No. 17-__

In the Supreme Court of the United States

BOBBY BOSTIC,

Petitioner,

–v–

RHODA PASH,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

RACHEL WAINER APTER
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 BROAD STREET
NEW YORK, NY 10004

DAVID COLE
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15TH STREET, NW
WASHINGTON, DC 20005

ANTHONY E. ROTHERT
COUNSEL OF RECORD
GILLIAN R. WILCOX
JESSIE STEFFAN
AMERICAN CIVIL LIBERTIES UNION OF MISSOURI FOUNDATION
906 OLIVE STREET
SUITE 1130
ST. LOUIS, MO 63101
(314) 669-3420
AROTHERT@ACLU-MO.ORG

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COUNSEL FOR PETITIONER

QUESTION PRESENTED

In *Graham v. Florida*, this Court held that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." 560 U.S. 48, 82 (2010). The question presented is whether States can bypass that rule by sentencing a juvenile offender who did not commit homicide to a term-of-years sentence under which he will die in prison, because he will not be eligible for parole until he is 112 years old.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Missouri Supreme Court's order summarily denying Petitioner Bobby Bostic's petition for writ of habeas corpus (Pet. App. 1a) is not published. The Missouri Court of Appeal's order (Pet. App. 3a) is not published. The Circuit Court's decision (Pet. App. 4a) is not published.

JURISDICTION

The judgment of the Missouri Supreme Court was entered on August 22, 2017. Justice Gorsuch granted an extension of the time in which to file a petition for certiorari to and including December 20, 2017. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

The trial judge in Petitioner Bobby Bostic's case sentenced him to die in prison for nonhomicide offenses he committed when he was 16 years old, telling him at sentencing, "you will die in the Department of Corrections." Pet. App. 41a.[1] Through two full rounds of habeas litigation in the state courts, not a single Missouri court has even issued an opinion explaining how that result can be squared with this Court's decision in *Graham v. Florida*, 560 U.S. 48 (2010).

On December 12, 1995, when Petitioner was 16 years old, he and an 18 year old male, Donald Hutson, robbed at gunpoint a group of six people delivering Christmas gifts to a needy family in St. Louis. Pet. App. 25a-37a. During the robbery, two people were shot at. One received a tetanus shot as treatment because the gunshot grazed his skin. Pet. App. 32a. The other testified that he was shot at but not injured at all. Pet. App. 36a-37a. Nobody else was injured.

After the robbery, Bostic and Hutson forced a seventh woman into her car and drove off. Pet. App. 21a-22a, 37a. After driving around with her in the car, they robbed her and then, at Bostic's insistence, let her go. Pet. App. 22a-25a, 37a. In the process of robbing the woman, Mr. Hutson, who was also the person demanding money from her, put his hands down her pants, in her bra, and in her boots to search for money. Pet. App. 22a-25a, 37a. The woman testified that she feared Hutson was going to rape her

[1] Portions of the transcript are included in the appendix. The full transcript is filed in *Bostic v. State of Missouri*, No. ED75939 (Mo. Ct. App.).

but that Bostic prevented Hutson from doing so. Pet. App. 25a. After letting the woman go, Bostic and Hutson threw their guns in the river and used the money to buy marijuana. Pet. App. 37a-38a. Bostic was pulled over by the police and ultimately charged with 18 counts arising out of these two incidents. Pet. App. 17a-18a.

The jury convicted Bostic of eight counts of armed criminal action, three counts of robbery, three counts of attempted robbery, two counts of assault, one count of kidnapping, and one count of possession of marijuana. Pet. App. 38a.

Circuit Judge Evelyn Baker sentenced Petitioner to 241 years in prison: 30 years on each robbery count, 15 years on each attempted robbery count, 15 years on each assault count, five years on six of the armed criminal action counts, 15 years on two of the armed criminal action counts, 15 years on the kidnapping count and one year on the possession of a controlled substance count, all to run consecutively. Pet. App. 41a-45a.

Before the sentencing hearing, Bostic sent several letters to the court apologizing for how he exited the courtroom at the trial, explaining why he did not cry even though he was in pain after hearing the verdict, expressing frustration over the trial and his treatment by the police and the prosecutor, telling the judge how he believed that he was intelligent and capable of helping his fellow human beings, and seeking leniency at sentencing.[2]

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[2] Petitioner's letters to the judge are contained in the supplemental legal file that is part of the record for *Bostic v. State of Missouri*, No. ED75939 (Mo. Ct. App.).

At sentencing, Circuit Judge Baker faulted Bostic for failing to take responsibility for his actions and failing to plead guilty, despite the overwhelming evidence against him. Pet. App. 38a-39a. She then intentionally sentenced him to die in prison:

> You are the biggest fool who has ever stood in front of this Court. You have expressed no remorse. You feel sorry for Bobby. Bobby doesn't want to do this time. Bobby doesn't want to do this. Bobby's feelings are hurt. Poor little Bobby….
>
> 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. Do you understand that? Your mandatory date to go in front of the parole board will be the year 2201. Nobody in this room is going to be alive in the year 2201.

Pet. App. 39a, 41a.

The Missouri Court of Appeals summarily affirmed Bostic's conviction. *See State v. Bostic*, 963 S.W.2d 720, 721 (Mo. Ct. App. 1998). After Petitioner's trial, Donald Hutson pleaded guilty to all counts of robbery, attempted robbery, assault and kidnapping. He will be eligible for parole next year.

The Missouri Board of Probation and Parole issued Petitioner a parole eligibility date of 2091. Pet App. 13a-14a. Petitioner will thus first become eligible for parole when he is 112 years old. According to data from the Centers for Disease Control and Prevention, life expectancy at birth for a black man born in 1979 is 64 years. U.S. Dep't of Health and Human Servs.,

Ctrs. for Disease Control and Prevention, Nat'l Ctr. for Health Statistics, *Table 15*, HEALTH UNITED STATES REPORT (2016), *available at* https://www.cdc.gov/nchs/data/hus/hus16.pdf#015.

In 2010, this Court held in *Graham v. Florida* that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." 560 U.S. 48, 82 (2010), as modified (July 6, 2010). While a State need not guarantee a juvenile nonhomicide offender's eventual release, it may not impose a sentence that "guarantees he will die in prison without any meaningful opportunity to obtain release." *Id.* at 79.

Petitioner filed a petition for a writ of habeas corpus in the Circuit Court of Texas County, Missouri, arguing that his sentence violated *Graham*. The court summarily denied the writ without prejudice, giving no reasoning for its decision. Pet. App. 12a. Petitioner then filed a petition for a writ of habeas corpus in the Missouri Court of Appeals, Pet. App. 11a, which denied the petition without an opinion, and in the Missouri Supreme Court, which also summarily denied the petition. Pet. App. 9a.

Petitioner then filed a second petition for writ of habeas corpus in the Circuit Court of Texas County, Missouri. The court again denied the petition, this time issuing a written decision. Pet. App. 4a. The decision explained that because the Missouri Supreme Court had previously summarily rejected Mr. Bostic's petition, his petition to the Circuit Court of Texas County was now barred by Missouri Supreme Court Rule 91.22.

Rule 91.22, entitled "Second Writ not to Issue

By Lower Court," states: "When a petition for a writ of habeas corpus has been denied by a higher court, a lower court shall not issue the writ unless the order in the higher court denying the writ is without prejudice to proceeding in a lower court." The rule does not bar the Missouri Supreme Court from granting a claim that it had previously denied. *See* Missouri Supreme Court Rule 91.22; *see also* Mo. Rev. Stat. § 532.040 ("Whenever an application under this chapter for a writ of habeas corpus shall be refused, it shall not be lawful for any inferior court or officer to entertain any application for the relief sought from, and refused by, a superior court or officer.").

The Missouri Court of Appeals, Pet. App. 3a, and the Missouri Supreme Court, Pet. App. 1a, nevertheless summarily denied Mr. Bostic's subsequent petitions. As a result, Bostic has never received *any* opinion from any court addressing the merits of his constitutional claim that sentencing him to die in prison for nonhomicide crimes he committed when he was 16 years old violates the Eighth Amendment.

Although the Missouri Supreme Court stated no reasoning in its order disposing of Petitioner's case, it recently held that a sentence of several hundred years for eight felony counts, under which a juvenile nonhomicide offender would not be eligible for parole until age 85, does not violate *Graham*. *See Willbanks v. Dep't of Corr.*, 522 S.W.3d 238, 239 (Mo.), *cert. denied*, 138 S. Ct. 304 (2017). The *Willbanks* majority reasoned that "*Graham* held that the Eighth Amendment barred sentencing a juvenile to a *single* sentence of life without parole for a nonhomicide offense. Because *Graham* did not address juveniles

who were convicted of *multiple* nonhomicide offenses and received multiple fixed-term sentences, as Willbanks had, *Graham* is not controlling." *Id.* at 239-40. According to the majority, a court "should not arbitrarily pick *the point* at which multiple aggregated sentences may become the functional equivalent of life without parole." *Id.* at 245.

Three judges dissented in *Willbanks*, concluding that Willbanks' sentence violated *Graham's* holding that "juveniles must have a 'meaningful opportunity for release' prior to death." *Id.* at 248 (Stith, J., dissenting). The dissent explained that *Graham's* "categorical approach requires this Court to recognize the characteristics that require treating juvenile nonhomicide offenders differently do not change depending on whether the sentence is denominated LWOP or is an aggregate sentence." *Id.* at 266 (Stith, J., dissenting).

REASONS FOR GRANTING THE PETITION

In this case, "based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law," Missouri has "guarantee[d]" that Petitioner "will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes." *Graham*, 560 U.S. at 79. The trial judge admitted to imposing a sentence designed to guarantee that Bostic would die in prison. And Mr. Bostic will not be eligible for parole until he is 112 years old. Yet the Missouri courts have summarily

rejected Mr. Bostic's claim that his sentence violates the Eighth Amendment under *Graham*.

Although in the minority, the Missouri Supreme Court is not the only court to ignore the limits this Court set forth in *Graham*. In fact, there is an entrenched split among the State Supreme Courts over whether *Graham* applies to term-of-years sentences that are equivalent to life without parole. This is a question of exceptional importance because in several States children who did not commit homicide are being condemned to die in prison, despite this Court's clear holding in *Graham*. Petitioner therefore respectfully requests that this Court either summarily reverse the erroneous decision of the Missouri Supreme Court or grant certiorari and set this case for plenary review.

I. AN AGGREGATE SENTENCE UNDER WHICH A JUVENILE NONHOMICIDE OFFENDER IS NOT ELIGIBLE FOR PAROLE UNTIL AGE 112 VIOLATES *GRAHAM.*

"[I]f a state collateral proceeding is open to a claim controlled by federal law, the state court 'has a duty to grant the relief that federal law requires.'" *Montgomery v. Louisiana*, 136 S. Ct. 718, 731 (2016) (quoting *Yates v. Aiken*, 484 U.S. 211, 218 (1988)); *see also Haywood v. Drown*, 556 U.S. 729, 736 (2009) ("[A]lthough States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies.").

Under Missouri law, state "[h]abeas corpus relief is the final judicial inquiry into the validity of a

criminal conviction." *State ex rel. Clemons v. Larkins*, 475 S.W.3d 60, 76 (Mo. 2015). "A prisoner is entitled to habeas corpus relief where he proves that he is 'restrained of his ... liberty in violation of the constitution or laws of the state or federal government.'" *State ex rel. Carr v. Wallace*, 527 S.W.3d 55, 59 (Mo. 2017), reh'g denied (Oct. 5, 2017). And Missouri has explicitly held that habeas relief is available for defendants serving sentences that violate the Eighth Amendment under *Graham* or *Miller v. Alabama*, 132 S.Ct. 2455 (2012). *See, e.g., Carr*, 527 S.W.3d at 59. Yet here, the Missouri courts have summarily refused to grant Mr. Bostic the relief that federal law requires.

As this Court reaffirmed this past summer, "*Graham* established that the Eighth Amendment prohibits juvenile offenders convicted of nonhomicide offenses from being sentenced to life without parole. While a 'State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime,' the Court held, it must 'give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" *Virginia v. LeBlanc,* 137 S. Ct. 1726, 1727 (2017) (per curiam) (quoting *Graham*, 560 U.S. at 75)).

In *Graham*, the Court articulated a "categorical rule" requiring that "all juvenile offenders" who do not commit homicide must have "a chance to demonstrate maturity and reform." 560 U.S. at 79. The Court explained that "[a]s compared to adults, juveniles have a 'lack of maturity and an underdeveloped sense of responsibility'; they are more vulnerable or susceptible to negative influences and outside

pressures, including peer pressure'; and their characters are 'not as well formed.'" *Id.* at 68 (quoting *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005)). Juveniles are also "more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." *Id.* (quoting *Roper*, 543 U.S. at 570). Moreover, "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." *Id.* at 69. Because juveniles have diminished moral culpability, the Court held that sentencing juveniles who do not commit a homicide crime to die in prison without a meaningful opportunity to obtain release cannot be justified by penological goals of retribution, deterrence, incapacitation, or rehabilitation. *Id*. at 71-74.

The Court concluded that "in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability," while "[a] State is not required to guarantee eventual freedom" to such an offender, it must give him or her "*some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation*." *Id.* at 73-75 (emphasis added). In other words, the Eighth Amendment prohibits a State from deciding "at the outset" that a juvenile offender who did not commit homicide "never will be fit to reenter society." *Id.* at 74; *see also id*. at 79 ("a categorical rule gives *all juvenile nonhomicide offenders a chance to demonstrate maturity and reform*. The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential." (emphasis added)).

In this case, Missouri did exactly what *Graham* forbids: It decided at the outset that Petitioner, who committed only nonhomicide offenses as a 16 year old, will *never* be fit to rejoin society, no matter how successfully he demonstrates maturity and reform as an adult. The sentencing judge specifically stated: "you're gonna die with your choice because, Bobby Bostic, you will die in the Department of Corrections. Do you understand that? Your mandatory date to go in front of the parole board will be the year 2201. Nobody in this room is going to be alive in the year 2201." Pet. App. 41a. Indeed, the Circuit Judge specifically used Mr. Bostic's immaturity—in particular his unwillingness to listen to adults urging him to take a plea deal and his inability to take responsibility for his actions—as a reason why he *should* die in prison. Pet. App. 39a-41a. That is precisely contrary to what this Court recognized in *Graham*: that juveniles' "'lack of maturity and … underdeveloped sense of responsibility'" make them *less deserving* of life in prison without the possibility of parole, not more. 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 569).

The Missouri Supreme Court did not dispute or engage with any of this—it summarily denied Mr. Bostic's petition without stating any reason for the denial. However, in *Willbanks* the Missouri Supreme Court held that sentencing a juvenile nonhomicide offender to die in prison is not unconstitutional as long as the juvenile is sentenced to consecutive fixed-term sentences on several different counts rather than one sentence denominated "life without parole" on one particular count. In the Missouri Supreme Court's opinion, "*Graham* held that the Eighth Amendment barred sentencing a juvenile to a *single* sentence of life

without parole for a nonhomicide offense. Because *Graham* did not address juveniles who were convicted of *multiple* nonhomicide offenses and received multiple fixed-term sentences, as Willbanks had, *Graham* is not controlling." 522 S.W. 3d at 239-40. The court therefore denied relief to Mr. Willbanks, who was sentenced to more than 100 years in prison on seven counts, with no eligibility for parole until age 85. *Id.* at 240.

Inexplicably, on the same day that it decided *Willbanks*, the Missouri Supreme Court granted state habeas relief to Jason Carr, who was convicted of three counts of capital murder for killing his brother, stepmother, and stepsister when he was 16 years old and sentenced to three concurrent terms of life in prison without the possibility of parole for 50 years. 527 S.W.3d at 56-57. Pursuant to his original mandatory sentence, Mr. Carr was eligible for parole in 2033, when he would be 65 years old. *Id.* at 58. Yet the Missouri Supreme Court found that that mandatory sentence *did constitute* "life without parole" and was therefore barred by *Miller v. Alabama*. *Id.* at 56-67. The court did not acknowledge or explain why life in prison without the possibility of parole until age 65 constituted "life without parole" under *Miller* or *Graham*, but consecutive sentences of more than 100 years without the possibility of parole until age 85 did not.

Adding Petitioner's case into the mix, under the Missouri Supreme Court's current interpretation of *Miller* and *Graham*, it is unconstitutional for a juvenile convicted of three counts of capital murder to face a mandatory sentence of life in prison without the possibility of parole until age 65, but it is

constitutional for a juvenile convicted of exclusively nonhomicide offenses to be sentenced to 241 years in prison without the possibility of parole until age 112.

What is more, the Missouri legislature recently enacted Missouri Revised Statute section 558.047, which makes juvenile offenders sentenced to life without parole eligible to apply for parole after serving 25 years of their sentence. *See Willbanks*, 522 S.W.3d at 243. The *Willbanks* court specifically held that the statute applies only to those formally sentenced to "life without parole"—not to juveniles sentenced to "multiple fix-term sentences." *Id*. So under current Missouri law, a juvenile convicted of homicide who is formally sentenced to life without parole is eligible for parole after serving 25 years of his sentence, but a juvenile who does not commit homicide can be sentenced to 241 years in prison with no parole eligibility until age 112.

That is shocking. It is also wrong under *Graham*.

The *Willbanks* court stressed that *Graham* did not address juveniles convicted of multiple nonhomicide crimes. But Graham *himself committed multiple nonhomicide crimes*: armed burglary and attempted armed robbery when he was 16 years old, and then, while on probation and 34 days shy of his 18th birthday, a home invasion robbery, possession of a firearm, and fleeing the police to avoid arrest. 560 U.S. at 53-55. After finding that Graham violated his probation, the trial court found him guilty of the original armed burglary and attempted armed robbery he had committed at age 16 and sentenced him to life for the armed burglary and 15 years for the

attempted armed robbery. *Id.* at 54-55, 57.[3] The Court did not suggest that its constitutional holding would have been different had the trial court sentenced Graham to two consecutive sentences of 45 years on the armed burglary count and 45 years on the attempted armed robbery count, with no possibility of release until age 107. And it did not suggest that the result would have changed had the trial court sentenced Graham to 20 years each on counts for armed burglary, armed robbery, home invasion robbery, possession of a firearm, and fleeing the police to avoid arrest, to be served consecutively with no possibility of release until age 117.

Instead, the Court in *Graham* repeatedly referenced Terrance Graham's multiple "bad acts," "crimes," and "mistakes"—plural. *See, e.g.*, 560 U.S. at 79 ("Terrance Graham's sentence guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the *bad acts* he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his *crimes* and learn from his *mistakes*." (emphasis added)).

The constitutional flaw in Graham's sentence was not that it was formally denominated "life in prison without parole," or that it was imposed for a single act of wrongdoing, but that it "denied him any chance to later demonstrate that he is fit to rejoin society." *Id*. That flaw is precisely the same where, as

[3] Graham was not sentenced to "life without parole." However, because Florida had abolished its parole system, as a practical matter there was no possibility of parole. *Id.* at 57.

here, a juvenile has been sentenced on multiple counts arising out of a single day's acts to a term of years intentionally designed to guarantee that he will die in prison. To suggest otherwise would allow states to evade *Graham*'s central premise—that juvenile nonhomicide offenders must be afforded a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," *id.* at 75—whenever a juvenile's actions support more than one criminal count.

But States should not be able to "circumvent the strictures of the Constitution merely by altering the way they structure their charges or sentences." *Budder v. Addison*, 851 F.3d 1047, 1058 (10th Cir. 2017), *cert. denied sub nom. Byrd v. Budder*, No. 17-405, 2017 WL 4155601 (U.S. Nov. 27, 2017). As this case illustrates, prosecutors have substantial discretion in how they charge particular criminal incidents. Here, two incidents in a single day led to eighteen separate counts for robbery, attempted robbery, armed criminal action, kidnapping, assault and possession of a controlled substance. And under Missouri's Armed Criminal Action statute, which provides for a minimum sentence but no maximum sentence, *see* Mo. Rev. Stat. § 571.015, defendants have been sentenced to 100 years on a single count. *See, e.g.*, *State v. Stoer*, 862 S.W.2d 348, 350 (Mo. Ct. App. 1993).

Just as states "may not sentence juvenile nonhomicide offenders to 100 years instead of 'life,' [to escape *Graham*,] they may not take a single offense and slice it into multiple sub offenses in order to avoid *Graham's* rule that juvenile offenders who do not commit homicide may not be sentenced to life without

the possibility of parole." *Budder*, 851 F.3d at 1058. Because the vast majority of criminal actions can be charged under multiple counts, any other rule means *Graham* would impose only a meaningless formal constraint, but no actual constraint, on judges seeking to sentence juvenile nonhomicide offenders to die in prison, as the trial judge admitted she was doing here. "Determining constitutional claims on the basis of [] formal distinctions, which can be manipulated largely at the will of the government," is something this Court has "consistently eschewed." *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 679 (1996).

And this Court has already recognized the equivalence of a sentence of life without parole and consecutive term-of-year sentences that guarantee a person will die in prison. In *Sumner v. Shuman*, this Court considered a challenge to a Nevada statute that mandated the death penalty for a prison inmate who committed murder while serving a life without parole sentence, but not for a prison inmate who committed murder while serving consecutive term-of-years sentences that together exceeded his life expectancy. *Sumner v. Shuman*, 483 U.S. 66, 67 (1987). The State argued that the mandatory death penalty was "necessary as a deterrent" for life without parole inmates. *Id.* at 69. The Court disagreed, holding that because there was "no basis for distinguishing, for purposes of deterrence, between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy," the mandatory death penalty for only life without parole inmates was not necessary. *Id.* at 83.

Because Petitioner's sentence guarantees that

"he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes," it violates *Graham*. 560 U.S. at 79. Missouri should not, by manipulating sentence structures and charges, be permitted to avoid this Court's clear limitation on sending juvenile nonhomicide offenders to die in prison. The Missouri Supreme Court's decision should be summarily reversed and remanded for resentencing in light of *Graham*.

II. DESPITE *GRAHAM*, THERE IS AN ENTRENCHED SPLIT OVER WHETHER A TERM-OF-YEARS SENTENCE UNDER WHICH A JUVENILE NONHOMICIDE OFFENDER IS NOT ELIGIBLE FOR PAROLE DURING HIS NATURAL LIFETIME VIOLATES THE EIGHTH AMENDMENT.

If this Court believes that summary reversal is not appropriate, it should grant plenary review because there is an acknowledged and entrenched split among the lower courts over whether *Graham's* holding applies only when a State uses the magic words "life without parole," or whether it applies whenever a State sentences a juvenile nonhomicide offender to die in prison without any chance to demonstrate maturity and reform for purposes of obtaining release on parole.[4]

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[4] As other recent petitions for certiorari have pointed out, *see, e.g.,* Pet. in *Willbanks v. Missouri Dep't of Corr.*, No. 17-165, *cert*

Five state high courts have held that *Graham* applies to juvenile nonhomicide offenders sentenced to prison for terms that exceed their life expectancy. For example, in *State v. Moore*, 76 N.E. 3d 1127 (Ohio), *cert. denied*, 138 S. Ct. 62 (2017), a 15 year old defendant robbed two people at gunpoint and then kidnapped and brutally raped a woman. *Id.* at 1128-1130. He was convicted of three counts of aggravated robbery, three counts of rape, three counts of complicity to commit rape, one count of kidnapping, one count of conspiracy to commit aggravated robbery, and one count of aggravated menacing, and sentenced to 112 years in prison, under which he would become eligible for parole at age 92. *Id.* at 1130-1131. The State argued that *Graham* applied only to juveniles formally sentenced to "life imprisonment without parole." *Id.* at 1137. The Ohio Supreme Court disagreed, holding that *Graham* applies "equally to a juvenile nonhomicide offender sentenced to prison for a term of years that extends beyond the offender's life expectancy." *Id.* at 1137-1138.

Four other State Supreme Courts hold the same. *See State v. Boston*, 363 P.3d 453, 457 (Nev. 2015), as modified (Jan. 6, 2016) (aggregate sentence under which defendant would have to serve "approximately 100 years in prison before he is eligible for parole" for 13 nonhomicide offenses violated "the *Graham* rule"); *Henry v. State,* 175 So. 3d 675, 676 (Fla. 2015), *cert. denied*, 136 S. Ct. 1455 (2016) (sentence of 90 years without the possibility of

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denied, 138 S. Ct. 304 (2017), there is also a related split about whether *Miller v. Alabama* applies to aggregate term-of-years sentences imposed on juveniles who do commit homicide offenses. We do not discuss those cases here.

parole for nine nonhomicide offenses was "unconstitutional under *Graham*"); *People v. Caballero*, 282 P.3d 291, 293 (Cal. 2012) (aggregate sentence under which juvenile would not become eligible for parole for more than 100 years for three nonhomicide crimes violates *Graham*); *Cf. State v. Zuber*, 152 A.3d 197, 203 (N.J.), *cert. denied*, 138 S. Ct. 152 (2017) (total sentence of 110 years, under which defendant would be eligible for parole at age 72, for 10 nonhomicide offenses, was unconstitutional under *Graham*).

On the other side of the split, three state high courts (plus Missouri) have explicitly held that *Graham* "appl[ies] only where a juvenile is sentenced to the *specific sentence* of life without the possibility of parole for *one offense*." *Lucero v. People*, 394 P.3d 1128, 1132 (Col. 2017), *petition for writ of certiorari pending* No. 17-5677 (emphasis added). According to these courts, for purposes of *Graham* "[m]ultiple sentences imposed for multiple offenses do not become a sentence of life without parole, even though they may result in a lengthy term of incarceration. Life without parole is a specific sentence, imposed as punishment for a single crime, which remains distinct from aggregate term-of-years sentences resulting from multiple convictions." *Id.*; *see also State v. Brown*, 118 So. 3d 332, 335 (La. 2013) ("The disputed issue in this case involves neither a life sentence, nor one non-homicide offense.… nothing in *Graham* addresses a defendant convicted of multiple offenses and given term of year sentences, that, if tacked on to the life sentence parole eligibility date, equate to a possible release date when the defendant reaches the age of 86"); *Vasquez v. Com.*, 291 Va. 232, 246 (2016) ("*Graham* does not apply to aggregate term-of-years

sentences involving multiple crimes, and we should not declare that it does.").

Although the state courts in this category have framed broad holdings, their sentencing and parole provisions each, in various ways, allowed for potential release for the prisoners affected. *Lucero* involved three Colorado prisoners. Under the challenged sentences, Defendant Lucero was eligible for parole at age 56, Defendant Armstrong at age 57, and Defendant Rainer at age 69. 394 P.3d at 1129; Respondent's Brief in Opposition at 1-2, *Lucero, Rainer & Armstrong v. Colorado*, Nos. 17-5677, 17-674, 17-5700 (Nov. 20, 2017) (Lucero Opp.). In addition, with Colorado's "earned time credits," the defendants could become eligible for parole at ages 49, 53 and 60, respectively. Lucero Opp. at 1, 10-13. And under a Colorado statute passed last year, juvenile offenders can apply for parole after serving twenty years of their sentence and completing a special three-year program. Colo. Rev. Stat. §§ 17-34-101, 17-34-102(7); 17-22.5-403(4.5); *see* also Lucero Opp. at 14. Defendants were therefore not guaranteed they would die in prison.[5]

Similarly, in *Vasquez v. Commonwealth*, defendants were eligible for geriatric release at age sixty. 291 Va. 232, 252 (2016), *cert. denied*, 137 S. Ct. 568 (2016); *see also Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017) (discussing Virginia's geriatric release program). And in *State v. Brown*, 118 So. 3d 332, 335

[5] In addition, all three defendants in *Lucero* were convicted of murder, conspiracy to commit murder, or attempted murder. The State thus argued they did not fall within the class of "nonhomicide" offenders addressed in *Graham*. Lucero Opp. at 2.

(La. 2013), defendant was eligible for parole at age 86, which, unlike 112, perhaps did not guarantee that he would die in prison.

With respect to state cases reviewed by federal courts under the Antiterrorism and Effective Death Penalty Act of 1997, 28 U.S.C.A. § 2254(d)(1), there is also a related split as to whether *Graham* constitutes clearly established law controlling this issue. Two circuits have held that *Graham* clearly establishes that aggregate sentences for juvenile non-homicide offenses that require the juvenile to die in prison violate the Eighth Amendment. In *Budder v. Addison*, the Tenth Circuit concluded that three consecutive sentences of life with the possibility of parole for four nonhomicide crimes, under which defendant would be eligible for parole after 131.75 years, violated clearly established federal law under *Graham*. 851 F.3d at 1050. The court explained that *Graham's* holding "applies[] not just to the factual circumstances of Graham's case, but to all juvenile offenders who did not commit homicide, and it prohibits, not just the exact sentence Graham received, but all sentences that would deny such offenders a realistic opportunity to obtain release." *Id.* at 1053.

And in *Moore v. Biter*, the Ninth Circuit held that a 254-year sentence for 24 nonhomicide offenses, under which defendant would be eligible for parole at age 144, violated clearly established federal law under *Graham*. 725 F.3d 1184, 1187-93 (9th Cir. 2013). The Ninth Circuit explained that *Graham* "chose a categorical approach, i.e., a flat-out rule that 'gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform.'" *Id.* at 1193 (quoting *Graham*, 560 U.S. at 79). Under that

approach, a "term-of-years sentence for multiple crimes" was "materially indistinguishable from a life sentence without parole" because it guaranteed that the defendant would "not be eligible for parole within his lifetime." *Id.* at 1191.

By contrast, the Sixth Circuit held that the Ohio Court of Appeals did not unreasonably apply clearly established federal law in *State v. Bunch*, 2007-Ohio-7211, ¶ 1, No. 06 MA 106, 2007 WL 4696832, at *5-*6 (Ohio Ct. App. Dec. 21, 2007), because *Graham* "did not clearly establish that consecutive, fixed-term sentences for juveniles who commit multiple nonhomicide offenses are unconstitutional when they amount to the practical equivalent of life without parole." *Bunch v. Smith*, 685 F.3d 546, 550 (6th Cir. 2012). But the Ohio Supreme Court has since overruled *State v. Bunch*, holding that *Graham* applies to "a juvenile nonhomicide offender sentenced to prison for a term of years that extends beyond the offender's life expectancy." *Moore*, 76 N.E.3d at 1137-38.

This conflict, which has existed since 2013, will not resolve itself without this Court's intervention. Missouri just joined the wrong side of the split in July, and the other States that have held juvenile offenders who do not commit homicide can be sentenced to die in prison despite *Graham* have shown no willingness to reconsider. The conflict means that had Petitioner committed his crimes in a multitude of other states, he would not face a certainty of dying in prison. Petitioner's sentence would be unconstitutional in Ohio, Florida, New Jersey, Washington, Oregon, Idaho, Montana, Nevada, Arizona, California, Guam, Alaska, Hawaii, Wyoming, Utah, Colorado, New

Mexico, Kansas, or Oklahoma, to name a few. But in Missouri, it is constitutional to commit a juvenile offender to die in prison so long as it is for more than one criminal count.

Particularly given the dire consequences, in which children can be sentenced, as here, to die in prison for nonhomicide offenses without any opportunity to demonstrate rehabilitation, this is an issue of exceptional importance that warrants this Court's immediate intervention. Indeed, even the Missouri Supreme Court appears to be seeking guidance from this Court, expressing the view that, "absent guidance from the Supreme Court, [it] should not arbitrarily pick *the point* at which multiple aggregated sentences may become the functional equivalent of life without parole." *Willbanks*, 522 S.W.3d at 245.

This case is well suited to resolve the conflict. There is no question that the sentencing judge intended to deprive Petitioner of any opportunity for parole. Likewise, unlike other cases in which certiorari has been denied, there is no doubt that Petitioner will in fact die in prison as the judge intended; she openly admitted as much, and Petitioner will first be eligible for parole when he is 112 years old. Therefore, if this Court believes that summary reversal is not appropriate, it should grant plenary review and set this case for oral argument.

CONCLUSION

For the foregoing reasons, the Missouri Supreme Court's decision should be summarily reversed and this case be remanded for resentencing in light of *Graham*, or the Court should grant plenary review and set this case for oral argument.

Respectfully submitted,

Anthony E. Rothert
Counsel of Record
Gillian R. Wilcox
Jessie Steffan
AMERICAN CIVIL LIBERTIES UNION OF MISSOURI FOUNDATION
906 Olive Street
Suite 1130
St. Louis, MO 63101
(314) 669-3420
arothert@aclu-mo.org

Rachel Wainer Apter
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

David Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, D.C. 20005