No. 17-912

IN THE

Supreme Court of the United States

BOBBY BOSTIC,

Petitioner

v.

RHODA PASH,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Missouri

---

BRIEF ON BEHALF OF *AMICUS CURIAE* THE RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER IN SUPPORT OF PETITIONER

AMY E. BREIHAN
Counsel of Record
RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER
3115 S. Grand Blvd.
Suite 300
St. Louis, MO 63118
(314) 254-8540
amy.breihan@macarthurjustice.org

DAVID M. SHAPIRO
RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER
NORTHWESTERN PRITZKER SCHOOL OF LAW
375 East Chicago Ave.
Chicago, IL 60611
(312) 503-0711
david.shapiro@law.northwestern.edu

ATTORNEYS FOR AMICUS CURIAE

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

REASONS FOR GRANTING THE PETITION 1

I. This Court Should Grant Certiorari To Clarify That *Graham* and its Progeny Apply to De Facto Life Without Parole Sentences for Juveniles. 2

II. Missouri and Other States Nullify This Court's Precedent by Imposing De Facto Life Without Parole Sentences When Prohibited Under *Graham*, *Miller*, and Their Progeny. 6

A. Missouri Regularly Condemns Youth To Die Behind Bars, Rendering Such Sentences Far Less Than a Rarity. 6

B. Missouri Courts Impose Death-Behind-Bars Sentences with Little Regard for Defendants' Youth. 11

III. Missouri Sentencing Practices, Including De Jure and De Facto LWOP Sentences, Have Racially-Disproportionate Impacts. 14

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Adams v. Alabama, 136 S.Ct. 1796 (2016)..... 12

Bd. of Cty. Comm'rs v. Umbehr, 518 U.S. 668 (1996) 13

Bear Cloud v. State, 334 P.3d 132 (Wyo. 2014) 13

Budder v. Addison, 851 F.3d 1047 (10th Cir. 2017), *cert. denied sub nom. Byrd v. Budder*, No. 17-405 (2017);..... 13

Casiano v. Comm'r of Corr., 115 A.3d 1031 (Conn. 2015)*, cert. denied*, 136 S. Ct. 1364 (2016). 13

Graham v. Florida, 560 U.S. 48 (2010) 2, 3, 4, 5

Miller v. Alabama, 567 U.S. 460 (2012), ... 2, 5, 9

Montgomery v. Louisiana, 136 S.Ct. 718 (2016). 7, 12

Roper v. Simmons, 543 U.S. 551 (2005), ... 4

State v. Belcher, 805 S.W.2d 245 (Mo. Ct. App. 1991) 8

State v. Bolds, 11 S.W.3d 633 (Mo. Ct. App. 1999), *aff'd* 156 S.W.3d 420 (Mo. Ct. App. 2005) 8

State v. Daniels, 18 S.W.3d 66 (Mo. Ct. App. 2000) . 8

State v. Harrell, 342 S.W.3d 908 (Mo. Ct. App. 2011) 7

State v. Nathan, 522 S.W.3d 881 (Mo. 2017) 14

State v. Ragland, 836 N.W.2d 107 (2013) 13

State v. Ramos, 387 P.3d 650 (Wash. 2017), *cert. denied* 138 S. Ct. 467 (2017) 13

State v. Stoer, 862 S.W.2d 348 (Mo. Ct. App. 1993) . 8

State v. Tankins, 865 S.W.2d 848 (Mo. Ct. App. 1993) 7

State v. Zuber, 152 A.3d 197 (N.J. 2017), *cert. denied*, 138 S. Ct. 152 (2017) 13

Willbanks v. Dep't of Corr., 522 S.W.3d 238, 240 (Mo. 2017), *cert. denied*, 138 S. Ct. 304 (2017) 8

Statutes

Mo. Rev. Stat. § 211.031(3) (2000)..... 7

Mo. Rev. Stat. § 558.011(1) (2000)..... 8

Mo. Rev. Stat. § 571.015 (2000) 7, 8

U.S. Const. amend. VIII..... 2

U.S. Const. amend. XIV 2

Other Authorities

Amy L. Katzen, *African American Men's Health and Incarceration: Access to Care Upon Re-Entry and Eliminating Invisible Punishments*, 26 BERKELEY J. GENDER L. & J. 221 (2011) 10, 11

Amy L. Katzen, *African American Men's Health and Incarceration: Access to Care Upon Re-Entry and Eliminating Invisible Punishments*, 26 BERKELEY J. GENDER L. & J. 221, 225 (2011) 10

App. to Pet. Cert. 41a..... 4, 5

Appellant's Substitute Br. in *State v. Nathan*, Mo. S. Ct. No. 95473 (filed May 25, 2016)..... 14

Ashley Nellis, *Still Life: America's Increasing Use of Life and Long-Term Sentences*, The Sentencing Project (2017) 6, 15

Evelyn J. Patterson, *The Dose–Response of Time Served in Prison on Mortality: New York State, 1989–2003*, 103(3) Am. J. Public Health 523 (Mar. 2013) 10, 11

Jason Purnell et al., For the Sake of All 5 (July 31, 2015) 10, 11

John R. Mills, Anna M. Dorn, & Amelia Courtney Hritz, *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 Amer. U. L. R. 535 (2016)..... 7

Justin Wolfers, David Leonhardt, and Kevin Quealy, *1.5 Million Missing Black Men*, N.Y. Times, Apr. 20, 2015 16

Juvenile Offenders and Victims: 1999 National Report, Dep't of Justice Office of Juvenile Justice and Delinquency Prevention 15 (Dec. 1999)..... 14

Missouri Sentencing Advisory Commission, *Annual Report on Sentencing and Sentencing Disparity: Fiscal Year 2015* (May 2016)..... 15, 16

National Center for Health Statistics, *Health, United States, 2016: With Chartbook on Long-term Trends in Health* 44 (2017) (analyzing 2015 life expectancy data), available at: https://www.cdc.gov/nchs/data/hus/2016/fig06.pdf) 9, 11

National Center for Health Statistics, *Health, United States, 2016: With Chartbook on Long-term Trends in Health* 44 (2017) (analyzing 2015 life expectancy data, available at: https://www.cdc.gov/nchs/data/hus/2016/fig06.pdf)9

Pet. in *Mitchell v. Griffith*, No. 16WA-CC00197 (Mo. Cir. Ct. 2016)..... 11

Pet. in *Willbanks v. Missouri Dep't of Corr.*, No. 17-165, *cert. denied,* 138 S. Ct. 304 (2017)..... 11, 14

Ronald E. Claus, Sarah Vidal, & Michele Harmon, *Racial and Ethnic Disparities in the Police*

Handline of Juvenile Arrests, Dep't of Justice Office of Justice Programs (June 2017) 17

Stephen Bronars, *Half of Ferguson's Young African-American Men Are Missing*, Forbes, Mar. 18, 2015 16

Supp. Suggestions in Support of Pet. in *State ex rel. Bostic v. Pash*, No. SC93110 (Mo. 2013) 4

U.S. Census Bureau, *Population Estimates Program*, July 1, 2016 15

INTEREST OF *AMICUS CURIAE*[1]

The Roderick and Solange MacArthur Justice Center ("RSMJC") is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC has offices at Northwestern Pritzker School of Law, at the University of Mississippi School of Law, in New Orleans, in St. Louis, and in Washington, D.C. RSMJC attorneys have led civil rights battles in areas that include police misconduct, the rights of the indigent in the criminal justice system, compensation for the wrongfully convicted, and the treatment of incarcerated men and women.

REASONS FOR GRANTING THE PETITION

Amicus curiae urges this Court to grant certiorari in this case to address a constitutional sentencing issue that is resulting in continued injustices in juvenile prosecutions across the country—that is, whether this Court's substantive and procedural directives from *Graham v. Florida* and its progeny apply with equal force to de facto life

---

[1] Pursuant to United States Supreme Court Rule 37.2, counsel of record received timely notice of the intent to file this brief and consented to the filing of this Amicus brief. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part. No person or entity, other than Amicus, its members, or its counsel made a monetary contribution for the preparation or submission of this brief.

without parole terms imposed upon youth for non-homicide offenses.

Resolution of this matter is especially important for places like Missouri, where Petitioner was sentenced. Indeed, as further described below, de facto life without parole terms are frequently imposed in juvenile non-homicide cases in the Show Me State, gutting the import, meaning, and intent of this Court's body of jurisprudence that has declared youth are categorically less culpable and must be seen as amenable to rehabilitation.

I. This Court Should Grant Certiorari To Clarify That *Graham* and its Progeny Apply to De Facto Life Without Parole Sentences for Juveniles.

The Eighth Amendment prohibits the federal government from inflicting cruel and unusual punishment upon individuals convicted of crimes. U.S. Const. amend. VIII. This bedrock principle has long been applied to the States through the Fourteenth Amendment. U.S. Const. amend. XIV. In *Graham* and *Miller*, this Court recognized that life without parole ("LWOP") sentences are unconstitutionally disproportionate for all non-homicide juvenile offenders and for all but the rarest of juvenile offenders in homicide cases. The de facto LWOP sentences imposed upon Missouri youthful offenders like Bobby Bostic violate the Eighth Amendment as fully as the de jure LWOP sentences found unconstitutional in *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. 460 (2012).

When imposed upon juveniles in non-homicide cases, or in homicide matters where there has been no finding beyond a reasonable doubt of irredeemable depravity, such sentences run counter to "the evolving standards of decency that mark the progress of a maturing society." *Graham*, 560 U.S. at 59 (internal citations omitted).

The reasoning underlying this Court's holdings in the *Roper-Graham-Miller-Montgomery* juvenile cases applies with equal force to any death-behind-bars sentence, whether given the moniker "life without parole" or a functional equivalent. Bobby Bostic's 241-year aggregate sentence for non-homicide crimes amounts to such a death-behind-bars sentence.

Bobby Bostic was 16 years old when he and an older co-defendant committed a robbery, during the course of which two people were injured. Following this incident, Mr. Bostic was convicted of 16 felonies and pled guilty to one felony count of armed criminal action (ACA)—all non-homicide offenses. His adult co-defendant received a sentence of 30 years in prison. Mr. Bostic, however, will become parole eligible in 2091, when he will be 112 years old—well beyond his natural lifetime.

The sentence given to Mr. Bostic is precisely the type of sentence forbidden by the Eighth Amendment, which "prohibit[s] States from making the judgment at the outset that those offenders [convicted of nonhomicide crimes committed before adulthood] never will be fit to reenter society." *Graham*, 560 U.S. at 75. Yet this is what the sentencing judge did in Mr. Bostic's case.

The jury did not recommend any life sentence for Mr. Bostic, although it could have done so on eleven of the felony counts. *See* Supp. Suggestions in Support of Pet. in *State ex rel. Bostic v. Pash*, No. SC93110 (Mo. 2013). Yet the trial judge exercised her discretion to impose greater than a life sentence, ordering Mr. Bostic's sentences to run consecutively for the express purpose of denying him any opportunity to obtain release.

Indeed, rather than allowing Mr. Bostic's age to mitigate the harshness of his penalty, his 16-year-old immaturity appeared to be a motivating factor in imposing his death-behind-bars sentence. During the sentencing hearing, the trial judge castigated Mr. Bostic for not accepting a plea deal and for believing himself "smarter than everyone else in the world." App. to Pet. Cert. 39a, 40a.[2] This attitude is one of the hallmarks of immaturity that this Court has found makes juveniles less culpable and "less deserving of the most severe punishments." *Graham*, 560 U.S. at 68 (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

Although this Court has found that juvenile death-behind-bars sentences cannot be justified by any of the legitimate goals of penal sanctions—"retribution, deterrence, incapacitation, and rehabilitation," *Graham*, 560 U.S. at 71,—judges in Missouri apply them willfully to children. Mr. Bostic's case is a clear example of this troubling practice. The

---

[2] Portions of the transcript are included in the Appendix to the Petition for Writ of Certiorari filed in this case. The full transcript is filed in *Bostic v. State of Missouri*, No. ED 75939 (Mo. Ct. App. 1999).

trial judge in Mr. Bostic's case made a subjective judgment, against the clear intent of the jury, that Mr. Bostic was irretrievably depraved, stating: "You made your choice. You're gonna have to live with your choice, and you're gonna die with your choice because, Bobby Bostic, you will die in the Department of Corrections. … Your mandatory date to go in front of the parole board will be the year 2201. Nobody in this room is going to be alive in the year 2201." App. to Pet. Cert. 41a.

Sentences that allow for parole eligibility only after juvenile offenders have exceeded their life expectancy deny them a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75. This Court's reasoning in *Graham* and *Miller* that juveniles possess a greater capacity for growth and rehabilitation than adults applies with no less force to multiple offenses committed within a short time period than it does to one offense. Likewise, the developmental attributes of a juvenile that make her categorically less culpable than an adult do not disappear simply because her crimes were not ones that mandated a sentence of life without parole. The fact that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes," *Miller*, 567 U.S. at 472, remains whether a juvenile receives a sentence that is the functional equivalent of life without parole.

Such differences do not disappear, and thus States cannot ignore such differences, simply by manipulating the name of a juvenile's death-behind-

bars sentence. Such a result would "improperly den[y] the juvenile offender a chance to demonstrate growth and maturity." *Graham*, 560 U.S. at 73.

II. Missouri and Other States Nullify This Court's Precedent by Imposing De Facto Life Without Parole Sentences When Prohibited Under *Graham*, *Miller*, and Their Progeny.

This case is of the utmost importance for the Court to decide because Missouri and other states impose de facto life sentences in both non-homicide and homicide cases in ways that contravene *Graham* and *Miller*. An estimated 2,089 juvenile offenders are serving virtual or *de facto* life sentences. Ashley Nellis, *Still Life: America's Increasing Use of Life and Long-Term Sentences*, The Sentencing Project 17 (2017). (defining a virtual life sentence as a "sentence of at least 50 years before parole"). A significant portion of those juvenile offenders are incarcerated in the state of Missouri.

A. Missouri Regularly Condemns Youth To Die Behind Bars, Rendering Such Sentences Far Less Than a Rarity.

In Missouri, 525 individuals were serving a virtual life without parole sentence in 2016. Nellis, *Still Life*, *supra* at 9-10. It is unknown exactly how many of these sentences were given to those under the age of 18 at the time of the offense. However, it is estimated that "[o]ne of every 21 virtual life-sentenced individuals was convicted of a crime committed as a juvenile." *Id.* at 18. And this likely does not account for the universe of 17-year-olds who

received such sentences because they are automatically considered adults, not children, under Missouri law. *See* Mo. Rev. Stat. § 211.031(3) (2000).

Indeed, Missouri is one of the nine states that comprise 81 percent of all juvenile LWOP ("JLWOP") sentences in the United States. St. Louis is Missouri's most notable example: although St. Louis City accounted for a mere 0.1 percent of the United States population, it accounted for two percent of all JLWOP sentences nationwide from 1953–2015. John R. Mills, Anna M. Dorn, & Amelia Courtney Hritz, *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 Amer. U. L. R. 535, 574, 572 (2016). With a per capita JLWOP rate that is twenty times the national average, St. Louis City has failed to limit life without parole sentences to "the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery v. Louisiana*, 136 S.Ct. 718, 734 (2016).

In addition, Missouri's armed criminal action (ACA) statute allows for the easy creation of de facto LWOP sentences. *See* Mo. Rev. Stat. § 571.015 (2000). This statute creates a separate offense if any person commits a felony "by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon." Mo. Rev. Stat. § 571.015(1).

Under the ACA statute, ordinary objects—even a replica of a sword from a children's carnival—can be considered "dangerous instruments" depending on the circumstances in which they are used. *State v. Harrell*, 342 S.W.3d 908, 915 (Mo. Ct. App. 2011); *see also State v. Tankins*, 865 S.W.2d 848, 851-52 (Mo. Ct. App. 1993) (finding that a defendant's self-described

butter knife could be a "dangerous instrument"). Missouri courts have even affirmed ACA charges from circumstantial evidence when no weapon was produced. *See, e.g.*, *State v. Daniels*, 18 S.W.3d 66, 69-70 (Mo. Ct. App. 2000) (affirming an ACA charge because of a one-inch wound on the victim's wrist, even though no weapon was ever produced or seen by anyone during the commission of the crime).

Missouri's ACA statute provides for a minimum sentence but defines no maximum sentence. *See* Mo. Rev. Stat. § 571.015. Missouri state courts have affirmed sentences of up to 400 years for an individual ACA charge. *See, e.g.*, *State v. Belcher*, 805 S.W.2d 245, 246 (Mo. Ct. App. 1991) (400-year sentence for one ACA charge); *State v. Bolds*, 11 S.W.3d 633, 637 (Mo. Ct. App. 1999), *aff'd* 156 S.W.3d 420 (Mo. Ct. App. 2005) (101 and 151-year sentences for two ACA charges); *Willbanks v. Dep't of Corr.*, 522 S.W.3d 238, 240 (Mo. 2017), *cert. denied*, 138 S. Ct. 304 (2017) (three consecutive 100-year sentences for three ACA charges); *State v. Stoer*, 862 S.W.2d 348, 354 (Mo. Ct. App. 1993) (100-year sentence for one ACA charge).

As a result, Missouri courts can impose virtually any length of sentence on a youth convicted of an ACA charge. Such a statute has an even greater impact in non-homicide cases, where a consecutive ACA sentence can easily turn a first degree robbery, which carries a maximum sentence of ten to thirty years or life with parole, *see* Mo. Rev. Stat. § 558.011(1) (2000), into a death-behind-bars sentence.

With such pliable tools, judges may impose consecutive sentences for any number of offenses and

easily effectuate the functional equivalent of a LWOP sentence, despite the fact that this Court has articulated a categorical ban on LWOP sentences for juveniles convicted of non-homicide offenses.

Bobby Bostic is not alone in Missouri. Numerous other youths have been sentenced to die behind bars and, without intervention by this Court, will be left condemned without the benefit of the required consideration of "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 567 U.S. at 480. These individuals include:

Timothy Willbanks: Timothy Willbanks was 17 years old when he and two co-defendants committed one carjacking-turned-robbery. The jury found him guilty of one count of kidnapping, one count of assault, two counts of robbery, and three counts of ACA, all stemming from one incident.

The trial court sentenced Mr. Willbanks to a life-plus-355-year aggregate sentence for these non-homicide crimes. Mr. Willbanks will not be eligible for parole until he is approximately 85 years old,[3] far exceeding his natural life expectancy.[4]

---

[3] *See Willbanks*, 522 S.W.3d at 240.

[4] The lifespan of an African American male is, on average, no more than 72.2 years—falling many years shorter than that of Caucasians. National Center for Health Statistics, *Health, United States, 2016: With Chartbook on Long-term Trends in Health* 44 (2017) (analyzing 2015 life expectancy data), available at: https://www.cdc.gov/nchs/data/hus/2016/fig06.pdf); *see also* Amy L. Katzen, *African American Men's Health and*

Ledale Nathan: Ledale Nathan was 16 years old when he and a co-defendant committed a home-invasion robbery that resulted in one victim's death. He was sentenced to six consecutive life sentences, concurrent life sentences, and several consecutive 15-year sentences for crimes including second degree murder and 13 ACA counts.

Despite the jury rejecting LWOP as a possibility for Ledale on remand following *Miller*, the trial judge proceeded to impose consecutive sentences such that Ledale will not be parole eligible until

---

Incarceration: Access to Care Upon Re-Entry and Eliminating Invisible Punishments, 26 BERKELEY J. GENDER L. & J. 221, 225 (2011) ("an African American boy born in 2004 faces a life expectancy of 69.5 years"); Evelyn J. Patterson, *The Dose–Response of Time Served in Prison on Mortality: New York State, 1989–2003*, 103(3) AM. J. PUBLIC HEALTH 523 (Mar. 2013) (finding correlation between time spent in prison and lower life expectancy). This phenomenon is particularly acute in places like Missouri, where Black communities over-represented in prisons have been under-resourced for decades. *See, e.g.*, Jason Purnell et al., For the Sake of All 5 (July 31, 2015) (finding that Clayton, Missouri, a predominantly white community, has an average life expectancy 18 years higher than that of zip codes only a few miles away in predominantly Black, urban St. Louis City), available at: https://forthesakeofall.org/wp-content/uploads/2016/06/FSOA_report_2.pdf.

decades after his natural life expectancy,[5] when he is in his eighties.[6]

Montea Mitchell: Montea Mitchell was 16 years old when he committed two armed robberies and attempted another. He was sentenced to an aggregate 70-year term behind bars for the two robberies, an attempted robbery, and the associated ACA charges.

Regardless of rehabilitation and maturation, under Missouri law Montea must serve over 65 years of his sentence before he becomes parole eligible at age 82.[7] Thus, unless he survives nearly a decade beyond his natural life expectancy, Montea will have no "meaningful chance at release" and will die behind bars.[8]

B. Missouri Courts Impose Death-Behind-Bars Sentences with Little Regard for Defendants' Youth.

As this Court stated in *Roper*, children are "more vulnerable … to negative influences and outside pressures, … have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment," and are comparatively immature and irresponsible. *Roper*, 543 U.S. at 569-

---

5 *See supra* footnote 4.

6 *See* Pet. in *Willbanks v. Missouri Dep't of Corr.*, No. 17-165, *cert. denied,* 138 S. Ct. 304 (2017).

7 *See* Pet. in *Mitchell v. Griffith*, Mo. Cir. Ct. No. 16WA-CC00197 (filed May 4, 2016).

8 *See supra* footnote 4.

70. Those differences should not result in a child growing up and passing away behind bars.

Mr. Bostic, Mr. Willbanks, Mr. Mitchell, and multiple other Missouri youth were intentionally sentenced to virtual LWOP prison terms for their non-homicide crimes. But such sentences should never be lawful in non-homicide cases. And even when a life is intentionally taken, such extreme incapacitation must be reserved for "the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'" *Adams v. Alabama*, 136 S.Ct. 1796, 1801 (2016) (Sotomayor, J., concurring) (citing *Montgomery*, 136 S.Ct. at 734). This mandate to reserve such sentences for only the rarest juvenile offender should apply regardless of whether the child's LWOP sentence is de jure or de facto.

Lower courts outside Missouri have recognized that it does not matter whether a death-behind-bars sentence is imposed as life without parole or a term of years that ensures a youth will never emerge from prison:

> [T]he rationale of *Miller*, as well as *Graham*, reveals that the unconstitutional imposition of a mandatory life-without-parole sentence is not fixed by substituting it with a sentence with parole that is the practical equivalent of a life sentence without parole. Oftentimes, it is important that the spirit of the law not be lost in the application of the law. This is one such time.

State v. Ragland, 836 N.W.2d 107, 121 (2013) (affirming postconviction modification from LWOP for 60 years to LWOP for 25 years). *Accord Budder v. Addison*, 851 F.3d 1047 (10th Cir. 2017), *cert. denied sub nom. Byrd v. Budder*, No. 17-405 (2017); *State v. Zuber*, 152 A.3d 197 (N.J. 2017), *cert. denied*, 138 S. Ct. 152 (2017); *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014); *State v. Ramos*, 387 P.3d 650 (Wash. 2017), *cert. denied*, 138 S. Ct. 467 (2017); *Casiano v. Comm'r of Corr.*, 115 A.3d 1031 (Conn. 2015), *cert. denied*, 136 S. Ct. 1364 (2016).

To exempt terms of years that all but guarantee death behind bars from the reach of *Graham* and *Miller* would reduce their constitutional protections to form over substance. Such an outcome is unacceptable. *See, e.g.*, *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 679 (1996) ("Determining constitutional claims on the basis of such formal distinctions, which can be manipulated largely at the will of the government … is an enterprise that we have consistently eschewed.").

Unfortunately, this is precisely what is happening to juveniles in Missouri. Missouri uses consecutive sentences to directly, and sometimes purposefully, contravene this Court's mandate that "children are different" when it comes to sentencing.

The case of 16-year-old Ledale Nathan demonstrates this issue. The judge made his intent in sentencing Ledale to over 300 years clear: Ledale's "future should be that [he] be permanently incapacitated," the purpose of his sentence being "to send a message to future Judges and Governors as to what this Court believes is an appropriate future for

[him]." *See* Appellant's Substitute Br. in *State v. Nathan*, Mo. S. Ct. No. 95473 (filed May 25, 2016).

In Ledale's resentencing, the judge went on to explain his view of this Court's mandates in *Graham* and *Miller*, referring to those cases as a "loss on the Eighth Amendment" but one that could easily be circumvented because they did "not preclude the entry of consecutive sentences, even if the sum total of those sentences would result in the functional equivalent of life without parole." *State v. Nathan*, 522 S.W.3d 881, 899 (Mo. 2017).

States like Missouri should not be able to avoid the Eighth Amendment's clear limitations on sending juveniles to die behind bars by manipulating sentencing structures.

III. Missouri Sentencing Practices, Including De Jure and De Facto LWOP Sentences, Have Racially-Disproportionate Impacts.

A 1999 report from the Office of Juvenile Justice and Delinquency Prevention found that in the late 1990s, "[m]inorities made up a greater proportion of new court commitments involving youth under age 18 than of those involving older offenders," with African Americans constituting 60 percent of new prison commitments for juveniles. *See Juvenile Offenders and Victims: 1999 National Report*, Dep't of Justice Office of Juvenile Justice and Delinquency Prevention 15 (Dec. 1999). Unfortunately, such trends have continued into the current day.

Nationwide, virtual and literal life sentences are imposed in a manner that disproportionately affects minorities. Such youth are overwhelmingly male (98 percent) and people of color (80.4 percent), with 55.1 percent being African American. Nellis, *Still Life*, *supra* at 17. Additionally, in comparison to adults serving LWOP, life, or a virtual life sentence, "youth of color comprise a considerably greater share of the total than their adult counterparts for each of the three types of life sentences." *Id.*

Missouri follows such trends. According to the Missouri Department of Corrections, African Americans account for 63.0 percent and Caucasians account for 34.7 percent of individuals currently serving JLWOP sentences.[9] These percentages are vastly disproportionate to the representative Missouri population – in July 2016, Missouri's population was estimated to be 11.8 percent African American and 83.2 percent Caucasian. *See* U.S. Census Bureau, *Population Estimates Program*, July 1, 2016.

Similarly, for all age offenders and all offense types, Missouri's incarceration rate for Black offenders is four times that of white offenders, with "black offenders receiving the highest average prison sentences" and "a higher rate of unmitigated prison sentences." Missouri Sentencing Advisory

---

[9] These percentages are based on a list maintained by the Missouri Department of Corrections, obtained by Amicus counsel through a Missouri Sunshine request. The list purports to include all "[o]ffenders under 18 at time of offense and serving a life [with] no parole sentence on August 19, 2016."

Commission, *Annual Report on Sentencing and Sentencing Disparity: Fiscal Year 2015* vii (May 2016). Indeed, the report found that "[f]or violent offenses, black offenders are more likely to be sentenced to prison than white offenders for class A, B, and C felony offenses and have the longest prison sentences for class B and C offenses." *Id.* at 35. Further, "[b]lack offenders served significantly more time than white offenders … and also served more time as a percent of the sentence." *Id.* at 40.

Such disproportionality in Missouri's sentencing practices contributes to the large numbers of African American males "missing" from daily life. Incarceration is "the primary reason why young black men are missing from our largest cities." Stephen Bronars, *Half of Ferguson's Young African-American Men Are Missing*, Forbes, Mar. 18, 2015; *see also* Justin Wolfers, David Leonhardt, and Kevin Quealy, *1.5 Million Missing Black Men*, N.Y. Times, Apr. 20, 2015. More than 40 percent of African American men ages 20 to 24 and 35 to 54 are missing from Ferguson, Missouri, and 24 percent aged 25 to 34 are missing from the St. Louis community. Both figures far exceed the nationwide average of 18 percent. Bronars, *supra*.

Bias is at least partially to blame for racially-skewed levels of incarceration. Studies show minority youth actions are "more likely to be attributed to character flaw[s] and they are more likely to be perceived as dangerous and receive recommendations for harsher punishments." *See* Ronald E. Claus, Sarah Vidal, & Michelle Harmon, *Racial and Ethnic Disparities in the Police Handline of Juvenile Arrests*,

Dep't of Justice Office of Justice Programs (June 2017).

Such racial disproportionality highlights the necessity of providing a check on de facto LWOP sentences. That is, in places like Missouri, racial bias may be driving extraordinarily harsh penalties for Black youth who are wholly capable of rehabilitation—but instead are being removed from society from childhood to death.

CONCLUSION

For the foregoing reasons, Amicus respectfully requests that this Court grant the petition for a writ of certiorari.

Respectfully Submitted,

Amy E. Breihan
Counsel of Record
RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER
3115 South Grand Blvd., Suite 300
St. Louis, MO 63118
Telephone: (314) 254-8540
amy.breihan@macarthurjustice.org

David M. Shapiro
RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER
NORTHWESTERN PRITZKER SCHOOL OF LAW
375 East Chicago Ave.
Chicago, IL 60611
Telephone: (312) 503-0711
david.shapiro@law.northwestern.edu

Attorneys for Amicus Curiae*

*MacArthur Justice Center law clerk, Rebecca Moreland, greatly contributed to the preparation of this brief.

CONSENTS

Customer Service

From: Blake, Julie <Julie.Blake@ago.mo.gov>
Sent: Wednesday, January 3, 2018 5:05 PM
To: Anthony Rothert; Amy Breihan
Cc: Rachel Wainer Apter
Subject: Re: Bostic v. Pash (No. 17-912)
Attachments: image001.png

We consent.

Best,

Julie Marie Blake

Deputy Solicitor General

Office of the Missouri Attorney General

Supreme Court Building

207 W. High St. <x-apple-data-detectors://5/0>

P.O. Box 899 <x-apple-data-detectors://5/0>

Jefferson City, MO 65102 <x-apple-data-detectors://5/0>

Direct Dial: 573.751.3767 <tel:573.751.3767>

Work cell: 573.694.7415 <tel:573.694.7415>

Fax: 573.751.2203 <tel:573.751.2203>

Julie.Blake@ago.mo.gov <mailto:Julie.Blake@ago.mo.gov>

From: Anthony Rothert <arothert@aclu-mo.org>
Date: Wednesday, January 3, 2018 at 3:57 PM
To: 'Amy Breihan' <amy.breihan@macarthurjustice.org>, Julie Blake <Julie.Blake@ago.mo.gov>
Cc: Rachel Wainer Apter <rwainerapter@aclu.org>
Subject: RE: Bostic v. Pash (No. 17-912)

Amy,

Petitioner consents.

Tony

Anthony E. Rothert

Legal Director

ACLU of Missouri Foundation

906 Olive Street, Suite 1130

St. Louis, Missouri 63101-1448

(314) 669-3420 (direct line)

(314) 652-3111 (main number)

(314) 652-3112 (fax)

From: Amy Breihan [mailto:amy.breihan@macarthurjustice.org]
Sent: Wednesday, January 3, 2018 3:56 PM
To: julie.blake@ago.mo.gov; Anthony Rothert <arothert@aclu-mo.org>
Cc: Rachel Wainer Apter <rwainerapter@aclu.org>
Subject: Bostic v. Pash (No. 17-912)

Dear Counsel:

The MacArthur Justice Center at St. Louis intends to file an amicus brief in this case. Please let me know if you consent.

Thank you,

Amy

Consistent with Missouri Bar and Missouri Supreme Court Rules, please be reminded that: 1) e-mail communication is not a secure method of communication; 2) any e-mail that is sent to you or by you may be copied and held by any or all computers through which it passes as it is transmitted; and 3) persons not participating in our communication may intercept our communications by improperly accessing either of our computers or another computer unconnected to either of us through which the e-mail has passed.

Total Control Panel

Login <https://asp.reflexion.net/login?domain=aclu-mo.org>

To: <https://asp.reflexion.net/address-properties?aID=12319502599&domain=aclu-mo.org> arothert@aclu-mo.org

From: amy.breihan@macarthurjustice.org <mailto:amy.breihan@macarthurjustice.org>

Remove <https://asp.reflexion.net/FooterAction?ver=3&un-wl-sender-address=1&hID=25328244207&domain=aclu-mo.org> this sender from my allow list

You received this message because the sender is on your allow list.

This email message, including the attachments, is from the Missouri Attorney General's Office. It is for the sole use of the intended recipient(s) and may contain confidential and privileged information, including that covered by § 32.057, RSMo. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply email and destroy all copies of the original message. Thank you.