NO. 16-6474

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IN THE

Supreme Court of the United States

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Norman Brown,

Petitioner,

v.

Michael Bowersox, Warden,
South Central Correctional Center,

Respondent.

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

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BRIEF OF AMICI CURIAE JUVENILE LAW CENTER, NATIONAL ASSOCIATION FOR PUBLIC DEFENSE, AND MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The organizations submitting this brief work on behalf of adolescents involved in the juvenile and criminal justice systems. *Amici* are advocates and researchers who have a wealth of experience and expertise in providing for the care, treatment, and rehabilitation of youth in the child welfare and justice systems. *Amici* know that youth who enter these systems need extra protection and special care. *Amici* understand from their collective experience that adolescent immaturity manifests itself in ways that implicate culpability and that a core characteristic of adolescence is the capacity to change and mature. For these reasons, *Amici* believe that youth status separates juvenile and adult offenders in categorical and distinct ways that warrant distinct treatment under the Eighth Amendment.

See Appendix for a list and brief description of all *Amici*.

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[1] Pursuant to Rule 37.2 counsel of record received timely notice of the intent to file this brief and the consent of counsel for all parties is on file with this Court. Pursuant to Rule 37.6, 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.

SUMMARY OF ARGUMENT

Norman Brown is currently serving an unconstitutional mandatory life without parole sentence for his role as an accomplice to a first degree murder. Brown was fifteen years old and unarmed when he participated in a robbery under the guidance and encouragement of an adult nearly twice his age. The armed adult co-defendant used Brown as a decoy as he went into the store and killed the store clerk. Brown was convicted of first degree murder under the theory of accessorial liability. This Court's rulings underscore the impropriety of a life without parole sentence for juveniles like Brown, who were not the principal in the commission of the crime.

Furthermore, although this Court has held that mandatory life without parole sentences are unconstitutional, Brown, and many other individuals in Missouri, continue to serve that sentence. In an attempt to ameliorate the unconstitutionality of a mandatory life without parole sentence that remains in the penal code, the Missouri legislature passed Senate Bill 590 (2016 Mo. Legis. Serv. S.B. 590) to permit juveniles serving mandatory life without parole sentences an opportunity to petition for parole after serving twenty-five years of their sentences. This review is conducted solely by the parole board and provides no opportunity for a court to determine an appropriate sentence in accordance with this Court's rulings in *Miller v. Alabama* and *Montgomery v. Louisiana*.

S.B. 590's illusory opportunity to obtain release does not satisfy this Court's mandates that youth should be considered on an individualized

basis and as a mitigating factor in sentencing. Moreover, it abdicates the judicial function of meting out a sentence to the parole board, an office of the executive branch.

ARGUMENT

I. This Court Should Grant *Certiorari* To Clarify That Juveniles Who Did Not Kill Or Intend To Kill Cannot Be Sentenced To Life Without Parole[2]

The boundaries of the Eighth Amendment are dynamic and constantly evolving. In recent years, Eighth Amendment jurisprudence has evolved with extraordinary speed in the context of juvenile sentencing. Prior to this Court's 2005 decision in *Roper v. Simmons*, juvenile offenders could be sentenced to death. *Roper v. Simmons*, 543 U.S. 551 (2005). Less than a decade later, not only the death penalty, but life without parole sentences for children are disfavored. *See Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) ("[W]e think appropriate occasions for sentencing juveniles to this harshest possible penalty [life without parole] will be uncommon."). This evolution in Eighth Amendment jurisprudence has been informed by neuroscience and adolescent developmental research that

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[2] *Amici* note the importance of its legal arguments in the instant case is shared with five similar cases whose petitions for *certiorari* are pending before this Court. *See Clerk v. Cassady*, No. 16-6442, *Evans-Bey v. Cassady*, No. 16-6441, *McElroy v. Cassady*, No. 16-6466, *Williams v. Steele*, No. 16-6530, and *Ramsey v. Pash*, No. 16-6517.

establishes that children who commit crimes are less culpable than adults, and demonstrates how youth have a distinctive capacity for rehabilitation. In light of this research, this Court has held that sentences that may be permissible for adult offenders are unconstitutional for juvenile offenders. *See, e.g.*, *Miller*, 132 S. Ct. at 2465 ("In [*Graham v. Florida*], juvenile status precluded a life-without-parole sentence, even though an adult could receive it for a similar crime.").

A. Brown Is Currently Serving An Unconstitutional Sentence

Norman Brown was sentenced over 23 years ago to mandatory life imprisonment without the possibility of parole. Mo. Ann. Stat. § 565.020 (West 1990). The legislature, through Senate Bill 590, has afforded an illusory opportunity to petition for parole—an option that does not cure the unconstitutionally of his sentence. Rather, he must be re-sentenced, after a careful, individualized assessment, which comports with this Court's rulings in *Miller* and *Graham v. Florida*, 560 U.S. 48 (2010).

When Brown was sentenced, the only available sentence for the crime for which he was convicted was death or life imprisonment without the possibility of parole. Mo. Ann. Stat. § 565.020. Brown was sentenced to life without parole. As such, the trial court had no discretion to determine an appropriate sentence and was not permitted to consider any of the petitioner's individual mitigating characteristics, such as his age and diminished culpability.

This Court made clear in *Miller* that mandatory life without parole sentences are impermissible under the Eighth Amendment. *Miller*, 132 S. Ct. at 2469. To allow such a sentence to stand is contrary to this Court's ruling in *Montgomery v. Louisiana* and the retroactive effect substantive rules must necessarily have. *Montgomery v. Louisiana*, 136 S. Ct. 718, 730–31, (2016) (citing *Ex parte Siebold,* 100 U.S. 371 (1880)). *See also State v. Hart*, 404 S.W.3d 232, 237-39 (Mo. 2013) (en banc) (holding that sentence for life without parole under Mo. Ann. Stat. § 565.020 would be void unless a sentencer determined on remand that life without parole was a just and appropriate sentence in light of Hart's age, maturity and the other factors discussed in *Miller*). Brown, and individuals similarly situated, are serving unconstitutional sentences unless afforded individualized determinations made by sentencing judges on remand.

Brown's sentence is also contrary to *Miller*, which states that life without parole sentences should be rare and reserved for the worst offenders:

> [G]iven all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. . . . Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences

> counsel against irrevocably sentencing them to a lifetime in prison.

Miller, 132 S. Ct. at 2469.

Justice Sotomayor recently underscored *Miller*'s mandate, requiring judges to make individualized sentencing decisions to determine "whether the petitioner was among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'" *Tatum v. Arizona*, No. 15-8850, 2016 WL 1381849, at *1 (Oct. 31, 2016) (Sotomayor, J., concurring) (quoting *Montgomery*, 136 S. Ct. at 734). Therefore, pursuant to *Miller*, not only are mandatory juvenile life without parole statutes invalid, even discretionary juvenile life without parole sentences are constitutionally suspect if the sentencer failed to fully consider how the relevant aspects of the defendant's youth counsel against imposing a life without parole sentence.

Because of the lack of both premeditation and personal participation in the killing, an accomplice to first degree murder is categorically less culpable than a triggerman. Therefore, a life without parole sentence, which implicitly deems the individual the "worst of the worst," is clearly inappropriate.

B. First Degree Murder Under A Theory Of Accessorial Liability Is Equivalent To A Nonhomicide Crime Under *Graham v. Florida* Because It Does Not Require That A Defendant Kill Or Intend To Kill The Victim

To the extent juvenile life without parole sentences are ever appropriate, *Graham* and *Miller*

necessitate that they be imposed only in the most extreme circumstances. *Graham v. Florida* emphasizes the "twice diminished" moral culpability of juvenile offenders who do not kill or intend to kill. 560 U.S. at 69. It is inconsistent with the logic of *Graham*—which mandates proportionality and graduation of sentences based on culpability and the nature of the offense—to sentence murder accomplices with the same maximum level of punishment, life without parole, as juveniles convicted of more serious crimes with greater degrees of culpability. *Id.* at 59 ("Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" (citing *Weems v. United States*, 217 U.S. 349, 367 (1910))). Under *Miller*, a juvenile who was not found to have killed or intended to kill cannot be categorized as one of the most culpable juvenile offenders for whom a life without parole sentence would be proportionate or appropriate. *See Miller,* 132 S.Ct. at 2476 (Breyer, J., concurring) ("The dissent itself here would permit life without parole for 'juveniles who commit the worst types of murder,' but that phrase does not readily fit the culpability of one who did not himself kill or intend to kill.") (citation omitted).

Simply put, an accomplice is less culpable than a shooter and should never be categorized as one of the "uncommon" most serious, most culpable juvenile offenders for whom a life without parole sentence would be proportionate or appropriate. *See Miller*, 132 S. Ct. at 2469. *Graham* held that a juvenile who does not commit homicide cannot be sentenced to life without parole. *Graham*, 560 U.S. at 82. *Graham*

forbids the imposition of this sentence on juveniles "who do not kill, intend to kill, or foresee that life will be taken" because they "are categorically less deserving of the most serious forms of punishment than are murderers. . . . [A] juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." *Id.* at 69.

The reasoning in *Graham* builds on this Court's felony murder jurisprudence which recognizes that the diminished culpability of non-principals precludes the application of mandatory sentencing schemes to individuals who may have participated, but did not commit a murder. *See Tison v. Arizona*, 481 U.S. 137, 151 (1987) (upholding defendants' death sentences when they acted with "reckless indifference" and their participation in the crime was "major"); *Enmund v. Florida*, 458 U.S. 782, 798, 801 (1982) (limiting culpability for the felony crime because homicide crimes are morally different). When sentencing a child, that reasoning applies with greater force. *Miller*, 132 S. Ct. at 2470 ("[A] sentencing rule permissible for adults may not be so for children.").

Conviction under a theory of accessorial liability can be analogized to a felony degree murder conviction, which requires simply that an offender participate in a felony and that someone was killed in the course of the felony; the offender need not have actually committed the killing or even have intended that anyone would die. It requires only the intent to commit or be an accomplice to the underlying felony. Mo. Ann. Stat. § 565.021 (West 1984).

Even when a juvenile may foresee some likelihood that death will result, acting with the

knowledge that death is more than a merely probable result is not the same as acting with the "inten[t] to kill" described by *Graham*. 560 U.S. at 69. As Missouri's own first and second degree murder statutes reflect, acting with a specific intent to kill is a more serious and more culpable crime. *Compare* Mo. Ann. Stat. § 565.020(1) (West 2016) (first degree murder requires knowingly causing the death of another "after deliberation upon the matter") *with* Mo. Ann. Stat. § 565.021 (second degree murder requires knowingly causing the death of another). The specific intent required in deliberation or planning for first degree murder underscores *Graham*'s reasoning that juveniles who do not kill or intend to kill demonstrate reduced culpability and thus must be precluded from receiving a life without parole sentence. 560 U.S. at 69.

Brown did not kill or intend to kill: he was unarmed and was clearly used by his adult co-defendant, Smulls, as a decoy as Smulls carried out the robbery that he personally planned. Brown was convicted under Missouri's accessorial liability statute, Mo. Ann. Stat. § 562.041, which requires that "before or during the commission of an offense with the purpose of promoting the commission of an offense, he aids or agrees to aid or attempts to aid such other person in planning, committing or attempting to commit the offense." Mo. Ann. Stat. § 562.041. In the instant case, there is no evidence that Brown agreed and deliberated with Smulls to carry out the murder.

C. The Rationale Underlying Accessorial Liability Is Inconsistent With This Court's Jurisprudence And Adolescent Developmental Research

Imposing liability on a juvenile accomplice for the same crime as his adult codefendant who acted as the principal in the commission of the crime is inconsistent with adolescent developmental and neurological research recognized and adopted by this Court in *Roper*, *Graham*, *J.D.B.*, and *Miller*. *See, e.g.*, *J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011) (noting that the common law has long recognized that the "reasonable person" standard does not apply to children); *see also Miller*, 132 S. Ct. at 2464 ("[C]hildren have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking.") (quoting *Roper*, 543 U.S. at 569). These cases preclude ascribing the same level of anticipation or foreseeability to a juvenile who takes part in the commission of a crime—even a dangerous felony—as the law ascribes to an adult. As Justice Breyer explained in his concurring opinion in *Miller*:

> At base, the theory of transferring a defendant's intent is premised on the idea that one engaged in a dangerous felony should understand the risk that the victim of the felony could be killed, even by a confederate. Yet the ability to consider the full consequences of a course of action and to adjust one's conduct accordingly is precisely what

> we know juveniles lack capacity to do effectively.

132 S. Ct. at 2476 (Breyer, J., concurring) (citations omitted).

Because adolescents' risk assessment and decision-making capacities differ from those of adults in ways that make it unreasonable to presume that juveniles would reasonably know or foresee that death may result from their actions, their risk-taking should not be equated with malicious intent. In particular, this Court has noted that adolescents have "[d]ifficulty in weighing long-term consequences" and "a corresponding impulsive-ness." *Graham*, 560 U.S. at 78. *See also* Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 THE FUTURE OF CHILDREN 15, 20 (2008). This Court's decisions recognize that adolescents participating in criminal activity, including the most serious felonies, are driven more by outside pressures, impulses, and emotion than by careful assessment of the risks to themselves or others. Youths' "lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions." *Graham*, 560 U.S. at 72 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

It is therefore unreasonable to infer that a juvenile had the intent to kill merely based on the juvenile's decision to engage in an act. In addition, "juveniles are more vulnerable or susceptible to negative influences and outside pressures" than are adults. *Roper*, 543 U.S. at 569. They "have less control, or less experience with control, over their own environment." *Id.* Research confirms the

common perception that adolescents are highly susceptible to peer pressure. Scott, *Adolescent Development, supra,* at 21.

In particular, because certain criminal behaviors can heighten status among adolescent peers, youth may face peer pressure to engage in criminal activities that they otherwise would avoid. *Id.* at 20-21. The influence of peers may be especially significant in accessorial liability cases.

A youth's decision to participate in a crime is often not a rational, calculated choice: he may assume that his friends will reject him if he declines to participate—a negative consequence to which he attaches considerable weight in considering alternatives. He does not think of ways to extricate himself, as a more mature person might do. *See Miller*, 132 S. Ct. at 2464. He may fail to consider possible options because he lacks experience, because the choice is made so quickly, or because he has difficulty projecting the course of events into the future. Also, the "adventure" of the crime and the possibility of getting some money are exciting.

These immediate rewards, together with peer approval, weigh more heavily in a juvenile's decision than the (remote) possibility of apprehension by the police. *See Graham*, 560 U.S. at 72. Adolescents are driven more by pressures, impulses, and emotion than careful assessment of the risks to themselves or others. Children make different cost-benefit analyses than a reasonable adult. While it may appear reasonable to impose the same sentences on adult principals and their accomplices because adults should be expected to walk away when a situation turns criminal, children do not have the same capacity for independence. A juvenile accomplice is

not "absolved of responsibility for his actions." *Graham*, 560 U.S. at 68. Rather, "his transgression 'is not as morally reprehensible as that of an adult,'" *id.*, and therefore, for children, a mandatory sentencing scheme that treats principals and accomplices identically "poses too great a risk of disproportionate punishment." *Miller*, 132 S. Ct. at 2469.

II. This Court Should Grant *Certiorari* To Clarify That *Miller* And *Montgomery* Mandate An Individualized, Judicial Resentencing Hearing For Individuals Serving Life Without Parole Sentences For Crimes Committed As Children

Because children are categorically less culpable than adults, imposing a mandatory or presumptive adult sentence on a juvenile offender creates a substantial risk that the punishment will be disproportionate. *See, e.g.*, *Miller*, 132 S. Ct. at 2469 ("By 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."). As Professor Martin Guggenheim has observed,

> [a] state sentencing statute that requires, regardless of the defendant's age, that a certain sentence be imposed based on the conviction violates a juvenile's substantive right to be sentenced based on the juvenile's culpability. When the only inquiry made by the sentencing court is to consult the

> legislature's mandatory punishment for the crime, without any further inquiry into whether the punishment is appropriate for a juvenile, for no other reason than it is appropriate for an adult, the Constitution requires more.

Martin Guggenheim, *Graham v. Florida and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 490-91 (2012) (citing *Graham*, 560 U.S. at 88 (Roberts, C.J., concurring) ("[J]uvenile offenders are generally—though not necessarily in every case—less morally culpable than adults who commit the same crimes."). *See also Miller*, 132 S. Ct. at 2468 ("*Graham* and *Roper* and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult."). When sentencing a child, a sentencer must take into account the child's "diminished culpability and greater prospects for reform." *Id.* at 2464. As Chief Justice Roberts remarked, concurring in *Graham*, "[o]ur system depends upon sentencing judges applying their reasoned judgment to each case that comes before them." 560 U.S. at 96 (Roberts, C.J., concurring). A parole board review cannot substitute for this process. One federal court interpreting *Miller* agreed, finding a life sentence constitutionally infirm when there was no opportunity for a judicial resentencing hearing.

> Routinely fixing the maximum of each sentence at life contradicts a sense of proportionality and smacks of categorical uniformity. A sentencing

> practice that results in every juvenile's sentence with a maximum term of life, regardless of the minimum term, does not reflect individualized sentencing. 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, No. 2-04-cv-5916, 2016 WL 4379233, at *3 (E.D. Pa. Aug. 17, 2016), *appeal docketed*, No. 16-3496 (3d Cir. Aug. 30, 2016)

A. *Miller* Requires That Juveniles Facing Life Without Parole Receive Individualized Sentencing Hearings At Which The Sentencer Considers The Juvenile's Youth As A Mitigating Factor

Miller held that prior to imposing a life without parole sentence on a juvenile offender, the sentencer must examine factors that relate to the youth's diminished culpability and heightened capacity for rehabilitation. 132 S. Ct. at 2468-69. 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.* *Miller* therefore requires the sentencer to make an individualized assessment of the juvenile's culpability prior to imposing life without parole. *Id.*

In at least four states, decisions interpreting *Miller* have turned on whether youth was considered by the trial court as a mitigating factor. The Ohio Supreme Court held that a pre-*Miller* discretionary life without parole sentence imposed on a juvenile homicide offender violated *Miller* because there was no evidence that the trial court treated the defendant's youth as a mitigating factor. *State v. Long*, 8 N.E.3d 890, 898-99 (Ohio 2014).

> Because the trial court did not separately mention that [the defendant] was a juvenile when he committed the offense, we cannot be sure how the trial court applied [the] factor [of his youth]. Although *Miller* does not require that specific findings be made on the record, it does mandate that a trial court *consider as mitigating* the offender's youth and its attendant characteristics before imposing a sentence of life without parole. For juveniles, like [the defendant], a sentence of life without parole is the equivalent of a death penalty.

Id. (citing *Miller*, 132 S. Ct. at 2463). Similarly, the South Carolina Supreme Court found that "*Miller* is clear that it is the failure of a sentencing court to consider the hallmark features of youth prior to sentencing that offends the Constitution. . . . *Miller* does more than ban mandatory life sentencing schemes for juveniles; it establishes an *affirmative requirement that* ***courts*** fully explore the impact of the defendant's juvenility on the sentence rendered." *Aiken v. Byars*, 765 S.E.2d 572, 576-77 (S.C. 2014) (emphasis added). The Court concluded that "*Miller* requires that before a life without parole sentence is imposed upon a juvenile offender, he must receive an *individualized hearing* where the mitigating hallmark features of youth are fully explored." *Id.* at 578 (emphasis added).

In *State v. Riley*, 110 A.3d 1205 (Conn. 2015), the Connecticut Supreme Court held that "the dictates set forth in *Miller* may be violated even when the sentencing authority has discretion to impose a lesser sentence than life without parole if it fails to give due weight to evidence that *Miller* deemed constitutionally significant before determining that such a severe punishment is appropriate." *Id.* at 1213. The court concluded that "*Miller* does not stand solely for the proposition that the eighth amendment [sic] demands that the sentencer have discretion to impose a lesser punishment than life without parole on a juvenile homicide offender. Rather, *Miller* logically indicates that, if a sentencing scheme permits the imposition of that punishment on a juvenile homicide offender, the trial court *must* consider the offender's 'chronological age and its hallmark features' as

mitigating against such a severe sentence. *Id.* at 1216 (quoting *Miller*, 132 S. Ct. at 2468).

Finally, the California Supreme Court vacated juvenile life without parole sentences under a discretionary sentencing scheme in which life without parole was the presumptive sentence. *People v. Gutierrez*, 324 P.3d 245, 270 (Cal. 2014). The court held that "the trial court must consider all relevant evidence bearing on the 'distinctive attributes of youth' discussed in *Miller* and how those attributes 'diminish the penological justifications for imposing the harshest sentences on juvenile offenders.'" *Id.* at 269 (citing *Miller*, 132 S .Ct. at 2465).

Given this Court's jurisprudence establishing that juveniles are developmentally different and less mature than adults, a sentencer must presume that a juvenile homicide offender lacks the maturity, impulse-control, and decision-making skills of an adult. Indeed, it would be the unusual juvenile whose participation in criminal conduct is not closely correlated with his immaturity, impulsiveness, and underdeveloped decision-making skills. Therefore, absent expert testimony establishing that a particular juvenile's maturity and sophistication were more advanced than a typically-developing juvenile, a sentencer must presume the juvenile offender lacks adult maturity, and treat this lack of maturity as a factor counseling against the imposition of a life without parole sentence.

B. Missouri's Sentencing And Parole Systems Do Not Provide Individualized Resentencing Hearings To Juveniles Serving Life Without Parole Sentences

In Missouri, individuals serving life without parole sentences for crimes committed as juveniles are not afforded a resentencing hearing. Although the Supreme Court of Missouri recognized that petitioners who were convicted under Mo. Ann. Stat § 565.020 are serving constitutionally defective sentences, and that the only way to remedy that defect is to remand the cases "for re-sentencing using a process by which the sentencer can conduct the individualized analysis required by *Miller," State v. Hart*, 404 S.W.3d 232, 238-39 (Mo. 2013) (en banc), the Supreme Court of Missouri has routinely denied writs of *habeas corpus* from petitioners seeking resentencing hearings. *See* App. B to Pet. Cert. A-10 (Mar. 15, 2016 order granting petition in part in *Brown v. Bowersox*, No. SC93094). The court reasoned that *Hart* merely provided a "constitutional, temporary, judicial remedy" for those cases when a jury determined that life without parole was not an appropriate sentence. *Id.* When the Missouri General Assembly adopted Senate Bill 590, repealing four sections of the Missouri code and enacting seven new statutes in a hasty attempt to comply with *Miller* and *Montgomery*, S.B. 590, the court concluded that the Assembly had brought the petitioners' sentences into conformity with *Miller* and *Montgomery* and therefore resentencing hearings were no longer required. See App. D to Pet.

Cert. A-29 (July 19, 2016 order granting petition in part in *Brown v. Bowersox*, No. SC93094).

The current sentencing and parole scheme is such that individuals serve unconstitutional sentences with no individualized or adversarial resentencing procedure, and are given only a single chance at parole wholly determined by the parole board. This scheme does not provide a meaningful and realistic opportunity for release.

1. The Missouri Parole System Does Not Provide A Meaningful Opportunity For Release

The opportunity to petition for parole after 25 years does not provide a meaningful opportunity for release. Although this Court did not fully define a "meaningful opportunity," in entrusting states to comply with the constitutional requirement, it made it clear that for a juvenile to receive a meaningful opportunity for release, this opportunity must also be "realistic." *Graham*, 560 U.S. at 82.

S.B. 590 did not alter the regulations governing how parole hearings must be conducted, and the lack of process afforded to potential parolees illustrates why the new regulations do not obviate the need for individualized resentencing hearings. During parole hearings, the petitioner has no right to counsel—he is only allowed one representative who may give a statement on his behalf at the parole hearing. *See* 14 C.S.R. 80-2.010(5)(A)(1). Potential parolees may not offer evidence, cross-examine opposing witnesses, call or present witnesses on their own behalf. *Ladd v. Missouri Bd. of Prob. & Parole*, 299 S.W.3d 33, 38 (Mo. Ct. App. 2009). Though parole hearings are

recorded, these recordings are considered closed records and prisoners are denied access to any record of the proceedings. This precludes parolees any opportunity to have meaningful judicial review of the constitutional adequacy of the parole process. 14 C.S.R. 80-2.010(5)(F).

In addition, Missouri parole statutes and guidelines give the board "'almost absolute discretion' in whether to grant parole release." *Ladd* at 39-40. *See* Mo. Ann. Stat. § 217.690(1) (West 2005). S.B. 590 did not change this. The parole board may deny a prisoner parole regardless of the circumstances of his individual case, and that prisoner has no constitutional right or protected liberty interest in parole release because Mo. Ann. Stat. § 217.690(10) creates no justifiable expectation of release. *See, e.g.*, *State ex rel. Cavallaro v. Groose*, 908 S.W.2d 133, 135 (Mo. 1995) (en banc). Section 217.690(1)&(2) does not comport with *Miller* because parole decisions are ultimately based solely on whether an offender "can be released without detriment to the community or to himself" and if release is in the "best interest of society," not whether the potential parolee's demonstrated maturity and rehabilitation weigh heavily in favor of release. Mo. Ann. Stat. § 217.690(1)&(2)

The petitioner and those similarly situated have no protected liberty interest entitling them to due process during parole hearings. *Blackburn v. Missouri Bd. of Prob. &Parole*, 83 S.W.3d 585, 587 (Mo. Ct. App. 2002). It follows that petitioners like Brown, and those similarly situated will never be given a meaningful opportunity for release unless a resentencing hearing is mandated. In *Lute*, the parole board could deny a petitioner parole after a

fifteen-minute hearing, based simply on the fact that "[r]elease at this time would depreciate the seriousness of the present offense." *Lute v. Missouri Bd. of Prob. & Parole*, 218 S.W.3d 431, 433-34 (Mo. 2007) (en banc); *see also Atwell v. State*, 197 So. 3d 1040, 1047 (Fla. 2016) (finding Florida's parole procedures violate *Miller* by placing primary emphasis upon the seriousness of the offense).

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

Pursuant to the statute, Brown, and others like him, will only have *one* opportunity to seek parole after twenty-five years. Section 558.047(1) authorizes "**a** petition for review" after serving twenty-five years. Mo. Ann. Stat. § 558.047(1) (West 2016). In contrast, juveniles sentenced to life without parole after S.B. 590's effective date may petition for parole after twenty-five years and a "subsequent petition" after serving thirty-five. § 558.047(1)(2).

Once a potential parolee is eligible to petition, the parole board must use the factors outlined in S.B. 590, related to the nature of the offense and individual characteristics of the potential parolee, to determine whether individuals convicted of first-degree murder when they were juveniles may be released on parole. S.B. 590 modified Missouri law to require the parole board to consider several factors mentioned by this Court in the *Miller* line of cases when considering whether to grant parole to those who were sentenced to life without parole as juveniles. *See* § 558.047(1)(5). These factors expand

on the factors listed in *Miller* and give the parole board a substantial amount of information to consider in making the parole decision. Notwithstanding, *Miller* requires that a *sentencer* make an individualized assessment of a juvenile's culpability. Although the parole board is required to examine each case individually, they are neither properly equipped nor legally entitled to conduct such an assessment.

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 and 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)). Thus, this 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.

Second, the Missouri Parole Board, like most boards, is part of the executive branch—members of the board are appointed by the governor for terms of six years. Mo. Ann. Stat. § 217.665(3) (West 2009). Though the Supreme Court of Missouri has recognized "that executive agencies may exercise 'quasi judicial powers' that are 'incidental and necessary to the proper discharge' of their administrative functions," it has also stated that "[t]he legislature 'has no authority to create any other tribunal and invest it with judicial power,' and cannot turn an administrative agency into a court by granting it power that has been constitutionally reserved to the judiciary." *State Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W.2d 69, 75-76 (Mo. 1982) (en banc) (citations omitted). As noted long ago by the Supreme Court of Missouri, "[t]he power to grant reprieves and pardons and that to sentence for crime being distinct and different in their origin and nature . . . [have] been kept separate and distinct, the one having been confided to the executive and the other to the judicial department." *Ex parte Thornberry*, 254 S.W. 1087, 1090–91 (Mo. 1923) (en banc).

"[A] court's powers in the administration of the criminal law is limited, upon the conviction of the accused, to the imposition of the sentence authorized to be imposed." *Id.* at 1091. The Missouri legislature's attempt to assign a judicial function to the parole board through S.B. 590 violates the separation of powers doctrine.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court grant the petition for a *writ of certiorari*.

Respectfully Submitted,

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APPENDIX

STATEMENTS OF INTEREST OF *AMICI CURIAE*

Juvenile Law Center, founded in 1975, is the oldest public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Among other things, 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 disposition, from post-disposition through appeal, and; that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

The National Association for Public Defense (NAPD) is an association of more than 14,000 attorneys, investigators, social workers, administrators and others professionals who fulfill constitutional mandates to deliver public defense representation throughout all U.S. states and territories. NAPD members are deeply committed to providing high-quality advocacy in jails, courtrooms, and communities for people who are charged with crimes but cannot afford to hire counsel. Thus, NAPD is uniquely situated to speak to issues of fairness and justice in criminal legal systems, including on issues of juvenile justice. Many NAPD members specialize in juvenile defense and

participate in NAPD leadership, including our Juvenile Committee, to ensure that the importance of advocacy for juveniles is always at the forefront of NAPD's extensive training, litigation, and policy reform efforts. As this case presents important questions about the appropriate role of the judiciary in juvenile sentencing, NAPD offers its perspective to the Court.

The **Missouri Association of Criminal Defense Lawyers** (MACDL) is a voluntary association of criminal defense lawyers organized to improve the quality of justice in Missouri by seeking to ensure justice, fairness, due process and equality before the law for persons accused of crime or other misconduct. MACDL is dedicated to protecting the rights of criminally accused through a strong and cohesive criminal defense bar. MACDL also works to improve the criminal justice system to those ends.

MACDL promotes study and research in the field of criminal law to disseminate and advance knowledge of the law in the area of criminal practice. The organization seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. An organizational objective is promotion of the proper administration of justice. In furtherance of that objective, at times the organization files amicus briefs in both federal and state courts.