, the judge sentenced the fourteen-year-old to sixty years in prison. *Id.*

These statutory and cultural changes resulting from the fear of a coming wave of mostly Black super-predators had a profound effect on the criminal sentencing of children. Although juvenile homicides had peaked by 1994, in 1993

the rate of juvenile life without parole sentences began and continued to grow throughout the 1990s. The Phillips Black Project, *No Hope: Re-Examining Lifetime Sentences for Juvenile Offenders* 12 (2015); *see also* John R. Mills, et. al., *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 Am. U. L. Rev. 535, 562 (2016). By 1999, the rate at which juveniles were sentenced to life without parole per juvenile homicide had increased nearly *tenfold* from the beginning of the decade. The Phillips Black Project, *No Hope*, at 12.

The coming wave of youth violence, however, never arrived. Violent juvenile crime began dropping in the mid-1990s and have continued declining to present. *See* Alexia Cooper & Erica L. Smith, Bureau of Just. Stat., *Homicide Trends in the United States*, 1980-2008 2 (2011). There is no evidence that the new punitive laws themselves played any role in the decline, either as a source of deterrence or incapacitation. *See* Franklin Ziming & Stephen Rushin, *Did Changes in Juvenile Sanctions Reduce Juvenile Crime Rates? A Natural Experiment*, 11 Ohio St. J. Crim. L. 57, 69 (2013); *see also* Brief of Jeffrey Fagan at 29-36. Dilulio and Fox themselves repudiated the notion of the "super-predator," going so far as to sign an amicus brief in *Miller v. Alabama* in support of the juvenile defendant Evan Miller, claiming that life without parole sentences were a product of the fear of a wave of "super-predators" that did not occur. *See* Brief of Jeffrey Fagan. The

brief explained that virtually every state legislature had revamped its laws on juvenile crime in the 1990s "in an environment of hysteria." *Id.*; *see also State v. Watkins*, 423 P.3d 830, 840 (Wash. 2018) (Yu, J., dissenting) (explaining that "the unfounded fears of juvenile superpredators gripped the nation in the 1990s"); *United States v. Sheppard*, No. 96-00085-04-CR-W-FJG, 2017 WL 875484, at *1 (W.D. Mo. Mar. 3, 2017) (same); *Mendez-Alcaraz v. Gonzales*, 464 F.3d 842, 848 (9th Cir. 2006) (Ferguson, J., dissenting) (same).

II. There Are Vast Racial Disparities in the Administration of Life Without Parole Sentences

The growth in life without parole sentences for children was founded on a myth targeting Black children, so it is no surprise that vast racial disparities exist in who is serving such sentences. There are more than twice as many African-Americans serving juvenile life without parole sentences in the United States than whites doing so, not per capita but in absolute terms. Mills, *Chronicling the Rapid Change* at 575. The disparity is not merely a consequence of racial disparities in arrest rates—while five percent of African-Americans arrested as a juvenile for murder are sentenced to life without parole, only three percent of whites are. *Id.* at 578. This racial gap, even when controlled for arrest rates, existed through the 1980s but began increasing in 1992, at approximately the same time the "super-predator" myth began growing in prominence. *Id.*

In some states particularly significant to the national spread of life without parole, the disparity is even higher. Pennsylvania, for example, as of 2016 had more people serving juvenile life without parole sentences than any state in the country. *Id.* at 603-04. While 22.1% of its general population is nonwhite, 79.5% of the juvenile life without parole population is. *Id.* at 579.

III. The Taint of Racial Discrimination in the Nation's Juvenile Sentencing Laws Renders "De Facto" Life Without Parole Sentences Illegitimate for Children Not Found to Be "Permanently Incorrigible"

The Supreme Court has long used the Eighth Amendment to regulate racially discriminatory punishments, even if not doing so explicitly. The Supreme Court first extensively articulated the proportionality theory of the Eighth Amendment in regulating capital punishment in the 1970s and "could not have avoided consciously reflecting on the racial history of capital punishment in America." Carol Steiker & Jordan Steiker, *Courting Death*, 78 (2016). A racial justice organization, the NAACP Legal Defense Fund, led this campaign during its initial years, and many of the cases were argued explicitly on racial discrimination theories. *Id.* For example, the Court first invalidated a punishment for a category of defendants on proportionality grounds for adults convicted of rape and sentenced to death in *Coker v. Georgia*, 433 U.S. 584 (1977), and "Georgia's continued authorization of death for rape was simply impossible to explain or understand

without examining the racial history surrounding that practice." Steiker, *Courting Death* at 97.

In recent years, the United States Supreme Court has used this same proportionality theory to place constitutional limits on sentences given to children, including prohibiting life without parole sentences for juvenile offenders who were sentenced under mandatory regimes in *Miller*. 567 U.S. at 479. In addition to its substantive holding, *see Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016), *Miller* held procedurally that mandatory life without parole statutory schemes were unconstitutional as applied to children, as the harshest punishments require "individualized sentencing." 567 U.S. at 483.

Racial discrimination is antithetical to *Miller*'s constitutional requirement of individualized consideration, as it is a classification-based form of bias and, furthermore, one that is uniquely "pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). The United States Supreme Court has engaged in what it has described as "unceasing efforts to eradicate racial discrimination" from various aspects of the criminal justice system. *Batson v. Kentucky*, 476 U.S. 79, 85 (1986) (prohibiting race discrimination in use of peremptory strikes); *see also, e.g.*, *Buck v. Davis*, 137 S. Ct. 759, 775 (2017) (holding that a constitutionally adequate defense counsel cannot put on evidence that a defendant's race "disproportionately predisposed him to violent conduct");

Turner v. Murray, 476 U.S. 28 (1986) (holding that defendants are uniquely constitutionally entitled to question jurors about their potential racial biases); *Whitus v. Georgia*, 385 U.S. 545 (1967) (prohibiting racial discrimination in petit jury selection); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) (prohibiting racial discrimination in grand jury selection).

Permitting "de facto" life sentences for children who had not been found to be "permanently incorrigible" would undercut the ability of *Miller* to replace a racially biased system with individualized consideration of the defendant's ability to reform. Sentences of 65 years, as in this case, may not technically be life without parole but the material result would be identical for most of the disproportionately African-American children who were sentenced under a racially biased regime and will grow old and likely die in prison before their first opportunity at parole.

CONCLUSION

This Court should reverse the district court's imposition of a "de facto" life sentence as violating the Eighth Amendment.

Dated: December 28, 2018

Respectfully submitted,

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COMBINED CERTIFICATIONS

1. Pursuant to Third Circuit Local Appellate Rule 28.3(d), I certify that the undersigned counsel is a member of the Bar of the United States Court of Appeals for the Third Circuit.
2. I further certify that this brief complies with the type and volume limitations, the brief is proportionally spaced, has a typeface of 14 points, and contains 2,485 words, excluding those parts exempted by Fed. R. App. P. 32, according to the word count feature of Microsoft Word.
3. I certify that the text of the electronic brief is identical to the text in the paper copies.
4. I also certify that a virus check was performed and no virus was detected.

Dated: December 28, 2018

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d), I hereby certify that on December 24, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

In addition, I had mailed 25 copies of the foregoing to the Office of the Clerk of Court.

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