ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellee, v. BRANDON MOORE, Defendant-Appellant.	:	CASE NO. 14-0120 On Discretionary Appeal From the Mahoning County Court of Appeal, Seventh Appellate District, Case No. 08MA20

BRIEF OF *AMICI CURIAE* CRIMINAL LAW SCHOLARS IN SUPPORT OF APPELLANT BRANDON MOORE

Rachel S. Bloomekatz (0091376)
Counsel of Record
rbloomekatz@jonesday.com
Kimberly A. Jolson (0081204)
kajolson@jonesday.com
JONES DAY
325 John H. McConnell Boulevard, Suite 600
P.O. Box 165017
Columbus, Ohio 43216-5017
(614) 469-3919
(614) 461-4198 (fax)
Attorneys for Appellant Brandon Moore

Matthew S. Hellman (*pro hac vice* pending)
Counsel of record
Erica L. Ross (*pro hac vice* pending)
JENNER & BLOCK LLP
1099 New York Avenue N.W.
Suite 900
Washington, DC 20001
(202) 639-6000
(202) 639-6066 (fax)
mhellman@jenner.com
eross@jenner.com
Attorneys for Amici Curiae
Criminal Law Scholars

Ralph Rivera (0082063)
rrivera@mahoningcountyoh.gov
Assistant Prosecuting Attorney
Mahoning County Prosecutor's Office
21 W. Boardman Street, 6th Floor
Youngstown, Ohio 44503
(330) 740-2330
(330) 740-2008 (fax)
Attorney for Appellee State of Ohio

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

INTRODUCTORY STATEMENT

Appellant Brandon Moore is currently serving a 112-year sentence for a nonhomicide crime he committed at the age of 15. Under this sentence, Mr. Moore will not become eligible for parole until he is 107 years old, meaning that he will die in prison. This case presents the question whether Mr. Moore's 112-year sentence for a nonhomicide crime committed while he was a juvenile violates the Eighth Amendment to the United States Constitution.

Mr. Moore's sentence violates the Eighth Amendment as interpreted and applied by the United States Supreme Court. Over the past nine years, the Supreme Court has issued three decisions concerning juvenile sentencing: *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 132 S. Ct. 2455 (2012). In each case, the Court held that the juvenile sentencing practice in question violated the Eighth Amendment. At the core of these opinions is the Court's recognition that children, when compared to adults, are less culpable and more capable of rehabilitation, and that these differences make it cruel and unusual to impose the most severe sentences upon children. In *Roper*, the Court held that the Eighth Amendment prohibits a State from sentencing a juvenile defendant to death. In *Graham*, the Court held that a sentence of life without parole for a juvenile nonhomicide offender violates the Eighth Amendment because that "penalty forswears altogether the rehabilitative ideal." *Graham*, 560 U.S. at 74. Thus, *Graham* requires that "all" such offenders must be given the chance to demonstrate growth and obtain release. *Id.* at 79. And in *Miller*, the Court held that the Eighth Amendment prohibits States from imposing *mandatory* life without parole on juvenile offenders who commit homicide, because "[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." *Miller*, 132 S. Ct. at 2469.

Mr. Moore's sentence cannot be squared with these decisions. The sentence contravenes the Supreme Court's specific holding in *Graham* because it sentences him to die in prison for a nonhomicide crime committed when he was a juvenile. More broadly, Mr. Moore's sentence runs afoul of the logic of all three decisions because it fails to take account of his diminished culpability and his greater capacity for change as a juvenile. Because Mr. Moore's sentence violates the Eighth Amendment, this Court should reverse the Seventh Appellate District's decision affirming that sentence.

INTEREST OF *AMICI CURIAE*

Amici, whose biographies appear in the addendum to this brief, are twenty-six scholars who study, write about, and work in the areas of criminal law, juvenile justice, and the Eighth Amendment. *Amici* include:[1]

- Cara H. Drinan, Associate Professor of Law at the Columbus School of Law, the Catholic University of America.
- Neelum Arya, Research Director for the David J. Epstein Program in Public Interest Law and Policy at UCLA School of Law.
- Tamar R. Birckhead, Associate Professor of Law and director of clinical programs at the University of North Carolina at Chapel Hill.
- John M. Burkoff, Professor of Law at the University of Pittsburgh.
- Bennett Capers, Professor of Law at Brooklyn Law School.
- Catherine L. Carpenter, Vice Dean and Professor of Law at Southwestern Law School.
- Sharon L. Davies, Gregory H. Williams Chair in Civil Rights and Civil Liberties at The Ohio State University Moritz College of Law and Executive Director of the Kirwan Institute for the Study of Race & Ethnicity.
- Barry C. Feld, Centennial Professor of Law at the University of Minnesota Law School.

[1] Titles and positions are included for identification purposes only.

- Brian Gallini, Professor of Law and Associate Dean for Faculty at the University of Arkansas-Fayetteville.

- Stephen P. Garvey, Professor of Law at Cornell Law School.

- Adam M. Gershowitz, Kelly Professor of Teaching Excellence at William & Mary Law School.

- Catherine M. Grosso, Associate Professor of Law at the Michigan State University College of Law.

- Janet C. Hoeffel, Catherine D. Pierson Associate Professor of Law, Tulane Law School.

- E. Lea Johnston, Associate Professor of Law and Assistant Director of the Criminal Justice Center at the University of Florida Levin College of Law.

- Margery B. Koosed, Aileen McMurray Trusler Professor Emeritus of Law in Public Service at the University of Akron School of Law.

- Richard A. Leo, the Hamill Family Chair in Law and Social Psychology and Professor and Dean's Circle Scholar at the University San Francisco School of Law, and Fellow in the Institute for Legal Research at the University of California, Berkeley School of Law.

- Paul Marcus, Haynes Professor of Law at the College of William and Mary.

- Perry Moriearty, Associate Professor, University of Minnesota Law School.

- Joy Radice, Associate Professor of Law, University of Tennessee College of Law.

- Ira P. Robbins, Barnard T. Welsh Scholar and Professor of Law at American University, Washington College of Law.

- Josephine Ross, Professor of Law at Howard University School of Law.

- Elizabeth S. Scott, Harold R. Medina Professor of Law, Columbia Law School.

- Jane M. Spinak, Edward Ross Aranow Clinical Professor of Law at Columbia Law School.

- John Stinneford, Associate Professor of Law at the University of Florida Levin College of Law.

- John B. Whiston, Herschel G. Langdon Clinical Professor of Trial Advocacy at the University of Iowa of College of Law.

- Franklin E. Zimring, William Simon Professor of Law at the University of California at Berkeley.

STATEMENT OF THE CASE AND FACTS

Amici Criminal Law Scholars adopt the statement of the case and facts presented in the brief of Appellant Brandon Moore.

ARGUMENT

Proposition of Law: *Roper*, *Graham*, and *Miller* Make Clear That Mr. Moore's 112-Year Sentence Violates the Eighth Amendment.

I. The Eighth Amendment Prohibits States from Sentencing Juvenile Nonhomicide Offenders to Die in Prison.

A. The Eighth Amendment Includes a Proportionality Principle.

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The Supreme Court has read the Cruel and Unusual Punishments Clause to prohibit the imposition of both barbaric punishments, *see, e.g.*, *In re Kemmler*, 136 U.S. 436, 446-47 (1890) (upholding death by electricity); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) (upholding death by shooting), and those that are disproportionate to the crime. *Graham*, 560 U.S. at 59; *Weems v. United States*, 217 U.S. 349, 367 (1910).

In the latter set of cases, the Court has developed and applied a "proportionality principle," *see* Note, *The Eighth Amendment, Proportionality, and the Changing Meaning of "Punishments,"* 122 Harv. L. Rev. 960, 963 (2009), holding that it is a "precept of justice that punishment for crime should be graduated and proportioned to [the] offense," *Weems* 217 U.S. at 367. Historically, the Court applied the proportionality principle differently depending on whether the challenged sentence entailed a term of years or the death penalty. With respect to term-of-years sentences, the Court developed a complex inquiry for determining whether a

sentence was constitutionally disproportionate. The reviewing court was to consider (1) the gravity of the offense and the harshness of the penalty; (2) sentences imposed on other defendants within the same jurisdiction; and (3) sentences imposed for the same crime in other jurisdictions. *Graham*, 560 U.S. at 60. The Supreme Court usually (though not invariably) rejected Eighth Amendment proportionality challenges to sentences involving a term of years. *Id.* at 59-60 (noting that "it has been difficult for the challenger to establish a lack of proportionality" regarding such sentences).

By contrast, with respect to the death penalty, the Court "used categorical rules to define Eighth Amendment standards." *Id.* at 60. The death penalty cases themselves "consist[] of two subsets, one considering the nature of the offense, the other considering the characteristics of the offender." *Id.* With respect to the former, the Court concluded that capital punishment was disproportionate for nonhomicide crimes because "[l]ife is over for the victim of the murderer" but "life ... is not over and normally is not beyond repair" for the victim of a nonhomicide crime. *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (ellipsis in original) (death penalty for defendant who aids or abets felony during which murder is committed, but who lacks the intent to kill, violates the Eighth Amendment); *see also Kennedy v. Louisiana*, 554 U.S. 407 (2008) (death penalty for rape of a child violates the Eighth Amendment); *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty for rape of an adult woman violates the Eighth Amendment). With respect to cases considering characteristics of the offender, the Court held that the death penalty was too severe a sanction for individuals with intellectual disabilities given their diminished culpability and capacity for deterrence. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

In the late 1980s, the Court decided two cases regarding the constitutionality of the death penalty as applied to juvenile offenders. In *Thompson v. Oklahoma*, 487 U.S. 815 (1988), the

Court held that the Eighth Amendment barred the imposition of the death penalty on a 15-year-old homicide offender. In reaching this conclusion, the Court emphasized "the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children." *Id.* at 836-37. Nonetheless, the next year, the Court held that the Eighth Amendment did *not* prohibit the death penalty for 16 and 17-year-old children. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989), *abrogated by Roper v. Simmons*, 543 U.S. 551 (2005).

B. The Supreme Court Has Barred Extreme Sentences for Juveniles in its Recent Proportionality Decisions.

Stanford and *Thompson* governed for a decade and a half, until, in 2005, the Supreme Court took a revitalized interest in juvenile sentencing. Through three decisions over the next nine years, the Court firmly established that harsh sentences for juveniles are subject to rigorous proportionality review under the Eighth Amendment. First, in *Roper*, the Court reviewed the case of Christopher Simmons, a 17-year-old who had committed murder and been sentenced to death in Missouri. *Roper v. Simmons*, 543 U.S. 551, 557 (2005). The Court overruled *Stanford* and invalidated Simmons' sentence, finding children categorically ineligible for the death penalty. *Id.* at 574. The *Roper* decision was expansive and forbid "the execution of any offender for any crime committed before his 18th birthday, no matter how deliberate, wanton, or cruel the offense." *Id.* at 587 (O'Connor, J., dissenting).

The *Roper* decision was grounded in the "differences between juvenile and adult offenders." *Id.* at 572. In particular, the *Roper* Court emphasized that children are uniquely vulnerable to negative pressure; they possess an underdeveloped sense of responsibility; and their moral character is still fluid. *Id.* at 569-70. Thus, "from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult." *Id.* at 570.

Five years later, in *Graham*, the Court reaffirmed *Roper*'s principles and held that life without parole ("LWOP") sentences for nonhomicide juvenile offenders violate the Eighth Amendment. In 2003, when he was 16, Terrence Graham tried to rob a barbeque restaurant in Florida. 560 U.S. at 53. After accepting a plea deal that withheld adjudication of guilt, Graham was arrested again. *Id.* at 55. Because Graham violated his probation, the trial court held a sentencing hearing on his original charges. *Id.* There, the judge sentenced him to life imprisonment for armed burglary plus fifteen additional years for attempted armed robbery. *Id.* at 57. Graham challenged his LWOP sentence as excessive in light of his nonhomicide conviction and his youth.

The Supreme Court viewed Graham's proportionality challenge not as an individual challenge to a term-of-years sentence, but rather as a challenge to a sentencing practice as it applied to an entire class of offenders. *Id.* at 61. The *Graham* Court thus found its categorical proportionality analysis—previously reserved for death penalty challenges—to be the appropriate methodology. Using this method of analysis, the Court found Graham's sentence unconstitutional. *See id.* at 59, 74. The Court first considered "objective indicia of national consensus" which demonstrated that LWOP sentences for juvenile nonhomicide offenders were "rare." *Id.* at 62, 66. The majority then conducted its own proportionality analysis, considering the culpability of the class of juvenile offenders at issue, their crimes, and "the severity of the punishment in question." *Id.* at 67.

In the process of conducting its own proportionality analysis, the Court made several crucial points regarding juvenile sentencing. *First*, the Court found that Graham's sentence was disproportionate given his status as a juvenile. To this end, *Graham* restated the findings from *Roper*, including that "[a]s compared to adults, juveniles have a 'lack of maturity and an

underdeveloped sense of responsibility'; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters 'are not as well formed.'" *Id.* at 68 (quoting *Roper*, 543 U.S. at 569-70). *Graham* stressed that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Id.* at 68.

Second and related, the Court found that Graham's sentence was disproportionate given the nature of his offense. The Court explained that "[those] who do not kill . . . are categorically less deserving of the most serious forms of punishment than are murderers." *Id.* at 69. Thus, "when compared to an adult murderer, a juvenile offender [like Graham] who did not kill or intend to kill has a twice diminished moral culpability," as "[t]he age of the offender and the nature of the crime each bear on the analysis." *Id.*

Third, the Court emphasized the severity of the LWOP penalty, particularly when applied to a child. As the Court stated, LWOP "is 'the second most severe penalty permitted by law,'" and is "especially harsh for a juvenile" offender, who "will on average serve more years and a greater percentage of his life in prison than an adult offender." *Id.* at 69-70 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991)).

The Supreme Court then considered the various penological justifications for this extreme penalty, explaining that a "sentence lacking any legitimate penological justification is by its nature disproportionate to the offense." *Id.* at 71. Here, none of the four goals of penal sanctions—retribution, deterrence, incapacitation, and rehabilitation—were served by Graham's lengthy sentence. *Id.* It neither furthered the retributive goal nor deterred crime because juveniles are far less morally culpable than adults and are less likely to consider future punishments. *Id.* at 71-72. And incapacitation and the rehabilitative ideal were ill-served

because Graham's sentence rested on the flawed assumption that juveniles were "incorrigible." *See id.* at 72-74; *see also Roper*, 543 U.S. 570 ("Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood." (quoting Elizabeth S. Scott & Laurence Steinberg, *Less Guilty by Reason of Adol*escence*: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)).) Because Graham was a juvenile convicted of a nonhomicide crime, the Court found that he had a "twice diminished moral culpability," *Graham*, 560 U.S. at 69, and thus a sentence of LWOP was disproportionate and in violation of the Eighth Amendment, *id.* at 74-75.

Two years later, in *Miller v. Alabama,* the Court continued to recognize that "children are constitutionally different from adults for purposes of sentencing." 132 S. Ct. 2455, 2464 (2012). In *Miller*, the Court asked whether states could impose *mandatory* LWOP for juveniles who commit murder. *Id.* at 2460. The Court found *Graham* to be directly on point—indeed, *Miller* discussed *Graham* at length, *see id.* at 2465-2468, described the "categorical bar" against LWOP imposed by the decision, *id.* at 2465, and stressed the "unprecedented" nature of its holding, *id.* at 2466. Based on *Graham*'s logic, the Court rejected mandatory LWOP for juvenile homicide offenders, holding that the sentence could be imposed only on a case-by-case basis after the sentencer had taken youth, among other mitigating factors, into account. *Id.* at 2475. *Miller*, then, cemented the overriding lesson of the two prior decisions: it held that courts must consider the "distinctive attributes of youth" even when juveniles "commit terrible crimes." *Id.* at 2465. By failing to provide for such consideration, the mandatory LWOP schemes at issue in *Miller* "contravene[d] *Graham*'s (and also *Roper*'s) foundational principle: that imposition of a State's

most severe penalties on juvenile offenders cannot proceed as though they were not children." *Id.* at 2466.

C. The *Graham* and *Miller* Decisions Were Groundbreaking and Require States to Treat Children Differently at Sentencing.

The *Graham* and *Miller* decisions were groundbreaking in several respects, *see generally* Elizabeth S. Scott, *"Children are Different": Constitutional Values and Justice Policy*, 11 Ohio St. J. Crim. L. 71 (2013), at least three of which are particularly relevant to this Court's analysis of Mr. Moore's sentence. To begin, the *Graham* decision was the first time in nearly thirty years the Supreme Court overturned a term-of-years sentence on Eighth Amendment grounds. *See Solem v. Helm*, 463 U.S. 277, 303 (1983) (finding a mandatory LWOP sentence for relatively minor criminal conduct to violate Eighth Amendment). And it did so because the case dealt with children. Indeed, multiple scholars have noted that *Graham* supplemented the Court's "death is different" jurisprudence, under which the Court creates greater protections for capital defendants, with a "juveniles are different" principle providing additional safeguards to juveniles. *See, e.g.*, Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality and Sentencing Policy:* Roper, Graham, Miller/Jackson *and the Youth Discount*, 31 Law & Ineq. 263, 296 (2013) ("*Graham* repudiated the Court's historical 'death is different' distinction, extended *Roper*'s categorical reduced culpability rationale, and 'declare[d] an entire class of offenders immune from a noncapital sentence . . . .'" (citation omitted)); Neelum Arya, *Using* Graham v. Florida *to Challenge Juvenile Transfer Laws*, 71 La. L. Rev. 99, 99-100 (2010) ("*Graham* has solidified the rule the Court first established in *Thompson v. Oklahoma* and reiterated in *Roper*—juveniles are different too."); Martin Guggeinheim, Graham v. Florida *and a Juvenile's Right to Age-Appropriate Sentencing*, 47 Harv. C.R.-C.L. L. Rev. 457, 464 (2012) ("*Graham* is a case about

how and why children are different from adults that states a constitutional principle with broad implications across the entire landscape of juvenile justice.").

Second, the *Graham* Court recognized that LWOP for children is analogous to the death penalty in its severity. Scott, *supra*, at 88 ("The Court makes explicit the correspondence between LWOP and the death penalty in both *Graham* and *Miller*"). The Court explained: "The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence." 560 U.S. at 69-70. Related, because children have a longer life expectancy than adult offenders, the LWOP sentence as it applies to children is even harsher still: "a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only." *Id.* at 70.

Third, the *Miller* Court made clear that LWOP—the second most severe sentence available—should be rarely imposed upon juveniles, even those who commit homicide crimes. John F. Stinneford, *Youth Matters:* Miller v. Alabama *and the Future of Juvenile Sentencing*, 11 Ohio St. J. Crim. L. 1, 1 (2013) ("*Miller* created a presumption against LWOP sentences even for those minors who commit homicide."). While the Court did not reach the question whether the Eighth Amendment requires a categorical ban on LWOP for children, it did express grave reservations about the practice based on the unique attributes of juveniles. *Miller*, 132 S. Ct. at 2469. As the Court explained, "given all we have said in *Roper*, *Graham*, and this decision

about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.*

Viewed as the watershed cases that they were, *Roper*, and especially *Graham* and *Miller* require states to treat children differently at sentencing. Moreover, the language and logic of *Graham* and *Miller* suggest that hyper-technical attempts to comply with the decisions are insufficient.

II. The *Roper-Graham-Miller* Line of Cases Makes Clear that Mr. Moore's 112-Year Sentence Constitutes Cruel and Unusual Punishment.

In this case, Mr. Moore was sentenced to 112 years in prison for a nonhomicide crime committed when he was 15 years old. Under Ohio's sentencing laws, Mr. Moore must serve a minimum of 92 years before he is even eligible for a parole hearing.[2] Thus, Mr. Moore will not be eligible for parole unless he lives to be 107 years old, which would be in the year 2093. As a practical matter, then, Mr. Moore has been sentenced to die in prison for a nonhomicide offense—precisely what *Graham* forbids. Indeed, because Mr. Moore's sentence fails to take into account "the distinctive attributes of youth," *Miller*, 132 S. Ct. at 2465, including his diminished culpability and heightened capacity for change, the sentence runs afoul of all three of the Supreme Court's recent decisions on juvenile sentencing.

The State may nonetheless contend that the Supreme Court's Eighth Amendment jurisprudence is silent on the topic of lengthy term-of-years sentences, and that the holdings of *Roper*, *Graham*, and *Miller*, are confined to the exact circumstances of those cases. The decision

---

[2] As explained in Mr. Moore's Memorandum in Support of Jurisdiction, "Brandon's mandatory sentence includes: 12 years for firearm specifications, R.C. 2941.145(A); 30 years for three counts of rape, R.C. 2929.13(F); and 30 years for three counts of complicity to rape, *id.*; R.C. 2023.03(F)." Mem. in Support of Jurisdiction of Appellant Brandon Moore at 10 n.3, *Ohio v. Moore*, No. 14-0120 (Ohio Jan. 23, 2014). Mr. Moore would not be eligible for parole until he serves these 72 years of mandatory time and at least half (20 years) of his nonmandatory sentence. *See* R.C. 2929.20.

below relied on another Seventh District decision—*State v. Bunch*, 7th Dist Mahoning No. 06 MA 106, JE, Aug. 8, 2013 ("*Bunch JE*")—that accepted these arguments.[3] *See State v. Moore*, No. 08-MA-20, 2013-Ohio-5868 ¶ 2, 2013 WL 6918852, at *1 (Ohio Ct. App. Dec. 9, 2013). In *Bunch*, the court found that *Graham* was not "directly on point" because Graham received a "life sentence[] without the possibility of parole," whereas Bunch "received a consecutive, fixed term sentence of 89 years." *Bunch JE* at 4. Thus, the *Bunch* court suggested that *Graham* did not apply to (1) lengthy term-of-years sentences, or (2) consecutive, fixed-term sentences. *See also Bunch v. Smith*, 685 F.3d 546, 550-51 (6th Cir. 2012) (rejecting Bunch's challenge to his sentence under 28 U.S.C. § 2254), *cert. denied*, 133 S. Ct. 1996 (2013).

The *Bunch* court's distinctions lack any basis in the Supreme Court's controlling opinions. As the text and reasoning of *Roper*, *Graham*, and *Miller* demonstrate, a 112-year sentence is the functional equivalent of an LWOP sentence for Eighth Amendment purposes. Both sentences deny the juvenile offender the opportunity to demonstrate growth and change, and thus neither is proportional to a nonhomicide offense. At the same time, nothing in the *Graham* decision turns on whether a juvenile received consecutive sentences. Instead, *Graham* applies to *all* juvenile nonhomicide offenders, regardless how their sentences are structured. Because the Supreme Court's juvenile sentencing decisions make clear that Mr. Moore's sentence violates the Eighth Amendment, this Court should reverse.

A. Mr. Moore's 112 Year Sentence is Equivalent to Life Without Parole and Thus Unconstitutional Under *Graham*.

Graham directly resolves the present case. Once again, *Graham* held that the Eighth Amendment does not permit a juvenile convicted of a nonhomicide offense to be sentenced to

[3] *Bunch* concerned an Eighth Amendment challenge to Chaz Bunch's 89-year prison sentence. Chaz Bunch was sentenced for his involvement in the same incident that led to Brandon Moore's convictions. *See Bunch JE* at 1.

life without parole, *i.e.*, to "die in prison without any meaningful opportunity to obtain release." *Graham*, 560 U.S. at 79. Although Mr. Moore was sentenced to 112 years, rather than life without parole, those sentences are functionally equivalent.[4] Either way, he will never obtain the right "to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes." *Id.* To hold that a State may escape *Graham*'s ruling so long as it phrases its sentences in terms of years would eviscerate the *Graham* ruling.

Indeed, *Graham* itself recognizes that LWOP is a term of years by another name. As Justice Kennedy explained, *Graham* "involve[d] an issue the Court has not considered previously: a categorical challenge to a *term-of-years sentence*." 560 U.S. at 61 (emphasis added). *Graham*, then, categorized LWOP as a term-of-years sentence, distinguishing it from the death sentences the Court had previously considered. In this way, *Graham* demonstrates that it is the functional effect of a sentence, rather than its technical name, that matters for Eighth Amendment analysis.[5]

And *Graham* went even further: it held that, when applied to juveniles, death sentences and life-imprisonment sentences have much in common. Each of those sentences "alters the

---

[4] The State has argued that Mr. Moore is "not similarly situated as the juvenile[] in *Graham* . . . because he was not sentenced to life in prison without the possibility [of] parole for a homicide." Appelle-State of Ohio's Response to Def.'s Mem. in Support of Jurisdiction at 3, *Ohio v. Moore*, No. 14-0120 (Ohio Feb. 11, 2014). This misstates the facts of *Graham*. While Terrence Graham was sentenced to LWOP, he was sentenced for armed burglary and attempted armed robbery. Graham was not convicted of a homicide offense, and the *Graham* ruling addressed nonhomicide juvenile offenders as a class.

[5] The *Graham* Court recognized that the functional effect of a sentence controls in yet another way. As a technical matter, Graham was sentenced to "life imprisonment"—not life imprisonment *without parole*. *See Graham*, 560 U.S. at 57. But the Supreme Court recognized that the sentence was the functional equivalent of LWOP: "[b]ecause Florida has abolished its parole system … a life sentence gives a defendant no possibility of release unless he is granted executive clemency." *Id.* (citation omitted). The same is true of Mr. Moore's 112-year sentence.

offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration . . . ." 560 U.S. at 69-70; *see also Miller*, 132 S. Ct. at 2466 ("we viewed this ultimate penalty for juveniles as akin to the death penalty . . .").[6] Mr. Moore's 112-year sentence causes the exact same "forfeiture," because it guarantees that he will die in prison. Thus, it is subject to the same constitutional limitations.[7]

Under *Graham*, a juvenile convicted of a nonhomicide offense must have a "meaningful" and "realistic" opportunity to obtain release. 560 U.S. at 75, 82. But Mr. Moore's sentence would provide him a parole hearing only when he reaches 107 years old—after living 92 years in prison. That is neither meaningful nor realistic.[8] Further, *Graham* forbids the State from "making the judgment at the outset that [a juvenile nonhomicide offender] never will be fit to reenter society." *Id.* at 75. Yet that is precisely what the sentencing judge intended in this case. He told Mr. Moore that "I want to make sure that you never get out of the penitentiary." Mem. in Support of Jurisdiction of Appellant Brandon Moore at 3, *Ohio v. Moore*, No. 14-0120 (Ohio Jan. 23, 2014) (citing record). Mr. Moore's sentence therefore violates the plain terms of *Graham*.

---

[6] As previously noted, *Graham* is revolutionary in this regard. Before *Graham*, the Court sharply separated death penalty cases from non-death penalty cases. Capital sentences received more scrutiny than noncapital sentences and were more likely to be struck down as a result. *See* Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 Ohio St. J. Crim. L. 107, 122-24 (2013). *Graham* eliminated this divide, at least for children. In so doing, *Graham* demonstrated that where children are involved, their specific characteristics are far more important than the precise sentence imposed.

[7] To be sure, there may be difficult questions in other cases regarding when a term of years is sufficiently long that it is the functional equivalent of life without parole. This case, however, does not present those tough line-drawing questions, because Mr. Moore's sentence guarantees he will spend the remainder of his natural life in prison.

[8] Notably, all inmates, but especially those who begin their sentences as minors, have a significantly diminished life expectancy. *See, e.g.*, ACLU of Michigan Juvenile Life Without Parole Initiative, *Michigan Life Expectancy Data for Youth Serving Natural Life Sentences*, *available at* http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf.

Nor can Mr. Moore's sentence be justified based on the nature of the offense or the characteristics of the offender. Just as in *Graham*, Mr. Moore did not commit murder; he is therefore "categorically less deserving" of the most severe punishments. *Graham*, 560 U.S. at 69. And Mr. Moore is indistinguishable from Graham (as he is from Roper, Miller, and Jackson) because he was a juvenile—and was therefore less fully developed, less culpable, and more susceptible to peer pressure—at the time he committed the crimes in question. As a result, Mr. Moore's crimes are "not as morally reprehensible as that of an adult." *Id.* at 68 (quotation marks omitted). Given this, his sentence violates both the narrowest holding of *Graham* and the rationale of *Graham*, *Roper*, and *Miller*.

For these reasons, numerous courts, including the California and Iowa Supreme Courts, have held that *Graham* bars a court from imposing a lengthy term-of-years sentence on a juvenile for a nonhomicide crime. *See, e.g.*, *Moore v. Biter*, 725 F.3d 1184, 1192 (9th Cir. 2013) ("*Graham*'s focus was not on the label of a 'life sentence'—but rather on the difference between life in prison with, or without, possibility of parole."); *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012) ("*Miller* . . . made it clear that *Graham*'s 'flat ban' on life without parole sentences applies to all nonhomicide cases involving juvenile offenders, including the term-of-year sentences that amounts to the functional equivalent of a life without parole sentence."); *State v. Null*, 836 N.W.2d 41, 76 (Iowa 2013) ("*Roper* and *Graham*[] appl[y] to the very lengthy mandatory minimum sentence without the possibility of parole at issue in this case."); *but see, e.g.*, *State v. Kasic*, 265 P.3d 410, 415 (Ariz. Ct. App. 2011) ("We conclude *Graham* does not categorically bar the sentences imposed in this case.").

If, as *Graham* holds, juvenile nonhomicide offenders lack the moral culpability to be sentenced to LWOP, they must also lack the moral culpability to spend the rest of their lives in

prison without the possibility of release. If, as *Graham* holds, the goals of criminal justice are disserved by Terrence Graham's life sentence, then they are no better served by Brandon Moore's sentence. And if, as *Graham* holds, *all* juvenile nonhomicide offenders must have "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," *Graham*, 560 U.S. at 75, then Mr. Moore is constitutionally entitled to that chance. This Court should follow in the steps of the Iowa and California Supreme Courts and hold Mr. Moore's extreme sentence unconstitutional.

B. The Fact that Mr. Moore's Sentence Resulted From Multiple, Fixed-Year Terms Does Not Remove His Sentence from the Purview of *Graham*.

The State also may argue that because Mr. Moore's 112-year sentence is the result of consecutive sentences for several nonhomicide crimes, *Graham* does not apply. But this distinction is not grounded in *Graham* or the Supreme Court's other juvenile sentencing decisions. Indeed, it is contrary to the logic of those decisions, and it would permit their circumvention.

The *Bunch* decision, which the lower court here adopted, suggested that *Graham* did not address juvenile offenders who received consecutive sentences for multiple nonhomicide offenses. *Bunch JE* at 4; *see also* 685 F.3d at 551. Thus, in the court's view, there is a meaningful difference between a juvenile who is sentenced to LWOP for a single crime and a juvenile who is sentenced to two consecutive 60-year prison sentences. The *Bunch* court essentially held that *Graham* prohibits the first juvenile's sentence but is silent on the second.

That is incorrect. *Graham*'s language is plain and categorical: the decision ensures "*all* juvenile nonhomicide offenders a chance to demonstrate maturity and reform." *Graham*, 560 U.S. at 79 (emphasis added). The Supreme Court made a number of explicit and meaningful distinctions in *Graham*: it distinguished between juveniles and adults, homicide and

nonhomicide crimes, and sentences that serve criminal justice purposes and those that do not. Yet nowhere did the Court distinguish between single nonhomicide offenses and multiple nonhomicide offenses. Indeed, in a prior case, the Court explicitly *rejected* such a distinction, explaining that (with respect to the penological goal of deterrence), "there is no basis for distinguishing ... between an inmate serving a life sentence without possibility of parole and a person serving *several sentences of a number of years*, the total of which exceeds his normal life expectancy." *Sumner v. Shuman*, 483 U.S. 66, 83 (1987) (emphasis added).

The Supreme Court found Terrence Graham's sentence unconstitutional because he was a juvenile who committed a nonhomicide crime and received a sentence that did not serve any legitimate penological purpose. The Supreme Court's decision simply did not hinge on the fact that Graham's life sentence corresponded to a single legal violation. As described above, the Eighth Amendment analysis centers on the proportionality of a given punishment. For Mr. Moore, no less than for Graham, the punishment is spending the rest of his life in prison without any realistic possibility of obtaining release. *Graham* forbids that sentence regardless of how one labels it.

The facts of *Graham* further demonstrate that no distinction between single and consecutive sentences is warranted. Terrence Graham's sentence was based on multiple nonhomicide convictions arising out of the same incident: an armed burglary charge and an attempted robbery charge stemming from an attempted robbery of a barbeque restaurant. *Graham,* 560 U.S. at 53, 57. Moreover, the sentencing judge in *Graham* made clear that he was sentencing Graham for multiple crimes. He explained that Graham deserved a life sentence because of his "escalating pattern of criminal conduct." *Id.* at 57 (quotation marks omitted). Thus, *Graham*'s facts are quite similar to those at issue here, because Moore, too, was sentenced

on multiple counts relating to the same criminal incident. *See also Miller*, 132 S. Ct. at 2461 (one of the two defendants in *Miller* was charged with both capital felony murder and aggravated robbery).

To be sure, Graham received an LWOP sentence on the armed burglary charge alone; the attempted robbery charge added an additional 15 years. But the Court never suggested that Graham's sentence would have been permissible had he received 95 years (rather than LWOP) on the armed burglary count and 15 years on the attempted robbery count. In fact, that result would generate illogical outcomes and invite arbitrary decision-making. To begin, in at least some cases, a defendant who receives a single LWOP sentence will have committed a *more* serious crime than a defendant who receives multiple shorter, consecutive sentences. Yet the *Bunch* court's reading of *Graham* would mean that the former defendant *must* receive the opportunity to obtain release, while the latter need not do so. The *Graham* Court surely did not intend such an illogical outcome.

Further, if accepted by this Court, the distinction made in *Bunch* would invite manipulation and arbitrary sentencing. Prosecutors enjoy great discretion when charging defendants for their criminal conduct. If *Graham* applied only to LWOP sentences denominated as such, prosecutors could simply choose to charge a defendant with multiple crimes none of which would trigger an LWOP sentence but all of which together exceeded the defendant's natural life. In this way, prosecutors (and sentencing judges) could ensure that juvenile nonhomicide offenders never receive the "meaningful opportunity to obtain release" that *Graham* requires. *Graham* does not permit that result.

Once again, the Court there focused on the *functional* effect of the sentence at issue, not its technical denomination. And as *Miller* recognized, by comparing LWOP to the death penalty,

Graham made the Court's death penalty cases relevant as well. *See Miller*, 132 S. Ct. at 2463. In the death-penalty context, however, it is clear that the number of counts does not make a difference. Consider a juvenile offender who committed a single murder, and another juvenile offender who committed six. Under *Roper*'s categorical ban, neither juvenile would be eligible for the death penalty. *See Roper*, 543 U.S. at 572. Similarly, *Atkins* would not allow an intellectually disabled defendant to be sentenced to death, regardless of the number of homicides he committed. *See Atkins*, 536 U.S. at 321. Thus, applying the same logic—and respecting the Supreme Court's preference for categorical rules in its juvenile sentencing decisions—a juvenile nonhomicide offender may not be sentenced to die in prison, however that sentence is calculated.

C. The Facts of Mr. Moore's Case Do Not Remove His Sentence from the Purview of *Graham*.

Finally, the State may suggest that Mr. Moore's sentence is justified by the facts of his case. In recommending denial of this appeal, the State focused on those facts. *See* Appellee-State of Ohio's Respond to Def.'s Mem. in Support of Jurisdiction at 3-5, *State of Ohio v. Moore*, No. 14-0120 (Ohio Feb. 11, 2014). But while there is little doubt that the crimes in question were horrific and warrant a serious sentence, this case is not simply an adjudication of those past facts. Nor is it an assessment of whether Mr. Moore "may live out his days as free man." *Id.* at 2. Instead, this case is about the actual sentence that Mr. Moore received. As explained above, Mr. Moore's current sentence mandates—by design—that he will die in prison, and it therefore violates *Graham*.

The *Graham* ruling simply does not depend on the facts of a given case. Indeed, the *Graham* Court was well aware that some juvenile defendants would commit horrific nonhomicide crimes. The Chief Justice concurred in the judgment in *Graham*, arguing that while Graham's sentence was disproportionate to his crime, some juvenile nonhomicide

offenders might deserve LWOP. 560 U.S. at 91-96 (Roberts, C.J., concurring). To support his point, the Chief Justice provided several examples of egregious nonhomicide crimes committed by juvenile offenders. *Id.* at 93-94 (Roberts, C.J., concurring). Yet the Court, well aware of these possibilities, guaranteed *all* juvenile nonhomicide offenders the right to seek release.

Miller reinforces that the facts of Mr. Moore's case do not change the result. *Miller* held that LWOP sentences could be imposed on juveniles who commit *murder* only in rare and egregious cases. 132 S. Ct. at 2469 (finding that "appropriate occasions for sentencing juveniles to this harshest possible penalty [life without parole] will be uncommon."). Given that Mr. Moore did not commit homicide, his 112-year sentence cannot be squared with the Supreme Court's decisions. Instead, while the State is "not required to guarantee freedom" to Mr. Moore, it must provide him a "meaningful opportunity" to seek release. *Graham*, 560 U.S. at 75. Because Mr. Moore's current sentence would not provide him a parole hearing until he is 107, it does not meet that standard.

CONCLUSION

For the foregoing reasons, as well as those in the brief of Appellant Brandon Moore, *amici curiae* Criminal Law Scholars respectfully urge this Court to reverse the decision below and hold that Mr. Moore's 112-year sentence violates the Eighth Amendment to the United States Constitution.

Dated: July 14, 2014

Respectfully submitted,

JENNER & BLOCK LLP

By: Matt Hellman / per with F. Bloomfield

Matthew S. Hellman (*pro hac vice* pending)
Erica L. Ross (*pro hac vice* pending)
1099 New York Avenue N.W.
Suite 900
Washington, DC 20001
(202) 639-6000
(202) 639-6066 (fax)
mhellman@jenner.com
eross@jenner.com

Attorneys for Amici Curiae
Criminal Law Scholars

ADDENDUM: LIST OF *AMICI*[*]

Cara H. Drinan is Associate Professor of Law at the Columbus School of Law, the Catholic University of America. Professor Drinan teaches Criminal Law and Criminal Procedure, and her scholarship focuses on the criminal justice system, with an emphasis on criminal justice reform, indigent defense and the death penalty. Most relevant here, Professor Drinan has written extensively on the Supreme Court's juvenile justice cases, including *Graham v. Florida*.

Neelum Arya, J.D., M.P.A., is the Research Director for the David J. Epstein Program in Public Interest Law and Policy at UCLA School of Law. Arya's research explores the connections and contradictions between justice-system involvement, child well being, and public safety with a specialization in youth who are prosecuted in the adult criminal justice system. Arya's work seeks to ameliorate laws and legal practices in the justice system that unintentionally harm community health, as well as identify regulatory, legal, and policy solutions to improve child and family wellbeing.

Tamar R. Birckhead is an associate professor of law and director of clinical programs at the University of North Carolina at Chapel Hill and a criminal defense attorney with more than 20 years of experience. She is a faculty supervisor of the UNC Youth Justice Clinic, an academic program in which third-year law students defend children charged with criminal offenses in juvenile delinquency court, and she teaches courses in the criminal lawyering process as well as juvenile courts and delinquency. Professor Birckhead's research interests focus on issues related to juvenile justice policy and reform, criminal law and procedure, and indigent criminal defense; her scholarship has been published in numerous law journals, and she co-edited the third edition of a law school casebook, Children, Parents, and the Law, with Professor Leslie J. Harris. She also regularly writes commentary, which has been published in the *Los Angeles Times* and the *Huffington Post*, and she recently launched the Juvenile Justice Blog.

John M. Burkoff is Professor of Law at the University of Pittsburgh, where he has taught since 1976. He has published forty-two books and many articles in the area of criminal justice. Professor Burkoff has been awarded the Chancellor's Distinguished Public Service Award and the Chancellor's Distinguished Teaching Award by the University of Pittsburgh, and has been involved with projects relating to human rights, criminal justice, legal ethics, and legal education all over the world. He is a former Chairperson of the Criminal Justice Section of the Association of American Law Schools.

Bennett Capers is Professor of Law at Brooklyn Law School. He is an expert in criminal law and procedure, and evidence law. His academic interests include the relationship between race, gender, and criminal justice, and he is a prolific writer on these topics. His articles and essays have been published or are forthcoming in top law reviews, including the California Law Review, Fordham Law Review, Harvard Civil Rights-Civil Liberties Law Review, Indiana Law Journal, Michigan Law Review, U.C. Davis Law Review, UCLA Law Review, and Washington University Law Review. Prior to teaching, he spent nearly ten years as an Assistant U.S.

---

[*] Titles and positions are included for identification purposes only.

Attorney in the Southern District of New York. His work trying several federal racketeering cases earned him a nomination for the Department of Justice's Director's Award in 2004. He also practiced with the firms of Cleary, Gottlieb, Steen & Hamilton and Willkie Farr & Gallagher. He clerked for the Hon. John S. Martin, Jr. of the Southern District of New York. He is an elected member of the American Law Institute, a member of the AALS Committee on Professional Development, and an appointed member of the New York State Judicial Screening Committee. In 2013, he served as Chairperson of the AALS 2013 Conference on Criminal Justice, and in September was selected to Chair the Academic Advisory Council appointed to assist the court-appointed monitor in the stop-and-frisk class action *Floyd v. City of New York.*

Catherine L. Carpenter is Vice Dean and Professor of Law at Southwestern Law School. She teaches and writes in the area of criminal law. Her primary focus of scholarship is on issues pertaining to sex crimes and sex offender registration laws. Her most recent article, *Against Juvenile Sex Offender Registration* argues that mandatory lifetime registration of juvenile offenders is unconstitutional based on the Supreme Court's prohibition of life without parole under *Miller* and *Graham.*

Sharon L. Davies is the Gregory H. Williams Chair in Civil Rights and Civil Liberties at The Ohio State University Moritz College of Law and the Executive Director of the Kirwan Institute for the Study of Race & Ethnicity. Professor Davies has taught Criminal Law, Criminal Procedure, Evidence, Civil Rights and Race & Criminal Justice at Ohio State for the last 19 years, and has focused much of her scholarship on constitutional criminal procedure. Prior to joining the law faculty, Davies served for five years as a federal prosecutor in the Southern District of New York. In her leadership role at the Kirwan Institute, Professor Davies is a nationally respected expert on the ways in which facially neutral discretionary practices can produce racial disparities, including in the criminal sentencing of juveniles. Thus, Professor Davies has a strong interest in the proper application of precedents such as *Graham, Roper* and *Miller* which cabin sentencing discretion, and her expertise may aid the Court in its resolution of this appeal.

Barry C. Feld, J.D., Ph.D., is Centennial Professor of Law at the University of Minnesota Law School. He is one of the country's leading scholars of juvenile justice and recipient of the A.B.A.'s Livingston Hall Award for juvenile justice advocacy. He has written ten books and more than 100 law review and criminology articles and book chapters on various aspects of juvenile justice administration focusing on adolescent competence and culpability, procedural justice, race and gender, and youth sentencing policy. He has written and lectured extensively on the Supreme Court's Roper, Graham, and Miller decisions.

Brian Gallini is Professor of Law and Associate Dean for Faculty at the University of Arkansas-Fayetteville. He has served two clerkships, practiced as a white-collar criminal defense litigator, and served on two law faculties. His scholarship focuses on law enforcement discretion issues in the context of interrogation methods, consent searches, and profiling. His work has been recognized nationally by the Southeastern Association of American Law Schools and his expert commentary has also been featured in global media outlets including *The Wall Street Journal*, *Chicago Tribune*, and *Los Angeles Times*. In the classroom, Professor Gallini teaches a variety of doctrinal criminal courses including Criminal Law, Criminal Procedure I & II, and

Federal Criminal Law. He has also developed seminars titled Problems in Police Discretion, and Crime & the Supreme Court.

Stephen P. Garvey is Professor of Law at Cornell Law School in Ithaca, New York. His scholarship focuses on the substantive criminal law. He is a co-author (with Joshua Dressler) of Cases and Materials on Criminal Law (6th ed. 2012).

Adam M. Gershowitz is the Kelly Professor of Teaching Excellence at William & Mary Law School. He is the author of more than two-dozen law review articles including scholarship about proportionality review and the Eighth Amendment.

Catherine M. Grosso is an Associate Professor of Law at the Michigan State University College of Law. Her scholarship primarily focuses on the role of race, victim/defendant relationships, and other extra-legal factors in the administration of capital punishment, including jury selection. She also teaches a seminar on capital punishment with a focus on the proportionality analyses relevant to this brief. She also teaches criminal procedure and remedies.

Janet C. Hoeffel is the Catherine D. Pierson Associate Professor of Law, Tulane Law School. Professor Hoeffel's scholarship and teaching in Criminal Law and Procedure over the past 14 years has included courses, expert testimony, and articles on the Supreme Court's death penalty jurisprudence and its closely related *Graham* and *Miller* jurisprudence. Prior to coming to Tulane Law School, Professor Hoeffel practiced criminal defense, including representation of juveniles, at the Public Defender Service of Washington, DC.

E. Lea Johnston is Associate Professor of Law and Assistant Director of the Criminal Justice Center at the University of Florida Levin College of Law. She earned her A.B. from Princeton University and her J.D. (*cum laude*) from Harvard Law School. She previously served as a litigation associate at Arnold & Porter LLP in Washington, D.C., and director of the Maryland Public Interest Research Group in Baltimore, MD. She clerked for Judge Richard Tallman of the U.S. Court of Appeals for the Ninth Circuit. Her research interests include criminal law and psychiatry; sentencing; and how criminal law and procedure respond to individuals with serious mental illnesses.

Margery B. Koosed is Aileen McMurray Trusler Professor Emeritus of Law in Public Service and a former Research Fellow in Constitutional Law at the University of Akron School of Law. From 1974 to 2013 she taught criminal law and criminal procedure courses, and focused on the death penalty and wrongful convictions in her research and scholarship. She will resume teaching part-time at the School of Law this fall. She has served on the Ohio Public Defender Commission (appointed by Governor Celeste), on the American Bar Association's Ohio Death Penalty Assessment Team, and recently assisted the Ohio Supreme Court and Ohio State Bar Association Death Penalty Task Force on occasion at the request of its Chair.

Richard A. Leo, PhD, JD, is the Hamill Family Chair in Law and Social Psychology and professor and Dean's Circle Scholar at the University San Francisco School of Law, and a Fellow in the Institute for Legal Research at the University of California, Berkeley School of Law. Dr. Leo is one of the leading experts in the world on police interrogation practices, false

confessions, and the wrongful conviction of the innocent. Dr. Leo has authored more than a hundred articles in leading scientific and legal journals as well as a half dozen books, including the multiple award-winning *Police Interrogation and American Justice* (Harvard University Press, 2008). Dr. Leo has won numerous career and lifetime achievement awards for research excellence and scholarly distinction from academic, scientific and professional organizations, including four in the last year. Dr. Leo has also been the recipient of Soros and Guggenheim fellowships, as well as a Fellowship from the Center for the Advanced Study in the Behavioral Sciences at Stanford University. Dr. Leo has been featured and/or quoted in hundreds of stories in the national print and electronic media, and his research has been cited by numerous appellate courts, including the United States Supreme Court on multiple occasions. He is a member of the American Law Institute.

Paul Marcus is the Haynes Professor of Law at the College of William and Mary. Formerly the law dean at the University of Arizona, his teaching and research interests are in the criminal justice, comparative law, and intellectual property areas. He has spoken to numerous judicial, bar and university groups in the U.S., and has lectured in several other nations. He is the author of several books in the criminal justice area and has written numerous articles in the field as well.

Perry Moriearty is Associate Professor, University of Minnesota Law School. Professor Moriearty teaches criminal law and co-directs the Child Advocacy and Juvenile Justice Clinic at the University of Minnesota Law School. Among other work, the Clinic represents juveniles charged with delinquency and traffic offenses and individuals serving sentences of life-without-parole for juvenile offenses. Professor Moriearty researches and writes in the areas of juvenile and criminal justice and, over the last two years, her work has been focused on matters relating to the implementation of the Supreme Court's 2012 decision in *Miller v. Alabama.*

Joy Radice joined the University of Tennessee College of Law faculty in August 2012. She teaches Criminal Law, Advocacy Clinic, a seminar on poverty, race, gender and the law, and a new Expungement Clinic. Prior to that she was an acting assistant professor at New York University teaching legal methods, legal process, legal research, and legal writing. From 2003 until 2006 she worked with Neighborhood Defender Services of Harlem representing clients in criminal cases, housing and family court proceedings, administrative hearings, and Article 78 appeals. She also supervised clinical students at NYU and launched the Harlem Reentry Advocacy Program to remedy the collateral consequences of criminal convictions. Radice graduated from Harvard Law School in 2003, and Princeton in 1997.

Ira P. Robbins is the Barnard T. Welsh Scholar and Professor of Law at American University, Washington College of Law. Professor Robbins has been teaching and writing about constitutional criminal law for forty years, and is the author/editor of Prisoners and the Law (Thomson/Reuters/West, six vols., 2014) and Habeas Corpus Checklists (Thomson/Reuters/West, 2014).

Josephine Ross is a Professor of Law at Howard University School of Law. Professor Ross teaches Criminal Procedure and a Criminal Defense Clinic and has taught Criminal Law several times. Her scholarship focuses on the criminal justice system and on civil rights.

Elizabeth S. Scott is the Harold R. Medina Professor of Law at Columbia University School of Law School. Her areas of scholarly interest are family law and juvenile justice, and she has published extensively in legal and social science journals, including the Virginia Law Review, California Law Review and the American Psychologist, on the legal regulation of juvenile crime, and on marriage, divorce, child custody, and adolescent decision-making. Much of her research is interdisciplinary, applying social science research, developmental theory and behavioral economics, to legal policy issues involving children and families. With Laurence Steinberg, she is the author of Rethinking Juvenile Justice (Harvard University Press, 2008). The book has had a major impact on juvenile justice reform and received the 2010 award for the best social policy book by the Society for Research in Adolescence. Scott is also the co-author of two widely used casebooks in Family Law and Children in the Legal System. Scott is a member of a John D. and Catherine T. MacArthur Foundation Research Network on Neuroscience and Criminal Law, and was formerly a member of a MacArthur Foundation Network on Adolescent Development and Juvenile Justice, an interdisciplinary research group that, over a 10 year period, conducted studies of adolescents' competence to stand trial, desistance from criminal activity, and public attitudes toward youthful culpability. She was also a member of a National Academy of Science Committee on Juvenile Justice and contributor to Reforming Juvenile Justice: A Developmental Approach, a National Academies report published by the National Research Council. Scott was a founder and co-director of the Center for Children, Family and the Law at the University of Virginia, an interdisciplinary Center that promotes research and informs policy makers and practitioners on issues relating to children and families. Scott has also served on numerous task forces and committees dealing with legal policy toward families.

Jane M. Spinak is the Edward Ross Aranow Clinical Professor of Law at Columbia Law School. A member of the Columbia faculty since 1982, she co-founded the Child Advocacy Clinic, which currently represents adolescents and young adults aging out of foster care. During the mid-1990s, Professor Spinak served as Attorney-in-Charge of the Juvenile Rights Division of The Legal Aid Society of New York City, the country's oldest and largest legal organization dedicated to criminal, civil and juvenile defense. From 2001 to 2006, she was the Director of Clinical Education at the law school. In 2002, she became the founding Chair of the Board of the Center for Family Representation, an advocacy and policy organization dedicated to ensuring the procedural and substantive rights of parents in child-welfare proceedings. Professor Spinak is a member of the New York State Permanent Judicial Commission on Justice for Children. She has served on numerous tasks forces and committees addressing the needs and rights of children, youth and families and has trained, lectured and written widely on those issues. In 2005, the ABA's Human Rights Magazine named Professor Spinak a Human Rights Hero for her work on behalf of children. In 2008 she was awarded the Howard A. Levine Award for Excellence in Juvenile Justice and Child Welfare by the New York State Bar Association. Professor Spinak recently co-chaired the Task Force on Family Court in New York City established by the New York County Lawyer's Association. In 2013, Professor Spinak was named to the Juvenile Justice Oversight Board of the NYC Administration for Children's Services.

John Stinneford is Associate Professor of Law at the University of Florida Levin College of Law. Professor Stinneford teaches and writes about criminal law, criminal procedure, and constitutional law, with a particular focus on the original meaning of the Cruel and Unusual

Punishments Clause. His work has been published in numerous scholarly journals including the Virginia Law Review, the Northwestern University Law Review, and the William & Mary Law Review. He has won several national awards for his writing, and has been cited by United States Supreme Court Justice John Paul Stevens (Ret.), state and federal courts, and numerous scholars.

Before joining the Florida faculty in 2009, Stinneford clerked for the Hon. James Moran of the U.S. District Court for the Northern District of Illinois, served as an Assistant U.S. Attorney, and practiced law with Winston & Strawn in Chicago. He holds a J.D. from Harvard Law School, an M.A. from Harvard University, and a B.A. from the University of Virginia. He has twice been voted faculty graduation speaker by the third-year class at Florida, and has twice been a finalist for Professor of the Year.

John B. Whiston is the Herschel G. Langdon Clinical Professor of Trial Advocacy at the University of Iowa of College of Law, Iowa City, Iowa. For fifteen years, he has supervised in-house clinical students representing criminal defendants on referral from the state public defender. He has represented inmates seeking relief from juvenile life without parole sentences in both the state and federal courts in Iowa.

Franklin E. Zimring is the William Simon Professor of Law at the University of California at Berkeley, and the author or editor of seven books on youth crime and legal policy toward adolescent offenders.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief of *Amici Curiae* Criminal Law Scholars in Support of Appellant Brandon Moore was served on counsel listed below by regular, U.S. Mail, postage prepaid, on July 14, 2014:

Rachel S. Bloomekatz (0091376)
Kimberly A Jolson (0081204)
JONES DAY
325 John H. McConnell Boulevard, Suite 600
P.O. Box 165017
Columbus, Ohio 43216-5017
(614) 469-3919
(614) 461-4198 (fax)

Attorneys for Appellant Brandon Moore

Ralph Rivera (0082063)
Mahoning County Prosecutor's Office
21 W. Boardman Street, 6th Floor
Youngstown, Ohio 44503
(330) 740-2330
(330) 740-2008 (fax)

Attorney for Appellee State of Ohio

Erica Ross /per ext R. Bloomekatz
Erica L. Ross (*pro hac vice* pending)