No. 12-

IN THE

Supreme Court of the United States

CHAZ BUNCH,

Petitioner,

v.

DAVID BOBBY, WARDEN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Chaz Bunch was convicted of several non-homicide offenses stemming from a single incident when he was sixteen years old. At sentencing, the Ohio trial court stated its view that Chaz was beyond rehabilitation and should never be permitted to leave prison, even though there was no physical evidence that he participated in the crimes. The trial court therefore sentenced Chaz to the maximum term of imprisonment for each conviction, and ordered that Chaz serve each sentence consecutively—all without the possibility of parole. This amounted to a fixed eighty-nine-year sentence, under which Chaz will not be eligible to even request release until his 95th birthday. In *Graham v. Florida*, 130 S. Ct. 2011 (2010), however, this Court held that the Eighth Amendment prohibits sentencing juvenile offenders for non-homicide offenses to sentences that provide "no meaningful opportunity to obtain release."

The question presented is thus:

> Whether states can bypass the holding in *Graham* by imposing term-of-year sentences that deny juvenile non-homicide offenders any chance for release.

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Chaz Bunch respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit opinion affirming the district court's judgment is reported at 685 F.3d 546 (6th Cir. 2012). The United States District Court decision denying habeas relief is unpublished but electronically reported at 2010 WL 750116 (N.D. Ohio Mar 02, 2010). The Ohio Supreme Court's denial of leave to appeal, issued over two dissents, is reported at 886 N.E.2d 872 (Ohio 2008). And finally, the Court of Appeals of Ohio's decision following Chaz's resentencing to the sentence challenged here is unpublished but is electronically available at 2007 WL 4696832 (Ohio Ct. App. 2007). Each is reproduced in the Appendix to this Petition.

JURISDICTIONAL STATEMENT

The Sixth Circuit's opinion was filed on July 6, 2012. On September 21, 2012, Petitioner requested an extension of time to file his Petition for a Writ of Certiorari until November 5, 2012. (No. 12A293) Justice Kagan granted that extension on September 25, 2012. This Court's jurisdiction is thus timely invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the United States Constitution reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

If his sentence stands, Chaz Bunch will die in prison for non-homicide offenses that he was convicted of committing as a sixteen-year-old child, as the sentencing court plainly intended. Based on its view that Chaz could never be rehabilitated, the sentencing court sentenced him to enough consecutive term-of-years sentences that Chaz would not even be able to request release until he is 95 years old. Pet. App. 124a. Unsurprisingly, neither the state's attorneys nor the judges who have reviewed Chaz's case have ever questioned the reality that Chaz will die in prison. Chaz has consistently challenged this sentence as being in violation of the Eighth Amendment.

1a. Before the incident culminating with this sentence, Chaz had largely avoided trouble with the law. The most serious trouble Chaz had previously gotten into was a juvenile misdemeanor adjudication for resisting arrest. Pet. App. 120a-21a. Before that, he had two other, minor misdemeanor adjudications—both nonviolent—one for receiving stolen property and the other for driving without a license. *Id.*

1b. On the evening of August 21, 2001, M.K., a twenty-two-year-old Youngstown State student, arrived at work. Pet. App. 37a. When she got out of her car, 15 year-old Brandon Moore approached her, demanded money, and ultimately forced her into a car. *Id.* at 39a-41a, 45a. Brandon got into the driver's seat and drove away in her car, following a second car; which contained eighteen year old Andre Bundy, who was driving, and twenty-one year old Jamar Callier, who was the passenger. *Id.* at 42a-

43a, 82a-83a, 87a-88a, 90a. While driving, Brandon asked M.K. to give her jewelry to him, and she complied. Pet. App. 43a. At one point, Brandon stopped the car, and picked up another passenger. *Id.* at 44a. M.K. later tentatively identified that passenger, who was carrying a gun, as Chaz. *Id.* at 47a, 54a. Brandon Moore, M.K. and this second person continued driving again, and Brandon sexually assaulted M.K. several times with his fingers. *Id.* at 49a. After both cars pulled into a gravel lot, Brandon and the passenger later tentatively identified as Chaz raped M.K. several times while Jamar went through M.K.'s trunk. *Id.* at 51a-52a, 57a-59a. In a successful effort to stop the assault, M.K. stated that she was pregnant, and Jamar put an end to the assaults and let M.K. go. *Id.* at 61a.

Soon thereafter, M.K. went to the hospital. Pet. App. 64a. The hospital promptly conducted DNA tests, and found only Brandon's DNA. *Id.* at 114a, 116a. The DNA test excluded Chaz as a potential donor. *Id.* (The DNA evidence revealed that of Chaz, Brandon, Andre and Jamar, only Brandon could not be excluded. *Id.* at 111a-12a.)

Later that night, at a local gas station, a police officer pulled behind a black car with a license plate that closely matched M.K.'s description. Pet. App. 73a. After leaving the gas station, the officer followed the car. *Id.* at 74a. The car eventually pulled into a driveway, and the officer approached the car. *Id.* at 74a-75a. Brandon, Jamar, and Andre were still in the car, and the driver was no longer there. *Id.* at 75a. Jamar and Brandon told the police that the driver had been a man called Shorty Mack.

Id. at 95a, 106a. Shortly thereafter, police spotted Chaz nearby and spoke with him, but did not detain him. *Id.* at 103a-04a.

2. M.K. subsequently identified Andre, Jamar and Brandon—but not Chaz—from proper photographic line-ups. Pet. App. 66a-67a, 70a-71a. She did not identify Chaz as a perpetrator until she later saw a photograph of him, in isolation, on a television news program identifying him as a suspect, *Id.* at 68a.

No physical evidence ever pointed to Chaz. In addition to the exclusion of his DNA, none of his fingerprints were found. Pet. App. 108a-09a.

Andre admitted to police that he had been the driver of the black car. Pet. App. 97a. Brandon likewise admitted to a separate robbery earlier that evening and to raping M.K., *id.* at 100a-01a, but claimed that he had performed those acts under duress from the never-apprehended Shorty Mack. *Id.* at 106a.

3a. Chaz and Brandon were tried jointly over Chaz's objection. Doc. 5-1, Ex. 3 (Defendant Chaz Bunch's Response in Opposition to State's Motion to Consolidate Trials, July 19, 2002). After receiving a very lenient plea bargain, Pet. App. 80a, Jamar testified at the joint trial that both Chaz and Brandon had raped M.K. *Id.* at 84a-86a. Jamar also testified that Chaz told him to say that Shorty Mack was behind the offenses. Chaz, however, has asserted his innocence throughout, *see, e.g.*, *id.* at 123a-24a, stressing that only Brandon's DNA was found on the victim and that the victim could not identify him in a non-suggestive line up.

3b. Despite these evidentiary deficiencies, but perhaps unsurprisingly given the nature of the crime

and the heavy local media coverage it garnered, a jury convicted Chaz of three counts each of rape, conspiracy to commit rape, and aggravated robbery, as well as single counts of kidnapping, aggravated robbery, conspiracy to commit aggravated robbery, and aggravated menacing. Pet. App. 22a. Firearm specifications were attached to each count, except for the menacing charge. *Id.* He received maximum consecutive sentences for all counts (except for the misdemeanor menacing, which was to run concurrently), for a total of 115 years in prison. R. 5 (Return), Ex. 5 (Judgment Entry, July 19, 2006).

3c. Chaz appealed, and the Mahoning County Court of Appeals (1) vacated one count of conspiracy to commit aggravated robbery because the indictment did not allege an overt act in support of the conspiracy, (2) vacated the sentences for the firearm specifications, and (3) vacated the consecutive prison terms because the trial court did not support the sentences with findings as required by Ohio Rev. Code Ann. § 2929.19. *State v. Bunch*, No. 02CA196, 2005 WL 1523844, at *24, 30, 37 (Ohio Ct. App. June 24, 2005). The Supreme Court of Ohio reversed the appellate court's decision and remanded for resentencing under *State v. Foster*, 845 N.E.2d 470 (Ohio 2006) (applying *Blakely v. Washington*, 524 US 296 (2004), to Ohio's sentencing scheme). *In re Ohio Criminal Sentencing Cases*, 847 N.E.2d 1174, 1177 ¶ 92 (Ohio 2006).

3d. At the resentencing hearing, the trial court determined that Chaz deserved a sentence that would ensure that he would spend the rest of his life in prison with no opportunity for release:

> [W]hen I sentence someone, when I say and others, that I have to make sure that anybody like you who would think about doing this to another human being, better know and understand you're going to get whacked.
>
> * * *
>
> I don't know that someone that did what you did could be rehabilitated.
>
> * * *
>
> [S]omebody who rapes somebody in this court gets sentenced to the maximum.
>
> * * *
>
> I just have to make sure that you don't get out of the penitentiary. I've got to do everything I can to keep you there . . . .

Pet. App. 124a-27a.

The trial court sentenced Chaz to serve eighty-nine years in prison. R. 5 (Return), Ex. 17 (Judgment Entry, July 19, 2006). It sentenced Chaz to serve ten years for each of the following convictions: one count of aggravated robbery, three counts of rape, three counts of complicity to rape, and one count of kidnapping—all to be served consecutively. Additionally, each of these sentences included a three-year firearm specification with some of the specifications merged, ultimately resulting in an additional nine years being added to Chaz's sentence. Finally, Chaz was also sentenced to serve 180 days for his conviction of aggravated menacing—the only charge for which he received a concurrent sentence (Ohio law at the time mandated that this sentence be concurrent, Ohio Rev. Code Ann. § 2929.41(A)

(2001)). In total, Chaz's sentence amounted to 89 years.

3e. Chaz is not eligible for parole. *See, e.g.*, *Woods v. Telb*, 733 N.E.2d 1103, 1106–07 (Ohio 2000) (explaining the abolition of parole in Ohio for most offenses). He will thus be 105 years old before the completion of his sentence. As a result of legislation that took effect in 2011, Chaz can ask the trial court for release ten years early—after he has served seventy-nine years of his sentence. Ohio H. 86, 129th Gen. Assembly (eff. Sept. 30, 2011). But even assuming this law remains on the books, Chaz will not be eligible to request release until after he turns ninety-five.

4a. Because he was sentenced to spend his life in prison without any meaningful opportunity for release, Chaz argued on appeal that his sentence violated the Eighth Amendment's ban on cruel and unusual punishment. R. 5, Ex. 19, at 14-30 (Appellant's Brief, Dec. 13, 2006). The Mahoning County Court of Appeals rejected the claim after considering it on the merits. Pet. App. 29a-34a. Over two dissents, the Ohio Supreme Court declined to hear an appeal raising the same issue. *Id.* at 20a.

4b. Chaz then filed a petition for a writ of habeas corpus in Federal District Court for the Northern District of Ohio. R.1. The district court dismissed the petition with no finding of procedural default. R. 21 (Memorandum of Opinion and Order, Mar. 2, 2010).

4c. The Sixth Circuit Court of Appeals granted a certificate of appealability, but ultimately affirmed the dismissal of the petition. Pet. App. 1a. In the Sixth Circuit, the State of Ohio expressly conceded

that *Graham* could apply to Chaz's Petition, *id.* at 130a-33a, but argued that the *Graham* rule did not encompass sentences pronounced in terms of years. The Sixth Circuit then rejected Chaz's claim despite acknowledging that his sentence was de facto for life:

> Bunch is not entitled to habeas relief. Even if we assume that *Graham* applies to Bunch's case on collateral review, that case does not clearly establish that consecutive, fixed-term sentences for juveniles who have committed multiple nonhomicide offenses are unconstitutional when they amount to the practical equivalent of life without parole.

Pet. App. 2a.

This timely petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

The decision of the Sixth Circuit Court of Appeals in this case both effectively nullifies this Court's holding in *Graham v. Florida*, 130 S. Ct. 2011 (2010), by creating an always-available loophole, and widens an already-broad split on the vital and recurring question whether this Court's decision in *Graham* bars *all* life sentences without the possibility of parole for non-homicide juvenile offenders or only those sentences that are expressly labeled "life without parole." This Court's opinion in *Graham* made clear that the Eighth Amendment is implicated by the cruelty and unusualness of the punishment, not the label used to describe the punishment. The *Graham* rule would be meaningless if sentencing authorities could circumvent it by simply imposing 100-year sentences without the possibility of parole. A sentence that forever denies the possibility of

parole is cruel and unusual regardless of whether it is enumerated in a term of years or labeled "life without parole." Cruelty by subterfuge remains cruelty all the same.

Numerous decisions of federal courts and state courts of last resort have addressed this issue—an issue that arises every time a juvenile is sentenced to a lengthy term of years without the possibility of parole—and have nonetheless reached conflicting decisions. Those decisions that confine the Eighth Amendment's protections to sentences that include the word "life" are plainly incorrect and flout the express terms of this Court's decision in *Graham*.

This case supplies an excellent vehicle for affirming that *Graham*'s rule is one of substance and not of labels, and, in doing so, resolving the widespread conflict over the fundamental question of whether the Eighth Amendment actually bars all life sentences for juveniles that do not commit homicide. The Court should therefore grant review.

I. THE DECISION BELOW EVISCERATES *GRAHAM* AND RAISES THE VITAL AND RECURRING ISSUE OF *GRAHAM*'S APPLICATION TO ALL LIFE SENTENCES

The issue of whether *Graham* bars all life sentences for juveniles who do not commit homicide—or only those sentences that expressly use the word "life"—is a vitally important and recurring one. Countless juveniles are sentenced every day, and many of those children are given sentences that are so long they equate to life in prison. Those life sentences violate the Eighth Amendment every bit as much as explicit "life" sentences. Intervention by this Court is necessary to ensure that the lower courts

recognize this reality and follow *Graham*, rather than converting *Graham* into an empty prohibition on formal labels.

A. The Sixth Circuit's Decision Effectively Nullifies *Graham*

The issue that Chaz presents here goes to the heart of this Court's holding in *Graham*. There, the Court made clear that the Eighth Amendment forbids sentences that fail to provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" for children who do not commit homicide. *Graham*, 130 S. Ct. at 2030. This is the basic holding of *Graham*. The holding of *Graham* is *not*—as the Sixth Circuit, and numerous other courts, have concluded—that life sentences for non-homicide juveniles are permitted so long as those sentences are pronounced using the word "years" instead of the word "life." If that were the holding of *Graham*, then the rule that *Graham* pronounced would be toothless. Sentencing authorities could rename all life sentences from "life without parole" to "100" or "200 years without parole" and thereby render *Graham* irrelevant. Such a meaningless rule is plainly *not* what the Eighth Amendment requires.[1]

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[1] A recent decision by the Arizona Court of Appeals exhibits the evisceration of *Graham* that would result from such a rule. In *State v. Kasic*, that court upheld a sentence totaling *139.75 years* in prison for several arson-related charges. 265 P.3d 410 (Ariz. Ct. App. 2011). The court concluded that *Graham* "made clear that 'the instant case concerns only those juvenile offenders sentenced to life without parole solely for a non-homicide offense.'" *Id.* at 414 (quoting *Graham*, 130 S. Ct. at 2023). Thus, the court held that "*Graham* does not categorically bar the sentences imposed in this case, and we decline to extend its reasoning in the manner Kasic urges." *Id.* at 415.

Review of *Graham* itself makes this plain. There, this Court held that, although "[a] State is not required to guarantee eventual freedom to a juvenile [non-homicide] offender," the state "must" impose a sentence that provides "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." 130 S. Ct. at 2030. Under *Graham*, the Eighth Amendment thus bars sentencing a child (defined as anyone under age eighteen) non-homicide offender to any sentence that fails to provide a *meaningful* opportunity for release, a rule this Court subsequently expanded to prohibit mandatory sentences of life without parole for juvenile homicide offenders. *See Miller v. Alabama*, 132 S. Ct. 2455 (2012).

This Court's Eighth Amendment jurisprudence as it relates to juvenile sentencing consistently focuses on the qualities of children that make children different from adults, and thus confirms that this is a doctrine of substance rather than form. In *Graham*, this Court reasoned that it is essential to give children "a chance to demonstrate maturity and reform." 130 S. Ct. at 2017. This is due to both the difficulty in diagnosing a child as having an "'irretrievably depraved character'" and to the superior ability of children—as opposed to adults—to grow as human beings and become law-abiding, upstanding citizens. *Id.* at 2026.

Indeed, as this Court further explained in *Miller*, juvenile offenders have a "lack of maturity and an

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Regardless of the age or health of a particular juvenile offender, a sentence of 140 years with no parole is plainly a life sentence.

underdeveloped sense of responsibility" that leads to "recklessness, impulsivity, and heedless risk-taking." 132 S. Ct. at 2464 (internal quotation marks omitted). As such, they are also more "vulnerable to negative influences and outside pressures" from sources including family and peers, and "have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings." *Id.* (internal quotation marks omitted). A juvenile non-homicide offender thus "has a twice diminished moral culpability" as compared to an adult offender. *Id.* at 2468.

Moreover, this Court has long understood that in sentencing it is the length that matters, *not* the label: "In some cases . . . there will be negligible difference between life without parole and other sentences of imprisonment—for example, a life sentence with eligibility for parole after 20 years, or even a lengthy term sentence without eligibility for parole, given to a 65-year-old man." *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991). This commonsense statement confirms the notion 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." *Sumner v. Shuman*, 483 U.S. 66, 83 (1987).[2]

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[2] Indeed, in many areas, this Court has recognized that the "practical effect" of a law, not its "formal language," is what matters. *See, e.g.*, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 288 (1977); *see also, e.g.*, *Ry. Exp. Agency, Inc. v. Virginia*, 358 U.S. 434, 441 (1959) (an otherwise unconstitutional tax cannot be made constitutional by the use of "magic words or labels").

Further, the clear trend in this Court's jurisprudence has been toward *more*—not *less*—protection for juvenile offenders. This trend began in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), in which William Thompson challenged a death sentence pronounced for his first-degree murder conviction, which stemmed from his active participation in a "brutal murder" at the age of fifteen. *Id.* at 819. This Court held that, regardless of the underlying crime, the death penalty violated the Eighth Amendment's prohibition on cruel and unusual punishments when applied against an offender under the age of sixteen. Two decades later, relying on similar rationales concerning the developmental differences between children and adults, this Court expanded the prohibition on death sentences for children to include all juveniles under the age of eighteen. *Roper v. Simmons*, 543 U.S. 551, 556-60 (2005).

Following *Roper*, this Court turned to, and held constitutionally impermissible, sentences of life without the possibility of parole for juvenile offenders convicted of crimes other than homicide. *Graham*, 130 S. Ct. at 2034. Then, in *Miller*, which came just two years later, this Court extended *Graham* to bar mandatory life sentences without parole for juveniles who commit homicide. 132 S. Ct. at 2457-58. In doing so, this Court recognized and adhered to "*Graham*'s (and also *Roper*'s) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Id.* at 2466.

Altogether, these cases confirm that the Eighth Amendment prohibits sentences that are cruel and

unusual in substance rather than just in terminology. *See generally Miller*, 132 S. Ct. 2455. Laws allowing sentences of life without parole to be imposed on children are cruel and unusual because they

> allow the imposition of the type of sentence at issue based only on a discretionary, subjective judgment by a judge or jury that the juvenile offender is irredeemably depraved, and are therefore insufficient to prevent the possibility that the offender will receive such a sentence despite a lack of moral culpability.

Graham, 130 S. Ct. at 2017. A sentence of life without parole—whether phrased in terms of "life" or in terms of 89 years before the possibility of release—"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 2027 (citation omitted).

The functional equivalence of these different sorts of life sentences is, no doubt, the reason why *Graham* described the "life" sentence at issue *as a term-of-years* sentence. *Graham*, 130 S.Ct. at 2022 ("The present case involves an issue the Court has not considered previously: a categorical challenge to a term-of-years sentence."). Spending a life in prison without the possibility of release is the same punishment regardless of how the sentencing court labels the sentence.

B. It is Vitally Important To Prevent The Easy Circumvention Of *Graham*

The importance of not allowing children to be given cruel and unusual life sentences—whatever those

sentences are called—is obvious. De facto life sentences for children are, of course, just as cruel and unusual, and thus just as important, as the explicit life sentences for children that this Court recently reviewed in *Graham* and *Miller*. Both types of sentence have the same effect and both are thus generally (and correctly) seen as interchangeable: "If . . . a state court imposed a hundred-year sentence on a juvenile for a particularly heinous nonhomicide offense, it seems evident that this sentence is, for all intents and purposes, the functional equivalent of life without parole." Michelle Marquis, Graham v. Florida*: A Game-Changing Victory for Both Juveniles and Juvenile-Rights Advocates*, 45 Loy. L.A. L. Rev. 255, 276 (2011). Lower court decisions that uphold massive term-of-years sentences without the possibility of parole are flouting the reasoning and holding of *Graham* and, therefore, the Eighth Amendment itself. *See, e.g.*, Martin Guggenheim, *Graham v. Florida and A Juvenile's Right to Age-Appropriate Sentencing*, 47 Harv. C.R.-C.L. L. Rev. 457, 457 (2012) ("Juveniles have a substantive right to be treated differently when states seek to punish them for criminal wrongdoing."); Mary Berkheiser, *Death Is Not So Different After All:* Graham v. Florida *and the Court's "Kids Are Different" Eighth Amendment Jurisprudence*, 36 Vt. L. Rev. 1, 14 (2011) (any sentence that forces children to spend their natural lives "in prison with no opportunity to seek parole is cruel and unusual and therefore violates the Eighth Amendment").

There is no question that children have a diminished mental capacity, and thus diminished culpability for their crimes. Years of scientific research back this up. As this Court has explained:

> [D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. It remains true that "from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." These matters relate to the status of the offenders in question; and it is relevant to consider next the nature of the offenses to which this harsh penalty might apply.

Graham, 130 S. Ct. at 2026-27 (quoting *Roper*, 543 U.S. at 570); *see also* Marquis, *supra* at 288 ("[I]t would be a mistake to assume that *Graham* is inapplicable to a larger juvenile population given that all juveniles, even those who are convicted of the worst offenses, are cognitively, behaviorally, and emotionally different from adults in ways that make them less culpable.").

And indeed, a wide variety of laws are premised on the basic difference between children and adults:

> Children are not allowed to drive, to buy cigarettes, to watch R-rated movies, or buy pornography. They cannot vote or serve our country in war or in peace. In many states, kids cannot marry without permission. They are

> required to attend school and are limited in how many hours they can work at after-school jobs.

Scott R. Hechinger, *Juvenile Life Without Parole: An Antidote to Congress's One-Way Criminal Law Ratchet?*, 35 N.Y.U. Rev. L. & Soc. Change 408, 461-62 (2011).

It is therefore established law that "'kids are different.'" Guggenheim, *supra* at 463. And that difference supplies "a strong argument for extending *Graham* to . . . juveniles who are sentenced to 'functional' life without parole . . . ." Marquis, *supra* at 275 (emphasis added). The semantic distinction between a "life" sentence and a sentence for more years than a child will live does nothing to diminish this issue's clear importance.

C. Circumvention Of *Graham* Is A Frequently Recurring Issue

In addition to its vital importance, the issue of *Graham*'s application to de facto life sentences is a frequently recurring one. More than a dozen times since *Graham* was decided, lower courts have grappled with the issue of whether this Court's decision encompasses de facto life sentences in addition to explicit life sentences. Many of those decisions correctly concluded that a life sentence is a life sentence whatever name you give it, and have thus held that, under *Graham*, de facto life sentences are just as cruel and unusual as explicit life sentences.[3] Other decisions have upheld de facto life

[3] *See United States v. Mathurin*, No. 09-21075-CR, 2011 WL 2580775, at *3 (S.D. Fla. June 29, 2011) (holding a combined sentence of 307 years for a child offender convicted of armed robbery and carjacking "constitutionally offensive"); *People v. Caballero*, 282 P.3d 291 (Cal. 2012) (holding that a nonhomicide

sentences even though they deprive the sentenced child of any meaningful opportunity to obtain release.[4]

(continued…)

child offender's total sentence of 110 years to life constituted cruel and unusual punishment); *People v. Mendez*, 114 Cal. Rptr. 3d 870 (Cal. Ct. App. 2010) (holding that a sentence of 84 years to life for a nonhomicide child offender constituted cruel and unusual punishment); *Floyd v. State*, 87 So. 3d 45 (Fla. Dist. Ct. App. 2012) (per curiam) (holding that a child sentenced to a combined 80 sentence for two counts of armed robbery constituted cruel and unusual punishment as the functional equivalent of a life sentence without parole); *Adams v. Florida*, No. 1D11-335, 2012 WL 3193932 (Fla. Dist. Ct. App. Aug. 8, 2012) (holding that a sentence which required a child defendant to serve at least 58.5 years in prison was a de facto life sentence imposed on a juvenile for nonhomicide offense, thus violating the Eight Amendment).

[4] *See Goins v. Smith*, No. 4:09-CV-1551, 2012 WL 3023306, at *6 (N.D. Ohio July 24, 2012) (holding that "even life-long sentences for juvenile non-homicide offenders do not run afoul of *Graham*'s holding unless the sentence is technically a life sentence without the possibility of parole"); *Selectman v. Zavaras*, 2011 U.S. Dist. LEXIS 48229, 52-53 (D. Colo. Apr. 28, 2011) (finding that the minor's conviction for felony murder was outside of *Graham*'s holding because neither the Supreme Court nor the Tenth Circuit had made it applicable); *Kasic*, 265 P.3d at 415–16 (holding that enhanced concurrent and consecutive prison terms totaling 139.75 years for a nonhomicide child offender furthered Arizona's penalogical goals and was not unconstitutionally excessive); *Adams v. State*, 707 S.E.2d 359, 365 (Ga. 2011) (holding that a child's 75-year sentence and lifelong probation for child molestation did not violate *Graham*); *Henry v. Florida*, 82 So.3d 1084, 1089 (Fla. Dist. Ct. App. 2012) (holding that a nonhomicide child offender's aggregate term of years sentence totaling 90 years without the possibility of parole was not excessive); *Smith v. Florida*, 93 So. 3d 371 (Fla. Dist. Ct. App. 2012) (holding that defendant's aggregate 80 year sentence was not the equivalent of a life sentence without the possibility

Either way, as these many cases show, the constitutionality of Chaz's sentence depriving him of a meaningful opportunity for release is an important and recurring question that, if unchecked, threatens to render *Graham* meaningless.

(continued…)

of parole, and thus did not violate the prohibition of life sentence without the possibility for parole for children convicted of nonhomicide crimes); *Gridine v. State*, 89 So. 3d 909 (Fla. Dist. Ct. App. 2011) (holding that a child's 70-year sentence for attempted first-degree murder was not a de facto life sentence, but that some term-of-years sentences may be the functional equivalent of life sentences for the purpose of the Eighth Amendment); *Thomas v. State*, 78 So. 3d 644 (Fla. Dist. Ct. App. 2011) (holding that a child offender's 50-year sentence for armed robbery and aggravated battery was not a de facto life sentence but that some term-of-years sentences may be the functional equivalent of life sentences for the purpose of the Eighth Amendment); *Diamond v. State*, Nos. 09-11-00478-CR, 09-11-00479-CR, 2012 WL 1431232 (Tex. Crim. App. April 25, 2012) (holding that a consecutive sentence of 99 years for a nonhomicide child offender was not excessive); *cf. Saunders v. Cox*, 470 F.2d 734 (4th Cir. 1972) (per curiam) (holding that an aggregate sentence of 80 years for a nonhomicide child offender was not excessive); *Hawkins v. State*, 742 P.2d 33, 34 (Okla. 1987) (holding that an aggregate sentence of 100 years for a nonhomicide child offender was not excessive); *Sterling v. State*, No. W1999-608-CCA-R3-CD (Tenn. Ct. Crim. App. Sept. 24, 2001) (holding that a total sentence of 64 years for a nonhomicide child offender was not excessive); *State v. Smith*, Not Reported in S.W.2d (Tenn. Ct. Crim. App. 1989) (holding that a total sentence of 115 years for a nonhomicide child offender was not excessive); *see also Shavers v. Com.*, No. 2001-SC-0232-MR, 2003 WL 21990214 (Ky. Aug. 21, 2003) (holding that trial court did not err in sentencing a sixteen year old to 65 years for murder, burglary, and robbery). *See also* Part II, *infra*.

The question this case presents has percolated through the lower courts since just after *Graham* was issued and has generated widespread conflict. The issue is now ripe for review.

II. THE SIXTH CIRCUIT'S DECISION DEEPENS A BROAD SPLIT CONCERNING THE ISSUE OF WHETHER *GRAHAM* EVER APPLIES TO TERM-OF-YEARS SENTENCES

The recurrence of the question whether *Graham* applies to term-of-years sentences has given rise to a deep conflict in the lower courts that prescribes this Court's immediate review. The reasoning of the Sixth Circuit below that eviscerates the protections of *Graham* has similarly been embraced by several other courts. Accordingly, the issue of whether *Graham* applies to all life sentences has given rise to a 2-2-1 split among federal courts of appeals and State courts of last resort, and a 3-5-2 split among all federal and State courts. The Sixth Circuit's opinion below exacerbated this division by joining those courts which have held that *Graham* bars only a particular label for life sentences, rather than barring life sentences generally.

A. Two State Supreme Courts And At Least One Federal District Court Have Determined That *Graham* Requires A "Meaningful Opportunity" For Child Offenders To Obtain Release

The supreme courts of California and Virginia have determined that *Graham* requires a child be given a "meaningful opportunity" for eventual release for all sentences resulting from non-homicide offenses. The Southern District of Florida has reached the same conclusion.

The Supreme Court of California's unanimous decision in *People v. Caballero*, 282 P.3d 291 (Cal. 2012), is the most recent decision holding that consecutive term-of-years sentences that last beyond a child's life expectancy, and are imposed for non-homicide offenses, runs afoul of *Graham*. In *Caballero*, the court found that "sentencing a juvenile offender for a non-homicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." *Id.* at 295. The court observed that "*Graham*'s analysis does not focus on the precise sentence meted out. Instead . . . it holds that a state must provide a juvenile offender 'with some realistic opportunity to obtain release' from prison during his or her expected lifetime." *Id.* (quoting *Graham*, 130 S. Ct. at 2034); *see also People v. J.I.A.*, 127 Cal. Rptr. 3d 141, 149 (Cal. Ct. App. 2011) (finding that "[t]he trial court's [lengthy term-of-years] sentence effectively deprive[d the child defendant] of any meaningful opportunity to obtain release regardless of his rehabilitate efforts while incarcerated," and was therefore unconstitutional).

The Supreme Court of Virginia has likewise properly understood *Graham* to require that child defendants must have a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Angel v. Commonwealth*, 704 S.E.2d 386, 401-02 (Va. 2011). There, the court held that a sentence of three life sentences, plus sentences of twenty years and twelve months, all of which were to run consecutively, was constitutional only *because* it provided "the meaningful opportunity to obtain release based on demonstrated maturity and

rehabilitation required by the Eighth Amendment." *Id.* (quotation omitted); *see also id.* at 402 ("The Supreme Court has left it up to the states to devise methods of allowing juvenile offenders an opportunity for release based on maturity and rehabilitation."). Virginia law complies with this requirement because, the court explained, it provides "conditional release [to] prisoners who have reached a certain age and served a certain length of imprisonment." *Id.* at 401.

Additionally, in light of *Graham* and due to the abolition of parole at the federal level, the Southern District of Florida found that a federally mandated term-of-years sentence of 307 years for numerous non-homicide offenses was "constitutionally offensive" because it failed to provide the child defendant with a "meaningful opportunity" to obtain release. *United States v. Mathurin*, No. 09-21075-CR, 2011 WL 2580775, at *3 (S.D. Fla. June 29, 2011). The court noted that *Graham* would permit the imposition of a sentence that "would amount to a life sentence" to a child convicted of non-homicide offenses only "as long as some mechanism such as parole is available to the juvenile." *Id.*

B. The Sixth Circuit, The Georgia Supreme Court, And Several Lower State Courts Have Interpreted *Graham* As Being Bound To Its Facts And Applying To Life-Term Sentences Only

On the other side of the ledger are those courts, such as the Sixth Circuit here, which have determined that *Graham* does not apply beyond the label of "life without parole." These courts include

the Supreme Court of Georgia and lower state courts in Arizona, Texas, and Illinois.

In this case, the Sixth Circuit became the first—and only—Circuit Court of Appeals to address *Graham*'s application to life sentences for non-homicide child offenders that are enumerated in terms of years. Following the Sixth Circuit's decision, an Ohio federal district court, in *Goins v. Smith*, No. 4:09-CV-1551, 2012 WL 3023306 (N.D. Ohio July 24, 2012), agreed, holding that "[a]ccording to [*Bunch*], long, even life-long sentences for juvenile non-homicide offenders do not run afoul of *Graham's* holding unless the sentence is technically a life sentence without the possibility of parole." *Id.* at *6.

In *Adams v. State*, 707 S.E.2d 359 (Ga. 2011), the Supreme Court of Georgia determined that a child defendant's sentence of twenty-five years in prison and lifelong probation did not violate *Graham*. *Id.* at 365. Relying on Justice Alito's *dissenting* opinion—rather than anything the majority actually held—the court found that "[c]learly, 'nothing in the [*Graham*] opinion affects the imposition of a sentence to a term of years without the possibility of parole.'" *Id.* (quoting *Graham*, 130 S. Ct. at 2058 (Alito, J., dissenting)).

The Arizona Court of Appeals considered a case involving a child defendant who was sentenced to a combination of concurrent and consecutive sentences for several arson charges totaling 139.75 years in prison. *State v. Kasic*, 265 P.3d 410 (Ariz. Ct. App. 2011). The court concluded that *Graham* "made clear that 'the instant case concerns only those juvenile offenders sentenced to life without parole solely for a non-homicide offense.'" *Id.* at 414 (quoting *Graham*,

130 S. Ct. at 2023). Thus, the court held that "*Graham* does not categorically bar the sentences imposed in this case, and we decline to extend its reasoning in the manner Kasic urges." *Id.* at 415.

The Texas Court of Appeals upheld a child's consecutive 99 and two-year sentences for non-homicide crimes but failed to analyze or address *Graham*'s applicability. *Diamond v. State*, Nos. 09-11-00478-CR, 09-11-00479-CR, 2012 WL 1431232 at *1–*5 (Tex. Ct. App. Apr. 25, 2012). The dissenting judge noted the majority's failure to grapple with *Graham* and stated that "[n]inety-nine years is not a sentence of life without parole, but similar sentencing difficulties and considerations [to those in *Graham*] are present in this case." *Id.* at *7 (Gaultney, J., dissenting). Further, although the State believed the facts justified the sentence, the dissenting judge noted that even the "State acknowledge[d] that it 'cannot disagree that holding a human being to what amounts to life in prison for horrendously bad decisions made at age fifteen is an ethically and morally monumental burden.'" *Id.* at *5.

The Illinois Court of Appeals found that *Graham* does not apply to consecutive sentences for non-homicide crimes that total 97 years in *People v. Gay*. 960 N.E.2d 1272, 1276 (Ill. Ct. App. 2011) (where appellant was a mentally-ill adult arguing that he qualified for relief per *Graham* because mental illness reduces culpability, the court analyzed *Graham*'s applicability independently from the appellant's class or status). The court further stated that the "[E]ighth [A]mendment allows the State to punish a criminal for each crime he commits, regardless of the number of convictions or the

duration of sentences he has already accrued." *Id.* at 1279. Therefore, the court determined that an aggregated term-of-years sentence did not equal a life sentence. *Id.*

C. The Applicability Of *Graham* To Term-Of-Years Sentences Remains Unresolved In Nevada And Florida

Finally, state courts in Nevada and Florida remain undecided about whether *Graham* requires that children have a "meaningful opportunity" to obtain release when given a term-of-years sentence for non-homicide offenses.

The Nevada Supreme Court noted that *Graham*'s applicability and scope is an important question on which authority is split, but ultimately declined to resolve the issue. *See Rogers v. State*, 267 P.3d 802 (Nev. 2011) (per curiam). There, the court reviewed the trial court's failure to appoint counsel for a defendant appealing a de facto life sentence on the ground that *Graham* prohibits all life sentences, whether explicit or de facto, for non-homicide juveniles. *Id.* at 803. In reversing the trial court, the Nevada Supreme Court noted that counsel was required to assist in resolving "the complicated issue of whether *Graham* applies only to a sentence of life without parole or whether *Graham* applies to a lengthy sentence structure that imposes a total sentence that is the functional equivalent of life without parole." *Id.* at 804–05.

The state courts of appeals in Florida are split on whether *Graham* applies to children facing lengthy term-of-years sentences. In *Henry v. Florida*, 82 So. 3d 1084 (Fla. Dist. Ct. App. 2012), Florida's Fifth District found that a term-of-years sentence was not

unconstitutional, despite its length, because *Graham* "applied only to juvenile offenders sentenced to life without parole for non-homicide offenses." *Id.* at 1089 (citing *Kasic*, 265 P.3d 410).

In a more recent decision, by contrast, Florida's First District determined that (1) "*Graham* applies not only to life without parole sentences, but also to lengthy term-of-years sentences that amount to de facto life sentences" and (2) "a de facto life sentence is one that exceeds the defendant's life expectancy." *Adams v. State*, No. 1D11 3225, 2012 WL 3193932, at *2 (Fla. Dist. Ct. App. Aug. 8, 2012) (citing *Smith v. State*, 93 So. 3d 371 (Fla. Dist. Ct. App. 2012); *Floyd v. State*, 87 So. 3d 45 (Fla. Dist. Ct. App. 2012) (per curiam); *Thomas v. State*, 78 So. 3d 644 (Fla. Dist. Ct. App. 2011); *Gridine v. State*, 89 So. 3d 909 (Fla. Dist. Ct. App. 2011)). The First District determined that the child defendant's sentence was unconstitutional under *Graham* because the child would have no opportunity for release until turning 76, which "exceed[ed] his life expectancy, as reflected in the National Vital Statistics Reports from, the federal Centers for Disease Control and Prevention." *Adams*, 2012 WL 3193932, at *2. Recognizing that its decision created a direct conflict, the *Adams* court utilized a Florida-specific procedure to certify the issue for decision by the Florida Supreme Court. *See id.*

III. THIS CASE IS AN EXCELLENT VEHICLE TO RESOLVE THE ISSUE

Finally, this case supplies an excellent vehicle to resolve this issue. It is uncontested that Chaz is serving a sentence that will, at the least, span over seven decades and keep him in prison until he is

nearly 100 years old. It is a life sentence that the sentencing court repackaged as an 89-year sentence. Further, Chaz has diligently litigated this issue throughout his case—a process during which the State of Ohio expressly conceded that *Graham* applies—and thus squarely presents the issue for resolution here.

A. Chaz's Sentence Will Keep Him In Prison For The Rest Of His Life

Even assuming that Chaz will be able to take advantage of recent Ohio legislation, Chaz will serve, at the very least, 79 years in state prison before he is eligible to request release. He would be a minimum of 95 years old. His sentence is thus plainly a life sentence without the possibility of parole.

Empirical evidence demonstrates that Chaz is likely to die more than thirty years before he becomes eligible for release. The lower courts that have grappled with *Graham*'s applicability to term-of-years sentences generally cite statistics from the Center for Disease Control. Those statistics show that the average male life expectancy is 76 years. *See, e.g.*, *Floyd*, 87 So. 3d at 47; *J.I.A.*, 147 Cal. Rptr. 3d at 149; *People v. Mendez*, 114 Cal. Rptr .3d 870, 882 (Cal. Ct. App. 2010). But this number dramatically decreases for African American males and does not include the impact of incarceration. The average life expectancy for an African American male born between 1980 and 1990—like Chaz—is approximately 64 years old. *See* Health, United States, 2011, U.S. Department of Health and Human Services Centers for Disease Control and Prevention, *available at* http://www.cdc.gov/nchs/data/hus/hus11.pdf#022 (Table 22). Additionally, "[l]ife expectancy

within prisons and jails is considerably shortened." *J.I.A.*, 147 Cal. Rptr. 3d at 149 (recognizing the negative impact of incarceration on life expectancy). Thus, as an incarcerated African American male, Chaz will likely not live to be 64 years old. Providing him with his first opportunity for release when he is projected to be 95 years old is the same as providing him with no opportunity for release. It is condemning him to death in prison, regardless of what maturation or reformation he undergoes while incarcerated.

Chaz's sentence therefore conflicts directly with this Court's admonition that non-homicide child offenders must be provided a meaningful opportunity for release. No one, not even the prosecution, has ever suggested that Chaz will make it out of prison alive. Indeed, the sentencing judge's explicit purpose in imposing the sentence he imposed was to keep Chaz in jail for the remainder of his life. Pet. App. 124a-27a. This is, under *Graham*, plainly cruel and unusual punishment.

B. *Graham* Clearly Applies Here

Because Chaz's state court proceedings were completed when *Graham* was decided, *Graham* must be retroactively applied to this case. *Graham* should be applied retroactively because (1) the State forfeited any retroactivity objection by failing to raise it and affirmatively waived the objection at oral argument, and (2) the new rule in *Graham* falls within the first exception to *Teague v. Lane*, 489 U.S. 288 (1989).

Generally speaking, "[r]etroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing

the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." *Id.* at 300. To determine whether a defendant's sentence can be overturned based on retroactive application of a rule, *Teague* requires three steps: (1) selection of a date on which the conviction became final on the merits; (2) determination of whether the rule the petitioner relies on is a "new rule"; and (3) if a "new rule" is implicated, determination of whether an exception to *Teague* applies. *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997); *Lambrix v. Singletary*, 520 U.S. 518, 527 (1997); *Saffle v. Parks*, 494 U.S. 484, 488 (1990).

This Court has found, however, that the nonretroactivity principle "is not 'jurisdictional' in the sense that [federal courts] . . . must raise and decide the issue sua sponte." *Collins v. Youngblood*, 497 U.S. 37, 41 (1990) (emphasis omitted). "Thus, a federal court may, but need not, decline to apply *Teague* if the State does not argue it." *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994); *see Schiro v. Farley*, 510 U.S. 222, 228-29 (1994). But nonetheless, even if *Teague* does apply, an exception to *Teague* (step three above) allows for retroactive application where, like here, the new rule is one that "forbid[s] criminal punishment of certain primary conduct [and] rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989); *O'Dell*, 521 U.S. at 157.

1. The State Has Waived Any Objection To The Retroactivity Of *Graham* And *Miller* On *Teague* Grounds

The State of Ohio has never argued that *Graham v. Florida* does not apply retroactively to Chaz's case. At oral argument in the court of appeals below, the State, through a deputy solicitor general (and with the Ohio Solicitor General sitting at counsel table), affirmatively waived any argument that *Graham* does not apply to this case.[5] And the Sixth Circuit proceeded to address on the merits the issue of whether *Graham* applies to this case. Because the non-retroactivity principle is non-jurisdictional, *see Collins*, 497 U.S. at 41, this Court does not have to raise it sua sponte, and *Graham* can simply be applied to Chaz's case as it was in the court below.

2. Regardless, The *Graham* Rule Falls Squarely Within The *Teague* Exception For Categorical Rules

But even if *Teague* does apply, *Graham* still applies to Chaz's case because *Graham* falls squarely within the first *Teague* exception. The rule in *Graham*—that a juvenile non-homicide offender must be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," 130 S. Ct. at 2030—falls within this exception because it "prohibits a certain category of

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[5] Pet. App. 132a (Q: "[D]o you have a position [on whether *Graham* applies in this matter]? A: I think that we [] have assumed that *Atkins* claims and claims like that slide into clearly established law . . . . Q: That is to say that we should look at *Graham* in applying AEDPA. A: I think for the purposes of this case, that's right.").

punishment for a class of defendants because of their status or offense." *Penry*, 492 U.S. at 330.

The Sixth Circuit correctly noted in its opinion that, although not resolving the retroactivity issue, "[a]n argument could be made [ ] that *Graham* [ ] applies because it sets forth a new rule prohibiting a certain category of punishment for a class of defendants and therefore can be raised on collateral review notwithstanding the Supreme Court's decision in *Teague v. Lane* . . . ." Pet. App. 7a. Past applications of the first *Teague* exception dispel any doubt. This Court's decisions in both *Atkins v. Virginia* and *Roper v. Simmons* were applied retroactively under this exception to *Teague* and both are analytically indistinguishable from *Graham*. *Atkins* announced the rule that the Eighth Amendment bars the execution of mentally retarded defendants. In the wake of *Atkins*, countless courts held that "there is no question that the new constitutional rule abstractly described in *Penry* and formally articulated in *Atkins* is retroactively applicable to cases on collateral review." *In re Holladay*, 331 F.3d 1169, 1172-73 (11th Cir. 2003) (citing four cases saying the same thing). Same for *Roper*, which determined that the Eighth Amendment forbids the execution of juveniles for non-homicide offenses.[6] By "the combined effect of

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[6] *See, e.g., In re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011) (per curiam) ("[T]he Supreme Court's decision in *Atkins* barring the execution of the mentally retarded has been given retroactive effect . . . as has the Court's decision in *Roper* . . . ."). As the Fifth Circuit has explained, "*Atkins* and *Roper* both 'prohibit a certain category of punishment for a certain class of defendants because of their status or offense' . . . so too does *Graham*, which bars the imposition of a sentence of life imprisonment without

the holding of *Graham* itself and the first *Teague* exception, *Graham* was therefore made retroactive on collateral review by the Supreme Court as a matter of logical necessity . . . ." *In re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011) (per curiam). *Graham* applies here.

3. Chaz's Claims Are Fully Cognizable Under AEDPA

Finally, the State of Ohio has likewise waived any AEDPA-based objection to applying *Graham*.[7] Just as a Respondent can waive reliance on *Teague*, a Respondent can waive AEDPA deference. At least one Circuit has already held that Respondents can waive AEDPA deference, *see, e.g.*, *James v. Ryan*, 679 F.3d 780, 802 (9th Cir. 2012), and that very question is the subject of a Petition currently pending in this Court, *see Ryan v. James*, Pet'n for Writ of Certiorari, No. 12-11 (filed June 28, 2012) (distributed for conference of Oct. 12, 2012). The Respondent's waiver of AEDPA deference should thus be given effect here.

But regardless of whether that waiver is effective, AEDPA *still* would not bar Chaz's claim because his claim falls squarely within a *Teague* exception. In *Greene v. Fisher*, this Court expressly reserved the question of whether AEDPA "would bar a federal habeas petitioner from relying on a decision that came after the last state-court adjudication on the merits, but fell within one of the exceptions

(continued…)

parole on a juvenile offender." *Id.* (quoting *Penry*, 492 U.S. at 330).

[7] *See* Pet. App. 132a.

recognized in *Teague*." 132 S. Ct. 38, 44 n.* (2011) (citing 28 U.S.C. § 2254(d), internal citations omitted). Therefore, at present, Chaz is entitled to the benefit of *Graham*'s retroactivity regardless of AEDPA.

Finally, to the extent that the Court disagrees and believes that AEDPA cannot be waived or potentially applies, this case also provides an excellent vehicle to answer the question that *Greene* left open: Whether a rule that falls within a *Teague* exception and is thus retroactive can somehow be independently barred by 28 U.S.C. § 2254(d)(1). This case falls in the heart of the first *Teague* exception and thus squarely presents this issue, to the extent that the Court is inclined to address it.

CONCLUSION

This Court should grant the petition for writ of certiorari, and reverse the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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November 5, 2012

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