NO. SC95395

IN THE SUPREME COURT OF MISSOURI

TIMOTHY S. WILLBANKS,

Appellant,
v.

MISSOURI DEPTARTMENT OF CORRECTIONS,

Respondent.

RESPONDENT'S SUBSTITUTE BRIEF

This case is on transfer from the Missouri Court of Appeals Western District.

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STATEMENT OF THE CASE

This is an appeal of a grant of judgment on the pleadings in a declaratory judgment action by the Circuit Court of Cole County.

The Court of Appeals treated the underlying case as a petition for writ of habeas corpus. Habeas corpus is a writ used to allege an entitlement to immediate discharge from current confinement, or to challenge a judgment of conviction and sentence, not allege eligibility for release at some earlier future date. *See State ex rel. Nixon v. Pennoyer*, 36 S.W.3d 767, 770 (Mo. App. E.D. 2000) (order quashing writ of habeas corpus, granted to inmate challenging ineligibility for a future conditional release date). Cases about earlier parole eligibility fit in the class of cases for which declaratory judgment is the proper form of action. *See McDermott v. Carnahan*, 934 S.W.3d 285 (Mo. 1996) (declaratory judgment action about parole ineligibility under the armed criminal action statute); *Mozee v. Missouri Bd. of Probation and Parole*, 401 S.W.3d 500 (Mo. App. W.D. 2013) (declaratory judgment action analyzing case under §217.690, §558.019, and 14 C.S.R. 80-2.010 to resolve allegation claiming earlier parole eligibility date); *Langston v. Missouri Bd. of Probation and Parole*, 391 S.W.3d 473 (Mo. App. W.D. 2013) (declaratory judgment action alleging the application of a parole statute to aggregate sentence of three consecutive terms of life imprisonment plus 224 years improperly denied an inmate the

opportunity for parole).

In the Circuit Court of Cole County, Willbanks asked for a declaration that a Missouri parole statute and a parole regulation, specifically Mo. Rev. Stat. §558.019.3 and 14 C.S.R. 80-2.010, are unconstitutional as applied to him, and other offenders who committed crimes while under age 18, because the statute and regulation would extend his parole ineligibility beyond his natural life on non-homicide offenses that he committed before age 18 (L.F. 24). The Circuit Court of Cole County granted judgment on the pleadings for the Department of Corrections, finding that the statute and regulation are not unconstitutional as applied to Willbanks (L.F. 37–40).

STATEMENT OF FACTS

The Department of Corrections confines Timothy Willbanks because of consecutive sentences for multiple violent felonies, including kidnapping, first-degree assault, two counts of first-degree robbery, and three counts of armed criminal action. His conduct was actually much worse than it sounds from that brief description. Willbanks psychologically tortured his victim, shot her four times with a shotgun, the last time in the back of the head, and left her to die on a river bank. The victim lived only because she crawled for forty minutes to reach safety, but she was maimed and permanently disfigured as a result of Willbanks' assaults (S.L.F. 139).

Willbanks filed a petition for habeas corpus in the Circuit Court of Cole County in August 2013 (S.L.F. 54). The petition alleged that because of the application of Mo. Rev. Stat. §558.019.3 and 14 C.S.R. 80-2.010 to Willbanks' lengthy aggregate sentence, he would not be eligible for parole consideration during his statistical life expectancy (S.L.F. 5–28). Willbanks asked as relief either that the court declare that §558.019.3 and 14 C.S.R. 80-2.010 are unconstitutional as applied to juvenile offenders, or that the court vacate his sentence and remand him for resentencing. Section 558.019.3 provides that an offender who commits a dangerous felony must serve eighty-five percent of his sentence for that offense, and 14 C.S.R. 80-2.010 provides regulatory parole

ineligibility periods for different classes of offenses. Parole ineligibility periods on consecutive sentences are added together. *Edger v. Missouri Dept. of Corrections*, 307 S.W.3d 778 (Mo. App. W.D. 2010).

The Circuit Court of Cole County denied the petition for several reasons, including that the petition raised claims more suited for declaratory judgment than habeas corpus, and that the principal case cited by Willbanks, *Graham v. Florida*, 560 U.S. 48 (2010), is distinguishable from Willbanks' own case (S.L.F. 139–42). Willbanks then filed a habeas corpus petition in this Court, without first filing a petition in the Missouri Court of Appeals. This Court denied the petition stating that the petition is "denied without prejudice." *State ex rel. Willbanks v. Norman*, SC92885 (Mo. Nov. 20, 2012).

On April 8, 2014, Willbanks, through counsel, filed a petition for declaratory judgment in the Circuit Court of Cole County (Legal File, L.F. 5–25). Willbanks asked the court to declare the Missouri parole statute and regulation that require service of a minimum prison term before parole eligibility to be unconstitutional as applied to Willbanks and other offenders who committed crimes as juveniles (L.F. 5). Willbanks pled that the Circuit Court of Jackson County sentenced him to consecutive terms of fifteen years' imprisonment, life imprisonment, two terms of twenty years' imprisonment, and three terms of 100 years' imprisonment (L.F. 7). Willbanks pled that under current Missouri parole

statutes and regulations, he will not become eligible for parole until he is almost eighty-five years old because the parole ineligibility periods on consecutive sentences are added together, but that his current life expectancy is only seventy-nine and one half years (L.F. 16). Willbanks asked for a hearing to present evidence in support of his allegations, and a declaration that the Missouri parole statute and regulation requiring service of specific percentages of his sentences before parole eligibility are unconstitutional as applied to juveniles (L.F. 24).

Unlike his earlier habeas petition, in his declaratory judgment petition, Willbanks argued at length that *resentencing would not be a proper remedy* because his sentence itself was legal, requiring resentencing would "hamstring" the discretion that should belong to sentencing judges, and resentencing would not actually comply with *Graham v. Florida* (L.F. 21–24). Willbanks asked that the trial court declare that the Missouri parole statute and regulation require him to serve some specific, presumably lower, percentage of his sentence before eligibility for parole consideration (L.F. 24).

The Department of Corrections answered the petition (L.F. 27–30). The Department of Corrections then moved for judgment on the pleadings, arguing that Willbanks is not entitled to the relief he seeks even if his allegation that he will not be eligible for parole until he is nearly eighty-five years old is taken as

true (L.F. 2, 32–36). The Department of Corrections agrees with Willbanks' calculation of his parole eligibility date. Willbanks did not file a responsive pleading, and the court granted the motion for judgment on the pleadings on July 14, 2014 (L.F. 2). Willbanks filed a motion to set aside judgment the same day (L.F. 2). The court denied the motion to set aside judgment on July 28, 2014, and entered a new order granting judgment on the pleadings on July 29, 2014 (L.F.3).

In its July 29, 2014, decision, the Circuit Court of Cole County found that Willbanks' main case in support of his argument, *Graham v. Florida*, 560 U.S. 48 (2010), overturning a life without parole sentence for a juvenile convicted of the offense of burglary, is distinguishable from Willbanks' case (L.F.51–55). The court found *Graham* was about a single sentence of life without parole for a particular offense, and did not control Willbanks' case, which involved consecutive terms of imprisonment for seven different felonies, each with its own parole ineligibility period (L.F. 51–55).

SUMMARY OF ARGUMENT

Willbanks' argument that a Missouri parole statute and regulation are unconstitutional as applied to him, because they extend his parole ineligibility beyond his life expectancy, relies on *Graham v. Florida*, 560 U.S. 48 (2010), and fails as a matter of law under the analysis in that case.

The Court in *Graham* did a two-part analysis. First, it analyzed whether there was societal consensus that imposing a life without parole sentence for a crime committed before age 18 violated evolving standards of decency. The Court conducted this analysis by counting how many legislatures authorize such a penalty, then counting how many offenders actually received such a penalty and in which states the offenders have received the penalty. The Court found that there was a national consensus against imposing the penalty because only eleven states actually impose life without parole sentences for crimes committed while an offender was under age 18, and that the vast majority of those sentences, 77 of 123, were imposed in the single state of Florida.

Then second, after finding a national consensus against the imposition of the penalty, the Court held it was bound to make its own determination of the culpability of the offenders in light of their crimes and characteristics including consideration of whether there are legitimate penological reasons for imposing the punishment. The Court reasoned that a sentence that is not supported by

legitimate penological reasons is, by its nature, disproportionate. The Court found that neither considerations of retribution, nor deterrence, nor incapacitation, nor rehabilitation, support imposing a life without parole sentence on an offender for a crime committed under age 18.

Here, Willbanks did not plead the existence of a national consensus against the penalty in the trial court. And his brief to this Court, by citing 28 decisions in different jurisdictions on one side or the other of the issue of whether *Graham* applies to facts like his, affirmatively proves that the penalty he received is widely imposed, and therefore there is no national consensus against the imposition of the penalty. Willbanks also did not plead below and does not argue here that there is no penological justification for his penalty. He cannot plausibly do that because retribution, deterrence, and incapacitation are all rationally served by adding additional increments of parole ineligibility for the commission of additional dangerous felonies.

ARGUMENT

The United States Supreme Court held in *Graham* that for a punishment to violate the Eighth Amendment the punishment must be rarely imposed and have no legitimate penological justification. Willbanks pled neither element and can show neither.

A. The standard of review is *de novo*.

The standard of review is *de novo* as the analysis turns on a question of law. On appeal of a judgment on the pleadings, this Court reviews the petition of the losing party to determine if the facts were sufficient as a matter of law. *Mitchell v. Nixon*, 351 S.W.3d 676, 679 (Mo. App. W.D. 2011). This Court upholds the grant of a motion for judgment on the pleadings where, holding all the facts in the petition as true, the moving party was entitled to judgment as a matter of law. *Id.*

B. *Graham* requires as the first element of a claim a national consensus, shown through legislative action and sentences imposed, that a penalty violates evolving standards of decency.

In *Graham v. Florida*, 560 U.S. 48 (2010) the United States Supreme Court set out the elements that establish that a punishment categorically violates the Eighth Amendment for a class of individuals across a broad range of

crimes. The Court held that the first element is the existence of a national consensus that the punishment violates evolving standards of decency. *Id.* at 62.

The Court conducted two tests for national consensus. First, the Court counted the number of legislatures that authorize the punishment, and second the Court counted the number of times the punishment was imposed, the number of states that actually imposed the punishment, and the punishment's distribution within the group of states that imposed it. *Id.* at 62–67.

The Court found that although 37 states, the District of Columbia, and the United States all theoretically permit life without parole sentences for non-homicide offenders under age 18, only 11 states have actually imposed the sentence, only 123 offenders were serving such a sentence, and 77 of those are in the single state of Florida. *Id.* at 65–67. From this evidence the Court concluded that the sentencing practice is exceedingly rare and that a national consensus has developed against it. The Court held that because a national consensus existed against the imposition of the penalty, the Court then had the duty to analyze the culpability of the offenders in light of their crimes and characteristics and the severity of the punishment to determine if the punishment for the class of individuals violates the Eighth Amendment. *Id.* at 67.

C. *Graham* requires as the second element of a claim that the penalty is disproportionate in the sense that is does not have legitimate penological value.

The *Graham* Court found that because there was a national consensus against the imposition of juvenile life without parole sentences for non-homicide offenses, the Court must do its own evaluation of whether the penalty violates the Eighth Amendment. *Id*. at 67. The Court held that offenders under age 18, *who did not kill or intend to kill*, the category the court was evaluating, and which arguably excludes Willbanks, have twice diminished moral culpability compared to adult murderers. *Id*. at 67. And the Court found that life without parole is the most severe noncapital punishment and is particularly severe for a juvenile. *Id*. at 70–71. Bearing those findings in mind, the Court evaluated the penalty for proportionality by determining if it was justified by the penological reasons of retribution, deterrence, incapacitation, or rehabilitation, because a sentence without a legitimate penological justification is necessarily disproportionate. *Id*. at 71–74.

The Court found that the retribution of a life without parole sentence on a juvenile non-homicide offender is disproportionate because of the severity of the punishment and the lessened culpability of juveniles. *Id*. at 71–72. The Court found that deterrence was not applicable because juveniles often make

impetuous and ill-considered decisions and are less likely to take a potential punishment into consideration, particularly when it is rarely imposed. *Id.* at 72. The Court found incapacitation does not justify the punishment because some of the offenders' criminal actions may be explained by transient immaturity as opposed to incorrigibility. *Id.* at 72–73. Finally, the Court found that rehabilitation does not justify the sentence, as life without parole by its nature makes rehabilitation irrelevant by abandoning the idea of return to society. *Id.* at 74. The Court concluded that penological theory does not justify the punishment and that therefore the penalty is cruel and unusual punishment. *Id.* at 74–75.

D. Willbanks did not plead and does not now demonstrate a national consensus as defined in *Graham* that his aggregate parole ineligibility period violates evolving standards of decency.

Willbanks' pleading in the trial court did not allege that there is a national consensus that long aggregate parole ineligibility terms on multiple consecutive sentences for offenses committed before age 18 violate evolving standards of decency because the punishments are rarely imposed (L.F. 5–24). Instead, the core of Willbanks' trial court pleading was that courts in California, Florida, and Colorado have read *Graham* to bar long aggregate parole ineligibility periods

and Missouri should, therefore, do the same (L.F. 18–20). But that argument missed the point. National consensus against a punishment under *Graham* is shown by the rare and isolated imposition of the punishment. It is not shown by counting how many courts interpret *Graham* one way or another.

Willbanks makes the same argument to this Court. But he does so on such a large scale that he actually proves the punishment he challenges is widely imposed. Therefore, he establishes that there is no national consensus that long aggregate parole ineligibility periods on multiple consecutive sentences for offenses committed as a juvenile violate evolving standards of decency.

At pages 35 through 41 of his brief, Willbanks cites cases from 20 courts that he alleges interpret *Graham* in a manner that would cover his case, and 8 decisions from other courts that interpret *Graham* in a manner that would exclude his case. Willbanks then argues that the cases that support his position are correct and that the other cases are wrong (Willbanks' Substitute Brief 41–45). The unstated implication is that because he has placed 20 cases in one column and 8 in the other, the reasoning of the 20 cases must have more merit. But by listing cases from 28 geographically diverse jurisdictions that have dealt with this issue, Willbanks proves something much more relevant to the outcome of this case. Willbanks proves that, unlike the punishment in *Graham*, the punishment he complains about is widely imposed in what appears to be a

majority of jurisdictions. Therefore, not only did he not plead the national consensus element of his claim at the trial court level, he has affirmatively refuted the existence of the element in his brief to this Court. That provides an independent and adequate reasoning for affirming the trial court, even if Willbanks could establish the second element of his claim. But he cannot do that either.

E. Willbanks did not plead, and cannot show that there is no legitimate penological justification for his period of parole ineligibility.

Willbanks did not plead to the trial court that there is no penological purpose that supports longer aggregate parole ineligibility for offenders who commit multiple violent felonies under age 18, he does not do so here, and he cannot plausibly do so. Retribution, deterrence, and incapacitation are all logically served by increasing parole ineligibility for each offense committed, in a way they are not in *Graham*, which banned a life without parole sentence for a single offense. Also, limiting parole ineligibility to a set period no matter how many violent felonies an offender commits, makes sentencing arbitrary as opposed to suited to the offender.

When an offender commits two or three, or ten violent felonies, he is more culpable than an offender who commits only one. Therefore, an incremental

increase in parole ineligibility makes retributive sense.

Similarly, an offender who commits a dangerous felony has an incentive not to commit another, or another ten, if each consecutive sentence contains an incremental increase in parole ineligibility. But if there is no real additional sanction, no matter how many violent felonies an offender commits after a certain point, then there is no incentive not to commit an unlimited number of felonies. Therefore, incremental increases in parole ineligibility on multiple consecutive sentences rationally serve both specific deterrence and general deterrence.

One can reasonably infer that an offender who commits multiple dangerous felonies may need to be kept separated from society longer than an offender who committed only one. Therefore, rational incapacitation is served by a sentence structure such as Willbanks'.

All these justifications distinguish this case from *Graham*. Also, the Eighth Amendment ban on cruel and unusual punishment flows from the idea that punishment for crimes should be graduated and proportioned. *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012). What Willbanks asks for is a one size fits all formula that would arbitrarily treat the less culpable like the more culpable. That result would be contrary to the idea of graduated and proportioned punishment that is at the core of the Eighth Amendment.

The existence of reasonable penological justifications for Willbanks' sentencing structure provides a second independent and adequate reason to affirm the trial court.

CONCLUSION

This Court should affirm the decision of the Circuit Court of Cole County.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The foregoing brief contains 3,472 words, which is within the applicable limitations in length set forth in Rule 84.06(b). The undersigned hereby certifies that on this 13th day of June, 2016, the foregoing was filed electronically with this Court, therefore to be served electronically by operation of the Court's electronic filing system upon counsel for Willbanks, who are electronic filers.

/s/Michael J. Spillane
Assistant Attorney General