No. 17-912

IN THE
Supreme Court of the United States

BOBBY BOSTIC,

Petitioner,

v.

RONDA PASH,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Missouri

BRIEF OF *AMICI CURIAE* FORMER JUDGES, CURRENT AND FORMER PROSECUTORS, LAW ENFORCEMENT OFFICERS, JUVENILE JUSTICE OFFICIALS, CORRECTIONAL OFFICERS, AND PROBATION OFFICERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici are seventy-five former judges, current and former prosecutors, law enforcement officers, juvenile justice officials, corrections officers, and probation officers. They include former Court of Appeals judges, a former state Supreme Court justice, two former U.S. Solicitors General, a former Acting U.S. Attorney General, a former F.B.I. Director, thirteen current elected prosecutors from across the country, and five former U.S. Attorneys. *Amici* are leaders in their professional communities on the federal and state levels, with a diverse range of experiences and perspectives on the criminal justice system. As officers of the law, they share a strong interest in a criminal justice system that is fair and that garners public trust and confidence—and a strong belief that the rule of law requires that courts give effect to this Court's decisions regarding rights protected under the U.S. Constitution. A complete list of the *amici* is set forth in the Appendix to this brief.[1]

SUMMARY OF ARGUMENT

In the sentencing context, the Eighth Amendment requires courts to take into account that brain development is different in children and that juvenile offenders have a capacity to reform and

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[1] Counsel for *amici curiae* authored this brief in its entirety and no party or its counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief.

grow. Those insights, which this Court has emphasized in numerous decisions—and which have been further confirmed by recent scientific research—are recognized by a wide range of judges, prosecutors, law enforcement officers, juvenile justice officials, correctional officers, and probation officers, many of whom have witnessed firsthand the potential for juvenile offenders to be rehabilitated. *Amici* respectfully urge the Court to ensure that this important principle is respected and enforced.

As officers of the law, *amici* also respectfully submit that the rule of law requires that this Court's decisions recognizing constitutional protections not be subordinated to formalistic distinctions that undermine the Court's reasoning. Petitioner's sentence—in which he will not have the opportunity to be considered for release until he is 112 years old—was imposed to ensure that he will die in prison with no meaningful opportunity for release, even though he committed a non-homicide offense when he was a juvenile. To permit such a sentence merely because the sentence technically is for a term of years rather than "life in prison"—or because it is an aggregate sentence for more than one charge—would elevate form over substance and eviscerate this Court's decision in *Graham v. Florida*, 560 U.S. 48 (2010). Prosecutors' broad discretion to decide which charges to bring and how to structure them provides important flexibility that allows prosecutors to individualize charging decisions in the interest of justice. But the structuring of those charges should not affect the extent of the Eighth Amendment's protections regarding the sentence imposed by the

judge, or the applicability of this Court's Eighth Amendment precedents.

ARGUMENT

I. IN JUVENILE SENTENCING, THE EIGHTH AMENDMENT REQUIRES THE CRIMINAL JUSTICE SYSTEM TO TAKE INTO ACCOUNT THAT CHILDREN ARE DIFFERENT, AND RECOGNIZING THAT FUNDAMENTAL REALITY COMPORTS WITH THE PURSUIT OF JUSTICE AND THE PROMOTION OF PUBLIC SAFETY

This Court has held repeatedly that, in light of the significant differences in children's brain development, juveniles are constitutionally different from adults for purposes of sentencing. Under the Eighth Amendment, juvenile non-homicide offenders may not be sentenced to imprisonment for life without the possibility of parole. They must have "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham v. Florida*, 560 U.S. 48, 75 (2010). Even a juvenile who commits murder may be denied that "meaningful opportunity" only in the "uncommon" circumstance where the sentencer determines that he is "the rare juvenile offender whose crime reflects irreparable corruption" rather than "unfortunate yet transient immaturity." *Miller v. Alabama*, 567 U.S. 460, 479 (2012) (citations omitted).

These holdings stem from the fundamental insight that "the penological justifications for life without parole collapse in light of the distinctive

attributes of youth." *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (citation omitted). In *Roper v. Simmons*, this Court reviewed scientific and social scientific research and concluded that, compared to adults, children (1) have "an underdeveloped sense of responsibility" which often leads to "impetuous and ill-considered actions and decisions"; (2) are more vulnerable to "negative influences and outside pressures, including peer pressure"; and (3) have character and personality traits that are "more transitory, less fixed." *Roper*, 543 U.S. 551, 569-70 (2005). In subsequent decisions, the Court has emphasized that additional empirical evidence supporting these points has further bolstered this understanding. *See Graham*, 560 U.S. at 68 ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."); *Miller*, 567 U.S. at 472 n.5 ("[T]he science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger.").

Since these decisions highlighting the extensive studies regarding juvenile development, moreover, still more scientific research has strengthened the already-strong conclusion that children are meaningfully different from adults in ways that are highly pertinent to sentencing. Recent research on the juvenile brain confirms that "[b]oth white and gray matter undergo critical changes" during adolescence that affect control of behavior "and as such are relevant to adolescent limitations in decision making." Beatriz Luna and Catherine Wright, *Adolescent Brain Development: Implications for the Juvenile Criminal Justice System*, *in* APA

Handbook of Psychology and Juvenile Justice 91, 97 (K. Heilbrun, ed., 2016). In particular, cognitive science research confirms that, "in the heat of the moment, as in the presence of peers, potential threat, or rewards, emotional centers of the brain hijack less mature prefrontal control circuits during adolescence, leading to poor choice behaviors." Alexandra O. Cohen and B.J. Casey, *Rewiring Juvenile Justice: The Intersection of Developmental Neuroscience and Legal Policy*, 18-2 Trends in Cognitive Sciences 63, 65 (Feb. 2014). A juvenile's criminal offense may be "due, in part, to brain immaturities that enhance risk taking" and lead to decisions that would not be made later in life. Luna & Wright, *supra*, at 108. Indeed, a study of juvenile offenders found that "even among those individuals who were high-frequency offenders at the beginning of the study, the majority had stopped these behaviors by the time they were 25." Laurence Steinberg, *Give Adolescents the Time and Skills to Mature, and Most Offenders Will Stop*, MacArthur Foundation 3 (2014), http://bit.ly/2FC0w40.

Amici know well, and in many cases have seen personally, that juvenile offenders—even those who have committed serious crimes—have the capacity to mature, reform, and grow out of the immaturity that contributed to their criminal conduct. A sentence requiring a juvenile offender to die in prison, however, "gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Graham*, 560 U.S. at 79. Such a sentence leaves a prisoner with little incentive to reform and mature, and in many cases also effectively deprives him of access to prison services

and programs that facilitate such growth. *See id.* As *amici* also have seen through personal experience, and as researchers have noted, juveniles who are imprisoned without a meaningful opportunity for release struggle with hopelessness and may prove more difficult to manage in a correctional setting as a result. *See, e.g.*, Human Rights Watch, *Against All Odds: Prison Conditions for Youth Offenders Serving Life without Parole Sentences in the United States* 12 (Jan. 2012), http://bit.ly/2Fszk4k.

In light of this Court's decisions, and in recognition of what we now know about child brain development, it is essential that all prisoners sentenced as juveniles for non-homicide crimes have "some meaningful opportunity to obtain release." *Graham*, 560 U.S. at 75. It would be a miscarriage of justice to deny that opportunity to prisoners who were sentenced based on a misinformed and impermissible "judgment at the outset that [they] never [would] be fit to reenter society." *Id.* *Amici* respectfully submit that a criminal justice system that respects juvenile offenders' rights and capacity for rehabilitation, and does not elevate form over substance, is both more just and more likely to garner public trust and confidence. Fortifying those bonds of trust and ensuring that individuals have faith in the criminal justice system is integral to promoting public safety.

Here, the need for reevaluation of Petitioner's sentence to comply with constitutional principles (and promote faith in the legitimacy of the criminal justice system) is highlighted by the fact that the

sentencing judge *in this very case* now recognizes that it was "unjust" for her to sentence Petitioner to die in prison. *See* Evelyn Baker, *I Sentenced a Teen to Die in Prison. I Regret It.*, Wash. Post, Feb. 13, 2018. Judge Baker readily acknowledges that, in light of the "[o]verwhelming scientific research" about brain development that has emerged in the intervening two decades, Petitioner and individuals in his position "cannot be permanently written off for something they did before their brains were even fully formed." *Id.* Moreover, she candidly admits that, looking back now, she sees that, in imposing a die-in-prison sentence on Petitioner, she "was punishing him both for what he did and for his immaturity." *Id.* It would be plainly inconsistent with this Court's decisions to uphold a die-in-prison sentence imposed on a juvenile non-homicide offender partly based on *the very characteristics of immaturity* which the Court has found justify a categorical ban on such sentences.

Amici are among the former judges as well as current and former prosecutors, law enforcement officers, juvenile justice officials, correctional officers, and probation officers who, like the sentencing judge in this case, recognize that die-in-prison sentences for juvenile non-homicide offenders violate this Court's decisions and conflict with the ever-growing scientific literature regarding juvenile brain development. Summary reversal—or plenary review—is urgently needed.

II. THE RULE OF LAW REQUIRES THAT THIS COURT'S DECISIONS NOT BE EVISCERATED BY FORMALISTIC DISTINCTIONS

In our constitutional system, the rule of law requires that courts give effect to this Court's decisions regarding federal constitutional protections. This Court's precedents must not be subordinated to formalistic distinctions that undermine the Court's reasoning. In light of this Court's decisions, Petitioner's sentence can be defended only by relying on form-over-substance reasoning that has no place in this Court's jurisprudence, and that is especially dangerous in this context.

The rule at issue in this case is clear. This Court held in *Graham* that the Eighth Amendment categorically prohibits sentencing juvenile non-homicide offenders to spend the rest of their lives in prison without the possibility of parole, based on the limited culpability of that class of offenders and the unjustified severity of depriving individuals within it of a meaningful opportunity to obtain release. *See Graham*, 560 U.S. at 74-75. While "[t]he Eighth Amendment does not foreclose the possibility" that juvenile non-homicide offenders would remain behind bars for life, "[i]t does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society." *Id.* at 75.

Yet in this case it is clear from the record that the sentencing court made a "judgment at the outset that [Mr. Bostic] never will be fit to reenter

society"—precisely what *Graham* prohibits. That is plainly the *effect* of a 241-year prison sentence under which a defendant is not eligible for parole until age 112. In addition, the sentencing judge in this case emphasized on the record that she *intentionally* crafted a sentence to ensure that Mr. Bostic would never reenter society because he would die before he ever went before a parole board. Judge Baker told Petitioner at sentencing: "You made your choice, and you're gonna die with your choice because Bobby Bostic, you will die in the Department of Corrections. Do you understand that?" (Pet. App. 41a.) She further emphasized that "[n]obody in this room is going to be alive" when Mr. Bostic would go before the parole board. (*Id.*) If Mr. Bostic's sentence were permitted to stand, then *Graham* would retain little (if any) substance. Respect for the rule of law, and the legitimacy of the criminal justice system, demands that this Court's precedents not be eviscerated in this manner.

This Court has long looked to "substance and not to mere matters of form" when "passing upon constitutional questions"—"in accordance with familiar principles, the state must be tested by its operation and effect." *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 708 (1931). "The exaltation of form over substance is to be avoided" in construing and enforcing constitutional protections. *United States v. DiFrancesco*, 449 U.S. 117, 142 (1980).

The State cannot justify the sentence here based on a distinction between life-without-parole and term-of-year sentences. Such a distinction would be wholly an exaltation of form over substance. There

is simply no sound basis to distinguish, in this context, between a life-without-parole sentence and a no-parole-before-age-112 sentence. Indeed, in *Graham*, the Court held that "the Eighth Amendment does not permit" a state to "guarantee[]" that a juvenile non-homicide offender "will die in prison without any meaningful opportunity to obtain release . . . even if he spends the next half century attempting to atone for his crimes and learn from his mistakes." *Graham*, 540 U.S. at 79. By design and in operation, Mr. Bostic's sentence makes the same prohibited guarantee.

The State also may not appropriately rely on a formalistic distinction between a single offense and multiple offenses. As the petition explains, this distinction cannot be reconciled with *Graham*, which also involved a juvenile sentenced on multiple convictions—and *Graham*'s reasoning runs entirely contrary to the suggestion that a juvenile defendant may be deprived of a meaningful opportunity to obtain release so long as the sentence is structured as an aggregate sentence for multiple charges rather than a life-without-parole sentence on one of the charges. (*See* Pet. at 13-15.)

As *amici* have observed in their own work, moreover, the distinction between a single crime of conviction or multiple crimes of conviction is not necessarily a reliable indicator of the seriousness of a defendant's criminal conduct—let alone his or her potential for rehabilitation. Indeed, in this context the distinction is plainly arbitrary. Consider, for example, that a defendant charged with virtually any felony in Missouri may also be charged under

the State's armed criminal action ("ACA") statute, Mo. Rev. Stat. § 571.015, if, in the commission of the crime, he wielded a "dangerous instrument"—which could be a butter knife, a beer bottle, or even his own elbow. *See State v. Williams*, 126 S.W.3d 377, 384 n.2 (Mo. 2004) (collecting cases). A defendant convicted under the ACA statute may be sentenced to a term of years with no statutory limit. *See* Mo. Rev. Stat. § 571.015; *e.g., State v. Belcher*, 805 S.W.2d 245, 246 (Mo. Ct. App. 1991) (upholding 400-year sentence for single ACA charge). If the Missouri Supreme Court's interpretation of *Graham* were accepted, then, for example, the Eighth Amendment would permit a juvenile defendant to be sentenced to die in prison if he wielded a butter knife in a robbery (and was charged with and convicted of both the robbery and the ACA violation), but not if he was charged with and convicted of a sole count of rape. Consider also that under current Missouri law, a juvenile offender sentenced to life without parole on any count—including murder—is automatically eligible for parole after 25 years, but a juvenile offender sentenced to an aggregate term of years for two or more counts may be held without parole effectively for the rest of his life. *See Willbanks v. Dep't of Corr.*, 522 S.W.3d 238, 239, 243 (Mo.), *cert. denied*, 138 S. Ct. 304 (2017). Simply put, to apply or not apply Eighth Amendment protections based on the structure of the charges brought against a juvenile offender and the label assigned to his sentence is hopelessly arbitrary—and nothing in this Court's jurisprudence supports such

a formalistic interpretation or permits these bizarre and anomalous results.[2]

Furthermore, accepting this distinction would convert what *amici* believe is generally a valuable and important feature of the criminal justice system—prosecutorial discretion to structure charging decisions—into a lever that determines the extent of Eight Amendment protections. It is well-established, and this Court has long recognized, that prosecutors appropriately have substantial discretion to structure charging decisions and can very often charge more than one count arising out of a single criminal event. *See, e.g.*, *Ashe v. Swenson*, 397 U.S. 436, 446 n.10 (1970) (while at one time "[a] single course of criminal conduct was likely to yield but a single offense," it is now possible for prosecutors to charge a "numerous series of offenses from a single alleged criminal transaction"); Wayne R. LaFave et al., *Forms of Plea Bargaining*, 5 Crim. Proc. § 21.1(a) (4th ed.) ("Multiple charges, either actual or potential, against a single defendant are not uncommon; a single criminal episode may involve violation of several separate provisions of the applicable criminal code . . . .").

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[2] Notably, even one of Mr. Bostic's victims has commented that she was "shocked" by the length of Mr. Bostic's sentence, did not think it was fair, and believed he should be afforded the opportunity for a reduced sentence, noting that "[p]eople who have committed heinous crimes" like murder and rape "are getting a lot less of a sentence." Jennifer S. Mann, *Life Sentence Reform for Juveniles May Pass by St. Louis Robber Serving 241 Years*, St. Louis Post-Dispatch, Aug. 10, 2014.

This discretion serves an important purpose. Discretion allows prosecutors to individualize charging decisions in the interest of justice, depending on the facts and circumstances of each case and consistent with applicable guidelines.[3] In the wake of *Graham*, many prosecutors (and judges) have embraced the opportunity to exercise their discretion in favor of a second chance for individuals who have matured since committing crimes as juveniles, recognizing the significance of the large and growing body of research regarding child brain development.

The manner in which this important discretion is exercised in any particular case, however, should not affect the extent of the Eighth Amendment's protections regarding the sentence imposed by the judge, or the applicability of this Court's Eighth Amendment precedents. While recognizing that prosecutors have the power "*to charge or not to charge* an offense," this Court has aptly recognized that this discretion does not "confer the extraordinary new power *to determine the*

[3] *See also, e.g.*, U.S. Attorney's Manual, Principles of Federal Prosecution § 9-27.300, U.S. Dep't of Justice ("Typically . . . a defendant will have committed more than one criminal act and his/her conduct may be prosecuted under more than one statute. . . . In such cases, considerable care is required to ensure selection of the proper charge or charges."); Nat'l District Attorneys Ass'n, *National Prosecution Standards* 53 (3d ed.), http://bit.ly/1MM4Mv9 (the charging decision entails determining both "[w]hat possible charges are appropriate to the offense or offenses" and "[w]hat charge or charges would best serve the interests of justice").

punishment for a charged offense by simply modifying the manner of charging." *Deal v. United States*, 508 U.S. 129, 134 n.2 (1993) (emphasis in original). Yet the Missouri Supreme Court's distinction between single and multiple counts would effectively convey an even more extraordinary power: simply modifying the manner of charging could unlock a sentence by the court that would otherwise violate the Eighth Amendment. *See Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 679 (1996) (this Court has "consistently eschewed" the notion of "[d]etermining constitutional claims on the basis of . . . formal distinctions, which can be manipulated largely at the will of the government"); *Budder v. Addison*, 851 F.3d 1047, 1058 (10th Cir.) ("Again, we must emphasize that states may not circumvent the strictures of the Constitution merely by altering the way they structure their charges or sentences."), *cert. denied sub nom. Byrd v. Budder*, 138 S. Ct. 475 (2017).

* * *

Those who commit crimes as children, while their brains are still developing, have a unique capacity to reform and grow out of the transient immaturity that may have led to their criminal conduct. As the sentencing judge in this very case now recognizes, condemning a juvenile non-homicide offender to die in prison "without any chance of release, no matter how they develop over time, is unfair, unjust and, under the Supreme Court's 2010 decision [in *Graham*], unconstitutional." Baker, *supra*. *Amici* respectfully urge the Court to vindicate Petitioner's constitutional right, as a juvenile non-homicide

offender, to have a "meaningful opportunity" to "demonstrate that he is fit to rejoin society." *Graham*, 560 U.S. at 79.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to summarily reverse the judgment, or to grant the petition.

Respectfully submitted,

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March 15, 2018

APPENDIX

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