IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

BOBBY BOSTIC,

Petitioner,

v.

MICHAEL BOWERSOX,

Respondent.

Case No. 4:11CV2193 FRB

BRIEF OF UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW CENTER FOR LAW AND GLOBAL JUSTICE, HUMAN RIGHTS ADVOCATES AND JUVENILE LAW CENTER AS *AMICUS CURIAE* ON BEHALF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*

The University of San Francisco (USF) Center for Law and Global Justice, Human Rights Advocates, and Juvenile Law Center hereby request that this Court consider the present brief pursuant to Rule 29 of the Federal Rules of Appellate Procedure in support of the Petitioner Bobby Bostic.

The Center for Law and Global Justice is a focal point for USF's commitment to international justice and legal education by creating student externships around the world and protecting and enforcing human rights through litigation and advocacy. The Center has advocated for juvenile justice reform through its Project to End Juvenile Life Without Parole, which assists juvenile defenders and justice advocates challenging juvenile life without parole sentence.

Human Rights Advocates (HRA) is a California non-profit corporation that advances the cause of human rights to ensure that the most basic rights are afforded to everyone. HRA has special consultative status in the United Nations and has participated in meetings for over 30 years. HRA has addressed the issue of juvenile sentencing for the past decade. HRA has filed *amicus curiae* briefs in cases involving juvenile sentencing practices where international standards offer assistance.

Founded in 1975, Juvenile Law Center is the oldest public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Recognizing the critical developmental differences between youth and adults, Juvenile Law Center works to align justice policy and practice, including state criminal laws on sentencing, with modern understandings of adolescent development and time-honored

constitutional principles of fundamental fairness. Juvenile Law Center participates as *amicus curiae* in state and federal courts throughout the country, including the United States Supreme Court, in cases addressing the rights and interests of children.

Amici submit that the sentence imposed in this case violates the Eighth Amendment of the United States Constitution, and must be overturned. Furthermore, the legal issues presented to this Court are directly related to important and pressing judicial concerns regarding appropriate sentencing policies for youth in the justice system. *Amici* urge the Court to consider international law and opinion, as well as foreign practice, when applying the Eight Amendment's clause prohibiting cruel and unusual punishment, and in applying the United States Supreme Court's decision in *Graham v. Florida*, 130 S.Ct. 2011 (2010). International standards and practice prohibiting sentencing juvenile offenders to life in prison without the possibility of parole provide an important indicator of evolving standards of decency. Additionally, the United States is bound by their treaty obligations, which prohibit a sentence of life without parole for juveniles. A review of the international standards and practices was conducted in *Graham*, the ruling under which the Petitioner seeks resentencing.

Finding that the sentence received by Bobby Bostic is the equivalent of life without parole would bring his sentence into alignment with the constitutional requirements set forth by the Supreme Court in *Graham*.

INTRODUCTION

In 1997 Bobby Bostic was found guilty of 3 counts of armed robbery, 3 counts of attempted armed robbery, 2 counts of assault, 8 counts of armed criminal action in conjunction with the robbery and assault, and 1 count of kidnapping, all stemming from a single incident. Bostic committed his offenses at the age of 16 and was sentenced to 241 years in prison.

Although the jury recommended that Bostic serve 30 years, the judge sentenced him to serve each count of his sentence consecutively. Under Missouri's Edgar Rule and rules of Minimum Eligibility, Bostic will be eligible for parole in January 2089, after serving 92 years behind bars. He will be 108 years old. The United States Supreme Court's decision in *Graham v. Florida*, 130 S.Ct. 2011 (2010) requires that his sentence be vacated.

Under the Supreme Court's decision in *Graham*, juvenile offenders who committed a non-homicide crime cannot be sentenced to life without parole, and must be given a meaningful and realistic opportunity for release and re-entry before the expiration of their sentences. *Id.*at 2010. Because Bostic received a 241-year sentence and will remain in prison for 92 years for a non-homicide offense, he will unquestionably die in prison before any possibility of release. This was recognized at Bostic's sentencing where the judge stated, "You're gonna have to live with your choice because Bobby Bostic, you will die in the Department of Corrections." As such, his sentence is a *de facto* life without parole sentence for a non-homicide offense and is unconstitutional.

SUMMARY OF ARGUMENT

Because Missouri law requires Bostic to serve a minimum of 92 years of his 241 year sentence before becoming parole-eligible, his sentence is the functional equivalent of life without parole for a non-homicide offense. This sentence violates the United States Supreme Court's ruling in *Graham v. Florida*, which held that juvenile offenders cannot be sentenced to life for non-homicide offenses without a meaningful and realistic opportunity for re-entry into society prior to the expiration of their sentence. Bostic's sentence is unconstitutional because it serves no legitimate penological purpose and is disproportionate with respect to his age at the time of the offense.

International law and opinion also inform the law of the United States, and courts have referred to international standards when considering the constitutionality of certain practices. This has been particularly true with regard to the Eighth Amendment's "cruel and unusual punishments" clause, as evidenced by a long line of United States Supreme Court cases. Thus, *amici* consider international law and practice with regard to sentences of juvenile life without parole to be particularly relevant to this Courts evaluation of a term-of-years sentence that amounts to life without parole.

The United States is today the only country in the world to sentence a juvenile to life without parole in practice and effectively ensure that the offender will die in prison with no hope of release. Additionally, universally accepted standards evidenced in international treaties, such as the Convention on the Rights of the Child to which every country is a party except the United States, Somalia and South Sudan, prohibit such a sentence. The United States is party to the Convention Against Torture and the International Convention on Civil and Political Rights, both of which have been interpreted to prohibit this sentence for juvenile offenders. The Supreme Court acknowledged the widespread practice against the sentence in *Graham v. Florida*, where it found the sentence unconstitutional for non-homicide crimes. The appropriate remedy to ensure that this Court follows its obligations under *Graham* and international law and norms is to resentence Bostic to a sentence that allows for a meaningful parole consideration.

PROCEDURAL HISTORY

Amicus adopts the procedural history presented by Petitioner in his brief.

STANDARD OF REVIEW

To make an application for writ of habeas corpus challenging a state court judgment, a petitioner must show that "the state court's adjudication on the merits was 'contrary to, or

involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Lafler v. Cooper*, 132 S.Ct. 1376, 1390 (2012) (citing 28 U.S.C. § 2254(d)(1)). "A decision is contrary to clearly established law if the state court 'applies a rule that contradicts the governing law set forth in [Supreme Court] cases.'." *Id.* (citing *Williams v. Taylor*, 529 U.S. 362, 405 (2000)).*Amicus* argues that *Graham* resolves this issue, requiring that relief be granted.[1]

ARGUMENT

I. A SENTENCE THAT IS THE FUNCTIONAL EQUIVALENT OF LIFE WITHOUT PAROLE FOR A JUVENILE WHO WAS CONVICTED OF A NON-HOMICIDE OFFENSE IS UNCONSTITUTIONAL

In *Graham v. Florida,* the United States Supreme Court held that "the Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Graham*, 130 S.Ct. at 2034. The Court's reasoning was grounded in developmental and scientific research that demonstrates that juveniles possess a greater capacity for rehabilitation, change and growth than adults. Emphasizing these unique developmental characteristics, the Court held that juveniles who are convicted of non-homicide offenses require a distinctive treatment under the Constitution.

A. Bostic's 241 Year Sentence For A Non-homicide Offense Is Unconstitutional As It Serves No Legitimate Penological Purpose

According to *Graham*, a sentence "lacking any legitimate penological justification is by its nature disproportionate to the offense" and therefore, unconstitutional. *Id.* at 2028. The Court

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[1]*Graham* has been found to apply retroactively, allowing for re-sentencing. In *In Re Sparks*, 657 F.3d 258 (5th Cir. 2011) the Court found that the decision in *Graham* did apply retroactively to cases of collateral review, which would include a writ of habeas corpus. Relying on the Supreme Court's decisions in both *Teague v. Lane* and *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989) (overruled on other grounds by *Atkins v. Virginia*, 536 U.S. 304), the Court found that "*Graham* was therefore made retroactive on collateral review by the Supreme Court as a matter of logical necessity [...]." *In Re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011).

concluded that no penological justification warrants a sentence of life without parole as applied to juveniles convicted of non-homicide offenses. *Id.* As in *Graham*, the 241-year sentenced imposed on Bostic, which ensures he will die in prison, does not serve any of the traditional penological goals – deterrence, retribution, incapacitation, or rehabilitation.

Relying on the analysis set forth in *Roper v. Simmons,* 543 U.S. 551 (2005) (prohibiting capital punishment for offenders younger than 18), the *Graham* Court concluded that the goal of deterrence did not justify the imposition of life without parole sentences on juveniles:

> *Roper* noted that "the same characteristics that render juveniles less culpable than adults suggest ... that juveniles will be less susceptible to deterrence." *Ibid.* ...they are less likely to take a possible punishment into consideration when making decisions.

Graham, 130 S.Ct. at 2028-29. Because youth would not likely be deterred by the fear of a life without parole sentence, this penological goal did not justify the sentence.

The *Graham* Court also concluded that retribution does not justify the imposition of life without parole sentences for juveniles. The Court echoed *Roper's* assessment that "the case for retribution is not as strong with a minor as with an adult." *Id.* at 2028 (citing *Roper*, 543 U.S. at 571). As the *Roper* Court had explained, such a severe retributive punishment was inappropriate in light of juvenile immaturity and capacity to change. The *Graham* Court recognized that these same considerations applied to "imposing the second most severe penalty on the less culpable juvenile." *Id.*

The *Graham* Court also held that incapacitation could not justify the sentence of juvenile life without parole. To justify incapacitation for life "requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable." *Id.* at 2029. Indeed, at its core, the developmental and scientific research proves the opposite – adolescents' natures are transient and adolescents must be given "a chance to

demonstrate growth and maturity." *Id.* As a result, a child sent to prison should have the opportunity to rehabilitate and qualify for release after some term of years. Mechanisms such as parole boards can provide a crucial check to ensure that the purposes of punishment are satisfied without unnecessarily incapacitating fully rehabilitated individuals and keeping youth in prison until they die.

Finally, *Graham* concluded that a life without parole sentence cannot be justified by the goal of rehabilitation.

> The penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society.

Graham, 130 S Ct. at 2029-30. The Court also underscored that the denial of rehabilitation was not just theoretical: the reality of prison conditions prevented juveniles from growth and development they could otherwise achieve, making the "disproportionality of the sentence all the more evident...." *Id.* During a lengthy adult sentence, youth lack an incentive to try to improve their character or skills. Indeed, many juveniles sentenced to spend the rest of their lives in prison commit suicide, or attempt to commit suicide. *See* Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 Wake Forest L. Rev. 681, 712, nn.141-47 (1998). Because this 241-year sentence, which is equivalent to life without parole, serves no legitimate penological purpose, it is unconstitutional.

B. Bostic's Sentence Is Unconstitutionally Disproportionate In Light Of His Age

1. The Eighth Amendment Requires That Sentences Be Proportionate

Even if a 241-year sentence does not equal a life without parole sentence pursuant to *Graham*, the sentence is still disproportionate. Proportionality is central to the Eighth Amendment. The U.S. Supreme Court has interpreted the Eighth Amendment's ban on cruel and

unusual punishment to include punishments that are "grossly disproportionate" to the crime. *Graham, supra* (citing *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991)). In *Graham,* the Court instructed, "to determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" *Id.* (citing*Estelle v. Gamble*, 429 U.S. 97, 102 (1976)). Courts apply a proportionality review to determine if a sentence meets that standard. *Id.*

The Court in *Graham* held that cases addressing the proportionality of sentences "fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case." *Id.* at 2021. "The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty." *Id.*

Under the first classification the Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive. A court must begin by comparing the gravity of the offense and the severity of the sentence. In the rare case where this "threshold comparison . . . leads to an inference of gross disproportionality," the Court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. *Id.* at 2022.If this comparative analysis "validate[s] an initial judgment that [the] sentence is grossly disproportionate, the sentence is cruel and unusual." *Id.*

The second, "categorical," classification of cases assesses the proportionality of a sentence as compared to the nature of the offense or the *characteristics of the offender*. *Id.* at 2022 (emphasis added). In this line of cases – in which a particular sentence is deemed unconstitutional for an entire class of offenders – the Court has found that some offenders have

characteristics that make them categorically less culpable than other offenders who commit similar or identical crimes. *See, e.g.Roper v. Simmons* 543 U.S. 551 (2005) (applying a categorical approach to ban the death penalty for defendants who committed crimes before turning 18); *Atkins v. Virginia,* 536 U.S. 304 (2002) (applying the approach to ban the death penalty for defendants who are mentally retarded); *Kennedy v. Louisiana,* 554 U.S. 407 (2008) (applying the approach for defendants convicted of rape where the crime was not intended to and did not result in the victim's death); *Graham*, 130 S.Ct. at 2022 (applying the approach to a juvenile sentenced to life without parole for a non-homicide offense).

In discussing proportionality, the *Graham* Court further explained, "a sentence that lacks any legitimate penological purpose is by its nature disproportionate to the offense and therefore unconstitutional." *Id.* at 2028. Relying on developmental and scientific research that demonstrated that juveniles possessed a greater capacity for rehabilitation, change and growth than adults, the *Graham* Court held that the four accepted rationales for the imposition of criminal sanctions – incapacitation, deterrence, retribution and rehabilitation – were not served by imposing a life without parole sentence on a juvenile. *Id.* at 2030.*Graham* established that the developmental characteristics of children and adolescents are relevant to the Eighth Amendment proportionality analysis – even in noncapital cases.

2. The Eighth Amendment Requires A Separate Proportionality Analysis for Children and Adolescents

Federal proportionality standards prohibit punishment that is grossly disproportionate to the crime or the individual culpability of the offender. *Graham*, 130 S.Ct. at 2037. As children are categorically less culpable than adults, a formal and separate proportionality analysis for juveniles should be incorporated into Eighth Amendment jurisprudence.

a. Children's Developmental Differences Are Salient To The Eighth Amendment Analysis Whenever Children Receive A Sentence Designed For Adults

The Supreme Court has consistently held that children are different from adults in constitutionally relevant ways. *See, e.g., J.D.B. v. North Carolina,* 131 S. Ct. 2394 (2011); *Graham, supra*; *Roper, supra*; *Haley v. Ohio*, 332 U.S. 596 (1948). A child's age is far "more than a chronological fact." *J.D.B, supra*; accord *Eddings*v. *Oklahoma,* 455 U. S. 104, 115 (1982); *Gall* v. *United States*, 552 U. S. 38, 58 (2007); *Roper,* 543 U.S. at 569; *Johnson* v. *Texas*, 509 U. S. 350, 367 (1993). In recent years, the firmly established doctrine that children merit distinct treatment under the Constitution has been supported and reinforced by a growing body of scientific research demonstrating that youth are not only socially, but also psychologically and physiologically different from adults. *See, e.g.,* Steinberg, Cauffman, Banich& Graham, *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 Dev. Psych. 1764 (2008).[2]

The *Graham* Court noted that three essential characteristics distinguish youth from adults for culpability purposes:

> As 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." These salient characteristics mean that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Accordingly, "juvenile offenders cannot with reliability be classified among the worst offenders."

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[2] The Court in *J.D.B.* noted that "[a]lthough citation to social science and cognitive science authorities is unnecessary to establish these commonsense propositions [that children are different than adults], the literature confirms what experience bears out." 131 S.Ct. at 2403 n.5.

130 S.Ct. at 2026 (quoting *Roper*, 543 U.S. at 569-70, 573). In light of these differences, the *Graham* Court concluded, "[a] juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.'" *Id.* (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988).[3] Because of a youth's developmental characteristics and capacity for change, the Supreme Court in *Roper* and *Graham* found that sentences that are constitutional for adults are unconstitutional when imposed on juveniles.

Though *Roper* and *Graham* involved sentences of death and life without parole, the research relied upon in both cases establishing that adolescents are less culpable than adults applies with equal force to any juvenile – regardless of his or her offense and regardless of his or her sentence. Therefore, when assessing whether a sentence imposed on a juvenile is proportionate under the Eighth Amendment, a court must consider the characteristics of the juvenile offender, not merely compare the gravity of the offense to the severity of the sentence. *SeeGraham*, 130 S.Ct. at 2202.

b. Courts Must Consider Mitigating Circumstances Whenever A Child Receives A Harsh Adult Sentence

In extending the proportionality jurisprudence that recognizes that children merit distinct treatment under the Eighth Amendment, courts must consider the offender's juvenile status and individual characteristics of the juvenile that would reflect a diminished level of culpability – in short, the court must look to mitigating factors.

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[3]*See* Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 31 (2008) (explaining that "[m]ost teenagers desist from criminal behavior . . . [as they] develop a stable sense of identity, a stake in their future, and mature judgment." Thus, because most adolescents who commit crimes are "not on a trajectory to pursue a life of crime, a key consideration in responding to their criminal conduct is the impact of dispositions on their prospects for productive adulthood.")

i. The Supreme Court Has Historically Considered Mitigating Factors in Death Penalty Cases

The Supreme Court has recognized that mitigating factors can justify less harsh sentences. The Court has held that, in adult death penalty cases, "the fundamental respect for humanity underlying the Eighth Amendment requires that the defendant be able to present any relevant mitigating evidence that could justify a lesser sentence." *Sumner v. Nevada Dept. of Prisons*, 483 U.S. 66, 85 (1987). The sentencer must consider all mitigating evidence and allow for individualized sentencing that hypothetically takes into account the full context in which the crime occurred. *See* J. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme,* 6 Wm. & Mary Bill of Rts. J. 345 (1998).

In death penalty cases, youth is one of these mitigating principles. *See, e.g.,Eddings v. Oklahoma*, 436 U.S. 921 (1978); *Thompson v. Oklahoma,* 487 U.S. 815 (1988). The *Roper* Court, in banning the death penalty for juveniles, found that the "differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood [exists] that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." 543 U.S. at 573.

ii. When Sentencing a Child to an Adult Sentence, Courts Must Always Look to Mitigating Factors, Even in Non-Death Penalty Cases

Courts should consider mitigating factors whenever considering an adult sentence for a child. The Supreme Court has required mitigating factors only in death penalty cases as "death is

a punishment different from all other sanctions in kind rather than degree." *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976).*Graham*, however, eliminated the "death is different" adult sentencing distinction – at least when juveniles are involved. This consequence of *Graham* was expressly noted by the dissent. *See Graham*, 130 S.Ct. at 2046 ("Today's decision eviscerates that distinction [between capital and noncapital sentencing]. 'Death is different' no longer.") (Thomas, J., dissenting). Under *Graham* and *Roper,* sentences that would be deemed appropriate for adult offenders would be unconstitutional for a child who committed like offenses. In the wake of these cases, courts should similarly look to mitigating factors that may justify a less harsh sentence whenever a child receives a sentence designed for an adult.

Because youth are categorically less culpable than adults, courts should always treat their youth as a mitigating factor that may justify a lesser sentence. *See, e.g., Roper*, 543 U.S. at 553 (finding that youth's irresponsible conduct is not as morally reprehensible as that of an adult and that juveniles' own vulnerability and comparative lack of control over their immediate surroundings mean they have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment). Other mitigating factors that courts typically consider may also be affected by a youth's age, immaturity and development.

To ensure that sentences for juveniles are not unconstitutionally disproportionate, courts should therefore evaluate mitigating factors including the juvenile's age, level of involvement in the offense, external or coercive pressures surrounding the criminal conduct, and other relevant characteristics. These factors should be considered in light of the juvenile's diminished capacity, increased impulsivity, and capacity for change or rehabilitation.

II. INTERNATIONAL PRACTICE AND TREATY OBLIGATIONS SUPPORT A FINDING THAT LIFE WITHOUT PAROLE SENTENCES FOR JUVENILES ARE UNCONSTITUTIONAL

The United States is the only country in the world that currently imposes life without parole sentences on juveniles. Connie de la Vega & Michelle Leighton, *Sentencing our Children to Die in Prison: Global Law and Practice,* 42 U.S.F. L. Rev. 983 (2008). While a few countries other than other than the United States have statutory language that arguably permits sentencing juvenile offender to life without parole, there is no known person to be serving such a sentence anywhere in the world other than the United States. *Id.*

Pursuant to *Graham v. Florida* and United States Supreme Court jurisprudence, the laws of other countries and international practice and opinion are relevant to the determination of whether a sentence violates the cruel and unusual clause of the Constitution. *Graham,* 130 S.Ct. at 2033-34; *see also Roper v. Simmons*, 543 U.S. 551, 577 (2005). International consensus is against sentencing a juvenile to life without parole, and the United States is party to treaties that explicitly forbid it. The Court should consider both of these issues in determining whether the sentence, the functional equivalent of life without parole, is constitutional in Bostic's case.

A. International Practice And Opinion Has Been A Part Of Eighth Amendment Analysis By The United States Supreme Courts For Decades

The Supreme Court has consistently recognized the relevance of international norms to the scope and content of societal norms and Constitutional rights. In *Graham v. Florida*, Justice Kennedy cited to foreign laws and international, practice and opinion that prohibit the sentence as evidence that "demonstrates that the Court's rationale has respected reasoning to support it." *Graham*, 130 S.Ct. at 2034. The *Graham* Court recognized that the U.N. Convention on the

Rights of the Child ("CRC"), ratified by every country except Somalia and the United States,[4] explicitly prohibits juvenile LWOP sentences and that countries had taken measures to abolish the practice in order to comply with the CRC. *Id.* at 2033-34. The Court found that "the United States now stands alone in a world that has turned its face against" life without parole for juvenile non-homicide offenders. *Id.* (citing *Roper*, 543 U.S. at 577). In his concurrence, Justice Stevens reaffirmed the Court's reliance on international law for at least a century when interpreting the Eighth Amendment's "evolving standards of decency." *Graham*, 130 S.Ct. at 2036 (citing *Weems v. United* States, 217 U.S. 349, 373-378 (1910)).

The rationale of Graham should apply equally to a sentence of 241 years, reduced to 92 years, and imposed on a juvenile offender, as is in the case of Bostic. In the past 50 years, United States Supreme Court jurisprudence on issues of cruel and unusual punishment has tended toward "evolving standards of decency" in "civilized" society. The Court has consistently relied upon international law, practice and custom as instructive to cruel and unusual punishment analysis.

In *Trop v. Dulles*, the Court expounded upon the need for dignity and civility in interpreting the Eighth Amendment. *Trop v. Dulles*, 356 U.S. 86, 100 (1958). The Court noted that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." *Id.* at 100. Because the Eighth Amendment's words are not precise and the scope is not static, the Court "established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress

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[4] South Sudan is also not a party to the Convention on the Rights of the Child, however at the time of the *Graham* opinion, the country had not yet been formed, as it did not officially become an independent state until July 9, 2011

of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual." *Id.* at 100-101. For example, it noted that the "civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime." *Id.* at 102-103.

In *Coker v. Georgia*, the Court considered "the climate of international opinion concerning the acceptability of a particular punishment" in a footnote. *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977). In support of its conclusion that a death sentence for a rape conviction was cruel and unusual, it stated "[it] is not irrelevant that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue." *Id.*

In *Enmund v. Florida*, the Court acknowledged *Coker* noting that "the climate of international opinion concerning the acceptability of a particular punishment" is an additional consideration that is "not irrelevant." *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (finding the death penalty is cruel and unusual punishment for felony murder). The Court went on to note the "doctrine of felony murder, has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe." *Id.* "It is also relevant that death sentences have not infrequently been commuted to terms of imprisonment on the grounds of the defendant's lack of premeditation and limited participation in the homicidal act." *Id.*

In *Thompson v. Oklahoma*, the Court recognized the relevance of the views of "respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western community" in its conclusion that the Eighth and Fourteenth Amendments prohibited execution of a defendant convicted of first degree murder that he committed when he was 15 years old. 487 U.S. 815, 830. The Court made an additional

reference to international practice and opinion in a footnote: "[w]e have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual:" *Id.* at n.31.

In *Atkins v. Virginia*, the Court looked to the overwhelming disapproval of the "world community" to sentencing mentally retarded offenders to death. 536 U.S. 304, 316 n. 21. The Court explained "[a]lthough these factors are by no means dispositive, their consistency with the legislative evidence further support to our conclusion that there is a consensus among those who have addressed the issue." *Id.*

In *Roper v. Simmons*, the Supreme Court abolished the juvenile death penalty. The Court relied upon the 'evolving standards of decency' reasoning applied in *Trop* and *Thompson*, and looked to international law, practice and opinion to categorically prohibit juveniles from receiving the death penalty. *Roper*, 543 U.S. at 575-78. Since the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." *Id.* at 575. In the inquiry of whether the punishment was cruel and unusual, the Court gave due deference to international treatment of juvenile offenders: "It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime." *Id.* at 578.

In *Graham*, the Court, citing to *Roper*, reaffirmed the relevance of international practice and opinion. "[T]he opinion of the world community, while not controlling our outcome, provide[s] respected and significant confirmation for our own conclusions." *Graham*, 130 S.Ct. at 2035. Justice Stevens' concurrence acknowledges that "evolving standards of decency" have

played a central role in Eighth Amendment jurisprudence for decades and will continue to do so. *Id.* at 2036. (Stevens, J. concurring).

Using the same rationale as *Graham* and its Eighth Amendment predecessors discussed above, this Court should look to the language of the CRC and the practices of other countries to apply the prohibition of juvenile life without parole to what is the functional equivalent of life without parole sentences.

B. International Practice And Opinion Are Relevant To A Determination Of Whether A Sentence Is Cruel And Unusual Under The United States Constitution

The global consensus against using the death penalty and JLWOP for juveniles was instructive in the United States Supreme Court's decisions to abolish those sentencing practices as cruel and unusual punishments in *Roper* with respect to the death penalty in *Graham* with respect to JLWOP for non-homicide crimes. *Roper*, 543 U. S. at 578; *Graham*, 130 S.Ct. at 2033-34. Similarly, the international prohibition against life without parole terms for minors, as well as other international principles, are relevant to whether a term of 241 years in prison is constitutional. As evidence of international practice and opinion, *Graham* recognized that Article 37(a) of the CRC, "prohibits the imposition of 'life imprisonment without possibility of release...for offences committed by persons below eighteen years of age.'" *Graham*, 130 S.Ct. at 2034.

Bostic's consecutive sentences totaling 241 years, with a potential parole date set after 92 years of imprisonment also fit within the prohibitions of Article 37(a) of the CRC because there is no real possibility of release within his lifetime. Moreover, the oversight committee for the CRC specifically recommends, "parties abolish all forms of life imprisonment for offences committed by persons under the age of eighteen. For all sentences imposed upon children the

possibility of release should be realistic and regularly considered." Comm. on Rights of the Child, Children's Rights in Juvenile Justice, General Comment No. 10, U.N. Doc. CRC/C/GC/10 par. 77 (Apr. 25, 2.007) (emphasis added). Also, Article 37(b) of the CRC provides that imprisonment be used only as a measure of last resort and for the shortest appropriate time. U.N. Convention on the Rights of the Child, GA Res. 44/25, Annex, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/49 (Nov. 20, 1989). Because Bostic's sentence provides no possibility of release and is not the shortest appropriate time available, it is out of step with the CRC and thus international practice and opinion.

Consistent with international law, practice and opinion, an irreducible sentence of life imprisonment cannot be imposed on a child in any European country. In fact, the majority of European countries do not allow life sentences to be imposed on children at all. *See* Dirk Van ZylSmit, *Outlawing Irreducible Life Sentences: Europe on the Brink?*, 23 Federal Sentencing Reporter, No. 1, 39-48 (October 2010). The maximum youth prison sentence or similar sanctions of deprivation of liberty vary between three years in Portugal, four years in Switzerland, 8 years in Denmark (Criminal Code sec. 33) 10 years in the Czech Republic (Criminal Code art. 79), Estonia (Penal Code art. 173), Germany (Youth Courts Law sec. 18), Slovenia (Penal Code art. 89) and 15 years in Romania (Penal Code art. 123) and even longer terms up to (theoretically) life imprisonment with the possibility for parole in England/Wales, the Netherlands or Scotland (in the latter cases restricted, however, to juveniles of at least 16 years of age). *Id.* In general, the maximum is fixed at 10 years, sometimes allowing an increase of penalties of up to 15 years for very serious crimes. *Id.*

The United States remains the only country in the world to sentence a juvenile to life without parole in practice. Connie de la Vega & Michelle Leighton, *Sentencing our Children to*

Die in Prison: Global Law and Practice, 42 U.S.F. L. Rev. 983 (2008). In a 2007 study, 10 countries were identified as having laws that could permit the sentencing of juvenile offenders to life without parole- Antigua and Barbuda, Argentina, Australia, Beliza, Brunei, Cuba, Dominica, Saint Vincent and the Grenadines, the Solomon Islands and Sri Lanka. *Id.* Since that time, additional research has clarified that such a sentence is not possible in Belize or Brunei, and that there are no known cases of such a sentence being imposed in the remaining countries.[5]

Because Bostic's 241-year sentence is out of step with international law, including the CRC, and practice and opinion, there is compelling support to find that this sentencing practice is

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[5] Additional research clarifies that "life sentence" in Belize means 18-20 years without parole. Second Periodic Report by Belize to the Committee on the Rights of the Child ¶ 85, U.N. Doc. CRC/C/65/Add.29 (July 13, 2004). In Brunei, while an offender under 18 may be detained during "His Majesty the Sultan and Yang Di-Pertuan's pleasure," the statute also provides that the child or young person (ages 14-18) may be released at any time and the case must be reviewed at least once a year. Children and Young Person's Order 2006, Section 45(1), (3), and (5).Four additional countries have been identified as having similar ambiguous statutory language - Zambia, Sierra Leone, Fiji, and Tonga- but there is no evidence that any of these countries in fact imposes JLWOP. Each of these countries is party to the Convention on the Rights of the Child. While the penal codes in these jurisdictions have ambiguous language regarding JLWOP, the wording of the statutes suggests that there remains some mechanisms for review of life sentences or for potential release. Section 25(1) of the Fijian Penal Code specifies that "the court shall sentence such person to be detained during the Governor-General's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the Governor-General may direct, and whilst so detained shall be deemed to be in legal custody," providing discretion in the sentencing. Tongan Penal Code Section 9l(2) notes that "[e]very person who attempts to commit murder shall be liable to imprisonment for life or any less period," and Tongan Courts have looked to human rights instruments regarding the validity of punishments. *See Fangupo v. Rex; Fa'ooa v. Rex* [2010] TOCA 17; AC 34 of 2009; AC 36 of 2009 (147 2010) (Tonga) (overturning sentence of judicial whipping because contrary to Tonga's international legal obligations under the Convention Against Torture). Additionally, in Sierra Leone, section 216 of the Criminal Procedures Acts specifies that the juvenile should be confined to a chosen place as may be directed by the president and for a stated period of time until a juvenile's reformation and transformation is guaranteed. Although this does not prohibit JLWOP, it does suggest that there is evaluation of juveniles during incarceration and upon rehabilitation the potential for release. Finally, the Penal Code Act of Zambia Section 25(2) notes that "the court shall sentence him to be detained during the President's pleasure; and when so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct." This, in conjunction with subsection (3), which states that "the presiding Judge shall forward to the President a copy of the notes of evidence taken at the trial, with a report in writing signed by him containing such recommendation or observations on the case as he may think fit to make" indicates that some discretion remains after the juvenile has been sentenced.

cruel and unusual. As *Graham* found with JLWOP, "[t]he judgment of the world's nations that a particular sentencing practice is inconsistent, with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it." *Graham*, 130 S.Ct. at 2034. Further, in the inquiry of whether a punishment is cruel and unusual, "the overwhelming weight of international opinion against' life without parole for non-homicide offenses committed by juveniles 'provide[s] respected and significant confirmation for our own conclusions.'" *Id.* The weight of global law, practice and opinion against life without parole similarly supports the conclusion that a sentence of 241 years, which is the functional equivalent of life without parole, is unconstitutional.

C. The Imposition Of A 241 Year Sentence On A Juvenile Offender Violates United States Treaty Obligations

The United States is a party to several treaties that have been interpreted by their oversight bodies to prohibit juvenile life without parole sentences. Under the Constitution, the states must uphold these treaty obligations. In determining whether the United States Constitution permits the challenged sentence, this Court should consider the mandates of the Supremacy Clause, which provides that "[a]ll Treaties made... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const. art.VI, cl. 2. As Justice Stevens has stated: "[o]ne consequence of our form of government is that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation." *Medellin v. Texas*, 552 U.S. 491, 536 (2008) (Stevens, J. concurring). In a follow-up opinion on the denial of habeas corpus relief, Justice Stevens again emphasized the point: "I wrote separately to make clear my view that Texas retained the authority and, indeed, the duty as a matter of international law to remedy the potentially significant breach of the United States' treaty obligations..." *Medellin v. Texas,* 129 S.Ct. 360, 362 (2008) (Stevens, J., dissenting).

Accordingly, Missouri has an obligation to ensure that its criminal punishments comply with the United States' international treaty obligations. Thus, this Court must consider treaties to which the United States is a party, including: (1) the International Covenant on Civil and Political Rights ("ICCPR"), 999 U.N.T.S 171,entered into force, Mar. 23, 1976, ratified by the United States; and (2) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), 1465 U.N.T.S. 85, entered into force, June 26, 1987, ratified by the United States, Oct. 21, 1994. In ratifying the ICCPR, Congress stated, "The United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the State and local governments;...". Senate Committee, on Foreign Relations, ICCPR, S. Exec.Rep. No. 102-23, at 19 (1992).

In 2006, the Human Rights Committee, oversight authority for the ICCPR, determined that allowing a life without parole sentence contravenes Article 24(1), which states that every child shall have "the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State" and Article 7, which prohibits cruel and unusual punishment Concluding Observations of the Human Rights Committee: The United States of America, U.N. Doc. CCPR/C/USA/CO/ 3/Rev.1, para. 34, (Dec. 18, 2006). Article 14(4) of the ICCPR further requires that criminal procedures for juvenile persons should take into account their age and desirability of promoting their rehabilitation. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95020 (1992), 999 U.N.T.S. 171, Article 14(4).[hereinafter ICCPR].)

The Committee Against Torture, the official oversight body for the Convention Against Torture, in evaluating the United States' compliance with that treaty, found that life

imprisonment of children "could constitute cruel, inhuman or degrading treatment or punishment" in violation of the treaty. Committee Against Torture, Conclusions and Recommendations of the Committee Against Torture: United States of America, at para. 34, U.N. Doc. CAT/USA/CO/2 (July 25, 2006). Bostic would be serving a sentence of 241 years with his first parole hearing after 92 years, thus also raising concerns under this treaty's provisions.

In light of these treaty obligations, this Court should consider the views of the bodies authorized to monitor treaty compliance in determining whether the sentence of 241 years violates international treaties.[6]

CONCLUSION

The Supreme Court has acknowledged that a child's age is far "more than a chronological fact." *See J.D.B. v. North Carolina* 564 U. S. 1, 8 (2011). For the foregoing reasons, the Court should engage in an offender-based analysis for juveniles that reflect both our society's evolving standards of decency and our greater understanding of adolescent development.

As the Supreme Court did in *Graham v. Florida*, this Court should treat practice and opinions of other nations and international agreements as relevant to the Court's interpretation of both the Eighth Amendment and the meaning of *de facto* life without parole. Further, it should apply the provisions of treaties to which the United States is a party. Therefore, this court should

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[6] In considering the treaties for this purpose, this Court need not address the issue of whether the treaty provisions are self-executing or the validity of the non-self-executing declarations to some of the treaties. For background and legislative history of the declarations, see Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 Cinn. L. Rev. 423, 456-62 (1997). Courts have applied treaty provisions in defensive postures without considering whether they are self-executing. See, *United States v. Rauscher*, 119 U.S. 407 (1886); *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

vacate the 241 year long sentence and resentence Bostic to a sentence that would permit meaningful consideration of parole.

For the foregoing reasons, *Amici Curiae* respectfully request that this Court vacate Petitioner Bostic's sentence and remand the case for sentencing in accordance with *Graham*.

Respectfully submitted,

Dated: May 8, 2012

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DISTRICT

BOBBY BOSTIC,	)	
Petitioner	)	
v.	)	No. 4:11CV2193FRB
MICHAEL BOWERSOX,	)	
Respondent.	)	
	)	

DECLARATION OF SERVICE OF MAIL

I, Nina Lopes, hereby certify that on May 8, 2012, a true and correct copy of the foregoing **BRIEF OF *AMICI CURIAE*** has been served by First Class mail on the following:

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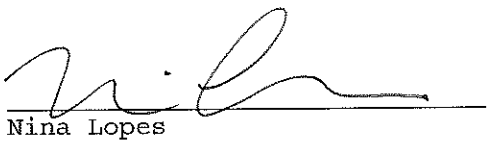

Nina Lopes