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No. 45

IN THE
COURT OF APPEALS OF MARYLAND

COA-REG-0045-2021

DAWNTA HARRIS
Petitioner,
v.
STATE OF MARYLAND,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF AMICUS CURIAE HUMAN RIGHTS FOR KIDS IN SUPPORT OF PETITIONER

(FILED WITH CONSENT OF ALL PARTIES)

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INTEREST OF AMICUS CURIAE

Human Rights for Kids is a non-profit organization dedicated to the protection of children's rights. A central focus of our work is advocating in state legislatures and courts for comprehensive legal protections for children consistent with the U.N. Convention on the Rights of the Child and the International Covenant on Civil and Political Rights. Our board of directors is comprised of current and former Republican and Democratic state lawmakers from across the country, including Maryland, who are working to change the way the nation treats vulnerable, system-involved youth.[1]

STATEMENT OF THE CASE

Amicus Curiae incorporates Petitioner's Statement of the Case by reference.

STATEMENT OF THE QUESTIONS PRESENTED

Amicus Curiae incorporates Petitioner's Statement of the Questions Presented by reference.

STATEMENT OF THE FACTS

Amicus Curiae incorporates Petitioner's Statement of Facts by reference.

STATEMENT OF THE APPLICABLE STANDARD OF REVIEW

Amicus Curiae incorporates Petitioner's Statement of the Applicable Standard of Review by reference.

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[1] No party wrote any portion of, or provided financial support for, this amicus brief. Mae C. Quinn, a professor at the UDC David A. Clarke School of Law, contributed to this brief in a *pro bono* capacity as co-counsel for amicus, Human Rights for Kids. She was assisted by law students Mary Brody, Tierra Copeland, and Tatyana Hopkins and has listed her professional affiliation on the front cover of this brief for identification and mailing purposes only.

ARGUMENTS

I. Proportionality Requirements Under the Eighth Amendment and the Maryland Declaration of Rights Require Individualized Sentencing Procedures for Children that Account for the Infirmities of Youth.

A. Children's Cognitive Immaturity Renders Them Less Culpable than Adults and Less Deserving of the Most Severe Punishments.

Supreme Court rulings over the last several decades confirm that "for purposes of sentencing," children are different from adults and must be treated differently as a matter of law. *See Miller v. Alabama*, 567 U.S. 460, (2012). *See also Graham v. Florida*, 560 U.S. 48 (2010) and *Roper v. Simmons*, 543 U.S. 551 (2005). Relying on developments in behavioral science, the Supreme Court has recognized that the penological justifications for imposing a state's harshest penalties on children "apply to them with lesser force than to adults" who commit the same crimes. *Roper*, 543 U.S. at 571. *See also* Thomas Grisso & Antoinette Kavanaugh, *Prospects for Developmental Evidence in Juvenile Sentencing Based on Miller v. Alabama*, 22 PSYCHOL. PUB. POL'Y & L. 235 (2016). Young people are impetuous and drawn to risk-taking behaviors. *See* Elizabeth Scott *et al*., *Juvenile Sentencing Reform in A Constitutional Framework*, 88 TEMP. L. REV. 675, 682 (2016). They lack planning skills, appreciation for long-term consequences, and the ability to self-regulate like adults. *See id.* at 683-85. The same developmental factors that make children susceptible to influence by their peers, however, make them amenable to rehabilitation. *Id.* Indeed, children are more likely to "mature out of their criminal tendencies" as they grow into adulthood. *Id.* at 679.

Given the scientific consensus that children often lack the ability to exercise mature judgment, are more vulnerable to the influences of others, more impulsive, and lack the discipline of adults, the U.S. Supreme Court has concluded that children prosecuted as adults must receive appropriate consideration at sentencing to account for their "developmental immaturity" and reduced culpability. *Miller*, 567 U.S. at 471 (referencing and applying youth-focused considerations developed in *Roper* and *Graham*). *See* Scott *et al*., *Juvenile Sentencing Reform, supra* at 678. Absent an individualized sentencing hearing where youth and its attendant circumstances are thoroughly considered by the court, the imposition of severe "adult" sentences on child offenders such as Dawnta Harris, are presumptively disproportionate and constitute cruel and/or unusual punishment under both the U.S. Constitution and Maryland Declaration of Rights.

B. The Federal Constitutional Framework for Sentencing Children Convicted as Adults

The Eighth Amendment's prohibition against cruel and unusual punishment flows from the basic "precept of justice that punishment for crime should be graduated and proportioned to the offense." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Weems v. United States*, 217 U.S. 349 (1910). This determination is informed, in part, by "'the evolving standards of decency that mark the progress of a maturing society.'" *Miller*, 567 U.S. at 469-70 (quoting *Estelle v. Gamble*, 429 U. S. 97, 102 (1976)). Consideration of the "'objective indicia of society's standards, as expressed in legislative enactments and state practice,'" is the first step in this analysis. *Graham*, 560 U.S. at 61, (quoting *Roper*, 543 U.S. at 572). To determine whether a "national consensus" against a punishment exists,

"[i]t is not so much the number" of jurisdictions that are enacting reforms "that is significant, but the consistency of the direction of change." *Atkins*, 536 U.S. at 315.

In addition, as part of the proportionality analysis, "the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution." *Roper*, 543 U.S. at 572. This analysis first "requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question." *Graham*, 560 U.S. at 67. Next, the Court examines "whether the challenged sentencing practice serves legitimate penological goals." *Id.* at 71.

"The understanding that it was cruel and unusual punishment to mandate the same sentences for juveniles as adults first emerged for crimes involving death sentences." *State v. Lyle*, 854 N.W.2d 378, 393 (Iowa 2014) (citing *Thompson v. Oklahoma*, 487 U.S. 815 (1988) and *Roper*, 543 U.S. 551). The Supreme Court's child sentencing jurisprudence then led to prohibitions against life without parole sentences for non-homicide offenses (*Graham*) and for children convicted of homicide where the crime did not reflect permanent incorrigibility (*Miller*). *See Graham*, 560 U.S. 48 and *Miller*, 567 U.S. 460. While the sentences in each of the Court's cases were different, the underlying rationale for the prohibitions reflects a recognition of the diminished culpability of child offenders and society's evolving standards of decency. *Id.*

Thompson and its progeny reveal that sentencing schemes that fail to take youth into account stand in direct contradiction to proportional sentencing for child offenders under the Eighth Amendment. *Miller*, 567 U.S. at 483. *Thompson* makes clear that:

> Adolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but *they deserve less punishment* because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.

487 U.S. at 834. The *Miller* Court expanded on this principle, finding that mandatory penalties

> preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other. And still worse, each juvenile will receive the same sentence as the vast majority of adults committing similar . . . offenses.

567 U.S. at 476-77. The Court's individualized sentencing cases teach that "in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult." *Id.* at 477.

C. Constitutional Protections for Children Under the Maryland Declaration of Rights

Article 25 of the Maryland Declaration of Rights states "that excessive bail ought not to be required, … nor cruel or unusual punishment inflicted, by the Courts of Law." When construing the meaning of Article 25, this Court has said:

> Even where the law confides to the Judge the imposition of the sentence without definite limit, it still may be possible to violate the Declaration of Rights. If the punishment is grossly and inordinately disproportionate to the offence so that the sentence is evidently dictated not by a sense of public duty, but by passion, prejudice, ill-will or any other unworthy motive, the judgment ought to be reversed, and the cause remanded for a more just sentence.

Thomas v. State, 333 Md. 84, 96 (1994) (quoting *Mitchell v. State*, 82 Md. 527, 533-34 (1896)). Proportionality is measured "not by comparing the sentence with the label of the crime (that the sentence be within legal limits is a legal problem, not a constitutional problem) but by comparing the sentence with the behavior of the criminal and the consequences of his act." *Thomas*, 333 Md. at 97 (citing *Walker v. State*, 53 Md. App. 171 (1982)). Consistent with the overwhelming weight of legal authority, this Court has further clarified that in cases involving child defendants, the principle that "children are constitutionally different from adults for purposes of sentencing" justifies inquiring whether a "sentencing package as a whole" is unconstitutional. *Carter v. State*, 461 Md. 295, 359-60 (2018) (citing *Miller*).

In *Carter*, this Court invalidated a 100-year sentence that required the child offender to serve 50 years before he became eligible for parole. *Id.* at 362. In remanding Mr. McCullough's case for re-sentencing consistent with *Miller*, the *Carter* Court noted that the sentence "exceeds the threshold duration recognized by most courts in decisions and legislatures in reform legislation." *Id.* The Court further encouraged the sentencing court on remand to "explain its reasoning . . . because 'justice is better served when a judge ... freely and openly discloses the factors he weighed in arriving at the final sentencing disposition.'" *Id.* at 365, (quoting *Johnson v. State*, 274 Md. 536, 544 (1975)). "It also helps an appellate court review whether the sentence is constitutionally proportionate." *Id.* (quoting *Thomas v. State*, 333 Md. at 95- 96 (1993)). The sentencing court in this case did not conduct an individualized sentencing hearing consistent with *Miller* to determine a

constitutionally proportionate sentence for Dawnta, nor was it required to under existing Maryland case law. *Hartless v. State*, 241 Md. App. 77 (2019).

II. Absent a Miller Hearing, Dawnta's *Mandatory* Life Sentence with 15 Years of Parole Ineligibility is Presumptively Disproportionate and Unconstitutional under the U.S. Constitution and the Maryland Declaration of Rights.

When the *Miller* Court adopted the view that an offender's age is relevant in assessing the constitutionality of a sentence under the Eighth Amendment, it noted that none of the mental and social impediments associated with youth are "crime-specific" and that *any* "criminal procedure laws that fail to take defendants' youthfulness into account . . . would be flawed." *Miller*, 567 U.S. at 478, 473 (quoting *Graham,* 560 U.S. at 76). Chief Justice Roberts further acknowledged the true breadth of this constitutional requirement:

> The principle behind today's decision seems to be only that because juveniles are different from adults, they must be sentenced differently . . . . There is no clear reason that principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive.

Id. at 501(dissenting opinion).

At the time when Dawnta was convicted of first-degree murder pursuant to Md. Code, Crim. Law § 2-201, children received a *mandatory* minimum of life imprisonment with fifteen years of parole ineligibility. Md. Code, Corr. Servs. §7-301. Under *Miller*'s foundational principle- that children are less culpable and less deserving of the same severe punishment as adults- Dawnta's mandatory minimum of life and its accompanying fifteen-years of parole ineligibility are presumptively disproportionate under the Eighth Amendment.

In addition, under this Court's directive in *Carter*, sentences like Dawnta's must be reevaluated to ensure they are not disproportionate. 461 Md. at 356-57. As *Carter* noted, courts look at how legislatures amend their laws governing sentencing and parole to comply with recent decisions to discern "contemporary values" in their Eighth Amendment analysis. *Id.* at 353-54. Dawnta's sentence raises proportionality concerns along the "comparison to legislative reforms" analysis this Court discussed in *Carter*, *id.* at 351-53, because it was imposed prior to the Maryland Legislature's codifying Md. Code Ann. Crim Proc. §6-235, which allows judges to depart from *any* mandatory minimum sentence.

A. Objective Indicia of Maryland's Standards, as Expressed in Recent Legislative Enactments, Make Clear that Dawnta's Mandatory Minimum Life Sentence with 15 years of Parole Ineligibility is Unconstitutional.

"Cruel and/or unusual" punishment is determined in light of "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 103 (1958). To assess whether a particular punishment applied to a class of offenders violates the Constitution, appellate courts first look to "objective indicia" to determine whether standards of decency have evolved before turning to their own independent judgment. Last year, the Maryland Legislature enacted the following law: "Notwithstanding any other provision of law, when sentencing a minor convicted as an adult, a court: (1) may impose a sentence *less than the minimum term* required under law; and (2) may not impose a sentence of life imprisonment without the possibility of parole or release." Juvenile Restoration Act, S.B. 494, Gen. Ass., Reg. Sess. (Md. 2021).

This policy shift occurred *after* this Court's decision in *Carter* providing further evidence that "evolving standards of decency" in Maryland have turned against both life without parole and mandatory minimum sentences for children who are tried and convicted as adults. That is not to say that a court cannot impose a lengthy sentence, including life, on a child offender, but only that the court must have discretion to impose a sentence below the statutory minimum. This policy change reflects the Maryland Legislature's adoption of the view that children do not deserve the same punishment as similarly situated adults, further underscoring the importance of individualized sentencing procedures for children.

Maryland now views the imposition of mandatory minimum sentences for children as indecent and contrary to societal standards. This prohibition includes any sentence that either carries a minimum term or has a mandatory period of parole ineligibility, such as the sentence Dawnta received under CL § 2-201. *See also* CS §7-301. Accordingly, absent a *Miller* hearing, which did not happen in Dawnta's case, the imposition of a sentence for any crime carrying a minimum term of incarceration violates Maryland's prohibition against cruel and/or unusual punishment. *See Connecticut v. Santiago*, 122 A.3d 1 (Conn. 2015) (the Connecticut Supreme Court ruled that Mr. Santiago was entitled to the benefit of new state legislation banning the death penalty prospectively only, despite the fact that Mr. Santiago had been sentenced to death prior to the effective date of the new legislation).

Neighboring states have also passed legislation requiring consideration of the *Miller* factors for all children in adult court and authorizing judges to depart from mandatory sentences that are otherwise required for adults. *See, e.g.,* Va. Code §16.1-272 (amended 2020) ("[N]otwithstanding any other provision of law, if the juvenile is convicted of any

felony, the court may in its discretion depart from any mandatory minimum sentence required by law or suspend any portion of an otherwise applicable sentence") ("[I]n any case in which a juvenile is sentenced as an adult under this chapter, the court shall, in addition to considering any other factor and prior to imposing a sentence, consider (i) the juvenile's exposure to adverse childhood experiences, early childhood trauma, or any child welfare agency and (ii) the differences between juvenile and adult offenders"); D.C. Code §21-238, District of Columbia Comprehensive Youth Justice Amendment Act of 2016 (eliminating all mandatory minimum sentences for child offenders prosecuted in the adult criminal system); and W.Va. Code §61-11-23 (requiring consideration of the *Miller* factors when sentencing a child convicted as an adult).

Across the country, similar reforms have been proposed at both the state and federal level. *See* 117th Congress H.R. 2858 (requiring consideration of youth and giving judges greater discretion when sentencing children in the federal system); Hawaii HB 418 (requiring consideration of the *Miller* factors at sentencing and allowing judges to depart from mandatory minimum sentences) 31st Leg., Reg. Sess. (Hi. 2021); Vermont H. 231 (requires the court to consider whether the child was subjected to any early childhood trauma or adverse childhood experiences as potential mitigating factors and allows the court to depart from any mandatory minimum sentence) (Vt. 2021); and Arkansas SB 607 ("The General Assembly finds that there is a recent trend in the United States of giving greater discretion to judges when sentencing children, including departing from mandatory minimums . . .") 92nd Gen. Ass., Reg. Sess. (Ar. 2019).

Bolstering the argument that these legislative actions reflect the "evolving standards of decency" of contemporary society is the fact that they have been championed by Democratic and Republican legislators alike in every region of the country. In fact, CP §6-235, was sponsored by Maryland Republican State Senator Chris West. And while there are jurisdictions that have not yet reached the question of whether mandatory minimum sentences for children are constitutional, *Graham* teaches us that the mere availability of a sentence "does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration." *Graham* at 67. In any event, "consensus is not dispositive" of the question; "the evolution of society that gives rise to change over time necessarily occurs in the presence of an existing consensus." *Lyle*, 854 N.W.2d at 387. As the Supreme Court of Iowa observed:

> Society is now beginning to recognize a growing understanding that mandatory sentences of imprisonment for crimes committed by children are undesirable in society. If there is not yet a consensus against mandatory minimum sentencing for juveniles, a consensus is certainly building . . . in the direction of eliminating mandatory minimum sentencing.

Id. The "direction and consistency of change" nationally, in the mid-Atlantic region, and in Maryland, in particular, is quite clear, supporting the conclusion that mandatory minimum sentences are presumptively unconstitutional without consideration of the *Miller* factors prior to sentencing.

B. There are No Penological Justifications for Imposing the Same Mandatory Minimum Life Sentence with Fifteen Years of Parole Ineligibility on Dawnta that a Similarly Situated Adult Would Receive.

After reviewing objective indicia of society's standards, the Court must determine, in the exercise of its own independent judgment, whether the punishment in question

violates the Constitution. *Graham*, 560 U.S. at 61. The issue of proportionality of *any* mandatory sentence on a child offender has been the touchstone issue for judges and courts considering the broader implications of *Miller* since 2012. This principle has led courts in recent years to conclude that "sentencing juveniles according to statutorily required mandatory minimums does not adequately serve legitimate penological objectives," which is the second part of the Court's Eighth Amendment analysis when determining whether a sentencing practice is cruel and/or unusual punishment. *See* Suzanne S. La Pierre & James Dold, *The Evolution of Decency: Why Mandatory Minimum and Presumptive Sentencing Schemes Violate the Eighth Amendment for Child Offenders*, 27 VA. J. SOC. POL'Y & L. 165, 175-76 (2020). Retribution is an "irrational exercise" in light of a juvenile's diminished culpability. *Lyle*, 854 N.W.2d at 399. The deterrence rationale is "even less applicable when the crime (and concordantly the punishment) is lesser." *Id.* Similarly, "the rehabilitative objective can be inhibited by mandatory minimum sentences" and delaying the release of a juvenile once he or she matures and reforms is "nothing more than the purposeless and needless imposition of pain and suffering." *Id.* In light of children's diminished culpability and the fact that mandatory sentences do not serve legitimate penological objectives, the imposition of such sentences, without an individualized sentencing hearing, are presumptively disproportionate under the Eighth Amendment and the Maryland Declaration of Rights.

While the fundamental principle that children are less culpable than adults is now beyond debate, the application of this rationale to assess the constitutionality of juvenile sentencing post-*Miller* continues to evolve. Two years after *Miller*, the Iowa Supreme

Court became the first to conclude that *all* mandatory sentences imposed on juveniles, absent an individualized sentencing hearing consistent with *Miller*, violate Iowa's constitutional provisions against cruel and unusual punishment. *Lyle,* 854 N.W.2d at 400, 403 ("a statute that sends all juvenile offenders to prison for a minimum period of time under all circumstances simply cannot satisfy the standards of decency and fairness embedded in article I, section 17 of the Iowa Constitution").

Based on *Miller's* rationale, the Iowa Supreme Court held that a sentencing judge must consider youth and its attendant circumstances as a mitigating factor and have discretion to impose a lighter punishment because mandatory sentences are "simply too punitive for what we know about juveniles," and there must be some "assurance that imprisonment is actually appropriate and necessary" before applying sentences crafted for adults to children. *Id.* at 395 (quoting *Miller*, 567 U.S. at 471). In that case, Lyle, who was 17 at the time, was convicted of second-degree robbery and sentenced to 10 years imprisonment with 7 years of parole ineligibility. The Iowa Supreme Court noted that the constitutional analysis was "not about excusing juvenile behavior, but imposing punishment in a way that is consistent with our understanding of humanity today." *Id.* at 398. In its reasoning the *Lyle* Court explained, that "[m]andatory minimum sentencing results in cruel and unusual punishment due to the differences between children and adults. This rationale applies to all crimes, and no principled basis exists to cabin the protection only for the most serious crimes." *Id.* at 401-02.

Relying on its proportionality analysis under the Eighth Amendment, the Washington Supreme Court reached the same conclusion as the Iowa Supreme Court in

Lyle. In *State v. Houston-Sconiers*, the Court ruled that "a trial court must be vested with full discretion to depart from the sentencing guidelines and any otherwise mandatory sentence enhancements, and to take the particular circumstances surrounding a defendant's youth into account." *State v. Houston-Sconiers*, 391 P.3d at 409, 426 (Wash. 2017). In that case, two teenage boys committed a series of robberies where they mostly netted candy on Halloween night and subsequently received sentences that required them to serve 31 and 26 years, respectively, before becoming eligible for parole. *Id.* at 414. The Court reversed and remanded their cases, declaring that "trial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements." *Id.* at 420. The Massachusetts Supreme Court reached a similar conclusion in rejecting lengthy mandatory minimums in cases involving children who "did not kill, intend to kill, or foresee that life will be taken." *Commonwealth v. Perez*, 477 Mass. 677, 685 (Mass. 2017). In reaching its conclusion under the Massachusetts Declaration of Rights, the Court held that the "unique characteristics of juvenile offenders should weigh more heavily in the proportionality calculus than the United States Supreme Court required under the Eighth Amendment." *Id.* at 685.

Like the high courts in Iowa and Washington, this Court should find that there are no penological justifications that support the imposition of the same minimum sentences on child offenders without first considering mitigating factors of youth. This, coupled with recent legislative changes, demonstrates that the evolving standards of decency in

Maryland do not allow sentencing courts to constitutionally proceed against individuals such as Dawnta as though they are not children.

III. The Imposition on Dawnta of What is Now the State's Most Severe Sentence for a Youth Tried in Adult Court, Absent a Miller Hearing, Violates the U.S. Constitution and the Maryland Declaration of Rights.

It is thus without controversy that child status matters at sentencing. The foundational principle of *Roper*, *Graham*, and *Miller* is that "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, 567 U.S. at 474. "By removing youth from the balance—by subjecting a juvenile to the same . . . sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Id.*

A. Consideration of the *Miller* Factors and the Diminished Culpability of Youth is Required When a Child Faces a State's Harshest Possible Punishment.

At the time Dawnta was sentenced, Maryland law authorized two sentencing options: (1) life with the possibility of parole or (2) life without the possibility of parole. Md. Code Ann., Crim. Law § 2-201. Indeed, the sentencing guidelines in cases of first-degree murder are Life to Life. (E. 333). Whether his life sentence included parole eligibility or not, it was almost certain that Dawnta would spend the majority of his adult life behind bars. And, it is entirely possible that he would never return to society again. Courts routinely consider life sentences, even those that carry the possibility of parole, to be among the most "severe" that society can impose. See *United States v. Jackson*, 583 Fed. App'x 571, 572 (8th Cir. 2014) (concluding that a "life sentence is doubtless severe"

in the context of life with parole eligibility); *United States v. Little*, 61 F.3d 450, 454 (6th Cir. 1995) (describing a life sentence with parole eligibility as "severe"); *Rummel v. Estelle*, 568 F.2d 1193, 1196, vac'd on reh'g , 587 F.2d 651 (5th Cir. 1978), aff'd , 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980) (considering a life sentence with parole eligibility and noting that "[i]n most jurisdictions, a sentence to imprisonment for life now stands in the place where the death penalty stood earlier in this century the ultimate punishment imposed by this society for those crimes most abhorrent to it.").

"When the sentence sought to be imposed on a juvenile is among the state's most severe, then procedurally, the imposition of that sentence cannot proceed as if the juvenile were not a child, even if the sentence otherwise might be substantively permissible." *State v. Link*, 297 Or. App. 126, 135 (Or. Ct. App. 2019). In this case, the state sought a sentence of life imprisonment for Dawnta, which was the second harshest sentence available at the time for child offenders. However, the sentencing court did not conduct a *Miller* hearing to determine whether or not the imposition of such a sentence was constitutionally permissible in light of the mitigating factors of Dawnta's youth. Because the court did not decide whether the imposition of the second harshest sentence under Maryland law – life imprisonment - was proportional punishment for a child offender like Dawnta this Court should remand his case for resentencing consistent with the requirements of *Miller*.

B. Parole Eligibility and Sentencing Review Under the Juvenile Restoration Act Are Not Sufficient for the Purpose of Avoiding Constitutional Sentencing Requirements.

In our tripartite form of government, courts of law are the constitutional venue for imposing criminal sentences. Parole boards or the governor may exercise mercy-focused

functions to allow early release, but they have never been authorized to impose constitutionally-compliant judgments and sentences in the first instance. *See* Mae C. Quinn, *Constitutionally Incapable: Parole Boards as Sentencing Courts*, 72 SMU L. REV. 565, 598-600 (2019). This is, in part, because sentencing hearings in criminal courts require a wide range of procedural and substantive protections. These same rights generally are not afforded by executive branch agencies and actors, an issue that was not litigated or squarely before the Supreme Court in *Miller* or *Montgomery* when in *dicta* it suggested parole board release might remedy sentencing errors. It is also important to note that this case is on direct appeal in contrast with the petitioner in *Montgomery* whose case was on collateral review. The possibility of a future parole hearing as a remedy does not apply with equal force to cases on direct appeal, nor does it resolve the underlying constitutional violations that occurred at sentencing.

First and foremost, sentencing hearings must comply with due process of law and protect against arbitrary outcomes or decisions based upon unreliable information. *See, e.g., Gardner v. Florida*, 430 U.S. 349 (1977); *see also Bosse v. Oklahoma*, 137 S.Ct. 1, 2 (2016) (continuing to ban in death penalty cases "characterizations and opinions from a victim's family members about the crime, the defendant, and the appropriate sentence"). In the ordinary course, that means that contested facts presented by the government in support of a sentencing outcome must be proven by at least a preponderance of the evidence. *See, e.g., United States v. Fatico*, 603 F.2d 1053 (2d Cir. 1979). However, in the most serious matters, such proof must satisfy the "beyond a reasonable doubt" standard and may need to be determined by a jury. *See, e.g., Apprendi v. New Jersey*, 530 U.S. 466

(2000); *Ring v. Arizona,* 536 U.S. 584 (2002). Further, to ensure a defendant's rights are protected in such an important hearing, considered a critical stage of the criminal process, they must be afforded the right to effective assistance of counsel at sentencing. *See, e.g.*, *Mempa v. Rhay,* 389 U.S. 128 (1967); *Strickland v. Washington,* 466 U.S. 668 (1984).

Where the sentencing court's process fails to meet constitutional requirements in the first instance, later referral to an executive branch agency or actor that does not provide all the requisite protections or features – including holding the government to its burden during the sentencing process and the appointment of counsel – should not be permitted to serve as a substitute. *See Jones v. Mississippi*, 141 S. Ct. 1307, 1322 (2021) ("state sentencing judges and juries . . . determine the proper sentence in individual cases in light of the facts and circumstances of the offense, and the background of the offender"). Thus, the possibility of parole review or release by the Maryland Parole Board in this case does not correct the entire range of constitutional infirmities that impacted Dawnta's first sentencing hearing, where prosecutors sought, and the court imposed, a life sentence.

The passage of SB 494, enacting CP § 8-110 (the Juvenile Restoration Act), also does not suffice to correct the sentencing court's constitutional errors. It serves as a post-judgment review process for an already existing sentence. It thus works to impose a mandatory minimum sentence of 20 years on juvenile offenders with no exceptions or individual assessments of the proportionality of the punishment considering the offender's child status at the time of sentencing. The blanket determination that such a sentence is appropriate for all child offenders—regardless of the offense, personal involvement in the offense, or mitigating factors of youth—breaches the direction

of *Carter*, which highlighted the importance of conducting a fact-specific proportionality analysis to evaluate whether a sentence constitutes cruel and unusual punishment for a juvenile. *Carter,* 461 Md. at 356.

IV. The Felony Murder Rule Raises Constitutional Questions Generally and Presents Heightened Concerns in Cases Involving Child Defendants such as Dawnta.

Maryland's felony murder statute is one of the most expansive in the country. It mandates the same level of conviction and penalty for deliberate killing as for unintended loss of life during the course of a much lesser crime gone wrong. It also makes no distinction between child defendants, such as Dawnta, and adults for any felony murder. Here, applied in the context of an alleged juvenile accomplice involved in helping others escape after a burglary was committed, the doctrine is simply irrational and arbitrary. Moreover, converting the felony murder sentence here to a *mandatory* minimum that would allow for possible release after 15 or 20 years would not correct the multi-fold errors here. Instead, both the conviction and sentence for felony murder are constitutionally unsupportable and must be set aside.

A. Sweeping Felony Murder Analyses and Accomplice Liability

At best, felony murder is a highly confusing, overly expansive doctrine. Handled improperly, as in this case, it becomes a meaningless morass with little in the way of culpability limitation. Maryland's law is among the most expansive in the country and makes no provision for juvenile defendants. Applied in this case, it produced a life sentence with the possibility of parole only after 15 years, for conduct of a 16-year-old which at best constitutes "accomplice liability" for a burglary committed by others. Though this might

bring solace to those seeking accountability for this deeply tragic event, which everyone wishes had never occurred, it shouldn't be applied in the context of a child offender. For just as adolescent brain development should be relevant for purposes of sentencing, it should be considered for purposes of procedural and fundamental fairness. *Cf. J.D.B. v. North Carolina*, 564 U.S. 261 (2011). Thus, bootstrapping criminal liability for first-degree murder here based upon the felony actions of breaking and entering committed by others is just too attenuated. And, again, this is especially true when the mindset of a teenage boy is taken into account.

B. Further Constitutional Concerns Raised by the Application of the Felony Murder Rule on Youth Offenders

Indeed, the felony murder doctrine has long been criticized for sweeping into its net persons who are not morally culpable for committing murder. *See, e.g.*, Nelson E. Roth and Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 446 (1985) (cataloging critiques of the long "maligned" rule). This concern is especially true when it comes to youth where it has been correctly called an "irrational legal response to youth crime and violence." *See* Erin Flynn, *Dismantling the Felony-Murder Rule: Juvenile Deterrence and Retribution Post-Roper v. Simmons*, 156 U. PA. L. REV. 1049, 1074 (2008).

Rooted in the concept of reasonable foreseeability, felony murder doctrine entirely fails to account for youth impetuosity and inability to appreciate the consequences of one's actions. *See* Cameron Casey, *Cruel and Unusual: Why the Eighth Amendment Bans Charging Juveniles with Felony Murder*, 61 BOSTON COLLEGE L.REV. 2965, 3001 (2020).

A "juvenile offender who did not kill or intend to kill has a twice diminished moral culpability" as compared to adults who intentionally take the life of another. *Graham*, 560 U.S. at 69-72.

Lack of personal, moral culpability is especially salient in teen group activity matters, such as Dawnta's. If youth generally are unable to engage in forward-looking evaluation, they surely lack appreciation for the special dangers that might flow from engaging in risk-taking activity as part of a larger number of young people. *See* Beth Caldwell, *The Twice Diminished Culpability of Juvenile Accomplices to Felony Murder*, 11 UC IRVINE L. REV. 905 (2021). Nor would threat of application of the rule in such cases serve as a deterrent. Emily Keller, *Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of Roper, Graham & J.D.B.*, 11 CONNECTICUT PUBLIC INTEREST L.J. 297, 317 (2019).

Indeed, the reality is that teens tend to act in groups and get carried away in the activities of their peers. This scientific fact, reiterated in countless studies of adolescent psychology and brain development, will not be counteracted by enhanced strict liability sentencing. *See* Alison Burton, *A Commonsense Conclusion: Creating a Juvenile Carve Out to the Massachusetts Felony Murder Rule*, 52 HARV. CIVIL RIGHTS-CIVIL LIBERTIES L. REV. 169, 183 (2017) (suggesting felony murder "plays directly into the cognitive vulnerabilities" of youth and, therefore, "the prototypical juvenile crime"). Youth such as Dawnta simply need to outgrow this stage of development. *See id.* at 191.

C. Considerations Relating to Youth Felony Murder Sentences

Finally, because Dawnta has never had a constitutionally-compliant, individualized sentencing hearing at the trial level, application of CP §8-110 to this case would merely exacerbate the harm. It provides for a mandatory minimum term of 20 years – which also disregards youth and moral culpability – and then shifts the burden to Dawnta to try to convince the court to grant him mercy by way of an earlier release than his actually-imposed sentence term.

Notably, the Supreme Court has prohibited death sentences in felony murder cases where the prosecution fails to prove that the defendant actually killed the victim or intended to kill, *see Enmund v. Florida*, 458 U.S. 782, 801 (1982), or was recklessly indifferent to human life while serving as a major participant in the felony, *see Tison v. Arizona*, 481 U.S. 137, 159 (1987). The Court requires an individualized assessment regarding *mens rea* and moral culpability before such a severe sentence may be imposed upon an adult. Although this is not a death penalty case, it involves very similar considerations as Dawnta received one of Maryland's most severe punishments - life imprisonment.

Moreover, without taking away from the tragic loss of life in this case, such analysis at a new sentencing hearing should account for the reasonable, panic-stricken mindset of a Black youth driver who faces gun fire from an armed White police officer. *See, e.g., J.D.B. v. North Carolina*, 564 U.S. 261 (2011) (establishing constitutional rule of analysis that differentiates a "reasonable youth" from a reasonable adult); *Commonwealth v. Evelyn*, 152 N.E.3d 108 (Mass. 2020) (considering youth as part of Fourth Amendment analysis and further agreeing that "the troubling past and present of policing and race are likely to inform how African-Americans and members of other racial minorities interpret police

encounters"); *Illinois v. Wardlow*, 528 U.S. 119 (2000) (Stevens, J., dissenting) ("Among some citizens, particularly minorities . . . there is also the possibility that the fleeing person is entirely innocent, but . . . believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence."). Dawnta's youth, with its accompanying cognitive immaturity, combined with contemporary events highlighting unfortunate encounters between Black suspects and White police officers, demonstrate that his moral culpability in this case is "twice diminished." *Graham*, 560 U.S. at 69-72.

CONCLUSION

For the foregoing reasons the Court should reverse the decision below and remand for a new sentencing hearing.

CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

I hereby certify that Amicus Curiae's Brief contains 6,187 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

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CERTIFICATE OF SERVICE

I hereby certify that, on February 1, 2022, two copies of the Brief of Amicus Curiae Human Rights for Kids in Support of Petitioner were mailed, postage prepaid, to:

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I further certify that an electronic copy of the foregoing has been filed and served electronically *via* MDEC.

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