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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Commonwealth does not dispute that this case presents vitally important constitutional questions affecting thousands of people sentenced for crimes committed during childhood. The Commonwealth also does not argue that this Court should not address these questions; it simply argues that this Court should not address these questions *yet*.

But there is no reason for delay. This case presents the opportunity for *de novo* review of the Eighth Amendment claim raised by Mr. Bright's petition. Both sides of the issues have been well-ventilated before numerous state courts of last resort, which have come to divergent conclusions about the logical implications of *Miller v. Alabama*, 132 S. Ct. 2455 (2012), with respect to mandatory sentences that are identical to the life sentence struck down in *Miller* but for a possibility that a State's executive branch may exercise discretion to grant early release. *Compare State v. Lyle*, 854 N.W.2d 378, 403 (2014), *with Lewis v. State*, 428 S.W.3d 860, 863-65 (Tex. Crim. App. 2014). Nor would additional legislative developments provide insight about the constitutional floor that the Eighth Amendment sets nationwide. "The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects." *Hall v. Florida*, 134 S. Ct. 1986, 2004 (2014).

I. This Case Raises Important Juvenile Justice Issues About Which State Courts Have Reached Differing Conclusions.

Mr. Bright's petition presents vitally important questions affecting thousands[1] of individuals sentenced for crimes committed during childhood: whether States can mandate that every child convicted of homicide (even those convicted as joint venturers) be imprisoned for life with the mere possibility that a future parole board may grant discretionary early release. The State's percolation and state-experimentation arguments do not support delaying review.

1. In the juvenile sentencing context, this Court has frequently granted review to address important Eighth Amendment questions without waiting for the sort of direct and deeply-entrenched conflict that the Commonwealth asserts is a prerequisite. In *Miller*, this Court granted certiorari despite objections—identical to the Commonwealth's (at 14)—that there was no split and that "[o]nly five years ha[d] passed since *Roper*, and merely a year ha[d] passed since *Graham*." Br. in Opp. 11, *Miller*, No. 10-9646. This Court likewise granted certiorari in *Graham v. Florida*, 560 U.S. 48 (2010), over the State's arguments that courts that had "considered the applicability of *Roper* to a juvenile's term of life imprisonment ha[d] universally decided the issue *against* Petitioner's position." Br. in Opp. 19, *Graham*, No. 08-7412. Review is equally appropriate here.

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[1] *See* Sentencing Project Br. 8-9.

2. Further underscoring that these issues are ripe for review, numerous state high courts have considered mandatory life-sentencing regimes since *Miller* and, relying on this Court's precedents, come to differing conclusions about the protections children must receive at sentencing. Several state high courts have held that the future opportunity for discretionary parole provides all the protection necessary under *Miller* and its progeny. *E.g.*, *Commonwealth v. Okoro*, 26 N.E.3d 1095, 1098-99 (Mass. 2015); *Lewis*, 428 S.W.3d at 863-65; *Ouk v. State*, 847 N.W.2d 698, 701-02 (Minn. 2014). The Iowa Supreme Court has come to the opposite conclusion. *Lyle*, 854 N.W.2d at 401.

The Commonwealth asks this Court to disregard *Lyle* because the Iowa Supreme Court's decision was styled as a state-law holding. But the *Lyle* court expressly stated its result was "also embedded within the most recent cases from the United States Supreme Court." 854 N.W.2d at 401. Tracing *this Court's* precedents, the court concluded that "[t]he heart of the constitutional infirmity with the punishment imposed in *Miller* was its mandatory imposition, not the length of the sentence. The mandatory nature of the punishment establishes the constitutional violation." *Id.*

Accordingly, state high courts *have* reached divergent conclusions about the logical implications of *Miller* on mandatory life-sentencing regimes like Massachusetts'. Furthermore, nearly all States have constitutional provisions that mirror the Eighth Amendment and can simply style their decisions as resting on state-law grounds, as Iowa did. *See* Kathi A. Drew & R.K. Weaver, *Disproportionate or Exces-*

sive Punishments: Is There A Method for Successful Constitutional Challenges?, 2 Tex. Wesleyan L. Rev. 1, 24 (1995). Disregarding state-court decisions that expressly interpret this Court's precedents as having "no bearing" on whether review is appropriate simply because their holdings are styled as state-law holdings, Opp. 11, shrinks the universe of sources of conflict and needlessly forestalls this Court's review of vital questions of juvenile justice. Indeed, this Court granted certiorari in *Graham* over identical arguments that the conflicting cases were decided under state-law Eighth Amendment analogues. Br. in Opp. 15-16, *Graham*, No. 08-7412.

3. The Commonwealth argues this Court should delay review to afford more opportunities for States to experiment with "differing approaches to juvenile sentencing." Opp. 16. But this case is about the constitutional floor below which *no* State may fall in sentencing children to life imprisonment. "The idea of the Constitution 'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.'" *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605-06 (2015) (citation omitted).[2] Whether the Eighth Amendment prohibits States from imposing

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[2] The state-experimentation rationale derives from the deference States enjoy under our federalist system to "try novel social and economic experiments." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). What "experimentation" means here is locking children up for life without considering their individual circumstances. The Eighth Amendment exists precisely to protect against this type of "experimentation."

mandatory life sentences on children, with only the hypothetical opportunity for discretionary parole decades in the future, is a question only this Court, and not state legislatures, can answer.

Moreover, the Commonwealth ignores that states have been experimenting with parole *for decades*. The results? Parole decisions made by an arm of the very branch of government responsible for prosecuting juvenile offenders, and release rates that shift with political winds and do nothing to ensure "all but the rarest of children" are spared from serving life sentences, *Montgomery v. Louisiana*, 136 S. Ct. 718, 726 (2016). *See* Pet. 19-21. Far from weighing against review, state experimentation underscores why mandatory sentencing regimes that place juvenile offenders' fates in parole boards' hands "pose[] too great a risk of disproportionate punishment." *Miller*, 132 S. Ct. at 2469.

4. The Commonwealth asks this Court to wait to see "how juvenile homicide offenders are treated across state jurisdictions," contending that this is a "threshold question" to the Eighth Amendment inquiry. Opp. 17 n.12. But the answer to this purported "threshold question" is apparent now: as a result of judicial percolation and legislative developments since *Miller*, *every child* convicted of certain offenses in states such as Massachusetts, Texas, and Minnesota must rely on the discretionary whims of the executive branch for any hope of future release, *see supra* p. 5, while *no child* convicted of any crime in states such as Montana, Washington, or Iowa can receive the same sentence absent a court's individualized determination that the sentence is proportionate, *see* Pet. 28. The possibility that an already-

disproportionate sentence might someday become more disproportionate is no reason to delay review.

II. This Case Is An Ideal Vehicle For The Questions Presented.

The Commonwealth mischaracterizes Mr. Bright's arguments. Mr. Bright does not argue that the Eighth Amendment "prohibits juvenile homicide offenders from being sentenced to life with the opportunity for parole," nor does he argue that Massachusetts' sentencing regime is unconstitutional because it does not provide a "meaningful opportunity for release." Opp. 7. Instead he argues that the *mandatory* imposition of such a sentence violates the Eighth Amendment, that the hypothetical availability of discretionary release by an executive department cannot substitute for individualized sentencing by a judge, and that the inherent qualities and historical practice of parole boards make parole categorically unsuitable to provide an Eighth Amendment backstop, as this Court assumed in *Montgomery*.

As in *Miller*, given the executive function and practical realities of parole boards, imposing mandatory life sentences on children "poses too great a risk of disproportionate punishment." 132 S. Ct. at 2469. This risk is only heightened, and the constitutional infirmities even more serious, for children convicted not for killing, but for aiding or abetting someone who did.

The Commonwealth argues this case is an inappropriate vehicle because Mr. Bright supposedly waived the first question presented and the Massachusetts Appeals Court's decision was unpublished. The first point is not true, and the second provides

no reason to deny certiorari—if anything, it reflects the extent to which Massachusetts courts have dug in on these issues.

A. Mr. Bright's Eighth Amendment Challenge Is Properly Before This Court.

The Commonwealth argues that Mr. Bright waived the first question presented by not raising it in his application for further appellate review ("FAR Application"). But Mr. Bright properly presented his Eighth Amendment claim in state court as required by 28 U.S.C. § 1257(a). In any event, both of his Eighth Amendment arguments were presented to and resolved by the Massachusetts Appeals Court. Under Massachusetts procedure, his FAR Application brought the *entire case* up for review by the SJC. FAR applicants need not raise every argument made before the appeals court to preserve them.

1. A state court judgment is properly before this Court if a state statute's validity was "drawn in question on the ground of its being repugnant to the Constitution" in state court. 28 U.S.C. § 1257(a). As long as a petitioner made reference to a clause of the federal Constitution or the federal cases supporting his challenge, the petitioner adequately presented the federal question in state court. *See Howell v. Mississippi*, 543 U.S. 440, 443-44 (2005); *Dewey v. City of Des Moines*, 173 U.S. 193, 198 (1899). Indeed, *Baldwin v. Reese*, cited by the Commonwealth (at 20 n.14), makes this point clear: "A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or

a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'" 541 U.S. 27, 32 (2004). Mr. Bright did precisely that: he challenged his mandatory sentence as violating the Eighth Amendment as interpreted in *Miller*, and he did so before the trial court, the Massachusetts Appeals Court, and the SJC. *See* SJC App. 202; Br. of Defendant-Appellant 16-35, No. 2014-P-0546; FAR Application 11-16, FAR-24324. Nothing more is required.

The Commonwealth argues that by not presenting to the SJC *one specific argument* in support of his Eighth Amendment *claim*—an argument he unquestionably asserted in his Massachusetts Appeals Court brief and that was decided against him because it was foreclosed by the SJC's recent *Okoro* decision—Mr. Bright surrendered his right to raise that argument here. But a petition for certiorari can modify, narrow, or broaden the way a constitutional claim was framed in state court. In *Yee v. City of Escondido*, 503 U.S. 519 (1992), the petitioner was permitted to raise a regulatory taking argument in this Court even though he had raised only a physical taking argument in state court. As this Court explained, the two theories were "separate *arguments* in support of a single claim—that [an] ordinance effects an unconstitutional taking. Having raised a taking claim in the state courts, therefore, petitioners could have formulated any argument they liked in support of that claim here." *Id.* at 535. Likewise, in *Dewey*, this Court stated that where a petitioner's question presented was "only an enlargement of the one mentioned in the assignment of errors" in state court, then there would be "no hesitation in holding the assignment to permit the question to be now

raised and argued" before this Court. 173 U.S. at 197-98.

Mr. Bright unquestionably raised his Eighth Amendment claim at every stage of state-court proceedings, referring explicitly to the Eighth Amendment and this Court's interpretation of it in *Miller*. It makes no difference that the first question presented here is "an enlargement of the one mentioned in" his FAR Application. *Dewey*, 173 U.S. at 380.

In contrast, the petitioners in the cases cited by the Commonwealth failed to assert the federal constitutional or statutory claim *at all* in state court. *See Webb v. Webb*, 451 U.S. 493, 496-98 (1981) (petitioner never cited the Constitution or "any cases relying on [the Constitution] … at any point in the state-court proceedings"); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) (petitioner failed to raise any federal constitutional issue "in any way below"); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 433-34 (1940) (declining to affirm on alternative statutory grounds where "[n]o mention was made of any applicable statute of the United States" in state-court proceedings); *cf. Mele v. Fitchburg Dist. Court*, 850 F.2d 817, 819 (1st Cir. 1988) (individual who raised only trial errors in FAR Application could not assert constitutional challenge in habeas petition).

2. The Commonwealth argues that Mr. Bright violated state law by not articulating one of his Eighth Amendment arguments in his FAR Application. But this is not a habeas case; the question is not whether Mr. Bright complied with *state* procedural rules, it is whether he "dr[ew] in question" the constitutionality of Massachusetts' mandatory-sentencing regime as

required by § 1257(a).[3] Nevertheless, Mr. Bright did not waive his argument under state law.

The SJC has repeatedly stated that claims presented to the Massachusetts Appeals Court are not waived by failing to include them in a FAR Application. A FAR Application is a short document—with just ten pages, double-spaced with 1½-inch margins, to argue why further review is appropriate, Mass. R. App. P. 27(a)(1), 27.1(b)(5)—filed 20 days after the appeals court's decision. Filing a FAR Application brings the *entire* appellate court's decision up for review, whether each claim asserted below is discussed in the FAR Application or not. *See Commonwealth v. Burno*, 487 N.E.2d 1366, 1368 (Mass. 1986) ("[A]ll issues that were before the Appeals Court are before this court, including issues not addressed in the application"). The SJC has even cautioned that a FAR respondent "incurs a clear risk" by addressing only the arguments raised in a FAR application, rather than "successive or alternative contentions" raised to the court below. *Ford v. Flaherty*, 305 N.E.2d 112, 116 (Mass. 1973).

Indeed, "[w]here further appellate review has been granted after consideration of a case by the Appeals Court, the case will be reviewed in the [SJC] based on the brief[s] that w[ere] earlier filed in the Appeals Court." Mass. R. App. P. 27.1 reporter's note (2001).

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[3] The fair-presentation requirement in § 1257(a) and the state-exhaustion requirement in 28 U.S.C. § 2254(c) share a common comity principle, but the two statutes are very different. Section 1257(a) merely requires a certiorari petitioner to have "drawn in question" the validity of a state statute on Constitutional grounds, whereas § 2254(c) more strictly requires a habeas applicant to have raised in state court "*the question presented*." (emphasis added).

A FAR applicant waives *nothing* by failing to raise an argument in a FAR application as long as it was raised before the appeals court, which Mr. Bright unquestionably did.[4]

3. In suggesting that the SJC should have the opportunity to address whether the potential for discretionary parole saves a mandatory life sentence for children, the Commonwealth omits that the SJC *has* addressed this specific question *twice*, most recently just one year before Mr. Bright filed his FAR Application. *See Commonwealth v. Brown*, 1 N.E.3d 259, 267-68 (Mass. 2013); *Okoro*, 26 N.E.3d 1095.

Indeed, Mr. Okoro and his *amici* raised the exact arguments made in Mr. Bright's petition—the constitutional infirmities of effectively vesting sentencing authority in the executive branch, that parole-board decisionmaking is based on recidivism risk rather than proportionality, that parole boards are highly susceptible to political pressure, and abysmal parole-release rates.[5] The SJC rejected these arguments, holding that "following *Miller,* the Eighth Amendment does not require individualized, discretionary judicial sentencing of juvenile homicide offenders before these offenders may be sentenced to life in pris-

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[4] *Mele*, a habeas case cited by the Commonwealth (at 20 n.14), is inapposite. As noted in footnote 3, the habeas exhaustion requirement is very different from § 1257(a)'s fair-presentation requirement. Moreover, the petitioner in *Mele* failed to raise *any* federal constitutional claim in his FAR Application and instead raised only state-law trial errors; *Mele* says nothing about the waiver of arguments in support of properly-raised federal constitutional claims. 850 F.2d at 819.

[5] The briefs filed in *Okoro* are available at http://www.ma-appellatecourts.org/display_docket.php?src=party&dno=SJC-11659.

on with eligibility for parole." *Okoro*, 26 N.E.3d at 1102. There is no risk of undermining state-federal comity by granting review to address questions the SJC has firmly resolved.

B. The Form Of The Appeals Court's Ruling Provides No Basis For Denying Review.

The court of appeals issued a reasoned decision addressing all of Mr. Bright's constitutional arguments and concluded that it was bound by the SJC's *Okoro* decision. Pet. App. 1a-5a. That the decision is unpublished "carries no weight in [the Court's] decision to review the case." *Commissioner v. McCoy*, 484 U.S. 3, 7 (1987); *Smith v. United States*, 502 U.S. 1017, 1020 (1991) (Blackmun, J., dissenting from denial of certiorari) ("Nonpublication must not be a convenient means to prevent review."). Indeed, this Court frequently reviews (and reverses) unpublished decisions, including from Massachusetts' intermediate appellate courts. *E.g.*, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009); *Bank of Am., N.A. v. Caulkett*, 135 S. Ct. 1995 (2015).

Furthermore, the court of appeals' decision rested on settled SJC precedent, which the court said it was "bound to follow." Pet. App. 5a. If anything, the fact that the court considered the issue so well-settled as to not merit precedential treatment only confirms that these issues are ripe for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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