INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER

VIA EMAIL

The Honorable Merrick B. Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

February 17, 2022

Re: Juvenile Life Without Parole in the Federal System

Dear Attorney General Garland,

We write to you as current and former federal, state, and local prosecutors, Department of Justice officials, and judges. We have extensive experience prosecuting, establishing policy for prosecuting, and seeking or imposing sentences for violent crimes, including those committed by juveniles. Based on our experience, we know that fair and proportionate punishments must account for the impact that violent crimes have on victims and survivors. Just as critically, however, we believe that the credibility of the criminal justice system requires consideration of the characteristics of juvenile offenders, including the possibility of rehabilitation.

Where a juvenile offender is capable of change—as all but the rarest will be—the Constitution and sound sentencing policy demand something less than the punishment of life without the possibility of parole. We accordingly write to urge the Department to ensure that this ultimate penalty is reserved for the rare juvenile homicide offender whose crime reflects permanent incorrigibility. Specifically, we recommend that, except in the most unusual circumstances, the Department should seek a sentence of no more than 30 years for juveniles convicted of crimes that carry a maximum sentence of life. We also recommend that the Department create a committee to review all requests by federal prosecutors to seek life sentences for juveniles, modeled on the capital case review process. The committee should also review all current cases of juveniles serving life sentences and seek sentencing reductions or commutations for those juveniles whose records establish that they are capable of rehabilitation.

We are sensitive to the pressures that the Department faces as jurisdictions across the country report increases in certain crimes, such as automobile thefts, committed by juveniles. The causes of such reported increases, and the best methods for addressing them, are complicated questions outside the scope of this letter. Our recommendations instead bear on a separate issue: just sentencing for juvenile homicide offenders. For the reasons below, we believe that life sentences will rarely be appropriate for such individuals, and that the Department should take steps to ensure consistency in the application of constitutional proportionality principles to these cases in the federal system. To the extent the Department would find it helpful, the signatories to this letter, or a subset of them, are available to discuss these recommendations further.

Only the Rare, Incorrigible Juvenile Offender Should Receive the Most Severe Punishment

As prosecutors and judges, we understand that proportionality in sentencing is essential to the credibility of the criminal justice system. Our experience teaches us that even in the case of homicide—which permanently ends a person's life and forever alters the lives of others—the culpability of a juvenile is often different than that of an adult. Sentences that fail to account for these differences undermine the perception that justice has been done in a particular case, and they give the impression of unfairness on a broader scale. As Justice Frankfurter put it, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954).

In a series of decisions spanning more than a decade, the Supreme Court has recognized that "children are constitutionally different from adults for purposes of sentencing." *Miller v. Alabama*, 567 U.S. 460, 471 (2012). Because of these differences, some sentences that may be appropriate for adults are invalid under the Eighth Amendment when imposed on juvenile offenders. In *Roper v. Simmons*, the Court held that the Eighth Amendment prohibits capital punishment for crimes committed by juveniles because "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." 543 U.S. 551, 572–73 (2005). The Court extended the logic of *Roper* in *Graham v. Florida* to bar sentences of life imprisonment without the possibility of parole for non-homicide offenses committed by juveniles. 560 U.S. 48 (2010). In doing so, the Court noted that, like a capital sentence, a sentence of life without parole "alters the offender's life by a forfeiture that is irrevocable" and that the "twice diminished moral culpability" of a juvenile non-homicide offender undermines the justification for such a severe sentence. *Id.* at 69. More recently, in *Miller v. Alabama*, as further explained in *Montgomery v. Louisiana*, the Court held that life-without-parole sentences are disproportionate for "the vast majority" of juvenile homicide offenders. 136 S. Ct. 718, 736 (2016).

These limitations on juvenile sentencing derive from the fact that, due to their "diminished culpability and greater prospects for reform," children "are less deserving of the most severe punishments." *Miller*, 567 U.S. at 471 (quoting *Graham*, 560 U.S. at 68). In particular, the Court has identified three crucial differences between children and adults for purposes of sentencing:

> 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 "control 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 irretrievable depravity."

Id. (quoting *Roper*, 543 U.S. at 569–70) (brackets and citations omitted). The Court has also emphasized the related point that a juvenile offender "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys." *Id.* at 477–78.

Considering the ways in which juveniles are different from adults, *Miller* and *Montgomery* concluded that, under the Eighth Amendment, a life sentence without the possibility of parole must be reserved for the "rare" juvenile homicide offender who "exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified." *Montgomery*, 136 S. Ct. at 733. In other words, because adolescents' "transient rashness, proclivity for risk, and inability to assess consequences" lessen their "'moral culpability' and enhance[] the prospect that, as the years go by . . . , [their] 'deficiencies will be reformed,'" *Miller*, 567 U.S. at 472 (quoting *Graham*, 560 U.S. at 68), "a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect 'irreparable corruption,'" *Montgomery*, 136 S. Ct. at 726 (quoting *Roper*, 543 U.S. at 573).

The Court's recent decision in *Jones v. Mississippi* does not unsettle these well-established principles. 141 S. Ct. 1307 (2021). In *Jones*, the Court held that a sentencer is not required, as a procedural matter, to make a finding that a juvenile homicide offender is permanently incorrigible before imposing a sentence of life without parole. *See id.* at 1311, 1318–19, 1321. The Court took pains to reaffirm, however, what it understood to be "[t]he key paragraph from *Montgomery*," including the following admonition: "That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment." *Id.* at 1315, n.2 (quoting *Montgomery*, 136 S. Ct. at 735). *Jones* indicated that where such disproportionate punishment is imposed, a juvenile homicide offender may raise an as-applied Eighth Amendment challenge. *See id.* at 1322; *see also, e.g.*, *United States v. Grant*, 9 F.4th 186, 197 (3d Cir. 2021) (where a sentencer finds a juvenile homicide offender to be corrigible, but nevertheless imposes a sentence of life without parole, "the vehicle for challenging the sentence is an as-applied Eighth Amendment claim based on disproportionality of the punishment to the crime and criminal"). And although *Jones* agreed with the respondent that "permanent incorrigibility is not an eligibility criterion akin to sanity or a lack of intellectual disability," 141 S. Ct. at 1315, the Court at no point suggested that transiently immature juveniles may be sentenced to life without parole. Such a suggestion would have been incompatible with the Court's reaffirmation of "[t]he key paragraph from *Montgomery*."

Furthermore, regardless of how one interprets *Jones*, the sparing imposition of juvenile life-without-parole sentences is required as a matter of sound sentencing policy. Justice demands that punishments accurately reflect offenders' culpability and capacity for change. And for the reasons articulated in *Roper* and its progeny—and confirmed by our experience as prosecutors and judges—these considerations generally will favor more lenient sentences for juveniles. This view is supported as well by evolving scientific understandings of child psychology and the neuroscience of adolescent development. In recent years, "studies of adolescent brain anatomy clearly indicate that regions of the brain that regulate such things as foresight, impulse control, and resistance to peer pressure" are not fully developed at age 17. Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, Issues in Sci. & Tech., Spring 2012, http://issues.org/28-3/steinberg/. At that time, a child is still growing into who she will become as an adult. *See, e.g.*, *id.* ("Adolescence . . . is a time when people are, on average, not as mature as they will be when they become adults."); Mass. Inst. Of Tech., *Brain Changes*, Young Adult Dev. Project (2008), https://hr.mit.edu/static/worklife/youngadult/brain.html ("The brain isn't fully mature . . . at 18.").

Limitations on juvenile life without parole are also necessary to mitigate severe racial disparities in our criminal justice system. It is no revelation that Americans of color are disproportionately

represented in the Nation's prisons and jails. *See, e.g.*, The Sentencing Project, The Color of Justice: Racial and Ethnic Disparity in State Prisons 5 (2021). But these disparities are even more pronounced when it comes to juveniles sentenced to life without parole. At the state level, Black inmates make up 40 percent of the overall prison population, but nearly *two-thirds* of the population of juveniles serving life without parole. *See* E. Ann Carson, Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 251149, Prisoners in 2016, 25 tbl.21 (2018); John R. Mills, Anna M. Dorn & Amelia Courtney Hritz, *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 Am. U. L. Rev. 535, 576 tbl.4 (2016). And at the federal level, our research indicates that juvenile offenders serving life sentences are disproportionately Black, Native American, and Asian relative to the prison population as a whole.

In Most Cases, the Department Should Seek Lesser Sentences for Juveniles

Due to the abolition of parole in the federal system, seeking a sentence of life *with* the possibility of parole is not an option for the Department. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987. For the reasons given above, however, we urge the Department to advocate for a sentence of less than life where a juvenile offender is capable of rehabilitation, as nearly all will be. An appropriate sentence of years will of course depend on the particular circumstances of the crime and the characteristics of the offender. But we maintain that in the vast majority of cases, a sentence of no more than 30 years will be a fair and proportionate punishment for a juvenile homicide offender.

It is worth noting at the outset that even a sentence of 30 years will be excessive for most juvenile homicide offenders. The median length of imprisonment for murder is 20 years for *all* adults in the federal system, and the median time served before initial release for murder is 17.5 years for *all* adults in the state systems. *See* Danielle Kaeble, Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 255662, Time Served in State Prison, 2018, 1 (2021); U.S. Sentencing Comm'n, 2019 Annual Report and Sourcebook of Federal Sentencing Statistics 64 tbl.15 (2020). The median sentence for juvenile homicide offenders should fall below these benchmarks, given that juveniles have a "diminished culpability and heightened capacity for change," *Miller*, 567 U.S. at 479.

A 30-year cap, except in rare cases of permanent incorrigibility, is consistent with a number of relevant data points from the state and federal systems. First, in the years following *Miller* and *Montgomery*, many States reconsidered the appropriate sentence length for juveniles convicted of the most serious offenses. Whereas nearly all States permitted the imposition of juvenile life-without-parole sentences at the time *Miller* was decided, roughly half have now abolished such sentences and replaced them with minimum terms of years before parole eligibility. *See* The Campaign for the Fair Sentencing of Youth, Tipping Point: A Majority of States Abandon Life-Without-Parole Sentences for Children 5 (2018); The Sentencing Project, Juvenile Life Without Parole: An Overview 3–4 (2021). These include States whose elected officials span the political spectrum—from Arkansas and Utah to Hawaii and Vermont—and the new minimums that they have enacted provide guideposts regarding proportionate sentences for the most culpable juvenile homicide offenders. Of the States that now prohibit juvenile life without parole, most have enacted minimum terms of 30 years or less.

Actual resentencing practice tells a similar story. In the three years following *Montgomery*, the number of individuals serving juvenile life-without-parole sentences in the United States fell by 60 percent, from 2,800 to 1,100, as a result of legislative reform and judicial resentencing. *See*

The Campaign for the Fair Sentencing of Youth, *supra*, at 6. Of the 1,700 individuals whose sentences have been altered, the median sentence before parole or release eligibility is 25 years. *Id.* Of course, minimum sentences before parole eligibility are not perfectly analogous to terms of years in the federal system, due to the elimination of federal parole. But we believe that a 30-year determinate sentencing cap is a close substitute for a 25-year minimum sentence before parole consideration, especially when the imposition of federal supervised release is taken into account. *See* 18 U.S.C. § 3583.

Myriad other considerations support a 30-year cap for all but the permanently incorrigible. It is well documented, for example, that criminal activity is strongly negatively correlated with age. *See, e.g.*, Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. Rev. 113, 122–23 (2018). By the time juvenile offenders reach their 40s, they have long passed the peak age of criminal involvement, and their risk of recidivism has declined significantly. *See id.* at 122; U.S. Sentencing Comm'n, The Effects of Aging on Recidivism Among Federal Offenders 11 fig.1 (2017).

Furthermore, a nominal term of years understates the degree of punishment exacted on a juvenile offender. Recent research suggests that time spent in prison decreases life expectancy, perhaps even significantly. *See* Evelyn J. Patterson, *The Dose-Response of Time Served in Prison on Mortality: New York State, 1989–2003*, 103 Am. J. Pub. Health 523 (2013) (finding that each year in prison translated into a two-year decline in life expectancy). A term of 30 years may thus reduce by an even greater amount the freedom that a juvenile offender will ever have. It is no surprise that courts have found lengthy terms of years to be functional life sentences, even where the defendant can theoretically survive his time in prison. *See, e.g.*, *State v. Zuber*, 152 A.3d 197, 201–02, 212–13 (N.J. 2017) (*Graham* and *Miller* applied to the sentences of a juvenile nonhomicide offender and a juvenile homicide offender who were ineligible for parole until ages 72 and 85, respectively); *State v. Moore*, 76 N.E.3d 1127, 1133, 1149 (Ohio 2016) (*Graham* prohibited the imposition of a sentence that rendered a juvenile nonhomicide offender ineligible for parole until age 92); *State v. Ragland*, 836 N.W.2d 107, 119, 121–22 (Iowa 2013) (*Miller* prohibited the mandatory imposition of a sentence that rendered a juvenile homicide offender ineligible for parole until age 78). And the United States Sentencing Commission has treated as a "de facto" life sentence any sentence of 470 months or longer. *See* U.S. Sentencing Comm'n, Life Sentences in the Federal System 10 (2015). The presumptive maximum sentence for juvenile homicide offenders should be significantly lower than that.

The Department Should Create a Committee to Review All Requests to Seek a Life Sentence for a Juvenile

In terms of practical implementation, we propose that the Department create a committee of experienced attorneys to review all requests to seek life sentences for juvenile offenders. This proposal is modeled after the Department's capital case review process. As outlined in the *Justice Manual*, federal decisions to seek the death penalty are reviewed by the Capital Review Committee (CRC), which in turn makes recommendations to the Attorney General through the Deputy Attorney General. *See* U.S. Dep't of Just., Just. Manual §9-10.130 (2021). The CRC comprises attorneys from the Office of the Deputy Attorney General, the Office of the Assistant Attorney General for the Criminal Division, the U.S. Attorneys' Offices, and other components within the Department. *Id.* By centralizing the recommendation process and drawing attorneys from diverse backgrounds, the CRC promotes the just and consistent application of capital sentencing laws, while minimizing the prospects of arbitrariness and reliance on impermissible factors. *See id.* §9-10.030 (describing the purposes of the capital case review process).

We believe that the Department should take a similar approach to juvenile life sentences. As with the death penalty for an adult, a life-without-parole sentence for a juvenile is the ultimate punishment. And life sentences are imposed sufficiently infrequently in the federal system that it would not be unduly burdensome for the Department to conduct an individualized review in each case. Unless a juvenile offender is one of those rare children incapable of rehabilitation, the Department should deny a request to seek a life sentence.

We believe the review process should contain at least the following elements:

- Federal prosecutors should be required to submit a request to the committee before seeking a life sentence for a juvenile offender. That submission should include not only the prosecutor's reasons for seeking the sentence, but also any relevant materials provided by defense counsel.

- All requests should be reviewed by a committee composed similarly to the CRC, but that also includes attorneys with expertise relating to juveniles. The committee should include, for example, members from the Organized Crime and Gang Section of the Criminal Division—which has experience relating to the prosecution of juveniles—and the Special Litigation Section of the Civil Rights Division—which has experience relating to juvenile justice. *See id.* §§8-2.263, 9-8.001.

- The Attorney General should make the final decision as to whether a life sentence should be sought in each case. As with the capital case review process, securing sign-off at the highest level is necessary to ensure adequate consideration before requesting the most severe penalty.

The committee should also conduct regular, proactive reviews of juvenile offenders serving life sentences in the federal system. Although we have not analyzed each of the underlying cases in detail, our preliminary assessment suggests that some of these individuals do not deserve their severe punishments because subsequent events have demonstrated that they have some capacity to change and thus are not among the permanently incorrigible.

To give just one example, Riley Briones, Jr. was a juvenile offender who was sentenced to life before *Miller* and was resentenced to life following *Miller*. His sentence was subsequently vacated by the en banc Ninth Circuit, *see United States v. Briones*, 929 F.3d 1057 (9th Cir. 2019) (en banc), but the Ninth Circuit's decision was in turn vacated by the Supreme Court for further consideration in light of *Jones*, *see United States v. Briones*, 141 S. Ct. 2589 (2021) (mem.). On remand, Mr. Briones compellingly explained not only that he is capable of rehabilitation, but also that he has in fact improved himself in prison. For example, he has received his GED, counseled younger inmates, and maintained a spotless disciplinary record. *See* Appellant's Supplemental Brief at 4, *United States v. Briones*, No. 16-10150 (9th Cir. June 25, 2021). The government conceded that Mr. Briones had improved himself—and thus that he is not irretrievably depraved—but it nevertheless argued that Mr. Briones's life sentence should stand. *See id.* at 5–6. The district court likewise acknowledged that Mr. Briones had changed, but it resentenced him to life in prison. *See id.* at 6. On December 6, 2021, the Ninth Circuit affirmed Mr. Briones's life sentence, *see United States v. Briones*, 18 F.4th 1170 (9th Cir. 2021), and he is currently seeking rehearing en banc.

We urge the Department (whether through our proposed committee or other channels) to reconsider its position in Mr. Briones's case, and to consider advocating for sentence reductions for other juvenile offenders currently serving life sentences. Where an individual's sentence is

still being reviewed on direct appeal (as is Mr. Briones's), the Department should seek to return the case to the district court for resentencing, unless the committee concludes that the offender is incapable of rehabilitation. And where an individual's sentence has become final, the Department should explore available mechanisms for correcting that sentence. *See, e.g.*, 18 U.S.C. § 3582(c)(1)(A)(i) (authorizing a district court to reduce a defendant's sentence if it finds that "extraordinary and compelling reasons warrant such a reduction"). The Department should also consider recommending sentence commutations for juvenile offenders capable of rehabilitation whose sentences have become final.

In addition to reviewing the sentences of juvenile offenders formally serving life in prison, we note there are strong arguments for reviewing the sentences of those serving lengthy terms of years. Focusing on a broader group may be necessary to avoid unwarranted disparities that could result if individuals serving formal life sentences are eligible for regular review, while those serving functional life sentences are not. Furthermore, it may be unfair to deprive a juvenile offender of any opportunity for review simply because a prosecutor did not technically seek, and a court did not technically impose, a formal life sentence.

Conclusion

Violent crime warrants proportionate punishment. But justice demands that any such punishment reflect an offender's youth and capacity for rehabilitation. Based on our experience as prosecutors, Department of Justice officials, and judges, we believe that life without parole is appropriate only in rare cases of permanent incorrigibility. Where a juvenile offender is capable of rehabilitation—as nearly all will be—we urge the Department to advocate for a lesser sentence.

Sincerely,

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