IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellee	:	Case No. 2019-0655
VS.	:	On APPEAL from the Mahoning County Court of Appeals Seventh Appellate District
KYLE PATRICK, Defendant-Appellant	:	C.A. Case No. 17 MA 0091

BRIEF OF AMICUS CURIAE, OFFICE OF THE OHIO PUBLIC DEFENDER, JUVENILE LAW CENTER, ET. AL.

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Statements of Interest of Amicus Curiae

The Office of the Ohio Public Defender ("OPD") is a state agency, designed to represent criminal defendants, adults, and juveniles, and to coordinate defense efforts throughout Ohio. The OPD, through its Juvenile Department, represents juveniles who have been committed to the Ohio Department of Youth Services and to the Ohio Department of Rehabilitation and Corrections, including juveniles who have been sentenced to life after being prosecuted as adults. Like this Court, the OPD is interested in the effect of the law that this case will have on parties who are or may someday be involved in similar litigation. To this end, the OPD supports the fair, just, and correct interpretation and application of *Graham*, *Miller* and its progeny, to the sentences of adolescent offenders in this state.

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

The **Central Juvenile Defender Center** ("CJDC") is a public interest organization that works to improve access to counsel and quality of representation for youth in the juvenile justice system. CJDC provides training, support, and technical assistance to juvenile defenders in Kentucky, Ohio, Tennessee, Indiana, Missouri, Kansas, and Arkansas. CJDC is one of 9 regional affiliates of the National Juvenile Defender Center in Washington, D.C. CJDC has participated as Amicus Curiae before federal and state courts throughout our region.

Children's Law Center has worked on behalf of adolescents in a variety of settings, including adolescents involved in the juvenile and criminal justice systems. The Children's Law Center, Inc. (CLC) is a non-profit organization committed to the protection and enhancement of the legal rights of children. CLC strives to accomplish this mission through various means, including providing legal representation for youth and advocating for systemic and societal change. For 30 years, CLC has worked in many settings, including the fields of special education, custody, and juvenile justice, to ensure that youth are treated humanely, can access services, and are represented by counsel. CLC advocates on behalf of youth prosecuted in juvenile and adult court, including ensuring that youth receive constitutionally required protections and due process in delinquency and criminal court proceedings.

The **Cuyahoga County Public Defender's Office** was established in 1977 to provide legal services to indigent adults and children charged with violations of the criminal code in Cuyahoga County. The 100-plus member staff of the Cuyahoga County Public Defender office includes attorneys, law clerks, paralegals, social workers,

investigators, and support staff. In total, the office handles over 10,000 cases annually, including misdemeanor cases in Cleveland Municipal Court, felony cases in the Cuyahoga County Court of Common Pleas, juvenile cases in the Juvenile Division, as well as appeals from all the foregoing courts and surrounding municipal courts. The office has represented and currently represents a sizable number of children treated as adults for the offenses of murder and aggravated murder. Accordingly, a significant number of the Public Defender's present and future clients would be directly impacted by the outcome of the present litigation.

The **National Juvenile Defender Center** ("NJDC") was created to ensure excellence in juvenile defense and promote justice for all children. NJDC responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. NJDC gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice. NJDC provides support to public defenders, appointed counsel, child advocates, law school clinical programs, and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural, and tribal areas. NJDC also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building, and coordination. NJDC has participated as Amicus Curiae before the United States Supreme Court, as well as federal and state courts across the country.

The **Schubert Center for Child Studies** ("Schubert Center") is an academic center in the College of Arts and Sciences at Case Western Reserve University ("CWRU") which bridges research, practice, policy and education for the well-being of children and adolescents. The Schubert Center Faculty Associates includes a group of approximately 100 researchers from various disciplines across CWRU with a shared interest in child-related research and connecting research with practice and policy to improve child well-being and to create knowledge and approaches that are generalizable to a larger population of children. The Schubert Center is interested in ensuring that public policies and legal determinations impacting children are informed by reliable research, aligned with principles of child and adolescent development and consistent with professional practice promoting child well-being. Toward this end, the Schubert Center has been engaged in state level policy reforms seeking to ensure that legal proceedings, sentencing and opportunities for rehabilitation involving youth are informed by an understanding of adolescent development and brain science. As these issues are directly addressed by this case, particularly in the court's understanding of what is considered a "meaningful opportunity" for a teenager, the implications of this decision are of distinct concern to the Schubert Center.

Statement of the Case and Facts

Kyle Patrick was 17 years old in 2012, when he was charged with multiple felony offenses, including aggravated murder and aggravated robbery. *State v. Patrick*, 7th Dist. Mahoning No. 17MA0091, 2019-Ohio-1189, ¶ 2. Kyle initially plead guilty to amended charges; but, four days later, filed a pro se motion to withdraw his plea because he did not understand the implications of his admission and of the accompanying 16-years-to-life sentence. *Id.* at ¶ 4; *State v. Patrick*, 7th Dist. Mahoning No. 14MA93, 2016-Ohio-3283, ¶ 62. The trial court denied the motion; but, the Seventh District reversed and remanded for further proceedings. *Id.* at ¶ 5.

On remand, a jury found Kyle guilty of the original charges. *Patrick*, 7th Dist. Mahoning No. 17MA0091, 2019-Ohio-1189, at ¶ 7.[1] The trial court then sentenced him to 33 years to life, in accordance with Ohio law, which mandates a life-tail sentence for aggravated murder convictions. *Id.*; R.C. 2929.02(A)-(B). Kyle's adult codefendant had been sentenced to 13 years after pleading to involuntary manslaughter. *Id.* at ¶ 17. Kyle timely appealed and challenged the constitutionality of his life-tail sentence. *Id.* at ¶ 8-20. Specifically, he argued that the sentencing court failed to consider his youth as a mitigating factor and failed to apply recent U.S. Supreme Court precedent when imposing a life sentence in his case. *Id.*

On review, the Seventh District found that Kyle's sentence comported with applicable statutory ranges under R.C. 2929.03(A) and 2941.145(A). *Patrick*, at ¶ 12.

[1] The record reflects that the trial court instructed the jurors on complicity, but that the jury did not make an express finding as to whether Kyle or his co-defendant was the shooter.

Concerning his constitutional challenge, the appellate court found that *Roper v. Simmons* did not apply to Kyle's case because "appellant was not sentenced to death." *Id.* at ¶ 13, citing *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). Further, the Seventh District determined that the U.S. Supreme Court's decision in *Graham v. Florida* was distinguishable because *Graham* concerned the imposition of life-without-parole sentences for juveniles who were convicted of nonhomicide offenses. *Id.* at ¶ 14-15. In addition, the court held that "[p]ursuant to R.C. 2929.12, a trial court is not required to consider the age of a defendant when issuing a felony sentence. While R.C. 2929.12(C) and (E) provide that 'any other relevant factors' should be considered, the statute itself does not mandate the sentencing court to consider the defendant's age." *Id.* at ¶ 16. Accordingly, the court overruled Kyle's challenge and found that his sentence was not otherwise contrary to law. *Id.* at ¶ 18-19. Kyle timely appealed; and, this Court accepted review. The question before this Court is whether such a sentence, imposed without consideration of a juvenile's youth, is constitutional.

Argument in Support of Appellant's Proposition of Law:

Introduction

"The most important attribute of the juvenile offender is the potential for change." *State v. Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, ¶ 42. In recent years, the U.S. Supreme Court has repeatedly held that "[i]t remains true that '[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.'" *Id.* at ¶ 42 quoting *Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

Accordingly, the Eighth Amendment protects child offenders categorically "from a final determination while they are still youths that they are irreparably corrupt and undeserving of a chance to reenter society." *Moore* at ¶ 42.

The distinct attributes of youth have been the defining principle upon which the Court has issued multiple categorical prohibitions of certain punishments for children. *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1(2005)(abolishing the death penalty for juvenile offenders); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010)(finding life-without-parole sentences for non-homicide juvenile offenders unconstitutional) and *Miller v. Alabama*, 567 U.S. 460 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012)(holding that mandatory life-without-parole sentences for juvenile homicide offenders violate the Eighth Amendment). In *Miller*, the U.S. Supreme Court made it clear that mandatory life sentences for children who commit murder are unconstitutional. *Miller* at 489. A sentencing court must have the opportunity to consider a child's age and age-attendant circumstances. *Id.* And, relying on *Miller's* guidance, this Court expressly held that even in non-mandatory sentencing schemes, like in Ohio, a sentencing court must consider youth as a mitigating factor. *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, ¶ 19.

Here, the trial court did not consider Kyle Patrick's youth as a mitigating factor when it sentenced him to a life in prison with the possibility of parole at age 50. Not only is this contrary to Ohio law, but it also contravenes the rationale of the U.S. Supreme Court in each of the above-cited cases. Accordingly, Amici urge this Court to adopt the Petitioner's Proposition of Law or otherwise hold that such sentences are in violation of

the Eighth Amendment's prohibition against cruel and unusual punishments.

Petitioner's Proposition of Law: Imposition of any life imprisonment sentence upon a juvenile offender without taking into consideration factors commanded by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Constitution of Ohio violates those provisions.

A. A juvenile offender's sentence is unconstitutional when the trial court does not consider youth when it sentences him to a life tail.

The Eighth Amendment states that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, at ¶ 31. "A key component of the Constitution's prohibition against cruel and unusual punishment is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" *Id.*, quoting *Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910). In truth, "[p]rotection against disproportionate punishment is the central substantive guarantee of the Eight Amendment." *Id.*, quoting *Montgomery v. Louisiana*, __ U.S. __, 136 S.Ct. 718, 732-733, 193 L.Ed.2d 599 (2016). Proportionality review can involve the length of sentence given in a particular case or categorical restrictions. *Moore* at ¶ 32. And, in recent years, the U.S. Supreme Court has made several categorial restrictions pertaining to the treatment of juvenile offenders who are prosecuted as adults.

For example, in 2005, the U.S. Supreme Court prohibited the imposition of the death penalty for juvenile offenders. *Roper*, 543 U.S. at 551, 125 S.Ct. 1183, 161 L.Ed.2d 1. Five years later, the High Court prohibited the imposition of life-without-parole sentences for juvenile non-homicide offenders. *Graham*, 560 U.S. at 75, 130 S.Ct. 2011, 176

L.Ed.2d 825. And, more recently, the Court prohibited the mandatory imposition of life without parole for juvenile homicide offenders. *Miller*, 567 U.S. at 460, 132 S.Ct. 2455 183 L.Ed.2d 407.

The U.S. Supreme Court has repeatedly reiterated that "a child's age is far 'more than a chronological fact.'" *J.D.B. v. North Carolina*, 564 U.S. 261, 263, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011). "It is a fact that generates commonsense conclusions about behavior and perception." *Id.* These conclusions directly impact a child's culpability and apply to all children as a class. *Id.* In *Miller*, the Court explained that a trial court must consider a child's age *and* age-related characteristics before imposing the harshest punishment. *See Miller*, 567 U.S. at 489, 132 S.Ct. 2455, 183 L.Ed.2d 407. In *Miller*, the Supreme Court strongly emphasized not only a child's age, but "the wealth of characteristics and circumstances attendant to it." *Id.* at 476-477. And, in *Long*, this Court held that the record must also show that such consideration occurred. *Long*, 138 Ohio St.3d 478, 8 N.E.3d 890, 2014-Ohio-849, at ¶ 11.

Children are different from adults in the following ways, and sentencing should reflect consideration of those differences:

- "[C]hildren have a 'lack of maturity and an underdeveloped sense of responsibility' leading to recklessness, impulsivity, and heedless risk-taking." *Miller* at 471, quoting *Roper*, 543 U.S. at 569, 125 S.Ct. 1183, 161 L.Ed.2d 1.

- "[C]hildren '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." *Miller* at 471.

- "[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].'" *Id.*, citing *Roper* at 570.

The studies cited by the U.S. Supreme Court demonstrate that children's "transient rashness, proclivity for risk, and inability to assess consequences" not only lessen a child's "moral culpability," but also "enhance[] the prospect that as the years go by and neurological development occurs, [the] 'deficiencies will be reformed.'" (Citations omitted). *Miller* at 472. "[T]he case for retribution is not as strong with a minor as with an adult." *Id.* at 472. A child's age is an important mitigating factor in sentencing because it explains hallmark characteristics of youth that impact culpability. *See* R.C. 2929.11(A)-(B). And, the passage of time, coupled with appropriate services, significantly decreases the likelihood of recidivism for children.

Accordingly, it is constitutionally imperative that a child's prospect for change be considered at sentencing. *See Montgomery*, __ U.S. ___, 136 S.Ct. 718, 193 L.Ed.2d 599, 618 (acknowledging that "*Miller* took as its starting premise the principle * * * that 'children are constitutionally different from adults for purposes of sentencing'"). The imposition of a 33-year-to-life sentence on a juvenile offender does not reflect consideration of the attendant circumstances of the child's youth.

B. The future possibility of discretionary parole is not an adequate substitute for individualized sentencing.

A life sentence, even with the possibility of receiving a future discretionary parole that will itself carry ongoing penal supervision, is one of the harshest penalties the criminal justice system imposes. Therefore, imposing such a sentence on a 17-year-old

child, with no consideration for his young age and age-attendant characteristics, cannot be squared with the Supreme Court and this Court's recognition that "children are constitutionally different from adults for purposes of sentencing" when that sentence could confine the child in prison forever. *Miller*, 567 U.S. at 471; *Long* at ¶ 11.

Ohio's capital sentencing scheme under R.C. 2929.03 mandates life in prison for both adult and child alike. The only discretion a judge has is whether to allow the possibility of parole, if at all, which is set at 20, 25, or 30 years. R.C. 2929.03(A). Even the grant of a possibility of parole, however, obscures the reality that this is in more than just name, a lifetime sentence. The opportunity for parole is at best an illusory promise. The realities of the parole system, of which Ohio's is no exception, make a life sentence with the possibility of parole a wholly inadequate Eighth Amendment safeguard to obviate the individualized sentencing that *Miller* requires for juveniles. By refusing to make youth and its attendant circumstances relevant to the imposition of a life sentence, Ohio's mandatory capital sentencing scheme "poses too great a risk of disproportionate punishment." *Id.* at 479. Parole does not and cannot ameliorate this risk.

Judges, who are constitutionally bound to safeguard the rights of children who come before them have no say in who actually serves the full life term and who is released early on parole. Instead, the Ohio Parole Board, part of the executive branch, has complete discretion in determining who and how a child gets paroled. *See Tomlin v. Ohio Adult Parole Authority*, 10th Dist. Franklin App. No. 01AP-807 (Jan. 31, 2002) ("Ever since parole has existed in the state of Ohio, the executive branch (the OAPA) has had absolute discretion over the time that an offender has served on parole."). Parole Board members

in Ohio are appointed by the Director of Rehabilitation and Correction under R.C. § 5149.02. The Director is appointed by the governor. Given the political nature inherent in its formation, it is unavoidable that external politics likely play a role in who gets released.

For exactly these reasons, the American Law Institute ("ALI") has been highly critical of the parole board system: "[t]he American history of parole boards as releasing authorities has been bleak ... and in recent years parole boards have proven highly susceptible to political influences." ALI, Model Penal Code: Sentencing, Discussion Draft No. 2, at 90 (Apr. 8, 2009); *see also* ALI, Model Penal Code: Sentencing, Discussion Draft No. 3, at 4 (Mar. 29, 2010) (ALI 2010) ("There are many instances in which the parole-release policy of a jurisdiction has changed overnight in response to a single high-profile crime."). The ALI has gone even further, calling parole boards "failed institutions," and claiming that "no one has come forward with an example in contemporary practice, or from any historical era, of a parole-release agency that has performed its function reasonably well." ALI 2010, at 4.

Ohio's own parole system offers a useful example of how parole boards are inadequate safeguards for Eighth Amendment abuses. Earlier this year, Governor-elect Mike DeWine appointed Annette Chambers-Smith to lead the Ohio Department of Rehabilitation and Correction after a former Parole Board member publicly rebuked the Board as being dysfunctional and lacking transparency and accountability.[2] Statistics

[2] Laura A. Bischoff, *Gov-elect DeWine makes more cabinet picks, including prison veteran to lead DRC,* Dayton Daily News, Jan. 3, 2019 (available at:

appear to support these claims. Between 1999 and 2015, the number of incarcerated people in Ohio released on parole each year dropped from thousands to dozens.[3] Laura A. Bischoff, *Parole releases decline substantially in Ohio*, Dayton Daily News, October 10, 2015 (available at: https://www.daytondailynews.com/news/state--regional/parole-releases-decline-substantially-ohio/vA7R8p2nwojXCY1jYJBbcN/). In 1998, 5,488 prisoners were paroled while in 2013, just 61 received parole and only after serving an average of 18 years in prison, far longer than in previous decades. *Id.* Meanwhile, between 2011 and October 2018, the Parole Board granted release for just 1,076 inmates out of the 10,575 hearings it held - a release rate of just 10.2 percent. Laura A. Bischoff, *Ohio parole board under fire from victims, inmates and lawmakers,* Dayton Daily News, April 7, 2019

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https://www.daytondailynews.com/news/gov-elect-dewine-makes-more-cabinet-picks-including-prison-veteran-lead-drc/DYb88WxKZjZ1aiWRDsb2MP/); Laura A. Bischoff, *Ohio Parole Board member quits, calls agency toxic and secretive*, Dayton Daily News, Jan. 19, 2019 (available at: https://www.daytondailynews.com/news/ohio-parole-board-member-quits-calls-agency-toxic-and-secretive/ByJ9WXUeoJOFFhhr8dQP8M/). The former Board member, also a former state representative, stated that she "witnessed strongly biased opinions regarding cases, unprofessional behavior, unethical decisions, and a frighteningly unfair practice of tribal morality." *Id.* She also alleged that the Board frequently "emasculated" black men who came before it and that the Board was "harsher and stricter with people of color." Jeremy Pelzer, *Ohio Parole Board is secretive and 'frighteningly unfair,' former member Shirley Smith says*, Cleveland.com, Jan. 23, 2019 (available at: https://www.cleveland.com/politics/2019/01/ohio-parole-board-is-secretive-and-frighteningly-unfair-former-member-shirley-smith-says.html).

[3] The drastic drop in parole rates was not unique to Ohio; rather Ohio was part of a larger national trend favoring lengthier and more punitive incarceration, and much less parole and early release. Sharon Dolovich, *Creating the Permanent Prisoner, in Life Without Parole: America's New Death Penalty?* 96, 110-11 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012) (Dolovich) ("What in the middle decades of the 20th century was a meaningful process in which parole boards seriously considered individual claims of rehabilitation has become in most cases a meaningless ritual in which the form is preserved but parole is rarely granted.")

(available at: https://www.daytondailynews.com/news/state--regional-govt--politics/ohio-parole-board-under-fire-from-victims-inmates-and-lawmakers/v3iPhe6kmV9wTm8SOxCpzO/.); *see also* Ohio Adult Parole Authority, Yearly Parole Board Reports (available at: https://drc.ohio.gov/reports/parole).

In Ohio, as in most states, an individual is not entitled to release on parole. The decision to deny or grant parole is also not subject to judicial review. The Parole Board in Ohio can deny the requested relief for any constitutionally permissible reason or for no reason at all. *Mayrides v. Ohio State Parole Auth.*, 10th Dist. Franklin App. No. 97APE08-1035 (April 30, 1998). Ohio's system is untenable with the Eighth Amendment. It permits sentences of such severe magnitude without the consideration required by U.S. Supreme Court precedent and it abdicates the constitutional responsibility of sentencing courts by empowering the Parole Board with the sole authority to correct an unconstitutional sentence.

Contrary to the requirements of constitutional scrutiny, the decision of whether a child receives parole often just comes down to how the child behaved in prison. The denial of parole in most cases effectively punishes a child for a status offense, *e.g.*, being an inmate who fails to conform to prison rules. It is not hard to conceive of a prison record that would lead to parole being denied despite other evidence of a child's rehabilitation. This would lead to the child being punished as an adult, not for their original involvement in the underlying offense, but rather for being a non-conforming inmate, a status that can be arbitrarily assigned to them. *See generally Robinson v. California*, 370 U.S. 660, 666, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). Thus, a mandatory life maximum sentence

creates the very real possibility that a child who fails to conform to prison rules will serve a life without parole sentence. Such a result would offend Due Process and the Eighth Amendment. U.S.CONST., Amend, V, VIII, XIV. As the Supreme Court has long recognized, "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense." *Graham*, 560 U.S. at 71 (citing *Ewing v. California*, 538 U.S. 11, 25, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003) (plurality opinion)).

Therefore, the Ohio Parole Board's unchallengeable parole decision, where as a matter of law there is no expectation of release, cannot possibly meet the Eighth Amendment's requirement that children be protected from the types of disproportionate sentencing identified in *Miller* with mandatory life sentences. Parole was not designed to comply with these constitutional requirements, and it clearly does not do so. Just as it would be unthinkable for a prosecutor's sentencing preferences to be an adequate Eighth Amendment substitute for a judge's considered determination, relying on parole only involves "too great a risk" that juvenile offenders will be subjected to unreasonably disproportionate sentences. *Miller*, 132 S. Ct. at 2469.

C. The growing trend in favor of individualized sentencing for children underscores the unconstitutionality of the sentence imposed in this case.

A growing number of states have moved away from the type of mandatory sentencing scheme maintained by Ohio and moved towards sentencing that gives judges discretion to consider the recognized characteristics of youth. For example, in New Mexico, judges are given discretion to sentence children convicted of first- and second-degree murder to a term-of-years or a life sentence. N.M. Stat. Ann. § 31-18-13 (enacted

2011). In Washington, Montana and Iowa, children are no longer subjected to mandatory minimums and mandatory life sentences. *State v. Houston-Sconiers*, 188 Wash. 2d 1, 21, 391 P.3d 409, 420 (2017) ("In accordance with *Miller*, we hold that sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system . . . [t]o the extent our state statutes have been interpreted to bar such discretion with regard to juveniles, they are overruled."); Wash. Rev. Code Ann. § 9.94A.540 (enacted 2014); Mont. Code Ann. §46-18-222 (enacted 2013); *State v. Lyle*, 854 N.W.2d 378 (Ia. 2014). In South Dakota, children no longer receive life sentences at all. D.C.L. § 22-6-1.3 (enacted 2016). Meanwhile, states that still permit mandatory life sentences now allow a neutral judge, rather than a parole board, to determine whether early release is appropriate. *E.g.*, Del. Code Ann. Tit. 11, § 4209 (enacted 2013); Fla. Stat. Ann. § 921.1402 (enacted 2014). Finally, the Model Penal Code now promotes judicial discretion for juvenile sentences, stating that "[t]he court shall have authority to impose a sentence that deviates from any mandatory-minimum term of imprisonment under state law." Model Penal Code § 6.11A(f).

Maintaining Ohio's mandatory life sentencing scheme for children convicted of a capital offense "poses too great a risk of disproportionate punishment." *Miller*, 567 U.S. at 479. And because a life sentence is one "of a State's most severe penalties," *id.* at 474, *Miller's* reasoning must be applied and Kyle's mandatory life sentence with parole eligibility after 33 years must be overturned.

D. A juvenile offender's sentence is unconstitutional when it denies him the opportunity to appear before the parole board while it is still meaningful.

The record below reflects that the trial court instructed the jury on complicity and that the jury did not make a specific finding that Kyle was the shooter in this case. Accordingly, Kyle's sentence is also cruel and unusual because it denies him a meaningful opportunity for release for a non-homicide offense.

Both this Court and the U.S. Supreme Court have found that imposing sentences that exceed the life expectancy of juvenile nonhomicide offenders is cruel and unusual punishment. *Id.* at ¶ 100. This is because "[t]he Eighth Amendment * * *prohibit[s] States from making the judgment at the outset that [juvenile nonhomicide] offenders will never be fit to reenter society." *Moore* at ¶ 45, quoting *Graham*, 560 U.S. at 75, 130 S.Ct. 2011, 176 L.Ed.2d 825. Further both Supreme Courts have found that,

> [A] juvenile who did not kill or intend to kill has "twice diminished moral culpability" based on two factors: the nature of the crime and the juvenile's age. As for the nature of the crime, the [U.S. Supreme Court] found that "[a]lthough an offense like robbery or rape is a serious crime deserving serious punishment, those crimes differ from homicide crimes in a moral sense, such that nonhomicide defendants" are categorically less deserving of the most serious forms of punishment than are murderers.

Moore, at ¶ 36 quoting *Graham*, at 69. And, because no one can definitively say at the onset whether a juvenile's crimes—including those heinous in nature, are the result of immaturity or the rare "irreparable corruption," all children who are convicted of nonhomicide offenses in criminal court must be granted a "meaningful opportunity to obtain release, based on demonstrated maturity and rehabilitation." *Graham*, at 68.

i. "Meaningful opportunity" means that juvenile offenders must be given the chance to spend a substantial part of their lives outside of prison.

The U.S. Supreme Court "viewed the concept of 'life' in *Miller* and *Graham* more broadly than biological survival; it implicitly endorsed the notion that an individual is effectively incarcerated for 'life' if he will have no opportunity to truly reenter society or have anything meaningful life outside of prison." *Moore*, 149 Ohio St. 3d 557, 2016-Ohio-8288, 73 N.E.3d 1127 at ¶ 84, quoting *Casiano v. Commissioner*, 317 Conn. at 78, 115 A.3d 1031 (Conn. 2015). This Court must consider whether Kyle's sentence—which does not permit him to see the parole board for the first time until he is 50 years old, gives him the opportunity to have a meaningful life outside prison.

In doing so, this Court must recall that the intent of *Graham* was "not to eventually allow juvenile offenders the opportunity to leave prison in order to die." *Moore* at ¶ 46. Rather, the constitutional requirement is that the juvenile offender be given the chance to seek release "while it is still meaningful." *Id.* at ¶ 63. This standard does not guarantee release. In fact, the U.S. Supreme Court recognized that "those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." *Graham*, 560 U.S. at 75, 130 S.Ct. 2011, 176 L.Ed.2d 825. But, the Eighth Amendment prohibits a court from announcing at sentencing that a juvenile nonhomicide offender may never reenter society again. *Id.* Instead, sentencing courts must give nonhomicide juvenile offenders a meaningful opportunity to show that they have been rehabilitated.

Although the Court did not give numeric figures when defining "meaningful opportunity" in years, it did give guidance to sentencing courts by highlighting what defining principles require different treatment of juveniles under the constitution. For example, it found that lawful sentences must recognize a juvenile offender's "capacity for change and limited moral culpability," offer "hope of restoration," give a "chance for fulfillment outside prison walls" and "for reconciliation with society." *Graham* at 74-79. This includes the opportunity for the juvenile offender to achieve "maturity of judgment and self-recognition of human worth and potential." *Id.* at 79.

As other states have recognized, the *Graham* court envisioned "more than the mere act of release or a de minimus quantum of time outside prison." *Contreras,* 4 Cal.5th at 368, 411 P.3d 445 (Cal.2018). Rather, *Graham* spoke of the chance to rejoin society in qualitative terms-'the rehabilitative ideal'-that contemplate a sufficient period to achieve reintegration as a productive and respected member of the citizenry." *Id.* Precisely because children are different, they must be given the opportunity to regain their "value and place in society." *Graham* at 79. This Court, in *Moore*, recognized that *Graham's* holding is more than mere formalism, determining that the "key principle" for ensuring that a juvenile nonhomicide offender receives a constitutional sentence is that the juvenile offender have the opportunity to someday demonstrate that they are worthy to reenter society. *Moore* at ¶ 63.

ii. **Life expectancy does not control "meaningful opportunity."**

Tying the constitutionality of a sentence to life expectancy raises concerns about equal protection, given the differences in life expectancy among races, genders, etc. *See*

Moore 149 Ohio St. 3d 557, 2016-Ohio-8288, 73 N.E.3d 1127 at ¶ 30 (citing a six-year difference between the life expectancy of white and black males). Also, life expectancy is an average. *See* Elizabeth Arias et al., *National Vital Statistics Reports: United States Life Tables, 2014,* Department of Health and Human Services, at 2 (Aug. 14, 2017), available at https://perma.cc/XQ3L-22HB (accessed February 28, 2019). In a normal distribution, about half of people will live long enough to reach or exceed their life expectancy. The other half will not. And, as the California Supreme Court aptly observed in deciding to reject the use of life expectancy tables, "[a]n opportunity to obtain release does not seem 'meaningful' or 'realistic' within the meaning of *Graham* if the chance of living long enough to make use of that opportunity is roughly the same as a coin toss." *People v. Contreras*, 4 Cal. 5th 349, 364, 411 P.3d 445, 229 Cal. Rptr.3d 249 (2018).

Further and more importantly, neither the U.S. Supreme Court in *Graham* nor this Court in *Moore* set life expectancy as the determining factor for what constitutes a "meaningful opportunity for release." In fact, this Court declined to do so in *Moore*. *Moore* at ¶ 138 (Lanzinger, concurring)("we leave unaddressed the problem of *when* the 'meaningful opportunity' would take place."). Instead, the Court recognized that "*Graham* is less concerned about how many years an offender serves in the long term than it is about the offender having the opportunity to seek release *while it is still meaningful.*" (Emphasis added) *Moore* at ¶ 64. Further, the *Moore* Court found that,

> The court in *Graham* did not establish a limit to how long a juvenile can remain imprisoned before getting the chance to demonstrate maturity and rehabilitation. But it is clear that the court intended more than to simply allow juvenile-turned-nonagenarians the opportunity to breathe their last breaths as free people. The intent was not to eventually allow juvenile

> offenders the opportunity to leave prison in order to die but to live part of their lives in society.

Id. at ¶ 46. Juvenile offenders "must be given the opportunity to show their crime did not reflect irreparable corruption; and if it did not, their hope for some years of life outside prison walls must be restored." *Id.*, quoting *Montgomery* at 736-737. A sentence that precludes parole review until age 50 does not restore the hope for life outside prison.

In its review, the *Moore* court referenced *State v. Null*, 836 N.W.2d 41 (Iowa 2013)—a homicide case, in which the Supreme Court of Iowa recognized that "the likelihood of simply surviving a sentence does not provide the protection to juvenile offenders envisioned by *Graham*." *Moore* 149 Ohio St. 3d 557, 2016-Ohio-8288, 73 N.E.3d 1127 at ¶ 81. For, as stated in *Null*, "[t]he prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a meaningful opportunity to demonstrate the maturity and rehabilitation required to obtain release as required by *Graham*." *Null* at 71. And this is because, release in geriatric age prohibits the juvenile offender from being able to pursue an education, become gainfully employed, establish a positive presence in the community, or start a family. *Id.* Further, "[f]or any individual released after decades of incarceration, adjusting to civic life is undoubtedly a complex and gradual process" and geriatric release seems "unlikely to allow for the reintegration that *Graham* contemplates." *Contreras*, 4 Cal. 5th at 454, 411 P.3d 445, 229 Cal. Rptr.3d 249 (2018). Moreover, "[a]ny such prospects will also be diminished by the increased risk for certain diseases and disorders that arise with more advanced age, including heart disease,

hypertension, stroke, asthma, chronic bronchitis, cancer, diabetes, and arthritis." *Casiano* at 1047.

Further, studies suggest that incarceration drastically reduces life expectancy. *Casiano* at 1045-1046; Campaign for the Fair Sentencing of Youth, *Michigan Life Expectancy Data for Youth Serving Natural Life Sentences*, 2 (2012-2015)(concluding that Michigan juveniles sentenced to natural life sentences have average life expectancy of 50.6 years); Straley, *Miller's Promise: Re-evaluating Extreme Criminal Sentences for Children*, 89 Wash. L.Rev. 963, 986 n.142 (2014)("[a] person suffers a two-year decline in life expectancy for every year locked away in prison."). "The high levels of violence and communicable diseases, poor diets, and shoddy health care all contribute to a significant reduction in life expectancy behind bars." *Id.* at 986 n.142; *see also Null*, 836 N.W.2d at 71(acknowledging that "long-term incarceration [may present] health and safety risks that tend to decrease life expectancy as compared to the general population."); *United States v. Tavares*, 436 F.Supp.2d 493, 500 (E.D.N.Y. 2006)(finding "persistent problems in United States penitentiaries of prisoner rape, gang violence, the use of excessive force by officers, [and] contagious diseases" that lead to a lower life expectancy in prisons in the United States), *eff'd in relevant part sub nom. United States v. Pepin*, 514 F.3d 193 (2d Cir.2008).

Courts throughout the country have held that life expectancy data should not be the determining factor as to whether a juvenile offender's sentence violates the Eighth Amendment. The Supreme Court of Iowa found that determining whether a sentence violates *Graham* must not "turn on the niceties of epidemiology, genetic analysis, or

actuarial sciences in determining precise mortality dates." *Null*, 836 N.W.2d at 71; *Wyatt L. Bear Cloud v. State of Wyoming*, 2014 WY 113, 334 P.3d 132, 142 (Wy. 2014). The Supreme Court of New Jersey concurred, holding that "[j]udges * * * should not resort to general life-expectancy tables when they determine the overall length of a sentence," since "those tables rest on informed estimates, not firm dates, and the use of factors like race, gender, and income could raise constitutional issues." *State v. Zuber*, 227 N.J. 422, 152 A.3d 197, 214 (N.J. 2017).

iii. For juvenile offenders, a "meaningful opportunity" should include an opportunity to go before the parole board after 15 years of incarceration.

In *Moore*, the Supreme Court recognized that "in the wake of *Graham* and *Miller*, many of the new statutes have allowed parole eligibility for juveniles sentenced to long prison terms for homicide to begin after fifteen or twenty-five years of incarceration. *Moore* at ¶ 82, quoting *Null* at 71-72. The chart below reflects the trend of states enacting legislative change for their juvenile nonhomicide offender population:

State	Code Section	Years Served Before Parole Eligibility
Alabama	Ala. Bd. of Pardons and Paroles Art. 1, Section	15
Arkansas	Ark. Code Ann. Section 16-93-621(a)(1)	20
California	Cal. Penal Code Section 3051(b)(1)	15
Colorado	Colo. Rev. Stat. Ann. Section 18-1.3-401(4)(c)(I)(B)	40
Delaware	Del. Code Ann. Tit. 11, Section 4204A(d)	20
District of Columbia	D.C. Code Ann. Section 24-403l.03(a)	20
Florida	Fla. Stat. Ann. Section 921.1402(2)(d)	20
Louisiana	La. Rev. Stat Section 15:574(D)(1)	25

Montana	Mon. Code Ann. Section 46-18-222(1)	¼ of term
Nevada	Nev. Rev. Stat. Ann. Section 213.12135	15
West Virginia	W.Va. Code Section 61-11-23(b)	15
Wyoming	Wyo. Stat. Ann. Section 6-10-301(c)	25

At the time *Graham* was decided, 37 of the states in the U.S. permitted life-without-parole sentences for juvenile nonhomicide offenders; and, now, at least 24 of them prohibit sentences that exceed 50 years for these youth and at least 12 of them prohibit sentences that exceed 20 years (or less) before granting the opportunity for parole. This is significant, because a necessary part of an Eighth Amendment analysis is whether a sentence violates the "evolving standards of decency." And, it is evident that the nationwide trend in juvenile sentencing is toward much earlier opportunities for parole than what Kyle is currently eligible for. *See Atkins v. Virginia*, 536 U.S. 304, 315, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)("Is it not so much the number of these States that is significant, but the consistency of the direction of change.").

In fact, following *Graham*, Ohio's Criminal Sentencing Commission, chaired by Supreme Court of Ohio Chief Justice, Maureen O'Connor, recommended changes to Ohio's sentencing scheme in a 2015 proposal to the Ohio General Assembly. The commission proposed that the legislature craft a sentencing scheme for juvenile offenders that would give them the opportunity to spend a substantial portion of their lives outside prison, which meant that juvenile offenders needed to be given a first opportunity for parole after serving 15 years. Ohio Criminal Sentencing Commission, Memorandum of Jo E. Cline to Sara Andrews (Nov. 23, 2015), available at https://perma.cc/6J7N-62GT. (Accessed February 27, 2019). And, for youth who were eligible for life-without-parole

sentences, the commission recommended parole at age 40. *Id.* The proposed language recommended that the parole board, in considering whether to grant parole to juvenile offenders, be required to consider "specific factors related to juveniles, including the diminished culpability of youth and the prisoner's subsequent growth and maturity." *Id.* In addition, the commission recommended that the board be required to review juvenile offenders' sentences at least every ten years following their initial review. *Id.*

Early review make sense, because "[f]or most teens, [risky and antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood." *Roper*, 543 U.S. at 570, 125 S.Ct. 1183, 161 L.Ed.2d 1 (quoting Steinberg & Scott, *Less Guilty by Reason of Adolescence: Development Immaturity, Diminished Responsibility, and the Juveniles Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)). Notably, in a study of juvenile offenders, "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." *See, e.g.*, Models for Change, *Research on Pathways to Desistance: 2014 Issue Brief* (2012) Steinberg, L., *Give Adolescents the Time and Skills to Mature, and Most Offenders Will Stop*, (2014) Available at: https://www.pathwaysstudy.pitt.edu/documents/MacArthur%20Brief%20Give%20Adolescents%20Time.pdf (accessed February 28, 2019).

Therefore, most juvenile offenders pose no public safety risk once they reached their late twenties, let alone later in their lives. Because most juveniles will outgrow

antisocial and criminal behavior as they mature into adults, review of the juvenile's maturation and rehabilitation should begin relatively early in the juvenile's sentence, and the juvenile's progress should be assessed regularly. *See, e.g.,* Models for Change, *Research on Pathways to Desistance: December 2012 Update* 4 (2012) (concluding 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") available at: http://www.modelsforchange.net/publications/357 (accessed February 28, 2019).

Conclusion

This Court has recognized that "[i]t does not take an entire lifetime for a juvenile offender to earn a first chance to demonstrate that he is not irredeemable." *Moore,* 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, at ¶ 47. Yet, a sentence that precludes parole review until age 50 does precisely that. Accordingly, and for the aforementioned reasons, Amici Curiae urge this Court to adopt Petitioner's Proposition of Law.

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Certificate of Service

I hereby certify that a copy of the foregoing **BRIEF OF AMICI CURIAE, OFFICE OF THE OHIO PUBLIC DEFENDER, JUVENILE LAW CENTER, ET. AL.** was sent by regular U.S. mail, postage prepaid, on October 7, 2019, to John Juahsz, Counsel of Record for Kyle Patrick at 7081 West Boulevard, Suite No. 4, Youngstown, Ohio 44512-4362, and Assistant Mahoning County Prosecutor, Ralph M. Rivera, 21 West Boardman Street, Youngstown, Ohio 44503.

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