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IN THE SUPREME COURT OF ARIZONA

STATE OF ARIZONA,)	Supreme Court No. CR-18-0583-PR
)	
Respondent,)	Court of Appeals No. 2-CA-CR 18-
vs.)	0062
)	
ROGER SCOTT HELM,)	Maricopa County Superior Court
)	No. CR142751
Petitioner.)	
_____)	

**BRIEF OF *AMICI CURIAE* JUVENILE LAW CENTER AND
PHILLIPS BLACK, INC.**

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INTEREST OF THE *AMICI*

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.

Phillips Black, Inc. attorneys have extensive familiarity and experience with the administration of the harshest penalties under law and the imposition of life without parole upon juveniles in particular. Phillips Black consists of independent practitioners collectively dedicated to providing the highest quality of legal representation to prisoners in the United States sentenced to the severest penalties under law. Phillips Black further contributes to the rule of law by consulting with counsel, conducting clinical training, and developing research on the administration of criminal justice.

Phillips Black has conducted leading research on the administration of juvenile life without parole sentences and has served as counsel for *amici*

and inmates serving such sentences in the state and federal courts across the United States.

ARGUMENT

This appeal presents the important question that has divided 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 the most serious offenses—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 give meaning and effect to this ruling.

The Court’s further observation that “[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 life 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.

Mr. Helm’s consecutive sentences of life with the possibility of parole after 25 years, twenty-one years, and twenty one years (totaling 67 years) means he will be 81 years old when his sentences expire. Regardless of how his sentence is labeled, Mr. Helm has effectively been sentenced to spend the rest of his life in prison.

A. All But the Rare Irreparably Corrupt Juvenile Offender Must Be Afforded a Meaningful Opportunity to Obtain Release

Children who are found to have the capacity for change—who are not permanently incorrigible—must be treated differently from those who are not, regardless of the severity of their offense or offenses. Justice Sotomayor has underscored this mandate, originally announced in *Miller* and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) , 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. *Montgomery*, 136 S. Ct. at 734. Sentencing courts have “discrete institutional strengths” to provide for individualized sentencing. *Kimbrough v. United States*, 552 U.S. 85, 109 (2007).

Imposing a penalty on a youthful offender without assessing whether they have a demonstrated capacity for reform that denies any meaningful opportunity for release violates *Graham*. 560 U.S. at 75. In light of 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 murder 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; *see also 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* p. 3 (2014).

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, Models for Change*, p. 4 (Dec. 2012 Update) (finding that, of the more than 1,300 serious offenders studied for a period of seven years, only approximately 10% continued high levels of antisocial acts). The recent, comprehensive 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.” *Id.* 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 gurney 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 the Sentence’s Form or Label, 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 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. Some of the federal circuits, including the Ninth Circuit have recognized this, holding that *de facto* LWOP sentences implicate the same Eighth Amendment concerns as *de jure* ones. *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* held that individuals must be afforded release, it further explained that release must 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 "mere release from prison at some age is not necessarily

meaningful”). These decisions establish 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—there is consensus that 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, providing

useful guidance for this Court. 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.” 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:

An opportunity to obtain release is not ‘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’’)).

Moreover, although the Eighth Amendment does not bar the possibility that individuals convicted of crimes committed before adulthood will remain behind bars for life for a murder , 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). The promise of *Graham*, is for a sentence that holds out “hope” for the juvenile offender to contribute productively to and “reconcile with society” as well as achieve “fulfilment outside prison walls.” *Graham*, 560 U.S. at 79. Release at age 81 converts this promise into a “cruel illusion.” *Cummings and Colling, supra*, at 291.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant review.

RESPECTFULLY SUBMITTED this 4th day of March, 2019.

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