No. 17-912

In the Supreme Court of the United States

BOBBY BOSTIC,

Petitioner,

V.

BILLY DUNBAR, ACTING WARDEN,

Respondent.

On Petition for Writ of Certiorari to the Missouri Supreme Court

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The trial judge in Petitioner Bobby Bostic's case sentenced him to die in prison for nonhomicide offenses he committed when he was 16 years old, telling him at sentencing, "you will die in the Department of Corrections." Pet. App. 41a. Without action from this Court, she will be correct: Mr. Bostic will not be eligible for parole until he is 112 years old, long past the end of his lifetime.

Such a sentence—functionally life without parole—violates this Court's decision in *Graham v. Florida*, 560 U.S. 48 (2010), which held that the Eighth Amendment prohibits a state from sentencing a juvenile nonhomicide offender to "die in prison without any meaningful opportunity to obtain release," *id*. at 79.

The State concedes that there is an entrenched split over the question presented here: whether the Eighth Amendment prohibits a term-of-years sentence for multiple nonhomicide offenses, under which a juvenile is not eligible for parole during his natural lifetime. Br. in Opp. 22.

It nonetheless opposes certiorari, but the reasons it gives are unconvincing. This case, in which a 16-year-old boy was sentenced to die in prison for a pair of crimes on a single day in which no one was seriously hurt, calls out for the Court's review.

ARGUMENT

I. NO PROCEDURAL BAR IMPEDES THIS COURT'S JURISDICTION.

Respondent first argues that this Court lacks jurisdiction because Petitioner's state-court habeas petition was barred on an independent and adequate state-law ground as a successive petition under Missouri Supreme Court Rule 91.22. Br. in Opp. 19–22. That is incorrect for two reasons: (1) that rule applies only where a previous petition was denied *with prejudice*, and Mr. Bostic's petition was denied *without prejudice*; and (2) that rule precludes only "lower court" review of a previously denied petition, and does not bar the Missouri Supreme Court itself from revisiting a question.

Rule 91.22, entitled "Second Writ not to Issue By Lower Court," provides that, "[w]hen a petition for writ of habeas corpus has been denied by a higher court, a lower court shall not issue the writ unless the order in the higher court denying the writ is without prejudice to proceeding in a lower court."

In the order Mr. Bostic seeks review of here, the Missouri Supreme Court did not purport to rely on Rule 91.22, and under settled state law it could not have done so. First, Mr. Bostic's initial petition for habeas corpus in the Missouri Supreme Court was denied without prejudice, and by its express terms Rule 91.22 applies only where a prior petition has been denied with prejudice by a higher court. The Missouri Supreme Court's summary order denying Petitioner's

prior petition did not specify that it was with prejudice. Pet. App. 9a. Under Missouri law, "an *order* denying a petition for writ of habeas corpus is without prejudice ***unless*** the order of denial otherwise specifies." *McKim v. Cassady*, 457 S.W.3d 831, 839 (Mo. Ct. App. 2015); *Willbanks v. Mo. Dep't of Corr.*, No. WD 77913, 2015 WL 6468489, at *8 n.5 (Mo. Ct. App. Oct. 27, 2015) ("Though the Court's order specifically stated, 'without prejudice,' we do not rely upon that language, as the denial would have been assumed to have been without prejudice, absent language to the contrary."). Because the state Supreme Court's prior denial of habeas relief was without prejudice, Rule 91.22 does not apply.[1]

Second, even if the denial of the earlier Supreme Court petition had been with prejudice, it would not have barred the Missouri Supreme Court itself from taking up Mr. Bostic's *Graham* claim on the

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[1] The Missouri trial court addressing Mr. Bostic's second petition for habeas corpus erroneously considered itself bound by Rule 91.22. Pet. App. 5a–7a. But the decision under review here, that of the Missouri Supreme Court, stands on its own. Under Missouri law, "denial of a petition for writ of habeas corpus is not appealable," so "the remedy is to file a new petition in a higher court." *Brown v. State*, 66 S.W.3d 721, 732 (Mo. 2002). Appellate courts "are required to independently consider [a petition for writ of habeas corpus] as an original writ." *Ferguson v. Dormire*, 413 S.W.3d 40, 51 (Mo. Ct. App. 2013). Higher courts "are not . . . conducting appellate review of the judgment entered in [the lower court]." *Id.* For the same reason, the last-reasoned-decision rule is inapposite; the Missouri Supreme Court was not reviewing the lower courts' decisions.

merits. Rule 91.22's bar applies only to *lower courts*, not to the Missouri Supreme Court. *See McKim*, 457 S.W.3d at 840 n.15; *see, e.g.*, *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 122–23 (Mo. 2010) (granting habeas relief on successive petition raising same *Brady* claim for which petitioner had already unsuccessfully sought habeas corpus relief).[2]

In short, Rule 91.22 played no role in the Missouri Supreme Court's decision. The reason for the decision is readily apparent: The court only weeks before had decided the precise *Graham* issue raised by Petitioner in *Willbanks v. Missouri Department of Corrections*, 522 S.W.3d 238 (Mo. 2017), *cert. denied*, 138 S. Ct. 304 (2017). The Missouri Supreme Court held Mr. Bostic's petition for *four-and-a-half years* while *Willbanks* was considered, and only then summarily denied Mr. Bostic's petition.

II. MISSOURI OFFERS NO CONVINCING REASON NOT TO GRANT CERTIORARI TO RESOLVE THE CONCEDED SPLIT ON FUNCTIONAL LIFE-WITHOUT-PAROLE SENTENCES.

Apart from its unavailing invocation of a procedural bar, the State's only arguments for not granting certiorari are that further percolation should be permitted, the sentence in this case is an outlier, and the

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[2] Missouri law has no general rule barring successive petitions. *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 217 (Mo. 2001) ("Successive habeas corpus petitions are, as such, not barred."), *criticized on other grounds by State ex rel. Zinna v. Steele*, 301 S.W.3d 510 (Mo. 2010).

Court should wait until it can decide other questions along with the question posed here. None of these arguments is persuasive.

1. There is nothing to be gained from further percolation. As the State concedes, multiple courts have addressed the question presented here, and there is an entrenched split. Br. in Opp. 22. As a result, Mr. Bostic's sentence would be unconstitutional in at least 19 states, yet permissible in four. Pet. 22–23.[3] The division can be resolved only by this Court.

The State notes that the Court has previously denied certiorari in cases raising variants of this question. Br. in Opp. 24–25. But many of the cases Respondent cites involved homicides, a distinct category. The Court has not denied certiorari in any case imposing a sentence as extreme as Mr. Bostic's for any *nonhomicide* offenses. Pet. 19–22. And even if the Court might have hoped at an earlier juncture that percolation might have resolved the question, it is plain now that there is an entrenched split that only this Court can resolve. Pet. 17–22 (citing cases); Br. in Opp. 22–23 (citing cases).

2. Second, Missouri makes the remarkable claim that because Mr. Bostic's sentence is so long, it is not a "particularly helpful vehicle" for resolving the precise point at which a term-of-years sentence amounts to functional life without parole. Br. in Opp.

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[3] In addition to the cases cited and discussed in Mr. Bostic's petition, Pet. 17–23, the New Mexico Supreme Court recently joined the majority view that *Graham* forbids a term-of-years sentence that guarantees that a juvenile offender convicted of multiple nonhomicide crimes will die in prison. *Ira v. Janecka*, – P.3d –, 2018 WL 1247219, at *4–*8 (N.M. March 9, 2018).

34; *see id*. at 24–26, 29–34. But the fact that there is a question of precisely *when* a term-of-years sentence becomes the functional equivalent of life without parole does not make the question of *whether* it can *ever* do so any less worthy of certiorari. The principal split in the courts is not over when a term-of-years sentence amounts to life without parole, but whether *any* term-of-years sentence for *multiple crimes* can violate *Graham*. The Missouri Supreme Court has answered that clearly in the negative, regardless of the age at which the juvenile is scheduled to become eligible for parole. This case provides a clean vehicle to answer that critical question.

The Court has often granted certiorari in cases that do not require it to specify the precise line that has been crossed in order to establish the constitutional principle, leaving further elaboration for the future. *See, e.g.*, *United States v. Place*, 462 U.S. 696, 709–10 (1983) (holding that a 90-minute detention of luggage under *Terry v. Ohio*, 392 U.S. 1 (1968), was too long, but declining to specify the precise point at which a *Terry* stop becomes unreasonable); *United States v. Jones*, 565 U.S. 400, 429–31 (2012) (Alito, J., concurring) (maintaining that round-the-clock GPS surveillance for 28 days requires a warrant, but declining to specify the precise point at which extended surveillance of public movements requires a warrant).

Indeed, even where the Court has ultimately adopted a bright-line period of time for a particular issue, it has often initially announced a standard without setting a precise time limit, and only later imposed a precise period. *Compare Gerstein v. Pugh*, 420 U.S. 103, 123–25 (1975) (holding that judicial deter-

minations of probable clause must be prompt but declining to set precise period), *with County of Riverside v. McLaughlin*, 500 U.S. 44, 55–57 (1991) (presumptively requiring judicial determination within 48 hours of warrantless arrest); *compare Edwards v. Arizona*, 451 U.S. 477, 487 (1981) (establishing that after suspect invokes right to counsel, police may not resume questioning without counsel the next day, without setting precise period), *with Maryland v. Shatzer*, 559 U.S. 98, 110–11 (2010) (setting 14-day period).

Moreover, there is not much dispute about what amounts to a functional life-without-parole sentence. As the cases in the State's brief demonstrate, the majority of courts that have addressed the issue have concluded that denying parole until a juvenile nonhomicide offender turns 70 or higher is functional life without parole and so unconstitutional under *Graham*. Br. in Opp. 31–33. At the other extreme, courts have generally agreed that sentences under which juveniles are eligible for parole prior to age 60 are not functionally life without parole. *Id.* The real dispute is the one presented here: whether *any* term-of-years sentence for multiple nonhomicide crimes violates the Eighth Amendment.

3. Finally, the State argues that the Court should wait until a case comes along that permits it to decide, in addition to the question presented here, the separate question of whether the Eighth Amendment prohibits discretionary as well as mandatory life-without-parole sentences for juvenile *homicide* offenders. Br. in Opp. 29–30. But the latter question is analytically distinct, as the Court's current jurisprudence, establishing different rules for homicide and nonhomicide cases, illustrates. And no rule supports denying

one cert-worthy question on the ground that it might be paired in some future case with another cert-worthy question.

III. THE SENTENCE IMPOSED HERE, UNDER WHICH A JUVENILE NONHOMICIDE OFFENDER IS NOT ELIGIBLE FOR PAROLE UNTIL AGE 112, VIOLATES *GRAHAM*.

The State devotes most of its opposition not to the threshold question of whether certiorari should be granted, but to the merits. But its defense of the Missouri Supreme Court rule limiting *Graham* to formal life-without-parole sentences imposed for a single crime is unpersuasive and only underscores the propriety of review here.

In *Graham*, this Court held that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." 560 U.S. at 82. If ever a term-of-years sentence *could* constitute life without parole, it is this one. The State tries to deny the reality that this is a sentence guaranteeing Mr. Bostic will die in prison—despite the sentencing judge's admission to that effect—by variously characterizing Mr. Bostic's parole date as occurring in his "great old age," Br. in Opp. 3, "extreme old age," *id.* at 34, "very old age," *id.* at 26, or simply "old age," *id.* at i. But no euphemism can obscure the fact that Mr. Bostic "will die in prison without any meaningful opportunity to obtain release." *Graham*, 560 U.S. at 79.

1. The State contends that sentencing juvenile offenders to multiple consecutive sentences for multiple crimes is not "unusual" for Eighth Amendment

purposes. Br. in Opp. 26–27. But it cites not a single case in which a sentence as extreme as that faced by Mr. Bostic for multiple nonhomicide offenses has withstood review.

Many of the cases the State cites involve much less onerous sentences. *See* Pet. 20–21. The longest sentences it points to, in the outlier decisions of *State v. Brown*, 118 So. 3d 332, 335, 341 (La. 2013), and *Willbanks*, 522 S.W.3d at 240–42, rendered their defendants eligible for parole at ages 86 and approximately 85, respectively, more than a quarter-century short of Mr. Bostic's parole eligibility age.

The other cases the State cites involve juvenile *homicide* offenders, who this Court has held are protected only from *mandatory* life-without-parole sentences. *See, e.g.*, *State v. Ali*, 895 N.W.2d 237 (Minn. 2017), *cert. denied*, 138 S. Ct. 640 (2018); *State v. Nathan*, 522 S.W.3d 881 (Mo. 2017), *cert. denied sub nom. Willbanks v. Mo. Dep't of Corr.*, 138 S. Ct. 304 (2017).[4]

In short, the sentence imposed on Mr. Bostic, relegating him to die in prison for a pair of armed robberies in which no one was seriously injured, is not just "unusual," but practically stands alone.

2. The State next contends that its interest in deterrence in cases involving multiple offences justifies a different result than *Graham*. But a reduction in the state's ability to punish is implicated *whenever* an extreme form of punishment is forbidden by the

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[4] *State v. Nathan*, a homicide case, was consolidated with *Willbanks*, a nonhomicide case, for purposes of certiorari.

Eighth Amendment—including this Court's holdings that the death penalty, *Roper v. Simmons*, 543 U.S. 551, 553 (2005), mandatory life without parole for homicide, *Miller v. Alabama*, 567 U.S. 460, 472 (2012), and life without parole for juvenile nonhomicide offenders, *Graham*, 560 U.S. at 72, violate the Constitution.

This Court has already explained that "none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation"—is adequate to justify life without parole for juvenile nonhomicide offenders. *Graham*, 560 U.S. at 71; *id.* at 72 ("[A]ny limited deterrent effect . . . is not enough to justify the sentence."). Even under the strictures of *Graham*, sentencing judges have many years of potential incarceration available, more than enough to calibrate the severity of a sentence for deterrence purposes.

3. Finally, the State argues that it is difficult to determine when a juvenile's sentence exceeds his or her life expectancy, because life expectancy differs along demographic lines. But the U.S. Department of Health and Human Services provides readily available life expectancy data, on which lower courts have relied. *See, e.g.*, *State v. Moore*, 76 N.E.3d 1127, 1133–34 (Ohio 2016). There is no difficulty in this case in concluding that Mr. Bostic was sentenced to die in prison.[5]

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[5] Per that data, Mr. Bostic's life expectancy is 64 years old. U.S. DEP'T OF HEALTH & HUMAN SERVS., *National Vital Statistics Reports,* Vol. 66, No. 4, at 45 (2014), available at https://www.cdc.gov/nchs/data/nvsr/nvsr66/nvsr66_04.pdf.

More importantly, the Court could choose a bright-line rule considerably short of life expectancy in order to ensure that juvenile offenders have a meaningful opportunity to rejoin society and lead a fulfilled life. *Graham*, 560 U.S. at 79 ("Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope."). This Court has chosen bright lines in the past for ease of administration, and could do so here. *See*, *e.g.*, *Shatzer*, 559 U.S. at 110–11; *McLaughlin*, 500 U.S. at 55–57.

The question presented by the extreme facts of this case is whether *any* term-of-years sentence for multiple nonhomicide offenses violates the principle articulated in *Graham*. The Court might resolve that issue with or without adopting a bright line. But what is clear beyond any doubt is that there is a fundamental split on whether *any* such penalty can violate *Graham*. If any can, this sentence does. That is all the Court need decide to resolve the conflict in the first instance.

IV. SUMMARY REVERSAL IS APPROPRIATE.

The State maintains that summary reversal is not appropriate absent a showing of willful disregard of Supreme Court precedent. Br. in Opp. 34–36.

That is not the standard. The Court has often summarily reversed decisions without finding that the lower court engaged in willful disregard of this Court's precedents. *See, e.g.*, *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (per curiam); *Dunn v. Madison*, 138 S. Ct. 9 (2017) (per curiam); Steven M. Shapiro, Kenneth S. Geller, Timothy S. Bishop, Edward A. Hartnett, & Dan Himmelfarb, *Supreme Court Practice* 352 (10th

ed. 2013) ("[T]here appears to be agreement that summary disposition is appropriate to correct clearly erroneous decisions of lower courts.").

Summary reversal is appropriate here because, under *Graham*, it should be clear that a state cannot sentence a juvenile nonhomicide offender to die in prison without any opportunity for release. The judge in Mr. Bostic's case left no doubt that that is precisely what she did. She has since joined an amicus brief supporting certiorari in this very case. She has recognized her error. But only this Court can correct it.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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