No. 17-165

IN THE

Supreme Court of the United States

TIMOTHY S. WILLBANKS, *Petitioner*

v.

MISSOURI DEP'T OF CORRECTIONS, *Respondent*

LEDALE NATHAN, *Petitioner*

v.

STATE OF MISSOURI, *Respondent*

On Petition for Writ of Certiorari
To the Supreme Court of Missouri

BRIEF ON BEHALF OF *AMICUS CURIAE* THE RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Roderick and Solange MacArthur Justice Center ("RSMJC") is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC has offices at Northwestern Pritzker School of Law, at the University of Mississippi School of Law, in New Orleans, in St. Louis, and in Washington, D.C. RSMJC attorneys have led civil rights battles in areas that include police misconduct, the rights of the indigent in the criminal justice system, compensation for the wrongfully convicted, and the treatment of incarcerated men and women.

REASONS FOR GRANTING THE PETITION

Amicus curiae urge this Court to grant certiorari in this case to address a constitutional sentencing issue that is resulting in continued injustices in juvenile prosecutions across the country – that is, whether this Court's substantive and procedural directives from *Graham v. Florida*, 560 U.S. 48 (2010) and *Miller v. Alabama*, 567 U.S. 460 (2012), and their progeny, apply with equal force to *de facto* life without parole terms imposed upon youth.

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[1] Pursuant to United States Supreme Court Rule 37.2, counsel of record received timely notice of the intent to file this brief and consented to the filing of this Amicus brief. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part. No person or entity, other than *Amicus*, its members, or its counsel made a monetary contribution for the preparation or submission of this brief.

Amicus curiae believe resolution of this matter is especially important in places like Missouri, where Petitioners were sentenced. Indeed, as further described below, *de facto* life without parole terms are not at all rare in juvenile homicide cases in the Show Me State, and are frequently imposed even in non-homicide cases, gutting the import, meaning and intent of this Court's body of jurisprudence that has declared youth are categorically less culpable and generally must be seen as amenable to rehabilitation.

I. This Court Should Grant Certiorari To Clarify That *Graham*, *Miller*, and Their Progeny Apply to *De Facto* Life Without Parole Sentences for Juveniles.

The Eighth Amendment prohibits the federal government from inflicting cruel and unusual punishment upon individuals convicted of crimes, U.S. Const., amend. VIII. This bedrock principle has long been applied to the States through the Fourteenth Amendment, U.S. Const., amend. XIV. The *de facto* life without parole (LWOP) sentences imposed upon Missouri youthful offenders like Timothy Willbanks and Ledale Nathan, violate the Eighth Amendment as fully as the *de jure* LWOP sentences found unconstitutional in *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. 460 (2012).

When imposed upon juveniles in non-homicide cases, or in homicide matters where there has been no finding beyond a reasonable doubt of irredeemable depravity, such sentences run counter to "the evolving standards of decency that mark the progress of a

maturing society." *Graham v. Florida*, 560 U.S. at 59 (internal citations omitted).

The reasoning underlying this Court's holdings in the *Roper-Graham-Miller-Montgomery* juvenile cases applies with equal force to any death-behind-bars sentence, whether given the moniker "life without parole" or a functional equivalent. Timothy Willbanks' life-plus-355-year aggregate sentence for nonhomicide crimes and Ledale Nathan's 300-year aggregate sentence for crimes including second degree homicide amount to such death-behind-bars sentences. Neither Mr. Willbanks nor Mr. Nathan will be eligible for parole within their natural lifetimes.

Obviously, sentences below 300 years can amount to natural life sentences, too. For instance, in the United States, life expectancy at birth is generally estimated at 76.3 years for males and 81.2 years for females, of all races. National Center for Health Statistics, *Health, United States, 2016: With Chartbook on Long-term Trends in Health* 44 (2017) (analyzing 2015 life expectancy data), available at: https://www.cdc.gov/nchs/data/hus/2016/fig06.pdf). For Caucasians alone, this study estimates a life-span of 76.6 and 81.3 years, respectively. *Id.* But for African Americans this estimate decreases to 72.2 and 78.5 years, respectively. *Id.*

Other studies show that Black males born in the last fifteen years will likely only live into their sixties. *See* Amy L. Katzen, *African American Men's Health and Incarceration: Access to Care Upon Re-Entry and Eliminating Invisible Punishments*, 26 BERKELEY J. GENDER L. & J. 221, 225 (2011) ("an

African American boy born in 2004 faces a life expectancy of 69.5 years while an African American girl born the same year can expect to reach 76.3 years"). Additional risk factors are likely to further negatively impact the life expectancies of incarcerated Black males. *See, e.g.*, Evelyn J. Patterson, *The Dose–Response of Time Served in Prison on Mortality: New York State, 1989–2003*, 103(3) AM. J. PUBLIC HEALTH 523 (Mar. 2013) (finding correlation between time spent in prison and lower life expectancy); *see also* Mark Alexander, Ph.D., *African American Men's Health: Breaking the Silence Presentation,* University of Alabama (March 17, 2015) ("the criminal justice system makes Black men sick"), available at: https://www.uab.edu/medicine/mhrc/images/2015_HDRS/Mark%20Alexander.pdf.

This phenomenon is particularly acute in places like Missouri, where Black communities over-represented in our prisons have been under-resourced for decades. *See, e.g., Segregation is Literally Killing Us, Health Researcher Says*, WE LIVE HERE – ST. LOUIS PUBLIC RADIO (June 28, 2015) (noting the public health findings of Washington University professor Jason Pernell, that Clayton, Missouri, a predominantly white community has an average life expectancy of 85 while St. Louis City – a mostly Black urban area just a few miles away – has an average life expectancy of 67), available at: http://www.welivehere.show/posts/2016/3/28/segregation-is-literally-killing-us-health-researcher-says.

Sentences that allow for parole eligibility only after juvenile offenders have exceeded their life

expectancy deny them a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75. This Court's reasoning in *Graham* and *Miller*, that juveniles possess a greater capacity for growth and rehabilitation than adults, applies with no less force to multiple offenses committed within a short time period than it does to one offense. Likewise, the developmental attributes of a juvenile that make her categorically less culpable than an adult do not disappear simply because her crimes were not ones that mandated a sentence of life without parole. The fact that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes," *Miller*, 567 U.S. at 472, also does not diminish when applied to sentences that are the functional equivalent of life without parole.

Such differences do not disappear, and thus States cannot ignore such differences, simply by manipulating the name of a juvenile's death-behind-bars sentence.

II. Missouri and Other States Nullify This Court's Precedent by Imposing *De Facto* Life Without Parole Sentences When Prohibited Under *Graham*, *Miller*, and Their Progeny.

Nationally, nearly 12,000 individuals sentenced as juveniles are currently serving life or virtual life sentences, defined as "a term of imprisonment that a person is unlikely to survive if carried out in full." Ashley Nellis, The Sentencing Project, *Still Life: America's Increasing Use of Life*

and Long-Term Sentences 5, 9 (2017) (defining a virtual life sentence as a "sentence of at least 50 years before parole"). Of these 12,000 juveniles, an estimated 2,089 are serving virtual or *de facto* life sentences. *Id.* at 17.

A. Missouri Regularly Condemns Youth To Die Behind Bars, Rendering Such Sentences Far Less Than a Rarity.

In Missouri, 525 individuals were serving a virtual life without parole sentence in 2016 – meaning the "person is unlikely to survive if [the imposed sentence] was carried out in full." Nellis, *Still Life*, *supra* at 9-10. It is unknown exactly how many of these sentences were given to those under the age of 18 at the time of the offense. However, it is estimated that "[o]ne of every 21 virtual life-sentenced individuals was convicted of a crime committed as a juvenile." *Id.* at 18. And this likely does not account for the universe of seventeen-year-olds who received such sentences because such children are automatically considered adults and not "juveniles" under Missouri law. *See* Mo. Rev. Ann. § 211.031.3.

However, Missouri sentencing practices did not – and do not – require a finding that such youth were "the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery v. Louisiana*, 136 S.Ct. 718, 734 (2016). Moreover, local culture and criminal law practice collide to allow for death behind bars sentences, even in non-homicide cases like that of Petitioner Willbanks, and in homicide cases like that of Petitioner Nathan, whose jury actually rejected LWOP as a possibility.

Indeed, Missouri is one of the nine states that comprise 81 percent of all JLWOP sentences in the United States. St. Louis is Missouri's most notable example; although St. Louis County accounted for a mere 0.1 percent of the United States population, it accounted for 2 percent of all JLWOP sentences nationwide from 1953 - 2015. John R. Mills, Anna M. Dorn, & Amelia Courtney Hritz, *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 Amer. U. L. R. 535, 574, 572 (2016).

In addition, Missouri's Armed Criminal Action (ACA), which provides for a minimum sentence but no maximum sentence, *see* Mo. Rev. Ann. § 571.015, allows for the easy creation of *de facto* life sentences. Under the ACA statute, ordinary objects – even a replica of a sword given out at a children's carnival – can be considered "dangerous instruments," depending on the circumstances in which they are used. *State v. Harrell*, 342 S.W.3d 908 (Mo. Ct. App. S.D. 2011); *see also State v. Daniels*, 18 S.W.3d 66 (Mo. Ct. App. W.D. 2000).

Shockingly, Missouri state courts have found that Sentences of 100 and 151 years for ACA charges do no violate the Eighth Amendment's prohibition against cruel and unusual punishment. *See, e.g.*, *State v. Bolds*, 11 S.W.3d 633 (Mo. Ct. App. E.D. 1999); *State v. Stoer*, 862 S.W.2d 348 (Mo. Ct. App. S.D. 1993). As a result, Missouri courts can impose any length of sentence on a youth convicted of an ACA charge, which has no mens rea element. *See* Mo. Rev. Ann. § 571.015.

With such pliable tools for charging and sentencing, judges may impose consecutive sentences for any number of offenses and easily effectuate the functional equivalent of a juvenile life sentence, despite the fact that there should be "no shortcut," to courts weighing "the difficult but essential question whether petitioners are among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'" *Adams v. Alabama*, 136 S.Ct. 1796, 1801 (2016) (Sotomayor, J., concurring) (citing *Montgomery*, 136 S.Ct. at 734).

Indeed, Timothy Willbanks and Ledale Nathan are not alone in Missouri. Numerous other youths have been sentenced to die behind bars, and without intervention by this Court, will be left condemned without the benefit of the required consideration of "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 567 U.S. at 480. These individuals include:

Bobby Bostic: Bobby Bostic was 16 years old when he and an older co-defendant committed a robbery, during the course of which two people were injured. Following this incident, Mr. Bostic was convicted of 16 felonies and pled guilty to one count of ACA. His sentence totals 241 years; he will become parole eligible in 2091, when he will be 112 years old. His adult co-defendant received a sentence of 30 years in prison.

The jury did not recommend a life sentence, although it could have done so on any of the eleven felony counts. Yet the trial judge disregarded the clear intent of the jury that Mr. Bostic not die in

prison and, instead, ordered his sentences to run consecutively, for the express purpose of giving him a death-behind-bars sentence.[2]

Orlando Fields: Orlando Fields was 16 years old when he and four co-defendants, three of whom were above 18 years of age, committed three carjackings and an attempted carjacking, which left one man dead. A jury found him guilty of five counts of first-degree robbery, 11 counts of ACA, one count of second-degree murder, two counts of attempted first-degree robbery, three counts of first-degree assault, and two counts of unlawful use of a weapon, all stemming from one weekend.

Based on the jury's recommendation, Mr. Fields could have spent an aggregate minimum of 20 years in prison, or a maximum of 227 years. The St. Louis trial court sentenced him to the maximum term totaling 227 years. Mr. Fields believes his nearest parole date is 2197, when he will be 211 years old.[3]

Montea Mitchell: Montea Mitchell was 16 years old when he committed two armed robberies and attempted another. He was sentenced to an aggregate 70-year term behind bars for the two robberies, an attempted robbery, and the associated Armed Criminal Action charges.

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[2] *See Supplemental Motions In Support of Petition for Habeas Corpus*, Bostic v. Bowersox, Missouri Supreme Court No. 93110 (filed Jul. 21, 2017).

[3] *See State v. Fields*, 194 S.W.3d 923 (Mo. Ct. App. E.D. 2006).; *see also Teen convicted of murder could receive 227 years*, Columbia Daily Tribune, Nov. 19, 2004.

Regardless of rehabilitation and maturation, under Missouri law Montea must serve over 65 years of his sentence before he becomes parole eligible, at age 82. Thus, unless he survives nearly a decade beyond his natural life expectancy, Montea will have no "meaningful chance at release" and will die behind bars.[4]

B. Missouri Courts Impose Death-Behind-Bars Sentences with Little Regard for a Defendants' Youth.

As this Court said in *Roper*, children are "more vulnerable . . . to negative influences and outside pressures, . . . have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment," and are comparatively immature and irresponsible. *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005). Those differences should not result in a child growing up and passing away behind bars.

Mr. Willbanks, Mr. Nathan, Mr. Bostic, Mr. Fields, Mr. Mitchell, and multiple other Missouri youth were intentionally sentenced to death-behind-bars for their crimes – virtual life without parole prison terms. But such sentences should never be lawful in non-homicide cases. And even when a life is intentionally taken, such extreme incapacitation must be reserved for the rare individual for whom specific fact-findings are made that they are absolutely beyond reach and redemption. *See, e.g.,*

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[4] *See Petition for Writ of Habeas Corpus*, Washington County Circuit Court, Missouri Circuit Court No. 16WA-CC00197 (filed May 4, 2016).

Adams, 136 S.Ct. at 1801. The rarity exception should apply whether the death behind bars term is mandatory or not. *See id.*

As the Iowa Supreme Court and many other courts have recognized, it does not matter whether a death-behind-bars sentence is imposed as life without parole or a term of years that ensures a youth will never emerge from prison:

> [T]he rationale of *Miller*, as well as *Graham*, reveals that the unconstitutional imposition of a mandatory life-without-parole sentence is not fixed by substituting it with a sentence with parole that is the practical equivalent of a life sentence without parole. Oftentimes, it is important that the spirit of the law not be lost in the application of the law. This is one such time.

State v. Ragland, 836 N.W.2d 107, 121 (2013) (affirming postconviction modification from LWOP for 60 years to LWOP for 25 years). *Accord Budder v. Addison*, 851 F.3d 1047 (10th Cir. 2017); *State v. Zuber*, 152 A.3d 197 (N.J. 2017); *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014); *State v. Null*, 836 N.W.2d 41 (Iowa 2013); *State v. Ramos*, 387 P.3d 650 (2017), *petition for cert. docketed in* 16-9363; *Casiano v. Comm'r of Corr.*, 115 A.3d 1031, 1044 (Conn. 2015), *cert. denied sub nom. Semple v. Casiano*, 136 S. Ct. 1364 (2016).

To exempt terms of years that all but guarantee death behind bars from the reach of *Graham* and *Miller* would reduce their substantive constitutional protections to form over substance. Such an outcome is unacceptable. *See, e.g., Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 679 (1996) ("Determining constitutional claims on the basis of [] formal distinctions, which can be manipulated largely at the will of the government is an enterprise that we have consistently eschewed.").

Unfortunately, this is precisely what is happening to juveniles in Missouri. Missouri uses consecutive sentences to directly and, sometimes purposefully, contravene this Court's mandate that "children are different" and require individualized fact-finding before the rare instance of LWOP being imposed in an intentional juvenile homicide matter. *Miller*, 567 U.S. at 480.

For instance, the trial judge in Bobby Bostic's case brazenly declared: "You made your choice. You're gonna have to live with your choice, and you're gonna die with your choice because, Bobby Bostic, you will die in the Department of Corrections." *See Suggestions in Support of the Petition for Writ of Habeas Corpus*, Bostic v. Bowersox, Missouri Supreme Court No. 93110 (filed Feb. 4, 2013).

Similarly, the judge in Ledale Nathan's case articulated that Ledale's "future should be that [he] be permanently incapacitated," the purpose of his 300-year sentence being "to send a message to future Judges and Governors." *See Appellant's Substitute Brief*, State v. Nathan, Missouri Supreme Court No. 95473 (filed May 25, 2016). In Ledale's resentencing,

the judge went on to explain his view of this Court's mandates in *Graham* and *Miller*, referring to those cases as a "loss on the Eighth Amendment" but one that could easily be circumvented because they did "not preclude the entry of consecutive sentences, even if the sum total of those sentences would result in the functional equivalent of life without parole." Tr. 1075.

Such unguided determinations to stack sentence terms, particularly for non-homicide counts, are similar to the examples given by this Court in *Graham* to explain the necessity for categorical distinctions in the case of juvenile offenders. *Graham*, 560 U.S. at 77 (explaining that current guidelines around "the imposition of these sentences based only on a discretionary, subjective judgment by a judge or jury that the offender is irredeemably depraved, are insufficient to prevent the possibility that the offender will receive a life without parole sentence for which he or she lacks the moral culpability").

States like Missouri should not, by manipulating sentencing structures and charges, be able to avoid the Eighth Amendment's clear limitations on sending juveniles to die behind bars.

III. Missouri Sentencing Practices, Including *De Jure* and *De Facto* LWOP Sentences, Have Racially-Disproportionate Impacts.

A 1999 report from the Office of Juvenile Justice and Delinquency Prevention found that in the late 1990s, "[m]inorities made up a greater proportion of new court commitments involving youth under age

18 than of those involving older offenders," with African Americans constituting 60 percent of new prison commitments for juveniles. *See Juvenile Offenders and Victims: 1999 National Report*, Dep't of Justice Office of Juvenile Justice and Delinquency Prevention 15 (Dec. 1999). Unfortunately, such trends have continued into the current day.

Nationwide, JLWOP sentences are imposed in a manner that disproportionately affects minorities. Even taking into account differences in arrest rates, race plays a key role in sentencing juveniles: African American youths make up 56 percent of individuals arrested for non-negligent homicides but 66 percent of individuals sentenced to JLWOP. John R. Mills, Anna M. Dorn, & Amelia Courtney Hritz, *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 Amer. U. L. R. 535, 576 (2016). Thus, "[w]hile five percent of African American juveniles arrested for murder are sentenced to JLWOP, only three percent of white juveniles are similarly sentenced." *Id.* at 578. Such disparate impacts have been shown to exist from 1980 onwards, the beginning of reporting on such data. *Id.*

Nationwide, the youth sentenced to life and its functional equivalent are overwhelmingly male (98 percent) and people of color (80.4 percent), with 55.1 percent being African American. Ashley Nellis, The Sentencing Project, *Still Life: America's Increasing Use of Life and Long-Term Sentences* 17 (2017). Additionally, in comparison to adults serving LWOP, life, or a virtual life sentence, "youth of color comprise a considerably greater share of the total than their

adult counterparts for each of the three types of life sentences." *Id.*

Of the juvenile LWOP sentences reported by the Missouri Department of Corrections, African-Americans accounted for 63.0 percent and Caucasians accounted for 34.7 percent of individuals currently serving such sentences.[5] These percentages are vastly disproportionate to the representative Missouri population – in July 2016, Missouri's population was estimated to be 11.8 percent African-American and 83.2 percent Caucasion. *See* U.S. Census Bureau, *Population Estimates Program*, July 1, 2016.

Similarly, for all age offenders, Missouri's incarceration rate for Black offenders is four times that of white offenders, with "black offenders receiving the highest average prison sentences" and "a higher rate of unmitigated prison sentences." Missouri Sentencing Advisory Commission, *Annual Report on Sentencing and Sentencing Disparity: Fiscal Year 2015* 32 (May 2016). Indeed, the report found that "[f]or violent offenses, black offenders are more likely to be sentenced to prison than white offenders for class A, B, and C felony offenses and have the longest prison sentences for class B and C offenses." *Id.* at 35. Further, "Black offenders served significantly more time than white offenders … and also served more time as a percent of the sentence." *Id.* at 40.

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[5] These percentages are based on a list maintained by the Missouri Department of Corrections, obtained by *Amicus* counsel through a Missouri Sunshine request. The list purports to include all "[o]ffenders under 18 at time of offense and serving a life [with] no parole sentence on August 19, 2016."

Such disproportionality in Missouri's sentencing practices contribute to the large numbers of African American males going "missing" from daily life. More than 40 percent of African-American men ages 20 to 24 and 35 to 54 are "missing" from Ferguson, Missouri, and 24 percent aged 25 to 34 are missing from the St. Louis community. Both figures far exceed the nationwide average of eighteen percent. Stephen Bronars, *Half of Ferguson's Young African-American Men Are Missing*, Forbes, Mar. 18, 2015. Moreover, incarceration is "the primary reason why young black men are missing from our largest cities." *Id*; *see also* Justin Wolfers, David Leonahrdt, and Kevin Quealy, *1.5 Million Missing Black Men*, N.Y. Times, April 20, 2015.

Racially skewed levels of incarceration result from implicit or explicit biases; studies show minority youth actions are "more likely to be attributed to character flaw[s] and they are more likely to be perceived as dangerous and receive recommendations for harsher punishments." *See* Ronald E. Claus, *et al.*, *Racial and Ethnic Disparities in the Police Handline of Juvenile Arrests*, Dep't of Justice Office of Justice Programs (June 2017).

This provides further reason to provide a check on *de facto* death behind bars prison terms imposed beyond "the rare juvenile offender whose crime reflects irreparable corruption." *Miller*, 567 U.S. at 479-80 (internal citations omitted). That is, in places like Missouri, racial bias may be driving extraordinarily harsh penalties for Black youth who are wholly capable of rehabilitation – but instead are being forever removed from society while children.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court grant the petition for a writ of certiorari.

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