Nos. 10-9646 and 10-9647

In the Supreme Court of the United States

EVAN MILLER,
Petitioner,,
v.

STATE OF ALABAMA,
Respondent.

On Writ of Certiorari to
The Alabama Court of Criminal Appeals

KUNTRELL JACKSON,
Petitioner,
v.

RAY HOBBS,
Respondent.

On Writ of Certiorari to
The Supreme Court of Arkansas

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Does imposition of a life-without-parole sentence on a fourteen-year-old child convicted of homicide violate the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishments, when the extreme rarity of such sentences in practice reflects a national consensus regarding the reduced criminal culpability of young children?

2. Does such a sentence violate the Eighth and Fourteenth Amendments when it is imposed upon a fourteen-year-old who did not personally kill the homicide victim, did not personally engage in any act of physical violence toward the victim, and was not shown even to have anticipated, let alone intended, that anyone be killed?

3. Does such a sentence violate the Eighth and Fourteenth Amendments when it is imposed upon a fourteen-year-old as a result of a mandatory sentencing scheme that categorically precludes consideration of the offender's young age or other mitigating circumstances?

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BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF THE PETITIONERS

INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association ("ABA"), as amicus curiae, respectfully submits this brief in support of the Petitioners. The ABA requests this Court to reverse the decisions below and extend its decision in Graham v. Florida, 130 S. Ct. 2011 (2010), to hold that a sentence of life imprisonment without the possibility of parole for a juvenile offender convicted of homicide is impermissible under the Eighth and Fourteenth Amendments of the United States Constitution.

The ABA is the largest voluntary professional membership organization and its nearly 400,000 members constitute the leading association of legal professionals in the United States. The ABA's members come from each of the fifty states, the District of Columbia, and the U.S. Territories. Its members include judges, prosecutors, defense lawyers, lawyers in private practice, as well as those in corporations, non-profit

[1] Pursuant to Rule 37.6, amicus curiae certifies that no counsel for a party authorized this brief in whole or in part, and that no such counsel or party, other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

organizations, and government agencies.[2] The ABA also includes lawyers involved in correctional facilities and parole boards, as well as legislators, law professors, and law students. Since its inception, this wide cross-section of legal professionals has sought to "[w]ork for just laws, including human rights, and a fair legal process."[3]

The ABA, through its Criminal Law Section, has always taken an active role in advocating for the improvement of the criminal justice system, with a special interest in the improvement of the juvenile justice system through its Juvenile Justice Committee. This committee is composed of stakeholders participating in the juvenile justice system, including both adult and juvenile judges, and lawyers involved in all aspects of the issues facing children in the juvenile justice process.

The ABA's research, investigation and experience of its members, along with its study of developments in juvenile justice law, and scientific and psychological studies regarding the differences between children and adults, has informed the ABA's continuing development of ABA policies relating to the sentencing of children. In addition,

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[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[3] ABA Mission and Association Goals, available at http://www.americanbar.org/utility/about_the_aba/association_goals.html (last visited Jan. 11, 2012).

the ABA devoted over nine years working with the Institute of Judicial Administration ("IJA") on the development of standards for the administration of juvenile justice, which culminated in the publication in 1980 of the IJA/ABA Juvenile Justice Standards and republication in 1996.[4]

The ABA drew upon this varied and rich experience in its amicus curiae briefs in Graham, 130 S. Ct. 2011 (2010), and Roper v. Simmons, 543 U.S. 551 (2005), in which the ABA discussed its sentencing policies that reflect factors rendering juvenile offenders less morally culpable, and more capable of rehabilitation than adults convicted of the same crimes, including homicide. See ABA Briefs in Graham, 2009 WL2197339 and Roper, 2004 WL 1617399, available at

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[4] Institute of Judicial Administration-American Bar Association, Juvenile Justice Standards, Annotated: A Balanced Approach (Robert E. Shepherd, Ed. 1996), available at https://www.ncjrs.gov/pdffiles1/ojjdp/166773.pdf (last visited Jan. 12, 2012). They resulted from an exhaustive historical, legal and criminological study of society's response to juvenile crime and were developed through the efforts of broadly representative task forces made up of juvenile judges, prosecutors, defense lawyers, law professors, experts and public groups that have an interest in the juvenile justice system. They were adopted as ABA policy by the ABA House of Delegates ("HOD"), which is composed of more than 500 representatives from states and territories, state and local bar associations, affiliated organizations, ABA sections and divisions, and the Attorney General of the United States, among others. See House of Delegates - General Information, American Bar Association, http://www.americanbar.org/groups/leadership/delegates.html (last visited 1/9/12).

http://www.abanet.org/amicus/briefs98-03.html (last visited Jan. 11, 2012).

SUMMARY OF ARGUMENT

The ABA respectfully submits that while this Court limited its holding in Graham to juveniles convicted of non-homicide offenses, every characteristic and difference between children and adults identified in Roper and Graham that supports this Court's conclusion that juveniles are less morally culpable and have a greater capacity for rehabilitation than adults also supports an extension of Graham's holding to all juveniles regardless of whether they were convicted of homicide. Similarly, Graham's holding that the standard penological justifications of sentencing are not served by juvenile life without parole ("JLWOP") sentences applies with equal force to juveniles convicted of homicide. Moreover, the exclusion of juveniles convicted of homicide from the protection of Graham does not comport with the "evolving standards of decency that mark the progress of a maturing society." Roper, 543 U.S. at 560-61. Each of these arguments for extending Graham to juveniles convicted of homicide is supported by the ABA's research, investigation and the experience of its members in formulating, adopting and periodically reviewing the ABA's Juvenile Justice Standards, which specifically include standards for sentencing.

Moreover, the ABA urges a conclusion that a JLWOP sentence is unconstitutional even for juveniles convicted of homicide crimes based on the

fact that neither public safety nor penal objectives would be compromised by allowing the chance for parole. Further, consideration should be given to the overwhelming opposition to JLWOP demonstrated by international authorities.

While the Petitioners may focus on the constitutionality of JLWOP as applied to fourteen year old children under particular circumstances, the ABA requests, for the reasons set forth herein and consistent with the consensus of medical and behavioral scientists as to a child's brain development, that this Court hold categorically that a JLWOP sentence for any child under the age of eighteen for any crime is unconstitutional.

The ABA is not asserting that all juveniles should be entitled to parole, but only that they should not be denied the opportunity to be considered for parole before they die in prison. The need for such protection for juvenile offenders is made more compelling by the fact that many juveniles sentenced to JLWOP, including the Petitioners here, are tried as adults before trial judges with no discretion to sentence them to anything but life without the possibility of parole. Thus, many trial judges are stripped of any opportunity to consider the backgrounds, developmental differences or other mitigating factors of youth that this Court, the scientific community, and the ABA have recognized.

ARGUMENT

JLWOP CATEGORICALLY CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

A. THE ABA'S INVESTIGATION, RESEARCH AND THE EXPERIENCE OF ITS MEMBERS SUPPORT A REJECTION OF JLWOP SENTENCES.

This Court has adopted categorical rules prohibiting the death penalty for defendants who committed their crimes before age 18, Roper, 543 U.S. 551, and JLWOP for defendants convicted of non-homicide crimes committed before age 18, Graham, 130 S. Ct. 2011. This Court has recognized "the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." Roper, 543 U.S. at 560-61 (citing Trop v. Dulles, 356 U.S. 86. at 100-01 (plurality opinion)). As the Court held, "[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change." Graham, 130 S. Ct. at 2021 (citations omitted).

Consistent with this Court's conclusions in Roper and Graham, and based on the research and guidance provided by its members active in the juvenile justice system, the ABA maintains that JLWOP sentences cannot comport with the the lesser culpability of juvenile offenders, and

therefore, should not be permissible regardless of the crime, including homicide. While recognizing that some juvenile offenders deserve severe punishment for their crimes, the ABA nevertheless concluded in 1980 that when they are compared to adults, their reduced capacity – in moral judgment, self restraint and the ability to resist the influence of others, among other factors – renders them less morally culpable than adults. See, e.g., IJA/ABA Juvenile Justice Standards Relating to the Transfer Between Courts at 3 (1980), available at https://www.ncjrs.gov/pdffiles1/ojjdp/82487.pdf (last visited Jan. 11, 2012). That is, children must be treated differently than adults in our justice system:

> The unifying thread to all twenty-three volumes was that we – the adult world – had the right to judge and punish youthful wrongdoers, but we also had responsibilities for adjudicating children fairly, for intervening in families in ways that would be salutary, not punitive and destructive, and for treating youths who must be removed from society in a manner which did not derogate their humanity and guarantee them a pass to the nearest penitentiary.[5]

Subsequently, in 1997, in response to a growing number of state statutes and policies that allowed the transfer for prosecution and sentencing

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[5] Juvenile Justice Standards, supra note 4, at xii.

of child offenders to the adult criminal justice system, the ABA created its Task Force on Youth in the Criminal Justice System. In 2001, this Task Force published its report, ABA, Youth in the Criminal Justice System: Guidelines for Policymakers and Practitioners (2001). In formally adopting the Task Force's conclusions in 2002, the ABA recognized, inter alia, that (a) "youth are developmentally different from adults and these differences should be taken into account", and (b) "judges should consider the individual characteristics of the youth during sentencing." [6]

Following this Court's affirmation of these principles in Roper, 543 U.S. 551, and an assessment of studies from the behavioral scientific community, the ABA adopted in February 2008 an additional policy specifically addressing sentence mitigation for juvenile offenders. ABA, 2008 Report with Recommendation #105C at 2 (Policy adopted Feb. 2008) [hereinafter the "Report"].[7] As stated in the Report at 2, "The ABA's overall approach to juvenile justice policies has been and continues to be to strongly protect the rights of youthful offenders within all legal processes while insuring public safety."

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[6] ABA, Report with Recommendation #101D (Policy adopted Feb. 2002), available at http://www.americanbar.org/content/dam/aba/uncategorized/criminal_justice/jj101d.authcheckdam.pdf (last visited Jan. 11, 2012).

[7] Available at http://www2.americanbar.org/sections/criminaljustice/CR200000/Pages/default.aspx (last visited Jan. 11, 2012).

As noted in the Report at 6, the ABA's opposition to JLWOP sentences dates back to the ABA's adoption in 1991 of a policy that endorsed the United Nations Convention on the Rights of the Child. With the ABA's long history of work in juvenile justice as its basis, the Report concluded that sentences for juvenile offenders must recognize that, no matter how adult-like their offenses, they are not adults. Id. at 6.[8]

As this Court concluded in Roper and again in Graham, juvenile offenders have lesser culpability than adult offenders due to the typical behavioral characteristics inherent in adolescence. Roper, 543 U.S. at 569-70; Graham, 130 S.Ct. at 2026.

Informed by its history of working in juvenile justice and by input from the medical and behavioral scientists, the ABA similarly has concluded that: (1) sentences for juveniles should generally be less punitive than those for adults who have committed comparable offenses; and (2) sentences for juveniles should recognize the key mitigating considerations relevant to their youthful status, including those identified by the Court in Roper, 543 U.S. at 567-70, as well as the seriousness of the offense and the delinquent and

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[8] The ABA has continued to adopt policies based on the characteristics of youth, most recently the ABA Report with Recommendation #102B (Policy adopted Feb. 2010), available at http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/midyear/daily_journal/102B.authcheckdam.pdf (last visited Jan. 12, 2012), urging the development of simplified Miranda warnings for juveniles, in light of their more limited verbal comprehension levels.

criminal history of the juvenile; and (3) sentences even for those convicted of the worst crimes, including homicide, cannot be based on a prediction of what kind of adult the juvenile may become. Accordingly, and as has been the ABA's position since 1991, a JLWOP sentence cannot be supported for any juvenile. Rather, juveniles should be eligible for parole or other early release consideration at a reasonable point during their sentences and, if denied, should be reconsidered for parole or early release periodically thereafter.[9]

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[9] ABA, Report with Recommendation #105C, at 9 (Policy adopted Feb. 2008), available at http://www.americanbar.org/content/dam/aba/migrated/leadership/2008/midyear/updated_reports/hundredfivec.authcheckdam.doc (last visited Jan. 11, 2012) (relying, inter alia, upon research including MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, Issue Brief 3: Less Guilty by Reason of Adolescence (2006), available at http://www.adjj.org/downloads/6093issue_brief_3.pdf (last visited Jan. 11, 2012); Elizabeth Cauffman & Laurence Steinberg, (Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable Than Adults, 18 Behav. Sci. & L. 742 (2000); William Gardner and Janna Herman, Adolescent's AIDS Risk taking: A Rational Choice Perspective, in Adolescents in the AIDS Epidemic 17, 25-26 (William Gardner, et al. eds.; 1990); Marty Beyer, Recognizing the Child in the Delinquent, 7 Kentucky Ch. Rts. J. 16 (Summer 1999); Meghan M. Deerin, The Teen Brain Theory, Chicago Tribune, Aug. 12, 2001, at C1; Catherine C. Lewis, How Adolescents Approach Decisions: Changes over Grades Seven to Twelve and Policy Implications, 52 Child Development 538, 541-42 (1981); Thomas Grisso, What We Know About Youth's Capacities, in Youth on Trial: A Developmental Perspective on Juvenile Justice 267 (Thomas Grisso and Robert G. Schwartz, eds., 2000); Kim Taylor-Thompson, States of Mind/States of Development, 14 Stan. L. & Pol'y Rev. 153, 155 nn 107-108 (2003); Marty Beyer, Immaturity, Culpability & Competency

B. THE CHARACTERISTICS OF CHILD OFFENDERS RENDER JLWOP INAPPROPRIATE.

The Court in Roper and Graham, in declaring unconstitutional the death penalty for juveniles and JLWOP for non-homicide offenses, respectively, recognized that juveniles have lessened culpability and are thus less deserving of the most severe punishments for many reasons having no bearing on the juvenile's crime.[10] As compared to adults, juveniles have a lack of maturity, an underdeveloped sense of responsibility, are more vulnerable to negative influences and peer pressures, have less control over their surroundings, and their characters are not as well formed. Graham, 130 S. Ct. at 2021; Roper, 543 U.S. at 569-70. Thus, there is "sufficient evidence that today our society views juveniles . . . as 'categorically less culpable than the average criminal.'" Roper, 543 U.S. at 567.

These characteristics of children mean that even a homicide committed by a juvenile is not

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in Juveniles: A Study of 17 Cases, 15 Summary of Criminal Justice 27 (2000).

[10] This Court recognized that "defendants who do not kill, intend to kill or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." Graham, 130 S. Ct. at 2027 (citations omitted). However, the ABA asserts that every characteristic and difference between children and adults identified in Roper and Graham, and every other consideration supporting the holdings in those cases, support a ruling extending the holding of Graham to all juveniles regardless of whether they were convicted of homicide.

evidence of an irretrievably depraved character. As this Court concluded:

> From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for the greater possibility exists that a minor's character deficiencies will be reformed. Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient: as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.

Roper, 543 U.S. at 569-70 (citations omitted).

Likewise, this Court concluded that juveniles are more capable of change than adults, and their actions are less likely to be evidence of irretrievably depraved character. Graham, at 2026, citing Roper, 543 U.S. at 570. "Maturity can lead to that considered reflection which is the foundation for remorse, renewal and rehabilitation." Graham, 130 S. Ct. at 2032. Accordingly, juvenile offenders cannot be classified among the worst offenders. Id. at 2038, citing Roper, 573 U.S. at 569.

In considering a juvenile offender's personal responsibility and moral guilt, and the ensuing consequences for the sentencing of juveniles, this Court has concluded that children in the criminal justice system are more vulnerable to coercion, and more likely to falsely confess to crimes they did not commit than are adults. J.D.B. v. North Carolina,

131 S.Ct. 2394, 2403-2404 (2011).[11] The ABA maintains that, based on its study, research and the experience of its members, two other observations should be considered as well:

First, juveniles are less capable than adults of communicating with and giving meaningful assistance to their counsel, their limited appreciation of long-term consequences impairs their ability to make appropriate decisions regarding plea bargains and other aspects of their legal strategy, and they lack the basic skills to assist them in identifying exculpatory facts and effectively communicating them to their counsel. Marty Beyer, Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases, 15 Crim. Just. 27, 28 (Summer 2000).

Second, "in eleven out of the seventeen years between 1985 and 2001, juveniles convicted of murder in the United States were more likely to enter prison with a life without parole sentence than adult murder offenders. Even when considering murder offenders sentenced to either life without parole or death sentences, in four of those years, children still were more likely than adults to receive one of those two most punitive sentences." Human Rights Watch & Amnesty Int'l, The Rest of Their Lives: Life Without Parole for Child Offenders in the United States, 2 (2005) available at http://www.amnesty.org/en/library

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11 Samuel Gross, et al., Exonerations in the United States, 1989 through 2003, 95 J. Crim. L. & Criminology 523, 545 (2004) (concluding that 42% of the juveniles convicted during that period falsely confessed to crimes they did not commit).

/info/AMR51/162/2005/en (last visited Jan. 11, 2012).[12] Further, minority juveniles are far more likely to be sentenced to life without possibility of parole than their non-minority counterparts. Id.

The foregoing observations underscore the need for safeguards, including the possibility of parole, as potential means to alleviate their harsh consequences and to give some opportunity for the exercise of some discretion regarding a juvenile before he or she dies in prison. See ABA Report with Recommendation #101D, supra note 7, at ¶6 ("judges should consider the individual characteristics of the youth during sentencing").

Many juveniles sentenced to JLWOP, including the Petitioners here, are tried as adults and the relevant statutes only permitted the adult sentences of either death or life without the possibility of parole.[13] As Roper eliminated the

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[12] "On its face, this data suggests that states have often been more punitive towards children who commit murder than adults. At the very least, it suggests age has not been much of a mitigating factor in the sentencing of youth convicted of murder." Amnesty International & Human Rights Watch, The Rest of Their Lives: Life Without Parole for Child Offenders in the United States at 33. These statistics are even more troubling because in the period from 1980 to 2008, just 11.1% of homicide offenders were age 17 and younger. Alexia Cooper and Erica L. Smith, U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Homicide Trends in the United States, 1980-2008 (Nov. 2011), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/htus8008.pdf (last visited Jan. 11, 2012). The ABA questions whether the homicides these children were involved in warranted harsher punishment than the 89% committed by adults.

[13] See Ark. Code 5-10-101(c)(1) and Ala. Code 13A-5-39(1).

death sentence for juveniles, the trial judge had only one "option" – life without parole. Thus, these statutory schemes deprived these judges of any discretion whatsoever to consider the backgrounds and mental development of these children in the sentencing process, or any other mitigating factors associated with young offenders, and, the ABA asserts, should be deemed to be contrary to the Court's Roper and Graham decisions. This lack of discretion is exacerbated by the increasing frequency with which children since the 1970s have been transferred to or tried in the adult criminal justice system. Patrick Griffin et al., Dept. of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, Trying Juveniles as Adults: An Analysis of state Transfer Laws and Reporting 8-9 (Sept. 2011), available at https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf (last visited Jan. 11, 2012).[14]

JLWOP is the second most severe penalty permitted by law – next to death. Graham, 130 S.Ct. at 2016 citing Harmelin v. Michigan, 501 U.S. 957, 1001 (J. Kennedy, J., concurring). Indeed, a

[14] Transfer laws generally fall into three basic categories. First, waiver laws allow juvenile courts to waive jurisdiction on a case by case basis. Second, prosecutors are often vested with discretion, sometimes without formal standards, in deciding whether a prosecution should be brought in juvenile or criminal court. Third, statutory exclusion laws grant criminal courts exclusive jurisdiction over certain classes of cases involving juvenile offenders, thus bypassing the juvenile system altogether. Id. at 2. Statutory and prosecutorial discretion laws proliferated from the 1970s to 2000, and have changed little since then. Id. at 8-9.

sentence of JLWOP "share[s] some characteristics with death sentences...the sentence alters the offender's life by a forfeiture that is irrevocable." Graham, at 2027, citing Naovarath v. State, 105 Nev. 525, 526 (1989) A JLWOP sentence "'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 child], he will remain in prison for the rest of his days.'" Id.

The ABA submits that the research, experiences of its members, and informed consideration that provided the basis for the IJA/ABA Juvenile Justice Standards and the ABA's policies, as well as behavioral research and studies, reinforce the fact that the transient characteristics that make juveniles less morally culpable and more likely to mature and reform, along with the severe nature of the sentence – death in prison – leads only to a conclusion that a JLWOP sentence should be categorically unconstitutional, even when the juvenile is convicted of homicide.[15]

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[15] Lawrence Steinberg, A Behavioral Scientist Looks At The Science Of Adolescent Brain Development, 72 Brain and Cognition 160, 162 (2010) ("From this perspective, middle adolescence (roughly 14-17) should be a period of especially heightened vulnerability to risky behavior, because sensation-seeking is high and self-regulation is still immature. And in fact, many risk behaviors follow this pattern, including unprotected sex, criminal behavior, attempted suicide, and reckless driving."); Sarah-Jayne Blakemore, Imaging Brain Development: The Adolescent Brain, NeuroImage, Dec. 8, 2011, at 8 [Epub ahead of print] ("The plentiful data that consistently paint a picture of the adolescent brain as relatively immature might speak against the relatively young

This Court has distinguished between the legal rights, protections and restrictions afforded to or imposed on children as compared to adults in drawing the line at the age of 18. J.D.B., 131 S. Ct. at 2403-04; Graham, 130 S. Ct. at 2030; Roper, 543 U.S. at 574. The ABA submits that the same distinction should be made here, in declaring JLWOP unconstitutional for all defendants who committed crimes as juveniles.

C. NONE OF THE STANDARD CRIMINAL JUSTICE SENTENCING THEORIES ARE SERVED BY JLWOP.

This Court recognized in Roper and Graham that transient characteristics of youth mean that none of the standard penological justifications of sentencing – retribution, deterrence, incapacitation or rehabilitation – were served by death sentences for juveniles or JLWOP for juveniles convicted of non-homicide crimes. Roper, 543 U.S. 551; Graham, 130 S. Ct. 2011. The ABA maintains that the principles recognized in Roper and Graham apply with equal force to JLWOP sentences for children convicted of homicide.

This Court recognized that the reduced moral culpability of juvenile offenders means that "the case for retribution is not as strong with a minor as with an adult." Graham, 130 S.Ct. at 2028, citing Roper, 543 U.S. at 571; *see* also Roper at 571. ("Retribution is not proportional if the law's most severe penalty is imposed on one whose

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age of criminal responsibility and harsh sentences for adolescents.").

culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.")

Likewise, "[d]eterrence does not . . . justify the sentence [because] the same characteristics that render juveniles less culpable than adults suggest . . that juveniles will be less susceptible to deterrence." Graham, 130 S. Ct. at 2028-9. A juvenile's lack of maturity and propensity for "impetuous and ill-considered actions and decisions" render them "less likely to take a possible punishment into consideration when making decisions." Id.; see also, Roper, 543 U.S. at 571 ("the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.") (citing Harmelin, 501 U.S. at 998-99 (1991) (Kennedy, J., concurring)).[16]

The ABA respectfully asserts that this Court's conclusion – that JLWOP for crimes other than homicide is not justified without the dubious finding that a child is "incorrigible" and not capable

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[16] Studies indicate that there appears to be no significant difference in deterrence between a juvenile death penalty and JLWOP. See, e.g., MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, Issue Brief 3: Less Guilty by Reason of Adolescence (2006), available at http://www.adjj.org/downloads/6093issue_brief_3.pdf (last visited Jan. 11, 2012) (concluding that juveniles' "lack of foresight, along with their tendency to pay more attention to immediate gratification than to long-term consequences, are among the factors that may lead them to make bad decisions").

of reform, Graham, 130 S. Ct. at 2029 – applies with equal force to juveniles convicted of homicides. Likewise, while this Court recognized that the penological goal of incapacitation is served when a juvenile may be a threat to society, the Court also observed that because "the signature qualities of youth are transient," Roper, 543 U.S. at 570 (citing Johnson v. Texas, 509 U.S. 350, 368 (1993)), the juvenile's continued incapacitation throughout adulthood and into old age without an opportunity for reevaluation, is not justified. See Roper, 543 U.S. at 573 ("It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects . . . transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption"). The ABA asserts that the analysis should be no different for juveniles convicted of homicide.

Finally, the Court's conclusion that a sentence of JLWOP for crimes other than homicide cannot be justified by the goal of rehabilitation, Graham, 130 S.Ct. at 2029-30, applies with equal force to juveniles convicted of homicide. As stated by Justice Marshall in his dissent in Harmelin, 501 U.S. at 1028, a sentence of life imprisonment without the possibility of parole "does not even purport to serve a rehabilitative function...." Id. (quoting Furman v. Georgia, 408 U.S. 238, 307 (1972) (Stewart, J., concurring)).

"A legitimate punishment must further at least one of these goals." Ewing v. California, 538 U.S. 11, 25 (2003); Harmelin, 501 U.S at 999 (Kennedy, J., concurring in part and concurring in judgment). As stated in Coker v. Georgia, 433 U.S.

584, 592 (1977), the Eighth Amendment bars punishment that "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." JLWOP fails on both counts.

D. NEITHER PUBLIC SAFETY NOR PENAL OBJECTIVES WOULD BE COMPROMISED BY ALLOWING THE CHANCE FOR PAROLE.

Public safety would not be compromised by giving the right merely to be considered for parole to those who were children when they committed homicide. Indeed, public safety has not been compromised by giving 14 parole hearings to Sirhan Sirhan[17] and 11 parole hearings to Charles Manson (with another scheduled for 2012)[18], both adults when they committed murder. "Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." Graham, 130 S. Ct. at 2030. However, the Eighth Amendment "forbid[s] States from making the judgment at the outset that [juveniles convicted of nonhomicide crimes] never will be fit to reenter society." Id. The ABA asserts that the same

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[17] Parole Denied for Sirhan Sirhan, CDCR Today, March 2, 2011, http://cdcrtoday.blogspot.com/2011/03/parole-denied-for-sirhan-sirhan.html (last visited Jan. 11, 2012)

[18] Parole Denied for Charles Manson, CDCR Today, May 23, 2007, http://cdcrtoday.blogspot.com/2007/05/parole-denied-for-charles-manson.html (last visited Jan. 11, 2012).

analysis should be applied to juveniles convicted of homicide.

The parole process has safeguards to protect the public, as well as recognized law enforcement and rehabilitative functions.[19] Thus, neither the public safety nor the objectives of the penal system would be compromised by allowing juvenile offenders the chance to be considered for parole.

Parole involves significant checks to protect the public. Years may pass before an offender becomes eligible for parole consideration.[20] Parole boards consider many factors in making parole recommendations, including the seriousness of the offense, the amount of time served, the offender's age, criminal history and prison behavior; participation in prison-based educational, vocational or rehabilitation programs; counseling reports, psychological evaluations, and the viability

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[19] See e.g. Greenholtz v. Inmates of the Nebraska Penal and Corr. Complex, 442 U.S. 1, 13 (1979) (the "ultimate purpose of parole . . . is a component of the long-range objective of rehabilitation"); PA Bd. of Prob. and Parole v. Scott, 524 U.S. 357, 367 (1998) (explaining that "one of the purposes of parole is to reduce the costs of criminal punishment while maintaining a degree of supervision over the parolee"); Bruce Zucker, A Triumph for Gideon: The Evolution of the Right to Counsel for California's Parolees in Parole Revocation Proceedings, 33 W. St. U. L. Rev. 1, 3 (2005-2006) (explaining that parole protects society through restrictions, reintegration services and by encouraging inmates to "conform their behavior . . . under the threat of delaying or forfeiting early release from custody").

[20] See, e.g., Ky. Rev. Stat. Ann. § 532.030 (2008) (25 years for capital offense); Mich. Comp. Laws § 791.234 (2009) (10 years before parole consideration for first degree murder or life sentence).

of parole plans, including how the inmate would live and support himself if released.[21] Some states have imposed more stringent approval requirements for certain offenders.[22] Most inmates eligible for parole consideration are not, in fact, granted parole.[23] Offenders whose requests for parole are rejected must wait a certain period of time, sometimes years, before they can be considered again.[24] Some states authorize the governor to reverse a decision granting parole, or impose delays or additional conditions on the terms

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[21] See, e.g., Cal. Penal Code § 3041(a) (2005); Cal. Code Regs, tit. 15 § 2281 (2009); Cal. Code Regs tit.15 § 2402 (2009).

[22] See, e.g., Michigan Dept. of Corrections, The Parole Consideration Process, http://www.michigan.gov/corrections/0,4551,7-119-1384-22909--,00.html (last visited Jan. 11, 2012) (requiring majority of all ten parole board members, rather than just the three member panel, must support parole for Michigan prisoners serving life sentences.)

[23] See Thomas P. Bonczar, Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Characteristics of State Parole Supervising Agencies, 2006, (Rev. Mar. 16, 2009), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/cspsa06.pdf (last visited Jan. 11, 2012) (reporting 54% of adult parole inmates in 15 states were denied request for release on parole).

[24] Massachusetts, for example, provides that if parole is not granted at the initial parole release hearing, a parole review hearing occurs for most inmates annually thereafter. Others sentenced as habitual criminals, committed as sexually dangerous persons or serving life sentences require subsequent hearings 2, 3 and 5 years, respectively, after the initial parole release hearing. 120 Mass. Code Regs. 301.01 (2009).

of parole as an additional check to ensure that public safety is not compromised.[25]

States also impose conditions and restrictions on parolees. States may require the offenders to complete in-prison rehabilitation programs before releasing them on parole.[26] Once released, parolees are subject to any number of restrictions and conditions.

Finally, parole boards retain the right to revoke parole for the violation of any condition imposed, and many parole revocations result not from the commission of another crime, but from a failure to comply with a procedural requirement.[27] A state's ability to revoke parole based on even a procedural violation of parole conditions often is far easier, and requires a far lower burden of proof, than an adjudication on the underlying offense.[28]

The ABA is not asserting that all juveniles serving JLWOP sentences for homicide will establish, at some point in their sentence, that they are entitled to parole. The ABA is asserting, however, that they should not be denied that opportunity because, as children, they were given the second most severe penalty permitted by law.

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[25] See, e.g., California Dept. of Corrections, Life Parole Process, http://www.cdcr.ca.gov/parole/ (follow link to "Lifer Parole Process") (last visited Jan. 11, 2012).

[26] See, e.g., 37 Tex. Admin. Code § 145.2 (2009).

[27] See generally, Wendy Heller, Note, Poverty: The Most Challenging Condition of Prison Release, 13 Geo. J. on Poverty & Pol'y 219 (Summer 2006).

[28] See Alaska Admin. Code tit. 22, §20.485 (2009) (preponderance of the evidence standard sufficient to authorize decision to revoke parole).

Graham, 130 S. Ct. at 2016, citing Harmelin, 501 U.S. at 1001 (Kennedy, J., concurring).

E. INTERNATIONAL AUTHORITIES DEMONSTRATE OVERWHELMING OPPOSITION TO JLWOP.

This Court has "treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it." Graham, 130 S.Ct. at 2034.

A recent Amnesty International Report confirms that "[i]n the face of a virtual universal legal and moral consensus that [JLWOP] should never be used for children, the USA is the only country in the world imposing this sentence." Amnesty Int'l; This is Where I'm Going to Die: Children Facing Life Imprisonment Without the Possibility of Release in the USA at 1 (March 2011) (emphasis added).[29] Further, an array of international bodies oppose JLWOP.[30]

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[29] See also Graham, 130 S. Ct. at 2033, citing, inter alia, Amnesty Int'l., Human Rights Watch, The Rest of Their Lives: Life Without Parole for Child Offenders in the United States 106, n. 322 (2005) (only the United States and Israel impose JLWOP for homicides, but noting that the Israeli parole procedure was unclear).

[30] See e.g. United Nations Convention on the Rights of the Child, , Sept. 2, 1990, 1577 U.N.T.S. 3, Art. 37(a) [hereinafter "CRC"]; id. at Art. 40.1 (supporting "the desirability of

As this Court held, "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." Roper, 543 U.S. at 578.

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promoting the child's reintegration and the child's assuming a constructive role in society."); Human Rights Watch & Amnesty Int'l, The Rest of Their Lives: Life Without Parole for Child Offenders in the United States at 95 (identifying the United States and Somalia as the two countries that have not ratified the CRC, although both have signed it); Hussain v. United Kingdom, 22 EHRR 1, ¶ 53 (1996) (citing European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov, 4, 1950, CETS No. 5, available at http://www.unhcr.org/refworld/docid/3ae6b3b04.html (last visited Jan. 11, 2012) (citing European Court of Human Rights' declaration that JLWOP is illegal under Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms); Human Rights Watch, World Report 107 (2005), available at http://www.hrw.org/legacy/wr2k5/wr2005.pdf (last visited Jan. 11, 2012) (reporting the Commission on Human Rights' April 2004 resolution urging states to abolish JLWOP); Connie De La Vega & Michelle Leighton, Sentencing Our Children to Die in Prison, 42 U.S.F. L. Rev. 983, 989 (2008) (citing Rights of the Child, G.A., Res. 61/146, ¶ 31(a), U.N. Doc. A/Res/61/146 (Dec. 19, 2006)) (reporting 185-1 U.N. General Assembly vote, with the United States the lone dissenter, calling upon nations to abolish the juvenile death penalty and JLWOP); Committee on Elimination of Racial Discrimination, Concluding Observations of the United States, ¶21, U.N. Doc. CERD/C/USA/CO/6 (Feb. 6, 2008) (reporting the U.N. Committee on the Elimination of Racial Discrimination determined that the racially disproportionate impact of JLWOP in the United States warranted recommending abolishing the sentence).

CONCLUSION

For the reasons stated above, amicus curiae the American Bar Association requests that the judgments below be reversed.

Respectfully submitted,

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