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 A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

# BRIEF FOR *AMICUS CURIAE* FAIR PUNISHMENT PROJECT IN SUPPORT OF PETITIONER

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## IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Fair Punishment Project ("FPP" or "*Amicus*") 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

Petitioners Willbanks and Nathan have asked this Court to determine whether the decisions in *Graham v. Florida*, 560 U.S. 48 (2010) and *Miller v. Alabama*, 567 U.S. 460 (2012), apply with equal force to children subject to aggregate terms of years, imposed consecutively for multiple offenses, that constitute *de facto* life sentences. The larger questions suggested by these cases and others like them, are: To what extent does the Court's 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

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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. 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.

imposed upon children, have a rehabilitative focus? For the reasons set forth in this brief, *Amicus* urges the Court to grant certiorari to clarify further, as it has done in prior cases, that children are constitutionally entitled to unique treatment within the criminal justice system with a special focus on their rehabilitation.

"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. The Court should grant the petition and hold that this principle applies with equal force to all juveniles sentenced in the criminal justice system, whether convicted of a single offense or multiple offenses, sentenced to life-without-parole or a lengthy term of years.

## ARGUMENT

Petitioners present the question whether the United States Constitution forbids condemning a juvenile with rehabilitative potential to a virtual lifetime of incarceration, simply because he was convicted of multiple crimes while a child, rather than one, or because he was sentenced, not to life-without-parole, but instead to an equivalent aggregate term of 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. The Eighth Amendment's protections apply with equal force to children who are convicted of multiple offenses

In *Graham* and *Miller*, this Court limited the imposition of life-without-parole sentences on juveniles. No matter the severity of the crime (or crimes) a juvenile has committed, he cannot be denied any possibility of future release unless he is the rare juvenile homicide offender "who exhibits such irretrievable depravity that rehabilitation is impossible." *Montgomery v. Louisiana*, 136 S.Ct. 718, 733 (2016).

The animating principle behind these decisions 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." *Graham v. Florida*, 560 U.S. 48, 68 (2010). As the Court has recognized, neuroscience proves what parents have long known, 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.

No coherent limiting principle cabins the scope of these holdings to encompass only life-without-parole sentences, imposed for a single offense. Rather, *Graham* and *Miller* should apply equally to any term-of-years sentence that denies a juvenile offender the "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75. While a juvenile's

conviction for multiple offenses, contemporaneously or apart, may inform *Miller*'s "irreparable corruption" inquiry, it is far from dispositive. *See Miller*, 567 U.S. at 479-80. The commission of multiple 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* and *Miller*'s protections.

Exempting long terms of years from the reach of *Graham* and *Miller* reduces their protections to form over substance, a practice that this Court's precedent has soundly rejected 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 85 or 110 years, is a classic example of the kind of arbitrary formal distinction this Court routinely scorns. *See also Sam v. State of Wyoming*, --- P.3d ---, No. S-16-0168, 2017 WL 3634525, at *21-22 (Wyo. Aug. 24, 2017) (holding that sentences that result in *de facto* life sentences, even with possibility of geriatric parole, violate *Graham* and *Miller*).

*Graham* and *Miller* are also fully applicable to children who commit multiple offenses. The holdings of those cases, which turn on the reduced culpability of juveniles and their greater capacity for change, should apply to <u>all</u> juveniles whose sentences foreclose a meaningful opportunity for release. *See Graham*, 560 U.S. at 68-69; *Miller*, 567 U.S. at 472. 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., Graham*, 560 U.S. at 72 ("'the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence.'") (quoting *Roper*, 543 U.S. at 571). Simply put, 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.

Moreover, here, both petitioners were charged with multiple offenses arising out of the same course of conduct: in the case of petitioner Willbanks, a single robbery of a car, and in the case of petitioner Nathan, a home invasion. That the State charged multiple offenses based on each of these single instances cannot dispose of the constitutional requirements unique to juvenile sentencing. Indeed, if prosecutors could evade this Court's rulings through the stacking of multiple charges, they would effectively usurp the sentencing judge's responsibility to consider the most appropriate sentence in light of the "mitigating qualities of youth." *Johnson v. Texas*, 509 U.S. 350, 367 (1993).[2]

2. In addition, both *Graham* and *Miller* involved juveniles 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. *Graham,* 560 U.S. 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

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. *Graham,* 560 U.S. at 68. Children who commit multiple offenses undergo the same brain development and emotional maturation as juveniles who commit a single offense. Over a period of years, a child who commits multiple offenses, even multiple serious violent offenses, may emerge as a profoundly different person. Thus, while courts may consider, in certain circumstances, the number of offenses as evidence of "permanent incorrigibility," *Montgomery*, 136 S.Ct. at 734, the sentencer must also consider these known scientific facts about juvenile development, as well as the juvenile's biological, psychological, and social history, before depriving the child of any meaningful "chance to later demonstrate that he is fit to rejoin society," *Graham*, 560 U.S. at 79.

The circumstances of the offense, standing alone, cannot foreclose a child's entitlement to potential release.

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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. Kuntrell Jackson, whose case was consolidated with Evan Miller's, was sentenced to life without parole after his conviction for two offenses: capital felony murder and aggravated robbery. *Miller*, 567 U.S. at 466. Evan Miller also arguably could have been charged with multiple serious offenses – he committed a murder, followed by arson. *Id*. at 468-69. Miller, however, was convicted of a single crime: "murder in the course of arson." *Id*. at 469. This distinction between the commission of one offense and two, which was based simply on statutory drafting and the State's charging decision, played no role in the Court's proportionality analysis. Nor should it here.

Because a juvenile's character is still developing, the severity of offense, or offenses, he has committed cannot conclusively demonstrate that he is irreparably corrupt. *See Adams v. Alabama*, 136 S. Ct. 1796, 1800 (2016) (Sotomayor, J., concurring) ("[T]he gruesomeness of a crime is not sufficient to demonstrate that a juvenile offender is beyond redemption: 'The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.'") (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)). Instead, a court should not impose a lifetime of incarceration – in any form – without fully considering his potential for rehabilitation.

## 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* and *Miller* reach 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." *Graham*, 560 U.S. 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; *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, making extreme, lengthy prison sentences disproportionate "for all but the rarest of children, those whose crimes reflect irreparable corruption." *Montgomery*, 136 S. Ct. at 726.

### 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. *Graham*, 560 U.S. at 72 (quoting *Johnson*, 509 U.S. at 367). 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 (2011); *see also id.* at 27-31 (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." *Graham*, 560 U.S. 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 deminstrates, each of the four penological justifications hinges on the nature of a child's true character and whether his offense, characteristics, and environment reflect a capacity for change or, in the rarest of cases, an immutable deficiency of morals. 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. It is for this reason that a lifetime of incarceration is only constitutionally permissible for a child who is "*irreparably* corrupt." *Montgomery*, 136 S.Ct. at 734 (emphasis added). This Court's juvenile jurisprudence has thus clarified that, under the Eighth Amendment, any child who is sentenced to a lengthy term of incarceration must be given the opportunity to demonstrate rehabilitation, and, if successful, must be released from custody.

## CONCLUSION

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

Respectfully submitted,

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