IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	Knox County Criminal 108568
	)	
v.	)	C.C.A. E2018-01439-CCA-R3-CD
	)	
TYSHON BOOKER,	)	S. Ct. No. E2018-01439-SC-R11-CD
	)	
Appellant.	)	

AMICUS CURIAE BRIEF OF THE TENNESSEE CONFERENCE OF THE NAACP

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This brief is lodged pending disposition of the motion for leave filed contemporaneously herewith.

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INTEREST OF *AMICUS* TN-NAACP

The Tennessee Conference of the NAACP (TN-NAACP) is the state conference of the National Association for the Advancement of Colored People. Since its inception in 1946, TN-NAACP has been on the frontlines in the struggle for racial justice and is particularly interested in the racially biased treatment of Black children in schools, courts, detention facilities, and other institutions. Accordingly, TN-NAACP is especially focused on the criminal justice system and the racially disparate sentencing of Black children.

TN-NAACP has a strong interest in this case because of the wildly disproportionate impact of juvenile life sentences on Black children in Tennessee. Racial bias – both implicit and overt – compounds the unconstitutional severity of Tennessee's life-sentencing law that deprives mostly Black children of any chance of a meaningful adult life outside of prison.

ARGUMENT

I. INTRODUCTION

The arbitrary imposition of a severe punishment violates the constitutional ban on cruel and unusual punishment, particularly when the arbitrary factor is race. *See Furman v. Georgia*, 408 U.S. 238 (1972). Tennessee's adult life sentence for juveniles, among the most extreme in the country, is severe. The average juvenile sentenced to a mandatory minimum of 51-years is condemned to die in prison, deprived of any opportunity to live as a free adult. The severity of this kind of sentence is

especially stark, because the overwhelming majority of life-sentenced juveniles are Black.

Tennessee changed its law in 1995 to require a mandatory minimum of 51 years of incarceration upon conviction of first-degree murder.[1] Since then, seventy-seven percent (77%) of all Tennessee juveniles sentenced under this law are Black,[2] even though Black people make up only seventeen percent (17%) of Tennessee's population[3] and forty two percent (42%) of Tennessee's prison population.[4] This extreme racial disparity implicates the Cruel and Unusual Punishments Clauses of the federal and Tennessee constitutions, which prohibit arbitrariness in the imposition of severe punishments.[5] Under these Clauses, racial bias is an unacceptable source of arbitrariness, and unconstitutional arbitrariness can exist even when a sentence is mandated upon conviction.[6]

Racial bias reverberates throughout the juvenile justice system, resulting in the racially biased imposition of severe adult life sentences mostly on Black boys. This constitutes cruel and unusual punishment.

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[1] *See Brown v. Jordan*, 563 S.W.3d 196 (Tenn. 2018), interpreting the 1995 amendments to Tenn. Code. Anno. §§ 40-35-501(h) and (i).
[2] *See* Part II.A, *infra*, and Appendix A hereto.
[3] *See*, U.S. Census Bureau (2019), Quick Facts, Tennessee, Population Estimates, https://www.census.gov/quickfacts/TN (last visited Nov. 11, 2020).
[4] U.S. Department of Justice (Bureau of Justice Statistics), Prisoners on 2018, https://www.bjs.gov/content/pub/pdf/p18.pdf at 36 (last visited Nov. 11, 2020).
[5] *See Furman v. Georgia*, 408 U.S. 238 (1972), discussed in Part IV, *infra*.
[6] *See Woodson v. North Carolina*, 428 U.S. 280 (1976), discussed in Part IV, *infra*.

II. FACTUAL BACKGROUND

A. Ed Miller's Survey of Post-1995 Juvenile Life Sentence Cases Reveals Racial Bias.

Mr. H.E. (Ed) Miller, Jr., has conducted a thorough survey of all Tennessee first-degree murder cases since 1977. This survey includes cases in which juveniles were tried as adults and convicted of first-degree murder for offenses that occurred after July 1, 1977, when Tennessee's current life sentence scheme was enacted. Mr. Miller's Declaration, which includes his chart of post-1995 juvenile life-sentence cases, is attached as Appendix A. As Mr. Miller explains in his Declaration, his survey is based on information obtained from Rule 12 reports, data provided by the Tennessee Department of Correction and the Administrative Office of the Courts, court records, and other sources. His chart identifies each juvenile defendant convicted of first degree murder and sentenced to life by name and Tennessee Offender Management Information System number and includes other data including date and county of offense, race of the defendant, race of the victim(s), age of the defendant at the time of the offense, and sentencing date. Mr. Miller's chart contains the most complete and accurate information available concerning these cases.

Mr. Miller's survey reveals a disparate impact in the imposition of adult life sentences on Black juveniles:

- For offenses that occurred after July 1, 1995, a total of 132 juvenile defendants tried as adults have received life sentences for first-degree murder.
- The ages of these juvenile defendants, as of their offense dates, range from 13 years old to 17 years old.

- State-wide, the racial breakdown of these juvenile defendants is:
    - 101 Black juveniles, representing 77% of the state-wide total;
    - 28 white juveniles, representing 21% of the state-side total;
    - 3 Hispanic juveniles, representing 2% of the state-wide total.
- In each of the four largest counties, the percentage of life-sentenced Black juveniles equals or exceeds the state-wide percentage, as follows:
    - Shelby County: all 47 life-sentenced juveniles (100%) are Black;
    - Davidson County: 17 of 22 life-sentenced juveniles (77%) are Black;
    - Knox County: 8 of 10 life-sentenced juveniles (80%) are Black; and
    - Hamilton County: 7 of 8 life-sentenced juveniles (87.5%) are Black.
- State-wide, in each of the 28 cases in which a white juvenile was sentenced to life, the victim(s) were white. Mr. Miller's Declaration includes the following table:

	White Victim(s)	Black Victim(s)	Hispanic Victim(s)
White Defendants	28	0	0
Black Defendants	32	55	4
Hispanic Defendants	1	0	2

See Appendix A. The racial disparities disclosed by these statistics reflect racial bias in the juvenile justice system.

B. Evaluations of the Shelby County Juvenile Court substantiate systemic racial bias.

Documented equal protection violations in Shelby County further substantiate persistent racial bias in the juvenile justice system.

In 2012 the United States Department of Justice, Civil Rights Division (the "DOJ"), issued a report of its *Investigation of the Shelby County Juvenile Court* (the "DOJ Report").[7] The DOJ Report found that "JCMSC[8] fails to provide constitutionally required due process to children of all races. In addition, [it found] that JCMSC's administration of justice discriminates against Black children," *Id.* at 1, and that "JCMSC engages in conduct that violates the constitutional guarantee of Equal Protection and federal laws prohibiting racial discrimination, including Title VI." *Id.* at 2.

The DOJ investigators performed two types of statistical analyses to determine "the odds that a child's case will be handled in a specific way at different decision points in the juvenile court process. The cases range from misdemeanor offenses, such as trespassing, to serious felony offenses, such as murder." *Id.* at 2-3. Based on these analyses, the DOJ found:

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[7] U.S. Dept. of Justice, Civil Rights Division, *Investigation of the Shelby County Juvenile Court* (April 26, 2012) https://shelbycountytn.gov/DocumentCenter/View/4255/DOJ-Report-of-Findings?bidId=. Many of the official documents relating to the DOJ Report are posted on "Shelby County's Juvenile Court Dashboard" at https://dashboard.shelbycountytn.gov/content/reports.

[8] "JCMSC" is the acronym for the Juvenile Court of Memphis and Shelby County.

> Both methods show that Black children are disproportionately represented in almost every phase of the Shelby County juvenile justice system, including pre-trial detention and transfers to criminal court. Moreover, the data shows that in certain phases of the County's juvenile justice system, race is – in and of itself – a significant contributing factor, even after factoring in legal variables (such as the nature of the charge and prior record of delinquency) and social variables (such as age, gender, and school attendance).
>
> …
>
> - We also found a substantial disparity in the rates of transfers to adult court. The RRI ["Relative Rate Index"] shows that JCMSC transfers Black children to adult criminal court more than two times as often than White children. Analysis of the case files shows that Black children in JCMSC have a greater odds ratio (2.07) of being considered for transfer to the criminal court and have a substantially higher chance of having their case actually transferred to the criminal court. Even after accounting for other variables including the types of offenses, prior offenses, age, and gender, the odds ratio associated with race was only slightly reduced to 2.02. This disproportionate impact cannot be explained by factors other than race.

Id. at 3 (emphasis added).

Following issuance of the DOJ Report, the parties entered into a *Memorandum of Agreement Regarding the Juvenile Court of Memphis and Shelby County* (the "MOA"),[9] which required the Juvenile Court to implement a number of changes to its practices and procedures to address the Court's due process and equal protection violations, as well as the substandard conditions of juvenile detention. The MOA appointed

[9] The 2012 MOA is posted at https://dashboard.shelbycountytn.gov/sites/default/files/file/pdfs/doj_moa%2012-12.PDF.

a Due Process Monitor, an Equal Protection Monitor, and a Facility Consultant to issue periodic reports on the Juvenile Court's progress towards complying with the terms of the MOA. *Id.* at 35 & 41. The MOA was to remain in effect until the Juvenile Court had "achieved substantial compliance with all substantive provisions" of the MOA and had "maintained that substantial compliance for 12 consecutive months." Id. at 38-39.

In October 2018, the DOJ closed the MOA, thereby terminating the agreement.[10] Although the Juvenile Court came into partial or substantial compliance with several of the requirements of the MOA, the problems with due process and equal protection violations persist. In February 2019 the Equal Protection Monitor issued his *Twelfth and Final Compliance Report – Equal Protection*,[11] in which he found:

> Although there is some evidence of slight fluctuations, for the most part, the data indicate disproportionate minority contact (DMC)[12]

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[10] *See* U.S. Dept. of Justice, Justice News, *Justice Department Successfully Closes Its Memorandum Of Agreement With Shelby County, Tennessee* (October 19, 2018),https://www.justice.gov/opa/pr/justice-department-successfully-closes-its-memorandum-agreement-shelby-county-tennessee.

[11] *See* Michael Leiber, *Twelfth and Final Compliance Report – Equal Protection*, (last visited Nov. 11, 2020) https://dashboard.shelbycountytn.gov/sites/default/files/file/pdfs/12th%20Equal%20Protection%20Monitor%20FINAL%20Compliance%20Report%20-%20February%202019.pdf. A copy of this report is attached hereto as Appendix B.

[12] "Disproportionate Minority Contact," a term of art under the Juvenile Justice and Delinquency Prevention Act, previously found in former 42 U.S. § 5601, *et seq.* and now found at 34 U.S.C. § 11101, *et seq.* after reauthorization and amendment in 2018, refers to racially disproportionate treatment of juveniles in the justice system.

> has been present in each of the steps of the juvenile justice system and has remained steady or constant since 2010 (see Table 1, next page). …
>
> …
>
> - The consistency of the DMC findings may be to [sic] the slowness of the Juvenile Court to grasp what is needed to reduce DMC, …

Id. at 2. This report demonstrated statistically that throughout the period from 2010 to 2018, Black children were disproportionately represented in all phases of the Juvenile Court's processes – including referrals to Juvenile Court, cases resulting in delinquent findings, cases resulting in confinement, and cases transferred to adult court. *Id.* The Equal Protection Monitor concluded, "Racial disparities in the operation of the justice system are nearly as great as those which led to the original MOA in 2012." *Id.* at 6.

Similarly, in December 2018 the Due Process Monitor issued her *Final Report (Compliance Report #12 – October 2018)*,[13] in which she stated:

> Despite the duration of the Memorandum of Agreement (MOA) and the notable progress in many areas, the structure of the Juvenile Court of Memphis and Shelby County remains deeply flawed enabling a culture of intimidation that undermines due process.
>
> The abrupt termination of oversight by the United States Department of Justice, Civil Rights Division (DOJ) on October 19, 2018 failed to recognize that Juvenile Court has actively resisted

[13] This report could not be found on Shelby County's website. A true copy of this report, along with a supporting declaration of the due process monitor and her C.V., is attached hereto as Appendix C.

> compliance with the word and the spirit of the Agreement and is likely to result in the Court reverting to prior practices.

Id. at 1. This report further explained how the Shelby County Juvenile Court's proceedings to transfer cases to adult court were particularly harmful to Black youth. *Id.* at 6-8.

These documented problems in the Shelby County Juvenile Court help explain why, since 1995, all 47 defendants in Shelby County's juvenile life-sentenced cases were Black.[14]

Shelby County may be an extreme situation, but it accounts for 36% of all post-1995 juvenile life-sentenced cases statewide,[15] and according to statistics the problems in Shelby County are not entirely unique: Black children are disproportionately represented in cases transferred to adult court throughout the state. For example, according to the *2018 Tennessee Juvenile Court Statistical Data – Children Transferred to Adult Court* made available by the Tennessee Administrative Office of the Courts,[16] 103 of the 133 children (or 73%) transferred to adult court statewide were Black. Excluding Shelby County, in the rest of the state 49 of the 78 children (or 63%) transferred to adult court were Black. While serious problems exist in Shelby County, perhaps similar problems exist in other counties throughout the state as well.

The Shelby County reports along with the data from other counties in the state make clear that racial bias infects all stages of Tennessee's juvenile justice system. As cases proceed through the system – including

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[14] *See* Appendix A, at 3.
[15] *Id.*
[16] Attached hereto as Appendix D.

arrests, referrals to juvenile court, transfers to adult court, and trials or plea bargains in adult court – the effects of racial bias are compounded. As one scholar explains:

> In the criminal justice system, racial bias at individual stages connects to create cumulative disadvantage for defendants of color…. Racial bias is not sequestered within a single stage but spread throughout multiple stages; it is not a singular phenomenon, but a multifarious phenomenon that cumulates.

William Y. Chin, *Racial Cumulative Disadvantage: The Cumulative Effects of Racial Bias at Multiple Decision Points in the Criminal Justice System*, 6 Wake Forest J. L. & Pol'y 441, 441 (2016).

The cumulative effects of racial bias throughout the juvenile court system have resulted in the grossly disproportionate imposition of life sentences on Black children (particularly Black boys) who account for 77% of all juveniles sentenced to life statewide.

III. THE SCIENCE OF IMPLICIT RACIAL BIAS HELPS EXPLAIN BIAS IN THE JUVENILE COURTS.

The DOJ Report and the Shelby County Equal Protection Monitor's report observed that the racially disparate statistics could not be explained merely by differences in offending status or delinquent behaviors. Generally, differences in offending status or delinquent behaviors are minimal between Black and white youth.[17] It is not

[17] *See* The Sentencing Project, *Policy Brief: Racial Disparities in Youth Commitments and Arrests*, (last visited November 11. 2020) https://www.sentencingproject.org/wp-content/uploads/2016/04/Racial-Disparities-in-Youth-Commitments-and-Arrests.pdf ("Researchers have found few group differences between youth of color and white youth regarding the most common categories of youth arrests.").

necessary to postulate conscious racial animus, however, to explain how and why racial bias infects the juvenile judicial system. Recent social science research reveals the pervasive effects of implicit racial bias and how this kind of bias – which operates automatically and below the level of conscious awareness – influences decision-making in juvenile and adult courts.[18]

In 2006, the science of "cognitive bias" or "implicit bias" was introduced to the legal profession in a law review article co-authored by a leading researcher in the field who helped develop the Implicit Association Test[19]: Anthony G. Greenwood & Linda Hamilton Krieger, *Implicit Bias, Scientific Foundations*, 94 Calif. L. Rev. 945 (2006). The authors explained, "Many mental processes function implicitly, or outside conscious attentional focus. These processes include implicit memory, implicit perception, implicit attitudes, implicit stereotypes, implicit self-esteem, and implicit self-concept." *Id.* at 947. The authors further described implicit bias as follows:

> *Implicit biases* are discriminatory biases based on implicit attitudes or implicit stereotypes. Implicit biases are especially intriguing, and also especially problematic, because they can produce behavior

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[18] The Tennessee Supreme Court's Access to Justice Commission itself recognizes this. The current strategic plan for the Commission addresses issues of racism and disparate impact on racial and ethnic minorities. One of the plan's initial steps is to conduct training sessions on a range of topics, including implicit bias and racial injustice. *See* JUSTICE FOR ALL, Tennessee Supreme Court Access to Justice Commission Strategic Plan 2020 Update, p. 3 http://www.tncourts.gov/sites/default/files/docs/2020_atjc_strategic_plan.pdf

[19] The Implicit Association Test (the "IAT") is an important tool used by social psychologists in studying implicit biases. For information about the IAT, see https://implicit.harvard.edu/implicit/education.html.

> that diverges from a person's avowed or endorsed beliefs or principles. …

Id. at 951. The authors described how implicit biases can produce discriminatory behavior and racially disparate outcomes, and they suggested that additional research would reveal more about the nature and effects of implicit racial biases. *Id.* at 961–67.

Indeed, since then the scientific research into implicit bias has accelerated, and the past fifteen years have yielded numerous peer reviewed empirical studies of the nature, prevalence, and effects of implicit racial biases in our society. A substantial body of this research is directly relevant to racial biases in the criminal justice system, particularly against Black male juveniles. As explained in a law review article published in 2014:

> "[O]ver the past decade … an extensive body of social science [] demonstrates how individual actors in the criminal justice system – and in society generally – possess implicit racial biases that can affect their perceptions, judgments, and behaviors. Criminal law scholars have employed implicit bias-based analyses to help explain racial discrepancies in police stop-and-frisk rates, arrest rates, prosecutorial charging and bargaining, sentencing, and other areas where disparities persist. These scholars have demonstrated, project by project, that implicit negative stereotypes of black Americans pervade the American psyche. For example, Americans rate ambiguous pieces of evidence to be more probative of guilt when a suspect is dark-skinned and display a stronger implicit connection between "black" and the concept "guilty" than they do between "white" and "guilty." The overriding theme in this work is that implicit negative stereotypes of black Americans as hostile, violent, and prone to criminality create a lens through which criminal justice actors automatically perpetuate inequality."

Robert J. Smith, et al., *Implicit White Favoritism in the Criminal Justice System*, 66 Ala. L. Rev. 871, 873–74 (2014) (citing numerous law review articles and studies).

Among the most famous of these studies are the "shooter bias" studies.[20] These studies involve "custom-designed video games" where "participants are instructed to shoot the bad guys, regardless of race, but not to fire at the innocent bystanders."[21] The studies found that participants have a "propensity to shoot Black perpetrators more quickly and more frequently than White perpetrators and to decide not to shoot White bystanders more quickly and frequently than Black bystanders."[22]

Regarding the juvenile justice system, a leading study demonstrated that, as compared to similarly situated white children, people are likely to perceive Black children as older, less innocent, and more culpable.[23] In the process, people tend to "dehumanize" Black children. Yet another study found that simply bringing to mind a Black juvenile defendant as opposed to a white juvenile defendant led participants to be significantly more likely to consider a child's inherent

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[20] *See, e.g.,* Judge Mark W. Bennett*, Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149, 155 (2010).

[21] *Id.*

[22] *Id.*

[23] *See* Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. Personality & Soc. Psychol. 526, 540 (2014).

culpability as similar to that of an adult and to favor more severe sentencing.[24]

Judges are not immune from these racial biases. In one study, researchers "found a strong white preference among white [trial] judges," stronger even than that observed among a sample of white subjects from the general population obtained online.[25] By contrast, Black judges did not show a clear racial preference.[26] Another study found that trial judges often rely on intuitive, rather than deliberative, decision making processes, which risks leading to reflexive, automatic judgments, such as intuitively "associat[ing] … African Americans with violence."[27] Yet another study found that "judges harbor the same kinds of implicit biases as others [and] that these biases can influence their judgment."[28] Judges' biases undoubtedly contribute to the fact that "at virtually every stage of the juvenile justice process, Black youth receive harsher treatment than white youth, even when faced with identical charges and offending histories."[29]

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[24] Aneeta Rattan et al., *Race and the Fragility of the Legal Distinction between Juveniles and Adults*, 7 PLoS ONE 5 (May 2012).
[25] Jeffry J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195, 1210 (2009).
[26] *Id.*
[27] Bennett, *supra* note 19, at 156–57.
[28] *Id.* at 157.
[29] Ellen Marrus & Nadia N. Seeratan, *What's Race Got to Do with It? Just About Everything: Challenging Implicit Bias to Reduce Minority Youth Incarceration in America*, 8 J. Marshall L. J. 437, 440 (2015).

Various studies demonstrate how racial stereotypes can come into play at different points in the juvenile justice system. For example, studies have shown that:

- Prosecutors are more likely to prosecute Black defendants, and to offer white defendants more generous plea deals[30];
- Practicing defense attorneys show a tendency to recommend plea bargains for Black defendants that were longer than those they would recommend for white clients, even though the attorneys believed that they could put aside all personal biases – indicating that implicit bias was a decisive factor[31];
- Subjects given racial primes express significantly more support for harsh sentences for juveniles, and perceive juveniles as similarly culpable and deserving of harsh punishment as adult[32]; and,
- In the school context, adults are more likely to inaccurately perceive anger on Black children's faces, and that misperception can help explain findings that Black students receive more frequent and harsher disciplinary actions than non-Black students, even when their behavior is the same.[33]

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[30] Rachel D. Godsil & Alexis McGill, *Transforming Perception: Black Men and Boys*, (2013) http://perception.org/wp-content/uploads/2014/11/Transforming-Perception.pdf.

[31] Vanessa A. Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 Law & Hum. Behav., 413, 425 (2011).

[32] Rattan et al., *supra* note 23.

[33] Amy G. Haberstadt et al., AMERICAN PSYCHOLOGICAL ASSOCIATION, *Racialized Emotion Recognition Accuracy and Anger Bias of Children's Faces,* Emotion, July 2020.

These studies represent but a sampling of the pertinent social science research into the phenomenon of implicit bias.

The developing understanding of the science of implicit bias, therefore, helps explain how and why life sentences are disproportionately imposed on Black children in a blatantly biased manner, not only in Shelby County but throughout the state.

IV. RACIAL BIAS RENDERS JUVENILE LIFE SENTENCES CRUEL AND UNUSUAL.

The arbitrariness of a sentencing scheme plays an essential role in an analysis under the Cruel and Unusual Punishments Clauses of the federal and State constitutions. These Clauses are implicated especially when the imposition of a severe sentence is racially biased, constituting an unacceptable form of arbitrariness. Racially biased arbitrariness can come into play wherever discretion is exercised. In the juvenile justice system, discretion is exercised at numerous points, from arrest through referral, from transfer hearings to trials in adult court.

In *Furman v. Georgia*, 408 U.S. 238 (1972), the Supreme Court held that "discretionary" death penalty systems violated the Eighth Amendment because application of the severe punishment of death under discretionary sentencing statutes was inherently arbitrary. Justice Brennan clearly stated the principle that the Eighth Amendment is violated when a severe punishment is arbitrarily imposed:

> In determining whether a punishment comports with human dignity, ... the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words "cruel and unusual punishments"

> imply condemnation of the arbitrary infliction of severe punishments. And, as we now know, the English history of the Clause reveals a particular concern with the establishment of a safeguard against arbitrary punishments.

Id. at 274 (citation omitted).

The various concurring opinions in *Furman* make clear that the Court was particularly concerned about the racially biased manner in which this severe punishment was being imposed, since racial bias is a pernicious source of arbitrariness. Justice Douglas found, "[T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments." *Id.* at 257. Justice Marshall wrote, "It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population. Studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination." *Id.* at 364–65. And Justice Stewart wrote, "My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race." *Id.* at 310.[34]

[34] Justice Stewart went on to write, "[b]ut racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Id.* at 310.

A severe punishment can be unconstitutionally arbitrary under the Cruel and Unusual Punishments Clauses even if the punishment is mandatorily imposed upon conviction – *i.e.*, even if discretion is removed after conviction in determining the punishment. This was the holding in *Woodson v. North Carolina*, 428 U.S. 280 (1976), in which the Supreme Court invalidated a "mandatory" death penalty statute under the Eighth Amendment because, notwithstanding its "mandatory" nature, it allowed for unconstitutional arbitrariness prior to sentencing. After *Furman* invalidated discretionary statutes, North Carolina (along with other states) attempted to resolve the arbitrariness problem by enacting a death penalty statute that mandated the imposition of the death penalty upon conviction of a capital crime, thereby eliminating discretion strictly at the sentencing stage. The Court held, however, that this kind of statute did not solve the problem in *Furman* because in capital cases unwarranted discretion, and therefore arbitrariness, occurred in earlier stages of the case, including at the point of conviction. The Court explained:

> A separate deficiency of North Carolina's mandatory death sentence statute is its failure to provide a constitutionally tolerable response to *Furman*'s rejection of unbridled jury discretion in the imposition of capital sentences … It is argued that North Carolina has remedied the inadequacies of the death penalty statutes held unconstitutional in *Furman* by withdrawing all sentencing discretion from juries in capital cases. But when one considers the long and consistent American experience with the death penalty in first-degree murder cases, it becomes evident that mandatory statutes enacted in response to Furman have simply papered over the problem of unguided and unchecked jury discretion.

> …[T]here is general agreement that American juries have persistently refused to convict a significant portion of persons charged with first-degree murder of that offense under mandatory death penalty statutes.

Id. at 302.

The same can be said about juvenile life sentencing in Tennessee. In the juvenile court system, discretion is exercised throughout the process; and, as shown above, that discretion is exercised in a racially biased manner at each stage. As a juvenile case proceeds through the system, racial bias, whether explicit or implicit, can come into play at multiple points in time, including the prosecutor's decision to charge first-degree murder and to seek transfer to adult court, the juvenile court's decision to transfer the case, the plea negotiations between the prosecutor and defense attorney, and the jury's decision whether to convict or acquit, or whether to convict the defendant of a lesser included offense. Consequently, by the time a case gets to adult court and the defendant is convicted of first-degree murder, the odds are at least 77% that the defendant will be Black and that the cards will have been stacked against the defendant because of race. This form of arbitrariness is intolerable under the Cruel and Unusual Punishments Clauses of the federal and State constitutions.

CONCLUSION

There can be no dispute that racial bias infects the juvenile justice system, resulting in the grossly disproportionate imposition of adult life sentences on Black children. Race is an odious arbitrary factor in these cases, which implicates the Cruel and Unusual Punishments Clauses.

This Court recently issued a statement on its commitment to equal justice, acknowledging that "Racism still exists and has no place in our society," and proclaiming that "We are striving toward a better tomorrow, and know there is much more work to do."[35] Pursuant to this Court's commitment, the Tennessee Supreme Court's Access to Justice Commission's Strategic Plan (2020 Update)[36] now includes a section titled "Identify and Eliminate Barriers to Racial and Ethnic Fairness," under which the Commission intends to "address issues of racism and disparate impact on racial and ethnic minorities head on, …" *Id.* at 3.

Tyshon Booker's case offers this Court the opportunity to ameliorate one of the most severe effects of racial injustice in the juvenile justice system by declaring that Tennessee's 51-year mandatory minimum life sentence for juveniles is unconstitutionally cruel and unusual.

November 19, 2020 Respectfully submitted,

s/ Alexandra MacKay

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[35] *Tennessee Supreme Court Issues Statement on Equal Justice*, Tennessee Courts, https://www.tncourts.gov/press/2020/06/25/tennessee-supreme-court-issues-statement-commitment-equal-justice (last visited Nov. 11, 2020).

[36] *See* JUSTICE FOR ALL, Tennessee Supreme Court Access to Justice Commission Strategic Plan 2020 Update, http://www.tncourts.gov/sites/default/files/docs/2020_atjc_strategic_plan.pdf.

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CERTIFICATE OF COMPLIANCE

In accordance with Tenn. Sup. Ct. R. 46, § 3.02 the total number of words in this brief, exclusive of the Title/Cover page, Table of Contents, Table of Authorities, and this Certificate of Compliance, is 5,073. This word count is based on the word processing system used to prepare this brief.

s/ Alexandra MacKay
Alexandra T. MacKay

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2020, true and correct copies of the foregoing Amicus Curiae Brief of the Tennessee Conference of the NAACP was served electronically, if available, or by first class mail, postage prepaid, addressed as set forth below:

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