

16-3820

IN THE
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)

BRIEF OF *AMICUS CURIAE* JUVENILE LAW CENTER IN SUPPORT OF
APPELLANT COREY GRANT

MARSHA L. LEVICK
Juvenile Law Center
1315 Walnut Street, 4th Floor
Philadelphia, PA 19107
(215) 625-0551
mlevick@jlc.org

Counsel for *Amicus Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTEREST AND IDENTITY OF AMICUS.....	1
ARGUMENT	1
I. A 65-YEAR SENTENCE DOES NOT PROVIDE A MEANINGFUL OPPORTUNITY FOR RELEASE BASED UPON DEMONSTRATED REHABILITATION AND MATURITY	2
A. Young Offenders’ Distinct Capacity For Rehabilitation Forecloses <i>De Facto</i> Life Sentences	3
B. Age And The Possibility Of Fulfillment Outside Prison Walls, Not Life Expectancy, Determine Whether A Sentence Provides A Meaningful Opportunity For Release.....	6
CONCLUSION	11
COMBINED CERTIFICATIONS.....	12
CERTIFICATE OF SERVICE.....	13

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Casiano v. Comm’r of Corr.</i> , 115 A.3d 1031 (Conn. 2015)	10
<i>Graham v. Florida</i> , 560 U.S. 48 (2010).....	<i>passim</i>
<i>Miller v. Alabama</i> , 567 U.S. 460 (2012).....	2, 7
<i>Montgomery v. Louisiana</i> , 136 S. Ct. 718 (2016).....	2, 4, 6
<i>People v. Contreras</i> , 411 P.3d 445 (Cal. 2018).....	10
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005).....	5
<i>State v. Null</i> , 836 N.W.2d 41 (Iowa 2013)	9
<i>Sumner v. Shuman</i> , 483 U.S. 66 (1987).....	6
<i>Tatum v. Arizona</i> , 137 S. Ct. 11 (2016) (mem.)	3
Other Authorities	
Adele Cummings and Stacie Nelson Colling, <i>There is No Meaningful Opportunity in Meaningless Data: Why it is Unconstitutional to use Life Expectancy Data in Post-Graham Sentences</i> , 18 U.C. Davis J. of Juv. L. & Pol’y 268 (2014).....	8, 11
Beth Caldwell, <i>Creating Meaningful Opportunities for Release: Miller, Graham, and California’s Youth Offender Parole Hearings</i> , 40 NYU Rev. L. & Soc. Change 245 (2016).....	8

Herman Wallace: ‘Angola Three’ Inmate Dies Days After Release from Solitary, The Guardian (Oct. 4, 2013), at <https://www.theguardian.com/world/2013/oct/04/herman-wallace-angola-three-dies-solitary-confinement>.....6

Laurence Steinberg, *Give Adolescents the Time and Skills to Mature, and Most Offenders Will Stop*. (2014) Chicago, IL: MacArthur Foundation, p. 3, available at <http://www.pathwaysstudy.pitt.edu/documents/MacArthur%20Brief%20Give%20Adolescents%20Time.pdf>.....5

Research on Pathways to Desistance: December 2012 Update, Models for Change, p. 4, available at <http://www.modelsforchange.net/publications/357>.....5

INTEREST AND IDENTITY OF AMICUS¹

Juvenile Law Center advocates for rights, dignity, equity and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy and submission of amicus briefs, policy reform, public education, training, consulting, and strategic communications. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children’s unique developmental characteristics, and reflective of international human rights values.

ARGUMENT

This appeal squarely presents the question that has vexed state and federal courts since the United States Supreme Court banned life without parole sentences for all but the rare and uncommon youth whose crime reflects irreparable corruption or permanent incorrigibility: How long is too long? The Court’s admonition that youth—even youth convicted of murder—must be afforded a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation,” *Graham v. Florida*, 560 U.S. 48, 75 (2010), has since spawned substantial litigation in an effort to lend concreteness to this ruling. The Court’s further observation that

¹ No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from *Amicus*, its members, or its respective counsel made a monetary contribution to the preparation or submission of this brief. *Amicus* files under the authority of Fed. R. App. P. 29(b).

“[l]ife in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope,” *id.* at 79, signals the Court’s expectation that these individuals have expansive and engaged lived experiences upon release.

Compliance with the Court’s expectation that youth spared a life without parole sentence have the opportunity to lead fulfilled, productive, and redemptive lives back in their communities requires the sentencing court’s faithful adherence to the two key pillars of *Graham* and *Miller v. Alabama*—a second chance to participate and engage with family and community, and individualized sentencing that takes account of the youth’s distinctive and hallmark developmental attributes. The sentence of 65 years meted out to Corey Grant meets neither of these core requirements.

I. A 65-YEAR SENTENCE DOES NOT PROVIDE A MEANINGFUL OPPORTUNITY FOR RELEASE BASED UPON DEMONSTRATED REHABILITATION AND MATURITY

Corey Grant was initially sentenced to life without the possibility of parole and resentenced following the United States Supreme Court’s rulings in *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). The resentencing court noted that children cannot be sentenced to life without parole unless their crimes reflect irreparable corruption or permanent incorrigibility, and held that Mr. Grant’s “upbringing, debilitating characteristics of youth, and post-

conviction record demonstrated that he had the capacity to reform.” (3d Cir. Panel Decision at 3, 7.) Notwithstanding this determination, the sentencing court imposed a term of 65 years with no possibility of parole. Accordingly, Mr. Grant will not be eligible for release until age 72. Regardless of how his sentence is labeled, Mr. Grant has effectively been sentenced to spend the rest of his life in prison.

A. Young Offenders’ Distinct Capacity For Rehabilitation Forecloses *De Facto* Life Sentences

The panel properly recognized that children who are found to have the capacity for change—who are not permanently incorrigible—must be treated differently from those who are not. (Panel Decision at 21-22.) Since the Supreme Court’s rulings in *Miller* and *Montgomery*, Justice Sotomayor has underscored this mandate, emphasizing the need for judges to make specific findings to determine “whether the petitioner was among the very ‘rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.’” *Tatum v. Arizona*, 137 S. Ct. 11, 12 (2016) (Sotomayor, J., concurring) (mem.) (quoting *Montgomery*, 136 S. Ct. at 734). These individuals, “‘whose crimes reflect transient immaturity of youth’ are now a constitutionally recognized class of defendants that are afforded a right to a meaningful opportunity for release.” (Panel Decision at 33 (quoting *Montgomery*, 136 S. Ct. at 734.)) The panel also found that federal sentencing courts have “discrete institutional strengths” to provide for individualized sentencing. (Panel Decision at 42 (quoting *Kimbrough v. United States*, 552 U.S. 85, 109 (2007))).

Imposing a penalty on a youthful offender with a demonstrated capacity for reform that denies any meaningful opportunity for release violates *Graham*. 560 U.S. at 75. Due to the salient characteristics of youth—the lack of maturity, evolving character, vulnerability and susceptibility to negative influences and external pressure—“juvenile offenders cannot with reliability be classified among the worst offenders.” *Id.* at 68 (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)). While *Graham* categorically barred a life without parole sentence for youth convicted of non-homicide crimes, the Court likewise barred life without parole sentences “for all but the rarest of juvenile offenders, *those whose crimes reflect permanent incorrigibility*,” in homicide cases. *Montgomery*, 136 S. Ct. at 734 (emphasis added). Any life sentence that fails to consider whether the sentenced individual demonstrates “irreparable corruption,” “permanent incorrigibility,” or “irretrievable depravity,” and does not afford a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation” is unconstitutional. *See id.* at 733-34; *Graham*, 560 U.S. at 75.

The Court’s sentencing decisions are rooted in scientific research regarding the behavioral attributes and characteristics of young offenders. “For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem

behavior that persist into adulthood.” *Roper*, 543 U.S. at 570 (alteration in original) (quoting Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Development Immaturity, Diminished Responsibility, and the Juveniles Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)). In a more recent study of over thirteen hundred juvenile offenders, “even among those individuals who were high-frequency offenders at the beginning of the study, the majority had stopped these behaviors by the time they were 25.” Laurence Steinberg, *Give Adolescents the Time and Skills to Mature, and Most Offenders Will Stop*. (2014) Chicago, IL: MacArthur Foundation, p. 3, available at <http://www.pathwaysstudy.pitt.edu/documents/MacArthur%20Brief%20Give%20Adolescents%20Time.pdf>.

Most juvenile offenders will cease to be a public safety risk once they reach their mid-twenties; the risk is even more remote later in life. Because most juveniles are likely to outgrow their criminal behavior as they mature into adults, sentences that fail to account for a youth’s likely maturation and rehabilitation are contrary to *Graham, Miller and Montgomery*. See also, *Research on Pathways to Desistance: December 2012 Update*, Models for Change, p. 4, available at <http://www.modelsforchange.net/publications/357> (finding that, of the more than 1,300 serious offenders studied for a period of seven years, only approximately 10% report continued high levels of antisocial acts. The study also found that “it is hard

to determine who will continue or escalate their antisocial acts and who will desist,” as “the original offense . . . has little relation to the path the youth follows over the next seven years”).

Federal juvenile sentences must reflect the scientific reality that incarceration past the period of maturation and rehabilitation ceases to serve any legitimate penological goal. *See Montgomery*, 136 S. Ct. at 734 (the penological justifications for life without parole collapse in light of “the distinctive attributes of youth” (citing *Miller*, 567 U.S. at 472)). A meaningful opportunity for release must mean more than release on a gurney² or so late in life that opportunities to meaningfully engage with their communities or reconcile with both their victims and society at large will be fleeting at best.

B. Age And The Possibility Of Fulfillment Outside Prison Walls, Not Life Expectancy, Determine Whether A Sentence Provides A Meaningful Opportunity For Release

Under the Eighth Amendment, the constitutionality of a sentence depends on the actual impact of the sentence upon the individual, not how a sentence is labeled. *See Sumner v. Shuman*, 483 U.S. 66, 83 (1987). A sentence that almost certainly dooms an individual to die in prison before the expiration of its term is a life without

² *Herman Wallace: ‘Angola Three’ Inmate Dies Days After Release from Solitary*, *The Guardian* (Oct. 4, 2013), at <https://www.theguardian.com/world/2013/oct/04/herman-wallace-angola-three-dies-solitary-confinement>.

parole sentence. Courts cannot circumvent the categorical ban on life without parole sentences for juveniles by imposing a lengthy term of years sentence that cannot realistically be fulfilled during the juvenile's lifetime. The panel itself recognized this, holding that "*Graham* applies to de facto LWOP sentences with the same force as it does to de jure ones." (Panel Decision at 25 (citing *Moore v. Biter*, 725 F.3d 1184, 1194 (9th Cir. 2013) ("[*De facto* LWOP] is irreconcilable with *Graham's* mandate that a juvenile nonhomicide offender must be provided 'some meaningful opportunity' to reenter society." (quoting *Graham*, 560 U.S. at 75))).

Although *Graham* found that individuals must be afforded release, release must also be *meaningful*: release late in life cannot satisfy this constitutional requirement. "The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. . . . Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Graham*, 560 U.S. at 79. *See also Miller*, 567 U.S. at 479. Basing the validity of a lengthy sentence on an individual's possible life expectancy fails to meaningfully account for *Graham's* requirements. General life expectancy data also fails to account for the physical and mental health toll incarceration takes on inmates and is likely to yield inequities based on race, gender, and economic status.

Life expectancy is lower for men, racial minorities, and the poor. People enter prison in poorer health than their counterparts in the

general population. While incarcerated, they experience relentless stress, exposure to infectious diseases, and the threat of violence. They have very little autonomy over their own diets, movement, exercise, and hobbies. They may spend long periods of time isolated in small spaces. Their contact with family and friends is limited and tightly controlled. Incarceration causes accelerated aging, and a significant proportion of prisoners in their forties and fifties have multiple chronic health conditions. Health care is provided, but it is limited by cost and often sporadic or delayed.

Adele Cummings and Stacie Nelson Colling, *There is No Meaningful Opportunity in Meaningless Data: Why it is Unconstitutional to use Life Expectancy Data in Post-Graham Sentences*, 18 U.C. Davis J. of Juv. L. & Pol’y 268, 288 (2014). See also, Beth Caldwell, *Creating Meaningful Opportunities for Release: Miller, Graham, and California’s Youth Offender Parole Hearings*, 40 NYU Rev. L. & Soc. Change 245, 281 (2016) (noting many courts have correctly interpreted the U.S. Supreme Court’s holding to conclude that “mere release from prison at *some* age is not necessarily meaningful”). These decisions find that parole eligibility in old age is not a “meaningful opportunity” as contemplated by *Graham* and focus instead on the ability of the individual to reenter society and live a fulfilling life outside prison walls.

While the elements of a fulfilled life may vary depending upon the lens through which one examines the question—experts and commentators in the fields of religion, philosophy, psychology and the humanities, for example, may describe a “fulfilled life” differently—fulfillment must include not only a reasonable, but also

a realistic opportunity to contribute to community, develop family relationships, pursue educational interests, demonstrate remorse and achieve reconciliation with one's past. It should allow individuals to lead lives reflective of their social, moral and spiritual values. Parenting, employment, serving others, and developing a sense of purpose are all aspects of living a "fulfilled" life. Experiencing these facets of life require more than a few years at the end of one's life; indeed some elements, like the chance to experience becoming a parent, are all but foreclosed to women released late in life. Ensuring that sentences imposed on juvenile offenders meet this requirement for fulfillment requires a qualitative as well as quantitative calculus.

Some courts have already grappled with this challenge and their analysis is instructive. In *State v. Null*, the Iowa Supreme Court recognized that though the evidence did not clearly establish that the defendant's prison term was beyond his life expectancy, it did "not believe the determination of whether the principles of *Miller* or *Graham* apply in a given case should turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates." *State v. Null*, 836 N.W.2d 41, 71-72 (Iowa 2013) (quoting *Graham*, 560 U.S. at 75). The California Supreme Court similarly struck a 50-year-to-life sentence where the defendant would be eligible for release at age 74, reasoning that the actuarial approach to determining what constitutes a *de facto* life without parole

sentence created a risk of gender and race discrimination. *People v. Contreras*, 411 P.3d 445, 446 (Cal. 2018). The court further found that

[a]n opportunity to obtain release does not seem “meaningful” or “realistic” within the meaning of *Graham* if the chance of living long enough to make use of that opportunity is roughly the same as a coin toss....[W]e do not believe the outer boundary of a lawful sentence can be fixed by a concept that *by definition* would not afford a realistic opportunity for release to a substantial fraction of juvenile offenders.

Id at 451 (internal citations omitted). *See also Casiano v. Comm’r of Corr.*, 115 A.3d 1031, 1047 (Conn. 2015) (citing *Graham*, 560 U.S. at 75 (“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”)); Brief of *Amicus Curiae*, Juvenile Sentencing Project at Quinnipiac Law School (providing further discussion of how states measure “meaningful opportunity for release”).

Moreover, although the Eighth Amendment does not bar the possibility that individuals convicted of crimes committed before adulthood will remain behind bars for life, it “does prohibit States from making the judgment at the *outset* that [juvenile nonhomicide] offenders never will be fit to reenter society.” *Graham*, 560 U.S. at 75 (emphasis added). Despite affirming Mr. Grant’s capacity to change, the 65-year sentence imposed below effectively reflects precisely that judgment. And while the panel held that “[a] sentence that preserves the juvenile offender’s opportunity to contribute productively to society inherently provides him or her with ‘hope’ to ‘reconcil[e] with society’ and achieve ‘fulfillment outside prison walls,’ (Panel

Decision at 37 (quoting *Graham*, 560 U.S. at 79)), release at age 72 converts this promise into a “cruel illusion.” Cummings and Colling, *supra*, at 291.

CONCLUSION

For the foregoing reasons, *Amicus Curiae*, Juvenile Law Center, respectfully requests that this Court proscribe the imposition of any sentence that fails to afford Mr. Grant a meaningful opportunity for release and for fulfillment outside the prison walls.

/s/ Marsha L. Levick

Marsha L. Levick, Esq.
1315 Walnut St., 4th Floor
Philadelphia, PA 19107
T: (215) 625-0551
F: (215) 625-2808
mlevick@jlc.org
PA Attorney No. 22535

Dated: December 24, 2018

COMBINED CERTIFICATIONS

1. Pursuant to Third Circuit Local Appellate Rule 28.3(d), I certify that the undersigned counsel is a member of the Bar of the United States Court of Appeals for the Third Circuit.
2. I further certify that this brief complies with the type and volume limitations, the brief is proportionally spaced, has a typeface of 14 points, and contains 2,446 words, excluding those parts exempted by Fed. R. App. P. 32, according to the word count feature of Microsoft Word.
3. I certify that the text of the electronic brief is identical to the text in the paper copies.
4. I also certify that a virus check was performed by Symantec endpoint Protection version NIS-20.4.0.40, and no virus was detected.

/s/ Marsha L. Levick
MARSHA L. LEVICK
Counsel for Amicus Curiae

DATED: December 24, 2018

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d), I hereby certify that on December 24, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

In addition, I hereby certify that on December 24, 2018, 25 paper copies of the foregoing brief have been hand delivered to the following:

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

/s/ Marsha L. Levick
MARSHA L. LEVICK

DATED: December 24, 2018