No. SC95395

In The
Supreme Court of Missouri

TIMOTHY S. WILLBANKS,

Petitioner/Appellant,

vs.

MISSOURI DEPARTMENT OF CORRECTIONS,

Respondent.

PETITIONER'S/APPELLANT'S SUBSTITUTE REPLY BRIEF

Craig A. Johnston, MOBar #32191
Assistant State Public Defender

Woodrail Centre
1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
(573) 777-9977 (telephone)
(573) 777-9963 (facsimile)
Craig.Johnston@mspd.mo.gov

Attorney for Timothy Willbanks

INDEX

TABLE OF AUTHORITIES

***CASES*:**

***CONSTITUTIONAL PROVISIONS*:**

***STATUTES*:**

***MISCELLANEOUS*:**

ARGUMENT

Contrary to Respondent's argument, *Graham v. Florida*,[1] does not require that for a punishment to violate the 8th and 14th Amendments to the U.S. Constitution, as applied to juveniles like Timothy, that the punishment must be rarely imposed and have no legitimate penological justification. But even if there is a requirement for a national consensus against *de facto* LWOP sentences for nonhomicide offenses committed by juveniles, there is such a consensus, as shown by legislative enactments, state sentencing practice, and international law. Also, none of traditional penological justifications recognized in *Graham* as legitimate—retribution, deterrence, incapacitation, and rehabilitation — provide an adequate justification for a *de facto* LWOP sentence, which is a sentence materially indistinguishable from the LWOP sentence found to be unconstitutional in *Graham*.

Introduction

Respondent advances only two reasons why this Court should not find that Timothy's *de facto* life without parole (LWOP) sentence is unconstitutional. Respondent argues that *Graham v. Florida*, 560 U.S. 48 (2010) held that for a punishment to violate the Eighth Amendment, it must: (1) "be rarely imposed;" and, (2) "have no legitimate penological justification," and Timothy "can show neither" (Resp. Br. at 9). *Graham* requires neither. But Timothy can show both.

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

There does not have to be a national consensus against a sentencing practice, and it does not have to be "rarely imposed," for it to be cruel or unusual

Regarding Respondent's first argument, the Supreme Court of the United States has made it clear that although national consensus is entitled to some weight, it is not itself determinative of whether a punishment is cruel and unusual. *Graham*, 560 U.S. at 67; *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008); *Atkins v. Virginia*, 536 U.S. 304, 312 (2002). The Eighth Amendment "demands more than that a challenged punishment be acceptable to contemporary society." *Gregg v. Georgia*, 428 U.S. 153, 182-183 (1976).

It is true that *Graham* did note that in cases adopting categorical rules, the Court first considers objective indicia of society's standards, as expressed in legislative enactments and state practice, to determine whether there is a national consensus against the sentencing practice at issue. *Id*. at 61. But while *Graham* said that community consensus is important, it also held that such a consensus was not itself determinate of whether a punishment is cruel and/or unusual. *Id*. at 67. Instead, the task of interpreting the Eighth Amendment remains the Court's responsibility, including considering whether the challenged sentencing practice serves legitimate penological goals. *Id*. *Also see*, *State v. Lyle*, 854 N.W.2d 378, 387 (Iowa 2014), holding that lack of consensus is not dispositive.

Moreover, as demonstrated in *Miller v. Alabama*, 567 U.S.___, 132 S.Ct. 2455, 2464-65 (2012), constitutional protection for the rights of juveniles in

sentencing for the most serious crimes is rapidly evolving in the face of widespread sentencing statutes and practices to the contrary (rejecting an argument that widespread use of mandatory-life-without-parole sentences for juvenile homicide offenders precluded holding the practice to be unconstitutional). Thus, any alleged lack of national consensus would not be dispositive because "the evolution of society that gives rise to change over time necessarily occurs in the presence of an existing consensus, as history has repeatedly shown." *Lyle*, 854 N.W.2d at 387. *Also see*, Martin Guggenheim, *Graham v. Florida and a Juvenile's Right to Age-Appropriate Sentencing*, 47 Harv. C.R.-C.L. L.Rev. 457, 495 (2012) (arguing that national consensus analysis is inadequate to protect juvenile rights).

Even if a national consensus against de facto juvenile LWOP sentences is required, a continually growing consensus against such practice exists

As noted above, in cases adopting categorical rules, the Court first considers objective indicia of national consensus, as expressed in actual sentencing practices and legislative enactments in different jurisdictions. *Graham*, 560 U.S. at 62.

Although exact data showing how many juvenile nonhomicide offenders are serving *de facto* LWOP sentences does not appear to exist, one law review article used data collected in 2011, which showed how many *total* juveniles were serving prison sentences (1,790), along with other data, and extrapolated and

estimated that only about 71 juvenile nonhomicide offenders nationwide were probably serving *de facto* LWOP sentences in 2013. Mark T. Freeman, Comment, *Meaningless Opportunities: Graham v. Florida and the Reality of the De Facto LWOP Sentences*, 44 McGeorge L. Rev. 961, 974-975 (2013). [2] The law review comment argued that because only an estimated 71 juveniles are serving *de facto* LWOP sentences for nonhomicide offenses nationwide, and because it is likely that many of these offenders are serving these sentences in only five states, that the courts should find that States rarely impose these types of sentences, and thus there is a national consensus against them. *Id*.

Graham found that there was a national consensus against sentencing juvenile offenders to LWOP despite the fact that 37 States as well as the District of Columbia permitted such sentence for a juvenile nonhomicide offender, and the Court identified at least 123 juvenile offenders serving LWOP sentences for nonhomicide offenses. *Graham*, 560 U.S. at 62-64. Because *de facto* LWOP and de jure LWOP sentences are "materially indistinguishable," it is reasonable to conclude that the national consensus found in Graham extends to *de facto* LWOP

[2] DOC's 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. That number would appear to be consistent with the figure arrived at by Freeman.

sentences. *Moore v. Biter*, 725 F.3d 1184, 1191 (9th Cir. 2013). That this is so can also be seen from the language recently used by the Supreme Court of the United States in *Montgomery v. Louisiana*, 577 U.S. __, 136 S.Ct. 718 (2016), where the Court characterized an LWOP 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* LWOP sentence.

Also, when *Miller* was decided, nearly 2,500 prisoners were serving LWOP sentences for murders they committed before the age of 18 with over 2,000 of them sentenced under a mandatory sentencing scheme. *Miller*, 132 S.Ct. at 2477 (Roberts, J., dissenting). Yet, the court found a consensus against a mandatory LWOP sentence.

These numbers refute Respondent's argument that "[n]ational consensus against a punishment … is shown by the rare and isolated imposition of the punishment." (Resp. Br. at 13). These numbers also refute Respondent's related argument that because Timothy had listed 28 cases in his opening brief dealing with *de facto* juvenile LWOP sentences, he had "affirmatively refuted the existence" of a national consensus against such sentencing practice (Resp. Br. at 13-14).

Additionally, a survey of current state legislation in other jurisdictions is further evidence of a national consensus against *de facto* juvenile LWOP sentences. *See*, *State v. Null*, 836 N.W.2d 41, 72, n. 8 (Iowa 2013), noting that in the flurry of legislative action that has taken place after *Graham* and *Miller*, many of the new statutes have allowed parole eligibility for juveniles sentenced to long prison terms - even for homicides:

- Nevada allows for parole eligibility after 15 years in prison for a juvenile offender who committed nonhomicide crimes. *NRS 213.12135.*[3]
- Delaware allows 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 to be eligible to petition for sentence modification after the offender has served 20 years of the originally imposed sentence. *11 Del.C. § 4204A(d)(1).*
- California 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

[3] Timothy's opening substitute brief incorrectly cited the statute by leaving out a digit, "*213.1235" (sic)*.

the offender received sentences of 25 years to life or greater. *Penal Code § 3051(b).*

- Connecticut allows a person convicted of one or more crimes committed while under 18 years of age, who received a definite sentence or total effective sentence of more than 10 years for such crime or crimes, to receive parole, provided, if such person is serving a sentence of more than 50 years, such person shall be eligible for parole after serving 30 years. *Conn. Gen. Stat. Ann. § 54-125a(f)(1)*
- Wyoming allows a person sentenced to life imprisonment for an offense committed before the person reached the age of 18 years to be eligible for parole after commutation of his or her sentence to a term of years or after having served 25 years of incarceration. *Wyo. Stat. Ann. § 6-10-301*.
- Washington allows any person convicted of one or more crimes committed prior to the person's 18th birthday to petition for early release after serving no less than 20 years of total confinement. RCW *9.94A.730*.
- Florida 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. *F.S.A. § 921.1402*.

- West Virginia provides that a person who is convicted of one or more offenses, for which the sentence or any combination of sentences imposed is for a period that renders the person ineligible for parole until he or she has served more than 15 years, shall be eligible for parole after he or she has served 15 years, if the person was less than 18 years of age at the time each offense was committed. *W. Va. Code Ann. § 61-11-23*.
- Colorado recently enacted Senate Bill 16-180, which was signed by their governor just this month, which allows a prisoner to petition for release after serving 20-25 years for crimes committed as a juvenile (except for convictions for "unlawful sexual behavior") (adding article 34 to title 17, including sections 17-34-101, 17-34-102, 17-22.5-403, 17-22.5-403.7).

Although this is not a lengthy list, it is a growing list, and as noted in *Atkins*, 536 U.S. at 312, "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change."

Further support against the practice of *de facto* LWOP sentences comes from other countries' practices as well. *See*, *Graham*, 560 U.S. at 79, explaining that international consensus against a sentencing practice influences the Court on whether a national consensus has developed against such a practice and for support for the Court's independent conclusion that a particular punishment is cruel and unusual.

Seventy-nine countries in the world do not allow consecutive sentences or else they mandate that the lesser offenses merge with the most serious offense when the different offenses are part of the same act. C. de la Vega, et al., *Cruel and Unusual: U.S. Sentencing Practices in a Global Context* 40-42 (2012). The United States is among only 36 countries that continue to allow judges to issue concurrent or consecutive sentencing with no known cap. *Id*. The authors in *Cruel and Unusual* concluded that "[c]onsecutive sentencing amounting to a time span exceeding a lifetime is in effect the equivalent of life without parole sentencing, depriving the offender of review for rehabilitation." *Id*. at 42.

None of the traditional penological justifications that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation — provide an adequate justification for either de facto or de jure LWOP sentences

In order for the Court to independently decide that a sentencing practice violates the Eighth Amendment, the Court determines whether the challenged sentencing practice serves legitimate penological goals. *Graham*, 560 U.S. at 67. In making this inquiry, this Court should consider that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller*, 567 U.S. ___, 132 S.Ct. at 2465.

Respondent argues that Timothy must show that "there is no legitimate penological justification for his period of parole ineligibility" (Resp. Br. at 14).

Respondent overstates what is required by *Graham* and *Miller*. Further, *Graham's* analysis regarding penological justifications for an LWOP sentence for nonhomicide crimes committed by a juvenile is the same whether the sentence is a *de jure* LWOP sentence or a *de facto* LWOP sentence because the focus in *Graham* and *Miller* was on the distinctive attributes of youth, not on the specific crimes involved.

Contrary to Respondent's argument, *Graham* does not require that there be "*no* legitimate penological justification" for a sentencing practice to be found to be unconstitutional. Although *Graham* did say that a sentence lacking any legitimate penological justification is by its nature disproportionate to the offense, *Graham*, 560 U.S. at 71, the Court also noted that retribution is a legitimate reason to punish, and that an LWOP sentence did have a "limited" deterrent effect even when a juvenile is involved. *Id*. at 71-72. Thus, Respondent's assertion that Timothy had to show that there was "*no* legitimate penological justification" is incorrect.

Instead, *Graham* concluded that "[w]ith respect to life without parole for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation [citation omitted] — provides an adequate justification." *Id*. at 71. *Graham's* conclusions apply with equal force to *de facto* LWOP sentences.

Regarding retribution, while it "is a legitimate reason to punish," *id*., because the heart of the retribution rationale relates to an offenders'

blameworthiness, "the case for retribution is not as strong with a minor as with an adult." *Id*., at 71, quoting, *Roper v. Simmons*, 543 U.S. 551, 571 (2005); *Miller*, 132 S.Ct. at 2465. "The case becomes even weaker with respect to a juvenile who did not commit homicide." *Graham*, 560 U.S. at 71-72. This reasoning equally applies to *de facto* LWOP sentences since the focus in retribution is on the offenders' blameworthiness, not on the offense. *De facto* LWOP sentences do not further the goal of retribution because they are the functional equivalent of "the second most severe penalty" in the American justice system. *Graham*, 560 U.S. at 69.

Graham also held that deterrence does not suffice to justify a sentence of LWOP either. *Id*. at 72. The *Graham* Court observed that "the same characteristics that render juveniles less culpable than adults" – their immaturity, recklessness, and impetuosity– means "they are less likely to take a possible punishment into consideration when making decisions." *Id*. at 72. That the sentence deters in a few cases does not overcome other objections. *Id*. Again, the same can be said with a *de facto* LWOP sentence based upon several crimes committed by the same juvenile during a single criminal episode, like the instant case, because the same characteristics that renders a juvenile less likely than an adult to consider potential punishment, are still present whether the juvenile commits more than one crime during the same criminal episode. *Cf. Sumner v. Shuman*, 483 U.S. 66, 83 (1987) ("Close consideration of the deterrence argument also points up the fact 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.").

Graham also held that incapacitation did not justify an LWOP sentence because while incapacitation may be a legitimate penological goal sufficient to justify LWOP in other contexts, it was inadequate to justify that punishment for juveniles who did not commit homicide. *Graham*, 560 U.S. at 72. Deciding that a "juvenile offender forever will be a danger to society" would require "mak[ing] a judgment that [he] is incorrigible" – but incorrigibility is inconsistent with youth." *Id*. at 72-73; *Miller*, 132 S.Ct. at 2465. Graham had committed "serious crimes early in his term of supervised release," and thus he "deserved to be separated from society for some time in order to prevent what the trial court described as an 'escalating pattern of criminal conduct.'" *Graham*, 560 U.S. at 73. But it did not follow that he would be a risk to society for the rest of his life. *Id*. "Even if the State's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset." *Id*. Incapacitation does not justify a *de facto* LWOP sentence either because with such a sentence, it would have been determined at the outset that the juvenile would not get a meaningful opportunity for release, contrary to the commands of *Graham*.

Finally, rehabilitation cannot justify a sentence of life imprisonment without parole because the penalty forswears altogether the rehabilitative ideal.

Id. at 74. By denying the juvenile the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society, which is inappropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability. *Id*. The same can be said for a sentence that exceeds the juvenile's life expectancy even if it is based upon multiple counts. A *de facto* LWOP sentence keeps juvenile offenders in prison for life and, as a result, "forswears altogether the rehabilitative ideal." *Id*. at 74.

Even if a juvenile's sentence is based on multiple counts, for retribution purposes, it still does not merit the punishment appropriate for the incorrigible murderer (that the juvenile will die in prison without having a meaningful opportunity for release). Also, whether serving a *de facto* or *de jure* life sentence, the characteristics of juveniles make them "less susceptible to deterrence. *Graham*, 560 U.S. at 72. Further, a sentencing court cannot make the subjective determination at the outset that the juvenile is irredeemable regardless of whether there are multiple counts. *Id*. at 77. Finally, just as an LWOP sentence "forswears altogether the rehabilitative ideal," *id.*, at 74, so does sentencing a juvenile to die in prison based on an aggregate term-of-years sentence.

There is no basis for distinguishing Timothy's sentence from Graham's sentence based on penological justifications. As in *Graham*, the 385-year sentence meted out to Timothy, virtually ensures that he will die in prison, and does not serve any of the traditional penological goals – deterrence, retribution, incapacitation, or rehabilitation. *Graham* and Miller compel the conclusion that *de*

facto LWOP should be treated like *de jure* LWOP because everything the Court said about LWOP in those cases applies equally to both sentences.

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.

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.

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.

Respectfully submitted,

/s/ Craig A. Johnston

Craig A. Johnston, MOBar #32191
Assistant State Public Defender

Woodrail Centre
1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Phone: (573) 777-9977
Fax: (573) 777-9963
Email: Craig.Johnston@mspd.mo.gov

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 3,674 words, which does not exceed the 7,750 words allowed for an appellant's substitute reply brief. And, on this 5th day of July, 2016, an electronic copy of Petitioner's/Appellant's Substitute Reply Brief, was sent through the Missouri e-Filing System to Michael J. Spillane, Assistant Attorney General, at Mike.Spillane@ago.mo.gov.

/s/ Craig A. Johnston

Craig A. Johnston, MOBar #32191
Assistant State Public Defender

Woodrail Centre
1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Phone: (573) 777-9977
Fax: (573) 777-9963
Email: Craig.Johnston@mspd.mo.gov