No. 16-3820

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

COREY GRANT,

Defendant-Appellant.

Appeal from the United States District Court for the District of New Jersey,
No. 2-90-cr-00328-JLL

On rehearing *En Banc* from the Decision in
United States v. Grant, 887 F.3d 131 (3d Cir. 2018)

BRIEF OF *AMICUS CURIAE* JUVENILE SENTENCING PROJECT IN SUPPORT OF APPELLANT COREY GRANT

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INTEREST OF *AMICUS CURIAE*

The Juvenile Sentencing Project, a project of the Legal Clinic at Quinnipiac University School of Law, focuses on issues relating to long prison sentences imposed on children. In particular, it researches and analyzes responses by courts and legislatures nationwide to the U.S. Supreme Court's decisions in *Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v Alabama*, 136 S. Ct. 718 (2016), and produces reports and memoranda for use by policymakers, courts, scholars, and advocates. The Juvenile Sentencing Project is particularly interested in the "meaningful opportunity to obtain release" standard applicable to juvenile offenders. Because of its dedication to pursuing research in this area of the law, the Juvenile Sentencing Project has an interest in assisting courts to develop an accurate understanding of the legal issues surrounding the standard.

ARGUMENT

In *Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the U.S. Supreme Court placed constitutional limits on sentences that may be imposed on children. *Graham* held that children convicted of nonhomicide offenses cannot be sentenced to life without parole, and must have a "realistic" and "meaningful opportunity to obtain release based on demonstrated maturity and

rehabilitation." *Graham*, 560 U.S. at 75, 82. *Miller* and *Montgomery* establish that children must have this meaningful opportunity for release even in homicide cases—except in the rarest of instances where the child is found to "exhibit[] such irretrievable depravity that rehabilitation is impossible." *Montgomery*, 136 S. Ct. at 733. A sentence that fails to provide an opportunity for release at a meaningful point in a juvenile's life triggers Eighth Amendment protections—regardless of whether it is labeled life without parole, life with parole, or a term of years.

Although the Supreme Court did not articulate the precise point in time at which this window for a "meaningful opportunity" closes, it held that a juvenile offender who is not incorrigible must receive a "chance for *fulfillment* outside prison walls" and a "chance for *reconciliation* with society." *Graham*, 560 U.S. at 79 (emphases added). State legislatures endeavoring to uphold the Eighth Amendment's mandate provide further guidance. Mr. Grant, who has been expressly deemed "not incorrigible," is now serving a 65-year sentence. Yet most legislatures that have eliminated life without parole for juveniles after *Miller* have now set the threshold for a permissible sentence for *any* juvenile offender at half that, or less. Their consensus is that the requisite meaningful opportunity must occur after a juvenile spends no more than two or three decades in prison—not six or seven, and certainly not a near-lifetime.

I. Mr. Grant's Sentence Must Allow for a Meaningful Life Outside of Prison.

The Supreme Court's dictates are clear: For non-incorrigible[1] juvenile offenders, the sentence imposed must provide a realistic and meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. *Graham*, 560 U.S. at 75, 82. Thus, sentences may violate the Eighth Amendment even if not labeled "life without parole." *State v. Zuber*, 152 A.3d 197, 201 (N.J. 2017), *cert. denied*, 138 S. Ct. 152 (2017) ("The proper focus belongs on the amount of real time a juvenile will spend in jail and not on the formal label attached to his sentence."); *see also Casiano v. Comm'r of Corr.*, 115 A.3d 1031, 1045 (Conn. 2015) ("reject[ing] the notion that, in order for a sentence to be deemed life imprisonment, it must continue until the literal end of one's life").

Instead of assessing whether someone is more likely than not to be dead before the chance of release, courts have focused on whether the sentence permits a chance for release at a meaningful point in an individual's life. As these courts have emphasized,

[1] The label of "incorrigible" is reserved for the "very rarest of juvenile offenders," if any. *Tatum v. Arizona*, 137 S. Ct. 11, 12 (2016) (mem.) (Sotomayor, J. concurring) (internal quotation marks omitted). Here, the court found at resentencing that Mr. Grant was not incorrigible. Unless a juvenile is deemed incorrigible at sentencing, the sentence imposed must provide a meaningful opportunity for release. *Montgomery*, 136 S. Ct. at 733.

> the language of *Graham* suggests that the high court envisioned more than the mere act of release or a de minimis quantum of time outside of prison. *Graham* spoke of the chance to rejoin society in qualitative terms—"the rehabilitative ideal"—that contemplate a sufficient period to achieve reintegration as a productive and respected member of the citizenry.

People v. Contreras, 411 P.3d 445, 454 (Cal. 2018) (finding sentences of 50-years-to-life and 58-years-to-life, with possible release at ages 66 and 74, unconstitutional because they would not "allow for the reintegration that *Graham* contemplates").

This is not a technical or formalistic inquiry. It is not limited to whether an individual will take his "last breaths" behind bars, or his last steps inside prison walls. *See State v. Moore*, 76 N.E.3d 1127, 1137 (Ohio 2016), *cert. denied*, 138 S. Ct. 62 (2017). Rather, a meaningful opportunity must be meaningful: "The . . . Supreme Court viewed the concept of 'life' in *Miller* and *Graham* more broadly than biological survival; it implicitly endorsed the notion that an individual is effectively incarcerated for 'life' if he will have no opportunity to truly reenter society or have any meaningful life outside of prison." *Casiano*, 115 A.3d at 1047 (holding that a sentence of 50 years without parole denies a meaningful opportunity for release); *see also State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) (holding that "[t]he prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a meaningful opportunity to demonstrate the maturity and rehabilitation required to obtain release and reenter society as required by *Graham*") (citation and internal quotation marks omitted).

Against this backdrop, the Maryland Supreme Court recently accepted *as a matter of course* that a sentence without parole eligibility for 50 years "would be treated as a sentence of life without parole for purposes of Eighth Amendment analysis under most of the benchmarks applied by the courts." *Carter v. State*, 192 A.3d 695, 734 (Md. 2018). It reasoned:

> The parole eligibility date far exceeds the parole eligibility date for a defendant sentenced to life in prison under Maryland law (15 years); it exceeds the threshold duration recognized by most courts in decisions and legislatures in reform legislation (significantly less than 50 years); and the eligibility date will be later than a typical retirement date for someone of Mr. McCullough's age.

Id. (remanding for resentencing); *see also Bear Cloud v. Wyoming*, 334 P.3d 132, 142 (Wyo. 2014) (concluding that aggregate term of at least 45 years in prison, with earliest release at age 61, was unconstitutional); *State ex rel. Carr v. Wallace*, 527 S.W.3d 55, 60 (Mo. 2017) (granting relief to juvenile sentenced to 50 years without parole eligibility, reasoning that the sentence was "the harshest penalty other than death available").[2]

[2] Many states have declined to base these judgments on life expectancy. *See, e.g.*, *Contreras*, 411 P.3d at 451 (doing so "would lead to problems of disparate sentencing" and "life expectancy is an average"); *Bear Cloud*, 334 P.3d at 142 (similar); *Null*, 836 N.W.2d at 71 (finding aggregate term of 75 years with 52.5 years before parole eligibility impermissible, whether or not it exceeded defendant's life expectancy).

II. State Legislatures Have Drawn the Line of an Impermissible Sentence Decades Short of Mr. Grant's.

As the Supreme Court has repeatedly emphasized in the Eighth Amendment context, the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (internal citation omitted); *see also Graham*, 560 U.S. at 48 (explaining that "the Court first considers 'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue") (quoting *Roper v. Simmons*, 543 U.S. 551, 552 (2005)). In the six years since *Miller*, a swath of legislatures has considered just what is required by the Supreme Court's "meaningful opportunity" mandate for juveniles. Their findings are instructive here.

Today, 21 states and the District of Columbia bar life without parole for juveniles. Nineteen of these jurisdictions have acted since *Miller*.[3] By necessity, states that have abolished juvenile life-without-parole sentences have completed just the line-drawing exercise that this case presents: defining the outer boundary of a constitutional sentence. The states to engage in this exercise have replaced life without parole with a maximum sentence far shorter than Mr. Grant's—on average,

[3] Kansas and Kentucky abolished the sentence before *Miller*. *See* Ky. Rev. Stat. § 640.040(1); Kansas Stat. Ann. § 21-6618. Alaska has never allowed the sentence.

approximately half as long. In fact, in revisiting their harshest sentences for juveniles, states routinely drew the line at the 20- or 30-year mark, at which point an individual must be granted a meaningful opportunity for release.

The following tables illustrate how jurisdictions that eliminated life-without-parole sentences post-*Miller* have approached maximum sentences for juveniles.

Parole Eligibility after Serving 15 Years
• West Virginia[4]

Parole Eligibility or Sentence Modification after Serving 20 to 25 Years[5]
• California[6] • D.C.[7] • Nevada (homicide)[8]

[4] H.B. 4210, 81 Leg., 2d Sess. (W.Va. 2014) (codified at W. Va. Code §§ 61-11-23, 62-12-13b) (providing parole eligibility for juveniles after 15 years).

[5] In addition to the listed states, Florida—which maintains the theoretical possibility of life-without-parole sentences for juveniles in narrow circumstances—has passed legislation entitling virtually all juvenile offenders to sentence review, with eligibility after 15, 20, or 25 years depending on the nature of the offense and sentence length. *See* H.B. 7035, 2014 Leg., Reg. Sess. (Fla. 2014) (codified at Fla. Stat. § 921.1402(2)).

[6] A.B. 1308, Reg. Sess. (Cal. 2017) (codified at Cal. Penal Code § 3051(b)(4)).

[7] D.C. created a mechanism for sentence modification after 20 years. B21-0683, D.C. Act 21-568 (codified at D. C. Code § 24-403.03).

[8] Since 2015, Nevada's maximum sentence for juveniles is life with parole. The statute's retroactive provisions provide that juveniles are eligible for parole after 15 years (nonhomicide) or 20 years (homicide offenses involving one victim). *See* A.B.

- North Dakota[9]
- Wyoming[10]

Parole Eligibility or Sentence Modification after Serving 30 Years

- Arkansas (capital murder)[11]
- Delaware (first-degree murder)[12]
- Connecticut (if sentence longer than 50 years)[13]
- Massachusetts (some first-degree murder cases)[14]

267, 78th Reg. Sess. (Nev. 2015) (codified at Nev. Rev. Stat. §§ 176.025, 213.12135).

[9] North Dakota created a mechanism for sentence modification after 20 years. H.B. 1195, 65th Leg. Assemb. (N.D. 2017) (codified at N.D. Cent. Code §§ 12.1-20-03, 12.1-32-13.1).

[10] Wyoming's penalty for first-degree murder for juveniles is life with parole after 25 years. H.B. 23, 62nd Leg., Gen. Sess. (Wyo. 2013) (codified at Wyo. Stat. Ann. §§ 6-2-101(b), 6-2-306(d), (e), 6-10-201(b)(ii), 6-10-301(c), 7-13-402(a)).

[11] Arkansas's maximum sentence for juveniles (for capital murder) puts parole eligibility at 30 years. Juveniles convicted of first-degree murder and sentenced to life are eligible for parole after 25 years, and those convicted of a non-homicide crime are eligible for parole after 20 years. S.B. 294, 91st Gen. Assemb., Reg. Sess. (Ark. 2017) (codified at Ark. Code §§ 5-4-104(b), 5-4-602(3), 5-10-101(c), 5-10-102(c), 16-93-612(e), 16-93-613, 16-93-614, 16-93-618, 16-93-621).

[12] In Delaware, juveniles may petition for sentence modification after 30 years in first-degree murder cases, and after 20 years for all other cases. S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013) (codified at Del. Code Ann. tit. 11, §§ 636(b), 4209, 4209A, 4204A).

[13] In Connecticut, those sentenced to more than 50 years may be paroled after 30 years. S.B. 796, Gen. Assemb., Jan. Sess. (Conn. 2015) (codified at Conn. Gen. Stat. §§ 54-125a).

[14] After its Supreme Court held that life without parole for juveniles violated the state constitution, *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270 (Mass.

• New Jersey[15]

Parole Eligibility after Serving 35 to 40 Years
• Colorado[16] • Texas[17] • Vermont[18]

2013), Massachusetts set juveniles' penalty for first-degree murder at life with parole eligibility set between 20 and 30 years, depending on the nature of the offense. H. 4307, 188th Gen. Court (Mass. 2014) (codified at Mass. Gen. Laws ch. 27, § 4; ch. 119, § 72B; ch. 127 §§ 133A, 133C; ch. 265, § 2; ch. 279, § 24).

[15] For murder, juveniles may receive either 30 years without parole eligibility, or a term of years between 30 years and life, with parole eligibility after 30 years. A. 373, 217th Leg. Assemb. (N.J. 2017) (codified at N.J. Stat. Ann. § 2C:11-3).

[16] Colorado retroactively eliminated life-without-parole sentences for juveniles in 2016, after doing so prospectively in 2006. Juveniles convicted of class 1 felonies are now parole-eligible after serving 40 years, less earned time (up to 25 percent of the sentence). S.B. 16-181, 70th Gen. Assemb., 2d Reg. Sess. (Colo. 2016) (codified, *inter alia*, at Colo. Rev. Stat. §§ 16-13-1001; 17-22.5-405; 18-1.3-401(4); 24-4.1-302(2)(h); 24-4.1-302.5(1)(d)(IV); 24-4.1-303(12)(c)).

[17] In Texas, juveniles convicted of capital felonies may receive life with the possibility of parole after 40 years. S.B. 2, 83rd Leg., Special Sess. (Texas 2013) (codified at Tex. Penal Code Ann. § 12.31, Tex. Code Crim. Proc. Ann. art. 37.071).

[18] After Vermont eliminated life without parole for juveniles, *see* H. 62, 73rd Sess. (Vt. 2015) (codified at Vt. Stat. Ann. tit. 13, § 7045), the maximum sentence for a juvenile convicted of first-degree murder, 35 years to life, carries parole eligibility at 35 years. Vt. Stat. Ann. tit. 13, § 2303; tit. 28, § 501.

The remaining three states do not set maximum parole eligibility dates by statute.[19] Two states have eliminated life without parole by judicial decision, finding that the sentence violated state constitutions.[20]

Notably, in passing reform legislation, states have been clear that their intent is to comport with the Supreme Court's directive that children who are not incorrigible cannot spend the bulk of their lives behind bars. *See, e.g.*, Ark. S.B. 294, 91st Gen. Assemb., Reg. Sess. (Ark. 2017) (quoting *Graham*, *Miller*, and *Montgomery* and stating: "It is the intent of the General Assembly to eliminate life without parole as a sentencing option for minors and to create more age-appropriate sentencing standards in compliance with the United States Constitution for minors who commit serious crimes."); Synopsis, S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013) ("This Act modifies Delaware's juvenile sentencing laws to bring those

[19] Hawaii's maximum sentence for a juvenile offender is now life with parole; following sentencing, the parole board holds a hearing and sets a parole eligibility date. H.B. 2116, 27th Leg. Sess. (Haw. 2014) (codified at Haw. Rev. Stat. §§ 706-656(1), -657); *see also* Haw. Rev. Stat. § 706-669. Utah's maximum sentence for a juvenile is "an indeterminate prison term of not less than 25 years and that may be for life." H.B. 405 (Utah 2016) (codified at Utah Code §§ 76-3-203.6, -206, -207, -207.5, -207-.7, -209). South Dakota's maximum sentence for juveniles is now a term of years, carrying parole eligibility. S.B. 140, 2016 S.D. Sess. Laws (S.D. 2016) (codified at S.D. Codified Laws § 22-6-1, -13).

[20] *See State v. Sweet*, 879 N.W. 2d 811, 839 (Iowa 2016); *State v. Bassett*, 428 P.3d 343, 355 (Wash. 2018). Prior to *Bassett*, Washington provided parole eligibility after 20 years to most juvenile offenders, *see* Wash. Rev. Code § 9.94A.730, and after 25 years to youth under 16 convicted of aggravated first-degree murder, *see id.* § 10.95.030(3).

laws into compliance with decisions the United States Supreme Court issued in 2010 and 2012.").

CONCLUSION

A sentence that may provide an opportunity for release before natural life expectancy violates the Eighth Amendment for juvenile offenders absent an opportunity for fulfillment and reconciliation outside of prison. *Amicus* respectfully urges this Court to conclude—consistent with legislative implementation of the Supreme Court's juvenile sentencing jurisprudence—that Mr. Grant's new sentence fails to offer the "meaningful opportunity for release" required by our Constitution.

Dated: December 28, 2018

/s/ Elana S. Bildner
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CERTIFICATION OF BAR MEMBERSHIP

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Dated: December 28, 2018

/s/ Elana S. Bildner
Elana S. Bildner

CERTIFICATE OF COMPLIANCE

1. Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Third Circuit LAR 31.1(c), I certify that this electronic brief:

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Dated: December 28, 2018

/s/ Elana S. Bildner
Elana S. Bildner

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I hereby certify that on December 28, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit through the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. Additionally, 25 copies of the foregoing will be sent by Federal Express to:

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Dated: December 28, 2018

/s/ Elana S. Bildner
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