No. 16-579

In the Supreme Court of the United States

AHMAD BRIGHT,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MASSACHUSETTS APPEALS COURT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In *Miller v. Alabama*, this Court held that the Eighth Amendment bars the imposition of mandatory life-without-parole sentences for juvenile homicide offenders. The questions presented are:

1. Whether the Eighth Amendment is violated by a state law that requires juvenile homicide offenders to receive a life sentence with the opportunity for parole after a term of imprisonment of fifteen years.

2. Whether the Eighth Amendment is violated by a state law that requires juvenile homicide offenders, whose convictions rest upon accomplice liability, to receive the same sentence as those who are convicted as principals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitutional and Statutory Provisions

Other Authorities

JURISDICTION

The judgment of the Massachusetts Appeals Court was entered on April 4, 2016. On June 20, 2016, the Massachusetts Supreme Judicial Court ("SJC") denied the petitioner's timely application for further appellate review. Justice Breyer extended the time within which to file a petition for a writ of certiorari, to and including October 28, 2016, and the petition was filed on that date. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATEMENT

1. In March of 2006, when the petitioner was sixteen years old, his older brother, Sherrod Bright, enlisted Remel Ahart to kill Corey Davis. T(4) 134-37; T(5) 83.[1] Sherrod believed that Davis had stolen $15,000 from him and he offered Ahart several thousand dollars to exact revenge. Ahart accepted the job and took a partial advance payment. Joined by the petitioner, he then drove around Cambridge, Massachusetts, for several hours, hunting for Davis. T(4) 142-51.

Along the way, they picked up an associate, James Miller, who accompanied them on their search for Davis. At one point, Miller observed Ahart remove a revolver from a compartment inside the car, place the gun in his pocket, and then enter a housing project in Cambridge with the petitioner. T(4) 128-29. They returned a short time later. T(4) 128. At another point, Miller overheard the petitioner take a call from

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[1] T( ) __ refers to a volume and page of the trial transcript. Pet. __ refers to a page of the petition. Pet. App. __ refers to a page of the appendix to the petition.

someone who promised to give him a "Baby 9." T(4) 132-33. Following that call, the petitioner and Ahart drove to the petitioner's home in the Dorchester section of Boston. T(4) 138. The petitioner went inside and then returned a short time later, bearing a nine millimeter pistol.[2] T(4) 138-41; T(5) 6.

Armed with Ahart's revolver and the petitioner's pistol, the trio headed back toward Cambridge; the petitioner was the driver. T(4) 141. Ahart told the petitioner, "Yo, either we do it tonight or not, or we don't do it at all." T(4) 142. "Yeah, I feel you," the petitioner replied. T(4) 143. Knowing that Miller and Davis were friends, the petitioner and Ahart urged Miller to call Davis to try to ascertain where he was. T(4) 144-46. Miller refused. T(4) 144, 146.

Shortly thereafter, the petitioner and Ahart spotted Davis's car, and the petitioner accelerated in order to follow it. T(4) 149. They proceeded past the location where Davis had parked and pulled off onto a side street. Ahart turned to the petitioner and said, "Yo, it's now or never." T(4) 152. The petitioner agreed, saying, "Yeah, let's kill that man." T(4) 152. Ahart grabbed the pistol and the petitioner armed himself with the revolver. T(4) 152-53. They then exited the car and ran toward Davis's location. T(4) 152-53.

Once they reached Davis's car, they approached it from behind. T(4) 48; T(6) 16. Davis and his cousin,

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[2] The police later found this pistol, and conducted DNA testing to determine who had possessed it. That testing revealed, to a probability of one among quintillions, that Sherrod Bright was a major source of the DNA profile that had been recovered from the gun. T(10) 38-39.

Troy, were sitting inside. T(4) 45-46. Ahart fired several shots into the passenger side, three of which struck Davis in the back. T(4) 48-51; T(5) 11-12; T(6) 118. Davis opened the passenger door and attempted to run down the sidewalk, but he managed to stagger only a few steps before falling to the ground and gasping for air. T(4) 48, 51, 53. He was rushed to Massachusetts General Hospital and pronounced dead. T(6) 34-37, 139-40. The petitioner, meanwhile, had approached the driver's side and positioned himself in a "firing stance," with the revolver pointed directly at Troy. T(4) 48-49; T(5) 11-12. Forensic evidence suggested that he had tried to fire the gun, but it was not functional.[3] Troy fled.

The petitioner and Ahart also ran from the scene, heading back toward their car and tossing their guns over a fence along the way. T(5) 51; T(7) 127-28, 134-36; T(9) 11, 85. Once they reached their vehicle, Miller asked them if they really had just done "that shit." T(4) 160. Ahart said yes and warned Miller that he had "better not say nothing" about the murder. T(4) 160-61.

2. A jury convicted the petitioner of second-degree murder in violation of Mass. Gen. Laws ch. 265, § 1, assault by means of a dangerous weapon in violation of Mass. Gen. Laws ch. 265, § 15B(b), and unlawful possession of a firearm in violation of Mass. Gen. Laws ch. 269, § 10(a). Pet. App. 1a. The murder and assault convictions rested upon the basis that the petitioner was criminally liable as a joint venturer. Pet. App. 63a, 64a. Under Massachusetts law, a "joint

[3] Forensic testing revealed that the revolver was fully loaded with live cartridges and that it had failed to discharge. T(11) 61, 72, 78-80.

venturer is one who aids, commands, counsels, or encourages commission of a crime while sharing with the principal the mental state required for the crime." *Commonwealth v. Semedo*, 456 Mass. 1, 8, 921 N.E.2d 57, 65 (2010) (quotation omitted).[4] State law mandates that joint venturers be sentenced "in the manner provided for the punishment of the principal felon." Mass. Gen. Laws ch. 274, § 2. And so, consistent with that directive, the petitioner was sentenced to a term of life with the possibility of parole after fifteen years on the murder conviction. Pet. App. 6a; *see* Mass. Gen. Laws ch. 265, § 2 (2006); Mass. Gen. Laws ch. 127, § 133A (2006). He was given concurrent sentences of four and three years, respectively, on the assault and firearm convictions. Pet. App. 7a n.1.

3. On direct appeal, the petitioner was able to bypass the Massachusetts Appeals Court and obtain review directly from the SJC. *See* Mass. Gen. Laws ch. 211A, § 10 (direct review is generally in the Appeals Court in the first instance, unless otherwise directed by requisite number of Appeals Court or SJC justices); *see also* Mass. R. App. P. 11(f) (similar). The SJC affirmed the murder and firearm convictions, but vacated the conviction for assault with a deadly weapon and directed that a verdict of simple assault

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[4] *See Commonwealth v. Fluellen*, 456 Mass. 517, 522 n.5, 924 N.E.2d 713, 718 n.5 (2010) (explaining that the state's joint venture doctrine is rooted in common law accomplice liability principles); *Commonwealth v. Zanetti*, 454 Mass. 449, 467-68, 910 N.E.2d 869, 883-84 (2009) (referring to a joint venturer as one who aids and abets the charged crime).

enter instead. *Commonwealth v. Bright*, 463 Mass. 422, 423, 974 N.E.2d 1092, 1097-98 (2012).

4. A little more than one year later, the petitioner filed a motion for collateral relief. *See* Mass. R. Crim. P. 30(a). Relying upon *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (holding that the Eighth Amendment bars the imposition of mandatory life-without-parole sentences for juvenile homicide offenders), he asked a state Superior Court judge to re-sentence him to a term of years on the murder conviction. Pet. App. 7a. He argued that a mandatory life sentence for a juvenile offender such as himself, even one with parole eligibility, violated the Eighth Amendment because a parole hearing did not constitute a meaningful opportunity for release. Pet. App. 8a, 11a; *cf. Graham v. Florida*, 560 U.S. 48, 75, (2010) (concluding, in the context of juvenile offenders who are convicted of non-homicide offenses, that the state must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation").

The Superior Court denied the motion, reasoning there was nothing in *Miller* or any of the SJC's related pronouncements to suggest that "a sentence of life with the possibility of parole at fifteen years is unconstitutional in the case of a juvenile convicted of murder (whether first or second degree). . . ." Pet. App. 14a. Further, the court concluded, it did not have the authority, whether by statute or under SJC precedent, to deviate from the punishment that the state legislature had established for second-degree murder convictions. Pet. App. 14a.

5. The petitioner then sought review from the Massachusetts Appeals Court. He raised essentially four arguments. First, he contended that his life-with-parole sentence was not consistent with the reasoning of *Miller*, which, according to him, forbids automatic or mandatory life sentences for juvenile offenders, even if such sentences include an opportunity for parole after a period of years. Pet. Appeals Court Br. at 16-35, *Commonwealth v. Bright*, No. 2014-P-546. Second, he contended that the Eighth Amendment's proportionality requirement should be read to forbid principals and joint venturers from receiving the same sentence.[5] Pet. Appeals Court Br., *supra*, at 30. Third, characterizing the Massachusetts Parole Board as "unpredictable" and "political," he contended that a parole hearing after fifteen years of imprisonment would not constitute the type of "meaningful opportunity for release" described in this Court's precedents. Pet. Appeals Court Br., *supra*, at 31-38. And fourth, he argued that his sentence was in violation of the state constitution. Pet. Appeals Court Br., *supra*, at 38-41.

In an unpublished, non-precedential opinion, the Appeals Court affirmed the Superior Court's decision. Pet. App. 1a-5a. The Appeals Court observed that life-without-parole sentences have been deemed

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[5] He also argued that the proportionality requirement forbids punishing juvenile second-degree murder offenders with the same sentence imposed upon adult second-degree murder offenders. And he argued that his sentence was "constitutionally disproportionate because he received the same sentence as would a juvenile convicted of first-degree murder." Pet. Appeals Court Br., *supra*, at 26-28. Massachusetts law no longer provides the same sentence for first and second degree murder convictions. *See infra*, n.10.

unconstitutional because of their "irrevocability," meaning that such sentences impermissibly provide no opportunity to assess or to take into account a child's capacity to be reformed in deciding when (or if) he should be released from prison. Pet. App. 4a. But, the Appeals Court noted, a parole hearing would provide such an opportunity, and therefore the petitioner's life-with-parole sentence satisfied the requirements of the Eighth Amendment. Pet. App. 3a-5a; *see id.* at 3a (characterizing the opportunity for parole as a "central element" to the Eighth Amendment analysis).

6. The petitioner next applied for further appellate review from the SJC, narrowing his focus to a single question presented: "whether a juvenile homicide offender's mandatory life sentence with the possibility of parole after fifteen years is unconstitutional under the Eighth Amendment of the U.S. Constitution . . . when the juvenile defendant is convicted solely on a theory that he was involved in, and acted as part of, a joint venture." SJC App. for Further Appellate Rev. at 13, *Commonwealth v. Bright*, No. FAR-24324. The SJC declined to conduct further review. Pet. App. 16a.

ARGUMENT

The petitioner asks this Court to grant the petition and hold that the Eighth Amendment: (1) prohibits juvenile homicide offenders from being sentenced to life with the opportunity for parole after fifteen years, primarily because the parole process is so "capricious" that it does not constitute a meaningful opportunity for release; and (2) prohibits juveniles who are convicted as accomplices from being given the same

sentence as juveniles who are convicted as principals. *See, e.g.*, Pet. 8-9, 19. This Court should not grant the petition for at least two reasons. First, the petitioner has not identified any significant disagreement among state and lower federal courts on either question. This Court's intervention at this time is therefore unnecessary. Second, this case is a poor vehicle to resolve both questions. The first question is waived because it was not presented to the SJC in the petitioner's application for further appellate review. And the second question seeks reversal on an issue as to which the Appeals Court, an intermediate state court, offered very little reasoned analysis in a non-binding, unpublished opinion. As to both questions, further percolation is necessary to see whether any well-developed split emerges following this Court's relatively recent decision in *Miller*.

I. The Petitioner Has Not Identified Any Conflict Between The Decisions Of Any State Courts Of Last Resort Or Federal Courts Of Appeals As To Either Question Presented.

The petitioner alleges no significant conflict between the decision below and a state court of last resort or federal court of appeals—on either of the two issues presented. This Court's review is therefore unwarranted. *See* Sup. Ct. R. 10.

1. Citing four state court decisions, the petitioner argues that this Court's intervention is needed because lower courts are conflicted as to how to respond to the holdings of *Miller* and *Montgomery v. Alabama*, 136 S. Ct. 718 (2016) (making *Miller*'s holding retroactive). *See* Pet. 31 (citing *Bear Cloud v.*

State, 334 P.3d 132 (Wyo. 2014); *State v. Lyle*, 854 N.W.2d 378 (Iowa 2014); *State v. Brown*, 118 So. 3d 332 (La. 2013); *In re C.P.*, 967 N.E.2d 729, 750 (Ohio 2012)). But not one of the cited cases conflicts with the Appeals Court's decision. None analyzes whether parole is a "capricious" process or whether it constitutes a meaningful opportunity for release within the meaning of the Eighth Amendment, which is the first question presented. And the only case that addresses the second question presented—that is, whether the Eighth Amendment requires different sentences for accomplices and principals—actually resolved that issue consistently with the Massachusetts Appeals Court's decision here.

a. In *Bear Cloud v. State*, the Wyoming Supreme Court invalidated a sentence consisting of consecutive and concurrent terms of imprisonment, the cumulative effect of which would have required the juvenile offender to remain in prison for forty-five years before he was eligible for parole. 334 P.3d at 141-42. A forty-five-year minimum sentence, the Wyoming Supreme Court concluded, would have "result[ed] in the functional equivalent of life without parole" for the juvenile. *Id.* at 142. And because that sentence was imposed without considering the juvenile's individual and particular circumstances, it violated the holding of *Miller*. *Id.*

This case is simply different. It does not involve a punishment that is the "functional equivalent" of life without parole.[6] The petitioner is eligible for parole

[6] The SJC has indicated that juveniles in Massachusetts may not be given the "functional equivalent" of a life-without-parole sentence. *Commonwealth v. Brown*, 466 Mass. 676, 691 n.11, 1 N.E.3d 259, 270 n.11 (2013) (the "sentencing scheme for juvenile

in fifteen years, a third of the time that was at issue in *Bear Cloud*. And *Bear Cloud* does not hold that parole does not constitute a meaningful opportunity for release within the meaning of *Miller* and the Eighth Amendment. So, *Bear Cloud* has no bearing on the first question presented.

As to the second question presented, *Bear Cloud* rejected an Eighth Amendment "challenge to the Wyoming Statutes' mandatory sentencing scheme that imposes the same sentence for a juvenile accessory as for the person actually committing the murder." *Id.* at 145-46. The court reasoned that principal or accomplice status is a factor that should be considered in deciding when a juvenile will be released from prison, but that it is not alone a basis to require different sentences as a matter of constitutional law. *Id.* Accordingly, far from creating a split with the Appeals Court's decision on that issue, *Bear Cloud* instead agrees with its result.

b. In *State v. Lyle*, the Iowa Supreme Court invalidated on *state* constitutional grounds "a statute mandating a sentence of incarceration in a prison for juvenile offenders with no opportunity for parole until a minimum period of time has been served." 854 N.W.2d at 380. Though it cites this Court's cases, *Lyle* does not resolve the *federal* constitutional question presented here: whether the Eighth Amendment bars life-with-parole sentences for juvenile homicide

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homicide defendants must . . . avoid imposing on juvenile defendants any term so lengthy that it could be seen as the functional equivalent of a sentence of life without parole").

offenders.[7] *See, e.g.*, *Arizona v. Evans*, 514 U.S. 1, 8 (1995) ("state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution"). And *Lyle* says nothing about whether the Eighth Amendment requires different sentences depending upon whether a conviction rests upon accomplice or principal liability. It simply has no bearing on either of the questions presented.

c. In *State v. Brown*, the Louisiana Supreme Court decided that the Eighth Amendment does not preclude the imposition of "cumulative sentences matching or exceeding [a juvenile offender's] life expectancy without the opportunity of securing early release from confinement." 118 So. 3d at 332. It reasoned that no Eighth Amendment precedent forecloses consecutive sentences for convictions on multiple offenses, even if the cumulative effect of those sentences would require the juvenile offender to spend his life in prison. *Id.* at 342.

Brown does not state that the Eighth Amendment forbids a life sentence with the possibility of parole after fifteen years for a juvenile homicide offender. Nor does *Brown* say that parole constitutes an inadequate opportunity for release within the meaning of *Miller*. And *Brown* is silent on the intersection of the Eighth Amendment and sentencing

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[7] The Iowa Supreme Court acknowledged that its decision was an outlier: "no other [state] court in the nation ha[d] held that its constitution or the Federal Constitution prohibits a statutory schema that prescribes a mandatory minimum sentence for a juvenile offender." *Lyle*, 854 N.W.2d at 386.

requirements for principals and accomplices. It thus has no application to either question presented.[8]

d. Finally, in *In re C.P.*, the Ohio Supreme Court invoked the Eighth Amendment to invalidate a state statute that imposed upon a certain class "of juvenile [sex] offenders an automatic, lifetime requirement of sex-offender registration and notification, including placement on a public Internet registry." 967 N.E.2d at 750. The Ohio court determined that the statute's lifetime requirements, subject to review and modification after no less than 25 years, were categorically disproportionate to the nature of the subject offenses and characteristics of the offenders. *Id.* at 744.

C.P. is even further afield than the other three cases. It does not involve a homicide offense; it says nothing about whether parole constitutes a meaningful opportunity for release; and it says nothing about whether accomplices must be punished differently than principals. In short, it does not in any way conflict with the Appeals Court's decision at issue here.

In sum, the petitioner has not identified any significant conflict between the decision below and a state court of last resort or a federal court of appeals. In fact, he has not directed this Court to any cases that even consider the first question presented, and he has identified only one that has considered the second—and it actually reaches the same result as the decision

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[8] While there may be tension between *Bear Cloud* and *Brown* with respect to cumulative sentences, that issue is not presented by the facts of this case, and the petitioner rightly does not raise it as a basis for granting the petition.

below.[9] Given these circumstances, granting review at this stage would "deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." *United States v. Mendoza*, 464 U.S. 154, 160 (1984). The petition should be denied.

2. The petitioner also urges this Court to grant review because state legislatures have not responded in a uniform manner to the Eighth Amendment issues that this Court identified in *Miller* and *Montgomery*. *E.g.*, Pet. 32. But, for the reasons offered below,

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[9] Counsel for the Commonwealth has been able to find one case in which it was argued that parole hearings do not, in practice, constitute a meaningful opportunity for release for reasons similar to those raised by the petitioner here. *See People v. Franklin*, 63 Cal. 4th 261, 284-85, 370 P.3d 1053, 1065-66 (2016), *cert. denied sub nom. Franklin v. California*, No. 16-6208, 2016 WL 5874502 (U.S. Dec. 5, 2016). But the California Supreme Court declined to reach that argument because the California legislature had just recently modified the statutory provisions governing juvenile parole hearings, and the state parole board had not yet had an opportunity to implement or comply with them. Counsel also found cases in which a juvenile argued that his parole hearing was inadequate, but for the reason that the state parole board in each case failed to consider the offender's youth at the time of the crime and its attendant characteristics. *See, e.g.*, *Atwell v. State*, 197 So. 3d 1040, 1049 (Fla. 2016), *reh'g denied*, No. SC14-193, 2016 WL 4440673 (Fla. Aug. 23, 2016); *Hawkins v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 140 A.D.3d 34, 40, 30 N.Y.S.3d 397, 401 (N.Y. App. Div. 2016). Those decisions create no conflict with any Massachusetts case law because the SJC has construed the Massachusetts Constitution to *require* the state parole board to consider the offender's youth at the time of the crime and its attendant characteristics in deciding whether to grant parole. *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 471 Mass. 12, 30, 33, 27 N.E.3d 349, 365, 368 (2015).

diverging legislative solutions to difficult legal problems are not alone a basis for this Court's intervention. *See, e.g.*, Sup. Ct. R. 10 (explaining that the Court generally will intervene to resolve judicial disagreements). Nor do they necessarily signal lurking constitutional infirmity.

It has been roughly four and a half years since *Miller* was decided and just over a year since the decision in *Montgomery*. In that short time, state legislatures have sought to comply with the directives of those two cases, while at the same time considering the proper form or amount of punishment for juvenile offenders generally and those who were convicted of murder more particularly.[10] *See Graham*, 560 U.S. at

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[10] Massachusetts offers a good example. At the time of Davis's murder and the petitioner's trial, a conviction for second-degree murder in Massachusetts carried a mandatory sentence of life imprisonment with the possibility of parole after fifteen years. Mass. Gen. Laws ch. 265, § 2 (2006). State law has since changed. A second-degree murder conviction still requires a mandatory a life sentence, but judges generally now have the discretion to allow parole after anywhere between 15 and 25 years from the judgment of conviction. Mass. Gen. Laws ch. 279, § 24 (2014). State law also has changed with respect to juvenile offenders who are convicted of first-degree murder. Whereas state law formerly required a mandatory sentence of life without parole, juvenile offenders who commit a first-degree murder between the ages of fourteen and eighteen now receive a life sentence with an opportunity for parole after 20, 25, or 30 years, depending upon whether the murder was deliberately premeditated or committed with extreme atrocity or cruelty. Mass. Gen. Laws ch. 279, § 24 (2014). In addition, the SJC requires special procedural protections in connection with parole hearings for all juvenile homicide offenders, and the state parole board "has adopted guidelines for parole determinations for juvenile homicide offenders serving life sentences, [which] take into account the unique characteristics of youth." *Diatchenko*,

74-75 (noting that it "is for legislatures to determine what rehabilitative techniques are appropriate and effective" and that it "is for the State, in the first instance, to explore the means and mechanisms for compliance [with Eighth Amendment directives]"); *see also Robinson v. California*, 370 U.S. 660, 665 (1962) (referring to the "wide" range of "valid choice[s]" a state can make in deciding how to regulate or penalize conduct); *Gore v. United States*, 357 U.S. 386, 393 (1958) (issues of punishment are "peculiarly questions of legislative policy").

Like Massachusetts, several states have eliminated life-without-parole sentences for juveniles and replaced them with sentences of life-with-parole after a period of years.[11] *See, e.g.*, Haw. Rev. Stat.

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471 Mass. at, 29, 32-33 & n.32, 27 N.E.3d at 365, 367-68 & n.32. In fact, the state parole board *must* take account of "the offender's status as a child when the crime was committed" or its decision is subject to reversal by a state superior court judge. *Diatchenko*, 471 Mass. at 33, 27 N.E.3d at 368.

[11] It is unsurprising that several states have charted this course. In *Miller* itself and then again in *Montgomery*, this Court signaled that parole eligibility, after a period of years, can remedy the Eighth Amendment violation that attends mandatory lifetime sentences for juvenile homicide offenders. *See, e.g.*, *Montgomery*, 136 S. Ct. at 736 (declaring that a "state may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them" and citing a Wyoming statute that provided for parole after a period of 25 years as one example of the application of that principle); *Miller*, 132 S. Ct. at 2474-75 (noting that individualized, discretionary sentencing of juveniles in adult court would enable a judge to "choose, rather than a life-without-parole sentence, a lifetime prison term *with* the possibility of parole or a lengthy term of years"); *see also Graham*, 560 U.S. at 70 (discussing a life-with-parole sentence and noting that, with

Ann. § 706-656; Nev. Rev. Stat. Ann. §§ 176.025, 213.12135(1); Vt. Stat. Ann. tit. 13, § 7045. As the petitioner correctly acknowledges, the legislative debate on juvenile sentencing issues is far from over. *See* Pet. 32 ("States are in the process of revising their juvenile sentencing schemes in light of the Eighth Amendment issues identified in *Miller* and *Montgomery* . . . ."); *see, e.g.*, Anita Wadhwani, *Task Force Seeks Juvenile Justice Overhaul*, The Tennessean, Jan. 10, 2017, at A10 (available on Westlaw at 2017 WLNR 830944).

Allowing that debate to continue serves beneficial purposes, even if it produces differing approaches to juvenile sentencing. This Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *Oregon v. Ice*, 555 U.S. 160, 171 (2009); *see also United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."). "[S]tate lawmaking," this Court has said, "allows local policies more sensitive to the diverse needs of a heterogeneous society, permits innovation and experimentation, [and] enables greater citizen involvement in democratic processes . . . ." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015) (quotations omitted).

Immediate review by this Court would "pretermit [these] other responsible solutions being considered in

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parole, the Court "could hardly ignore the possibility that [t]he [inmate] will not actually be imprisoned for the rest of his life").

. . . state legislatures" and similarly halt the lower courts from considering the validity *and* workability of the solutions that already have been enacted—and all unnecessarily, given that the petitioner has not identified any lower court disagreement that would require this Court's intervention on the two questions presented.[12] *District Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 73 (2009); *see Spears v. United States*, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting) (where Supreme Court decisions "have given the lower courts a good deal to digest over a relatively short period[,] [this Court] . . . should give them some time to address the nuances of these precedents before adding new ones. As has been said, a plant cannot grow if you constantly yank it out of the ground to see if the roots are healthy."); *Evans*, 514 U.S. at 24 n.1 (Ginsburg, J., dissenting) ("when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court"); *McCray v. New York,* 461 U.S. 961, 963, (1983) (Stevens, J., respecting denial of petitions for writs of certiorari) ("My vote to deny certiorari in these cases does not reflect disagreement with Justice Marshall's appraisal of the importance of the underlying issue . . . . In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue

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[12] Indeed, a threshold question for the type of proportionality review that the petitioner seeks—whether categorical or as applied to his particular circumstances—asks how juvenile homicide offenders are treated across state jurisdictions. *Graham*, 560 U.S. at 60-61. That question can best be answered as legislative activity subsides and state supreme courts have an opportunity to assess the statutes that have been enacted.

receives further study before it is addressed by this Court."). For these reasons too, the petition should be denied.

II. This Case Is A Poor Vehicle To Address The Two Questions Presented.

The petitioner describes this case as an "[i]deal" vehicle for this Court to consider the questions presented. Pet. 35. It is not. The first question was not presented to the SJC, so it is waived. And the second question seeks review of an issue that was decided with very little reasoned discussion and in an opinion that is not binding in Massachusetts or anywhere else.

1. The petitioner waived the issue in his first question presented by failing to raise it in his application for further appellate review before the SJC. *See Schiro v. Farley*, 510 U.S. 222, 229 (1994) ("the propriety of reaching the merits of a dispute is an important consideration in deciding whether or not to grant certiorari").

a. This Court has consistently enforced the principle that it will "entertain cases from state courts only where the record clearly shows that the federal issue has been *properly* raised below." *Webb v. Webb*, 451 U.S. 493, 499 (1981) (emphasis added); *see also Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (Court will not decide federal constitutional questions that have not "been raised, preserved, or passed upon in the state courts below"); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-35 (1940) (refusing to consider grounds not raised or decided in state court); *cf.* 28 U.S.C. § 1257. That

principle emanates from considerations of "comity" and "a proper respect for state functions." *Webb*, 451 U.S. at 499. State procedural rules, this Court has repeatedly recognized, "serve vital purposes" and "important interests" by, for example, "channel[ing], to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently." *Coleman v. Thompson*, 501 U.S. 722, 749 (1991); *see Reed v. Ross*, 468 U.S. 1, 10 (1984) (describing state rule that required criminal defendant to raise all of his claims during appeal and noting that such a rule "promotes not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together").[13] When such rules are not respected, there is "significant harm to the States." *Coleman*, 501 U.S. at 750.

b. The petitioner did not properly raise, and so waived, the issue in the first question presented. Massachusetts Rule of Appellate Procedure 27.1(b) requires applications seeking further review from the SJC to contain both "a statement of the points with respect to which further appellate review of the decision of the appeals court is sought" and "a brief statement . . . , including authorities, indicating why further appellate review is appropriate." But, with

[13] Although *Coleman* and *Ross* are federal habeas corpus cases, the "principal of comity that stands behind the 'properly-raised-federal-question' doctrine is similar to the principle that stands behind the exhaustion-of-state-remedies doctrine applicable to federal habeas corpus review of the constitutional claims of state prisoners." *Webb*, 451 U.S. at 500.

respect to the first question in the petition, the petitioner did not do either.

As mentioned, the petitioner asked the SJC to review only one of the four discrete issues that he had presented to the Appeals Court. *Compare* SJC App. for Further Appellate Rev., *supra*, at 11 *with* Pet. Appeals Court Br., *supra*, at 1, 16-42. He asked the SJC to consider whether juvenile joint venturers should be treated differently from principals for sentencing purposes. SJC App. for Further Appellate Rev., *supra*, at 13. Reminding the SJC that it had upheld life-with-parole sentences for principals, he claimed that his case would present the Court with an opportunity to resolve whether the same should be true for joint venturers. SJC App. for Further Appellate Rev., *supra*, at 16-18 (citing *Commonwealth v. Okoro*, 471 Mass. 51, 26 N.E.3d 1092 (2015)); *see id.* at 18 n.4 ("juvenile joint venturers must be treated differently from their principal counterparts for the purposes of sentencing"). In sharp contrast to his brief to the Appeals Court, at no point did the petitioner inform the SJC that the state parole board was "unpredictable" or overly "political," and he did not argue—much less with citations to any authority—that parole hearings are not meaningful opportunities for juveniles to obtain release within the meaning of *Graham* and *Miller*.[14] *Compare* SJC App. for Further

[14] The petitioner cannot validly claim that merely including an issue in a brief to the Appeals Court amounts to requesting that the SJC review it further. *Mele v. Fitchburg Dist. Court*, 850 F.2d 817, 822–23 (1st Cir. 1988); *cf. Baldwin v. Reese*, 541 U.S. 27, 34 (2004) (exhaustion analysis in habeas context does not encompass materials beyond the actual petition for review filed with state's highest court).

Appellate Rev., *supra*, at 11-21 *with* Pet. Appeals Court Br., *supra*, at 13-41. He simply did not raise that issue in the manner that state rules require.[15]

The principles of state-federal comity, discussed earlier, would suffer harm if this Court were to consider a ground for attacking Massachusetts's juvenile sentencing scheme that was never presented to Massachusetts's highest court. *Webb*, 451 U.S. at 500 (comity requires giving the state court "the initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights" (quotation omitted)); *cf. R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941) (federal courts should not rule upon constitutionality of state enactments until state courts have been afforded reasonable opportunity to consider them). If there are serious and systemic

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[15] The petitioner's failure to raise the issue in the manner required by Mass. R. App. P. 27.1(b) likely would cause the state courts of Massachusetts to refuse to consider any belated assertion of it now, whether under a theory of waiver or because it already was decided by the Appeals Court and no further review was sought. *See, e.g.*, *Commonwealth v. Rodriguez*, 443 Mass. 707, 710-11, 823 N.E.2d 1256, 1259-60 (2005) (direct estoppel bars relitigation in new trial motion of issue already decided on direct appeal); *Commonwealth v. Gagliardi*, 418 Mass. 562, 565, 638 N.E.2d 20, 22 (1994) (new trial motion may not be used to seek reconsideration of questions of law on which a defendant has had his day in appellate court); *Commonwealth v. Stirk*, 62 Mass. App. Ct. 1106, 816 N.E.2d 181 (2004) (unpublished) ("Stirk did not raise any claim as to this instruction in his direct appeal or his application for further appellate review. He cannot raise the claim now."); *Commonwealth v. Sowell*, 34 Mass. App. Ct. 229, 230, 609 N.E.2d 492, 493 (1993) ("As a general rule, a defendant is precluded from asserting, in a motion for new trial, claims of error which he could have raised, but did not raise, at trial or on appeal."); *see also* Mass. R. Crim. P. 30(c)(2).

problems with the Massachusetts parole system, as the petitioner now alleges (but the Commonwealth does not concede), the SJC should have been alerted to them so that it could have attempted, in the first instance, to rectify them before federal court intervention.

There is no reason to think that the SJC would have turned its back on such arguments, if they had been made and appeared colorable. The SJC, after all, is a staunch defender of the rights of criminal defendants, often construing the state constitution to offer greater protection than its federal counterpart. *See, e.g.*, *Diatchenko v. Dist. Atty. for the Suffolk Dist.*, 466 Mass 655, 658, 1 N.E.3d 270 (2013) (holding that the state constitution bars all life-without-parole sentences for juveniles); *Commonwealth v. Greineder*, 464 Mass. 580, 593, 984 N.E.2d 804, 814 (2013) ("We can, and often do, afford criminal defendants greater protections, both under our common-law rules of evidence and the Massachusetts Constitution."); *Commonwealth v. Rodriguez*, 430 Mass. 577, 584, 722 N.E.2d 429, 434 (2000) (state constitution provides greater protection than the federal as to certain searches and seizures).

In sum, the petitioner's failure to comply with state presentation and preservation rules makes this case an unsuitable and inappropriate vehicle to consider the first question presented. The petition should not be granted.

2. This case is a poor vehicle to decide the second question presented because the decision below is an unpublished ruling of an intermediate appellate panel with no precedential value. It is thus more vulnerable

to modification or reversal during the pendency of this appeal than a binding opinion of the Massachusetts SJC, or a published opinion of the Appeals Court, would be.

The Appeals Court is Massachusetts's intermediate appellate court. *Commonwealth v. Colon*, 52 Mass. App. Ct. 725, 730 n.1, 756 N.E.2d 615, 620 n.1 (2001). Any holding that it issues is always subject to modification by the SJC both in the case itself and in subsequent cases.

But the decision at issue here is on even less solid footing, because the Appeals Court resolved the petitioner's appeal through a summary decision issued under Mass. App. Ct. R. 1:28. In Massachusetts, a "summary decision pursuant to rule 1:28 . . . may be cited for its persuasive value but . . . not as binding precedent." *Chace v. Curran*, 71 Mass. App. Ct. 258, 261, 881 N.E.2d 792, 795 (2008). Accordingly, at any time, not only the SJC but also a different panel of the Appeals Court could, in another case, resolve the issue differently.[16] In fact, even a state trial court judge could offer a different view as to whether, or the extent to which, the Eighth Amendment allows juvenile principals and accomplices to receive the same sentence, particularly where the Appeals Court did not offer any reasoned analysis of the issue for a trial judge to adopt or follow. And all three courts—the SJC, the Appeals Court, and the trial court—could construe the state constitution

[16] The petitioner has not cited, and the Commonwealth is not aware of, any binding Massachusetts precedent that addresses the issue raised by the second question presented.

to offer greater protection than the federal constitution.

In light of these circumstances, Massachusetts's sentencing practices for juvenile accomplices and principals could change in material ways, including before this Court resolves this petition. For this reason too, the petition should be denied.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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