IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-843

STATE OF FLORIDA,

Petitioner,
v.

KENNETH PURDY,

Respondent.

BRIEF OF THE FLORIDA JUVENILE RESENENTENCING AND REVIEW PROJECT AND THE FAIR PUNISHMENT PROJECT AS *AMICI CURIAE* ON BEHALF OF THE RESPONDENT

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

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IDENTITY AND INTEREST OF *AMICI*

The Florida Juvenile Resentencing and Review Project ("Resentencing Project") at the Florida International University College of Law was founded in 2015 following the legislative enactment of Chapter 2014-220, Law of Florida, and the release of this Court's decision in *Falcon v. State*, 162 So. 3d 954 (Fla. 2015) (holding that *Miller v. Alabama*, 567 U.S. 460 (2012), is retroactive). The Resentencing Project was created with the goal of ensuring that each juvenile in the State of Florida who is either serving or facing life in prison as well as those entitled to judicial review receive a robust and comprehensive defense. The focus of the Resentencing Project is to provide consultation and training for attorneys who are representing juveniles in the adult system and make recommendations on policy and legislative matters affecting juveniles who are subject to prosecution as adults.

The Fair Punishment Project ("FPP") is a joint project of the Charles Hamilton Houston Institute for Race and Justice and the Criminal Justice Institute, both at Harvard Law School. The mission of the Fair Punishment Project is to address ways in which our laws and criminal justice system contribute to the imposition of excessive punishment. FPP believes that punishment can be carried out in a way that holds offenders accountable and keeps communities safe, while still affirming the inherent dignity that all people possess.

CONSENT OF THE PARTIES

The Petitioner and Respondent do not object to this filing. Petitioner's Initial Brief on the Merits was filed on June 15, 2017. Respondent's Answer Brief was filed on July 5, 2017. *Amici* write in support of the Respondent, and are filing their brief on Monday, July 17, 2017 as the tenth day after the filing of the Answer brief falls on a Saturday. If this filing is considered untimely, *Amici* request "leave for later service." Fla. R. App. P. 9.370(c).

SUMMARY OF THE ARGUMENT

The issue of statutory interpretation currently before the Court is crucial to the constitutional sentencing of juveniles throughout the State of Florida. It is only by permitting reviewing courts to modify a juvenile's aggregate sentence, and all the individual sentences that compose it, that Florida's statutory scheme can serve as an effective remedy for violations of *Graham v. Florida*, 560 U.S. 48 (2010) and *Miller v. Alabama*, 567 U.S. 460 (2012).

"Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment," *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016). "A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense." *Graham*, 560 U.S. at 71. Once a trial court has determined a child has been rehabilitated and is fit to reenter society, his continued confinement serves no such purpose. For a trial court to ensure such

unconstitutional punishment is not inflicted upon Florida's children, it must have the authority to modify a juvenile's entire sentence during judicial review, not just the sentence on one count of the information or indictment.

ARGUMENT

The narrow statutory issue before this Court is whether, when conducting judicial review pursuant to Florida Statute section 921.1402, the trial court may modify a juvenile's aggregate sentence on all counts of conviction if it finds the child has demonstrated maturity and rehabilitation and is fit to reenter society. *Purdy v. State*, No. 5D16-370, at *5 (5th DCA Jan. 27, 2017). The broader constitutional question presented by Mr. Purdy's case, however, is whether the United States Constitution permits the State to condemn a juvenile, who has been rehabilitated and found fit to reenter society, to serve nearly another decade in prison for conduct that arose out of the same offense. *Amici* submits, for the reasons that follow, that it does not.

I. Florida's chosen legislative response to the United States Supreme Court's evolving juvenile jurisprudence demonstrates a concerted effort to guarantee constitutional sentences for all juveniles.

Over the past twelve years, the United States Supreme Court has revolutionized the manner in which juveniles may be sentenced. The Court has repeatedly recognized that children have a "'lack of maturity and an underdeveloped sense of responsibility,' … 'are more vulnerable or susceptible to negative

influences and outside pressures, including peer pressure,'" and are "more capable of change" than adult offenders. *Graham*, 560 U.S. at 68, quoting *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005). The Court has held that "children are constitutionally different from adults for purposes of sentencing," *Miller v. Alabama*, 567 U.S. at 471, and therefore, "a sentencing rule permissible for adults may not be so for children." *Id.* at 481. The Court has categorically prohibited sentencing juveniles to death, *Roper*, 543 U.S. at 568, to life-without parole for a non-homicide offense, *Graham*, 560 U.S. at 74, or to life-without-parole for a homicide offense unless the child is one of the "rare" individuals who shows "irretrievable depravity" and for whom "rehabilitation is impossible," *Montgomery*,136 S. Ct. at 733.

Once *Miller* held that children could not be sentenced to a mandatory life sentence without parole, the Florida Legislature responded by passing a new juvenile sentencing scheme, Chapter 2014-220, Laws of Florida, which sought to implement *Graham* and *Miller*. The statute requires individualized sentencing hearings for juveniles convicted of serious felonies in adult court and grants trial judges greater discretion to impose proportionate penalties on juvenile offenders. §§ 775.082, 921.1401, Fla. Stat.

In addition to permitting lesser penalties at the time of initial sentencing, the statutory scheme also provides for judicial review and modification of a juvenile's sentence years later. § 921.1402, Fla. Stat. Perhaps recognizing a court's superior

ability to ensure children are not subject to unconstitutional incarceration, the legislature opted not to reinstate the parole system for juvenile offenders but rather assigned the determination about a juvenile's fitness to rejoin society to the trial judge. *Id*. Once a juvenile has served a threshold term of years, the length of which is determined by the nature of the crime committed and the initial sentence imposed, the trial court **must** modify the sentence and impose a probationary term if it finds that the juvenile "has been rehabilitated and is reasonably believed to be fit to reenter society." *Id*. The statute specifically applies to children convicted of felonies that, standing alone, may carry a life sentence: capital felonies, life felonies, and first-degree felonies punishable by life in prison. *Id*. The proper interpretation of this statutory scheme is at issue in this case.

II. This Court must interpret section 921.1402 to permit courts conducting judicial sentence review to modify a child's aggregate sentence.

The parties have advocated for alternative interpretations section 921.1402, each asserting its favored reading is supported by the statute's text and legislative history. Only Mr. Purdy's approach, however, would produce constitutional sentencing outcomes for Florida's juveniles. Continued incarceration "[a]fter the juvenile's transient impetuosity ebbs and the juvenile matures and reforms ... becomes 'nothing more than the purposeless and needless imposition of pain and suffering,'" *State v. Roby*, No. 15-0175, at *9 (Iowa June 16, 2017), quoting *Coker*

v. Georgia, 433 U.S. 584, 592 (1977). Therefore, limiting the scope of judicial review to a single count of conviction, as the State has advocated, would necessarily lead to incarceration unsupported by any penological purpose, as it has in Mr. Purdy's case. Because "[t]his Court has an obligation to construe a statute in a way that preserves its constitutionality," *Perry v. State*, 210 So. 3d 630, 638–39 (Fla. 2016), it must instead read the statute to allow courts to review and modify a juvenile's aggregate sentence, not just the sentence imposed on one count.

A. The Eighth Amendment requires that a legitimate penological justification supports the incarceration of children.

"Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment," *Montgomery*, 136 S. Ct. at 732. Because "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense," *Graham*, 560 U.S. at 71, this Court must consider the penological goals purportedly served by prison sentences imposed upon children. When continued incarceration advances no penological purpose, it constitutes cruel and unusual punishment. *See id*. Furthermore, "[e]ven if the punishment has some connection to a valid penological goal, it must [also] be shown that the punishment is not grossly disproportionate in light of the justification offered." *Id*. at 72.

The U.S. Supreme Court has recognized four legitimate goals of penal sanctions: "retribution, deterrence, incapacitation, and rehabilitation." *Graham*, 560

U.S. at 71. However, the "distinctive attributes of youth," including immaturity and impetuosity, vulnerability to "negative influences and outside pressures," and a greater capacity for change and rehabilitation, *Roper*, 543 U.S. at 569-570, weaken each of the penological objectives severe penalties purportedly serve. *See Miller*, 567 U.S. at 473-74. A juvenile's uniquely reduced culpability and ability to change require that a child's punishment must be targeted towards a rehabilitative goal. *See Graham*, 560 U.S. at 68-74. Where, as here, a juvenile has already served over two decades in prison—longer than the period of time mandated by statute before he was entitled to judicial review—and a court has determined he is rehabilitated and fit to rejoin society, any penological purpose of additional punishment disappears.

1. Retribution

While "[s]ociety is entitled to impose severe sanctions on a juvenile . . . offender to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense[,] . . . '[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.'" *Graham*, 560 U.S. at 71, quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987). An offender's culpability is not exclusively determined by the facts of his offense, but rather is a function of both his "crimes and characteristics." *Id*. at 67; *see also Roper*, 543 U.S. at 568, quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)("Capital punishment must be limited to those offenders who commit a

'narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"). Because juvenile offenders are biologically predisposed to immature and irresponsible behavior, are more easily influenced by their peers, and lack the ability to control their own environments, their criminal offenses, even when shocking or heinous, are generally less morally reprehensible than those committed by their adult counterparts. *See Roper*, 543 U.S. at 571; *Adams v. Alabama*, 136 S. Ct. 1796, 1800 (2016) (Sotomayor, J., concurring) ("[T]he gruesomeness of a crime is not sufficient to demonstrate that a juvenile offender is beyond redemption: 'The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.'").

Because a juvenile's offense does not necessarily reflect his true and permanent character, the United States Supreme Court has repeatedly stressed that respect for his potential to reform is the touchstone of a proportionate and constitutional juvenile sentence. *See Montgomery*, 136 S. Ct. at 726 ("a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect irreparable corruption"). The goal of retribution is only served if the punishment imposed is warranted by the offender's true level of depravity. *See Miller*, 567 U.S. at 472.

2. Deterrence

Because juveniles' "'lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions,'" they are less likely to fully appreciate and respond to risks when making decisions. *Graham*, 560 U.S. at 72, quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993). As a result, the deterrent effect of severe punishments upon juveniles is reduced. *Id*. This effect is directly related to the immature brain of a teenager—his diminished capacity for risk assessment, impulse control, and emotional regulation necessarily render him less responsive to long term incentives that may successfully deter an adult. *Id*.

In addition, even with adult offenders, the deterrent effect of continued incarceration dramatically decreases with sentence length. Numerous studies have found that "the marginal deterrent effect of increasing already lengthy prison sentences is modest at best." Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and crime: Can both be reduced?*, 10 CRIMINOLOGY & PUBLIC POLICY 13, 14 (2011)(collecting studies at 27-31). Studies specifically examining the impact of increased sentence length on juveniles demonstrate that it is virtually nonexistent. *Id*. at 30. Therefore, once a juvenile is required to serve fifteen, twenty or twenty-five years in prison, any additional punishment he faces is unlikely to impact his choices or conduct. *See id*.

3. Incapacitation

Although "[r]ecidivism is a serious risk to public safety," recidivism prevention only justifies continued incarceration for as long as an inmate poses a substantial risk to reoffend. *See Graham*, 560 U.S. at 72-73. "[O]rdinary adolescent development diminishes the likelihood that a juvenile offender forever will be a danger to society." *Montgomery*, 136 S. Ct. at 733 (internal quotation marks and citation omitted) . The vast majority of teenagers cease engaging in risky and illegal behavior as they mature. *Roper*, 543 U.S. at 570, citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003). Where a trial court has found a juvenile offender is fit to reenter society, incapacitation cannot justify his continued incarceration. *See Graham*, 560 U.S. at 73.

4. Rehabilitation

Finally, to promote the rehabilitative ideal, a sentence must offer a juvenile offender a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75. Rehabilitation is critically important to constitutional juvenile sentencing. The Court has stressed, a "juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential." *Id*. at 79. However, rehabilitation, as a

penological justification, is meaningless unless it is directly linked to a child's right to reenter his community. *See id.* at 74 (life-without-parole "forswears altogether the rehabilitative ideal"). When a child has been rehabilitated and is deemed fit to rejoin society, there is no legitimate interest in his continued imprisonment. *See id*. at 73.

In summary, each of these four penological justifications hinges on the nature of a child's true character and whether or not his offense reflected an immutable deficiency of values and morals. Because an accurate assessment of a child's culpability, potential threat to public safety, and ability to rehabilitate all turn on whether or not a juvenile offender is redeemable, the answer to that question dictates whether any penological purpose is served by the child's continued incarceration. It is for this reason that the Supreme Court has held that a lifetime of incarceration is only constitutionally permissible for a child who is "irreparably corrupt." *Montgomery*, 136 S. Ct. at 734. As the recent juvenile jurisprudence has clarified, therefore, under the Eighth Amendment, any child who is sentenced to a lengthy term of incarceration must be given the opportunity to demonstrate rehabilitation, and, once successful, released from custody. *Graham*, 560 U.S. at 75.

B. A child's continued incarceration, after a reviewing court has found he is successfully rehabilitated under section 921.1402, serves no penological purpose and is unconstitutional.

The principles set forth in the Supreme Court's Eighth Amendment jurisprudence make clear that, once a court has determined a juvenile has been

successfully rehabilitated and is unlikely to be a danger to society, any continued incarceration lacks penological purpose and is unconstitutional.

Retribution is not advanced by this detention, because society has been made whole and the child has demonstrated his character has been reformed. Therefore, neither the "crimes [or] characteristics," *Graham*, 560 U.S. at 67, of the juvenile support his continued incarceration.

The juvenile sentencing review statute, section 921.1402, only permits modification of a child's sentence after he or she has served a set, lengthy term of incarceration. These mandatory terms, which vary in length depending on the specific crime committed, reflect the legislature's assessment of the sentence necessary to "express [society's] condemnation of the crime and to seek restoration of the moral imbalance caused by the offense." *Graham*, 560 U.S. at 71. Once a judicial review hearing occurs, these purposes have been satisfied.

As for the culpability of the offender, the other facet of the retribution rationale, the court makes a definitive determination of the continued viability of this penological justification during the review hearing. Once the court has found a child successfully rehabilitated, it is apparent that his offense does not reflect permanent moral failings such that continued incarceration is proportionate.

Neither does continued incarceration advance either the deterrence or incapacitation rationales. As discussed earlier, the deterrence effect of additional

incarceration, on top of substantially lengthy sentences, is negligible in general and likely non-existent where a juvenile offender is involved. *See infra* at 9-10. Similarly, the need to incapacitate the offender cannot justify continued incarceration once court has found he is fit to reenter society because, by that finding, the court has determined that he is unlikely to be a continued danger.

The last penological justification, rehabilitation, fails as well. Once the court has determined that the offender "has been rehabilitated," Florida Statute section 921.1402(7), there is no justification for continued imprisonment for the sake of reform. Rehabilitation, which the constitution requires to serve as the primary basis for the child's sentence in the first instance, has already occurred. The Eighth Amendment mandates that, after a child has spent decades in prison and been successfully reformed, he must be released.

C. Florida courts cannot ensure that juvenile sentences are proportionate and serve valid penological purposes unless all counts of the child's aggregate sentence may be modified during sentence review.

Because the constitution requires that a child who has been successfully rehabilitated must be released, courts reviewing sentences under section 921.1402 must have the authority to modify the aggregate sentence a juvenile is serving, not just the sentence for one specific count of conviction. This Court can interpret section 921.1402 in a constitutional manner by holding that the permitted review of the offender's "sentence" under subsection (2) encompasses his entire sentence, not

just the sentence for a particular count. To hold otherwise would impair the ability of trial courts to fashion constitutional sentences for children and would necessarily lead to continued, unconstitutional, incarceration well after a juvenile has been successfully reformed.

This interpretation of the statute is also consistent with this Court's prior juvenile sentencing jurisprudence. In *Henry v. State*, 175 So. 3d 675 (Fla. 2015), this Court held that *Graham* applies with equal force to aggregate sentences that do "not afford any 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" *Id*. at 679, quoting *Graham*, 560 U.S. at 75. *Graham,* which was predicated on the unique characteristics and reduced culpability of children, required that **all** juvenile non-homicide offenders have such an opportunity. *Id*. at 679. Therefore, Henry's 90-year aggregate sentence, resulting from consecutive sentences imposed on eight separate felony offenses, violated the Eighth Amendment. *Id*. at 676, 679; *see also Gridine v. State*, 175 So. 3d 672, 674 (Fla. 2015)(70-year aggregate sentence for non-homicide offenses violated *Graham*).

This Court's remedy for Henry's unconstitutional sentence was to remand the case for resentencing under chapter 2014–220, Laws of Florida. *Id*. at 680. Henry's offenses, however, were not all capital, life, or first-degree felonies punishable by life. *Id*. at 676. In fact, many were second-degree felonies, which are not technically included in the explicit terms of section 921.1402. *See id*. Nevertheless, this Court

did not distinguish how the statute should apply to different counts of conviction or limit its holding in *Henry* to isolated offenses, and it would have been illogical to do so. Henry's consecutive sentences for multiple offenses were unconstitutional because the aggregate term failed to link a meaningful opportunity for release to demonstrated maturity and rehabilitation. *Id*. at 679. The Court's remedy would be meaningless if it did not apply to each link in the chain creating that constitutional infirmity.

Florida's District Court of Appeals have interpreted *Henry* accordingly, finding lengthy aggregate sentences violate the Eighth Amendment and ordering resentencing under chapter 2014–220, Laws of Florida, even where the juvenile offender did not commit a single capital felony, life felony, or first-degree felony punishable by life. *See*, *e.g.*, *Tyson v. State*, 199 So. 3d 1087 (Fla. 5th DCA 2016)(consecutive sentences for robbery with a weapon, conspiracy and evidence tampering); *Cook v. State*, 190 So. 3d 215 (Fla. 4th DCA 2016)(aggregate sentence for four counts of attempted second-degree murder, one count of aggravated assault, one count of shooting a deadly missile, and one count of possession of a firearm by a minor); *Barnes v. State*, 175 So. 3d 380, 381 (Fla. 5th DCA 2015)(aggregate sentence for aggravated battery with a firearm, aggravated assault with a firearm, carrying a concealed firearm, and resisting an officer without violence). These results are clearly mandated by *Henry*. Were this Court to adopt the State's proposed

interpretation of the statute, trial and appellate courts would be unable to ensure the constitutional viability of these and other juvenile sentences.

III. Conclusion

For all of the reasons set forth above, *Amici* urge this Court to find that, under section 921.1402, a reviewing court is permitted to modify a juvenile's aggregate sentence, once the court concludes a juvenile offender has been rehabilitated and is fit to reenter society.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirement of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was served to Matthew R. McLain, Esquire, 1057 Maitland Center Commons Blvd., Suite 204, Maitland, Florida, 32751, at *Matthew@Mclainlaw.com* and Wesley Heidt, Daytona Beach Bureau Chief, and Pamela J. Koller, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Boulevard, Suite 500, Daytona Beach, Florida, 32118, by email at *crimappdab@myfloridalegal.com* on this 17th day of July, 2017.

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