

NO. E2018-01439-SC-R11-CD

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE,
Plaintiff/Appellee,

v.

TYSHON BOOKER,
Defendant/Appellant.

On Appeal from Knox County Criminal Court
No. CC- E2018-01439-CCA-R3-CD

AMICUS BRIEF OF RAPHAH INSTITUTE IN SUPPORT OF
APPELLANT TYSHON BOOKER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	3
INTEREST OF AMICUS CURIAE.....	7
ARGUMENT	8
I. Restorative Justice Promotes Healing In Victims And Effectuates Positive Change In Juvenile Offenders.	8
A. Restorative Justice Is A Proven, Comprehensive Response To Juvenile Crime.	9
B. Tennessee Has Successfully Employed Restorative- Justice Measures As A Response To Juvenile Crime.....	15
II. Tennessee’s 51-Year Mandatory-Minimum Sentence Prevents Stakeholders From Taking Part In Restorative- Justice Programs.....	18
CONCLUSION	22
CERTIFICATE OF COMPLIANCE	23
CERTIFICATE OF SERVICE.....	24

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Commonwealth v. Okoro</i> , 26 N.E.3d 1092 (Mass. 2015)	19
<i>Graham v. Florida</i> , 560 U.S. 48 (2010)	11, 18
<i>Miller v. Alabama</i> , 567 U.S. 460 (2012)	10, 11, 18, 19
<i>Montgomery v. Louisiana</i> , 136 S. Ct. 718 (2016)	19
<i>Naovarath v. State</i> , 779 P.2d 944 (Nev. 1989)	19
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005)	10, 11
Statutes	
Tenn. Code Ann. § 40-28-101	20, 21
Other Authorities	
<i>2019-20 Annual Report</i> , State of Tennessee Board of Parole (2020), https://www.tn.gov/content/dam/tn/boardofparole/1920%20FINAL%20Annual%20Report%20093020.pdf	21
Alan Waterman, <i>Identity Development from Adolescence to Adulthood</i> , 18 <i>Developmental Psychol.</i> 341 (1982)	10
<i>Ashlee</i> , JUVENILE, https://www.juvenilefilm.com/stories/ashlee	17

Can Restorative Justice Help Offenders Reintegrate Into Society?, PBS (July 22, 2016, 11:49 AM), <https://www.pbs.org/newshour/nation/can-restorative-justice-help-offenders-reintegrate-society>..... 14

Common Justice Model, https://www.commonjustice.org/common_justice_model 12

Corinne David-Ferdon et al., *A Comprehensive Technical Package for the Prevention of Youth Violence and Associated Risk Behaviors*, Centers for Disease Control and Prevention, 35 (2016), <https://www.cdc.gov/violenceprevention/pdf/yv-technicalpackage.pdf>..... 15, 16

Edward Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 *Developmental Psychol.* 453 (2010)..... 10

Face-To-Face Restorative Justice Conferences Are Cost-Effective in Reducing Reoffending and Increasing Victim Satisfaction, The Campbell Collaboration (2017), https://campbellcollaboration.org/media/k2/attachments/0145_CJCG_Strang_Restorative_justice_PLS_EN.pdf 12, 16

Francis Allen, *The Decline of the Rehabilitative Ideal in American Criminal Justice*, 27 *Clev. St. L. Rev.* 147 (1978)..... 20

Give Adolescents the Time and Skills to Mature, and Most Offenders Will Stop, Resource Center Partnership (2014), <https://www.pathwaysstudy.pitt.edu/documents/MacArthur%20Brief%20Give%20Adolescents%20Time.pdf> 11

Gordon Bazemore and Mark Umbreit, *A Comparison of Four Restorative Conferencing Models*, Office of Juvenile Justice and Delinquency Prevention (Feb. 2001), <https://www.ncjrs.gov/pdffiles1/ojjdp/184738.pdf> 9

Heather Strang et al., *Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction*, Campbell Systematic Review (2013), <https://restorativejustice.org.uk/sites/default/files/resources/files/Campbell%20RJ%20review.pdf>..... 20

Ian Edwards, *An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making*, 44 Brit. J. of Criminology 967 (2004)..... 14

Insight Prison Project, [http:// www.insightprisonproject.org/](http://www.insightprisonproject.org/)..... 13

Jeff Latimer et al., *The Effectiveness of Restorative Justice Practices: A Meta-Analysis*, 85 Prison Journal 127 (June 2005), https://www.d.umn.edu/~jmaahs/Correctional%20Assessment/rj_meta%20analysis.pdf 15

Jennifer N. Shaffer and R. Barry Ruback, *Violent Victimization as a Risk Factor for Violent Offending Among Juveniles*, Office of Juvenile Justice and Delinquency Prevention (2002), <https://www.ncjrs.gov/pdffiles1/ojjdp/195737.pdf>..... 14

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Martha Henderson Hurley, *Restorative Practices in Institutional Settings and at Release: Victim Wrap Around Programs*, 73 Federal Probation 16 (2009), [https://www.uscourts.gov/sites/default/files/ 73_1_3_0.pdf](https://www.uscourts.gov/sites/default/files/73_1_3_0.pdf)..... 12

Pathways to Desistance, <https://www.pathwaysstudy.pitt.edu/> 11

Proven Results, MST Services, <https://www.mstservices.com/proven-results> 16

Raphah Institute, <https://raphah.org/> 7

Restorative Justice: The Evidence, The Smith Institute (2007), <http://restorativejustice.org/10fulltext/restorative-justice-the-evidence>..... 11

Sujatha Baliga et al., *Restorative Community Conferencing: A Study of Community Works West’s Restorative Justice Youth Diversion Program in Alameda County*, Impact Justice, 17 (2017), https://impactjustice.org/wp-content/uploads/CWW_RJreport.pdf..... 12

Thomas P. Bonczar, *Characteristics of State Parole Supervising Agencies*, U.S. Dept. of Justice, 5 (2008), <https://www.bjs.gov/content/pub/pdf/cspsa06.pdf>..... 21

Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 Soc. Just. Res. 313 (2002) 14

INTEREST OF AMICUS CURIAE

Amicus curiae Raphah Institute is a Nashville-based non-profit organization dedicated to restorative justice. Restorative justice is a comprehensive, victim-centered criminal-justice approach that focuses on repairing the harm caused by crime. Restorative-justice programs have been adopted all over the country, including in Tennessee, and have proven highly effective in addressing victim needs, facilitating juvenile-offender rehabilitation, and lowering the juvenile-recidivism rate.

Amicus operates a restorative justice diversion (“RJD”) pilot program in Davidson County. Founded in 2017, the RJD program is the result of a partnership between Juvenile Court Judge Sheila Calloway; District Attorney General Glenn Funk; Public Defender Martesha Johnson; and then-Police Chief Steve Anderson. The RJD program facilitates voluntary conferences between the persons harmed by crime and the young person responsible for that harm, thus helping both parties. See Raphah Institute, <https://raphah.org/> (last visited Nov. 18, 2020). Thus far, the RJD program has helped over 150 people involved with and affected by juvenile crime.

To be sure, amicus firmly believes that juvenile offenders must be held accountable for their actions. And restorative justice should not be used in every case, particularly where either the victims or the defendant do not want to participate. But in amicus’s experience, restorative justice can be an important and highly effective tool for facilitating accountability and personal transformation where all stakeholders are committed to the process.

Unfortunately, Tennessee’s mandatory 51-year minimum sentence for juvenile offenders often precludes the effective use of restorative justice. Victims are left with the impression that a lengthy, punitive sentence is their only option. Additionally, juveniles—who have a heightened capacity for reform and rehabilitation compared to adults—cannot pursue and exhibit the self-growth and transformation that occurs during restorative-justice programming when they have no opportunity for parole for 51 years.

Amicus submits this brief to provide the Court with a summary of restorative justice and its actual and potential benefits for the juvenile-justice system in Tennessee. Amicus witnesses daily the power of restorative justice to address victim needs and facilitate juvenile-offender rehabilitation. Amicus encourages this Court to invalidate Tennessee’s 51-year mandatory-minimum sentence for juvenile offenders because it precludes substantial and meaningful restorative-justice opportunities for victims of crime and rehabilitation for young offenders uniquely capable of reform and transformation.

ARGUMENT

I. Restorative Justice Promotes Healing In Victims And Effectuates Positive Change In Juvenile Offenders.

Restorative-justice programs are used throughout the country, including in Tennessee, to promote healing and help rehabilitate juvenile offenders. As explained below, restorative-justice programs produce well-documented benefits for victims, offenders, and the criminal-justice system generally.

A. Restorative Justice Is A Proven, Comprehensive Response To Juvenile Crime.

Restorative justice is a community-based response to crime, which explores the explanations for the harmful act, identifies the needs of and obligations to the persons harmed by the act, and allows the responsible person to take active accountability for the act. Restorative justice is both victim-centered and non-punitive—it recognizes that juvenile offenders must be held accountable for the harm they caused but does so by means other than inflicting additional suffering. Moreover, restorative justice can work at different points. It is sometimes used as an alternative to the traditional retributive criminal-justice process, but it can also be utilized while an individual is incarcerated or even after an incarcerated individual is awarded parole or otherwise released.

The specific steps of a restorative-justice response will vary depending on the type and severity of the crime and the parties' needs. Nonetheless, most restorative-justice processes, including Raphah's RJD program, follow a model centered around encounters or conferences between the parties. *See* Gordon Bazemore and Mark Umbreit, *A Comparison of Four Restorative Conferencing Models*, Office of Juvenile Justice and Delinquency Prevention (Feb. 2001), <https://www.ncjrs.gov/pdffiles1/ojjdp/184738.pdf> (describing different restorative-justice conferencing methods including victim-offender mediation, community-reparative boards, family-group conferencing, and circle sentencing).

Restorative justice's flexibility is one reason why it works particularly well for juvenile offenders, who are significantly more receptive to change than adults. As the United States Supreme Court

has recognized, a child's character and traits are not as "well formed" or "fixed" as an adult's. *Miller v. Alabama*, 567 U.S. 460, 471 (2012). Distinctive attributes of youth like immaturity and impulsiveness subside as a juvenile ages, with identity formation "extensive[ly] advanc[ing]" through at least the early twenties. Alan Waterman, *Identity Development from Adolescence to Adulthood*, 18 *Developmental Psychol.* 341, 355 (1982).

This natural maturation process is the same for violent juvenile offenders as it is for those juveniles who committed less serious harms—the degree of the harm caused does not change the offender's fundamental characteristics. That one committed a violent crime as a juvenile does not automatically mean the juvenile is of "irretrievably depraved character." *Roper v. Simmons*, 543 U.S. 551, 570 (2005). Indeed, juvenile crime often "reflects unfortunate yet transient immaturity" relating to "the signature qualities of youth." *Id.* at 570, 573. It is "the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 573.

Studies have shown that even within samples of juvenile offenders convicted of the most serious crimes, those who consistently continue to offend is a very small minority, with such behavior largely desisting with age. See Edward Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 *Developmental Psychol.* 453, 468–470 (2010) (finding an 8.7% "persister" rate out of a large sample of serious adolescent offenders). Emotional maturation and internal development

best predict lawful, productive behavior among juveniles who committed violent crimes. *See Give Adolescents the Time and Skills to Mature, and Most Offenders Will Stop*, Resource Center Partnership (2014), <https://www.pathwaysstudy.pitt.edu/documents/MacArthur%20Brief%20Give%20Adolescents%20Time.pdf>.

Pathways to Desistance, the largest longitudinal study of serious juvenile crime, followed 1,354 serious juvenile offenders for seven years after becoming involved in the criminal-justice system. *See Pathways to Desistance*, <https://www.pathwaysstudy.pitt.edu/> (last visited Nov. 18, 2020). Of those juveniles studied, 91.5% committed less or limited illegal activity during the three years following their court involvement. *Id.* These findings align with the United States Supreme Court’s repeated recognition that juvenile offenders are categorically different, both because their antisocial behavior naturally “cease[s] with maturity” and because of their receptiveness for rehabilitation. *Miller*, 567 U.S. at 472; *Roper*, 543 U.S. at 570.

The multitude of research on juvenile development supports the notion that juvenile offenders, even those who have committed violent crimes, have a demonstrated capacity for change. Indeed, “[m]aturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation.” *Graham v. Florida*, 560 U.S. 48, 79 (2010).

Restorative-justice programs bolster this change and maturation process. *See* Lawrence W. Sherman & Heather Strang, *Restorative Justice: The Evidence*, The Smith Institute (2007), <http://restorativejustice.org/10fulltext/restorative-justice-the-evidence>.

In fact, research indicates that restorative justice can even be a more effective response to violent crime than lesser offenses such as property crime, despite a common misconception otherwise. *See Face-To-Face Restorative Justice Conferences Are Cost-Effective in Reducing Reoffending and Increasing Victim Satisfaction*, The Campbell Collaboration (2017), https://campbellcollaboration.org/media/k2/attachments/0145_CJCG_Strang_Restorative_justice_PLS_EN.pdf.

Jurisdictions nationwide recognize restorative justice as an effective tool to respond to violent crime committed by juveniles and young adults. For example, in Kings County, New York, an organization called Common Justice facilitates an RJD program for young men aged eighteen to twenty-six who have committed serious violent crimes. It reports a recidivism rate in the low single digits and a high victim satisfaction rate. *See Common Justice Model*, https://www.commonjustice.org/common_justice_model (last visited Nov. 18, 2020). Likewise, San Francisco's Community Works West organization facilitates a similar juvenile felony RJD program, reporting a 5% recidivism rate in its first twelve months. *See Sujatha Baliga et al., Restorative Community Conferencing: A Study of Community Works West's Restorative Justice Youth Diversion Program in Alameda County*, Impact Justice, 17 (2017), https://impactjustice.org/wp-content/uploads/CWW_RJreport.pdf.

Research also shows that restorative-justice programs within correctional institutions can be more impactful for the well-being and development of long-term inmates than short-term inmates. *See Martha*

Henderson Hurley, *Restorative Practices in Institutional Settings and at Release: Victim Wrap Around Programs*, 73 Federal Probation 16, 18 (2009), https://www.uscourts.gov/sites/default/files/73_1_3_0.pdf. Insight Prison Project, which operates a Victim/Offender Education Group in over 20 state prisons and one juvenile institution, is but one example of successful restorative programming occurring in the institutional setting for long-term inmates. See Insight Prison Project, <http://www.insightprisonproject.org/> (last visited Nov. 18, 2020).

No matter the program's context or formality, restorative justice is, at its core, a victim-focused response to crime. To be sure, some victims of crime understandably seek lengthy prison sentences for their offenders and have no interest in participating in any restorative-justice program. In those situations, restorative justice has no meaningful role. But some victims have different needs. And to address those needs, the restorative-justice process provides opportunities for healing and rehabilitation that the traditional criminal-justice system cannot offer.

In one study asking crime victims why they took part in restorative-justice programs, 63% of respondents said the ability to “have a say” was the most important factor guiding their decision. See Kyle Richard Haney, *Increasing Victim Satisfaction with Traditional Criminal Justice Systems: Lessons Learned from Restorative Justice* (June 2016), https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/20457/Haney_oregon_0171N_11539.pdf;jsessionid=35EE72C9DF6F37B32F5070BF68144039?sequence=1. In the restorative-justice context, victims can ask the person who committed the harm questions that they are not able

to pose in court. See *Can Restorative Justice Help Offenders Reintegrate Into Society?*, PBS (July 22, 2016, 11:49 AM), <https://www.pbs.org/newshour/nation/can-restorative-justice-help-offenders-reintegrate-society>. Although the traditional criminal-justice process often relegates victims to “information providers,” restorative justice provides the victims with a voice, an outlet to be heard, and an opportunity to understand. See Ian Edwards, *An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making*, 44 *Brit. J. of Criminology* 967, 978 (2004) (noting that as an “information-provider” the victim’s usefulness is determined completely by other people).

Moreover, restorative justice often helps victims avoid so-called “secondary victimization”—*i.e.*, post-offense harms resulting from being a part of the criminal-justice system. Research shows that approximately 67% of victims experience secondary victimization from interaction with the traditional criminal-justice system. See Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 *Soc. Just. Res.* 313, 319 (2002). When their primary or secondary victimization goes unaddressed or is inadequately addressed, many people harmed by violence frequently go on to cause harm themselves. See Jennifer N. Shaffer and R. Barry Ruback, *Violent Victimization as a Risk Factor for Violent Offending Among Juveniles*, Office of Juvenile Justice and Delinquency Prevention (2002), <https://www.ncjrs.gov/pdffiles1/ojjdp/195737.pdf>. Restorative justice places the victim at the forefront, minimizing the harmful impact of victimization. As such, those affected by crime who participate in restorative-justice processes have an

overwhelmingly high satisfaction rate with the process. See Jeff Latimer et al., *The Effectiveness of Restorative Justice Practices: A Meta-Analysis*, 85 Prison Journal 127, 136 (June 2005), https://www.d.umn.edu/~jmaahs/Correctional%20Assessment/rj_meta%20analysis.pdf.

B. Tennessee Has Successfully Employed Restorative-Justice Measures As A Response To Juvenile Crime.

Meaningful restorative-justice work is currently being done in Tennessee through Raphah’s RJD pilot program. The RJD pilot program works with cases diverted to it from juvenile court and utilizes a community-conferencing process in which all parties voluntarily work with a trained restorative-justice facilitator. The facilitator works separately with the parties in preparation for the conference, focusing on each party’s unique needs. During the conference, the victim(s) express the ways in which the crime affected them and the needs they have as a result. The responsible person accepts responsibility for the act as well as the harmful effects that it had on the victims, and to the best of their ability, answers the victims’ questions. The parties create an accountability plan, under which the responsible person repairs, to the extent possible, the harm they caused.

Raphah has furthered its restorative-justice efforts by introducing multisystemic therapy (“MST”) into its programming. MST is an intensive multi-component program for high-risk young people who are involved in the justice system or are at risk of involvement. Studies have repeatedly demonstrated that MST intervention produces long-term reductions in criminal behavior and positive self-growth. See Corinne

David-Ferdon et al., *A Comprehensive Technical Package for the Prevention of Youth Violence and Associated Risk Behaviors*, Centers for Disease Control and Prevention, 35 (2016), <https://www.cdc.gov/violenceprevention/pdf/yv-technicalpackage.pdf>. Moreover, research indicates that MST is at its peak effectiveness when used with more serious offenders (e.g., those with a history of both person and property offenses). *See id.* Not only does MST work to promote change in juvenile offenders—it is cost effective, with up to a \$23.59 return on investment for every dollar spent. *See Proven Results*, MST Services, <https://www.mstservices.com/proven-results> (last visited Nov. 18, 2020). Together, restorative-justice conferencing and MST provide well-rounded support to facilitate internal development and self-transformation.

The restorative-justice work that Raphah is doing in Tennessee has tangible results. Impressively, not a single young person who has completed the RJD program has become re-involved with the court system. Additionally, Raphah’s work is helping victims, over 90% of whom report their satisfaction with the RJD process. Such results reflect the findings of the most rigorous meta-analysis of restorative-justice programs to date, which concluded that restorative-justice programs cost-effectively reduce recidivism and increase victim satisfaction. *See Face-To-Face Restorative Justice Conferences Are Cost-Effective in Reducing Reoffending and Increasing Victim Satisfaction*, *supra* at 9.

Raphah is currently in the process of expanding its programming to include other serious, violent offenses. Additionally, while RJD

programs have not yet been used in conjunction with punitive sentences in Tennessee, the promising results of Raphah’s pilot program and the flexibility of restorative justice suggest that such a program would yield positive results for both juveniles and victims. Amicus is confident that a more comprehensive restorative-justice program for juvenile offenders who have committed serious crimes would be even more impactful.

The life story of Raphah’s own RJD Program Coordinator, Ashlee Sellars, is compelling proof that restorative justice can be used in Tennessee to promote transformational change in juveniles who have committed serious crimes. In 1995, Ms. Sellars was convicted of felony murder in Knox County—just as Tyshon Booker. At sentencing, Ms. Sellars went through an informal restorative-justice conference with the victim’s parents. This conference not only spurred transformative change in Ms. Sellars, it also promoted healing and restoration for the victims of her crime. The victim’s parents previously sought the harshest punishment available for Ms. Sellars. The restorative-justice process, however, personalized both Ms. Sellars and her victims, giving both parties a new perspective and a newfound appreciation for the other as a human being. Today, Ms. Sellars considers her restorative-justice conference a pivotal moment in her process of transformation. *See Ashlee*, JUVENILE, <https://www.juvenilefilm.com/stories/ashlee> (last visited Nov. 18, 2020).

II. Tennessee’s 51-Year Mandatory-Minimum Sentence Prevents Stakeholders From Taking Part In Restorative-Justice Programs.

Like a life sentence without parole, Tennessee’s 51-year mandatory-minimum sentence for juveniles significantly thwarts the potential for restorative justice, “disregard[ing] the possibility of rehabilitation even when the circumstances most suggest it.” *Miller*, 567 U.S. at 478.

Victims of violent crime are frequently misguided by the lengthy sentences automatically imposed on juveniles, often believing that punitive measures are the only recourse available. Moreover, juveniles are disincentivized to take personal accountability for their actions and their impact because they face no meaningful opportunity for rehabilitation and release. Indeed, a 51-year sentence without the possibility parole is a “denial of hope” that largely forecloses any meaningful chance for rehabilitation. *Graham*, 560 U.S. at 69–70. Such sentences give “no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.” *Id.* at 79. They send the blatant message that society has deemed that individual to be unworthy and beyond the reaches of redemption.

Tennessee’s 51-year mandatory minimum forecloses meaningful opportunities for restorative justice. It largely prohibits trial judges from considering the transformative possibilities of restorative justice at the sentencing phase. Judges’ hands are inescapably tied—they have no choice but to impose a 51-year sentence, without the ability to “take[]

account of an offender's age and the wealth of characteristics and circumstances attendant to it.” *Miller*, 567 U.S. at 476.

Although restorative-justice principles and the possibility of rehabilitation are sometimes considered in juvenile court before transfer, the fact that such discretion is afforded to juvenile court judges does not mean that it is acceptable for trial court judges to be stripped of any discretion. At the time a juvenile court judge initially makes this transfer determination, it is almost always impossible to accurately conclude that a juvenile is incapable of change. *See Naovarath v. State*, 779 P.2d 944, 948 (Nev. 1989) (“It does not seem to us . . . that the trial judge had enough information to make the predictive judgment that this particular thirteen-year-old boy should never again see the light of freedom.”). Sentencing judges have no discretion to consider whether restorative justice could help rehabilitate a juvenile over a more meaningful period of time.

Invalidating Tennessee’s 51-year mandatory minimum would likely result in the opportunity for parole for juvenile offenders, thus opening the door to restorative justice. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016) (“A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.”). If juvenile offenders were eligible for parole, restorative-justice resources, such as Raphah Institute, could play a more active role in rehabilitation while the juvenile is incarcerated and awaiting his parole hearing. *See, e.g., Commonwealth v. Okoro*, 26 N.E.3d 1092, 1098 (Mass. 2015) (recognizing that parole eligibility would

allow juvenile offenders a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation”).

For those offenses where parole is available, Tennessee has a parole board that is statutorily afforded discretion to consider the “individual characteristics, circumstances, needs and potentialities” of the person before them. Tenn. Code Ann. § 40-28-101. But parole-board discretion is of limited value where a sentence does not incorporate one of the best tools to foster potential and positive self-transformation—restorative justice. See Heather Strang et al., *Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction*, Campbell Systematic Review (2013), <https://restorativejustice.org.uk/sites/default/files/resources/files/Campbell%20RJ%20review.pdf>.

Restorative justice considers the characteristics, circumstances, and needs, including past trauma, of the person causing the harm and victim of the harm, and fosters the potentialities that parole boards are directed to consider. In contrast, lengthy prison sentences alone are not designed to foster the type of self-growth and potential that parole boards consider—they are designed to punish. In fact, scholars have for decades commented on and critiqued the decline of the rehabilitative ideal in prisons. See Francis Allen, *The Decline of the Rehabilitative Ideal in American Criminal Justice*, 27 Clev. St. L. Rev. 147, 148 (1978).

Once there has been a meaningful opportunity for restoration of offenders through restorative-justice measures, members of society, through the parole hearing, could then assess whether the juvenile should remain in prison for a wrong committed during adolescence. Such

an opportunity would, of course, involve significant checks inherent in the parole process to protect the public. *See generally 2019-20 Annual Report, State of Tennessee Board of Parole (2020), <https://www.tn.gov/content/dam/tn/boardofparole/19-20%20FINAL%20Annual%20Report%20093020.pdf>*. That an individual went through restorative-justice programming and experienced self-growth and restoration would not be an automatic ticket to freedom—most inmates eligible for parole consideration in Tennessee are not, in fact, granted parole. *See Thomas P. Bonczar, Characteristics of State Parole Supervising Agencies, U.S. Dept. of Justice, 5 (2008), <https://www.bjs.gov/content/pub/pdf/cspsa06.pdf>* (reporting a 29% grant rate in Tennessee as of 2006). Instead, amicus simply maintains that those who committed crimes while adolescents should be given the opportunity of a parole hearing.

Finally, striking down the current mandatory-sentencing scheme could also foster restorative-justice work as a post-parole measure to reinforce positive self-growth and transformation after the juvenile offender is no longer incarcerated. Tennessee parole boards are to ensure that persons being granted parole are “dealt with in the community by a uniformly organized system of constructive rehabilitation.” Tenn. Code Ann. § 40-28-101. In amicus’s experience, restorative justice is a proven method of “constructive rehabilitation” that can help juvenile offenders and their victims during the parole process. *See id.*

CONCLUSION

Restorative justice is a powerful tool when used as a response to juvenile crime. Tennessee’s current sentencing scheme, however, prevents the effective use of juvenile restorative-justice measures. Amicus respectfully requests that this Court hold that the imposition of a mandatory 51-year sentence on a juvenile defendant is unconstitutional so that meaningful restorative-justice measures can—in the appropriate circumstances—assist victims and help rehabilitate juvenile offenders.

Dated: November 23, 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the requirements of Supreme Court Rule 46 § 3.02 because it is typed in fourteen-point Century Schoolbook font and consists, according to the word-count utility on the software with which it was produced, and exclusive of the elements exempted by Section 3.02(a)(1), of 3,593 words.

s/ Edmund S. Sauer _____
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on the following by **U.S. mail, postage prepaid**, on this the 23rd day of November 2020:

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