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No. SC95395

In The Supreme Court of Missouri

TIMOTHY S. WILLBANKS,

Petitioner/Appellant,

vs.

MISSOURI DEPARTMENT OF CORRECTIONS,

Respondent.

PETITIONER'S/APPELLANT'S SUBSTITUTE BRIEF

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TRANSFER QUESTION

States are required to give juveniles who are sentenced for nonhomicide offenses a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham v. Florida*, 560 U.S. 48, 75 (2010). The Constitution "forbid[s] States from making the judgment at the outset that [these] offenders never will be fit to reenter society." *Id.*

Timothy Willbanks was given an aggregate prison sentence of life plus 355 years, with parole ineligibility until age 85, for nonhomicide offenses committed when he was a juvenile. His parole eligibility date exceeds his life expectancy. Thus, the related questions presented for transfer, which courts in the United States are deeply divided on, but have not been addressed by this Court, are:

Is a total term of imprisonment that exceeds a juvenile's life expectancy the functional equivalent of life without parole (LWOP)?

If so, does this *de facto* LWOP sentence for nonhomicide offenses violate the Eighth Amendment because it denies the juvenile a "meaningful opportunity to obtain release" as required by *Graham?* In other words, does *Graham's* underlying principle apply to *de facto* LWOP sentences?

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JURISDICTIONAL STATEMENT

In 2010, the Supreme Court of the United States held that the Eighth Amendment's Cruel and Unusual Punishments Clause does not permit a juvenile offender to be sentenced to life in prison without parole (LWOP) for a nonhomicide crime. *Graham v. Florida*, 560 U.S. 48 (2010). The Court held that states were required to give juvenile offenders a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75.

In response, in 2012 Timothy Willbanks filed a petition for a writ of habeas corpus in this Court alleging that his 385-years sentence (life + 355 years)[1] for offenses committed when he was a juvenile were the functional equivalent of a sentence of LWOP, and this sentence was unconstitutional under *Graham* because he will not have a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," *id.* at 75. *State ex rel. Willbanks v. Norman*, No. SC92885. The petition was denied without prejudice. *Id.*

As a result, Timothy filed a petition for a writ of habeas corpus with the Cole County Circuit Court, again arguing that he was condemned to serve a *de facto* LWOP sentence, which was precluded by *Graham*. The circuit court denied Timothy's petition, indicating, at the suggestion of the Missouri Department of

[1] For the purpose of determining the minimum prison term to be served, a sentence of life is calculated to be 30 years. *§ 558.019.4(1).*

Corrections (DOC), that his proper avenue for seeking relief was through a declaratory judgment petition.

Timothy responded by filing for a declaratory judgment, Rule 87 and §§ 527.010, 527.050, 527.080,[2] in the circuit court seeking a declaration that Missouri Statutes and Regulations requiring offenders to serve specific percentages of their sentence before becoming parole eligible are unconstitutional as applied to juveniles like Timothy, because such application violates the Eighth Amendment to the U.S. Constitution and *Graham*. On July 29, 2014, the Hon. Daniel Green granted a judgment on the pleadings for DOC, holding, "[a]s a matter of law, [Timothy] is not entitled to a declaration that Missouri parole statutes and regulations are unconstitutional insofar as those provisions make him ineligible for parole until he is eighty-five years old" (LF 42-46). A timely notice of appeal was filed (LF 47-60).

On appeal, however, the Western District of this Court dismissed the declaratory judgment appeal, but chose to treat the appeal as an application for an original petition for writ of habeas corpus filed in that court since it believed that a declaratory judgment action was not appropriate, and the parties had provided sufficient record and briefing on issues pertaining to the propriety of considering a habeas corpus writ petition. *Graham. Willbanks v. Missouri Dep't of Corrs.,*

[2] All statutory citations are to RSMo 2000, and all Rule references are to Missouri Court Rules (2014) unless otherwise indicated.

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No.WD77913, slip op. at 13-16, 2015 WL6468489 (2015). But that court denied the petition for writ of habeas corpus, and issued an opinion holding that Timothy's *de facto* LWOP sentence did not violate *Graham*, and declined to extend *Graham's* holding to "multiple, consecutively imposed, non-LWOP, term-of-years sentences" *Id.*, slip op. at 22-33.

Rule 84.24(n) provides that if an appellate court disposes of a petition for a writ by the issuance of an opinion, further review of the action shall be allowed only as provided in Rules 83 and 84.17. Timothy timely filed a transfer application with this Court under Rule 83.04. This Court granted the application for transfer, so this Court has jurisdiction. Article V, §§ 3, 4 and 10, Mo. Const. and Rules 83.04 and 84.24(n).

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STATEMENT OF FACTS

On January 28, 1999, Timothy (then age 17)[3] and two other individuals (then ages 19 and 20), planned to steal a car (LF 8). Timothy approached a woman in the parking lot of her apartment complex. *Id.* Timothy was carrying a sawed-off shotgun. *Id.* He ordered her to get into the driver's seat of her car, while he sat in the back seat and directed her to drive to an ATM, where he removed all of the money from her account (SLF 101).

After leaving the ATM, Timothy directed the victim to drive toward the river, but she turned the wrong way, and he became angry and told her to stop the car (SLF 101). He then forced the victim into the trunk so that he could drive. *Id.*

While in the trunk, the victim removed her jewelry and hid it under the mat. *Id.* After Timothy stopped the car, he let the victim out of the trunk and demanded that she turn over her jewelry. *Id.* When she indicated that she wasn't wearing any, Timothy made her retrieve the jewelry she had hidden. *Id.* at 101-102. He also took some of her other belongings. *Id.* at 102.

The two other individuals, who had been at the victim's apartment parking lot with Timothy, had followed in a car (LF 8-9; SLF 101). Timothy told them that he wanted to shoot the victim, but they wanted to leave her alone (SLF 102). Nevertheless, Timothy directed the victim to turn around and walk away; as she

[3] Timothy was born on October 29, 1981 (LF 8).

walked, he shot her four times, striking her right arm, shoulder, lower back, and head. *Id.* She fell, and Timothy left her. *Id.*

Despite receiving numerous severe injuries, the victim was able to crawl to find help. *Id.* Later, she was able to pick Timothy out of a photo lineup. *Id.* The police found Timothy and his other two accomplices, and they all three gave matching confessions. *Id.*

Timothy was charged and convicted by a jury of one count of kidnapping (facilitating the robbery of the car), one count of first-degree assault (attempted to kill *or* cause serious physical injury), two counts of first-degree robbery (forcibly stealing the car and jewelry), and three counts of armed criminal action. *Willbanks v. Missouri Dep't of Corrs.,* No.WD77913, slip op. at 3, 2015 WL6468489 (2015).

The trial court sentenced Timothy to consecutive prison terms of 15 years for kidnapping, life imprisonment for assault, 20 years for each robbery count, and 100 years for each armed criminal action count, for an aggregate sentence of life plus 355 years (i.e. 385 years) (LF 11). Because of statutory and regulatory mandatory minimum sentencing requirements preceding parole eligibility, Timothy is not eligible for parole until he is 85 years old (LF 15-16).[4] But,

[4] In a filing with the Western District, DOC agreed that Timothy will not be eligible for parole until age 85.

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according to actuarial statistics from the Center for Disease Control, a person with Timothy's characteristics is not expected to live beyond age 79.5 (LF 16).[5]

Timothy's convictions and sentences were affirmed on direct appeal, *State v. Willbanks,* 75 S.W.3d 333 (Mo. App. W.D. 2002); as was the denial of his post-conviction relief motion under Rule 29.15, *Willbanks v. State,* 167 S.W.3d 789 (Mo. App. W.D. 2005) (Slip Op. at 4).

In 2012, four months after the Supreme Court of the United States handed down its decision in *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 (2012), Timothy filed a petition for a writ of habeas corpus in this Court concerning this issue; the petition was denied *without prejudice* (LF 7).[6] As a result, in 2013, he filed a petition for a writ of habeas corpus with the Cole County Circuit Court, arguing that he was serving a *de facto* LWOP sentence, which was precluded by the holding in *Graham* (LF 7; SLF 5-28). The circuit court denied Timothy's petition, indicating, at the suggestion of DOC, that his proper avenue for seeking relief was through a declaratory judgment petition (LF 7; SLF 139-142).

Accordingly, in April 2014, Timothy filed a petition for declaratory judgment imploring the circuit court "to enter a judgment declaring that Missouri

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[5] But as noted in the argument portion of this brief, life expectancy within prisons and jails is considerably shortened. By the time Timothy will be parole eligible, he would have been incarcerated for almost 68 years.

[6] *State ex rel. Willbanks v. Norman*, No. SC92885.

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State Statutes and Regulations which require offenders to serve specific percentages of their sentences before they become eligible for parole are unconstitutional as applied to juvenile offenders, such as [Timothy]," because they violated *Graham*'s mandate that juvenile offenders be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (LF 5). The circuit court granted DOC's motion for judgment on the pleadings, finding *Graham* inapplicable to Timothy's multiple, consecutive, parole-eligible, non-LWOP sentences (LF 42-46).

On appeal, the Western District dismissed the declaratory judgment appeal, finding that the claims were improperly brought under the Declaratory Judgment Act and should have been raised in a petition for writ of habeas corpus. *Willbanks*, No. WD77913, slip op. at 13-16. But because Timothy's choice to pursue a declaratory judgment, rather than a habeas writ in the Western District was based, in part, on DOC's suggestion, adopted by the trial court, that his claims were more suitable for a declaratory judgment petition, the Western District treated the appeal as an application for an original petition for writ of habeas corpus in that court. *Id.*, slip op. at 16-17.

Even though Timothy's claim was not raised on direct appeal or in a Rule 29.15 motion, the Western District reviewed the claim on the merits because it fell within "the sentencing-defect exception" to the rule generally barring procedurally defaulted claims, *citing State v. Whitfield*, 107 S.W.3d 253, 269 n. 19 (Mo. banc 2003) *Willbanks*, No. WD77913, slip op. at 18-19. But the Western District

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denied the petition, finding that *Graham* did not apply to multiple, consecutive, term-of-years sentences, even if they exceed the juvenile's life expectancy *Willbanks*, No. WD77913, slip op. at 1-2, 22, 32.

Subsequently, this Court granted Timothy's application for transfer under Rule 83.04. Any further facts necessary for the disposition of this case will be set out in the argument portion of this brief.

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POINT RELIED ON

Timothy is entitled to a writ of habeas corpus vacating his sentence of life + 355 years for nonhomicide offenses he committed when he was 17 years old, because this sentence is unconstitutional under *Graham v. Florida,*[7] and the 8th and 14th Amendments to the U.S. Constitution, as applied to juveniles like Timothy, in that his sentence constituted the functional equivalent of life without parole since he will be ineligible for parole until about age 85 no matter how much he has matured and been rehabilitated, which is well-beyond his natural life expectancy, and thus he will not receive a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, which is required by *Graham.*

Graham v. Florida, 560 U.S. 48 (2010);

Montgomery v. Louisiana, 577 U.S. __, 136 S.Ct. 718 (2016);

Henry v. State, 175 So.3d 675 (Fla. 2015),

cert. denied, 136 S. Ct. 1455 (2016)

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

U.S. Const., Amends. VIII and XIV;

Article V, § 4, Mo. Const.;

14 CSR 80-2.010(1)(E);

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[7] *Graham v. Florida*, 560 U.S. 48 (2010).

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§§ 556.061, 558.019;

California Penal Code § 3051(b);

Conn. Gen. Stat. Ann. § 54-125a(f)(1);

11 Del.C. §4204A(d)(1);

F.S.A. § 921.1402;

NRS 213.1235;

RCW § 9.94A.730;

Wyo. Stat. Ann. § 6-10-301;

Table 105, *Life Expectancy by Sex, Age, and Race: 2008*, U.S. Census Bureau, Statistical Abstracts of the United States: 2012

Adele Cummings & Stacie Nelson Colling, *There Is No Meaningful Opportunity in Meaningless Data: Why It Is Unconstitutional to Use Life Expectancy Tables in Post-Graham Sentences*, 18 U.C. DAVIS J.JUV. L. & POL'Y 267 (2014); and

Leanne Palmer, *Note, Juvenile Sentencing in the Wake of Graham v. Florida: A look Into Uncharged Territory*, 17 Barry L. Rev. 133, 147 (2011).

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ARGUMENT

Timothy is entitled to a writ of habeas corpus vacating his sentence of life + 355 years for nonhomicide offenses he committed when he was 17 years old, because this sentence is unconstitutional under *Graham v. Florida*,[8] and the 8th and 14th Amendments to the U.S. Constitution, as applied to juveniles like Timothy, in that his sentence constituted the functional equivalent of life without parole since he will be ineligible for parole until about age 85 no matter how much he has matured and been rehabilitated, which is well-beyond his natural life expectancy, and thus he will not receive a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, which is required by *Graham*.

Issue Presented:

States are required to give juveniles,[9] who are sentenced for nonhomicide offenses, a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham v. Florida*, 560 U.S. 48, 75 (2010). The Constitution "forbid[s] States from making the judgment at the outset that [these] offenders never will be fit to reenter society." *Id.*

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[8] *Graham v. Florida*, 560 U.S. 48 (2010).

[9] "Juvenile" is a child under the age of 18, which is the dividing line chosen by the Supreme Court in *Graham*, 560 U.S. at 74-75.

Timothy was given an aggregate prison sentence of life plus 355 years, with parole ineligibility until age 85, for nonhomicide offenses committed when he was a juvenile; his parole eligibility date exceeds his natural life expectancy.

Does *Graham's* holding apply to a juvenile's aggregate sentence for nonhomicide offenses, which is the functional equivalent of a life-without-parole (LWOP) sentence because it denies the juvenile a "meaningful opportunity to obtain release" as required by *Graham*?

Relevant facts:

Timothy was born on October 29, 1981 (LF 8). In 2001, he was convicted by a jury in Jackson County, Missouri, of several crimes involving the same victim and occurring during the same criminal episode on January 28, 1999: kidnapping (facilitating the robbery of a car), one count of first-degree assault (attempted to kill *or* cause serious physical injury), two counts of first-degree robbery (forcibly stealing the car and jewelry), and three counts of armed criminal action (LF 8-9). He was only 17 years old when he committed the charged crimes (LF 8).

On April 4, 2001, he was sentenced to consecutive prison sentences of 15 years for kidnaping, life for assault, 20 years for each count of robbery, and 100

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years for each count of armed criminal action, for a total of life plus 355 years (i.e., 385 years) (LF 11).[10]

Timothy's convictions and sentences were affirmed on direct appeal, *State v. Willbanks,* 75 S.W.3d 333 (Mo. App. W.D. 2002); as was the denial of his post-conviction relief motion under Rule 29.15, *Willbanks v. State,* 167 S.W.3d 789 (Mo. App. W.D. 2005).

Because of statutory and regulatory mandatory minimum sentencing requirements preceding parole eligibility, Timothy is not eligible for parole until he is 85 years old (LF 15-16). The Missouri Department of Corrections arrived at that eligibility date the following way:

Four of his convictions are dangerous felonies, *§ 556.061(8)*: kidnaping, first-degree assault, and two counts of first-degree robbery. An offender is required to serve a minimum prison term of 85% of any sentence *for a dangerous felony* **or** until the offender attains 70 years of age, and has served at least 40% of the sentence imposed, whichever occurs first. *§ 559.019.3*. He received the following consecutive prison sentences for those offenses: 15 years, life imprisonment, 20 years and 20 years. 85% of those sentences are: 12.75 years, 25.5 years, 17 years, and 17 years. However, on October 29, 2051, he will be 70 years old and he would have served at least 40% of those sentences. Thus, DOC

[10] For the purpose of determining the minimum prison term to be served, a sentence of life is calculated to be thirty years. *§ 558.019.4(1)*.

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has determined that he will be eligible for parole *on the dangerous felonies* when he is 70 years old.

But he also has three *consecutive* 100-year prison sentences for armed criminal action, *which are not dangerous offenses*. Sentences that aggregate over 75 years are calculated at 75 years. *§ 558.019.4(2)*. Offenders serving sentences for non-dangerous felonies totaling 45 years or more are eligible for parole after 15 years. *14 CSR 80-2.010(1)(E)*. These sentences were *consecutive to the dangerous felonies*, thus, DOC has determined that after Timothy has reached 70 years of age, he is eligible for parole on the dangerous felonies, but under *14 CSR 80-2.010(1)(E)*, he has to serve a minimum of 15 years to be eligible for parole on his sentences for ACA, which is on October 29, 2066 (15 years after his 70th birthday when he is 85 years old).[11] By the time Timothy will be parole eligible, he would have been incarcerated for more than 67 years.

But, according to actuarial statistics from the Center for Disease Control (CDC), a person with Timothy's characteristics (e.g., sex, race) is not expected to live beyond age 79.5, or perhaps less since he will have been incarcerated for almost 68 years before he is parole eligible (LF 16).[12] Timothy will likely be dead

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[11] In a filing with the Western District, DOC agreed that Timothy will not be eligible for parole until age 85.

[12] Table 105, *Life Expectancy by Sex, Age, and Race: 2008*, U.S. Census Bureau, Statistical Abstracts of the United States: 2012 (SLF 50, 71). The average life

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before he is eligible for parole in 2066 (LF 15-16). Thus, he will never have had a meaningful opportunity to obtain release, no matter what he does.

In 2012, four months after the Supreme Court of the United States handed down its decision in *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 (2012), Timothy filed a petition for a writ of habeas corpus in this Court concerning this issue; the petition was denied *without prejudice* (LF 7).[13]

As a result, in 2013, he filed a petition for a writ of habeas corpus with the Cole County Circuit Court, arguing that he was serving a *de facto* LWOP sentence, which was precluded by the holding in *Graham* (LF 7; SLF 5-28). The circuit court denied Timothy's petition, indicating, at the suggestion of DOC, that his proper avenue for seeking relief was through a declaratory judgment petition (LF 7; SLF 139-142).

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expectancy for a male in the United States is 76 years. *Casiano v. Comm'r of Correction*, 317 Conn. 52, 76, 115 A.3d 1031, 1046 (2015). The U.S. Sentencing Commission defines a life sentence as 470 months (or just over 39 years), based on average life expectancy of those serving prison sentences. *See*, e.g., *United States v. Nelson*, 491 F.3d 344, 349-50 (7th Cir. 2007). Life expectancy within prisons and jails is considerably shortened. *Casiano*, 115 A.3d at 1046.

[13] *State ex rel. Willbanks v. Norman*, No. SC92885. Timothy requests that this Court take judicial notice of the documents filed in that case.

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Accordingly, in April 2014, Timothy filed a petition for declaratory judgment imploring the circuit court "to enter a judgment declaring that Missouri State Statutes and Regulations which require offenders to serve specific percentages of their sentences before they become eligible for parole are unconstitutional as applied to juvenile offenders, such as [Timothy]," because they violated *Graham*'s mandate that juvenile offenders be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (LF 5). The circuit court granted DOC's motion for judgment on the pleadings, finding *Graham* inapplicable to Timothy's multiple, consecutive, parole-eligible, non-LWOP sentences (LF 42-46).

On appeal, the Western District dismissed the declaratory judgment appeal, finding that the claims were improperly brought under the Declaratory Judgment Act and should have been raised in a petition for writ of habeas corpus. *Willbanks v. Missouri Dep't of Corrs.,* No.WD77913, slip op. at 13-16, 2015 WL6468489 (2014). But because Timothy's choice to pursue a declaratory judgment, rather than a habeas writ in the Western District was based, in part, on DOC's suggestion, adopted by the trial court, that his claims were more suitable for a declaratory judgment petition, the Western District treated the appeal as an application for an original petition for writ of habeas corpus in that court. *Id.*, slip op. at 16-17.

But the Western District denied the petition, finding that *Graham* did not apply to multiple, consecutive, term-of-years sentences, even if they exceed the

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juvenile's life expectancy. *Willbanks*, No. WD77913, slip op. at 1-2, 22, 32. The Western District believed that *Graham* should not be extended to aggregate sentences like Timothy's, in part, because it believed that a categorical challenge to *de facto* LWOP sentences was "unworkable." *Id.* at 22-32. Subsequently, this Court granted Timothy's application for transfer under Rule 83.04.

Standard for Obtaining Habeas Relief:

Article V, § 4 of the Missouri Constitution vests this Court with the authority "to issue and determine original remedial writs," including writs of habeas corpus. *State ex rel. Zinna v. Steele*, 301 S.W.3d 510, 513 (Mo. banc 2010). "Habeas corpus relief is the final judicial inquiry into the validity of a criminal conviction and functions to relieve defendants whose convictions violate fundamental fairness." *Id.* The petitioner has the burden of showing that he or she is entitled to habeas corpus relief. *Id.* A writ of habeas corpus may be issued when a person is restrained of his or her liberty in violation of the constitution or laws of the state or federal government. *Id.*

Questions of law, including constitutional challenges, are reviewed *de novo*. *Earth Island Inst. v. Union Elec. Co.*, 456 S.W.3d 27, 32 (Mo. banc 2015).

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Argument:

I. The Supreme Court of the United States has recognized that children are categorically less deserving of the harshest forms of punishment

In *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 (2012), and *Montgomery v. Louisiana*, 577 U.S. __, 136 S.Ct. 718 (2016), the Supreme Court of the United States recognized that juveniles are fundamentally different from adults and categorically less deserving of the harshest forms of punishment.

In doing so, the Supreme Court recognized three essential characteristics that distinguish juveniles from adults for culpability purposes: 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 characteristics are "not as well formed." *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 569-70. These 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." *Graham*, 560 U.S. at 68 (Internal quotation marks and citations omitted).

In *Graham*, the Supreme Court held that sentencing a juvenile nonhomicide offender to a life in prison without the possibility for parole violates the Eighth

Amendment's prohibition against cruel and unusual punishment because of the unique characteristics of youth that make juveniles less culpable, in addition to the developmental difference between juveniles and adults that make it more likely that a child can reform. The Court's holding rested largely on the inconsistency of imposing a final, irrevocable penalty on a juvenile, who had capacity to change and grow. *Id.* at 68-69.

After *Graham*, the Supreme Court in *Miller* reiterated the importance of scientific and social science research that demonstrates fundamental differences between juveniles and adults and lessens a child's "'moral culpability.'" *Miller*, 132 S.Ct. at 2464-2465 (*quoting Graham*, 560 U.S. at 70). The Court found that none of what *Graham* "said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific." 567 U.S. at ___, 132 S.Ct. at 2465. It emphasized "that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id.*

Thus, *Miller* and *Graham* define a life without parole sentence as one that does not give the offender "some meaningful opportunity to obtain release based on maturity and rehabilitation." *Miller*, 132 S.Ct. at 2469; *Graham*, 560 U.S. at 75. *Graham* describes "meaningful opportunity" for release as a "chance for fulfillment outside prison walls" and a "chance for reconciliation with society." *Id.* at 79. A sentence that exceeds a juvenile offender's life expectancy clearly fails to

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provide a meaningful opportunity for release, fulfillment outside prison, or a chance to reunite with society.

In *Montgomery,* the Court considered "whether *Miller* adopts a new substantive rule that applies retroactively on collateral review to *people condemned as juveniles to die in prison.*" 577 U.S. ——, ——, 136 S.Ct. 718, 727(2015) (emphasis added). *Montgomery* noted that "[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity." (Internal quotation marks omitted). *Montgomery*, 577 U.S. at ___, 136 S.Ct. at 734 (quoting *Miller*, 567 U.S. at ___, 132 S.Ct. at 2469, quoting *Roper*, 543 U.S. at 573). The *Montgomery* Court stated that "prisoners like [him] must be given the opportunity to show their crime did not reflect irreparable corruption; and if it did not, their hope for *some years of life outside of prison walls* must be restored." *Montgomery*, 577 U.S. at ___, 136 S.Ct. at 736-737 (Emphasis added).

The clear trend in the jurisprudence of the Supreme Court of the United States has been toward more – not less – protection for juvenile offenders, and to ensure that all juveniles be given a chance to prove that once they have matured and developed, that they are deserving of a second chance to be in society.

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II. Graham prohibits sentencing a juvenile nonhomicide offender to spend the rest of his or her life in prison without a meaningful opportunity for release

Terrence Graham, at the age of 16, pleaded guilty to armed burglary with assault or battery and attempted armed robbery. *Graham*, 560 U.S. at 53-54. He was initially placed on probation, but he was later arrested for committing additional robberies and other infractions, in violation of his probation. *Id.* at 54-55. After his probation was revoked, he was sentenced to life in prison for the armed burglary conviction and 15 years for the attempted robbery conviction. *Id.* at 57. But because Florida had abolished its parole system, his sentence required that he spend the rest of his life in prison unless he received a grant of executive clemency. *Id.*

Subsequently, the Supreme Court held that Terrence's constitutional rights were violated because the Eighth Amendment prohibits a juvenile nonhomicide offender to be sentenced to a term of life in prison without the possibility of parole. *Graham* concluded that "none of the goals of penal sanctions that have been recognized as legitimate – retribution, deterrence, incapacitation, and rehabilitation – provides an adequate justification" for imposing such a sentence against a juvenile. *Id.* at 71 (Internal citation omitted). The States are prohibited "from making the judgment at the outset that those offenders never will be fit to reenter society." *Id.* at 75. The Court also concluded that although a State is not required to guarantee eventual freedom to a juvenile offender, the State must give

some "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* The Court elaborated:

> 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 79.

Terrence was a recidivist offender, who in the relevant criminal episode, committed two serious felonies against the same victim (armed burglary and attempted robbery). Yet there was nothing written in the Court's opinion indicating that it would have been constitutional for the trial court upon remand to resentence Terrence to consecutive sentences of 70 and 15 years, which still would have resulted in Terrence dying in prison. The fact that one of Terrence's sentences was labeled "life" was not controlling; rather, the Court's emphasis was that a juvenile who commits a nonhomicide offense must be given a meaningful opportunity to be released. The constitutionality of a sentence depends on the actual impact of the sentence upon the individual, not how a sentence is labeled. *See, Sumner v. Shuman*, 483 U.S. 66, 83 (1987), which noted that "there is no basis for distinguishing, for purposes of deterrence, between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy." 483 U.S. at 83.

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A. *Graham's* reasoning applies to all juveniles who did not commit homicide offenses even if they are sentenced to multiple consecutive sentences.

As noted above, the Supreme Court has held that there are some sentences that are categorically barred under the Eighth Amendment based on the nature of the offender and the offenses, regardless of the specific facts and circumstances. *Graham*, 560 U.S. at 60-61; *Roper*, 543 U.S. at 573. In *Graham*, the Supreme Court placed sentences that require a juvenile who did not commit homicide to "remain behind bars for life" in this category. *Graham*, 560 U.S. at 75. Thus, there is a "flat ban" on sentences that ensure a juvenile will die in prison without an opportunity for parole, unless he or she has committed homicide. *Miller*, 567 U.S. ___, 132 S.Ct. at 2466, n. 6.

Graham's rationale for establishing this "flat ban" does not depend on whether the juvenile was sentenced for a single nonhomicide offense or was sentenced for multiple nonhomicide counts. *Graham's* reasoning is based on the principle that juvenile nonhomicide offenders have "twice diminished moral culpability." *Graham*, 560 U.S. at 69. Thus, sentencing a juvenile who did not murder to an aggregate number of years that "guarantees he will die in prison" is contrary to *Graham*. *Id.* at 79. The Supreme Court explained that none of the four traditional justifications of punishment could justify such a harsh sentence for "a juvenile who did not commit homicide." *Id.* at 71. Rather, such sentences are

reserved for juveniles who commit murder, and even then such a punishment should be "uncommon." *Miller*, 132 S.Ct. at 2469.

Notably, the Supreme Court adopted this reasoning after having emphasized that Terrence had committed multiple nonhomicide offenses, including a "spree" of armed robberies. *Graham*, 560 U.S. at 73. Still, the Supreme Court drew a "clear line" between juveniles who do, and do not, commit murder – not between juveniles convicted of single, or multiple, counts. *Graham*, 560 U.S. at 74. The Court drew "a line 'between homicide and other serious violent offenses against the individual'" that extends to juveniles. *Graham*, 560 U.S. at 69 (Citations omitted). A juvenile who has not committed murder cannot be given a sentence that "guarantees he will die in prison without any meaningful opportunity to obtain release." *Id.* at 79. Otherwise, a juvenile's status would be meaningless – he could receive a sentence that virtually ensures he will die in prison, the same as an adult.

The Supreme Court did not confine *Graham* to juveniles who commit only one nonhomicide offense. The Western District's opinion in *Willbanks, supra*, ignored the fact that Graham himself was convicted of two offenses, armed burglary with assault or battery (a first-degree life felony) and attempted armed robbery (a second-degree felony), for which he was sentenced to concurrent sentences of life and 15 years – only after he had already been given probation, but had violated it by committing several further offenses. *Graham v. State*, 982 So.

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2d 43, 45, 51-52 (Fla. Dist. Ct. App. 2008) *rev'd,* 560 U.S. 48 (2010), *as modified* (July 6, 2010).

Graham was given a *de facto* LWOP sentence because Florida has no parole. But what if, upon remand from the United States Supreme Court, the trial court gave Graham consecutive sentences of 70 and 15 years? Graham would still die in prison without ever having been given a meaningful opportunity for release. Yet, under the Western District's analysis, because Graham would have received "multiple, consecutive, term-of years sentences," (Slip Op. at 1-2), that would be constitutional since instead of a literal "life without parole" sentence, he would have only received two term-of-years sentences. There is nothing in the Supreme Court's opinion in *Graham* indicating that this result would be countenanced by the Court. To interpret *Graham* in a manner that would allow this to happen would truly result in form over substance. But the Western District's allows it.

As the Iowa Supreme Court explained: "[T]he unconstitutional imposition of a … life-without-parole sentence is not fixed by substituting it with a [term-of-years sentence] that is the practical equivalent of a life sentence without parole." *State v. Ragland*, 836 N.W.2d 107, 121 (Iowa 2013). The Wyoming Supreme Court further stated that this would "ignore the reality that lengthy aggregate sentences have the effect of mandating that a juvenile 'die in prison.'" *Bear Cloud v. State*, 334 P.3d 132, 142 (Wyo. 2014), quoting *Miller*, 132 S.Ct. at 2460.

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B. Many courts have held that Graham's categorical rule cannot be evaded by allowing a juvenile nonhomicide offender to be sentenced to an aggregate term-of-years sentence that is the functional equivalent of life without parole

A sentence imposed on a juvenile for nonhomicide offenses requires "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75. *Graham* condemned sentences that deny the juvenile "a chance to demonstrate growth and maturity." *Id.* at 73.

But courts have inconsistently ruled whether *Graham*'s holding prohibits aggregated, term-of-years sentences, which operate as the functional equivalent of life without parole. Many jurisdictions have held that *Graham* and *Miller* prohibit aggregated *de facto* LWOP sentences, concluding that such sentences would frustrate the Supreme Court's reasoning regarding a juvenile offender's opportunity to demonstrate growth and maturity since the opportunity to receive parole would not arise during the juvenile's expected lifetime.

Cases recognizing and enforcing the true meaning and mandate of *Graham* by ensuring that juveniles get a meaningful opportunity for release include:

- *State v. Belcher*, No. CR94100508, 2016 WL 2935462 (Conn. Super. Ct. Apr. 29, 2016): multiple nonhomicide offenses with a total effective sentence of 60 years were the functional equivalent of LWOP (juvenile entitled to be resentenced at a new sentencing proceeding);

- *People v. Nieto,* --N.E.3d--, 2016 IL App (1st) 121604, 2016 WL 1165717 (2016) (sentence vacated, and remanded for resentencing);
- *State v. Zarate*, -- N.J. Super --, 2016 WL 1079462 (App. Div. 2016): juvenile's life sentence with a 63.75 year parole disqualifier, making him ineligible for parole until he was almost 79 years old, amounted to a *de facto* LWOP sentence (remanded to the trial court to reconsider homicide sentence in light of new life expectancy data and recent case law);
- *State v. Boston*, 131 Nev., Adv. Op. 98, 363 P.3d 453 (Nev. 2015): aggregated sentences resulting in parole ineligibility for about 100 years were prohibited by *Graham* (but remanded to the district court to deny the petition because the legislature had enacted new legislation giving the juvenile offender parole eligibility after 15 years in prison, and the juvenile had been incarcerated at least 27 years);
- *State v. Riley,* 315 Conn. 637, 110 A.3d 1205 (2015), *cert. denied*, 136 S.Ct. 1361 (2016): juvenile's sentence for homicide and nonhomicide offenses with the total effective sentence of 100 years, with parole ineligibility until at least 94 years were served was the functional equivalent of LWOP (remanded for a new sentencing proceeding).
- *Henry v. State*, 175 So.3d 675 (Fla. 2015), *cert. denied*, 136 S. Ct. 1455 (2016): juvenile nonhomicide offender's aggregate sentence, which totaled 90 years and required juvenile to be imprisoned until he was

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nearly 95 years old was unconstitutional (remanded for resentencing in light of new juvenile sentencing legislation);

- *Gridine v. State*, 175 So.3d 672 (Fla. 2015), *cert. denied*, 136 S. Ct. 1387 (2016): *Graham* prohibits a juvenile to be sentenced to 70 years imprisonment with a minimum mandatory prison terms of 25 years for the crime of attempted first-degree murder (remanded for resentencing in light of new juvenile sentencing legislation);
- *Casiano v. Comm'r of Correction*, 115 A.3d 1031 (Conn. 2015), *cert. denied sub nom. Semple v. Casiano*, 136 S. Ct. 1364 (2016): imposition of a 50-year sentence without parole on a juvenile was subject to the *Miller* sentencing procedures; the focus in *Graham* was not on the label of a "life sentence," but rather on whether a juvenile would, as a consequence of a lengthy sentence without the possibility of parole, actually be imprisoned for the rest of his life (reversed and remanded to habeas court, which improperly granted Correction's motion for summary judgment);
- *State v. Ronquillo*, 190 Wash.App. 765, 361 P.3d 779 (2015): juvenile's sentence of 51.75 years, which meant that he would remain in prison until age 68, was a *de facto* LWOP sentence (reversed and remanded for resentencing);
- *Hayden v. Keller*, 134 F. Supp. 3d 1000 (E.D.N.C. 2015): *Miller* and *Graham* apply to lengthy term-of-years sentences or aggregate

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sentences; North Carolina has implemented a parole system which failed to provide Hayden with any "meaningful opportunity" to make his case for parole (parties given 60 days to present a plan for compliance with *Graham* to provide a meaningful opportunity to obtain release);

- *People v. Ellis*, 2015 COA 108, 2015 WL 4760322 (2015): juvenile's sentence of life with the possibility of parole, together with a mandatory consecutive term of 32 years imprisonment was the equivalent of LWOP; case remanded to determine life expectancy (remanded for determination of offender's life expectancy and first parole eligibility date and whether the sentence leaves him a meaningful opportunity for release; if not, the court must conduct a resentencing hearing);
- *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014): an aggregate sentence of over 45 years was *de facto* equivalent of LWOP (reversed and remanded for resentencing);
- *State v. Null,* 836 N.W.2d 41 (Iowa 2013): 75-year sentence resulting from aggregating two mandatory sentences that permitted parole eligibility only after 52 ½ years was unconstitutional (reversed and remanded for resentencing consistent with the cruel and unusual punishment provision of the Iowa Constitution);
- *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013): sentence of 254 years for nonhomicide crimes was materially indistinguishable from LWOP

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(district court's denial of habeas petition reversed and remanded with instructions to grant the petition);

- *People v. Lewis*, 222 Cal. App. 4th 108, 165 Cal. Rptr. 3d 624 (2013): aggregate 75–years–to–life sentence for nonhomicide offenses constituted the functional equivalent of a LWOP sentence since the juvenile would not be eligible for parole until about 84 years old (remanded for the trial court to determine a parole eligibility date within the offender's lifetime unless the offenses reflect irreparable corruption within the meaning of *Miller*);
- *People v. Rainer*, 2013 COA 51, 2013 WL 1490107: aggregate sentence of 112 years constituted the functional equivalent of a LWOP sentence; juvenile would not be eligible for parole until he was 75 years old, and he had a life expectancy of between 63.8 and 72 years of age) (reversed and remanded for resentencing consistent with *Graham* and *Miller*), but *cert. granted by Colo. Supreme Court*, 2014 CO 81, on issue of whether the *Graham* should be extended to invalidate a consecutive term-of-years sentence imposed on a juvenile convicted of multiple offenses;
- *Commonwealth v. Brown*, 466 Mass. 676, 1 N.E.3d 259 (2013): a sentencing scheme for juveniles must avoid imposing on juveniles any term so lengthy that it could be seen as the functional equivalent of a sentence of LWOP (remanded for resentencing);

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- *People v. Caballero*, 282 P.3d 291 (Cal. 2012): 110-year-to-life sentence with a parole eligibility date falling outside the juvenile's life expectancy was the functional equivalent of an LWOP sentence (reversed and remanded for resentencing);
- *Thomas v. Pennsylvania*, 2012 WL 6678686 (E.D. Pa. 2012): juvenile's sentence of 65–to–150 years in prison, with parole eligibility at age 83, which was more than a decade beyond his life expectancy, was unconstitutional under *Graham* (remanded for resentencing);
- *U.S. v. Mathurin*, 2011 WL 2580775 (S.D.Fla. 2011): where a juvenile faced a mandatory minimum sentence of 307 years, the court severed the portion of the Hobbs Act prohibiting concurrent sentences so that it could impose a constitutionally permissible sentence providing a meaningful opportunity for release at age 53 (sentenced reduced).

Other courts, however, have concluded that aggregate term-of-years sentences, even if they exceed the juvenile's life expectancy, do not violate *Graham*; these courts mostly focus on a passage in *Graham*, which states that "[t]he instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense." *Graham*, 560 U.S. at 63: *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012) (but on collateral review in federal court, the state court's adjudication has to be contrary to, or involved an unreasonable application of, clearly established Federal law that existed at the time of the state court's adjudication on the merits); *Goins v. Smith*, 2012 WL 3023306 (N.D. Ohio

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2012) (same Federal standard as *Bunch*); *State v. Kasic*, 228 Ariz. 228, 265 P.3d 410 (Ct. App. 2011) (but most of the crimes were committed after the defendant turned 18); *Adams v. State*, 707 S.E.2d 359 (Ga. 2011) (but juvenile was only required to serve 25 years); *State v. Brown*, 118 So. 3d 332 (La. 2013); *State v. Merritt*, 2013 WL 6505145 (Tenn. Crim. App. 2013) (but appellate court concluded that effective 225-year sentence was excessive and reversed for remand for entry of judgments reflecting an effective 50-year sentence); *State v. Denzmore*, 436 S.W.3d 635 (Mo. App. E.D. 2014) (but juvenile only received a 44-year sentence; at the most, juvenile would be eligible for parole when he was 54 years old, possibly earlier); *Vasquez v. Com.*, 291 Va. 232, 781 S.E.2d 920 (2016) (but Virginia contained a geriatric release provision making the juvenile parole eligible at age 60-65).

Contrary to this last group of cases, the *Graham* opinion does not limit its holding to offenders who were convicted for a single nonhomicide offense. *Boston,* 363 P.3d at 457. Terrence Graham did not receive the specific sentence of life without parole; he received a sentence of life in a state that abolished its parole system. *Graham*, 560 U.S. at 57. Therefore, just like Timothy, Terrence received the functional equivalent of life without parole. The focus in *Graham* was not on the label of a "life sentence," but rather on whether a juvenile would, as a consequence of a lengthy sentence without the possibility of parole, actually be imprisoned for the rest of his life. *Casiano*, 115 A.3d at 1044. If this Court were to read *Graham's* holding as to not apply to aggregated nonhomicide offenses

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committed by a juvenile, this would undermine *Graham's* goal of "prohibit[ing] States from making the judgment at the outset that those offenders never will be fit to reenter society." *Id.*, 560 U.S. at 75.

Courts that reject *Graham*'s applicability to lengthy term-of-years-without-parole or *de facto* life without parole sentences violate *Graham* because those decisions are irreconcilable with the spirit and reasoning of that opinion. Although a lengthy term-of-years sentence does not technically render a "life" sentence, it becomes a practical life sentence when it ensures that the juvenile will be incarcerated until his or her death. Imposing severe punishment on juvenile nonhomicide offenders labels them as incorrigible and incapable of change, and thus denies to them 'a chance to demonstrate growth and maturity.' …These concerns remain true whether the sentence is life without parole or a term of years exceeding the offender's life expectancy. *Caballero*, 55 Cal.4th at 294, *quoting Graham*, 560 U.S. at 73. The functional-equivalent approach best addresses the concerns enunciated by the Supreme Court regarding the culpability of juvenile offenders and the potential for growth and maturity of these offenders. *Boston*, 363 P.3d at 458.

Language in the recent Supreme Court's opinion in *Montgomery* confirms that *Graham* and *Miller* were not limited to a single "life without parole" sentence.

In *Montgomery*, the Court considered "whether *Miller* adopts a new substantive rule that applies retroactively on collateral review to *people condemned as juveniles to die in prison.*" 577 U.S. ——, 136 S.Ct. 718, 727

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(2015) (Emphasis added). Although Montgomery himself challenged an explicit life sentence, neither the parties nor the Court saw that label as the relevant constitutional factor; rather, it was the fact that Montgomery was subject to a punishment that ensured he would spend the rest of his life behind bars.

Throughout the opinion, the Supreme Court characterized a disproportionate sentence as one that "condemn[s] [the juvenile] to die in prison," results in "a lifetime in prison," or one in which the prisoner "spen[ds] each day ... knowing he [is] condemned to die in prison" and deprived of "hope for some years of life outside prison walls." *Id.*, 136 S.Ct. at 734, 736, 737. Each of these characterizations applies with equal force to a *de facto* or functionally equivalent life without parole sentence.

Just as a life without parole sentence unconstitutionally denies the juvenile offender a chance to demonstrate growth and maturity, a *de facto* life sentence has precisely the same features that *Graham* prohibits: it deprives the juvenile of a meaningful opportunity to obtain release based on demonstrated reform. As noted in a law review article:

> What difference is there really between 120 years and life besides semantics, because the reality is the same either way. All sentencing courts would have to do is stop issuing LWOP and instead start sentencing those same juveniles to 100 years, and the problem is solved. Gone would be the idea that juveniles are different, less culpable, and more deserving of a

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meaningful opportunity for release. Gone would be the incentive to rehabilitate. Gone would be Graham.

Leanne Palmer, *Note, Juvenile Sentencing in the Wake of Graham v. Florida: A look Into Uncharged Territory*, 17 Barry L. Rev. 133, 147 (2011).

C. *Timothy is serving an unconstitutional, de facto life without parole sentence since his parole eligibility date is well beyond his natural life expectancy*

Timothy was sentenced to life plus 355 years, which requires him to remain in prison until he is 85 years old, if he lives that long, for nonhomicide offenses occurring during a single criminal episode, against the same victim, and which occurred when he was only 17 years old. This sentence means that Timothy will likely die in prison without ever being given the opportunity to demonstrate that he has been rehabilitated. Yet, under *Graham*, juveniles who do not kill must be guaranteed a "meaningful opportunity to obtain release" -- even if that opportunity does not actually result in release. 560 U.S. at 75. Timothy will be denied that meaningful opportunity.

Timothy is a "juvenile offender who did not commit homicide." *Id.* at 74. Yet he received a sentence with parole ineligibility until age 85. This judgment that Timothy would "never be fit to reenter society" was made at the outset, and is contrary to *Graham*. *Id.* at 75. Like Terrence Graham's sentence, Timothy's 385 year sentence:

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> guarantees he will die in prison … no matter what he might do to demonstrate that the bad acts he committed as a teenage are not representative of his true character, even if he spends the next half century attempting to atone of his crimes and learn from his mistakes.

Id. at 79. "It is essential to give children "a chance to demonstrate maturity and reform." *Id.*

The categorical rule in *Graham* is about outcomes – not labels. The outcome *Graham* sought to prohibit is exactly the one that will result in this case – Timothy will spend the rest of his life in prison – a decision that was made at the outset – without Timothy being able to show that he has been rehabilitated. A sentence of life without parole – whether phrased in terms of "life" or in terms of a term-of-years that exceeds the juvenile's life expectancy- "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the convict, he will remain in prison for the rest of his days." *Id.* at 70 (citation omitted).

This Court should not ignore the reality that a 17 year-old sentenced to life without parole (Terrence) and a 17 year-old sentenced to a term of years beyond his lifetime (Timothy) have effectively received the same sentence. Because both

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sentences deny the juvenile a meaningful chance to return to society, *Graham* applies to both sentences.[14]

Ironically, this Court recently granted habeas corpus relief to numerous first-degree murderers, making them eligible for parole after serving 25 years. E.g., *State ex rel. Lockhart v. Norman*, No. SC93335. Similarly, the Missouri legislature passed new legislation this term making first-degree murderers who committed their offense or offenses before August 28, 2016, eligible for parole after serving 25 years. S.B. 590 (2016).[15] If Timothy had committed murder, he would be eligible for parole after serving 25 years under this new legislation or by order of this Court. But because he committed nonhomicide offenses, he must serve about 45 years more than these first-degree murderers. Such an inconsistent result should not be countenanced by this Court.

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[14] DOC in its Third Letter Brief filed in the Western District, stated that there are only "five Missouri offenders who committed offenses that do not involve any type of homicide, either manslaughter or murder, while under age 18 whose combined parole restrictions amount to more than 60 years of parole eligibility." *Id.* at 24.

[15] At the time this brief was written, the governor had neither signed nor vetoed this bill.

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D. A sentence that provides a juvenile offender with no more than the prospect of geriatric release does not provide a meaningful opportunity to demonstrate the maturity and rehabilitation required to obtain release and reenter society and, thus, constitutes cruel and unusual punishment

Although a sentence that exceeds a juvenile offender's natural life expectancy is unconstitutional because it clearly fails to provide a meaningful opportunity for early release, this does not mean that a sentence barely under predicted life expectancy is constitutional.

Life expectancy can be a poor measure of whether a sentence provides a meaningful opportunity for release because: (1) using life expectancy as a sentencing guideline focuses on exacting maximum punishment and retribution, whereas as the Supreme Court has held that occasions for sentencing juveniles to the harshest possible penalty will be uncommon even for a homicide offender, *Miller*, 132 S. Ct. at 2469; (2) some life tables that are used provide estimates for the general population and should not be applied to the distinctive group of young people facing decades of incarceration;[16] and, (3) sentences that deprive young people of the opportunity to demonstrate their maturity and rehabilitation until

[16] The life expectancy of inmates who have been sentenced as juveniles is difficult to determine because life expectancy within prisons and jails is considerably shortened. *Casiano*, 115 A.3d at 1046.

they become eligible for parole in their mid-fifties or sixties, or in Timothy's case, his eighties, lead to the same hopelessness, irretrievable loss, and lack of motivation for change of juveniles receiving such harsh sentences. Adele Cummings & Stacie Nelson Colling, *There Is No Meaningful Opportunity in Meaningless Data: Why It Is Unconstitutional to Use Life Expectancy Tables in Post-Graham Sentences*, 18 U.C. DAVIS J.JUV. L. & POL'Y 267, 287-288 (2014). Moreover, even if life expectancy data were perfectly accurate, about 50% of people will die *before* the age indicated by the statistic. *Id.* at 283.

A meaningful opportunity for release must mean more than affording a juvenile offender the opportunity to die at home. For an opportunity for release to be "meaningful" under *Graham*, review must be long before a juvenile reaches old age. Providing an opportunity for release only after decades in prison denies these young offenders an opportunity to live a meaningful life in the community and meaningfully contribute to society. *See*, e.g., *State v. Pearson*, 836 N.W.2d 88, 96 (Iowa 2013) (striking down a 35 year sentence that would render the juvenile eligible for parole at age 52 because it violated *Miller* by "effectively depriv[ing] of any chance of an earlier release and the possibility of leading a more normal adult life.").

Even assuming Timothy lived long enough to be released in his 80s (or even in his 70s), it is unlikely he would be able to engage in other aspects of a meaningful life. *See*, e.g., *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013), which held: "Even if lesser sentences than life without parole might be less problematic,

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we do not regard the juvenile's potential future release in his or her late sixties after a half century of incarceration sufficient to escape the rationales of *Graham* or *Miller*. The prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society as required by *Graham*."

Whether an opportunity for release is *meaningful* should not depend on anticipated dates of death. In *Null*, the Iowa Supreme Court held that a sentence for a juvenile nonhomicide offender granting parole eligibility at age 69, although not labeled "life without parole," merited the same analysis as a sentence explicitly termed such and was unconstitutional under *Graham*. The *Null* court ruled that whether a sentence complied with *Graham* was not dependent on a analysis of life expectancy or actuarial tables:

> [W]e do not believe the determination of whether the principles of *Miller* or *Graham* apply in a given case should turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates. In coming to this conclusion, we note the repeated emphasis of the Supreme Court in *Roper*, *Graham*, and *Miller* of the lessened culpability of juvenile offenders, how difficult it is to determine which juvenile offender is one of the very few that is irredeemable, and the importance of a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."

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Null, 836 N.W.2d at 71-72.

Some state statutes enacted after *Graham* reflect that those states also believe that geriatric release is insufficient, including:

- Nevada – enacted *NRS 213.1235*, which allows for parole eligibility after 15 years in prison for a juvenile offender who committed nonhomicide crimes. *Boston*, 363 P.3d at 459.
- Delaware - enacted *§4204A(d)(1)*, which provides that any offender sentenced to an aggregate term of incarceration in excess of 20 years for any offense or offenses other than first-degree murder that were committed prior to the offender's 18th birthday shall be eligible to petition the Superior Court for sentence modification after the offender has served 20 years of the originally imposed sentence.
- California – enacted *Penal Code § 3051(b)*, which requires the Board of Parole Hearings to conduct a youth offender parole hearing during the inmate's 25th year of incarceration for offenses that were committed prior to the offender's 18th birthday if the offender received sentences of 25 years to life or greater.
- Connecticut: enacted *Conn. Gen. Stat. Ann. § 54-125a(f)(1)*, which provides that a person convicted of one or more crimes committed while such person was under 18 years of age, who received a definite sentence or total effective sentence of more than 10 years for such crime or crimes, may be allowed to go at large on parole in the discretion of the

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panel of the Board of Pardons and Paroles for the institution in which such person is confined, provided, if such person is serving a sentence of more than 50 years, such person shall be eligible for parole after serving 30 years.

- Wyoming – enacted *Wyo. Stat. Ann. § 6-10-301*, which provides that a person sentenced to life imprisonment for an offense committed before the person reached the age of 18 years shall be eligible for parole after commutation of his or her sentence to a term of years or after having served 25 years of incarceration.
- Washington - enacted 9.94A.730, which provides that any person convicted of one or more crimes committed prior to the person's 18th birthday may petition the indeterminate sentence review board for early release after serving no less than 20 years of total confinement.
- Florida - enacted *§ 921.1402*, which allows a juvenile offender who is sentenced to lengthy prison sentences a review of his or her sentence after 15-25 years in prison, with the length being dependent on the offense(s) committed. *See, Henry, supra; Horsley v. State*, 160 So.3d 393 (Fla 2015).
- Missouri - as noted above, the Missouri legislature just this year approved legislation that allowed a petition for review of sentence to be filed after 25 years. S.B. 590 (2016).

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These statutes, along with the cases cited above finding that *de facto* LWOP sentences are unconstitutional, reflect a growing national trend or consensus against geriatric release for juvenile offenders.

The Supreme Court of Iowa has defined a lengthy sentence for purposes of *Graham* and *Miller* as any sentence that "effectively deprive[s][a juvenile offender] of any chance of an earlier release and the possibility of a leading a more normal adult life." *State v. Pearson*, 836 N.W.2d 88, 96 (Iowa). Extending the principle that juvenile offenders are entitled to more than the mere "prospect of geriatric release," the Iowa Supreme Court granted a juvenile offender with a sentence of 35 years for non-homicide offenses a resentencing. *Null*, 836 N.W.2d at 71; *Pearson*, 836 N.W.2d at 96 (35 years). As noted in *Pearson*, "applying the teachings of *Roper*, *Graham*, and *Miller* only when mortality tables indicate the offender will likely die in prison without ever having the opportunity for release based on demonstrate maturity inadequately protects the juvenile's constitutional rights." *Pearson,* 836 N.W.2d at 98 (Cady, C.J. concurring).

Graham required that the state provide some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation; it did not indicate when such an opportunity must be provided or give guidance regarding its nature or structure. Rather, it left it to the states to determine the "means and mechanisms for compliance." *Graham,* 560 U.S. at 75. Until Missouri passes legislation directly addressing this issue, however, this Court should hold that a juvenile offender's sentence, at least for offenses committed during a single

criminal episode, must be such that would allow the juvenile a meaningful opportunity for release, although not a guarantee, within 25 years.

III. Retroactivity and Procedural Default

In the Western District Court of Appeals, DOC raised the issue of procedural default, so Timothy will address that issue now.

Even though Timothy's claim was not raised on direct appeal or in a Rule 29.15 motion, the Western District reviewed the *de facto* LWOP claim on the merits because the claim fell within "the sentencing-defect exception" to the rule generally barring procedurally defaulted claims, *citing State v. Whitfield*, 107 S.W.3d 253, 269 n. 19 (Mo. banc 2003). *Willbanks v. Missouri Dept. of Corrections*, slip op. at 18-19, No. WD7791. That part of the Western District's opinion was correct. There are also additional reasons why the claim is not procedurally defaulted.

A. Graham v. Florida applies retroactively

Courts have consistently held that categorical sentencing bans like those announced in *Atkins v. Virginia*, 536 U.S. 304 (2002), *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010), apply retroactively on

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collateral review because they satisfy the substantive rule exception of the *Teague* doctrine.[17]

When a decision of the Supreme Court of the United States results in a new rule of constitutional law, that rule applies only in limited circumstances as to convictions that are already final. *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004). For example, new *substantive* rules apply retroactively and are *not* subject to a bar on retroactive application of procedural rules. *Id.* Substantive rules include constitutional determinations that place particular conduct or persons covered by the statute beyond the state's power to punish. *Id.* Such rules apply retroactively

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[17] *Teague v. Lane*, 489 U.S. 288 (1989). Missouri generally uses the broader "*Linkletter-Stovall*" test for retroactivity. *State v. Whitfield*, 107 S.W.3d 253, 266-269 (Mo. banc 2003). But under *Teague*, all substantive new rules must be retroactively applied, and the States' standards for determining retroactivity cannot achieve a result that is narrower than *Teague*. W*hitfield*, 107 S.W.3d at 267. Thus, since the new rule announced in *Graham* is substantive, it must be retroactively applied regardless the applicable retroactivity standard. *Also see, State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 400-401 (Mo. banc 2003) (imposition of the death penalty on juvenile offenders was categorically unconstitutional and it was retroactively applied because it was a substantive rule under *Teague*). Similarly, this Court recognized that *Atkins* applies retroactively to cases pending on collateral review. *Johnson v. State*, 102 S.W.3d 535, 539, n.12 (Mo. banc 2003).

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because they necessarily carry a significant risk that a defendant faces a punishment that the law cannot impose upon him. *Id.* A new rule is substantive if it prohibits a certain category of punishment for a class of defendants because of their status or defense. *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989) *abrogated on other grounds by Atkins*).

Like the categorical bans in *Atkins* and *Roper*, *Graham* categorically recognizes "a punishment that the law cannot impose upon [a defendant]," *Schriro,* 542 U.S. at 352, specifically, that it is categorically unconstitutional for juvenile nonhomicide offenders to face a life prison sentence without being provided some meaningful, realistic opportunity to obtain release. Courts have consistently concluded that *Graham* applies retroactively on collateral review. *E.g., Bonilla v. State*, 791 N.W.2d 697, 700-01 (Iowa 2010); *Moore v. Biter*, 725 F.3d 1184, 1190-91 (9th Cir. 2013); *In re Sparks,* 657 F.3d 258, 260–61 (5th Cir.2011); *Rogers v. State*, 267 P.3d 802, 804 (Nev. 2011).

Any question about whether *Graham* is retroactive has been laid to rest by the Supreme Court when it recently held that *Miller v. Alabama* was retroactive because *Miller* announced a substantive rule of constitutional law. *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). The *Montgomery* Court held that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. *Id.* at 729. This is because the Constitution requires substantive rules to have retroactive effect regardless of when a conviction became final. *Id.* A court has no

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authority to leave in place a sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced. *Id.* at 731.

B. Timothy's claim is not procedurally defaulted

Generally, if a defendant fails to raise a claim that could have been raised during direct appeal or post-conviction proceedings, the defendant waives the claim and is barred from raising it in a subsequent petition for writ of habeas corpus. *State ex rel. Koster v. Jackson*, 301 S.W.3d 586, 590 (Mo. App. W.D. 2010). But a habeas petitioner can overcome this procedural default by demonstrating: (1) a claim of actual innocence; (2) a "jurisdictional" or "sentencing" defect;[18] or (3) that the procedural default was caused by something external to the defense and that prejudice resulted from the underlying error that worked to the petitioner's actual and substantial disadvantage (cause and prejudice). *Id.*

The second and third exceptions are discussed below. Timothy can overcome any alleged procedural default under either of those two exceptions.

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[18] Because unauthorized sentences subject to review in habeas corpus proceedings do not implicate the subject-matter jurisdiction of the sentencing court, such unauthorized sentences are more properly referred to as "sentencing defects." *Thornton v. Denney*, 467 S.W.3d 292, 296 (Mo. App. W.D. 2015).

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Further, as noted above, because *Graham* applies retroactively, the claim is not procedurally defaulted. As noted in *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 400-01 (Mo. banc 2003), if a new rule falls under an exception to nonretroactivity, such a rule is applicable to persons whose cases are on collateral review, "and the usual waiver rules will not apply." *In accord*, *Whitfield*, 107 S.W.3d at 269, n. 19 ("In such a case, the rules regarding preservation of error by raising the error on direct appeal or in authorized post-conviction motions do not apply, for 'those waivers do not affect his objection that the sentence exceeds the maximum allowed by law.'") (Citation omitted). *Graham* falls under the substantive rule exception of *Teague*, so it applies retroactively on collateral review, and thus "the usual waiver rules" do not apply. *State ex rel. Simmons v. Roper*, 112 S.W.3d at 400-01.

1. The claim falls within the sentencing-defect exception

It is well-settled that the imposition of a sentence in excess of that authorized by law may be raised in a habeas corpus petition and such a claim is not subject to procedural default even if the habeas petitioner failed to timely raise the claim in a direct appeal or post-conviction motion. *State ex rel. Zinna v. Steele*, 301 S.W.3d 510, 515, 517 (Mo. banc 2010); *Jackson*, 301 S.W.3d at 590. Under these cases, a habeas corpus petitioner is entitled to raise a sentencing defect in a habeas corpus proceeding, and the petitioner need not show that he or she had "cause" for failing to raise the issue at an earlier time. *Id.*

"Cases in which a person received a sentence greater than that permitted by law traditionally have been analyzed under the second of these exceptions." *Zinna,* 301 S.W.3d at 517. "[W]here a court 'imposes a sentence that is in excess of that authorized by law, habeas corpus is a proper remedy.' " *Id.* (quoting *State ex rel. Osowski v. Purkett,* 908 S.W.2d 690, 691 (Mo. banc 1995)).

In *Whitfield,* 107 S.W.3d at 269 n. 19 (Mo. banc 2003), this Court held that habeas relief would be appropriate under a sentencing-defect theory where the defendant, though sentenced in compliance with Missouri statute, was sentenced in violation of the Eighth Amendment, as interpreted in *Ring v. Arizona,* 536 U.S. 584 (2002), which was handed down after the defendant's direct and post-conviction appeals were final. The same is true here. Timothy's sentences comply with Missouri statutes, but they violate the Eighth Amendment, as interpreted by *Graham.* This argument falls within the sentencing-defect exception and permits us to review the merits of his claim. *Willbanks*, No. WD 77913, 2015 WL 6468489, at *9-10.

2. Cause and Prejudice ("novelty cause")

A habeas petitioner can also avoid a finding of procedural default by showing "cause" for the failure to timely raise the claim at an earlier juncture and "prejudice" resulting from the error. *Zinna*, 301 S.W.3d. at 517. "Cause" can be shown where a constitutional claim is "so novel that its legal basis is not reasonably available to counsel." *Reed v. Ross*, 468 U.S. 1, 14-16 (1984).

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Reed recognized three ways that a claim can be so novel to establish cause for the failure to earlier raise it and avoid a finding of procedural default: (1) the Court explicitly overrules one of its precedents; (2) the Court overturns a longstanding and widespread practice to which the Court has not spoken but which a near-unanimous body of lower court authority has expressly approved; and (3) the Court disapproves a practice of the Court arguably sanctioned in prior cases. *Reed*, 468 U.S. at 17.

Graham relied extensively on *Roper v. Simmons*, which in 2005 overruled prior Supreme Court precedent (*Stanford v. Kentucky*, 492 U.S. 361 (1989)) that had been the law of the land at the time Timothy's criminal case and post-conviction proceedings were pending (1999-2003). Thus, the genesis of the *Graham* opinion began with the overruling of Supreme Court precedent, which occurred *after* Timothy's direct appeal had concluded. This "clear break from the past," *Reed*, 468 U.S. at 17, emerged after Timothy could have been expected to raise the issue in the normal course of his proceedings. "Consequently, the failure of [Timothy's] attorney to have pressed such a clam before a state court is sufficiently excusable to satisfy the cause requirement." *Reed*, 468 U.S. at 17. *See*, *Rogers*, 267 P.3d at 804 (legal basis for a *Graham* claim was not reasonably available to be raised in a prior, timely post-conviction petitioner, and thus demonstrated good cause to overcome procedural default); *In re Sparks,* 657 F.3d at 260 (*Graham* "was certainly the first recognition that the Eighth Amendment bars the imposition of life imprisonment without parole on nonhomicide offenders

under age eighteen."); *Boston*, 363 P.3d at 454-455 (Nev. 2015) (The *Graham* decision provides good cause and actual prejudice. Good cause to overcome procedural bars may be established where the legal basis for the claim was not reasonably available).

Prejudice is established where a petitioner demonstrates that the underlying error worked to his or her actual and substantial disadvantage. *Zinna*, 301 S.W.3d at 517. Timothy has been prejudiced because he is serving an unconstitutional sentence that will keep him in prison until he dies or reaches the age of eight-five, an age he will unlikely reach. "An unauthorized sentence affects substantial rights and results in manifest injustice." *Drennen v. State*, 906 S.W.2d 880, 882 (Mo. App. E.D. 1995). Timothy has established both cause and prejudice to avoid a finding of procedural default.

IV. Conclusion

This Court should reverse Timothy's sentences and remand for resentencing with directions that any sentence imposed must comport with *Graham's* and *Miller's* command that Timothy be given a meaningful opportunity to obtain release. The Constitution requires that juvenile nonhomicide offenders be sentenced in a manner that provides the juvenile with a meaningful opportunity for release based upon demonstrated maturity and rehabilitation. This requirement applies whenever the offenses do not result in the death of a person, and further applies regardless of the number of offenses for which the juvenile was convicted.

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A person who is convicted of multiple nonhomicide offense committed when he was a juvenile cannot be constitutionally sentenced to die in prison. *Graham's* "meaningful opportunity to obtain release" command applies whether the juvenile is convicted of one or several counts.

Alternatively, this Court should find that the Missouri minimum term statute and the regulations governing parole are unconstitutional as applied to juvenile offenders given *de facto* LWOP sentence. Cf. *State v. Lyle*, 854 N.W.2d 378 (Iowa 2014) (mandatory minimum prison sentences for juveniles violate the Iowa Constitution). Without the application of the minimum term statute, it appears that Timothy would be eligible for parole after 15 years. *See*, *14 CSR 80-2.010(1)(E)* ("Offenders serving life or multiple concurrent or consecutive life sentences and offenders with sentenced totaling forty-five (45) years or more are eligible for parole after a minimum of fifteen (15) years has been served, except where statute would require more time to be served.").[19]

[19] If the minimum term statute is held not to apply to juveniles, like Timothy, who have been sentenced to the functional equivalent of life without parole, then the last portion of the regulation, "except where statue would require more time to be served," would not apply.

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CONCLUSION

Timothy's 385-year sentence constituted a *de facto* life sentence since he will be ineligible for parole until age 85, which is well-beyond his life expectancy. As a result, he will not receive a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, which is required by *Graham v. Florida* and the Eighth Amendment.

This Court should reverse Timothy's sentences and remand for resentencing with directions that any sentence imposed must comport with *Graham's* command that he be given a meaningful opportunity to obtain release.

Alternatively, this Court should find that the Missouri minimum term statute and the Missouri regulations governing parole are unconstitutional as applied to juvenile offenders sentenced to *de facto* LWOP sentence, such as Timothy. Without the application of the minimum term statute, Timothy would be eligible for parole after 15 years. *See, 14 CSR 80-2.010(1)(E).*

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Craig A. Johnston, hereby certify: The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word 2010, in Times New Roman size 13 point font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 13,453 words, which does not exceed the 31,000 words allowed for an appellant's brief. And, on this 25th day of May, 2016, electronic copies of Petitioner's/Appellant's Substitute Brief, and Petitioner's/Appellant's Substitute Brief Appendix, were sent through the Missouri e-Filing System to Michael J. Spillane, Assistant Attorney General, at Mike.Spillane@ago.mo.gov.

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