

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

CHAZ BUNCH, :  
 :  
 :  
 Petitioner-Appellant, :  
 :  
 :  
 v. : **§ 2254 HABEAS CASE**  
 :  
 :  
 KEITH SMITH, Warden; :  
 :  
 :  
 Respondent-Appellee. :

**MEMORANDUM IN SUPPORT OF APPELLANT’S APPLICATION FOR  
A CERTIFICATE OF APPEALABILITY AND FOR LEAVE TO  
SUPPLEMENT AND EXPAND THE CERTIFICATE OF APPEALABILITY  
OF *AMICUS CURIAE* JUVENILE LAW CENTER**

Stephen P. Hardwick (0062932)  
Counsel of Record  
Counsel for Appellant Chaz Bunch  
Office of the Ohio Public Defender  
8 East Long Street – 11th Floor  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167 (fax)  
stephen.hardwick@opd.ohio.gov

Jerri L. Fosnaught  
Assistant Attorney General  
150 E. Gay St.,  
16<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 644-7233  
(614) 738-9327 (fax)

Counsel for Appellee  
State of Ohio

Marsha Levick (PA 22535)  
Counsel for Amicus Curiae  
Juvenile Law Center  
1315 Walnut Street, 4<sup>th</sup> Floor  
Philadelphia, PA 19107  
(215) 625-0551  
(215) 625-2808 (fax)  
mlevick@jlc.org

## **CORPORATE DISCLOSURE STATEMENT**

No counsel for a party authored this brief in whole or in part. No person or entity, other than *Amicus*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief. *Amicus*, Juvenile Law Center is not a subsidiary or affiliate of a publicly-owned corporation, nor does any publicly-owned corporation have an interest in the appeal of this case.

## TABLE OF CONTENTS

Table of Authorities .....	iii
I. Interest of <i>Amicus Curiae</i> .....	1
II. Introduction .....	2
III. Procedural History .....	3
IV. Standard of Review.....	4
V. Argument.....	4
A. Chaz Has Been Given an Unconstitutional Sentence of Life Without a Meaningful Opportunity for Parole for a Nonhomicide Offenses Committed When he was a Juvenile.....	4
B. Because Chaz’s 89 Year Sentence Provides no Opportunity to Re-Enter Society, it must be Vacated Under <i>Graham</i> .....	5
CONCLUSION .....	9
CERTIFICATE OF SERVICE	
CERTIFICATE OF COMPLIANCE	

## TABLE OF AUTHORITIES

### CASES

Barefoot v. Estelle, 463 U.S. 880 (1983) .....	4
Graham v. Florida, --- S.Ct. ---, 2010 WL 1946731 (May 17, 2010).....	passim
Harmelin v. Michigan, 501 U.S. 957 (1991).....	9
Miller-El v. Cockrell, 537 U.S. 322 (2003) .....	4
Roper v. Simmons, 543 U.S. 551 (2005) .....	9
Woods v. Telb, 733 N.E. 2d 1103 (Ohio 2000) .....	2

### STATUTES

28 U.S.C. 2253 (c).....	4
-------------------------	---

### OTHER AUTHORITIES

Arias, “United States Life Tables, 2003,” National Vital Statistics Reports, Vol. 54, No. 14, April 19, 2006, Centers for Disease Control and Prevention, <a href="http://www.cdc.gov/nchs/data/nvsr/nvsr54/nvsr54_14.pdf">http://www.cdc.gov/nchs/data/nvsr/nvsr54/nvsr54_14.pdf</a> (last visited December 11, 2006) .....	5
Nationwide Publishing Company, 2006, Form 4026D, <a href="http://www.claimspages.com/documents/docs/4026D.pdf">http://www.claimspages.com/documents/docs/4026D.pdf</a> (last visited December 11, 2006) .....	5

## **I. Interest of *Amicus Curiae***

Founded in 1975, Juvenile Law Center is the oldest multi-issue 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 ensure that the child welfare, juvenile justice, and other public systems provide vulnerable children with the protection and services they need to become healthy and productive adults. *Amicus*, Juvenile Law Center, works to align juvenile justice policy and practice, including state 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. *Amicus* believes that the judicial sentence in this case violates the Eighth Amendment of the US Constitution, and must be overturned.

Furthermore, the issues of law currently before the 6<sup>th</sup> Circuit Court of Appeals are directly related to important and pressing judicial concerns surrounding appropriate care for juveniles. A Motion for Leave to File accompanies this brief.

## II. Introduction

*Amicus* writes in support of Petitioner’s Application for Certificate of Appealability and Motion for Leave to Supplement and Expand His Application for Certificate of Appealability. On March 2, 2010, the District Court entered judgment denying the petitioner’s habeas corpus petition. Subsequently, the United States Supreme Court, in *Graham v. Florida*, --- S.Ct. ---, 2010 WL 1946731 (May 17, 2010), held that sentences of life without the possibility of parole for non-homicide offenses committed by juveniles violated the cruel and unusual punishment clause of the Eighth Amendment of the United States Constitution. The Petitioner in the instant case received a sentence of eighty-nine years upon his conviction of a non-homicide offense before he would even be eligible for any opportunity of release – at the age of approximately 106 – a sentence which is the functional equivalent of life without parole.<sup>1</sup> The Supreme Court’s decision in *Graham* necessitates this Court issue a Certificate of Appealability in his case.

---

<sup>1</sup> In fact, Ohio law does not permit parole for anyone sentenced after 1996: “one of the overriding goals of [the new sentencing legislation enacted in 1996] was ‘truth in sentencing,’ meaning that the sentence imposed by the judge is the sentence that is served, unless altered by the judge. This was primarily accomplished by two methods: eliminating indefinite sentences and eliminating parole.” *Woods v. Telb*, 733 N.E. 2d 1103, 1106 (Ohio 2000).

On May 17, 2010, the United States Supreme Court ruled in *Graham* that juveniles cannot be sentenced to life without a meaningful and realistic opportunity for parole for non-homicide offenses. 2010 WL 1946731, at \* 23. The Court explained:

The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. . . . Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.

*Id.* at \* 20. *Graham* therefore held that a sentence that provides no “realistic opportunity to obtain release” before the end of the term is unconstitutional. *Id.*

Here, the Petitioner was sentenced to remain in prison without the chance of parole until he is at least 106 years old for non homicide offenses committed when he was a juvenile. Because this sentence will unquestionably imprison Petitioner for life with no possibility of parole, it is unconstitutional under *Graham*. This Court must therefore issue a Certificate of Appealability in Petitioner’s case.

### **III. Procedural History**

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

### **IV. Standard of Review**

In order to appeal a final order in a habeas proceeding, a petitioner must make a “substantial showing of the denial of a constitutional right.” *Barefoot v.*

*Estelle*, 463 U.S. 880, 890 (1983); 28 U.S.C. § 2253 (c). The petitioner must demonstrate “that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). *Amicus* argues that *Graham* resolves this issue, requiring that the Application for a Certificate of Appealability be granted.

## **V. Argument**

### **A. Petitioner Chaz Bunch Has Been Given an Unconstitutional Sentence of Life Without a Meaningful Opportunity for Parole for Non-homicide Offenses Committed When he was a Juvenile**

Ground Three of Petitioner’s Habeas Corpus Petition states that his sentence of life without parole for offenses committed when he was a juvenile violates the Eighth Amendment’s prohibition against the imposition of cruel and unusual punishment. A Certificate of Appealability must be issued on this Ground as Bunch’s current sentence violates the Constitution pursuant to the United States Supreme Court’s recent decision in *Graham v. Florida*.

Chaz Bunch was 16 years old when the incidents leading to his 89 year sentence occurred. None of the offenses were homicides. Chaz’s 89-year sentence is the equivalent of life without parole. He will have to live to be 106 years old to complete his prison term. A 16 year old African American boy can expect to only



live an additional 54 years. Nationwide Publishing Company, 2006, Form 4026D, <http://www.claimspages.com/documents/docs/4026D.pdf> (last visited June 14, 2010); Arias, “United States Life Tables, 2003,” National Vital Statistics Reports, Vol. 54, No. 14, April 19, 2006, Centers for Disease Control and Prevention, [http://www.cdc.gov/nchs/data/nvsr/nvsr54/nvsr54\\_14.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr54/nvsr54_14.pdf) (last visited June 14, 2010). Indeed, nowhere does the Warden argue that Chaz will be eligible for parole in his lifetime.

**B. Because Petitioner’s 89 Year Sentence Provides no Opportunity to Re-Enter Society, it must be Vacated Under *Graham***

In *Graham*, the Court held “that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole.” 2010 WL 1946731, at \*18. Contrary to the District Court’s conclusion, Dist. Ct. Op. at 4, *Graham* directly applies to this case. Under *Graham*, juveniles must be given a meaningful or a “realistic opportunity” to show rehabilitation. *Graham*, 2010 WL 1946731, at \*23. Where the actual sentence allows for no such opportunity, it cannot stand.

The defendant’s age and the fact that the offenses were non-homicide crimes were the salient factors in the *Graham* Court’s determination that the sentence of

life without parole was cruel and unusual. *See id.* at \*14 (“The age of the offender and the nature of the crime each bear on the analysis”). As the *Graham* Court recognized, because juveniles are more likely to be reformed than adults, it is inappropriate to impose a sentence with no meaningful opportunity for release upon them. Such a sentence “improperly denies the juvenile offender a chance to demonstrate growth and maturity.” *Id.* at \*17.

The Court explained, “the differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive” a sentence of life without parole for a non-homicide crime. *Id.* at \*20. The *Graham* Court reiterated its findings in *Roper* that:

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.” A juvenile is not absolved of responsibility for his actions, but his transgression “is not as morally reprehensible as that of an adult.”

*Id.* at \*13 (internal citations omitted). The Court underscored that these findings are supported by developments in psychology and brain science, which “continue to show fundamental differences between juvenile and adult minds. For example,

parts of the brain involved in behavior control continue to mature through late adolescence.” *Id.* at \*13. Like the defendant in *Graham*, Chaz likewise was ‘fundamentally different’ from adult offenders convicted of comparable crimes, and was also less culpable than his adult counterparts.

At the same time, as Justice Kennedy observed, defendants who do not kill or intend to kill “are categorically less deserving of the most serious forms of punishment than are murderers. There is a line ‘between homicide and other serious and violent offenses against the individual.’” *Id.* at \*14. While non-homicide crimes may be devastating “they cannot be compared to murder in their ‘severity and irrevocability.’” *Id.* This is because ‘life is over for the victim of the murderer,’ but for the victim of even a very serious non-homicide crime, ‘life is not over and normally is not beyond repair.’” *Id.* (internal citations omitted).

The Court’s insistence on a bright-line rule further supports the importance of applying *Graham* to any sentence that effectively imprisons a juvenile for life. Without a categorical rule, an “unacceptable likelihood exists that the brutality or coldblooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course...” *Id.* at \*20. Were the Court to allow a case-by-case assessment of culpability, courts might not “with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the

capacity to change.” *Id.* Thus, life without parole – or its functional equivalent - is unacceptable in any non-homicide case. Juvenile non-homicide offenders are “not sufficiently culpable to merit that punishment.” *Id.* at \*30. The categorical rule “gives all juvenile non-homicide offenders a chance to demonstrate maturity and reform.” *Id.* at \*20. Chaz has been deprived of this chance.

The Court’s “clear line” is necessary to protect defendants like Chaz—juveniles who committed non-homicide offenses—from the likelihood that the number and brutality of any particular crime or crimes would lead to a sentence that would ignore the Court’s clear pronouncements that the sentence is inappropriate for such cases. Without this clear line, the law could easily be subverted by sentencing juveniles to lengthy consecutive sentences that have the same end result – a life spent in prison with no opportunity for parole. There is no principled distinction nor practical difference between these sentences.

Like any life without parole sentence, Chaz’s sentence disproportionately impacts him because of his status as a juvenile. As the Court explained in *Graham*,

Life without parole is an especially harsh punishment for a juvenile. Under this sentence 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. *See Roper v. Simmons*, 543 U.S. 551, 572 (2005); *cf. Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) (“In some cases ... there will be negligible

difference between life without parole and other sentences of imprisonment—for example, ... a lengthy term sentence without eligibility for parole, given to a 65-year-old man”). This reality cannot be ignored.

*Id.* at \*15.

Importantly, as the *Graham* Court stated, declaring life without parole sentences unconstitutional did not – and does not -- mean that Graham or Chaz will be actually ever be released. It simply means that these sentences violate the law because “that judgment [of irredemiability] was made at the outset.” *Id.* at \*17. Like Graham’s sentence, Chaz’s current sentence “guarantees he will die in prison. . . no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character.” *Id.* at \*21. Such a sentence is unconstitutional. Chaz must be given an opportunity for meaningful review at a date significantly earlier than age 106.

## **CONCLUSION**

Wherefore, for the foregoing reasons, *Amicus Curiae* Juvenile Law Center respectfully requests that this Court grant jurisdiction to Appellant.

Respectfully submitted,

/s/ Marsha L. Levick

Marsha L. Levick, Esq.  
JUVENILE LAW CENTER  
1315 Walnut Street, Suite 400  
Philadelphia, PA 19107  
(215) 625-0551  
Fax (215) 625-2808  
mlevick@jlc.org  
*Counsel for Amicus Curiae Juvenile Law Center*

Dated: June 14th, 2010

## **CERTIFICATE OF SERVICE**

I certify a copy of the foregoing has been uploaded to the CM/ECF system for the US Court of Appeals for the Sixth Circuit and that an electronic copy has been served on all counsel of record on this 14th day of June, 2010.

\_\_\_\_\_/s/ Marsha L. Levick

Marsha L. Levick, Esq.  
JUVENILE LAW CENTER  
1315 Walnut Street, Suite 400  
Philadelphia, PA 19107  
(215) 625-0551  
Fax (215) 625-2808  
mlevick@jlc.org  
*Counsel for Amicus Curiae Juvenile Law Center*

## **CERTIFICATE OF COMPLIANCE**

I certify that the foregoing brief conforms to FRAP 32(a)(7)(C), as it contains 1,994 words in 14-point Times New Roman font, as calculated by Microsoft Word 2003.

\_\_\_\_\_/s/ Marsha L. Levick

Marsha L. Levick, Esq.  
JUVENILE LAW CENTER  
1315 Walnut Street, Suite 400  
Philadelphia, PA 19107  
(215) 625-0551  
Fax (215) 625-2808  
mlevick@jlc.org  
*Counsel for Amicus Curiae Juvenile Law Center*