

No. 17-912

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IN THE  
**Supreme Court of the United States**

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BOBBY BOSTIC,

*Petitioner,*

*v.*

RONDA PASH, WARDEN,

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO  
THE SUPREME COURT OF MISSOURI

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**BRIEF OF *AMICUS CURIAE* THE  
FAIR PUNISHMENT PROJECT IN  
SUPPORT OF PETITIONER**

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## IDENTITY AND INTEREST OF AMICUS<sup>1</sup>

The Fair Punishment Project (“FPP”) is a joint project of the Charles Hamilton Houston Institute for Race and Justice and the Criminal Justice Institute, both at Harvard Law School. The mission of FPP is to address ways in which our laws and criminal justice system contribute to the imposition of excessive punishment. FPP believes that punishment can be carried out in a way that holds offenders accountable and keeps communities safe, while still affirming the inherent dignity that all people possess.

## SUMMARY OF THE ARGUMENT

Petitioner has asked this Court to determine whether the decision in *Graham v. Florida*, 560 U.S. 48 (2010), which prohibits the imposition of life-without-parole sentences on juveniles who commit nonhomicide offenses, applies with equal force to a child subject to an aggregate term of years, imposed consecutively for multiple offenses, that will render Petitioner ineligible for parole until he is 112 years old. The larger question suggested by this case and others like it,<sup>2</sup> however, is: To what extent does the Court’s

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1. Pursuant to Supreme Court Rule 37.6, counsel for Amicus represents that none of the counsel for any party, nor any person or entity other than Amicus and its counsel, authored any part of this brief nor made any monetary contribution intended to fund the preparation or submission of this brief. This brief was paid for entirely by the amicus and/or its attorneys. In accordance with Rule 37.2, timely notice was provided to counsel for petitioners and respondent, and both have consented in writing to the filing of this brief.

2. Amicus previously filed a brief supporting the petitioners in two cases raising the same issue, No. 17-165, *Willbanks v. Missouri Department of Corrections* and *Nathan v. Missouri*.

juvenile jurisprudence impact how juveniles, as a whole, may be treated in the criminal justice system? Does the Eighth Amendment require that incarcerative sentences, when imposed upon children, have a rehabilitative focus? For the reasons set forth in this brief, Amicus contends that it does.

“Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment,” *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016). “A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.” *Graham*, 560 U.S. at 71. This Court’s jurisprudence recognizes that, once a child has been rehabilitated and is fit to reenter society, his continued confinement lacks penological justification and is therefore unconstitutional. This principle applies with equal force to all juveniles sentenced in the criminal justice system, whether convicted of a single nonhomicide offense or multiple nonhomicide offenses, sentenced to life-without-parole or a lengthy term of years.

## ARGUMENT

Petitioner presents the question whether the United States Constitution forbids condemning a juvenile with rehabilitative potential to a lifetime of incarceration, simply because he was convicted of multiple nonhomicide crimes while a child, rather than one, or because he was sentenced, not to life-without-parole, but instead to an equivalent term of years – in this case, an aggregate term of 241 years. The Court should grant certiorari and hold that the Constitution’s requirement that all juvenile incarceration serve a primarily *rehabilitative* purpose commands an affirmative answer to that question.



**I. *Graham*'s protections apply with equal force to children who are convicted of multiple nonhomicide offenses**

In *Graham*, this Court prohibited the imposition of life-without-parole sentences on juveniles who commit nonhomicide offenses. The Court held, “when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability” that could not justify the imposition of such a severe incarcerative sanction. *Graham*, 560 U.S. at 69.

The animating principle behind this decision, as with the Court’s juvenile sentencing jurisprudence as a whole, is that, unlike adults, juveniles possess a “lack of maturity and an underdeveloped sense of responsibility,” tend to be “more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,” and are “more capable of change.” *Id.* at 68. Social science proves, and the Court recognized, that for almost all children, what presents as incorrigibility is actually a transitory state. *Id.* at 68-69; *Miller v. Alabama*, 567 U.S. 460, 472 (2012). Once the juvenile’s brain fully develops, he is likely to emerge as a less impulsive, more responsible, more stable person. *Miller*, 567 U.S. at 472.

*Graham* also recognized the substantial distinction between juvenile homicide offenders and those who do not kill or intend to kill. 560 U.S. at 69. This Court

drew a “moral” distinction between homicide and nonhomicide crimes—a difference in kind. According to the Court, “[t]here is a line ‘between homicide and other serious violent

offenses against the individual.’ Serious nonhomicide crimes ‘may be devastating in their harm ... but ‘in terms of moral depravity and of the injury to the person and to the public,’ ... they cannot be compared to murder in their ‘severity and irrevocability.’” “Although an offense like robbery or rape is ‘a serious crime deserving serious punishment,’ those crimes differ from homicide crimes in a moral sense.”

*Budder v. Addison*, 851 F.3d 1047, 1057 (10th Cir. 2017) (internal citations omitted).

In light of *Graham*’s rationale, there is no coherent limiting principle that could cabin the scope of *Graham* to only “life-without-parole” sentences, imposed for a single nonhomicide offense. Rather, *Graham* must apply equally to any term-of-years sentence that denies a juvenile nonhomicide offender the “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Graham*, 560 U.S. at 75. The commission of multiple nonhomicide offenses as a juvenile in no way forecloses the possibility that the individual will develop into a responsible and law-abiding citizen over time. Therefore, he may not be exempted from *Graham*’s protections.

Exempting long terms of years from the reach of *Graham* reduces its protections to form over substance, a practice that this Court’s precedent has soundly disapproved in a number of contexts. *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.”). Affording constitutional protection to a juvenile sentenced to life-without-parole, but not one sentenced to over two hundred years without parole, is a classic example of the kind of arbitrary formal distinction courts routinely scorn. *See also State v. Moore*, 76 N.E.2d 1127, 1141–43 (Ohio 2016) (defendant’s aggregate term-of-years sentence for multiple nonhomicide offenses committed on the same night, which exceeded his life expectancy, violated *Graham*).

The holding of *Graham*, which turns on the reduced culpability of juveniles, their greater capacity for change, and the moral distinction between homicide and nonhomicide offenses, should apply to *all* juveniles whose sentences foreclose a meaningful opportunity for release, even those who commit multiple nonhomicide offenses as children. *See Graham*, 560 U.S. at 68-69. The same impulsivity and underdeveloped judgment that lead a juvenile to commit one offense can lead the same child to commit multiple offenses. In fact, these unique characteristics of juveniles make it substantially *more* likely that they may commit several crimes before they are mature enough to respond to the incentives and rehabilitative opportunities offered by the criminal justice system. *See, e.g., id.* at 72 (“[T]he same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence.” (quoting *Roper v. Simmons*, 543 U.S. 551, 571 (2005))).

Here, Petitioner committed two separate armed robberies on the same day when he was sixteen years old. No matter whether a juvenile is sentenced for a single offense or multiple offenses, “imposition of a State’s most

severe penalties on juvenile offenders cannot proceed as though they were not children.” *Miller*, 567 U.S. at 474. Indeed, *Graham* itself involved a juvenile who committed multiple serious, violent felonies. Terrance Graham was first convicted of armed burglary with an assault and battery and attempted armed robbery in one criminal episode. *Id.* at 53. Six months after his release, and while still on probation, he committed a separate, unrelated, armed home invasion robbery, and it was only after his commission of the second serious, violent offense that a judge imposed a life sentence for the first, citing “an escalating pattern of criminal conduct.” *Id.* at 57. Nevertheless, the Court found that Mr. Graham must be given a meaningful opportunity for release.

Not only are their offenses likely to reflect their immaturity, children must be afforded rehabilitative opportunities because they are “more capable of change” than are adults. *Id.* at 68. Children who commit multiple nonhomicide offenses undergo the same brain development and emotional maturation as juveniles who commit a single offense. After a period of years, a child who committed multiple offenses, even multiple serious violent offenses, may emerge as a profoundly different person. A court cannot disregard these known scientific facts about juvenile development, as well as the juvenile’s biological, psychological, and social history, and simply stack lengthy terms of years sentences in order to deprive the child of any meaningful “chance to later demonstrate that he is fit to rejoin society.” *Id.* at 79. Neither can Petitioner’s aggregate sentence, which guarantees he will never be released from prison, “even if he spends the next half century attempting to atone for his crimes and learn from his mistakes,” *id.*, be exempted from *Graham* simply

because it is composed of multiple individual sentences which, in isolation, may not offend the Constitution.

This Court has not squarely addressed whether, in the context of adult sentencing, an Eighth Amendment proportionality analysis should focus on an offender's aggregate prison term or rather the sentence imposed for each individual offense, regardless of whether those terms are imposed concurrently or consecutively. *See State v. Buchhold*, 727 N.W.2d 816, 823–24 (S.D. 2007) (noting that the U.S. Supreme Court has not determinatively resolved this question).<sup>3</sup> However, even if it were appropriate in the adult context to examine each individual sentence in isolation, “sentencing practices that are permissible for adults may not be so for children.” *Miller*, 567 U.S. at 481. Lower courts have recognized this constitutional distinction and exempted juveniles from precedent holding that aggregate sentences are immune from proportionality review. *Compare State v. Hairston*, 888 N.E.2d 1073,

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3. Several lower courts, when holding that Eighth Amendment proportionality analysis does not apply to aggregate sentences, have incorrectly noted that this Court “explained” or “indicated” in an 1892 decision, *O’Neil v. Vermont*, 144 U.S. 323, 331 (1892), that “each sentence should be considered separately for purposes of proportionality reviews.” *Close v. People*, 48 P.3d 528, 538 (Colo. 2002); *see also United States v. Aiello*, 864 F.2d 257, 265 (2d Cir. 1988). These courts completely misread *O’Neil*. In reciting the procedural history of the case, the *O’Neil* Court quoted the Eighth Amendment holding of the Vermont Supreme Court, which determined that the proportionality of each sentence should be considered separately. *O’Neil*, 144 U.S. at 331. However, the Court then noted that it would decline to address the Eighth Amendment issue because it was not actually raised by the parties, *id.*, and because, at that time, “the eighth amendment to the constitution of the United States d[id] not apply to the states,” *id.* at 332.

1078 (Ohio 2008) (“[W]e conclude that for purposes of the Eighth Amendment and Section 9, Article I of the Ohio Constitution, proportionality review should focus on individual sentences rather than on the cumulative impact of multiple sentences imposed consecutively.”) *with Moore*, 76 N.E.3d at 1143 (juvenile’s 112-year aggregate sentence, imposed for twelve different nonhomicide offenses, was unconstitutional under *Graham*); *compare Hawkins v. Hargett*, 200 F.3d 1279, 1285 n.5 (10th Cir. 1999) (“The Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence for multiple crimes.”) *with Budder*, 851 F.3d at 1058 (juvenile defendant’s aggregate sentence for four nonhomicide offenses, when those sentences were imposed consecutively, violated *Graham*). Because this Court’s Eighth Amendment jurisprudence recognizes that juveniles are categorically different from adults, the Court should grant the petition and hold that, at least as to juveniles, proportionality analysis applies to an aggregate term of consecutive sentences.

**II. A juvenile’s prison sentence is only proportionate if he is released once he has been successfully rehabilitated and is fit to reenter society**

Beyond the question whether *Graham* reaches multiple aggregate sentences that produce a *de facto* life sentence, this case presents the larger constitutional concern whether a juvenile’s sentence, regardless of the specific length, must have a rehabilitative purpose, and may only persist as long as continued reform is necessary. Because continued incarceration “[a]fter the juvenile’s transient impetuosity ebbs and the juvenile matures and reforms . . . becomes ‘nothing more than the purposeless

and needless imposition of pain and suffering,” *State v. Roby*, 897 N.W.2d 127, 142 (Iowa 2017) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)), the Eighth Amendment requires that, once maturation and rehabilitation have occurred, juvenile offenders must be released.

**A. The Eighth Amendment requires that a legitimate penological justification supports the incarceration of children**

“Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment,” *Montgomery*, 136 S. Ct. at 732. Because “[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense,” *Graham*, 560 U.S. at 71, this Court has taken care to require that states ensure that a penological goal is served by the continued incarceration of children. *See id.* Furthermore, “[e]ven if the punishment has some connection to a valid penological goal, it must [also] be shown that the punishment is not grossly disproportionate in light of the justification offered.” *Id.* at 72.

**B. Once successful rehabilitation has occurred, the incarceration of a juvenile serves no legitimate penological function**

This Court has recognized four legitimate goals of penal sanctions: “retribution, deterrence, incapacitation, and rehabilitation.” *Id.* at 71. The “distinctive attributes of youth,” including immaturity and impetuosity, vulnerability to “negative influences and outside pressures,” and a greater capacity for change and rehabilitation, *Roper*, 543 U.S. at 569-570, weaken each of the penological objectives

that severe penalties ordinarily serve. *See Miller*, 567 U.S. at 473-74. A juvenile's uniquely reduced culpability and ability to change require that a child's punishment must be targeted specifically toward a *rehabilitative* goal. *See Graham*, 560 U.S. at 68-74. Thus, once a juvenile has been rehabilitated and is fit to rejoin society, any penological purpose of additional punishment disappears.

### 1. Retribution

While “[s]ociety is entitled to impose severe sanctions on a juvenile . . . offender to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense[,] . . . ‘[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.’” *Graham*, 560 U.S. at 71 (quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987)). An offender's culpability is not exclusively determined by the facts of his offense, but rather is a function of both his “crimes and characteristics.” *Id.* at 67; accord *Roper*, 543 U.S. at 568; see also *Atkins v. Virginia*, 536 U.S. 304, 319 (2002). Juvenile offenders' biological predisposition to immature and irresponsible behavior, their susceptibility to peer-influence, and their inability to control their own environments, render their criminal offenses, even when shocking or heinous, less morally reprehensible than those committed by adults. *See Roper*, 543 U.S. at 571.

The goal of retribution is served only if the punishment imposed is warranted by the offender's true level of depravity. *See Miller*, 567 U.S. at 472. Because a juvenile's offense does not necessarily reflect his true and permanent character, respect for his potential to reform



is the touchstone of a proportionate and constitutional juvenile sentence. *See Graham*, 560 U.S. at 72.

This is especially true for juveniles who do not kill or intend to kill—as “compared to an adult murderer,” they have a “twice diminished moral culpability” that does not justify the most severe forms of retribution. *Id.* at 69.

## 2. Deterrence

Similarly, juveniles’ “lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions,” making them less likely to fully appreciate and respond to risks when making decisions. *Id.* at 72 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). As a result, the deterrent effect of severe punishments upon juveniles is sharply reduced. *Id.* This effect is directly related to the immature brain of a teenager – his diminished capacity for risk assessment, impulse control, and emotional regulation necessarily render him less responsive to long term incentives that may successfully deter an adult. *Id.*

In addition, even with adult offenders, the deterrent effect of continued incarceration dramatically decreases with sentence length. Numerous studies have found that “the marginal deterrent effect of increasing already lengthy prison sentences is modest at best.” Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and crime: Can both be reduced?*, 10 CRIMINOLOGY & PUBLIC POLICY 13, 14, 27–31 (2011) (collecting studies). Studies specifically examining the impact of increased sentence length on juveniles demonstrate that it is virtually nonexistent. *Id.* at 30. Therefore, once a juvenile is required to serve fifteen,

twenty or twenty- five years in prison, any additional punishment he faces is unlikely to impact his choices or conduct. *See id.*

### 3. Incapacitation

Although “[r]ecidivism is a serious risk to public safety,” recidivism prevention only justifies continued incarceration for as long as an inmate poses a substantial risk to reoffend. *See Graham*, 560 U.S. at 72–73. “[O]rdinary adolescent development diminishes the likelihood that a juvenile offender forever will be a danger to society.” *Montgomery*, 136 S. Ct. at 733 (internal quotation marks and citation omitted). The vast majority of teenagers cease engaging in risky and illegal behavior as they mature. *See Roper*, 543 U.S. at 570 (citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)). Where a juvenile offender has been found fit to reenter society, incapacitation cannot justify his continued incarceration. *See Graham*, 560 U.S. at 73.

### 4. Rehabilitation

Finally, and most fundamentally, to promote the rehabilitative ideal, a sentence must offer a juvenile offender a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Id.* at 75. This Court has repeatedly stressed the critical importance of rehabilitation in juvenile sentencing, holding that a “juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of

human worth and potential.” *Id.* at 79. Rehabilitation as a penological justification is meaningless, however, unless it is directly linked to a child’s right to reenter his community. *See id.* at 74 (life-without-parole “forswears altogether the rehabilitative ideal”). Once a child is successfully rehabilitated to the point where he no longer poses a danger to society, there is no legitimate interest in his continued imprisonment. *See id.* at 73.

As the foregoing discussion reveals, each of the four penological justifications hinges on the nature of a child’s true character and whether he demonstrates the capacity for change. Because an accurate assessment of a child’s culpability, potential threat to public safety, and ability to rehabilitate all turn on whether or not a juvenile offender is redeemable, the answer to that question dictates whether any penological purpose is served by the child’s continued incarceration. This Court’s juvenile jurisprudence has thus clarified that, under the Eighth Amendment, any child who is sentenced to a lengthy term of incarceration, regardless of the type or number of offenses he committed, must be given the opportunity to demonstrate rehabilitation, and, if successful, must be released from custody. *Id.* at 75.

### III. Conclusion

For the reasons set forth above, Amicus respectfully urges the Court to grant the petition for certiorari and conclude that *Graham* applies with equal force to lengthy term-of-years sentences, imposed for multiple offenses.

Respectfully submitted,

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