STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MONTEZ STOVALL,

Defendant-Appellant.

Supreme Court No. 158557

Court of Appeals No. 342440

Wayne CC: 92-0334-01-FC

BRIEF OF AMICI CURIAE JUVENILE LAW CENTER, JUVENILE SENTENCING PROJECT, AND AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN IN SUPPORT OF DEFENDANT-APPELLANT STOVALL'S APPLICATION FOR LEAVE TO APPEAL

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INTERESTS AND IDENTITIES OF AMICI CURIAE

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

Juvenile Law Center has worked extensively on the issues of juvenile life without parole and de facto life sentences, serving as co-counsel for petitioner in the U.S. Supreme Court case *Montgomery v Louisiana*, 136 S Ct 718; 193 L Ed 2d 599 (2016), and filing amicus briefs in the U.S. Supreme Court in both *Graham v Florida*, 560 US 48; 130 S Ct 2011; 176 L Ed 2d 825 (2010), and *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012). Additionally, Juvenile Law Center has participated as *amicus curiae* in numerous juvenile life without parole and *de facto* life cases throughout the nation, including in the Michigan Supreme Court in *People v Carp*, 496 Mich 440; 852 NW2d 801 (2014), *vacated* 136 S Ct 1355; 194 L Ed 2d 339 (2016), and *People v Skinner*, 502 Mich 89; 917 NW2d 292 (2018).

The **Juvenile Sentencing Project** is a project of the Legal Clinic at Quinnipiac University School of Law. The Juvenile Sentencing Project focuses on issues relating to long prison sentences imposed on children. In particular, it researches and analyzes responses by courts and legislatures nationwide to the U.S. Supreme Court's decisions in *Graham v Florida*, 560 US 48; 130 S Ct 2011; 176 L Ed 2d 825 (2010), *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), and *Montgomery v Alabama*, 136 S Ct 718; 193 L Ed 2d 599

(2016), and produces reports and memoranda for use by policymakers, courts, scholars, and advocates. The Juvenile Sentencing Project focuses its research in particular on the "meaningful opportunity to obtain release" standard applicable to juvenile offenders. Because of its dedication to pursuing research in this area of the law, the Juvenile Sentencing Project has an interest in assisting courts to develop an accurate understanding of the legal issues surrounding the standard.

The **American Civil Liberties Union of Michigan** ("ACLU") is the Michigan affiliate of a nationwide, nonpartisan organization with over a million members dedicated to protecting the rights guaranteed by the United States Constitution. The ACLU has long advocated for an end to the practice of sentencing children in Michigan to life in prison, including through litigation, as amicus curiae, and through public education. See, e.g., *Hill v Snyder*, 900 F3d 260 (CA 6, 2018); *People v Carp*, 496 Mich 440, 852 NW2d 801 (2014), *vacated*, 136 S Ct 1355 (2016); ACLU of Michigan, *Second Chances: Juveniles Serving Life Without Parole in Michigan Prisons* (2004).

SUMMARY OF THE ARGUMENT

The United States Supreme Court has repeatedly admonished against the imposition of juvenile life sentences without consideration of the hallmark characteristics of youth. "The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. . . . Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Graham v Florida*, 560 US 48, 79; 130 S Ct 2011; 176 L Ed 2d 825 (2010); see also *Miller v Alabama*, 567 US 460, 479; 132 S Ct 2455; 183 L Ed 2d 407 (2012). A sentence imposed on a child in a nonhomicide case, whether formally labeled life without parole or not, is

unconstitutional if it fails to provide a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 US at 75. This meaningful opportunity for release must also be provided to juvenile homicide offenders—except in the rarest of cases where the sentencer has determined, after giving mitigating effect to the circumstances and characteristics of youth, that the child is irreparably corrupt. *Montgomery v Alabama*, 136 S Ct 718, 733; 193 L Ed 2d 599 (2016).

Michigan courts are now resentencing all youth who were unconstitutionally sentenced to life without any possibility of parole. See MCL 769.25, 769.25a. Retroactive correction of the sentence to die in prison is precisely what the Eighth Amendment requires. *Montgomery*, 136 S Ct at 718. But for individuals like petitioner, Montez Stovall—who pled guilty as a youth in exchange for the chance of receiving parole—the possibility of living outside of prison walls is likely foreclosed. Like other people sentenced to life with the theoretical possibility of parole for childhood offenses, Mr. Stovall has no *meaningful* opportunity for release, which is what the Eighth Amendment requires. No court has considered the mitigating circumstances of Mr. Stovall's youth at the time of his offense, or whether Mr. Stovall is irreparably corrupt or permanently incorrigible such that he may constitutionally serve a sentence of life without parole or its equivalent. Instead, Mr. Stovall is at the mercy of the Michigan Parole Board (the "Board"), which is not required to consider his youth at the time of the crime, or his post-crime maturity and rehabilitation, but instead exercises unfettered discretion in deciding whether even to *consider* an application for release review. Moreover, the Board's stated "life means life" approach denies a realistic chance at release—only the smallest percentage of parolable lifers in Michigan are ever granted parole.

This system, which denies review to a population that science confirms will mature and reform with age, contravenes the clear constitutional mandate that juvenile offenders receive a "realistic" and "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 US at 75, 82. This Court should grant leave to appeal to ensure that Michigan's sentencing and parole system provides the realistic and meaningful opportunity for release to which Mr. Stovall is constitutionally entitled.

ARGUMENT

THE COURT SHOULD GRANT LEAVE TO APPEAL TO ADDRESS CONSTITUTIONAL DEFICIENCIES IN MICHIGAN'S PAROLE PROCESS

The United States Supreme Court's directive that courts must consider youths' diminished culpability, heightened vulnerability, and increased capacity for reform before condemning them to die in prison applies equally regardless of the mechanism that threatens to keep them in prison for life: "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." *Miller*, 567 US at 479. Where, as here, a defendant is sentenced without adequate consideration of youth, he must have a "realistic" and "meaningful opportunity for release based on demonstrated maturity and rehabilitation." *Graham*, 560 US at 75, 82; *Montgomery*, 136 S Ct at 733. The criteria and procedures that the Michigan Parole Board uses to assess Mr. Stovall's suitability for release must account for his youth at the time of the crime and subsequent growth and change, and must provide a realistic, non-remote chance for release within his lifetime. The Board's current policies, practices, and governing standards do not pass constitutional muster. This Court should intervene to ensure that Michigan is not condemning youth to die in prison based on a constitutionally inadequate parole process.

I. Due to Wide Discretion Afforded Michigan's Parole Board, and Its Practice of Ensuring That "Life Means Life," People Sentenced to Parolable Life in Michigan for Childhood Offenses Do Not Have a Realistic or Meaningful Opportunity for Release

The rules governing parole release for prisoners serving life with the possibility of parole, like Mr. Stovall, appear in statutes as well as in Michigan Department of Corrections policy directives. See generally MCL 791.233–791.235[1]; MDOC Policy Directives 06.05.100, 06.05.103, and 06.05.104. No special protections are afforded to individuals who were sentenced for offenses committed when they were under the age of 18. *Id.* (providing no differentiation between adult lifers and juvenile lifers).

Parole may be granted or denied only after a public hearing. MCL 791.234(8)(c). But there are multiple hurdles a lifer such as Mr. Stovall must clear in order to reach the public hearing stage, each of which is decided at the unfettered discretion of the Board—or a single Board member. See generally Def's Br at 7–10. Most critically, parole-eligible individuals have no right to a public hearing. Rather, Michigan's parole system operates by affording parole-eligible individuals an interview with a single member of the Board after serving 10 years. MCL 791.234(8)(a). The Board member does not consider whether to grant parole, but rather whether to recommend that the rest of the Board hold a public hearing. MCL 791.234(8)(b). In other words, the Board member considers *whether to consider* granting parole.

No standards govern the interview or the Board member's ultimate decision to recommend a parole hearing. The would-be parolee receives only 30 days' notice of the interview, and the role of counsel is constrained. MCL 791.234(9)(a), (b); see also MDOC Policy Directive 06.05.104(T) ("[Attorneys] may not provide legal representation at the interview."). The interview leaves the parole-eligible individual with no recourse when the

[1] Note that amendments to MCL 791.233(e) and 791.235, which take effect December 12, 2018, do not affect the rules at issue here.

public hearing is inevitably denied: The Board has complete discretion to deny a parole hearing, MDOC Policy Directive 06.05.104(L); it is not required to provide any explanation for its decision to do so, see MDOC Policy Directive 06.05.105(N) (clarifying that decision to deny public hearing is not a denial of parole) and MCL 791.235(12) (requiring that only those denied parole receive a written explanation); and the prisoner has no right to court review of the Board's "decision," MCL 791.234(11).

After the initial interview, there is no right to another interview. MDOC Policy Directive 06.05.104(M). Rather, the prisoner is entitled only to "file review" of the case every five years. *Id.* There appear to be no standards governing file review; as after an interview, the Board is not required to provide a statement of reasons for its decision to decline a public hearing, and there is no right to court review of an unfavorable determination after file review. See *id.*; MCL 791.234(9) (providing no articulation of standards, no requirement for a statement, and no mechanism of review).

The process is equally uncertain for individuals who make it to the public hearing stage. The original sentencing judge may unilaterally bar any parole grant. MCL 791.234(8)(c). If the judge does not object, the would-be parolee is afforded a public hearing, but no useful guidelines govern the Board's decision to grant parole. See MCL 791.233(1)(a), (e). The parole statute affords no guidance on the effect the mitigating circumstances of youth, maturation, or rehabilitation must play in the Board's decision. *Id.* And while prosecutors or victims may appeal a decision to grant parole, the would-be parolee has no right to any sort of review of a denial. MCL 791.234(11).

Given these hurdles, it is unsurprising that only the smallest fraction of Michigan's parolable lifers ever receive parole.[2] This is not inadvertent. The Board explicitly treats individuals serving life with parole differently from those serving non-life sentences, applying a "life means life" approach to keep the vast majority in prison until they die. E.g., *People v Hill*, 267 Mich App 345, 349; 705 NW2d 139 (Mich. Ct. App. 2005) ("It has been a long standing philosophy of the Michigan Parole Board that a life sentence means just that-life in prison."); Citizens Alliance on Prisons & Public Spending, *No Way Out: Michigan's Parole Board Redefines the Meaning of "Life,"* p 10 (2004) (citing Board-authored materials stating that "[t]he parole board believes a life sentence means life in prison. There is nothing which exists in statute that allows the parole board to think, or do, otherwise."). Numerous courts have recognized that the Board's "life means life" approach renders the chance of parole extremely remote. See, e.g., *Foster v. Booker*, 595 F3d 353, 360–64 (CA 6, 2010); *Hill*, 267 Mich App at 347–349; *Bey v Rubitschun*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued October 23, 2007 (Docket No. 05-71318), 2007 WL 7705668, at *15 (quoting testimony from Board official that it was "very rare" to reach the parole hearing phase), *rev'd and remanded sub nom Foster v Booker*, 595 F3d 353 (CA 6, 2010).

[2] *See, e.g.*, *Foster v Booker*, 595 F3d 353, 360 (CA 6, 2010) (internal citation omitted) (citing data from 2000-2004 showing that only 0.15% of Michigan's parolable lifers were granted parole). According to the Michigan Department of Corrections ("MDOC"): "Over the past 30 years, averages of 8.2 prisoners per year serving a life sentence have been released through the lifer law or commutation process." Michigan Department of Corrections, Parole from Past to Present < https://www.michigan.gov/corrections/0,4551,7-119-1435_11601-331908--,00.html> (last visited Dec. 4, 2018). MDOC reported to the legislature that, at the end of 2017, there were a total of 927 parolable lifers with ten years or more of elapsed time since commitment date who had already been interviewed at least once by the parole board. MDOC, Report to the Legislature: Parolable Lifers with Lifer Law Interview Parole Board Actions (2018) < https://www.michigan.gov/documents/corrections/Sec._615_620527_7.pdf>. Thus, a very small proportion of eligible lifers are released each year.

II. To Comply with the Eighth Amendment, Michigan Must Provide People Sentenced to Parolable Life as Youth a Meaningful Opportunity for Release Through the Parole Process

The diminished culpability of youth and their heightened capacity for change, as recognized by the Supreme Court and grounded in a well-settled body of scientific research, means "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 US at 471. The Eighth Amendment does not bar the possibility that individuals convicted of crimes committed before adulthood will remain behind bars for life. But except in the rarest of cases in which the sentencer has determined—after giving mitigating effect to the circumstances and characteristics of youth—that a youthful homicide offender is irreparably corrupt, a sentence must provide a "realistic" and "meaningful opportunity for release based on demonstrated maturity and rehabilitation." *Montgomery*, 136 S Ct at 733; *Graham*, 560 US at 75, 82. For parolable life sentences such as Mr. Stovall's, this constitutional obligation falls to the parole board.

A. The Constitution Requires Consideration of Youth's Categorical Differences from Adults Before Allowing Them to Die in Prison

The United States Supreme Court has long recognized that kids are different from adults, and that these differences are constitutionally significant. *Graham*, 560 US at 68; *Miller*, 567 US at 471; *Montgomery*, 136 S Ct at 733. Three significant differences distinguish youth from adults for culpability purposes:

> First, children have a "lack of maturity and an underdeveloped sense of responsibility," leading to recklessness, impulsivity, and heedless risk-taking. Second, children "are more vulnerable . . . to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]."

Miller, 567 US at 471 (alterations in original) (citations omitted). In reaching these conclusions about young people's reduced culpability, the Supreme Court has relied on an increasingly settled body of research confirming the distinct emotional, psychological, and neurological attributes of youth. *Graham*, 560 US at 68 (confirming that since *Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005), "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds").

For example, adolescents "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *JDB v North Carolina*, 564 US 261, 272; 131 S Ct 2394; 180 L Ed 2d 310 (2011), quoting *Bellotti v Baird*, 443 US 622, 635; 99 S Ct 3035; 61 L Ed 2d 797 (1979). See also Scott & Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 The Future of Children 15, 20 (2008) ("Considerable evidence supports the conclusion that children and adolescents are less capable decision makers than adults in ways that are relevant to their criminal choices."). Although adolescents have the capacity to reason logically, they "are likely less capable than adults are in *using* these capacities in making real-world choices, partly because of lack of experience and partly because teens are less efficient than adults in processing information." *Id.* at 20. Because adolescents are less likely to perceive potential risks, they are less risk-averse than adults. *Id*. at 21. See also Steinberg, *The Science of Adolescent Brain Development and Its Implications for Adolescent Rights and Responsibilities*, in Bhabha, ed, *Human Rights and Adolescence*, pp 59, 64–65 (2014) ("[A]dolescents' reward centers are activated more than children's or adults' when they expect something pleasurable to happen. Heightened sensitivity to anticipated rewards motivates adolescents to engage in acts, even risky acts, when the potential for pleasure is high . . . ." (internal citations omitted)).

Youths' diminished ability to perceive potential risks and make appropriate decisions is exacerbated by the challenges they face in thinking realistically about future events. See Br for Am Psych Ass'n et al. as Amici Curiae Supporting Pet'rs, *Graham v Florida*, 560 US 48; 130 S Ct 2011; 176 L Ed 2d 825 (2010) (Nos. 08-7412, 08-7621), pp 11–12. Their lack of future orientation means that adolescents are both less likely to think about potential long-term consequences and more likely to assign less weight to those that they *have* identified, especially when faced with the prospect of short-term rewards. Scott & Steinberg, *supra*, at 20; *Graham*, 560 US at 78. Because adolescents attach different values to rewards than adults do, they often exhibit sensation-seeking characteristics that reflect their need to seek "varied, novel, [and] complex . . . experiences [as well as a] willingness to take physical, social, legal and financial risks for the sake of such experience." Zuckerman, *Behavioral Expressions and Biosocial Bases of Sensation Seeking* (1994), p 27. Adolescents thus frequently engage in risky behaviors and are less able to suppress action toward emotional stimulus; they have difficulty exhibiting self-control. Scott & Steinberg, *supra*, at 21–22. All of these attributes cause adolescents to make different calculations than adults, leading them to engage in behavior—including criminal conduct—that they would not participate in in adulthood.

Significantly, the United States Supreme Court has recognized that "'[f]or most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.'" *Roper*, 543 US at 570 (second alteration in original), quoting Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juveniles Death Penalty*, 58 Am Psychologist 1009, 1014 (2003). In a

study of over 1,300 people who committed juvenile offenses, "even among those individuals who were high-frequency offenders at the beginning of the study, the majority had stopped these behaviors by the time they were 25." Steinberg, *Give Adolescents the Time and Skills to Mature, and Most Offenders Will Stop* (2014), p 3 <http://www.pathwaysstudy.pitt.edu/documents/MacArthur%20Brief%20Give%20Adolescents%20Time.pdf>.

Most people who commit offenses in childhood are no longer a public safety risk once they reached their mid-twenties, let alone later in life. See, e.g., Models for Change, *Research on Pathways to Desistance: December 2012 Update*, p 4 <http://www.modelsforchange.net/publications/357> (finding that, of more than 1,300 serious offenders studied for seven years, only approximately 10 percent reported continued high levels of antisocial acts, and noting that "it is hard to determine who will continue or escalate their antisocial acts and who will desist," as "the original offense . . . has little relation to the path the youth follows over the next seven years").

In light of this research, "[i]ncorrigibility is inconsistent with youth." *Graham*, 560 US at 72–73. "Life means life" cannot apply in the juvenile context, because the penological justification of a life sentence—incapacitation—is fundamentally at odds with what we know of children's capacity for change. See *id.* at 74.

B. Given Constitutionally Significant Differences Between Children and Adults, the Constitution Requires Parole Boards to Account for Youth and Base Release Decisions on an Assessment of Maturity and Rehabilitation

Recognizing the constitutionally significant differences between children and adults, the Eighth Amendment requires that juvenile sentences provide a "realistic" and "meaningful opportunity for release based on demonstrated maturity and rehabilitation." *Montgomery*, 136 S Ct at 733; *Graham*, 560 US at 75, 82.

In this context, a sentence like that imposed on Mr. Stovall may violate the Eighth Amendment even if it technically provides for the possibility of parole or some other form of early release. Life-with-the-possibility-of-parole sentences, lengthy term-of-years sentences, and aggregate sentences all violate the Eighth Amendment if they do not provide a realistic opportunity for release at a meaningful time in a prisoner's life. See *State v Moore*; 76 NE3d 1127, 1141 (Ohio, 2016), ("Certainly, the [*Graham*] court envisioned that any nonhomicide juvenile offender would gain an opportunity to obtain release sooner than after three-quarters of a century in prison."), cert denied 138 S Ct 62, 199 L Ed 2d 183 (2017); *Casiano v Comm'r of Corr*, 115 A.3d 1031, 1047 (Conn, 2015) ("[A] fifty year term and its grim prospects for any future outside of prison effectively provide a juvenile offender with 'no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.'" (quoting *Graham*, 560 US at 79)).

For life sentences that carry the possibility of parole, the Eighth Amendment requires parole boards to account for youth and base release decisions on an assessment of an individual's maturity and rehabilitation. See, e.g., *Brown v Precythe*, unpublished order of the United States District Court for the Western District of Missouri, issued October 12, 2018 (Docket No. 2:17-CV-04082-NKL), 2018 WL 4956519, at *10 (holding that Missouri's parole system denies a realistic and meaningful opportunity to demonstrate maturity and rehabilitation); *Maryland Restorative Justice Initiative v Hogan*, unpublished memorandum opinion of the United States District Court for the District of Maryland, issued February 3, 2017 (Docket No. ELH-16-1021), 2017 WL 467731, at *25–*27 (denying in part motion to dismiss challenge to parole system, noting inadequate governing standards, no consideration of maturity and rehabilitation, and alleged denials based on status as lifers and offense); *Funchess v Prince*, unpublished order of

the United States District Court for the Eastern District of Louisiana, issued February 25, 2016 (Docket No. 14-2105), 2016 WL 756530, at *5 (holding that Louisiana's "two-step parole procedure" failed to provide a meaningful opportunity for release under the Eighth Amendment); *Hayden v Keller*, 134 F Supp 3d 1000, 1009 (EDNC, 2015) (holding that parole board procedures did not provide a meaningful opportunity for release because they "do not distinguish parole reviews for juvenile offenders from adult offenders, and thus fail to consider 'children's diminished culpability and heightened capacity for change' in their parole reviews"), appeal dismissed sub nom *Hayden v Butler*, 667 F App'x 416 (CA 4, 2016) (per curiam); *Greiman v Hodges*, 79 F Supp 3d 933, 944 (SD Iowa, 2015) (finding plausible claim that parole system was constitutionally deficient because it failed adequately to account for youth, maturity, and rehabilitation and focused instead on the seriousness of the offense); *Hawkins v NY State Dep't of Corr & Cmty Supervision*, 140 AD3d 34, 36; 30 NYS3d 397 (2016) ("[P]etitioner was denied his constitutional right to a meaningful opportunity for release when the Board failed to consider the significance of petitioner's youth and its attendant circumstances at the time of the commission of the crime."); *cf Johnson v State*, 215 So3d 1237, 1242 (Fla, 2017) (finding "gain time" accrual constitutionally inadequate because not based on maturity and rehabilitation); *State v Young*, 794 SE2d 274, 279 (NC, 2016) (rejecting sentence review procedures for failure to consider youth and maturation).

Not only must parole boards consider the unique characteristics of youth and focus on post-crime maturity and rehabilitation, but they must avoid giving undue weight to the seriousness of the underlying offense. In fact, emphasizing the "circumstances of the offense" is "directly at odds with the requirement that maturity and rehabilitation be considered." *Brown*, 2018 WL 4956519, at *9. As the *Brown* court explained,

> Consideration of maturity and rehabilitation requires a review of how the inmate has changed since the offense was committed. Permitting the Board to base a denial of parole to a *Miller*-impacted individual on the "circumstances of the offense" alone necessarily authorizes the Board to disregard evidence of the inmate's subsequent rehabilitation and maturity—in contravention of the Supreme Court's edict.

Id.

C. To Meet the Eighth Amendment's Requirements, States Must Employ Parole Procedures to Ensure Youth Have a Realistic and Meaningful Opportunity for Release

In addition to applying the proper criteria when considering release for juvenile offenders sentenced to life, parole boards must also employ procedures that ensure the constitutionally required realistic and meaningful opportunity for release based on consideration of youth, maturity, and rehabilitation. See, e.g., *Brown*, 2018 WL 4956519, at **8-10 (delineating how Missouri's parole policies, procedures, and practices diverge from this requirement); *Greimen*, 79 F Supp at 945 (recognizing due process rights for juveniles in parole proceedings post-*Graham*).

Juvenile offenders remain an especially vulnerable prison population. They are more likely than adult offenders to have experienced abuse and trauma, to require psychological and other professional services, to be uneducated, and to lack connections and support outside prison, among other vulnerabilities. See, e.g., Nellis, *The Lives of Juvenile Lifers*: *Findings from a National Survey* (The Sentencing Project, 2012), pp 2–3 <https://sentencingproject.org/wp-content/uploads/2016/01/The-Lives-of-Juvenile-Lifers.pdf>; American Civil Liberties Union, *False Hope: How Parole Systems Fail Youth Serving Extreme Sentences* (2016), p 26 <https://www.aclu.org/sites/default/files/field_document/121416-aclu-parolereportonlinesingle.pdf>. Therefore, parole procedures must account for the differences between individuals sentenced as adults and those sentenced as youth, even though the parole-

eligible individual is now an adult. A meaningful opportunity for release must include procedural protections that prepare individuals to navigate the parole process, provide opportunities to adequately present their cases for release to the Board, and ensure mechanisms for review.

Finally, because most youth outgrow their antisocial and criminal behavior as they mature, review of their maturation and rehabilitation should begin relatively early in their sentences, and their progress should be assessed regularly. Although *Miller* requires that courts consider a "youth's chances of becoming rehabilitated," that decision is difficult to make at the outset. See *Roper*, 543 US at 573 ("It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity and the rare juvenile whose crimes reflect irreparable corruption."). For youth serving sentences for life *with* parole, the decision has never been made at all. Given the difficulty of determining whether a person is irreparably corrupt and the extremely high stakes of a decision to keep a youth detained for life, parole boards must grant regular review to youth serving life with parole sentences. Early and regular assessments of juveniles enable timely evaluation of the individual's maturation, progress, and performance, as well as provide an opportunity to confirm that the person is receiving vocational training, programming, and treatment opportunities that foster growth and rehabilitation. See, e.g., *Graham*, 560 US at 74 (noting the importance of "rehabilitative opportunities or treatment" to "juvenile offenders, who are most in need of and receptive to rehabilitation").

In sum, to meet the constitutional standard of *Graham*, *Miller*, and *Montgomery*, a parole board must ground its release decision in an understanding of the characteristics of youth and an assessment of an individual's rehabilitation, and it must have procedures in place to make an

informed decision. Only in this way can it ensure that only the rarest juvenile actually serves life in prison.

III. This Court Should Grant Leave to Appeal to Ensure that Michigan Provides Youth Sentenced to Parolable Life a Meaningful Opportunity for Release

Michigan's parole system does not achieve the Eighth Amendment's demands that individuals who offend in childhood have a realistic and meaningful opportunity for release based on maturity and rehabilitation. Rather, the Board has virtually unfettered discretion to deny even the opportunity to be considered for parole. The Board is free to consider youth, or to ignore it entirely. Without articulated criteria to guide the Board's decision, and without procedures that safeguard young people's rights to a meaningful parole process, Michigan continues to offend the Eighth Amendment. This Court should grant leave to appeal to ensure that a lifetime behind bars is reserved for only the rarest of young people.

A. The Court Should Grant Leave to Appeal Because the Board's Decisions Do Not Adequately Account for the Mitigating Circumstances of Youth and Post-Crime Maturity and Rehabilitation

Michigan has articulated only two criteria upon which the Board should base its decision:

- "[T]hat the prisoner will not become a menace to society or to the public safety,"

  and

- "[T]hat arrangements have been made for such honorable and useful employment as the prisoner is capable of performing, for the prisoner's education, or for the prisoner's care if the prisoner is mentally or physically ill or incapacitated."

MCL 791.233(1)(a), (e). Neither of these criteria accounts for what *Miller* and *Montgomery* require—namely, consideration of the youth's age and immaturity at the time of the offense and what should be a presumption of post-crime maturity and rehabilitation. Indeed, Michigan fails to account for youth, maturity, or rehabilitation at all in its parole scheme. See generally MCL 791.233 – MCL 791.235; MDOC Policy Directives 06.05.100, 06.05.103, and 06.05.104.

Considering—and placing determinative weight on—the mitigating circumstances of youth is non-optional. See *Montgomery*, 136 S Ct at 734 ("[T]he penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" (quoting *Miller*, 567 US at 472); see also *Young*, 794 SE2d at 279 (rejecting North Carolina's sentence review procedures as constitutionally insufficient for juvenile offenders because of failure to consider youth and maturation); *Hayden*, 134 F Supp at 1009 (North Carolina "wholly fails to provide [petitioner] with any 'meaningful opportunity'" for parole because of board's failure to distinguish parole review for juvenile offenders); *Hawkins*, 140 AD3d at 36 (holding that the New York Board of Parole "as the entity charged with determining whether petitioner will serve a life sentence, was *required* to consider the significance of petitioner's youth and its attendant circumstances at the time of the commission of the crime before making a parole determination" (emphasis added)).

Indeed, in designing parole procedures for juvenile offenders in the wake of *Graham* and *Miller*, numerous states have directed parole boards to account for youth—often through consideration of the factors enumerated in *Miller*. See, e.g., Ark Code 16-93-621(b)(2) (directing consideration of "[t]he diminished culpability of minors," "the hallmark features of youth," and certain mitigating factors of youth); W Va Code 62-12-13b(b) (same); Cal Penal Code 4801(c) (same); see also RI Parole Board, 2018 Guidelines § 1.5(F)(2) (same). States providing sentence reduction opportunities for juvenile offenders similarly require consideration of youth. See, e.g., DC Code 24-403.03(c)(8), (10) (directing courts to consider age, diminished culpability, the hallmark features of youth, and certain youth-related factors); ND Cent Code 12.1-32-13.1(3)(c), (j) (requiring consideration of youth and related characteristics). These

reforms recognize that constitutionally adequate parole requires consideration of the mitigating characteristics of youth.

Michigan also fails to comply with the mandate in *Miller* and *Montgomery* that parole boards base release decisions on post-crime maturity and rehabilitation (and not base decisions, for example, on the severity of the offense or victim impact). See *Miller*, 567 US at 478; *Montgomery*, 136 S Ct at 736; see also, e.g., *Hogan*, 2017 WL 467731 at *25–*27 (denying motion to dismiss challenge to parole system in part because plaintiff alleged parole board was not required to assess maturity or rehabilitation); *Johnson*, 215 So3d at 1242 (holding that opportunity for release based on "gain time" in Florida does not satisfy Eighth Amendment, because "gain time, generally, is not based on a determination of maturity and rehabilitation").

Many states include statutory direction that the parole board or other decisionmakers consider maturity and rehabilitation. Arkansas, for example, enacted legislation requiring its parole board to ensure "a meaningful opportunity to be released on parole based on demonstrated maturity and rehabilitation" and directing consideration of, *inter alia*, "immaturity . . . at the time of the offense" and "subsequent growth and increased maturity . . . during incarceration," as well as participation in rehabilitative and educational programs. See Ark Code 16-93-621(b). West Virginia, California, and North Dakota similarly require parole boards to consider post-crime growth and increased maturity. See W Va Code 62-12-13b(b); Cal Penal Code 4801(c); ND Cent Code 12.1-32-13.1(3)(e) (requiring consideration of whether a juvenile offender "has demonstrated maturity, rehabilitation, and a fitness to re-enter society sufficient to justify a sentence reduction"); see also DC Code 24-403.03(c)(5) (requiring sentence-modification proceedings to consider "[w]hether the defendant has demonstrated maturity, rehabilitation, and a fitness to reenter society"); RI Parole Board, 2018 Guidelines § 1.5(F)(2) (requiring

consideration of "any subsequent growth and increased maturity of the prisoner during incarceration," including "[p]articipation in available rehabilitation and education programs" and "[e]fforts made toward rehabilitation," when considering a juvenile offender).

Absent criteria mandating an emphasis on youth and post-crime growth and change, the state cannot guarantee that the Board even *considers* youth and bases its decision on "demonstrated maturity and rehabilitation." *Graham*, 560 US at 75. This Court must step in to grant relief absent assurance that the Board will give weight to the mitigating circumstances of youth and the reform that young people demonstrate as they mature.

B. The Court Should Grant Leave to Appeal Because the Board Does Not Afford a Realistic Opportunity for Release

The Constitution requires that the opportunity for release for individuals who offended as youth not only be meaningful in its consideration of youth and rehabilitation, but also realistic. See, e.g., *Graham*, 560 US at 82. A sentence fails to provide a realistic opportunity for release if, as here, the chance of parole is remote, and the release decision is subject to unfettered discretion. Michigan's almost non-existent parole rate for individuals sentenced to life with parole reflects the remoteness of the possibility that they will ever be at liberty. So, too, do the non-existent standards governing the Board's decision.

State and federal courts regularly recognize the need for articulated criteria in the parole system when individuals sentenced as youth face a parolable life sentence. Where a parole system vests unfettered discretion in one or more deciders, it cannot meet the mandate of *Graham*, *Miller*, and *Montgomery*. In Maryland, for example, the federal district court found that juvenile offenders had sufficiently alleged that the parole system violated the Eighth Amendment by operating as a system of executive clemency. See *Hogan*, 2017 WL 467731, at *25. There, the "unfettered discretion" afforded to the governor "to deny every parole

recommendation for *any* reason whatsoever or for no reason at all," resulted in denial of every parole recommendation for two decades. *Id.* Similarly, the North Carolina Supreme Court rejected the adequacy of the state's statutory sentence review because "the possibility of alteration or commutation . . . is deeply uncertain and rooted in essentially unguided discretion." *Young*, 794 SE2d at 279. Indeed, parole must not just be based on articulated criteria, but it must be achievable. A federal district court rejected Louisiana's former parole procedure, which required gubernatorial commutation, because "all of these obstacles" to commutation meant that "a life sentence . . . is—for all intents and purposes—a life sentence, regardless of whether the prisoner received a parole eligibility date." *Funchess*, 2016 WL 756530, at *5.

In Michigan, the power of the sentencing judge to veto a parole grant, and the Board's lack of articulated criteria to govern its decisions—at the file review, interview, and public hearing stages—necessarily precludes a meaningful opportunity for release. This Court should grant leave to appeal to end the standardless approach to parole that allows the Board to operate beyond the reach of the law. Absent known criteria that, as applied, afford a realistic chance of parole, Michigan's parole procedure cannot pass constitutional muster.

C. This Court Should Grant Leave to Appeal Because Michigan Fails to Afford Adequate Procedural Protections to Ensure the Board Can Meaningfully Assess an Individual's Maturation and Rehabilitation

The Board must put in place procedures that account for the differences between juvenile and adult offenders and ensure a meaningful assessment of rehabilitation. This Court should grant leave to appeal to remedy the procedural deficiencies that effectively preclude meaningful release opportunities.

First, individuals serving parolable life are guaranteed only *one* chance to meet in person with even a single member of the Board. MCL 791.234(8)(a); MDOC Policy Directive 06.05.104(L). This interview is scheduled 10 years into a life sentence, meaning that individuals

serving life with the possibility of parole may be relegated to only written communications after they have matured and are likely to be able to demonstrate rehabilitation. Denying regular, in-person review is inconsistent with what science shows about people who offend as youth: they are highly likely to reform as they mature. Moreover, juvenile offenders serving lengthy sentences "will often lack the educational attainment necessary to write effectively, and are likely to be much more capable of expressing themselves orally." Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 Ind LJ 373, 423 (2014) [hereinafter *Review for Release*] (internal citation and quotation marks omitted); see also Nellis, *The Lives of Juvenile Lifers*, p 3 (noting that two in five respondents had been enrolled in special education classes and that fewer than half had been attending school at all at the time of the offense). In-person hearings permit efficient, real-time exchange between prospective parolees and decisionmakers and help the Board to more fully assess a juvenile offender's level of insight and maturity and to ensure that the information it has before it is accurate.

Second, Michigan affords parole-eligible individuals only 30 days to prepare for their interview, without the assistance of counsel. MCL 791.234(9)(a), (b); MDOC Policy Directive 06.05.104(S). But meeting the constitutional demands of the Eighth Amendment requires time to prepare, and assistance of counsel. As the Massachusetts Supreme Judicial Court has emphasized, juvenile offenders serving lengthy sentences "will likely lack the skills and resources to gather, analyze, and present [relevant] evidence adequately." *Diatchenko v Dist Attorney for Suffolk Dist*, 27 NE 3d 349, 360 (Mass, 2015); see also Russell, *Review for Release*, *supra*, 89 Ind LJ at 419–442. (detailing that individuals incarcerated since childhood may be lacking skills, access to information about their childhoods, and connections or support within the community); Human Rights Watch, *Against All Odds: Prison Conditions for Young*

Offenders Serving Life Without Parole Sentences in the United States (2012) (noting that many juvenile offenders serving long sentences lose social support and family connections). In contrast to the would-be parolee's likely skill level, a meaningful opportunity for release necessitates review of a "potentially massive amount of information . . . including legal, medical, disciplinary, education, and work-related evidence." *Diatchenko*, 27 NE3d at 360. Courts and legislatures across the country have recognized that placing constitutionally required information before a parole board requires assistance of counsel. See, e.g., *id.* at 361 ("[G]iven the challenges involved . . . and in light of the fact that the offender's opportunity for release is critical to the constitutionality of the sentence, we conclude that this opportunity is not likely to be 'meaningful' . . . without access to counsel."); Conn Gen Stat 54-125a(f)(3); Haw Rev Stat 706-670(3)(c); Cal Penal Code 3041.7; Fla Stat 921.1402(5). Without adequate time and support to prepare, the notice and opportunity to be heard that due process requires is rendered meaningless for parole proceedings, precluding a realistic and meaningful opportunity for release.

Finally, the Board's limitless discretion to grant or deny even the *opportunity* for parole goes unchecked by the judiciary. MCL 791.234(11) (providing for review only after a public hearing, and only if requested by prosecutors or victims). Absent a mechanism to redress Board decisions, Michigan risks condemning youth to life in prison without giving due weight—or any weight at all—to the mitigating factors of youth or maturity and rehabilitation as required. That intolerable risk of disproportionate punishment is precisely what *Miller* and *Montgomery* prohibit. *Miller*, 567 US at 479; *Montgomery*, 136 S Ct at 726. In Michigan, appropriate review requires not only a right to appeal when a parole-eligible individual is denied a public hearing, but also a way to challenge that denial—that is, a written record that includes the findings

supporting the decision. As many states have recognized, parole boards must articulate their reasons for denying parole or parole consideration, including recommendations for improving the likelihood of parole in the future. See, e.g., Cal Penal Code 3041.5(b)(2); Conn Gen Stat 54-125a(f)(5); La Rev Stat 15:574.4(D)(3); cf. DC Code 24-403.03(b)(4); Fla Stat 921.1402(7); see also Haw Rev Stat 706-670(4) (directing a parole board state its reasons for denial of parole in writing and requiring a verbatim record be made and preserved).

CONCLUSION

Mr. Stovall's case exemplifies the constitutional deficiencies in Michigan's parole scheme as applied to individuals sentenced to parolable life for offenses they committed when under the age of 18. The Board is nowhere required to consider youth, maturity, or rehabilitation. It further fails to provide adequate procedures to ensure that its decision is based on full and accurate consideration of these constitutionally mandated criteria. The Constitution reserves a life sentence—whether in name or practice—to only the rarest youthful offender. Without a legal mandate that it consider the factors articulated in *Miller* as well as post-crime maturity and rehabilitation, and without the necessary procedures in place to ensure meaningful review, the Board can and will continue to deny parole as a matter of course to youthful offenders serving parolable life, condemning them to die in prison. For these, and for all the foregoing reasons, *amici* respectfully request that this Court grant defendant Montez Stovall's application for leave to appeal.

Respectfully submitted, this 6th day of December, 2018.

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