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 (3RD CIR. 2018)

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BRIEF OF *AMICI CURIAE*

Amici curiae respectfully submit this brief in support of defendant-appellant Corey Grant.

INTEREST OF THE *AMICI*

Amici are legal scholars whose scholarship and teaching focus on constitutional law and the Eighth Amendment in particular.

Jenny Carroll is the Wiggins, Childs, Quinn & Pantazis Professor of Law at the University of Alabama. **Alison Flaum** is a Clinical Associate Professor of Law at the Northwestern Pritzker School of Law and the Legal Director of the Bluhm Legal Clinic's Children and Family Justice Center. She is also the author of a number of works focusing on adult prosecution and sentencing of children. **Shobha L. Mahadev** is a Clinical Assistant Professor of Law at the Children and Family Justice Center (CFJC) at Northwestern Pritzker School of Law, where she represents children and adults in trial, on appeal and in postconviction proceedings, focusing on individuals whose offenses occurred in their youth. She also serves as the project director for the Illinois Coalition for the Fair Sentencing of Children, overseeing policy and litigation strategy with respect to advocating for fair sentencing laws for children. She has co-authored numerous *amicus* briefs, including in the United States Supreme Court in support of the petitioners in

Graham v. Florida, 560 U.S. 48 (2010), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case presents a fundamental question concerning the scope of the Eighth Amendment's mandate that only irreparably corrupt juveniles may be denied a meaningful opportunity to obtain release: what constitutes such an opportunity. *Miller v. Alabama*, 567 U.S. 460, 479-80 (2012); *Graham v. Florida*, 560 U.S. 48, 74 (2010). For purposes of the Eighth Amendment, the United States Supreme Court has consistently applied a methodology for assessing the scope of the Eighth Amendment's protections. Relevant here, courts determine whether objective indicia suggest societal abandonment of a punishment. The most important indicator of society's views is enacted legislation. However, other indicia are also relevant, including actual sentences imposed, global policy, and public opinion. Robert J. Smith, et al., *The Way The Court Gauges Consensus (And How To Do It Better)*, 35 Cardoza L. Rev. 2397, 2411-15 (2014).

Courts also assess whether a particular practice fulfills legitimate penological interests: retribution, deterrence, rehabilitation, and incapacitation. *Graham*, 560 U.S. at 70. The high Court has held that in light of the characteristics inherent to childhood, the interest in subjecting juveniles to our harshest punishments "collapse." *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016).

This observation, however, does not explain how to ensure juveniles are punished in accordance with the Eighth Amendment.

As with other areas of Eighth Amendment jurisprudence, careful consideration of legislative enactments is warranted. The legislative responses to *Miller* have been extensive[1] and are beyond the scope of this brief. However, examining those processes will serve the dual interests of avoiding judicial overreach into legislative concerns and of fairly protecting the rights of juveniles.

ARGUMENT

I. For the Eighth Amendment's Restriction on a State's Power to Punish to Have Meaning, Courts Must Delineate the Scope of That Protection.

States have the power to punish, but this power is not wholly unfettered. The Eighth Amendment acts as a failsafe to protect the "dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion). To determine "which punishments are so disproportionate as to be cruel and unusual," courts most commonly look to, "the evolving standards of decency that mark the progress of a maturing society." *Roper v. Simmons*, 543 U.S. 551, 561-62 (2005) (*citing Trop*, 356 U.S. at 100-01).

[1] Campaign for Fair Sentencing of Youth, *Tipping Point: A Majority of State Abandon Life-Without-Parole Sentences for Children* (Dec. 3, 2018); Amelia Hritz, et al., *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 Am. U. L. Rev. 535, 556 (2016) (noting that approximately three states per year have eliminated life without the possibility of parole as a potential punishment since *Miller*).

Courts have employed a consistent methodology to assess harshest punishments under law, namely the death penalty or sentencing a juvenile to die in prison. *Graham*, 560 U.S. at 58-59 (distinguishing *Harmelin v. Michigan*, 501 U.S. 957 (1990)). A punishment is prohibited if it falls under one of two categories, "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted," *Ford v. Wainwright*, 477 U.S. 399, 405 (1986), and modes of punishment that are inconsistent with modern "'standards of decency.'" *Atkins v. Virginia*, 536 U.S. 304, 339-40 (2002). Courts have not been "confined by the prohibition embodied in the Eighth Amendment to 'barbarous' methods that were generally outlawed in the 18th century," but instead the courts have "interpreted the Amendment 'in a flexible and dynamic manner.'" *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989) (plurality opinion) (citing *Gregg v. Georgia*, 428 U.S. 153, 171 (1976)).

To do so, courts first assess objective indicia about whether a punishment is within these bounds. The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry* v. *Lynaugh,* 492 U.S. 302, 330 (1989). When considering whether a punishment is permitted, "[i]t is not so much the number of . . . State [legislatures permitting or prohibiting a punishment] that is significant, but the consistency and direction of change." *Atkins*, 536 U.S. at 315. In reviewing

legislative enactments, the courts generally count states forbidding a punishment altogether as being among those expressing disapproval for a narrower prohibition. *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 426 (2008) (counting "noncapital jurisdictions" as among those who disapprove of executing those who have not committed murder). Courts also review actual sentencing practices, as well as a handful of other evidence to assess whether society has explicitly or implicitly rejected a punishment. Smith, *The Way The Court Gauges Consensus*, 35 Cardoza L. Rev. at 2411-15.

Although objective evidence is a critical factor in a court's analysis of evolving standards of decency it is not the only determining factor, "for the Constitution contemplates that in the end [the Court's] judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Atkins*, 536 U.S. at 312 (citing *Coker v. Georgia*, 433 U.S. 584, 597 (1977)). Courts are ultimately able to decide these Eighth Amendment questions "by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislatures." *Atkins*, 536 U.S. at 313. The first step a court must undertake is to "review the judgment of legislatures that have addressed the suitability of imposing [the sentence in question] and then consider reason for agreeing or disagreeing with their judgment." *Id*. This suggests that even if there is a clear consensus reached by the citizenry and legislatures that the Court is still

able to draw a line and find that the punishment in question violates the Eighth Amendment.

Assessing these criteria, courts have given meaning to the substantive Eighth Amendment protections[2] by excluding categories of offenders or offenses from particular punishments. Making these exclusions from punishment necessarily entails difficult line drawing and announcing new substantive rules to "narrow the scope of a criminal statute by interpreting its terms [in accordance with the principle of constitutional avoidance] . . . as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004). Ultimately, it must be for the courts to provide the outward constitutional limits. This is so even if implementation of a limit is initially left to the other branches of government. *See Roper*, 543 U.S. at 593 (noting that the Court in excluding the intellectually disabled from punishment, in the first instance "le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution sentences.") (quoting *Ford*, 477 U.S. at 416-17). However,

[2] This brief does not address the procedural protections required to meet the Eighth Amendment's demand that punishment not be inflicted arbitrarily. *Gregg*, 428 U.S. at 188 (discussing *Furman v. Georgia*, 408 U.S. 238, 313 (1972)). However, recent cases suggest courts should engage a similar process as that advocated here for assessing what may be characterized as procedural protections the Eighth Amendment must provide. *See e.g. Moore v. Texas*, 137 S. Ct. 1039, 1052 (2017); *Hall v. Florida*, 134 S. Ct. 1986, 1999-2000 (2014).

when the other branches of government are unable or unwilling to implement Eighth Amendment protections, the courts do not hesitate to ensure enforcement of constitutional norms. *See e.g., Moore*, 137 S. Ct. at 1044 ("As we instructed in *Hall*, adjudications of intellectual disability should be 'informed by the views of medical experts'"); *Hall*, 134 S. Ct. at 1999 ("If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity and the Eighth Amendment's protection of human dignity would not become a reality.").

When the courts make exclusions from punishment, they necessarily infringe upon the government's power to punish. Assessing objective indicia of societal consensus on a punishment provides a barometer against which the court can limit itself to avoid inappropriate interference with state priorities. However, for the promises of the Eighth Amendment to have meaning, the courts must be willing to enforce them, particularly where other branches of the government are unable or unwilling to do so.

II. Legislative Enactments Guide Courts in Delineating the Scope of Eighth Amendment Protections.

Defining the outward limits of acceptable punishment have long been part and parcel with the judicial function. As early as 1890 the Supreme Court held that it was cruel and unusual for an individual to have to wait between two and four weeks to be executed, recognizing the "immense mental anxiety amounting to a

great increase of the offender's punishment." *See In re Medley*, 134 U.S. 160, 172 (1890). Over time courts have further defined the contours of the Eighth Amendment's limitations on the power to punish.

The death penalty is an area where the courts have most frequently defined the Eighth Amendment's limits. Over time the Eighth Amendment via the evolving standards of decency has limited execution of the insane, *Ford*, 477 U.S. at 401, the intellectually disabled[3], *Atkins*, 536 U.S. at 321, and juveniles. *Roper*, 543 U.S. at 575. These changes however occurred incrementally as the courts responded to shifting attitudes on punishment, as reflected in the policies expressed in the laws across the country.

For example, the Court in 1989 held that intellectual disability was not a bar to execution and, instead, was only a mitigating circumstance to be considered among others to determine whether death was the appropriate punishment. *See Penry*, 492 U.S. at 340. After that decision, seventeen states adopted legislation excluding the intellectually disabled from execution. *See Atkins*, 536 U.S. at 314-15. The Supreme Court placed great weight on this legislative activity in concluding that the intellectually disabled are exempt from execution: "the large number of States prohibiting the execution of mentally retarded persons (and the

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[3] Intellectually disabled has been used here as a substitute for "mentally retarded" which was the vernacular used by the Supreme Court when the *Atkins* decision was handed down but has since been replaced. *Brumfield v. Cain*, 135 S. Ct. 2269, 2274 n.1 (2015) (noting change in nomenclature).

complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal." *Id.* at 315-16.

Similarly, the high Court's limitations on executing persons not convicted of murder reflects a reliance on legislative enactments. In 2008, the Court relied heavily on legislative enactments when definitively holding that only those convicted of murder may be executed. *Kennedy*, 554 U.S. at 412. The Court recounted at some length the historical legislative abandonment of capital punishment for those who have not killed. *Id.* at 422-26 ("Though our review of national consensus is not confined to tallying the number of States with applicable death penalty legislation, it is of significance that, in 45 jurisdictions, petitioner could not be executed for child rape of any kind.").

Each Eighth Amendment protection involves difficult questions about the scope of Eighth Amendment protections. And the high Court has noted that there are "always objections raised against categorical rules" based on the lines that must be drawn. But the high Court's jurisprudence both demonstrates that ultimately courts are responsible for ensuring defendant's receive those protections and provides a clear methodology for assessing the bounds of acceptable punishments.

This case presents a "difficult challenge:" the Court must determine what constitutes a "meaningful opportunity to obtain release." *United States v. Grant*, 887 F.3d 131, 135 (3d Cir. 2018). As the Court takes on that challenge, *Amici* urge it to rely upon the collective wisdom of the country's legislatures. Placing great weight on the legislative attempts to fulfill the promise of *Miller* and *Graham* will place the Court squarely within the Supreme Court's jurisprudence and society's consensus on the appropriate limit on punishments for juveniles.

CONCLUSION

Amici urge the Court to give particular heed to legislative responses to *Graham* and *Miller* in assessing the proper remedy for the constitutional violation here.

Respectfully submitted,

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December 28, 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 typeface of 14 points, and contains 2,220 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 paper copies.
4. I certify that a virus check was performed by Kapersky Virus Desk's version current as of December 27, 2018, and no virus was detected.

/s/Jennifer Merrigan
Counsel for *Amici Curiae*

DATED: December 28, 2018

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d), I hereby certify that on December 28, 2018, I electronically filed the foregoing with the Clerk of the Court of 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 28, 2018, 25 copies of the foregoing brief was mailed via US priority mail to the following:

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