No. 16-3820

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

COREY GRANT,

Defendant-Appellant.

ON 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)

SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANT COREY GRANT

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PRELIMINARY STATEMENT

This matter is before the Court *en banc* pursuant to the government's petition challenging the panel's holding that juvenile offenders who are capable of reform must presumptively be sentenced to a term that provides for release by the national age of retirement—a holding that the government criticizes as "an arbitrary cap on sentencing to remedy a non-existent constitutional violation." Gov't Pet. at 2-3. According to the government, Grant's case presents "a non-existent constitutional violation" because, based upon the government's actuarial estimate, Grant will be released 4.6 years before he is likely to die. *Id.* at 4, 9-12. Further, the government argues, any attempt to draw a line which sets forth the permissible limits for sentencing juveniles capable of reform is necessarily "arbitrary" and is a task "for legislatures." *Id.* at 15.

Grant addressed the former contention in his underlying briefing. *See* Grant Br. at 21-31; Grant Reply at 1-11. There, he argued that, consistent with the United States Supreme Court's decisions in *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 460 U.S. 48 (2010), *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), juveniles are fundamentally different from adults, and these differences undermine the penological justifications for sentences that deny (either a non-homicide offender, or a homicide offender who is not incorrigible) any meaningful opportunity for release. These holdings, Grant

argued, apply to *de facto* life without parole sentences just as surely as they do those that use the magic words "life without parole." *See* Grant Br. at 21-27 (citing, *e.g.*, *Budder v. Addison*, 851 F.3d 1047 (10th Cir. 2017), *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016); *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013)).[1] Grant also argued that even if he were to survive his sentence, it would nonetheless deprive him of the chance for "fulfillment outside prison walls" and "reconciliation with society" to which he is entitled under *Graham*. *See* Grant Br. at 28-31; Grant Reply at 1-11.[2]

However, Grant has not yet briefed the question of how to draw the line between permissible and impermissible federal sentences (which are without parole

[1] Notably in this regard, the United States Sentencing Commission defines a "*de facto* life sentence" as any term in excess of "470 months (39 years and two months)." United States Sentencing Commission, *Life Sentences in the Federal System* 10 (2015), *available at* www.ussc.gov/sites/default/pfd/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf. Grant's sentence of 65 years exceeds that by more than 25 years.

[2] Grant also argued that the district court misapplied the *Miller* factors, Grant Br. at 31-47; Grant Reply at 12-21, and that the district court should have resentenced him *de novo* on all counts under the sentencing package doctrine, Grant Br. at 47-53; Grant Reply at 21-26; *see also* Grant Pet. for Rehearing or Rehearing *En Banc*. Grant incorporates those arguments herein by reference; they are properly before the Court because in granting rehearing *en banc*, the Court "vacat[ed] the opinion and judgment entered April 9, 2018." Order (Oct. 4, 2018). *E.g.*, *Brown v. Stites Concrete, Inc.*, 994 F.2d 553, 557 (8th Cir. 1993) ("[A]ll issues originally on appeal technically remain open because the panel opinion was vacated in its entirety.").

per Congress's abolition of parole in 1984) for juveniles who are not incorrigible.[3] Accordingly, Grant respectfully submits this supplemental brief to address that issue, as the Court permitted in its November 30, 2018 Order. The question of whether and where this Court should draw such a line is properly analyzed under the categorical approach to Eighth Amendment proportionality review, which applies where, as here, "a sentencing practice itself is in question" with regard to "an entire class of offenders," *i.e.* juveniles found to be capable of reform. *See Graham*, 560 U.S. at 61. Under this approach,[4] "[t]he 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[.]" *Id.* (citation omitted). Then, exercising its "own independent judgment," the Court examines the "the culpability of the offenders at issue," "whether the challenged sentencing practice serves legitimate penological goals," and "the severity of the punishment in question." *Id.* at 67 (citations omitted).

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[3] The panel posed this question to the parties in a letter docketed after the close of briefing, asking "at what point does a term-of-years sentence rise to the level of a 'de facto' LWOP sentence? . . . . At what specific age should we hold that such an offender will no longer have a chance for fulfillment outside prison walls or to reconcile with society?" *United States v. Grant*, Dkt. No. 16-3820, Ltr. of Marcia M. Waldron, Clerk (Oct. 5, 2017).

[4] The categorical approach is in contrast with proportionality review of individual sentences under *Harmelin v. Michigan*, 501 U.S. 957 (1991). *See Graham*, 560 U.S. at 59-61.

Correctly employing this framework, the Court should draw a line at 30 years without release as the presumptive maximum sentence for juvenile offenders found to be capable of reform, as Grant was here. Thus, objective indicia of societal values, and social science concerning rehabilitation of juveniles, coalesce around a term of 30 years as the presumptive term, beyond which, juvenile offenders who are not incorrigible will be deprived of their Eighth Amendment right to a chance for "fulfillment outside prison walls" and "reconciliation with society." Drawing a presumptive line at 30 years will best effectuate the Supreme Court's holdings, protect the rights of juveniles, and provide guidance to sentencing courts, while still allowing for appropriately divergent outcomes under 18 U.S.C. § 3553(a) where the statutory factors so warrant. Accordingly, and for the reasons discussed in Grant's earlier submissions, Grant's sentence of 65 years should be vacated, and he should be resentenced with a presumptive maximum term of 30 years.

ARGUMENT

I. Objective Indicia of Societal Values Demonstrate a Consensus Against Sentencing Juveniles Who Are Capable of Reform to More than 30 Years without Parole.

"[T]he '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) (citation omitted), with the most probative evidence "not the numerical counting of [] [S]tates . . . but the direction of change," *Kennedy v.*

Louisiana, 554 U.S. 407, 418 (2008) (citation and quotation marks omitted). Here, since *Graham* and *Miller*, 11 States and the District of Columbia have prohibited sentences of over 30 years without parole eligibility for juvenile offenders. *See Atkins*, 536 U.S. at 315-16 (calling it "powerful evidence" that 16 States had prohibited the punishment at issue). Specifically, seven states (including New Jersey) have established a maximum term of years without parole eligibility at or below 30 years,[5] and D.C. and four others permit a juvenile offender to petition for parole or reduction of sentence at or before 30 years.[6] Similar legislation is currently pending in five other States.[7]

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[5] *See* Ark. S.B. 294, 91st Gen. Assemb., Reg. Sess. (2017) (maximum permissible juvenile term without parole eligibility is 30 years); Cal. S.B. 394, Reg. Sess. (2017) (25 years); Conn. S.B. 796, Jan. Sess. (2015) (30 years); Mass. H. 4307, 188th Gen. Court (Mass. 2014) (30 years); N.J. A. 373, 217th Leg. Assemb. (N.J. 2017) (30 years); Wyo. H.B. 23, 62nd Leg., Gen. Sess. (2013) (30 years); W. Va. H.B. 4210, 81 Leg., 2d Sess. (2014) (15 years).

[6] *See* Del. S.B. 9, 147th Gen. Assemb., Reg. Sess. (2013) (juveniles convicted of most serious homicide offense may petition the court for sentence modification after 30 years); Fla. Chapter 2014-20 (2014) (juvenile offender may petition for parole or reduction of sentence after serving, at most, 25-year term); D.C. B21-0683, D.C. Act 21-568 (2016) (same, after 20 years); N.D. H.B. 1195, 65th Leg. Assemb. (2017) (same); Wa. RCW 9.94A.730 (2014) (same).

[7] *See* Ga. HB 802 (proposed Jan. 31, 2018) (requiring parole eligibility for all juvenile offenders no later than 25 years); Ill. HB 2515; SB 2073 (proposed Feb. 17. 2017) (20 years); Minn. H.F. 3368 (proposed Mar. 5, 2018) (25 years); R.I. S2272 (proposed Feb. 1, 2018) (those already sentenced as adults eligible for parole after 15 years); Tenn. H.B. 2226; S.B. 2298 (proposed on Jan. 31 and Feb. 1, 2018, respectively) (maximum term for all juvenile offenders of 15 years with parole eligibility after five years).

Also probative are "actual sentencing practices."[8] *Graham*, 560 U.S. at 62. Thus, of the approximately 1300 juvenile homicide offenders who have been resentenced since *Miller*, "the median sentence nationwide is 25 years before parole or release eligibility." *See* Campaign for Fair Sentencing of Youth, Report, "*Montgomery* Momentum: Two Years of Progress since *Montgomery v. Louisiana*, at 4 (2018).[9]

To be sure, these enactments establish when society believes a juvenile offender must have an opportunity for parole, whereas here, because Congress has eliminated parole for federal crimes, Pub. L. No. 98-473, § 224 (1984), the question presented is when a non-incorrigible juvenile must actually be released. But at the very least, these developments demonstrate an emerging social consensus that a juvenile offender who is capable of reform must be considered for, and depending on the circumstances, may be entitled to, release within 30 years. In order to be faithful to the Eighth Amendment jurisprudence (and the social science that undergirds it, discussed below), this Court should guide future sentencing of such

[8] Though not unique to juveniles, a 360-month term is the baseline for the most severe Guidelines range in federal sentencing, showing that society believes a 30-year term may be sufficient for the most serious offenses. *See* U.S.S.G. Sentencing Table (2018).

[9] *Available at* https://www.fairsentencingofyouth.org/wp-content/uploads/Montgomery-Anniversary-2018-Snapshot1.pdf

offenders by setting a 30-year term as the presumptive limit for juveniles who are capable of reform.[10]

II. In the Exercise of its "Own Independent Judgment," the Court Should Set 30 Years As the Presumptive Maximum Sentence for a Juvenile Who Is Capable of Reform.

"In cases involving a [societal] consensus," the Court's "own judgment is 'brought to bear,'" *Atkins*, 536 U.S. at 313 (citation omitted), through examination of "the culpability of the offenders at issue," the "legitima[cy] [of] penological goals" with regard to such offenders, and "the severity of the punishment in question," *Graham*, 560 U.S. at 67. In performing this analysis, the Supreme Court is guided by social and biological science bearing upon the characteristics of the offender class. *See Miller*, 567 U.S. at 471 (noting that *Roper* and *Graham* rested significantly on "science and social science.") (citation omitted); *Graham*, 560 U.S. at 68 (relying on "developments in psychology and brain science"); *Roper*, 543 U.S. at 569-70 (citing research psychologists); *see also Atkins*, 536 U.S. at 318 (citing clinical studies). Here, that science—and application of the analysis required by the

[10] Alternatively, as the government noted before the district court, the Court could strike down the Sentencing Reform Act's abolition of parole as applied to juveniles. *See* A488 ("[T]o convert Grant's life-without parole sentence to life-with-parole, this Court would have to hold that Chapter 311's repeal [of parole] violates the Eighth Amendment on an as-applied basis for juvenile offenders[.]").

Supreme Court—shows that a sentence beyond 30 years is unjustifiable for juveniles who are not incorrigible.

(a) Culpability

It is by now well-established, as a matter of law, that:

> [C]hildren have a lack of maturity and underdeveloped sense of responsibility leading to recklessness, impulsivity, and heedless risk-taking. . . . [They] are more vulnerable . . . to negative influences and outside pressures, including from family and peers; they have limited contro[l] over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And . . . [their] character is not as well formed as an adult's, [meaning their] traits are less fixed and [their] actions [] less likely to be evidence of irretrievabl[e] depravi[ty.]

Miller, 567 U.S. at 471 (citations and quotation marks omitted). These developmental shortcomings mean that juveniles "have diminished culpability and greater prospects for reform" such that "they are less deserving of the most severe punishments." *Id.*; *accord Graham*, 560 U.S. at 75; *Roper*, 543 U.S. at 573.

(b) Penological Rationales

Equally well-established is the principle that "the distinctive attributes of youth diminish the penological justifications [retribution, deterrence, incapacitation, and rehabilitation] for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller*, 567 U.S. at 472. Beginning with retribution, the Supreme Court has held that, owing to the developmental deficiencies of juveniles, "their irresponsible conduct is not as morally reprehensible as that of an adult," so that "the case for retribution is not as strong." *Roper*, 543

U.S. at 570-71 (citations and quotation marks omitted). Likewise for deterrence: "the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence." *Graham*, 560 U.S. at 571-72 (citation and quotation marks omitted).

Thus, only the incapacitation and rehabilitation rationales are capable of justifying the harshest punishment for juveniles. Indeed, it was on this basis that *Miller* did not foreclose a sentence of life without parole for "the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible." *See Montgomery*, 136 S.Ct. at 733. But for juveniles who are not incorrigible, the incapacitation and rehabilitation rationales justify punishment for only so long as is necessary to protect society and for the offender to reform. *See, e.g.*, *Graham*, 560 U.S. at 72 (holding that life without parole is justifiable only where "the juvenile offender forever will be a danger to society," "forswear[ing] altogether the rehabilitative ideal").

On this point, the scientific research establishes that juveniles who are not incorrigible will universally desist from crime within 30 years. This is evident from numerous empirical studies showing the existence of an "age-crime curve":

> [M]ost forms of risk-taking follow an inverted U-shaped curve with age, increasing between childhood and adolescence, peaking in either mid- or late adolescence (the peak age varies depending on the specific type of risky activity) and declining thereafter. Involvement in violent and nonviolent crime also follows this pattern and is referred to as the "age-crime curve."

Laurence Steinberg, *The Influence of Neuroscience on U.S. Supreme Court Decisions about Adolescents' Criminal Culpability*, 14 NEUROSCIENCE 513, 515 (2013); *accord* Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCH. R. 674, 675 (1993) (same).

More specifically, the age-crime curve conclusively establishes that juveniles who are capable of reform desist from all criminal activity by their early 40's. Thus, between one quarter and one half of offenders desist after their first offense. *See* Megan C. Kurlycheck, *et al.*, *Long-Term Crime Desistance and Recidivism Patterns – Evidence from the Essex County Felony Study*, 50 CRIMINOLOGY 71, 98 (2012); *see also* Maynard L. Erickson, *Delinquency in a Birth Cohort: A New Direction in Criminological Research*, 64 J. CRIM. L. & CRIMINOLOGY 362, 364 (1973) (empirical study of 9,945 juvenile delinquents found "46 percent were classified as one-time offenders") (citing Marvin E. Wolfgang, *et al.*, DELINQUENCY IN A BIRTH COHORT (1972)). Of those who do not desist immediately, most do so by their mid-to-late 20's. *See* Moffitt, *Adolescence-Limited and Life-Course-Persistent*, 100 PSYCH. R. at 680 (estimating desistance by mid-to-late 20's at 85%); Steinberg, *The Influence of Neuroscience*, 14 NEUROSCIENCE at 516 (estimating same at 90%). Beyond that, research shows a final wave of desistance in the early 40's, *see* John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME &

JUSTICE 1, 17 (2001), after which only the most persistent, incorrigible offenders (approximately 5-6%) remain a danger to society. Moffitt, *Adolescence-Limited and Life-Course-Persistent*, 100 PSYCH. R. at 676; Alfred Blumstein, *et al.*, *Delinquency Careers: Innocents, Desisters, and Persisters*, 6 CRIME & JUSTICE 195 (1985) (finding persistent offenders constituted 5.66% of sample in empirical study).[11] And this is so for violent offenders as well. *See* Laub & Sampson, *Understanding Desistance*, 28 CRIME & JUSTICE at 52 ("[T]here appear to be no major differences in the process of desistance for nonviolent and violent juvenile offenders.") (internal citations omitted); Moffitt, *Adolescence-Limited and Life-Course-Persistent*, 100 PSYCH. R. at 680 (same). In sum, it is a scientific fact—of exactly the sort upon which the Supreme Court relies in conducting proportionality review—that juvenile offenders who are capable of reform pose no danger to society by, at the latest, their early 40's.

(c) <u>The Severity of the Punishment</u>

As *Graham* made clear, this Court must also assess the harshness of the punishment at issue, examining its practical impact for the class of offenders in

[11] Likewise, research into average criminal career length shows that the average time from first to last offense, regardless of offense type, is between 5 and 15 years. *See* Alex R. Piquero, *et al.*, *The Criminal Career Paradigm*, 30 CRIME & JUSTICE 359, 435 (2003); *see also* Alfred Blumstein, *et al.*, THE DURATION OF ADULT CRIMINAL CAREERS 10 (1982).

question. 560 U.S. at 69-71 (analyzing sentence of life without parole as imposed on juvenile offenders). Here, the Court should thus conclude that any sentence over 30 years is presumed to be inappropriately harsh punishment for a juvenile capable of reform, entailing decades in a punitive, often violent setting, confined without liberty and cut off from society. And the "reality cannot be ignored" that prison is especially harsh for youthful offenders. *Graham*, 560 U.S. at 70-71. Indeed, tragically, youthful offenders in adult prisons are five times more likely to be targeted for assault and sexual violence than are adult inmates, and they commit suicide more frequently. *See* Equal Justice Initiative, Report, "All Children Are Children: Challenging Abusive Punishment of Juveniles," at 9 (2017).

But lengthy sentences for juveniles are not only harsh for what they impose, but also for what they deny. Thus, the Supreme Court in *Graham* specifically held that a sentence of life without parole is particularly harsh punishment for a juvenile because it denies any chance for "fulfillment outside prison walls" or "reconciliation with society." 560 U.S. at 79. The same is true of a term of over 30 years without the possibility of release.

That is because, first, while the concepts of "fulfillment" and "reconciliation" are admittedly abstract, they certainly "encompass more than mere physical release at a point just before a juvenile offender's life is expected to end," as the panel correctly held. *See United States v. Grant*, 887 F.3d 131, 147 (3d Cir. 2018). Rather,

the concepts of fulfillment and reconciliation entail an opportunity to realize the fundamentals of adult life, such as cohabitation or marriage, raising a family, embarking on a career, achieving financial independence, owning property, and carving out a role in one's community and/or place of worship. *See People v. Contreras*, 411 P.3d 445, 454 (Cal. 2018) ("*Graham* spoke of the chance to rejoin society in qualitative terms . . . that contemplates a sufficient period to achieve reintegration as a productive and respected member of the citizenry.") (internal citations omitted); *see also Casiano v. Comm'r of Corrs.*, 115 A.3d 1031, 1046 (Conn. 2015) ("*Miller* and *Graham* . . . 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."). In this regard, it is telling that *Graham* took pains to note that life without parole is particularly harsh because juveniles so sentenced may be "denied access to vocational training and other rehabilitative services," showing that at the very least, juveniles who are capable of reform should be able to start a career and achieve financial independence. 560 U.S. at 74.

But juveniles sentenced to more than 30 years in prison have little chance to realize these qualitative aspects of adult life. That is, juvenile offenders who are incarcerated for over 30 years are detained during the period when people typically

cohabitate and marry,[12] start a family,[13] develop a career, and achieve financial independence.[14] Thus, confinement for over 30 years holds a juvenile offender in an extended state of arrested development, rendering him unable to meaningfully embark on adult life until after it will be too late to do so.

This is particularly so because the effects of lengthy incarceration render juvenile offenders less able to attain the "fulfillment" described by *Graham*. Of course, every offender faces challenges upon re-entry in securing housing, transportation, employment, public benefits, and healthcare, all with the stigma of a criminal conviction, and often without resources or a social support network, which may have frayed over extended imprisonment. *See* Grant Br. at 26-27 (citing, *inter alia*, Craig Haney, *The Psychological Impact of Incarceration: Implications for Postprison Adjustment*, in Prisoners Once Removed 48 (eds. Jeremy Travis &

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[12] According to data provided by the United States Bureau of Labor Statistics compiled through a national longitudinal study of nearly 10,000 individuals born between 1980-84, the mean age of initial cohabitation with a dating partner was 25.1, and the mean age of marriage was 27.5. *See* searchable database *available at* www.nlsinfo.org/content/access-data-investigator.

[13] The mean age of individuals within the United States at the time a first child is born is 26.6 years old. *See* Centers for Disease Control, Nat'l Ctr. for Health Statistics, *available at* https://www.cdc.gov/nchs/fastats/births.htm.

[14] According to Bureau of Labor Statistics data, the majority of the workforce in the United States is between the ages of 16 and 44, and the median weekly income rises continuously for individuals over this timespan. *See* U.S. Dept. of Labor, Bur. Labor Stats., "Economic News Release" (2017), *available at* https://www.bls.gov/news.release/wkyeng.t03.htm

Michelle Waul 2004)). But extended incarceration imposes additional handicaps. *See* Grant Br. at 27-31. Thus, long-term inmates experience "accelerated aging" and "develop[] [] chronic illness and disability at a younger age than the general U.S. population." Brie Williams and Rita Abraldes, *Growing Older: Challenges of Prison and Reentry for the Aging Population*, in PUBLIC HEALTH BEHIND BARS 56 (ed. Robert B. Greifinger 2007). And those incarcerated for lengthy terms also experience the "broad-based and potentially disabling" symptoms of "institutionalization," including "dependence on institutional structure" and development of social characteristics that are out of place in free society, such as "alienation" and "interpersonal distrust and suspicion." *See* Haney, *Psychological Impact of Incarceration*, at 54. These effects are amplified for those first incarcerated as juveniles, since they have "little internal structure to revert to or rely upon" and so more readily absorb harmful prison norms and culture. Haney, *Psychological Impact of Incarceration*, at 40.

It is accordingly no surprise that, as one study found, individuals who were 44 and older at the time of release "received less support from family, were more likely to be insecurely housed or outside of regular households, and were less likely to be employed." Bruce Western, *et al.*, *Stress and Hardship After Prison*, 120 AM. J. OF SOCIOLOGY 1512, 1538 (2015). This 44-and-over population was also the most dependent on public benefits, *id.* at 1529, and "shelters or transitional housing

programs," *id.* at 1535, and faced an increased probability of "[e]strangement from family, housing insecurity, and income poverty" and resulting placement "at the margins of society with little access to the mainstream social roles and opportunities that characterize full community participation," *id.* at 1515. For these reasons, incarceration for over 30 years in the case of a juvenile offender is highly likely to deny an opportunity for "fulfillment outside prison walls" and "reconciliation with society," and the longer the sentence, the greater the likelihood. *See, e.g.*, *Contreras*, 411 P.3d at 454 ("For any individual released after decades of incarceration, adjusting to ordinary civic life is undoubtedly a complex and gradual process. Confinement . . . until age 66 or age 74 seems unlikely to allow for the reintegration that *Graham* contemplates."); *Casiano*, 115 A.3d at 1046-47 (juvenile offender released after 50 years "will be left with seriously diminished prospects for his quality of life," in light of minimal employment opportunities and "increased risk for . . . heart disease, hypertension, stroke, asthma, chronic bronchitis, cancer, diabetes, and arthritis.").

In sum, as the panel correctly recognized, this Court's role must be to "effectuate the [Supreme] Court's mandate" that the government "must give non-incorrigible juvenile offenders the opportunity to meaningfully reenter society upon their release." *Grant*, 887 F.3d at 148. And the scientific research, which provides the backbone of the Supreme Court's jurisprudence in this area, assists this Court in

drawing an appropriate line to assure that a juvenile offender capable of reform is not deprived of the chance for "fulfillment" and "reconciliation" that *Graham* requires. For the reasons set forth above, the categorical analysis dictated by the Court compels the conclusion that a sentence of more than 30 years presumptively violates that mandate.

III. It Is Appropriate for the Court to Draw a Presumptive Line in Order to Protect the Rights of Juveniles Who Are Capable of Reform.

Although the government attacked the panel for drawing a presumptive line at the national age of retirement, Gov't Rehearing Pet. at 15, the Supreme Court has held that categorical lines "must be drawn" where leaving the sentencing decision to the discretion of courts on a case-by-case basis would create an "unacceptable likelihood" of a disproportionate sentence. *Roper*, 543 U.S. at 572-74. Thus, *Roper* held the death penalty unconstitutional for all juvenile offenders because:

> The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course[.]

Id.

Moreover, a presumptive line is an appropriate form of categorical rule for the Court to impose. Looking to societal values and social science research, which coalesce around a particular timeframe, the Court may provide firm guidance to sentencing courts in this difficult area, while leaving room for divergence where

particular cases so require. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 700-01 (recognizing a term of six months as "presumptively reasonable" for detention of immigrant because issue would "call for difficult judgments" and merited "uniform administration in the federal courts,"); *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 55-56 (1991) (identifying presumptive time limit of 48 hours to satisfy Fourth Amendment entitlement to "prompt judicial determination of probable cause" because standard was otherwise "vague" and "simply ha[d] not provided sufficient guidance"); *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966) (creating presumption that sentences in excess of six months require a jury trial in the interest of "[e]ffective administration"); *see also Press-Enter. Co. v. Sup. Ct.*, 464 U.S. 501, 508-10 (1984) (examining competing principles in recognizing a presumption in favor of public access to criminal trial); *Miranda v. Arizona*, 384 U.S. 436, 446-58 (1966) (examining the circumstances and psychological impact of custodial interrogation and creating a presumption that it is inherently coercive under the Fifth Amendment).

Accordingly, the Court should adopt a presumption that "give[s] life to the Supreme Court's holdings in *Graham* and *Miller*, [while] also afford[ing] lower courts the discretion to depart from it in the exceptional circumstances where a juvenile offender is found to be capable of reform but the § 3553(a) factors still favor a sentence" in excess of the presumption, as the panel appropriately held. *Grant*,

887 F.3d at 152. Specifically, the Court should adopt 30 years as the presumptive maximum sentence for juveniles who are not incorrigible—a term of years which a sentencing court may not exceed unless the government carries the burden of showing that a longer sentence is necessary to fulfill the purposes of sentencing set forth in 18 U.S.C. §3553(a), taking account of the defendant's youth and attendant circumstances, *Miller*, 567 U.S. at 477-78, and nonetheless assuring that the juvenile is not deprived of a chance for "fulfillment" and "reconciliation."

The panel admirably sought to draw a presumptive line and did so at the national age of retirement. While Grant agrees that a presumptive maximum sentence is appropriate, rather than focusing quantitatively on how much life is likely to remain upon a defendant's release, using life expectancy as a starting-point, *see Grant*, 887 F.3d at 153, Grant urges the Court instead to look forward from the time of sentencing, in a more qualitative fashion. Such a framework avoids certain of the pitfalls of actuarial estimates, which vary across gender and race, creating potential constitutional problems. *See Contreras*, 411 P.3d at 450 (citing Adele Cummings & Stacie Colling, *There Is No Meaningful Opportunity in Meaningless Data: Why It Is Unconstitutional to Use Life Expectancy Tables in Post-Graham Sentences*, 18 U.C. DAVIS J. OF JUVENILE L. & POL'Y 267, 281-82 (2014)). But more fundamentally, Grant's approach employs the requisite Eighth Amendment analysis, utilizing both the social consensus to which the Supreme Court points and the social

science, which sheds light on the time, starting from sentencing, after which a juvenile sentence really will undermine *Graham*'s mandate that juvenile who is not incorrigible have an opportunity for "fulfillment" and "reconciliation." That line—a maximum of 30 years—is one that is, then, far from arbitrary. *See Contreras*, 411 P.3d at 457 (asking rhetorically of an approach that looks backward from actuarial estimates, "why is five years sufficient? Why not require 10, 15, or 25 years? And if five years is sufficient, then what about four years? three? two? or one?"). And the presumptive rule here proposed allows for deviation through an appropriate, adversarial process, based upon consideration of the statutory sentencing factors, *see* 18 U.S.C. § 3553(a), and/or further expert scientific proofs. As a result, well within the judicial role, this Court may impose a presumptive maximum sentence of 30 years for juveniles who are capable of reform to balance the constitutional imperative of effectuating *Miller* and *Graham* with preserving the flexibility required in sentencing, thus providing the best answer to a difficult but essential question.

CONCLUSION

For the foregoing reasons, and those asserted in Grant's prior briefing, the Court should reverse and remand for re-sentencing with instructions that Grant, as a juvenile determined not incorrigible, presumptively be sentenced to a term no greater than 30 years.

/s/ Lawrence S. Lustberg
Lawrence S. Lustberg, Esq.

Date: December 21, 2018

CERTIFICATIONS

1. Certification of Bar Membership

I hereby certify that I, Lawrence S. Lustberg, am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Certification of Word Count, Identical Text, and Virus Check

I hereby certify that this Brief complies with the type and volume limitations set forth in Fed. R. App. P. 32(a)(7) and in the Court's Order of November 30, 2018. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared using a proportionally spaced typeface using Microsoft Word with 14-point font. According to the word count feature of Microsoft Word, this Brief contains 4,999 words, excluding those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The text of the electronic version of this Brief is identical to the text in the paper copies. Sophos Endpoint Security & Control virus-scan, Version 9, has been run on the files, and no virus was detected.

3. Certification of Service

I hereby certify that on December 21, 2018, I caused the foregoing Brief to be electronically filed with the Clerk of the United States Court of Appeals for the Third Circuit through the Court's CM/ECF system, and to have twenty-five (25) paper copies of the Brief delivered to:

Patricia S. Dodszuweit
The Office of the Clerk
United States Court of Appeals for the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106-1790

I hereby certify that on December 21, 2018, I caused the foregoing Brief to be served upon the counsel of record for Appellee through the Notice of Docketing Activity issued by this Court's CM/ECF system.

/s/ Lawrence S. Lustberg
Lawrence S. Lustberg, Esq.

Date: December 21, 2018