The Florida Senate

COMMITTEE MEETING EXPANDED AGENDA

CRIMINAL JUSTICE Senator Evers, Chair Senator Dean, Vice Chair

MEETING DATE: Tuesday, January 11, 2011

TIME: 1:45 —3:45 p.m.

PLACE: Mallory Horne Committee Room, 37 Senate Office Building

MEMBERS: Senator Evers, Chair; Senator Dean, Vice Chair; Senators Dockery, Margolis, and Smith

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION					
1	Presentations by local sheriffs on the sale and use of synthetic marijuana.							
2	SB 204 Wise (Identical H 39)	Controlled Substances; Defines the term "homologue" for purposes of the Florida Comprehensive Drug Abuse Prevention and Control Act. Includes certain hallucinogenic substances on the list of controlled substances in Schedule I. Reenacts specified provisions relating to prohibited acts and penalties regarding controlled substances and the offense severity chart of the Criminal Punishment Code, etc. CJ 01/11/2011 HR JU BC						
3	Discussion and testimony on options for complying with the United States Supreme Court decision (Graham v. Florida) relating to sentences of life-without-parole for juveniles convicted of non-homicide offenses.							
4	Presentation by Tax Watch on crim	inal and juvenile justice reform.						

The Florida Senate BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

	Prepared By:	The Professional S	taff of the Criminal	Justice Commit	tee			
BILL:	SB 204							
INTRODUCER:	Senator Wise							
SUBJECT:	Controlled Substa	nces						
DATE:	January 4, 2011	REVISED:						
ANAL	YST ST.	AFF DIRECTOR	REFERENCE		ACTION			
. Erickson	Can	non	CJ	Pre-meeting				
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I. Summary:

The bill schedules several synthetic cannabinoids or synthetic cannabinoid-mimicking compounds in Schedule I of Florida's controlled substance schedules. The U.S. Drug Enforcement Administration (DEA) recently indicated its intent to temporarily place these substances in Schedule I of the federal controlled substance schedules. The effect of the federal scheduling is that the substances can no longer be legally sold by retailers and possession and sale of these substances would be a federal crime. The effect of Florida scheduling is that arrests and prosecutions under Florida law may be made for possession and sale of these substances.

This bill substantially amends sections 893.02 and 893.03, Florida Statutes. This bill reenacts sections 893.13(1), (2), (4), and(5), 893.135(1)(1), and 921.0022(3)(b), (c), and (e), Florida Statutes, to incorporate the amendment to section 893.03, Florida Statutes, in references thereto.

II. Present Situation:

The DEA has provided the following information regarding synthetic cannabinoids (often referred to by the slang terms "K2" or "Spice"):

Synthetic cannabinoids have been developed over the last 30 years for research purposes to investigate the cannabinoid system. No legitimate non-research uses have been identified for these synthetic cannabinoids. They have not been approved by the U.S.

¹ "Schedules of Controlled Substances: Temporary Placement of Five Synthetic Cannabinoids Into Schedule I," Federal Register, Vol. 75, No. 226, November 24, 2010 (http://frwebgate3.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=A2yMds/0/2/0&WAISaction=retrieve) (last accessed on December 23, 2010). All information for this analysis is from this source unless otherwise indicated.

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> Food and Drug Administration for human consumption. These THC-like synthetic cannabinoids, 1-pentyl-3-(1-naphthoyl)indole (JWH-018), 1-butyl-3-(1-naphthoyl)indole (JWH-073), 1-[2-(4-morpholinyl)ethyl]-3-(1- naphthoyl)indole (JWH-200), 5-(1,1dimethylheptyl)-2-[(1R,3S)-3- hydroxycyclohexyl]-phenol (CP-47,497), and 5-(1,1dimethyloctyl)-2- [(1R,3S)-3-hydroxycyclohexyl]-phenol (cannabicyclohexanol; CP-47,497 C8 homologue), are so termed for their THC-like pharmacological properties. Though they have similar properties to delta-9- tetrahydrocannabinol (THC) found in marijuana and have been found to be more potent than THC in animal studies. Numerous herbal products have been analyzed and JWH-073, JWH-018, JWH-200, CP-47,497, and cannabicyclohexanol have been identified in varying mixture profiles and amounts spiked on plant material.

The DEA found that these substances have "a high potential for abuse, no currently accepted medical use in treatment in the United States and are not safe for use under medical supervision." Based on the DEA findings, these substances appear to meet the criteria for scheduling under Schedule 1 under both federal and Florida law. The DEA has indicated its intent to temporarily place these substances in Schedule I of the federal controlled substance schedules.³

Currently, these substances are not controlled substances under Florida law and possession and sale offenses are not generally applicable, though it has been reported that the Polk County Sheriff's Office recently arrested several retailers for violation of Florida's imitation controlled substance statute, s. 817.564⁴. It remains to be seen whether convictions will occur under these statutes, and if they do occur, whether they will be upheld if subject to appellate challenge.

The DEA indicated that "[t]he emergence of these synthetic cannabinoids represents a recent phenomenon in the designer drug market." "The popularity of these THC-like synthetic cannabinoids has greatly increased in the United States and they are being abused for their psychoactive properties." The substances are "[p]rimarily found laced on plant material" and "are also being abused alone as self-reported on Internet discussion boards." "The most common route of administration of these synthetic cannabinoids is by smoking, using a pipe, water pipe, or rolling the drug-spiked plant material in cigarette papers."

The DEA stated that "products containing these THC-like synthetic cannabinoids are marketed as 'legal' alternatives to marijuana and are being sold over the Internet and in tobacco and smoke shops, drug paraphernalia shops, and convenience stores." Further, "a number of the products and synthetic cannabinoids appear to originate from foreign sources and are manufactured in the absence of quality controls and devoid of regulatory oversight." "The marketing of products that contain one or more of these synthetic cannabinoids is geared towards teens and young adults. Despite disclaimers that the products are not intended for human consumption, retailers promote

² See s. 893.03(1), F.S.

³ The final order, if issued, will be effective on the date of publication of the order in the Federal Register. It is the DEA's intent to issue such a final order as soon as possible after the expiration of thirty days from the date of publication of the notice of scheduling and the date that notification was transmitted to the Assistant Secretary for the U.S. Department of Health and Human Services.

⁴ Curtis, Henry Pierson, "Imitation marijuana: More than dozen arrested in Polk County for selling 'legal weed'," Orlando Sentinel, November 18, 2010 (http://articles.orlandosentinel.com/2010-11-18/news/os-fake-pot-arrests-polk-county-20101118 1 synthetic-marijuana-small-gasoline-stations-legal-weed) (last accessed on January 2, 2011).

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that routine urinalysis tests will not typically detect the presence of these synthetic cannabinoids."

The DEA further stated that abuse of these substances or products containing these substances "has been characterized by both acute and long term public health and safety problems":

- These synthetic cannabinoids alone or spiked on plant material have the potential to be extremely harmful due to their method of manufacture and high pharmacological potency. DEA has been made aware that smoking these synthetic cannabinoids for the purpose of achieving intoxication and experiencing the psychoactive effects is identified as a reason for emergency room visits and calls to poison control centers.⁵
- Health warnings have been issued by numerous state public health departments and poison control centers describing the adverse health effects associated with these synthetic cannabinoids and their related products including agitation, anxiety, vomiting, tachycardia, elevated blood pressure, seizures, hallucinations and non-responsiveness. Case reports describe psychotic episodes, withdrawal, and dependence associated with use of these synthetic cannabinoids, similar to syndromes observed in cannabis abuse. Emergency room physicians have reported admissions connected to the abuse of these synthetic cannabinoids. Additionally, when responding to incidents involving individuals who have reportedly smoked these synthetic cannabinoids, first responders report that these individuals suffer from intense hallucinations. Detailed chemical analysis by the DEA and other investigators have found these synthetic cannabinoids spiked on plant material in products marketed to the general public. The risk of adverse health effects is further increased by the fact that similar products vary in the composition and concentration of synthetic cannabinoids(s) spiked on the plant material.

According to the National Conference of State Legislatures, as of November 23, 2010, "at least 11 state legislatures and another six state agencies have taken action to outlaw the use of these drugs."

III. Effect of Proposed Changes:

The bill amends s. 893.02, F.S., the definitions section of ch. 893, F.S., to define the term "homologue" as "a chemical compound in a series in which each compound differs by one or more alkyl functional groups on an alkyl side chain." The term "homologue" appears in the scheduling nomenclature of one of the substances scheduled by the bill.

⁵ "[T]he American Association of Poison Control Centers (AAPCC) has reported receiving over 1,500 calls as of September 27, 2010, relating to products spiked with these synthetic cannabinoids from 48 states and the District of Columbia." It is unknown how many of those calls were to Florida poison control centers. There have been several media reports of persons having to go to the hospital after use of synthetic cannabinoids. *See e.g.*, Repecki, Tiffany, "Cape teen hospitalized after smoking 'synthetic marijuana'," *Cape Coral Daily Breeze*, November 3, 2010 (http://www.cape-coral-daily-breeze.com/page/content.detail/id/520354.html) (last accessed on January 3, 2011) and Wyazan, Sam, "Teenagers treated after smoking 'K2 Spice' substance," *Tallahassee Democrat* (abstract), June 30, 2010 (http://pqasb.pqarchiver.com/tallahassee/access/2074740741.html?FMT=ABS&date=Jun+30%2C+2010) (last accessed on January 3, 2011).

⁶ "Synthetic Cannabinoids (K2)," National Conference of State Legislatures, updated November 23, 2010 (http://www.ncsl.org/?tabid=21398) (last accessed on January 3, 2011).

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The bill also amends. s. 893.03, F.S., to schedule the following synthetic cannabinoids or synthetic cannabinoid-mimicking compounds in Schedule I of Florida's controlled substance schedules:

- 2-[(1R, 3S) -3-hydroxycyclohexyl] -5- (2-methyloctan-2-yl) phenol, also known as CP 47, 497 and its dimethyloctyl (C8) homologue.
- (6aR, 10aR) -9- (hydroxymethyl) -6, 6-dimethyl-3- (2-methyloctan-2-yl) -6a, 7, 10, 10a-tetrahydrobenzo [c] chromen-1-ol, also known as HU-210.
- 1-Pentyl-3- (1-naphthoyl) indole, also known as JWH-018.
- 1-Butyl-3- (1-naphthoyl) indole, also known as JWH-073.

The bill also reenacts ss. 893.13(1), (2), (4), and(5), 893.135(1)(1), and 921.0022(3)(b), (c), and (e), F.S., to incorporate the amendment to s. 893.03, F.S., in references thereto.

The effective date of the bill is July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The scheduling of synthetic cannabinoids as provided in the bill should not impact retailers if the DEA's emergency scheduling of these substances goes into effect before the bill's effective date because federal scheduling would require the removal of these substances and prohibit their sale.

⁷ The bill does not include 1-[2-(4-morpholinyl)ethyl]-3-(1- naphthoyl) indole (JWH-200). This substance is included in the DEA's proposed emergency scheduling of certain synthetic cannabinoids.

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C. Government Sector Impact:

The Criminal Justice Impact Conference has not yet met to consider the prison bed impact, if any, of the bill. A preliminary estimate by the Office of Economic and Demographic Research (EDR)⁸ is that the bill has a potentially insignificant prison bed impact.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

⁸ Staff communication with EDR staff, January 3, 2011.



LEGISLATIVE ACTION

Senate House

The Committee on Criminal Justice (Dean) recommended the following:

Senate Amendment

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Between lines 114 and 115 insert:

44. 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl) indole, also known as JWH-200.

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GRAHAM v. FLORIDA

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, 1ST DISTRICT

No. 08-7412. Argued November 9, 2009—Decided May 17, 2010

Petitioner Graham was 16 when he committed armed burglary and another crime. Under a plea agreement, the Florida trial court sentenced Graham to probation and withheld adjudication of guilt. Subsequently, the trial court found that Graham had violated the terms of his probation by committing additional crimes. The trial court adjudicated Graham guilty of the earlier charges, revoked his probation, and sentenced him to life in prison for the burglary. Because Florida has abolished its parole system, the life sentence left Graham no possibility of release except executive clemency. He challenged his sentence under the Eighth Amendment's Cruel and Unusual Punishments Clause, but the State First District Court of Appeal affirmed.

Held: The Clause does not permit a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime. Pp. 7–31.

(a) Embodied in the cruel and unusual punishments ban is the "precept . . . that punishment for crime should be graduated and proportioned to [the] offense." Weems v. United States, 217 U.S. 349, 367. The Court's cases implementing the proportionality standard fall within two general classifications. In cases of the first type, the Court has considered all the circumstances to determine whether the length of a term-of-years sentence is unconstitutionally excessive for a particular defendant's crime. The second classification comprises cases in which the Court has applied certain categorical rules against the death penalty. In a subset of such cases considering the nature of the offense, the Court has concluded that capital punishment is impermissible for nonhomicide crimes against individuals. E.g., Kennedy v. Louisiana, 554 U.S. ____, ___. In a second subset, cases turning on the offender's characteristics, the Court has prohibited death

for defendants who committed their crimes before age 18, Roper v. Simmons, 543 U.S. 551, or whose intellectual functioning is in a low range, Atkins v. Virginia, 536 U.S. 304. In cases involving categorical rules, the Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. Roper, supra, at 563. Next, looking to "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose," Kennedy, supra, at ____, the Court determines in the exercise of its own independent judgment whether the punishment in question violates the Constitution, Roper, supra, at 564. Because this case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes, the appropriate analysis is the categorical approach used in Atkins, Roper, and Kennedy. Pp. 7–10.

- (b) Application of the foregoing approach convinces the Court that the sentencing practice at issue is unconstitutional. Pp. 10–31.
- (1) Six jurisdictions do not allow life without parole sentences for any juvenile offenders. Seven jurisdictions permit life without parole for juvenile offenders, but only for homicide crimes. Thirty-seven States, the District of Columbia, and the Federal Government permit sentences of life without parole for a juvenile nonhomicide offender in some circumstances. The State relies on these data to argue that no national consensus against the sentencing practice in question exists. An examination of actual sentencing practices in those jurisdictions that permit life without parole for juvenile nonhomicide offenders, however, discloses a consensus against the sentence. Nationwide, there are only 129 juvenile offenders serving life without parole sentences for nonhomicide crimes. Because 77 of those offenders are serving sentences imposed in Florida and the other 52 are imprisoned in just 10 States and in the federal system, it appears that only 12 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders, while 26 States and the District of Columbia do not impose them despite apparent statutory authorization. Given that the statistics reflect nearly all juvenile nonhomicide offenders who have received a life without parole sentence stretching back many years, moreover, it is clear how rare these sentences are, even within the States that do sometimes impose them. While more common in terms of absolute numbers than the sentencing practices in, e.g., Atkins and Enmund v. Florida, 458 U.S. 782, the type of sentence at issue is actually as rare as those other sentencing practices when viewed in proportion to the opportunities for its imposition. The fact that many jurisdictions do not expressly prohibit the sen-

tencing practice at issue is not dispositive because it does not necessarily follow that the legislatures in those jurisdictions have deliberately concluded that such sentences would be appropriate. See *Thompson* v. *Oklahoma*, 487 U. S. 815, 826, n. 24, 850. Pp. 10–16.

- (2) The inadequacy of penological theory to justify life without parole sentences for juvenile nonhomicide offenders, the limited culpability of such offenders, and the severity of these sentences all lead the Court to conclude that the sentencing practice at issue is cruel and unusual. No recent data provide reason to reconsider Roper's holding that because juveniles have lessened culpability they are less deserving of the most serious forms of punishment. 543 U.S., at 551. Moreover, defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of such punishments than are murderers. E.g., Kennedy, supra. Serious nonhomicide crimes "may be devastating in their harm ... but 'in terms of moral depravity and of the injury to the person and to the public,' . . . they cannot be compared to murder in their 'severity and irrevocability.'" *Id.*, at ____. Thus, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. Age and the nature of the crime each bear on the analysis. As for the punishment, life without parole is "the second most severe penalty permitted by law," Harmelin v. Michigan, 501 U.S. 957, 1001, and is especially harsh for a juvenile offender, who will on average serve more years and a greater percentage of his life in prison than an adult offender, see, e.g., Roper, supra, at 572. And none of the legitimate goals of penal sanctions—retribution, deterrence, incapacitation, and rehabilitation, see Ewing v. California, 538 U.S. 11, 25—is adequate to justify life without parole for juvenile nonhomicide offenders, see, e.g., Roper, 543 U.S., at 571, 573. Because age "18 is the point where society draws the line for many purposes between childhood and adulthood," it is the age below which a defendant may not be sentenced to life without parole for a nonhomicide crime. Id., at 574. A State is not required to guarantee eventual freedom to such an offender, but must impose a sentence that provides some meaningful opportunity for release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance.
- (3) A categorical rule is necessary, given the inadequacy of two alternative approaches to address the relevant constitutional concerns. First, although Florida and other States have made substantial efforts to enact comprehensive rules governing the treatment of youthful offenders, such laws 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. Second, a case-by-case approach requiring that the particular offender's age be weighed against the seriousness of the crime as part of a gross disproportionality inquiry would not allow courts to distinguish with sufficient accuracy the few juvenile offenders having sufficient psychological maturity and depravity to merit a life without parole sentence from the many that have the capacity for change. Cf. Roper, supra, at 572-573. Nor does such an approach take account of special difficulties encountered by counsel in juvenile representation, given juveniles' impulsiveness, difficulty thinking in terms of longterm benefits, and reluctance to trust adults. A categorical rule avoids the risk that, as a result of these difficulties, a court or jury will erroneously conclude that a particular juvenile is sufficiently culpable to deserve life without parole for a nonhomicide. It also gives the juvenile offender a chance to demonstrate maturity and reform. Pp. 24-29.

(4) Additional support for the Court's conclusion lies in the fact that the sentencing practice at issue has been rejected the world over: The United States is the only Nation that imposes this type of sentence. While the judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment, the Court has looked abroad to support its independent conclusion that a particular punishment is cruel and unusual. See, e.g., Roper, supra, at 575–578. Pp. 29–31.

982 So. 2d 43, reversed and remanded.

Kennedy, J., delivered the opinion of the Court, in which Stevens, Ginsburg, Breyer, and Sotomayor, JJ., joined. Stevens, J., filed a concurring opinion, in which Ginsburg and Sotomayor, JJ., joined. Roberts, C. J., filed an opinion concurring in the judgment. Thomas, J., filed a dissenting opinion, in which Scalia, J., joined, and in which Alito, J., joined as to Parts I and III. Alito, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 08-7412

TERRANCE JAMAR GRAHAM, PETITIONER v. FLORIDA

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

[May 17, 2010]

JUSTICE KENNEDY delivered the opinion of the Court.

The issue before the Court is whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime. The sentence was imposed by the State of Florida. Petitioner challenges the sentence under the Eighth Amendment's Cruel and Unusual Punishments Clause, made applicable to the States by the Due Process Clause of the Fourteenth Amendment. *Robinson* v. *California*, 370 U. S. 660 (1962).

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Petitioner is Terrance Jamar Graham. He was born on January 6, 1987. Graham's parents were addicted to crack cocaine, and their drug use persisted in his early years. Graham was diagnosed with attention deficit hyperactivity disorder in elementary school. He began drinking alcohol and using tobacco at age 9 and smoked marijuana at age 13.

In July 2003, when Graham was age 16, he and three other school-age youths attempted to rob a barbeque restaurant in Jacksonville, Florida. One youth, who worked at the restaurant, left the back door unlocked just

before closing time. Graham and another youth, wearing masks, entered through the unlocked door. Graham's masked accomplice twice struck the restaurant manager in the back of the head with a metal bar. When the manager started yelling at the assailant and Graham, the two youths ran out and escaped in a car driven by the third accomplice. The restaurant manager required stitches for his head injury. No money was taken.

Graham was arrested for the robbery attempt. Under Florida law, it is within a prosecutor's discretion whether to charge 16- and 17-year-olds as adults or juveniles for most felony crimes. Fla. Stat. §985.227(1)(b) (2003) (subsequently renumbered at §985.557(1)(b) (2007)). Graham's prosecutor elected to charge Graham as an adult. The charges against Graham were armed burglary with assault or battery, a first-degree felony carrying a maximum penalty of life imprisonment without the possibility of parole, §§810.02(1)(b), (2)(a) (2003); and attempted armed-robbery, a second-degree felony carrying a maximum penalty of 15 years' imprisonment, §§812.13(2)(b), 777.04(1), (4)(a), 775.082(3)(c).

On December 18, 2003, Graham pleaded guilty to both charges under a plea agreement. Graham wrote a letter to the trial court. After reciting "this is my first and last time getting in trouble," he continued "I've decided to turn my life around." App. 379–380. Graham said "I made a promise to God and myself that if I get a second chance, I'm going to do whatever it takes to get to the [National Football League]." *Id.*, at 380.

The trial court accepted the plea agreement. The court withheld adjudication of guilt as to both charges and sentenced Graham to concurrent 3-year terms of probation. Graham was required to spend the first 12 months of his probation in the county jail, but he received credit for the time he had served awaiting trial, and was released on June 25, 2004.

Less than 6 months later, on the night of December 2, 2004, Graham again was arrested. The State's case was as follows: Earlier that evening, Graham participated in a home invasion robbery. His two accomplices were Meigo Bailey and Kirkland Lawrence, both 20-year-old men. According to the State, at 7 p.m. that night, Graham, Bailey, and Lawrence knocked on the door of the home where Carlos Rodriguez lived. Graham, followed by Bailey and Lawrence, forcibly entered the home and held a pistol to Rodriguez's chest. For the next 30 minutes, the three held Rodriguez and another man, a friend of Rodriguez, at gunpoint while they ransacked the home searching for money. Before leaving, Graham and his accomplices barricaded Rodriguez and his friend inside a closet.

The State further alleged that Graham, Bailey, and Lawrence, later the same evening, attempted a second robbery, during which Bailey was shot. Graham, who had borrowed his father's car, drove Bailey and Lawrence to the hospital and left them there. As Graham drove away, a police sergeant signaled him to stop. Graham continued at a high speed but crashed into a telephone pole. He tried to flee on foot but was apprehended. Three handguns were found in his car.

When detectives interviewed Graham, he denied involvement in the crimes. He said he encountered Bailey and Lawrence only after Bailey had been shot. One of the detectives told Graham that the victims of the home invasion had identified him. He asked Graham, "Aside from the two robberies tonight how many more were you involved in?" Graham responded, "Two to three before tonight." *Id.*, at 160. The night that Graham allegedly committed the robbery, he was 34 days short of his 18th birthday.

On December 13, 2004, Graham's probation officer filed with the trial court an affidavit asserting that Graham had violated the conditions of his probation by possessing

a firearm, committing crimes, and associating with persons engaged in criminal activity. The trial court held hearings on Graham's violations about a year later, in December 2005 and January 2006. The judge who presided was not the same judge who had accepted Graham's guilty plea to the earlier offenses.

Graham maintained that he had no involvement in the home invasion robbery; but, even after the court underscored that the admission could expose him to a life sentence on the earlier charges, he admitted violating probation conditions by fleeing. The State presented evidence related to the home invasion, including testimony from the victims. The trial court noted that Graham, in admitting his attempt to avoid arrest, had acknowledged violating his probation. The court further found that Graham had violated his probation by committing a home invasion robbery, by possessing a firearm, and by associating with persons engaged in criminal activity.

The trial court held a sentencing hearing. Under Florida law the minimum sentence Graham could receive absent a downward departure by the judge was 5 years' imprisonment. The maximum was life imprisonment. Graham's attorney requested the minimum nondeparture sentence of 5 years. A presentence report prepared by the Florida Department of Corrections recommended that Graham receive an even lower sentence—at most 4 years' imprisonment. The State recommended that Graham receive 30 years on the armed burglary count and 15 years on the attempted armed robbery count.

After hearing Graham's testimony, the trial court explained the sentence it was about to pronounce:

"Mr. Graham, as I look back on your case, yours is really candidly a sad situation. You had, as far as I can tell, you have quite a family structure. You had a lot of people who wanted to try and help you get your

life turned around including the court system, and you had a judge who took the step to try and give you direction through his probation order to give you a chance to get back onto track. And at the time you seemed through your letters that that is exactly what you wanted to do. And I don't know why it is that you threw your life away. I don't know why.

"But you did, and that is what is so sad about this today is that you have actually been given a chance to get through this, the original charge, which were very serious charges to begin with. . . . The attempted robbery with a weapon was a very serious charge.

"[I]n a very short period of time you were back before the Court on a violation of this probation, and then here you are two years later standing before me, literally the—facing a life sentence as to—up to life as to count 1 and up to 15 years as to count 2.

"And I don't understand why you would be given such a great opportunity to do something with your life and why you would throw it away. The only thing that I can rationalize is that you decided that this is how you were going to lead your life and that there is nothing that we can do for you. And as the state pointed out, that this is an escalating pattern of criminal conduct on your part and that we can't help you any further. We can't do anything to deter you. This is the way you are going to lead your life, and I don't know why you are going to. You've made that decision. I have no idea. But, evidently, that is what you decided to do.

"So then it becomes a focus, if I can't do anything to help you, if I can't do anything to get you back on the right path, then I have to start focusing on the community and trying to protect the community from your

actions. And, unfortunately, that is where we are today is I don't see where I can do anything to help you any further. You've evidently decided this is the direction you're going to take in life, and it's unfortunate that you made that choice.

"I have reviewed the statute. I don't see where any further juvenile sanctions would be appropriate. I don't see where any youthful offender sanctions would be appropriate. Given your escalating pattern of criminal conduct, it is apparent to the Court that you have decided that this is the way you are going to live your life and that the only thing I can do now is to try and protect the community from your actions." *Id.*, at 392–394.

The trial court found Graham guilty of the earlier armed burglary and attempted armed robbery charges. It sentenced him to the maximum sentence authorized by law on each charge: life imprisonment for the armed burglary and 15 years for the attempted armed robbery. Because Florida has abolished its parole system, see Fla. Stat. §921.002(1)(e) (2003), a life sentence gives a defendant no possibility of release unless he is granted executive clemency.

Graham filed a motion in the trial court challenging his sentence under the Eighth Amendment. The motion was deemed denied after the trial court failed to rule on it within 60 days. The First District Court of Appeal of Florida affirmed, concluding that Graham's sentence was not grossly disproportionate to his crimes. 982 So. 2d 43 (2008). The court took note of the seriousness of Graham's offenses and their violent nature, as well as the fact that they "were not committed by a pre-teen, but a seventeen-year-old who was ultimately sentenced at the age of nineteen." *Id.*, at 52. The court concluded further that Graham was incapable of rehabilitation. Although Graham

"was given an unheard of probationary sentence for a life felony, . . . wrote a letter expressing his remorse and promising to refrain from the commission of further crime, and . . . had a strong family structure to support him," the court noted, he "rejected his second chance and chose to continue committing crimes at an escalating pace." *Ibid*. The Florida Supreme Court denied review. 990 So. 2d 1058 (2008) (table).

We granted certiorari. 556 U.S. ___ (2009).

П

The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to "'the evolving standards of decency that mark the progress of a maturing society." Estelle v. Gamble, 429 U. S. 97, 102 (1976) (quoting Trop v. Dulles, 356 U. S. 86, 101 (1958) (plurality opinion)). "This is because '[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." Kennedy v. Louisiana, 554 U. S. ____, ___ (2008) (slip op., at 8) (quoting Furman v. Georgia, 408 U. S. 238, 382 (1972) (Burger, C. J., dissenting)).

The Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances. See, e.g., Hope v. Pelzer, 536 U. S. 730 (2002). "[P]unishments of torture," for example, "are forbidden." Wilkerson v. Utah, 99 U. S. 130, 136 (1879). These cases underscore the essential principle that, under the Eighth Amendment, the State must respect the human attributes even of those who have committed serious crimes.

For the most part, however, the Court's precedents

consider punishments challenged not as inherently barbaric but as disproportionate to the crime. The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." Weems v. United States, 217 U. S. 349, 367 (1910).

The Court's cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty.

In the first classification the Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive. Under this approach, the Court has held unconstitutional a life without parole sentence for the defendant's seventh nonviolent felony, the crime of passing a worthless check. Solem v. Helm, 463 U.S. 277 (1983). In other cases, however, it has been difficult for the challenger to establish a lack of proportionality. A leading case is *Harmelin* v. *Michigan*, 501 U.S. 957 (1991), in which the offender was sentenced under state law to life without parole for possessing a large quantity of cocaine. A closely divided Court upheld the sentence. The controlling opinion concluded that the Eighth Amendment contains a "narrow proportionality principle," that "does not require strict proportionality between crime and sentence" but rather "forbids only extreme sentences that are 'grossly disproportionate' to the crime." Id., at 997, 1000–1001 (KENNEDY, J., concurring in part and concurring in judgment). Again closely divided, the Court rejected a challenge to a sentence of 25 years to life for the theft of a few golf clubs under California's so-called three-strikes recidivist sentencing scheme.

Ewing v. California, 538 U. S. 11 (2003); see also Lockyer v. Andrade, 538 U. S. 63 (2003). The Court has also upheld a sentence of life with the possibility of parole for a defendant's third nonviolent felony, the crime of obtaining money by false pretenses, Rummel v. Estelle, 445 U. S. 263 (1980), and a sentence of 40 years for possession of marijuana with intent to distribute and distribution of marijuana, Hutto v. Davis, 454 U. S. 370 (1982) (per curiam).

The controlling opinion in *Harmelin* explained its approach for determining whether a sentence for a term of years is grossly disproportionate for a particular defendant's crime. A court must begin by comparing the gravity of the offense and the severity of the sentence. 501 U. S., at 1005 (opinion of Kennedy, J.). "[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality" the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. *Ibid*. If this comparative analysis "validate[s] an initial judgment that [the] sentence is grossly disproportionate," the sentence is cruel and unusual. *Ibid*.

The second classification of cases has used categorical rules to define Eighth Amendment standards. The previous cases in this classification involved the death penalty. The classification in turn consists of two subsets, one considering the nature of the offense, the other considering the characteristics of the offender. With respect to the nature of the offense, the Court has concluded that capital punishment is impermissible for nonhomicide crimes against individuals. *Kennedy*, *supra*, at __ (slip op., at 28); see also *Enmund* v. *Florida*, 458 U. S. 782 (1982); *Coker* v. *Georgia*, 433 U. S. 584 (1977). In cases turning on the characteristics of the offender, the Court has adopted categorical rules prohibiting the death penalty for defendants who committed their crimes before the age of 18,

Roper v. Simmons, 543 U. S. 551 (2005), or whose intellectual functioning is in a low range, Atkins v. Virginia, 536 U. S. 304 (2002). See also Thompson v. Oklahoma, 487 U. S. 815 (1988).

In the cases adopting categorical rules the Court has taken the following approach. The Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. *Roper*, *supra*, at 563. Next, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose," *Kennedy*, 554 U. S., at ____ (slip op., at 10), the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution. *Roper*, *supra*, at 564.

The present case involves an issue the Court has not considered previously: a categorical challenge to a term-of-years sentence. The approach in cases such as *Harmelin* and *Ewing* is suited for considering a gross proportionality challenge to a particular defendant's sentence, but here a sentencing practice itself is in question. This case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes. As a result, a threshold comparison between the severity of the penalty and the gravity of the crime does not advance the analysis. Here, in addressing the question presented, the appropriate analysis is the one used in cases that involved the categorical approach, specifically *Atkins*, *Roper*, and *Kennedy*.

III A

The analysis begins with objective indicia of national consensus. "[T]he 'clearest and most reliable objective

evidence of contemporary values is the legislation enacted by the country's legislatures." Atkins, supra, at 312 (quoting Penry v. Lynaugh, 492 U. S. 302, 331 (1989)). Six jurisdictions do not allow life without parole sentences for any juvenile offenders. See Appendix, infra, Part III. Seven jurisdictions permit life without parole for juvenile offenders, but only for homicide crimes. Id., Part II. Thirty-seven States as well as the District of Columbia permit sentences of life without parole for a juvenile nonhomicide offender in some circumstances. Id.. Part I. Federal law also allows for the possibility of life without parole for offenders as young as 13. See, e.g., 18 U.S.C. §§2241 (2006 ed. and Supp. II), 5032 (2006 ed.). Relying on this metric, the State and its *amici* argue that there is no national consensus against the sentencing practice at issue.

This argument is incomplete and unavailing. "There are measures of consensus other than legislation." Kennedy, supra, at ___ (slip op., at 22). Actual sentencing practices are an important part of the Court's inquiry into consensus. See Enmund, supra, at 794–796; Thompson, supra, at 831–832 (plurality opinion); Atkins, supra, at 316; Roper, supra, at 564-565; Kennedy, supra, at ___ (slip op., at 22–23). Here, an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use. Although these statutory schemes contain no explicit prohibition on sentences of life without parole for juvenile nonhomicide offenders, those sentences are most infrequent. According to a recent study, nationwide there are only 109 juvenile offenders serving sentences of life without parole for nonhomicide offenses. See P. Annino, D. Rasmussen, & C. Rice, Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to Nation 2 (Sept. 14, 2009) (hereinafter Annino).

The State contends that this study's tally is inaccurate

because it does not count juvenile offenders who were convicted of both a homicide and a nonhomicide offense, even when the offender received a life without parole sentence for the nonhomicide. See Brief for Respondent 34; Tr. of Oral Arg. in Sullivan v. Florida, O. T. 2009, No. 08–7621, pp. 28–31. This distinction is unpersuasive. Juvenile offenders who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide. It is difficult to say that a defendant who receives a life sentence on a nonhomicide offense but who was at the same time convicted of homicide is not in some sense being punished in part for the homicide when the judge makes the sentencing determination. The instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense.

Florida further criticizes this study because the authors were unable to obtain complete information on some States and because the study was not peer reviewed. See Brief for Respondent 40. The State does not, however, provide any data of its own. Although in the first instance it is for the litigants to provide data to aid the Court, we have been able to supplement the study's findings. The study's authors were not able to obtain a definitive tally for Nevada, Utah, or Virginia. See Annino 11–13. Our research shows that Nevada has five juvenile nonhomicide offenders serving life without parole sentences, Utah has none, and Virginia has eight. See Letter from Alejandra Livingston, Offender Management Division, Nevada Dept. of Corrections, to Supreme Court Library (Mar. 26, 2010) (available in Clerk of Court's case file); Letter from Steve Gehrke, Utah Dept. of Corrections, to Supreme Court Library (Mar. 29, 2010) (same); Letter from Dr. Tama S. Celi, Virginia Dept. of Corrections, to Supreme Court Library (Mar. 30, 2010) (same). The study also did not note that there are six convicts in the federal prison sys-

tem serving life without parole offenses for nonhomicide crimes. See Letter and Attachment from Judith Simon Garrett, U. S. Dept. of Justice, Federal Bureau of Prisons, to Supreme Court Library (Apr. 12, 2010) (available in Clerk of Court's case file).

Finally, since the study was completed, a defendant in Oklahoma has apparently been sentenced to life without parole for a rape and stabbing he committed at the age of 16. See Stogsdill, Delaware County Teen Sentenced in Rape, Assault Case, Tulsa World, May 4, 2010, p. A12. Thus, adding the individuals counted by the study to those we have been able to locate independently, there are 129 juvenile nonhomicide offenders serving life without parole sentences. A significant majority of those, 77 in total, are serving sentences imposed in Florida. Annino 2. other 52 are imprisoned in just 10 States—California, Delaware, Iowa, Louisiana, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina, and Virginia—and in the federal system. *Id.*, at 14; *supra*, at 12–13; Letter from Thomas P. Hoey, Dept. of Corrections, Government of the District of Columbia, to Supreme Court Library (Mar. 31, 2010) (available in Clerk of Court's case file); Letter from Judith Simon Garrett, U.S. Dept. of Justice, Federal Bureau of Prisons, to Supreme Court Library (Apr. 9, 2010) (available in Clerk of Court's case file). Thus, only 12 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders—and most of those impose the sentence quite rarely—while 26 States as well as the District of Columbia do not impose them despite apparent statutory authorization.

The numbers cited above reflect all current convicts in a jurisdiction's penal system, regardless of when they were convicted. It becomes all the more clear how rare these sentences are, even within the jurisdictions that do sometimes impose them, when one considers that a juvenile sentenced to life without parole is likely to live in prison

for decades. Thus, these statistics likely reflect nearly all juvenile nonhomicide offenders who have received a life without parole sentence stretching back many years. It is not certain that this opinion has identified every juvenile nonhomicide offender nationwide serving a life without parole sentence, for the statistics are not precise. The available data, nonetheless, are sufficient to demonstrate how rarely these sentences are imposed even if there are isolated cases that have not been included in the presentations of the parties or the analysis of the Court.

It must be acknowledged that in terms of absolute numbers juvenile life without parole sentences for nonhomicides are more common than the sentencing practices at issue in some of this Court's other Eighth Amendment cases. See, e.g., Enmund, 458 U.S., at 794 (only six executions of nontriggerman felony murderers between 1954 and 1982) Atkins, 536 U.S., at 316 (only five executions of mentally retarded defendants in 13-year period). contrast can be instructive, however, if attention is first given to the base number of certain types of offenses. For example, in the year 2007 (the most recent year for which statistics are available), a total of 13,480 persons, adult and juvenile, were arrested for homicide crimes. same year, 57,600 juveniles were arrested for aggravated assault; 3,580 for forcible rape; 34,500 for robbery; 81,900 for burglary; 195,700 for drug offenses; and 7,200 for arson. See Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, Statistical Briefing Book, online at http://ojjdp.ncjrs.org/ojstatbb/ (as visited May 14, 2010, and available in Clerk of Court's case file). Although it is not certain how many of these numerous juvenile offenders were eligible for life without parole sentences, the comparison suggests that in proportion to the opportunities for its imposition, life without parole sentences for juveniles convicted of nonhomicide crimes is as rare as other sentencing practices found to be cruel and unusual.

The evidence of consensus is not undermined by the fact that many jurisdictions do not prohibit life without parole for juvenile nonhomicide offenders. The Court confronted a similar situation in *Thompson*, where a plurality concluded that the death penalty for offenders younger than 16 was unconstitutional. A number of States then allowed the juvenile death penalty if one considered the statutory scheme. As is the case here, those States authorized the transfer of some juvenile offenders to adult court; and at that point there was no statutory differentiation between adults and juveniles with respect to authorized penalties. The plurality concluded that the transfer laws show "that the States consider 15-year-olds to be old enough to be tried in criminal court for serious crimes (or too old to be dealt with effectively in juvenile court), but tells us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders." 487 U.S., at 826, n. 24. Justice O'Connor, concurring in the judgment, took a similar view. Id., at 850 ("When a legislature provides for some 15-year-olds to be processed through the adult criminal justice system, and capital punishment is available for adults in that jurisdiction, the death penalty becomes at least theoretically applicable to such defendants.... [H]owever, it does not necessarily follow that the legislatures in those jurisdictions have deliberately concluded that it would be appropriate").

The same reasoning obtains here. Many States have chosen to move away from juvenile court systems and to allow juveniles to be transferred to, or charged directly in, adult court under certain circumstances. Once in adult court, a juvenile offender may receive the same sentence as would be given to an adult offender, including a life without parole sentence. But the fact that transfer and direct charging laws make life without parole possible for some juvenile nonhomicide offenders does not justify a judgment that many States intended to subject such of-

fenders to life without parole sentences.

For example, under Florida law a child of any age can be prosecuted as an adult for certain crimes and can be sentenced to life without parole. The State acknowledged at oral argument that even a 5-year-old, theoretically, could receive such a sentence under the letter of the law. See Tr. of Oral Arg. 36–37. All would concede this to be unrealistic, but the example underscores that the statutory eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration. Similarly, the many States that allow life without parole for juvenile nonhomicide offenders but do not impose the punishment should not be treated as if they have expressed the view that the sentence is appropriate. The sentencing practice now under consideration is exceedingly rare. And "it is fair to say that a national consensus has developed against it." Atkins, supra, at 316.

В

Community consensus, while "entitled to great weight," is not itself determinative of whether a punishment is cruel and unusual. Kennedy, 554 U.S., at ___ (slip op., at 24). In accordance with the constitutional design, "the task of interpreting the Eighth Amendment remains our responsibility." Roper, 543 U.S., at 575. The iudicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. Id., at 568; Kennedy, supra, at (slip op., at 27–28); cf. Solem, 463 U.S., at 292. In this inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals. Kennedy, supra, at ___ (slip op., at 30-36); Roper, supra, at 571–572; Atkins, supra, at 318–320.

Roper established that because juveniles have lessened

culpability they are less deserving of the most severe punishments. 543 U.S., at 569. As compared to adults, juveniles have a "lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed." Id., at 569-570. These salient characteristics mean that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Id., at 573. Accordingly, "juvenile offenders cannot with reliability be classified among the worst offenders." Id., at 569. A juvenile is not absolved of responsibility for his actions, but his transgression "is not as morally reprehensible as that of an adult." Thompson, supra, at 835 (plurality opinion).

No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles. As petitioner's amici point out, developments 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. See Brief for American Medical Association et al. as *Amici Curiae* 16–24; Brief for American Psychological Association et al. as Amici Curiae 22-27. 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. Roper, 543 U.S., at 570. It remains true that "[f]rom 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." Ibid. 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.

The Court has 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. Kennedy, supra; Enmund, 458 U.S. 782; Tison v. Arizona, 481 U.S. 137 (1987); Coker, 433 U.S. 584. There is a line "between homicide and other serious violent offenses against the individual." Kennedy, 554 U.S., at ___ (slip op., at 27). Serious nonhomicide crimes "may be devastating in their harm . . . but 'in terms of moral depravity and of the injury to the person and to the public,' . . . they cannot be compared to murder in their 'severity and irrevocability.'" Id., at ___ (slip op., at 28) (quoting Coker, 433 U. S., at 598 (plurality opinion)). This is because "[l]ife is over for the victim of the murderer," but for the victim of even a very serious nonhomicide crime, "life . . . is not over and normally is not beyond repair." *Ibid.* (plurality opinion). Although an offense like robbery or rape is "a serious crime deserving serious punishment," Enmund, supra, at 797, those crimes differ from homicide crimes in a moral sense.

It follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis.

As for the punishment, life without parole is "the second most severe penalty permitted by law." *Harmelin*, 501 U. S., at 1001 (opinion of KENNEDY, J.). It is true that a death sentence is "unique in its severity and irrevocability," *Gregg* v. *Georgia*, 428 U. S. 153, 187 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.); yet life without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life

without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence. *Solem*, 463 U. S., at 300–301. As one court observed in overturning a life without parole sentence for a juvenile defendant, this 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 convict], he will remain in prison for the rest of his days." *Naovarath* v. *State*, 105 Nev. 525, 526, 779 P. 2d 944 (1989).

The Court has recognized the severity of sentences that deny convicts the possibility of parole. In Rummel, 445 U. S. 263, the Court rejected an Eighth Amendment challenge to a life sentence for a defendant's third nonviolent felony but stressed that the sentence gave the defendant the possibility of parole. Noting that "parole is an established variation on imprisonment of convicted criminals," it was evident that an analysis of the petitioner's sentence "could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life." Id., at 280–281 (internal quotation marks omitted). And in Solem, the only previous case striking down a sentence for a term of years as grossly disproportionate, the defendant's sentence was deemed "far more severe than the life sentence we considered in Rummel," because it did not give the defendant the possibility of parole. 463 U.S., at 297.

Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only. See *Roper*, *supra*, at 572; cf. *Harmelin*, *supra*, at 996 ("In some cases

... there will be negligible difference between life without parole and other sentences of imprisonment—for example, ... a lengthy term sentence without eligibility for parole, given to a 65-year-old man"). This reality cannot be ignored.

The penological justifications for the sentencing practice are also relevant to the analysis. Kennedy, supra, at (slip op., at 30–36); Roper, 543 U.S., at 571–572; Atkins, supra, at 318–320. Criminal punishment can have different goals, and choosing among them is within a legislature's discretion. See Harmelin, supra, at 999 (opinion of KENNEDY, J.) ("[T]he Eighth Amendment does not mandate adoption of any one penological theory"). It does not follow, however, that the purposes and effects of penal sanctions are irrelevant to the determination of Eighth Amendment restrictions. A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense. With respect to life without parole for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate retribution, deterrence, incapacitation, and rehabilitation, see Ewing, 538 U.S., at 25 (plurality opinion)—provides an adequate justification.

Retribution is a legitimate reason to punish, but it cannot support the sentence at issue here. Society is entitled to impose severe sanctions on a juvenile nonhomicide offender to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense. But "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison*, 481 U. S., at 149. And as *Roper* observed, "[w]hether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult." 543 U. S., at 571. The case

becomes even weaker with respect to a juvenile who did not commit homicide. *Roper* found that "[r]etribution is not proportional if the law's most severe penalty is imposed" on the juvenile murderer. *Ibid*. The considerations underlying that holding support as well the conclusion that retribution does not justify imposing the second most severe penalty on the less culpable juvenile nonhomicide offender.

Deterrence does not suffice to justify the sentence either. Roper noted that "the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence." Ibid. Because juveniles' "lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions," Johnson v. Texas, 509 U.S. 350, 367 (1993), they are less likely to take a possible punishment into consideration when making decisions. This is particularly so when that punishment is rarely imposed. That the sentence deters in a few cases is perhaps plausible, but "[t]his argument does not overcome other objections." Kennedy, 554 U.S., at ___ (slip op., at 31). Even if the punishment has some connection to a valid penological goal, it must be shown that the punishment is not grossly disproportionate in light of the justification offered. Here, in light of juvenile nonhomicide offenders' diminished moral responsibility, any limited deterrent effect provided by life without parole is not enough to justify the sentence.

Incapacitation, a third legitimate reason for imprisonment, does not justify the life without parole sentence in question here. Recidivism is a serious risk to public safety, and so incapacitation is an important goal. See *Ewing*, *supra*, at 26 (plurality opinion) (statistics show 67 percent of former inmates released from state prisons are charged with at least one serious new crime within three years). But while incapacitation may be a legitimate

penological goal sufficient to justify life without parole in other contexts, it is inadequate to justify that punishment for juveniles who did not commit homicide. To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable. "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Roper, supra, at 573. As one court concluded in a challenge to a life without parole sentence for a 14year-old, "incorrigibility is inconsistent with youth." Workman v. Commonwealth, 429 S. W. 2d 374, 378 (Ky. App. 1968).

Here one cannot dispute that this defendant posed an immediate risk, for he had committed, we can assume, serious crimes early in his term of supervised release and despite his own assurances of reform. Graham deserved to be separated from society for some time in order to prevent what the trial court described as an "escalating pattern of criminal conduct," App. 394, but it does not follow that he would be a risk to society for the rest of his life. Even if the State's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset. A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity. Incapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity.

Finally there is rehabilitation, a penological goal that forms the basis of parole systems. See *Solem*, 463 U. S., at 300; *Mistretta* v. *United States*, 488 U. S. 361, 363 (1989).

The concept of rehabilitation is imprecise; and its utility and proper implementation are the subject of a substantial, dynamic field of inquiry and dialogue. See, e.g., Cullen & Gendreau, Assessing Correctional Rehabilitation: Policy, Practice, and Prospects, 3 Criminal Justice 2000, pp. 119–133 (2000) (describing scholarly debates regarding the effectiveness of rehabilitation over the last several decades). It is for legislatures to determine what rehabilitative techniques are appropriate and effective.

A sentence of life imprisonment without parole, however, cannot be justified by the goal of rehabilitation. The penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability. State's rejection of rehabilitation, moreover, goes beyond a mere expressive judgment. As one amicus notes, defendants serving life without parole sentences are often denied access to vocational training and other rehabilitative services that are available to other inmates. See Brief for Sentencing Project as *Amicus Curiae* 11–13. For juvenile offenders, who are most in need of and receptive to rehabilitation, see Brief for J. Lawrence Aber et al. as Amici Curiae 28-31 (hereinafter Aber Brief), the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident.

In sum, penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders. This determination; the limited culpability of juvenile nonhomicide offenders; and the severity of life without parole sentences all lead to the conclusion that the sentencing practice under consideration is cruel and unusual. This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the

sentence of life without parole. This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment. Because "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood," those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime. *Roper*, 543 U. S., at 574.

A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. 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. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.

C

Categorical rules tend to be imperfect, but one is necessary here. Two alternative approaches are not adequate to address the relevant constitutional concerns. First, the State argues that the laws of Florida and other States governing criminal procedure take sufficient account of

the age of a juvenile offender. Here, Florida notes that under its law prosecutors are required to charge 16- and 17-year-old offenders as adults only for certain serious felonies; that prosecutors have discretion to charge those offenders as adults for other felonies; and that prosecutors may not charge nonrecidivist 16- and 17-year-old offenders as adults for misdemeanors. Brief for Respondent 54 (citing Fla. Stat. §985.227 (2003)). The State also stresses that "in only the narrowest of circumstances" does Florida law impose no age limit whatsoever for prosecuting juveniles in adult court. Brief for Respondent 54.

Florida is correct to say that state laws requiring consideration of a defendant's age in charging decisions are salutary. An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed. Florida, like other States, has made substantial efforts to enact comprehensive rules governing the treatment of youthful offenders by its criminal justice system. See generally Fla. Stat. §958 et seq. (2007).

The provisions the State notes are, nonetheless, by themselves insufficient to address the constitutional concerns at issue. Nothing in Florida's laws prevents its courts from sentencing a juvenile nonhomicide offender to life without parole based on a subjective judgment that the defendant's crimes demonstrate an "irretrievably depraved character." Roper, supra, at 570. This is inconsistent with the Eighth Amendment. Specific cases are illustrative. In Graham's case the sentencing judge decided to impose life without parole—a sentence greater than that requested by the prosecutor—for Graham's armed burglary conviction. The judge did so because he concluded that Graham was incorrigible: "[Y]ou decided that this is how you were going to lead your life and that there is nothing that we can do for you. . . . We can't do anything to deter you." App. 394.

Another example comes from Sullivan v. Florida, No. 08–7621. Sullivan was argued the same day as this case, but the Court has now dismissed the writ of certiorari in Sullivan as improvidently granted. Post, p. ___. The facts, however, demonstrate the flaws of Florida's system. The petitioner, Joe Sullivan, was prosecuted as an adult for a sexual assault committed when he was 13 years old. Noting Sullivan's past encounters with the law, the sentencing judge concluded that, although Sullivan had been "given opportunity after opportunity to upright himself and take advantage of the second and third chances he's been given," he had demonstrated himself to be unwilling to follow the law and needed to be kept away from society for the duration of his life. Brief for Respondent in Sullivan v. Florida, O. T. 2009, No. 08–7621, p. 6. The judge sentenced Sullivan to life without parole. As these examples make clear, existing state laws, allowing the imposition of these sentences based only on a discretionary, subjective judgment by a judge or jury that the offender is irredeemably depraved, are insufficient to prevent the possibility that the offender will receive a life without parole sentence for which he or she lacks the moral culpability.

Another possible approach would be to hold that the Eighth Amendment requires courts to take the offender's age into consideration as part of a case-specific gross disproportionality inquiry, weighing it against the seriousness of the crime. This approach would allow courts to account for factual differences between cases and to impose life without parole sentences for particularly heinous crimes. Few, perhaps no, judicial responsibilities are more difficult than sentencing. The task is usually undertaken by trial judges who seek with diligence and professionalism to take account of the human existence of the offender and the just demands of a wronged society.

The case-by-case approach to sentencing must, however,

be confined by some boundaries. The dilemma of juvenile sentencing demonstrates this. For even if we were to assume that some juvenile nonhomicide offenders might have "sufficient psychological maturity, and at the same time demonstrat[e] sufficient depravity," Roper, 543 U.S., at 572, to merit a life without parole sentence, it does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change. Roper rejected the argument that the Eighth Amendment required only that juries be told they must consider the defendant's age as a mitigating factor in sentencing. The Court concluded that an "unacceptable likelihood exists that the brutality or coldblooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." Id., at 573. Here, as with the death penalty, "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive" a sentence of life without parole for a nonhomicide crime "despite insufficient culpability." *Id.*, at 572–573.

Another problem with a case-by-case approach is that it does not take account of special difficulties encountered by counsel in juvenile representation. As some *amici* note, the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense. Brief for NAACP Legal Defense & Education Fund et al. as *Amici Curiae* 7–12; Henning, Loyalty, Paternalism, and Rights: Client Counseling

Theory and the Role of Child's Counsel in Delinquency Cases, 81 Notre Dame L. Rev. 245, 272–273 (2005). Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense. Aber Brief 35. These factors are likely to impair the quality of a juvenile defendant's representation. Cf. Atkins, 536 U.S., at 320 ("Mentally retarded defendants may be less able to give meaningful assistance to their counsel"). A categorical rule avoids the risk that, as a result of these difficulties, a court or jury will erroneously conclude that a particular juvenile is sufficiently culpable to deserve life without parole for a nonhomicide.

Finally, a categorical rule gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform. The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. In Roper, that deprivation resulted from an execution that brought life to its end. Here, though by a different dynamic, the same concerns apply. Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual. In some prisons, moreover, the system itself becomes complicit in the lack of development. As noted above, see supra, at 23, it is the policy in some prisons to withhold counseling, education, and rehabilitation programs for those who are ineligible for parole consideration. A categorical rule against life without parole for juvenile nonhomicide offenders avoids the perverse consequence in which the lack of maturity that led to an offender's crime

is reinforced by the prison term.

Terrance Graham's sentence guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes. The State has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit.

 \mathbf{D}

There is support for our conclusion in the fact that, in continuing to impose life without parole sentences on juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over. This observation does not control our decision. The judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment. But "'[t]he climate of international opinion concerning the acceptability of a particular punishment'" is also "'not irrelevant." Enmund, 458 U.S., at 796, n. 22. The Court has looked beyond our Nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual. See, e.g., Roper, 543 U. S., at 575–578; Atkins, supra, at 317–318, n. 21; Thompson, 487 U.S., at 830 (plurality opinion); Enmund, supra, at 796–797, n. 22; Coker, 433 U.S., at 596, n. 10 (plurality opinion); Trop, 356 U.S., at 102-103 (plurality opinion).

Today we continue that longstanding practice in noting the global consensus against the sentencing practice in question. A recent study concluded that only 11 nations authorize life without parole for juvenile offenders under

any circumstances; and only 2 of them, the United States and Israel, ever impose the punishment in practice. See M. Leighton & C. de la Vega, Sentencing Our Children to Die in Prison: Global Law and Practice 4 (2007). An updated version of the study concluded that Israel's "laws allow for parole review of juvenile offenders serving life terms," but expressed reservations about how that parole review is implemented. De la Vega & Leighton, Sentencing Our Children to Die in Prison: Global Law and Practice, 42 U. S. F. L. Rev. 983, 1002–1003 (2008). But even if Israel is counted as allowing life without parole for juvenile offenders, that nation does not appear to impose that sentence for nonhomicide crimes; all of the seven Israeli prisoners whom commentators have identified as serving life sentences for juvenile crimes were convicted of homicide or attempted homicide. See Amnesty International, Human Rights Watch, The Rest of Their Lives: Life without Parole for Child Offenders in the United States 106, n. 322 (2005); Memorandum and Attachment from Ruth Levush, Law Library of Congress, to Supreme Court Library (Feb. 16, 2010) (available in Clerk of Court's case file).

Thus, as petitioner contends and respondent does not contest, the United States is the only Nation that imposes life without parole sentences on juvenile nonhomicide offenders. We also note, as petitioner and his *amici* emphasize, that Article 37(a) of the United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U. N. T. S. 3 (entered into force Sept. 2, 1990), ratified by every nation except the United States and Somalia, prohibits the imposition of "life imprisonment without possibility of release . . . for offences committed by persons below eighteen years of age." Brief for Petitioner 66; Brief for Amnesty International et al. as *Amici Curiae* 15–17. As we concluded in *Roper* with respect to the juvenile death penalty, "the United States now stands alone in a

world that has turned its face against" life without parole for juvenile nonhomicide offenders. 543 U. S., at 577.

The State's amici stress that no international legal agreement that is binding on the United States prohibits life without parole for juvenile offenders and thus urge us to ignore the international consensus. See Brief for Solidarity Center for Law and Justice et al. as Amici Curiae 14-16; Brief for Sixteen Members of United States House of Representatives as Amici Curiae 40-43. These arguments miss the mark. The question before us is not whether international law prohibits the United States from imposing the sentence at issue in this case. question is whether that punishment is cruel and unusual. In that inquiry, "the overwhelming weight of international opinion against" life without parole for nonhomicide offenses committed by juveniles "provide[s] respected and significant confirmation for our own conclusions." Roper, supra, at 578.

The debate between petitioner's and respondent's *amici* over whether there is a binding *jus cogens* norm against this sentencing practice is likewise of no import. See Brief for Amnesty International 10–23; Brief for Sixteen Members of United States House of Representatives 4–40. The 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.

* * *

The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must

provide him or her with some realistic opportunity to obtain release before the end of that term. The judgment of the First District Court of Appeal of Florida is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Appendix to opinion of the Court

APPENDIX

I. JURISDICTIONS THAT PERMIT LIFE WITHOUT PAROLE FOR JUVENILE NONHOMICIDE OFFENDERS

Alabama Ala. Code §12–15–203 (Supp. 2009); §§13A–3–3,

13A-5-9(c), 13A-6-61 (2005); §13A-7-5 (Supp.

2009)

Arizona Ariz. Rev. Stat. Ann. §§13–501, §13–1423 (West

2010)

Arkansas Ark. Code $\S9-27-318$ (b) (2009); $\S5-4-501$ (c) (Supp.

2009)

California Cal. Penal Code Ann. §667.7(a)(2) (1999); §1170.17

(2004)

Delaware Del. Code Ann., Tit., 10, §1010 (Supp. 2008); id.,

Tit., 11, §773(c) (2003)

District of D. C. Code §16–2307 (2009 Supp. Pamphlet); §22–

3020 (Supp. 2007)

Florida Fla. Stat. §§810.02, 921.002(1)(e), 985.557 (2007) Georgia Code Ann. §15–11–30.2 (2008); §16–6–1(b)

(2007)

Columbia

Idaho Code §18–6503 (Lexis 2005); §§19–2513, 20–

509 (Lexis Supp. 2009)

Ill. Comp. Stat., ch. 705, §§405/5–805, 405/5–130

(West 2008); *id.*, ch. 720, §5/12–13(b)(3) (West 2008); *id.*, ch. 730, §5/3-3-3(d) (West 2008)

Indiana Ind. Code §31–30–3–6(1); §35–50–2–8.5(a) (West

2004)

Iowa Code §§232.45(6), 709.2, 902.1 (2009)

Louisiana La. Child. Code Ann., Arts. 305, 857(A), (B) (West

Supp. 2010); La. Stat. Ann. §14:44 (West 2007)

Maryland Md. Cts. & Jud. Proc. Code Ann. §§3–8A–03(d)(1),

3-8A-06(a)(2) (Lexis 2006); Md. Crim. Law Code

Ann. §§3–303(d)(2),(3) (Lexis Supp. 2009)

Michigan Mich. Comp. Laws Ann. §712A.4 (West 2002);

§750.520b(2)(c) (West Supp. 2009); §769.1 (West

2000)

Minnesota Minn. Stat. §§260B.125(1), 609.3455(2) (2008)

Mississippi Miss. Code Ann. §43–21–157 (2009); §§97–3–53,

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99-19-81 (2007); §99-19-83 (2006)

Missouri Mo. Rev. Stat. §§211.071, 558.018 (2000)

Nebraska Neb. Rev. Stat. §§28–105, 28–416(8)(a), 29–2204(1),

(3), 43–247, 43–276 (2008)

Nevada Nev. Rev. Stat. §§62B.330, 200.366 (2009) New Hampshire N. H. Rev. Stat. Ann. §169–B:24; §628:1 (2007);

§§632-A:2, 651:6 (Supp. 2009)

New York N. Y. Penal Law Ann. §§30.00, §60.06 (West 2009);

§490.55 (West 2008)

North Carolina N. C. Gen. Stat. Ann. §§7B–2200, 15A–1340.16B(a)

(Lexis 2009)

North Dakota N. D. Cent. Code Ann. §12.1–04–01 (Lexis 1997);

§12.1-20-03 (Lexis Supp. 2009); §12.1-32-01

(Lexis 1997)

Ohio Chio Rev. Code Ann. §2152.10 (Lexis 2007);

92907.02 (Lexis 2006); 92971.03(A)(2) (2010 Lexis

Supp. Pamphlet)

Oklahoma Okla. Stat., Tit. 10A, §§2–5–204, 2–5–205, 2–5–206

(2009 West Supp.); id., Tit. 21, §1115 (2007 West

Supp.)

Oregon Ore. Rev. Stat. $\S137.707$, 137.719(1) (2009) Pennsylvania 42 Pa. Cons. Stat. $\S6355(a)$ (2000); 18 id.,

§3121(e)(2) (2008); 61 id., §6137(a) (2009)

Rhode Island R. I. Gen. Laws §§14–1–7, 14–1–7.1, 11–47–3.2

(Lexis 2002)

South Carolina S. C. Code Ann. §63–19–1210 (2008 Supp. Pam-

phlet); §16-11-311(B) (Westlaw 2009)

South Dakota S. D. Codified Laws §26–11–3.1 (Supp. 2009); §26–

11-4 (2004); §§22-3-1, 22-6-1(2),(3) (2006); §24-

15-4 (2004); §\$22-19-1, 22-22-1 (2006)

Tennessee Tenn. Code Ann. §§37–1–134, 40–35–120(g) (West-

law 2010)

Utah Code Ann. §§78A-6-602, 78A-6-703, 76-5-

302 (Lexis 2008)

Virginia Va. Code Ann. §§16.1–269.1, §18.2–61, §53.1–

151(B1) (2009)

Washington Wash. Rev. Code §13.40.110 (2009 Supp.);

§§9A.04.050, 9.94A.030(34), 9.94A.570 (2008)

West Virginia W. Va. Code Ann. §49–5–10 (Lexis 2009); §61–2–

14a(a) (Lexis 2005)

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Wisconsin Wis. Stat. §§938.18, 938.183 (2007–2008);

§939.62(2m)(c) (Westlaw 2005)

Wyoming Wyo. Stat. Ann. §§6–2–306(d),(e), 14–6–203 (2009) Federal 18 U. S. C. §2241 (2006 ed. and Supp. II); §5032

(2006 ed.)

II. JURISDICTIONS THAT PERMIT LIFE WITHOUT PAROLE FOR JUVENILE OFFENDERS CONVICTED OF HOMICIDE CRIMES ONLY

Connecticut Conn. Gen. Stat. §53a–35a (2009)

Hawaii Haw. Rev. Stat. §571–22(d) (2006); §706–656(1)

(2008 Supp. Pamphlet)

Maine Me. Rev. Stat. Ann., Tit. 15, §3101(4) (Supp. 2009);

id., Tit. 17–a, §1251 (2006)

Massachusetts Mass Gen. Laws ch. 119, §74; id., ch. 265, §2 (2008)

New Jersey N. J. Stat. Ann. §2A:4A–26 (West Supp. 2009);

§2C:11-3(b)(2) (West Supp. 2009)

New Mexico N. M. Stat. Ann. §31–18–14 (Supp. 2009); §31–18–

15.2(A) (Westlaw 2010)

Vermont Vt. Stat. Ann., Tit. 33, §5204 (2009 Cum. Supp.);

id., Tit. 13, §2303 (2009)

III. JURISDICTIONS THAT FORBID LIFE WITHOUT PAROLE FOR JUVENILE OFFENDERS

Alaska Stat. §12.55.015(g) (2008)

Colorado Colo. Rev. Stat. Ann. §18–1.3–401(4)(b) (2009)

Montana Mont. Code Ann. §46–18–222(1) (2009) Kansas Kan. Stat. Ann. §21–4622 (West 2007)

Kentucky Ky. Rev. Stat. Ann. §640.040 (West 2008); Shep-

herd v. Commonwealth, 251 S. W. 3d 309, 320-321

(Ky. 2008)

Texas Tex. Penal Code Ann. §12.31 (West Supp. 2009)

STEVENS, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 08-7412

TERRANCE JAMAR GRAHAM, PETITIONER v. FLORIDA

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

[May 17, 2010]

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE SOTOMAYOR join, concurring.

In his dissenting opinion, JUSTICE THOMAS argues that today's holding is not entirely consistent with the controlling opinions in Lockyer v. Andrade, 538 U.S. 63 (2003), Ewing v. California, 538 U.S. 11 (2003), Harmelin v. Michigan, 501 U.S. 957 (1991), and Rummel v. Estelle, 445 U. S. 263 (1980). *Post*, at 7–9. Given that "evolving standards of decency" have played a central role in our Eighth Amendment jurisprudence for at least a century, see Weems v. United States, 217 U.S. 349, 373–378 (1910), this argument suggests the dissenting opinions in those cases more accurately describe the law today than does JUSTICE THOMAS' rigid interpretation of the Amendment. Knowledge accumulates. Society changes. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time; unless we are to abandon the moral commitment embodied in the Eighth Amendment, proportionality review must never become effectively obsolete, post, at 8–9, and n. 2.

While JUSTICE THOMAS would apparently not rule out a death sentence for a \$50 theft by a 7-year-old, see *post*, at 4, 10, n. 3, the Court wisely rejects his static approach to

STEVENS, J., concurring

the law. Standards of decency have evolved since 1980. They will never stop doing so.

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[May 17, 2010]

CHIEF JUSTICE ROBERTS, concurring in the judgment.

I agree with the Court that Terrance Graham's sentence of life without parole violates the Eighth Amendment's prohibition on "cruel and unusual punishments." Unlike the majority, however, I see no need to invent a new constitutional rule of dubious provenance in reaching that conclusion. Instead, my analysis is based on an application of this Court's precedents, in particular (1) our cases requiring "narrow proportionality" review of noncapital sentences and (2) our conclusion in *Roper* v. *Simmons*, 543 U. S. 551 (2005), that juvenile offenders are generally less culpable than adults who commit the same crimes.

These cases expressly allow courts addressing allegations that a noncapital sentence violates the Eighth Amendment to consider the particular defendant and particular crime at issue. The standards for relief under these precedents are rigorous, and should be. But here Graham's juvenile status—together with the nature of his criminal conduct and the extraordinarily severe punishment imposed—lead me to conclude that his sentence of life without parole is unconstitutional.

Ι

Our Court has struggled with whether and how to apply the Cruel and Unusual Punishments Clause to sentences

for noncapital crimes. Some of my colleagues have raised serious and thoughtful questions about whether, as an original matter, the Constitution was understood to require any degree of proportionality between noncapital offenses and their corresponding punishments. See, e.g., Harmelin v. Michigan, 501 U.S. 957, 962–994 (1991) (principal opinion of SCALIA, J.); post, at 3–5, and n. 1 (THOMAS, J., dissenting). Neither party here asks us to reexamine our precedents requiring such proportionality, however, and so I approach this case by trying to apply our past decisions to the facts at hand.

Α

Graham's case arises at the intersection of two lines of Eighth Amendment precedent. The first consists of decisions holding that the Cruel and Unusual Punishments Clause embraces a "narrow proportionality principle" that we apply, on a case-by-case basis, when asked to review noncapital sentences. Lockyer v. Andrade, 538 U. S. 63, 72 (2003) (internal quotation marks omitted); Solem v. Helm, 463 U.S. 277, 290 (1983); Ewing v. California, 538 U.S. 11, 20 (2003) (plurality opinion); Harmelin, supra, at 996– 997 (KENNEDY, J., concurring in part and concurring in judgment). This "narrow proportionality principle" does not grant judges blanket authority to second-guess decisions made by legislatures or sentencing courts. On the contrary, a reviewing court will only "rarely" need "to engage in extended analysis to determine that a sentence is not constitutionally disproportionate," Solem, supra, at 290, n. 16 (emphasis added), and "successful challenges" to noncapital sentences will be all the more "exceedingly rare," Rummel v. Estelle, 445 U. S. 263, 272 (1980).

We have "not established a clear or consistent path for courts to follow" in applying the highly deferential "narrow proportionality" analysis. *Lockyer*, *supra*, at 72. We have, however, emphasized the primacy of the legislature in

setting sentences, the variety of legitimate penological schemes, the state-by-state diversity protected by our federal system, and the requirement that review be guided by objective, rather than subjective, factors. *Ewing, supra*, at 23 (plurality opinion); *Harmelin, supra*, at 998–1001 (opinion of KENNEDY, J.). Most importantly, however, we have explained that the Eighth Amendment "does not require strict proportionality between crime and sentence"; rather, "it forbids only extreme sentences that are "grossly disproportionate" to the crime." *Ewing, supra*, at 23 (plurality opinion) (quoting *Harmelin, supra*, at 1001 (opinion of KENNEDY, J.)).

Our cases indicate that courts conducting "narrow proportionality" review should begin with a threshold inquiry that compares "the gravity of the offense and the harshness of the penalty." Solem, 463 U. S., at 290–291. This analysis can consider a particular offender's mental state and motive in committing the crime, the actual harm caused to his victim or to society by his conduct, and any prior criminal history. *Id.*, at 292–294, 296–297, and n. 22 (considering motive, past criminal conduct, alcoholism, and propensity for violence of the particular defendant); see also *Ewing*, *supra*, at 28–30 (plurality opinion) (examining defendant's criminal history); *Harmelin*, 501 U. S., at 1001–1004 (opinion of KENNEDY, J.) (noting specific details of the particular crime of conviction).

Only in "the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality," *id.*, at 1005, should courts proceed to an "intrajurisdictional" comparison of the sentence at issue with those imposed on other criminals in the same jurisdiction, and an "interjurisdictional" comparison with sentences imposed for the same crime in other jurisdictions. *Solem*, *supra*, at 291–292. If these subsequent comparisons confirm the inference of gross disproportionality, courts should invalidate the

sentence as a violation of the Eighth Amendment.

B

The second line of precedent relevant to assessing Graham's sentence consists of our cases acknowledging that juvenile offenders are *generally*—though not necessarily in every case—less morally culpable than adults who commit the same crimes. This insight animated our decision in *Thompson* v. *Oklahoma*, 487 U. S. 815 (1988), in which we invalidated a capital sentence imposed on a juvenile who had committed his crime under the age of 16. More recently, in *Roper*, 543 U. S. 551, we extended the prohibition on executions to those who committed their crimes before the age of 18.

Both *Thompson* and *Roper* arose in the unique context of the death penalty, a punishment that our Court has recognized "must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution." 543 U.S., at 568 (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)). Roper's prohibition on the juvenile death penalty followed from our conclusion that "[t]hree general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." 543 U.S., at 569. These differences are a lack of maturity and an underdeveloped sense of responsibility, a heightened susceptibility to negative influences and outside pressures, and the fact that the character of a juvenile is "more transitory" and "less fixed" than that of an adult. Together, these factors establish the *Id.*, at 569–570. "diminished culpability of juveniles," id., at 571, and "render suspect any conclusion" that juveniles are among "the worst offenders" for whom the death penalty is reserved, id., at 570.

Today, the Court views *Roper* as providing the basis for

a new categorical rule that juveniles may never receive a sentence of life without parole for nonhomicide crimes. I disagree. In *Roper*, the Court tailored its analysis of juvenile characteristics to the specific question whether juvenile offenders could constitutionally be subject to capital punishment. Our answer that they could not be sentenced to death was based on the explicit conclusion that they "cannot with reliability be classified among the *worst* offenders." *Id.*, at 569 (emphasis added).

This conclusion does not establish that juveniles can never be eligible for life without parole. A life sentence is of course far less severe than a death sentence, and we have never required that it be imposed only on the very worst offenders, as we have with capital punishment. Treating juvenile life sentences as analogous to capital punishment is at odds with our longstanding view that "the death penalty is different from other punishments in kind rather than degree." *Solem*, *supra*, at 294. It is also at odds with *Roper* itself, which drew the line at capital punishment by blessing juvenile sentences that are "less severe than death" despite involving "forfeiture of some of the most basic liberties." 543 U.S., at 573–574. Indeed, *Roper* explicitly relied on the possible imposition of life without parole on some juvenile offenders. *Id.*, at 572.

But the fact that *Roper* does not support a categorical rule barring life sentences for all juveniles does not mean that a criminal defendant's age is irrelevant to those sentences. On the contrary, our cases establish that the "narrow proportionality" review applicable to noncapital cases itself takes the personal "culpability of the offender" into account in examining whether a given punishment is proportionate to the crime. *Solem*, *supra*, at 292. There is no reason why an offender's juvenile status should be excluded from the analysis. Indeed, given *Roper*'s conclusion that juveniles are typically less blameworthy than adults, 543 U. S., at 571, an offender's juvenile status can

play a central role in the inquiry.

JUSTICE THOMAS disagrees with even our limited reliance on *Roper* on the ground that the present case does not involve capital punishment. *Post*, at 26 (dissenting opinion). That distinction is important—indeed, it underlies our rejection of the categorical rule declared by the Court. But *Roper*'s conclusion that juveniles are typically less culpable than adults has pertinence beyond capital cases, and rightly informs the case-specific inquiry I believe to be appropriate here.

In short, our existing precedent already provides a sufficient framework for assessing the concerns outlined by the majority. Not every juvenile receiving a life sentence will prevail under this approach. Not every juvenile should. But all will receive the protection that the Eighth Amendment requires.

П

Applying the "narrow proportionality" framework to the particular facts of this case, I conclude that Graham's sentence of life without parole violates the Eighth Amendment.*

^{*}JUSTICE ALITO suggests that Graham has failed to preserve any challenge to his sentence based on the "narrow, as-applied proportionality principle." Post, at 1 (dissenting opinion). I disagree. It is true that Graham asks us to declare, categorically, that no juvenile convicted of a nonhomicide offense may ever be subject to a sentence of life without parole. But he claims that this rule is warranted under the narrow proportionality principle we set forth in Solem v. Helm, 463 U. S. 277 (1983), Harmelin v. Michigan, 501 U. S. 957 (1991), and Ewing v. California, 538 U. S. 11 (2003). Brief for Petitioner 30, 31, 54–64. Insofar as he relies on that framework, I believe we may do so as well, even if our analysis results in a narrower holding than the categorical rule Graham seeks. See also Reply Brief for Petitioner 15, n. 8 ("[T]he Court could rule narrowly in this case and hold only that petitioner's sentence of life without parole was unconstitutionally disproportionate").

Α

I begin with the threshold inquiry comparing the gravity of Graham's conduct to the harshness of his penalty. There is no question that the crime for which Graham received his life sentence—armed burglary of a nondomicil with an assault or battery—is "a serious crime deserving serious punishment." *Enmund* v. *Florida*, 458 U. S. 782, 797 (1982). So too is the home invasion robbery that was the basis of Graham's probation violation. But these crimes are certainly less serious than other crimes, such as murder or rape.

As for Graham's degree of personal culpability, he committed the relevant offenses when he was a juvenile—a stage at which, Roper emphasized, one's "culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." 543 U.S., at 571. Graham's age places him in a significantly different category from the defendants in Rummel, Harmelin, and Ewing, all of whom committed their crimes as adults. youth made him relatively more likely to engage in reckless and dangerous criminal activity than an adult; it also likely enhanced his susceptibility to peer pressure. See, e.g., Roper, supra, at 569; Johnson v. Texas, 509 U.S. 350, 367 (1993); Eddings v. Oklahoma, 455 U. S. 104, 115–117 (1982). There is no reason to believe that Graham should be denied the general presumption of diminished culpability that *Roper* indicates should apply to juvenile offenders. If anything, Graham's in-court statements—including his request for a second chance so that he could "do whatever it takes to get to the NFL"—underscore his immaturity. App. 380.

The fact that Graham committed the crimes that he did proves that he was dangerous and deserved to be punished. But it does not establish that he was *particularly* dangerous—at least relative to the murderers and rapists for whom the sentence of life without parole is typically

reserved. On the contrary, his lack of prior criminal convictions, his youth and immaturity, and the difficult circumstances of his upbringing noted by the majority, *ante*, at 1, all suggest that he was markedly less culpable than a typical adult who commits the same offenses.

Despite these considerations, the trial court sentenced Graham to life in prison without the possibility of parole. This is the second-harshest sentence available under our precedents for *any* crime, and the most severe sanction available for a nonhomicide offense. See *Kennedy* v. *Louisiana*, 554 U. S. ___ (2008). Indeed, as the majority notes, Graham's sentence far exceeded the punishment proposed by the Florida Department of Corrections (which suggested a sentence of four years, Brief for Petitioner 20), and the state prosecutors (who asked that he be sentenced to 30 years in prison for the armed burglary, App. 388). No one in Graham's case other than the sentencing judge appears to have believed that Graham deserved to go to prison for life.

Based on the foregoing circumstances, I conclude that there is a strong inference that Graham's sentence of life imprisonment without parole was grossly disproportionate in violation of the Eighth Amendment. I therefore proceed to the next steps of the proportionality analysis.

В

Both intrajurisdictional and interjurisdictional comparisons of Graham's sentence confirm the threshold inference of disproportionality.

Graham's sentence was far more severe than that imposed for similar violations of Florida law, even without taking juvenile status into account. For example, individuals who commit burglary or robbery offenses in Florida receive average sentences of less than 5 years and less than 10 years, respectively. Florida Dept. of Corrections, Annual Report FY 2007–2008: The Guidebook to Correc-

tions in Florida 35. Unsurprisingly, Florida's juvenile criminals receive similarly low sentences—typically less than five years for burglary and less than seven years for robbery. *Id.*, at 36. Graham's life without parole sentence was far more severe than the average sentence imposed on those convicted of murder or manslaughter, who typically receive under 25 years in prison. *Id.*, at 35. As the Court explained in *Solem*, 463 U. S., at 291, "[i]f more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive."

Finally, the inference that Graham's sentence is disproportionate is further validated by comparison to the sentences imposed in other domestic jurisdictions. As the majority opinion explains, Florida is an outlier in its willingness to impose sentences of life without parole on juveniles convicted of nonhomicide crimes. See *ante*, at 11–13.

TII

So much for Graham. But what about Milagro Cunningham, a 17-year-old who beat and raped an 8-year-old girl before leaving her to die under 197 pounds of rock in a recycling bin in a remote landfill? See Musgrave, Cruel or Necessary? Life Terms for Youths Spur National Debate. Palm Beach Post, Oct. 15, 2009, p. 1A. Or Nathan Walker and Jakaris Taylor, the Florida juveniles who together with their friends gang-raped a woman and forced her to perform oral sex on her 12-year-old son? See 3 Sentenced to Life for Gang Rape of Mother, Associated Press, Oct. 14, 2009. The fact that Graham cannot be sentenced to life without parole for his conduct says nothing whatever about these offenders, or others like them who commit nonhomicide crimes far more reprehensible than the conduct at issue here. The Court uses Graham's case as a vehicle to proclaim a new constitutional rule—applicable well beyond the particular facts of Graham's case—that a

sentence of life without parole imposed on *any* juvenile for *any* nonhomicide offense is unconstitutional. This categorical conclusion is as unnecessary as it is unwise.

A holding this broad is unnecessary because the particular conduct and circumstances at issue in the case before us are not serious enough to justify Graham's sentence. In reaching this conclusion, there is no need for the Court to decide whether that same sentence would be constitutional if imposed for other more heinous nonhomicide crimes.

A more restrained approach is especially appropriate in light of the Court's apparent recognition that it is perfectly legitimate for a juvenile to receive a sentence of life without parole for committing murder. This means that there is nothing *inherently* unconstitutional about imposing sentences of life without parole on juvenile offenders; rather, the constitutionality of such sentences depends on the particular crimes for which they are imposed. But if the constitutionality of the sentence turns on the particular crime being punished, then the Court should limit its holding to the particular offenses that Graham committed here, and should decline to consider other hypothetical crimes not presented by this case.

In any event, the Court's categorical conclusion is also unwise. Most importantly, it ignores the fact that some nonhomicide crimes—like the ones committed by Milagro Cunningham, Nathan Walker, and Jakaris Taylor—are especially heinous or grotesque, and thus may be deserving of more severe punishment.

Those under 18 years old may as a general matter have "diminished" culpability relative to adults who commit the same crimes, *Roper*, 543 U. S., at 571, but that does not mean that their culpability is always insufficient to justify a life sentence. See generally *Thompson*, 487 U. S., at 853 (O'Connor, J., concurring in judgment). It does not take a moral sense that is fully developed in every respect to

know that beating and raping an 8-year-old girl and leaving her to die under 197 pounds of rocks is horribly wrong. The single fact of being 17 years old would not afford Cunningham protection against life without parole if the young girl had died—as Cunningham surely expected she would—so why should it do so when she miraculously survived his barbaric brutality?

The Court defends its categorical approach on the grounds that a "clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment." *Ante*, at 24. It argues that a case-by-case approach to proportionality review is constitutionally insufficient because courts might not be able "with sufficient accuracy [to] distinguish the few incorrigible juvenile offenders from the many that have the capacity for change." *Ante*, at 27.

The Court is of course correct that judges will never have perfect foresight—or perfect wisdom—in making sentencing decisions. But this is true when they sentence adults no less than when they sentence juveniles. It is also true when they sentence juveniles who commit murder no less than when they sentence juveniles who commit other crimes.

Our system depends upon sentencing judges applying their reasoned judgment to each case that comes before them. As we explained in *Solem*, the whole enterprise of proportionality review is premised on the "justified" assumption that "courts are competent to judge the gravity of an offense, at least on a relative scale." 463 U. S., at 292. Indeed, "courts traditionally have made these judgments" by applying "generally accepted criteria" to analyze "the harm caused or threatened to the victim or society, and the culpability of the offender." *Id.*, at 292, 294.

* * *

Terrance Graham committed serious offenses, for which he deserves serious punishment. But he was only 16 years old, and under our Court's precedents, his youth is one factor, among others, that should be considered in deciding whether his punishment was unconstitutionally excessive. In my view, Graham's age—together with the nature of his criminal activity and the unusual severity of his sentence—tips the constitutional balance. I thus concur in the Court's judgment that Graham's sentence of life without parole violated the Eighth Amendment.

I would not, however, reach the same conclusion in every case involving a juvenile offender. Some crimes are so heinous, and some juvenile offenders so highly culpable, that a sentence of life without parole may be entirely justified under the Constitution. As we have said, "successful challenges" to noncapital sentences under the Eighth Amendment have been—and, in my view, should continue to be—"exceedingly rare." *Rummel*, 445 U. S., at 272. But Graham's sentence presents the exceptional case that our precedents have recognized will come along. We should grant Graham the relief to which he is entitled under the Eighth Amendment. The Court errs, however, in using this case as a vehicle for unsettling our established jurisprudence and fashioning a categorical rule applicable to far different cases.

SUPREME COURT OF THE UNITED STATES

No. 08-7412

TERRANCE JAMAR GRAHAM, PETITIONER v. FLORIDA

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

[May 17, 2010]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, and with whom JUSTICE ALITO joins as to Parts I and III, dissenting.

The Court holds today that it is "grossly disproportionate" and hence unconstitutional for any judge or jury to impose a sentence of life without parole on an offender less than 18 years old, unless he has committed a homicide. Although the text of the Constitution is silent regarding the permissibility of this sentencing practice, and although it would not have offended the standards that prevailed at the founding, the Court insists that the standards of American society have evolved such that the Constitution now requires its prohibition.

The news of this evolution will, I think, come as a surprise to the American people. Congress, the District of Columbia, and 37 States allow judges and juries to consider this sentencing practice in juvenile nonhomicide cases, and those judges and juries have decided to use it in the very worst cases they have encountered.

The Court does not conclude that life without parole itself is a cruel and unusual punishment. It instead rejects the judgments of those legislatures, judges, and juries regarding what the Court describes as the "moral" question of whether this sentence can ever be "proportionat[e]" when applied to the category of offenders at

issue here. *Ante*, at 7 (internal quotation marks omitted), *ante*, at 1 (STEVENS, J., concurring).

I am unwilling to assume that we, as members of this Court, are any more capable of making such moral judgments than our fellow citizens. Nothing in our training as judges qualifies us for that task, and nothing in Article III gives us that authority.

I respectfully dissent.

T

The Court recounts the facts of Terrance Jamar Graham's case in detail, so only a summary is necessary here. At age 16 years and 6 months, Graham and two masked accomplices committed a burglary at a small Florida restaurant, during which one of Graham's accomplices twice struck the restaurant manager on the head with a steel pipe when he refused to turn over money to the intruders. Graham was arrested and charged as an adult. He later pleaded guilty to two offenses, including armed burglary with assault or battery, an offense punishable by life imprisonment under Florida law. Fla. Stat. $\S 810.02(2)(a)$, 810.02(2)(b) (2007). The trial court withheld adjudication on both counts, however, and sentenced Graham to probation, the first 12 months of which he spent in a county detention facility.

Graham reoffended just six months after his release. At a probation revocation hearing, a judge found by a preponderance of the evidence that, at age 17 years and 11 months, Graham invaded a home with two accomplices and held the homeowner at gunpoint for approximately 30 minutes while his accomplices ransacked the residence. As a result, the judge concluded that Graham had violated his probation and, after additional hearings, adjudicated Graham guilty on both counts arising from the restaurant robbery. The judge imposed the maximum sentence allowed by Florida law on the armed burglary count, life

imprisonment without the possibility of parole.

Graham argues, and the Court holds, that this sentence violates the Eighth Amendment's Cruel and Unusual Punishments Clause because a life-without-parole sentence is always "grossly disproportionate" when imposed on a person under 18 who commits any crime short of a homicide. Brief for Petitioner 24; *ante*, at 21.

II A

The Eighth Amendment, which applies to the States through the Fourteenth, provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." It is by now well established that the Cruel and Unusual Punishments Clause was originally understood as prohibiting torturous "'methods of punishment," Harmelin v. Michigan, 501 U. S. 957, 979 (1991) (opinion of SCALIA, J.) (quoting Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 Cal. L. Rev. 839, 842 (1969))—specifically methods akin to those that had been considered cruel and unusual at the time the Bill of Rights was adopted, Baze v. Rees, 553 U.S. 35, 99 (2008) (THOMAS, J., concurring in judgment). With one arguable exception, see Weems v. United States, 217 U.S. 349 (1910); Harmelin, supra, at 990–994 (opinion of SCALIA, J.) (discussing the scope and relevance of Weems' holding), this Court applied the Clause with that understanding for nearly 170 years after the Eighth Amendment's ratification.

More recently, however, the Court has held that the Clause authorizes it to proscribe not only methods of punishment that qualify as "cruel and unusual," but also any punishment that the Court deems "grossly disproportionate" to the crime committed. *Ante*, at 8 (internal quotation marks omitted). This latter interpretation is

entirely the Court's creation. As has been described elsewhere at length, there is virtually no indication that the Cruel and Unusual Punishments Clause originally was understood to require proportionality in sentencing. See Harmelin, 501 U.S., at 975–985 (opinion of SCALIA, J.). Here, it suffices to recall just two points. First, the Clause does not expressly refer to proportionality or invoke any synonym for that term, even though the Framers were familiar with the concept, as evidenced by several founding-era state constitutions that required (albeit without defining) proportional punishments. See id., at 977–978. In addition, the penal statute adopted by the First Congress demonstrates that proportionality in sentencing was not considered a constitutional command.¹ See id., at 980–981 (noting that the statute prescribed capital punishment for offenses ranging from "'run[ning] away with ... goods or merchandise to the value of fifty dollars," to "murder on the high seas" (quoting 1 Stat. 114)); see also Preyer, Penal Measures in the American Colonies: An Overview, 26 Am. J. Legal Hist. 326, 348–349, 353 (1982) (explaining that crimes in the late 18th-century colonies

¹The Chief Justice's concurrence suggests that it is unnecessary to remark on the underlying question whether the Eighth Amendment requires proportionality in sentencing because "[n]either party here asks us to reexamine our precedents" requiring "proportionality between noncapital offenses and their corresponding punishments." Ante, at 2 (opinion concurring in judgment). I disagree. Both the Court and the concurrence do more than apply existing noncapital proportionality precedents to the particulars of Graham's claim. The Court radically departs from the framework those precedents establish by applying to a noncapital sentence the categorical proportionality review its prior decisions have reserved for death penalty cases alone. See Part III, infra. The concurrence, meanwhile, breathes new life into the case-bycase proportionality approach that previously governed noncapital cases, from which the Court has steadily, and wisely, retreated since Solem v. Helm, 463 U.S. 277 (1983). See Part IV, infra. In dissenting from both choices to expand proportionality review, I find it essential to reexamine the foundations on which that doctrine is built.

generally were punished either by fines, whipping, or public "shaming," or by death, as intermediate sentencing options such as incarceration were not common).

The Court has nonetheless invoked proportionality to declare that capital punishment—though not unconstitutional per se—is categorically too harsh a penalty to apply to certain types of crimes and certain classes of offenders. See Coker v. Georgia, 433 U.S. 584 (1977) (plurality opinion) (rape of an adult woman); Kennedy v. Louisiana, 554 (2008) (rape of a child); Enmund v. Florida, 458 U.S. 782 (1982) (felony murder in which the defendant participated in the felony but did not kill or intend to kill); Thompson v. Oklahoma, 487 U.S. 815 (1988) (plurality opinion) (juveniles under 16); Roper v. Simmons, 543 U.S. 551 (2005) (juveniles under 18); Atkins v. Virginia, 536 U. S. 304 (2002) (mentally retarded offenders). In adopting these categorical proportionality rules, the Court intrudes upon areas that the Constitution reserves to other (state and federal) organs of government. The Eighth Amendment prohibits the government from inflicting a cruel and unusual method of punishment upon a defendant. Other constitutional provisions ensure the defendant's right to fair process before any punishment is imposed. But, as members of today's majority note, "[s]ociety changes," ante, at 1 (STEVENS, J., concurring), and the Eighth Amendment leaves the unavoidably moral question of who "deserves" a particular nonprohibited method of punishment to the judgment of the legislatures that authorize the penalty, the prosecutors who seek it, and the judges and juries that impose it under circumstances they deem appropriate.

The Court has nonetheless adopted categorical rules that shield entire classes of offenses and offenders from the death penalty on the theory that "evolving standards of decency" require this result. *Ante*, at 7 (internal quotation marks omitted). The Court has offered assurances that these standards can be reliably measured by "objective"

tive indicia" of "national consensus," such as state and federal legislation, jury behavior, and (surprisingly, given that we are talking about "national" consensus) international opinion. Ante, at 10 (quoting Roper, supra, at 563); see also ante, at 8–15, 29–31. Yet even assuming that is true, the Framers did not provide for the constitutionality of a particular type of punishment to turn on a "snapshot of American public opinion" taken at the moment a case is decided. Roper, supra, at 629 (SCALIA, J., dissenting). By holding otherwise, the Court pretermits in all but one direction the evolution of the standards it describes, thus "calling a constitutional halt to what may well be a pendulum swing in social attitudes," Thompson, supra, at 869 (SCALIA, J., dissenting), and "stunt[ing] legislative consideration" of new questions of penal policy as they emerge, Kennedy, supra, at ___ (slip op., at 2) (ALITO, J., dissenting).

But the Court is not content to rely on snapshots of community consensus in any event. Ante, at 16 ("Community consensus, while 'entitled to great weight,' is not itself determinative" (quoting Kennedy, supra, at __ (slip op., at 24)). Instead, it reserves the right to reject the evidence of consensus it finds whenever its own "independent judgment" points in a different direction. Ante, at 16. The Court thus openly claims the power not only to approve or disapprove of democratic choices in penal policy based on evidence of how society's standards have evolved, but also on the basis of the Court's "independent" perception of how those standards should evolve, which depends on what the Court concedes is ""necessarily . . . a moral judgment"" regarding the propriety of a given punishment in today's society. Ante, at 7 (quoting Kennedy, *supra*, at ___ (slip op., at 8)).

The categorical proportionality review the Court employs in capital cases thus lacks a principled foundation. The Court's decision today is significant because it does

not merely apply this standard—it remarkably expands its reach. For the first time in its history, the Court declares an entire class of offenders immune from a noncapital sentence using the categorical approach it previously reserved for death penalty cases alone.

B

Until today, the Court has based its categorical proportionality rulings on the notion that the Constitution gives special protection to capital defendants because the death penalty is a uniquely severe punishment that must be reserved for only those who are "most deserving of execution." Atkins, supra, at 319; see Roper, supra, at 568; Eddings v. Oklahoma, 455 U. S. 104 (1982); Lockett v. Ohio, 438 U. S. 586 (1978). Of course, the Eighth Amendment itself makes no distinction between capital and noncapital sentencing, but the "bright line" the Court drew between the two penalties has for many years served as the principal justification for the Court's willingness to reject democratic choices regarding the death penalty. See Rummel v. Estelle, 445 U. S. 263, 275 (1980).

Today's decision eviscerates that distinction. "Death is different" no longer. The Court now claims not only the power categorically to reserve the "most severe punishment" for those the Court thinks are "the most deserving of execution," *Roper*, 543 U. S., at 568 (quoting *Atkins*, 536 U. S., at 319), but also to declare that "less culpable" persons are categorically exempt from the "second most severe penalty." *Ante*, at 21 (emphasis added). No reliable limiting principle remains to prevent the Court from immunizing any class of offenders from the law's third, fourth, fifth, or fiftieth most severe penalties as well.

The Court's departure from the "death is different" distinction is especially mystifying when one considers how long it has resisted crossing that divide. Indeed, for a time the Court declined to apply proportionality principles

to noncapital sentences at all, emphasizing that "a sentence of death differs in kind from any sentence of imprisonment, no matter how long." Rummel, 445 U. S., at 272 (emphasis added). Based on that rationale, the Court found that the excessiveness of one prison term as compared to another was "properly within the province of legislatures, not courts," id., at 275–276, precisely because it involved an "invariably . . . subjective determination, there being no clear way to make 'any constitutional distinction between one term of years and a shorter or longer term of years," Hutto v. Davis, 454 U. S. 370, 373 (1982) (per curiam) (quoting Rummel, supra, at 275; emphasis added).

Even when the Court broke from that understanding in its 5-to-4 decision in *Solem* v. *Helm*, 463 U. S. 277 (1983) (striking down as "grossly disproportionate" a life-withoutparole sentence imposed on a defendant for passing a worthless check), the Court did so only as applied to the facts of that case; it announced no categorical rule. Id., at 288, 303. Moreover, the Court soon cabined Solem's rationale. The controlling opinion in the Court's very next noncapital proportionality case emphasized that principles of federalism require substantial deference to legislative choices regarding the proper length of prison sentences. Harmelin, 501 U.S., at 999 (opinion of KENNEDY, J.) ("[M]arked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure"); id., at 1000 ("[D]iffering attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of prison terms for particular crimes"). That opinion thus concluded that "successful challenges to the proportionality of [prison] sentences [would be] exceedingly rare." 1001 (internal quotation marks omitted).

They have been rare indeed. In the 28 years since

Solem, the Court has considered just three such challenges and has rejected them all, see *Ewing* v. *California*, 538 U. S. 11 (2003); *Lockyer* v. *Andrade*, 538 U. S. 63 (2003); *Harmelin*, *supra*, largely on the theory that criticisms of the "wisdom, cost-efficiency, and effectiveness" of term-of-years prison sentences are "appropriately directed at the legislature[s]," not the courts, *Ewing*, *supra*, at 27, 28 (plurality opinion). The Court correctly notes that those decisions were "closely divided," *ante*, at 8, but so was *Solem* itself, and it is now fair to describe *Solem* as an outlier.²

Remarkably, the Court today does more than return to *Solem*'s case-by-case proportionality standard for noncapital sentences; it hurtles past it to impose a *categorical* proportionality rule banning life-without-parole sentences not just in this case, but in *every* case involving a juvenile nonhomicide offender, no matter what the circumstances. Neither the Eighth Amendment nor the Court's precedents justify this decision.

Ш

The Court asserts that categorical proportionality review is necessary here merely because Graham asks for a categorical rule, see *ante*, at 10, and because the Court

²Courts and commentators interpreting this Court's decisions have reached this conclusion. See, e.g., United States v. Polk, 546 F. 3d 74, 76 (CA1 2008) ("[I]nstances of gross disproportionality [in noncapital cases] will be hen's-teeth rare"); Barkow, The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity, 107 Mich. L. Rev. 1145, 1160 (2009) ("Solem now stands as an outlier"); Note, The Capital Punishment Exception: A Case for Constitutionalizing the Substantive Criminal Law, 104 Colum. L. Rev. 426, 445 (2004) (observing that outside of the capital context, "proportionality review has been virtually dormant"); Steiker & Steiker, Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly, 11 U. Pa. J. Const. L. 155, 184 (2009) ("Eighth Amendment challenges to excessive incarceration [are] essentially non-starters").

thinks clear lines are a good idea, see ante, at 24-25. I find those factors wholly insufficient to justify the Court's break from past practice. First, the Court fails to acknowledge that a petitioner seeking to exempt an entire category of offenders from a sentencing practice carries a much heavier burden than one seeking case-specific relief under Solem. Unlike the petitioner in Solem, Graham must establish not only that his own life-without-parole sentence is "grossly disproportionate," but also that such a sentence is always grossly disproportionate whenever it is applied to a juvenile nonhomicide offender, no matter how heinous his crime. Cf. United States v. Salerno, 481 U.S. 739 (1987). Second, even applying the Court's categorical "evolving standards" test, neither objective evidence of national consensus nor the notions of culpability on which the Court's "independent judgment" relies can justify the categorical rule it declares here.

Α

According to the Court, proper Eighth Amendment analysis "begins with objective indicia of national consensus," and "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures," *ante*, at 10–11 (internal quota-

³The Court ignores entirely the threshold inquiry of whether subjecting juvenile offenders to adult penalties was one of the "modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." Ford v. Wainwright, 477 U. S. 399, 405 (1986). As the Court has noted in the past, however, the evidence is clear that, at the time of the Founding, "the common law set a rebuttable presumption of incapacity to commit any felony at the age of 14, and theoretically permitted [even] capital punishment to be imposed on a person as young as age 7." Stanford v. Kentucky, 492 U. S. 361, 368 (1989) (citing 4 W. Blackstone, Commentaries *23–*24; 1 M. Hale, Pleas of the Crown 24–29 (1800)). It thus seems exceedingly unlikely that the imposition of a life-without-parole sentence on a person of Graham's age would run afoul of those standards.

tion marks omitted). As such, the analysis should end quickly, because a national "consensus" in favor of the Court's result simply does not exist. The laws of all 50 States, the Federal Government, and the District of Columbia provide that iuveniles over a certain age may be tried in adult court if charged with certain crimes.⁴ See ante, at 33–35 (Appendix to opinion of the Court). Fortyfive States, the Federal Government, and the District of Columbia expose juvenile offenders charged in adult court to the very same range of punishments faced by adults charged with the same crimes. See ante, at 33–34, Part I. Eight of those States do not make life-without-parole sentences available for any nonhomicide offender, regardless of age.⁵ All remaining jurisdictions—the Federal Government, the other 37 States, and the Districtauthorize life-without-parole sentences for certain nonhomicide offenses, and authorize the imposition of such sentences on persons under 18. See *ibid*. Only *five* States

⁴Although the details of state laws vary extensively, they generally permit the transfer of a juvenile offender to adult court through one or more of the following mechanisms: (1) judicial waiver, in which the juvenile court has the authority to waive jurisdiction over the offender and transfer the case to adult court; (2) concurrent jurisdiction, in which adult and juvenile courts share jurisdiction over certain cases and the prosecutor has discretion to file in either court; or (3) statutory provisions that exclude juveniles who commit certain crimes from juvenile-court jurisdiction. See Dept. of Justice, Juvenile Offenders and Victims: 1999 National Report 89, 104 (1999) (hereinafter 1999 DOJ National Report); Feld, Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences, 10 J. Law & Family Studies 11, 38–39 (2007).

 $^{^5}$ Alaska entitles all offenders to parole, regardless of their crime. Alaska Stat. $\S12.55.015(g)$ (2008). The other seven States provide parole eligibility to all offenders, except those who commit certain homicide crimes. Conn. Gen. Stat. $\S53a-35a$ (2009); Haw. Rev. Stat. $\S\$706-656(1)-(2)$ (1993 and 2008 Supp. Pamphlet); Me. Rev. Stat. Ann., Tit. 17–a, $\S1251$ (2006); Mass. Gen. Laws Ann., ch. 265, $\S2$ (West 2008); N. J. Stat. Ann. $\S\$2C:11-3(b)(2)-(3)$ (West 2005); N. M. Stat. Ann. $\S31-18-14$ (Supp. 2009); Vt. Stat. Ann., Tit. 13, $\S2303$ (2009).

prohibit juvenile offenders from receiving a life-withoutparole sentence that could be imposed on an adult convicted of the same crime.⁶

No plausible claim of a consensus against this sentencing practice can be made in light of this overwhelming legislative evidence. The sole fact that federal law authorizes this practice singlehandedly refutes the claim that our Nation finds it morally repugnant. The additional reality that 37 out of 50 States (a supermajority of 74%) permit the practice makes the claim utterly implausible. Not only is there no consensus against this penalty, there is a clear legislative consensus *in favor* of its availability.

Undaunted, however, the Court brushes this evidence aside as "incomplete and unavailing," declaring that "'[t]here are measures of consensus other than legislation.'" *Ante*, at 11 (quoting *Kennedy*, 554 U. S., at ____ (slip op., at 22)). This is nothing short of stunning. Most importantly, federal civilian law approves this sentencing practice.⁷ And although the Court has never decided how many state laws are necessary to show consensus, the Court has never banished into constitutional exile a sentencing practice that the laws of a majority, let alone a supermajority, of States expressly permit.⁸

 $^{^6}$ Colo. Rev. Stat. Ann. §18–1.3–401(4)(b) (2009) (authorizing mandatory life sentence with possibility for parole after 40 years for juveniles convicted of class 1 felonies); Kan. Stat. Ann. §\$21–4622, 4643 (2007); Ky. Rev. Stat. Ann. §640.040 (West 2006); Shepherd v. Commonwealth, 251 S. W. 3d 309, 320–321 (Ky. 2008); Mont. Code Ann. §46–18–222(1) (2009); Tex. Penal Code Ann. §12.31 (West Supp. 2009).

⁷Although the Court previously has dismissed the relevance of the Uniform Code of Military Justice to its discernment of consensus, see *Kennedy* v. *Louisiana*, 554 U. S. ___, ___ (2008) (statement of Kennedy, J., respecting denial of rehearing), juveniles who enlist in the military are nonetheless eligible for life-without-parole sentences if they commit certain nonhomicide crimes. See 10 U. S. C. §\$505(a) (permitting enlistment at age 17), 856a, 920 (2006 ed., Supp. II).

⁸Kennedy, 554 U.S., at ___ (slip op., at 12, 23) (prohibiting capital

Moreover, the consistency and direction of recent legislation—a factor the Court previously has relied upon when crafting categorical proportionality rules, see *Atkins*, 536 U.S., at 315–316; *Roper*, 543 U.S., at 565–566—underscores the consensus *against* the rule the Court announces here. In my view, the Court cannot point to a national consensus in favor of its rule without assuming a consensus in favor of the two penological points it later discusses: (1) Juveniles are always less culpable than similarly-situated adults, and (2) juveniles who commit nonhomicide crimes should always receive an opportunity to demonstrate rehabilitation through parole. *Ante*, at 16–17, 22–24. But legislative trends make that assumption untenable.

First, States over the past 20 years have consistently *increased* the severity of punishments for juvenile offenders. See 1999 DOJ National Report 89 (referring to the 1990's as "a time of unprecedented change as State legis-

punishment for the rape of a child where only six States had enacted statutes authorizing the punishment since Furman v. Georgia, 408 U. S. 238 (1972) (per curiam)); Roper v. Simmons, 543 U. S. 551, 564, 568 (2005) (prohibiting capital punishment for offenders younger than 18 where 18 of 38 death-penalty States precluded imposition of the penalty on persons under 18 and the remaining 12 States did not permit capital punishment at all); Atkins v. Virginia, 536 U.S. 304, 314-315 (2002) (prohibiting capital punishment of mentally retarded persons where 18 of 38 death-penalty States precluded imposition of the penalty on such persons and the remaining States did not authorize capital punishment at all); Thompson v. Oklahoma, 487 U.S. 815, 826, 829 (1988) (plurality opinion) (prohibiting capital punishment of offenders under 16 where 18 of 36 death-penalty States precluded imposition of the penalty on such persons and the remaining States did not permit capital punishment at all); Enmund v. Florida, 458 U.S. 782, 789 (1982) (prohibiting capital punishment for felony murder without proof of intent to kill where eight States allowed the punishment without proof of that element); Coker v. Georgia, 433 U.S. 584, 593 (1977) (holding capital punishment for the rape of a woman unconstitutional where "[a]t no time in the last 50 years have a majority of the States authorized death as a punishment for rape").

latures crack[ed] down on juvenile crime"); *ibid*. (noting that, during that period, "legislatures in 47 States and the District of Columbia enacted laws that made their juvenile justice systems more punitive," principally by "ma[king] it easier to transfer juvenile offenders from the juvenile justice system to the [adult] criminal justice system"); id., at 104. This, in my view, reveals the States' widespread agreement that juveniles can sometimes act with the same culpability as adults and that the law should permit judges and juries to consider adult sentences—including life without parole—in those rare and unfortunate cases. See Feld, Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences, 10 J. Law & Family Studies 11, 69–70 (2007) (noting that life-without-parole sentences for juveniles have increased since the 1980's); Amnesty International & Human Rights Watch, The Rest of Their Lives: Life Without Parole for Child Offenders in the United States 2, 31 (2005) (same).

Second, legislatures have moved away from parole over the same period. Congress abolished parole for federal offenders in 1984 amid criticism that it was subject to "gamesmanship and cynicism," Breyer, Federal Sentencing Guidelines Revisited, 11 Fed. Sentencing Rep. 180 (1999) (discussing the Sentencing Reform Act of 1984, 98 Stat. 1987), and several States have followed suit, see T. Hughes, D. Wilson, & A. Beck, Dept. of Justice, Bureau of Justice Statistics, Trends in State Parole, 1990–2000, p. 1 (2001) (noting that, by the end of 2000, 16 States had abolished parole for all offenses, while another 4 States had abolished it for certain ones). In light of these developments, the argument that there is nationwide consensus that parole must be available to offenders less than 18 years old in *every* nonhomicide case simply fails.

В

The Court nonetheless dismisses existing legislation,

pointing out that life-without-parole sentences are rarely imposed on juvenile nonhomicide offenders—129 times in recent memory⁹ by the Court's calculation, spread out across 11 States and the federal courts. *Ante*, at 11–13. Based on this rarity of use, the Court proclaims a consensus against the practice, implying that laws allowing it either reflect the consensus of a prior, less civilized time or are the work of legislatures tone-deaf to moral values of their constituents that this Court claims to have easily discerned from afar. See *ante*, at 11.

This logic strains credulity. It has been rejected before. *Gregg* v. *Georgia*, 428 U. S. 153, 182 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) ("[T]he relative infrequency of jury verdicts imposing the death sentence does not indicate rejection of capital punishment *per se*. Rather, [it] . . . may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases"). It should also be rejected here. That a punishment is rarely imposed demonstrates nothing more than a general consensus that it should be just that—rarely imposed. It is not proof that the punishment is one the Nation abhors.

The Court nonetheless insists that the 26 States that authorize this penalty, but are not presently incarcerating a juvenile nonhomicide offender on a life-without-parole sentence, cannot be counted as approving its use. The mere fact that the laws of a jurisdiction permit this penalty, the Court explains, "does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration." *Ante*, at 16.

As an initial matter, even accepting the Court's theory,

⁹I say "recent memory" because the research relied upon by the Court provides a headcount of juvenile nonhomicide offenders presently incarcerated in this country, but does not provide more specific information about all of the offenders, such as the dates on which they were convicted.

federal law authorizes this penalty and the Federal Government uses it. See *ante*, at 13 (citing Letter and Attachment from Judith Simon Garrett, U. S. Dept. of Justice, Federal Bureau of Prisons, to Supreme Court Library (Apr. 12, 2010) (available in Clerk of Court's case file)). That should be all the evidence necessary to refute the claim of a national consensus against this penalty.

Yet even when examining the States that authorize, but have not recently employed, this sentencing practice, the Court's theory is unsound. Under the Court's evolving standards test, "[i]t is not the burden of [a State] to establish a national consensus approving what their citizens have voted to do; rather, it is the 'heavy burden' of petitioners to establish a national consensus against it." Stanford v. Kentucky, 492 U.S. 361, 373 (1989) (quoting Gregg, supra, at 175 (joint opinion of Stewart, Powell, and STEVENS, JJ.); some emphasis added). In light of this fact, the Court is wrong to equate a jurisdiction's disuse of a legislatively authorized penalty with its moral opposition to it. The fact that the laws of a jurisdiction permit this sentencing practice demonstrates, at a minimum, that the citizens of that jurisdiction find tolerable the possibility that a jury of their peers could impose a life-withoutparole sentence on a juvenile whose nonhomicide crime is sufficiently deprayed.

The recent case of 16-year-old Keighton Budder illustrates this point. Just weeks before the release of this opinion, an Oklahoma jury sentenced Budder to life without parole after hearing evidence that he viciously attacked a 17-year-old girl who gave him a ride home from a party. See Stogsdill, Teen Gets Life Terms in Stabbing, Rape Case, Tulsa World, Apr. 2, 2010, p. A10; Stogsdill, Delaware County Teen Sentenced in Rape, Assault Case, Tulsa World, May 4, 2010, p. A12. Budder allegedly put the girl's head "into a headlock and sliced her throat," raped her, stabbed her about 20 times, beat her, and

pounded her face into the rocks alongside a dirt road. Teen Gets Life Terms in Stabbing, Rape Case, at A10. Miraculously, the victim survived. *Ibid*.

Budder's crime was rare in its brutality. The sentence the jury imposed was also rare. According to the study relied upon by this Court, Oklahoma had no such offender in its prison system before Budder's offense. P. Annino, D. Rasmussen, & C. Rice, Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to Nation 2, 14 (Sept. 14, 2009) (Table A). Without his conviction, therefore, the Court would have counted Oklahoma's citizens as morally opposed to life-without-parole sentences for juveniles nonhomicide offenders.

Yet Oklahoma's experience proves the inescapable flaw in that reasoning: Oklahoma citizens have enacted laws that allow Oklahoma juries to consider life-without-parole sentences in juvenile nonhomicide cases. Oklahoma juries invoke those laws rarely—in the unusual cases that they find exceptionally depraved. I cannot agree with the Court that Oklahoma citizens should be constitutionally disabled from using this sentencing practice merely because they have not done so more frequently. If anything, the rarity of this penalty's use underscores just how judicious sentencing judges and juries across the country have been in invoking it.

This fact is entirely consistent with the Court's intuition that juveniles *generally* are less culpable and more capable of growth than adults. See *infra*, at 21–22. Graham's own case provides another example. Graham was statutorily eligible for a life-without-parole sentence after his first crime. But the record indicates that the trial court did not give such a sentence serious consideration at Graham's initial plea hearing. It was only after Graham subsequently violated his parole by invading a home at gunpoint that the maximum sentence was imposed.

In sum, the Court's calculation that 129 juvenile non-

homicide life-without-parole sentences have been imposed nationwide in recent memory, even if accepted, hardly amounts to strong evidence that the sentencing practice offends our common sense of decency.¹⁰

Finally, I cannot help but note that the statistics the Court finds inadequate to justify the penalty in this case

¹⁰ Because existing legislation plainly suffices to refute any consensus against this sentencing practice, I assume the accuracy of the Court's evidence regarding the frequency with which this sentence has been imposed. But I would be remiss if I did not mention two points about the Court's figures. First, it seems odd that the Court counts only those juveniles sentenced to life without parole and excludes from its analysis all juveniles sentenced to lengthy term-of-years sentences (e.g., 70 or 80 years' imprisonment). It is difficult to argue that a judge or jury imposing such a long sentence—which effectively denies the offender any material opportunity for parole—would express moral outrage at a life-without-parole sentence.

Second, if objective indicia of consensus were truly important to the Court's analysis, the statistical information presently available would be woefully inadequate to form the basis of an Eighth Amendment rule that can be revoked only by constitutional amendment. The only evidence submitted to this Court regarding the frequency of this sentence's imposition was a single study completed after this Court granted certiorari in this case. See P. Annino, D. Rasmussen, & C. Rice, Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to Nation 2 (Sept. 14, 2009). Although I have no reason to question the professionalism with which this study was conducted, the study itself acknowledges that it was incomplete and the first of its kind. See id., at 1. The Court's questionable decision to "complete" the study on its own does not materially increase its reliability. For one thing, by finishing the study itself, the Court prohibits the parties from ever disputing its findings. Complicating matters further, the original study sometimes relied on third-party data rather than data from the States themselves, see ibid.; the study has never been peer reviewed; and specific data on all 129 offenders (age, date of conviction, crime of conviction, etc.), have not been collected, making verification of the Court's headcount impossible. The Court inexplicably blames Florida for all of this. See ante, at 12. But as already noted, it is not Florida's burden to collect data to prove a national consensus in favor of this sentencing practice, but Graham's "heavy burden" to prove a consensus against it. See supra, at 16.

are stronger than those supporting at least one other penalty this Court has upheld. Not long ago, this Court, joined by the author of today's opinion, upheld the application of the death penalty against a 16-year-old, despite the fact that no such punishment had been carried out on a person of that age in this country in nearly 30 years. See *Stanford*, 492 U.S., at 374. Whatever the statistical frequency with which life-without-parole sentences have been imposed on juvenile nonhomicide offenders in the last 30 years, it is surely greater than zero.

In the end, however, objective factors such as legislation and the frequency of a penalty's use are merely ornaments in the Court's analysis, window dressing that accompanies its judicial fiat.¹¹ By the Court's own decree, "[c]ommunity consensus . . . is not itself determinative." *Ante*, at 16. Only the independent moral judgment of this Court is sufficient to decide the question. See *ibid*.

¹¹I confine to a footnote the Court's discussion of foreign laws and sentencing practices because past opinions explain at length why such factors are irrelevant to the meaning of our Constitution or the Court's discernment of any longstanding tradition in this Nation. See Atkins, 536 U.S., at 324-325 (Rehnquist, C.J., dissenting). Here, two points suffice. First, despite the Court's attempt to count the actual number of juvenile nonhomicide offenders serving life-without-parole sentences in other nations (a task even more challenging than counting them within our borders), the laws of other countries permit juvenile life-withoutparole sentences, see Child Rights Information, Network, C. de la Vega, M. Montesano, & A. Solter, Human Rights Advocates, Statement on Juvenile Sentencing to Human Rights Council, 10th Sess. (Nov. 3, 2009) ("Eleven countries have laws with the potential to permit the sentencing of child offenders to life without the possibility of release"), online at http://www.crin.org/resources/infoDetail.asp?ID=19806) (as visited May 14, 2010, and available in Clerk of Court's case file)). Second, present legislation notwithstanding, democracies around the world remain free to adopt life-without-parole sentences for juvenile offenders tomorrow if they see fit. Starting today, ours can count itself among the few in which judicial decree prevents voters from making that choice.

 \mathbf{C}

Lacking any plausible claim to consensus, the Court shifts to the heart of its argument: its "independent judgment" that this sentencing practice does not "serv[e] legitimate penological goals." *Ante*, at 16. The Court begins that analysis with the obligatory preamble that "'[t]he Eighth Amendment does not mandate adoption of any one penological theory," *ante*, at 20 (quoting *Harmelin*, 501 U. S., at 999 (opinion of KENNEDY, J.)), then promptly mandates the adoption of the theories the Court deems best.

First, the Court acknowledges that, at a minimum, the imposition of life-without-parole sentences on juvenile nonhomicide offenders serves two "legitimate" penological goals: incapacitation and deterrence. Ante, at 20–21. By definition, such sentences serve the goal of incapacitation by ensuring that juvenile offenders who commit armed burglaries, or those who commit the types of grievous sex crimes described by THE CHIEF JUSTICE, no longer threaten their communities. See ante, at 9 (opinion concurring in judgment). That should settle the matter, since the Court acknowledges that incapacitation is an "important" penological goal. Ante, at 21. Yet, the Court finds this goal "inadequate" to justify the life-without-parole sentences here. Ante, at 22 (emphasis added). A similar fate befalls deterrence. The Court acknowledges that such sentences will deter future juvenile offenders, at least to some degree, but rejects that penological goal, not as illegitimate, but as insufficient. Ante, at 21 ("[A]ny limited deterrent effect provided by life without parole is not enough to justify the sentence." (emphasis added)).

The Court looks more favorably on rehabilitation, but laments that life-without-parole sentences do little to promote this goal because they result in the offender's permanent incarceration. *Ante*, at 22. Of course, the Court recognizes that rehabilitation's "utility and proper implementation" are subject to debate. *Ante*, at 23. But

that does not stop it from declaring that a legislature may not "forswea[r]... the rehabilitative ideal." *Ibid*. In other words, the Eighth Amendment does not mandate "any one penological theory," *ante*, at 20 (internal quotation marks omitted), just one the Court approves.

Ultimately, however, the Court's "independent judgment" and the proportionality rule itself center on retribution—the notion that a criminal sentence should be proportioned to "'the personal culpability of the criminal offender.'" *Ante*, at 16, 20 (quoting *Tison* v. *Arizona*, 481 U. S. 137, 149 (1987)). The Court finds that retributive purposes are not served here for two reasons.

1

First, quoting Roper, 543 U.S., at 569–570, the Court concludes that juveniles are less culpable than adults because, as compared to adults, they "have a "lack of maturity and an underdeveloped sense of responsibility,"" and "their characters are 'not as well formed." Ante, at 17. As a general matter, this statement is entirely consistent with the evidence recounted above that judges and juries impose the sentence at issue quite infrequently, despite legislative authorization to do so in many more cases. See Part III-B, supra. Our society tends to treat the average juvenile as less culpable than the average adult. But the question here does not involve the average juvenile. The question, instead, is whether the Constitution prohibits judges and juries from ever concluding that an offender under the age of 18 has demonstrated sufficient depravity and incorrigibility to warrant his permanent incarceration.

In holding that the Constitution imposes such a ban, the Court cites "developments in psychology and brain science" indicating that juvenile minds "continue to mature through late adolescence," *ante*, at 17 (citing Brief for American Medical Association et al. as *Amici Curiae* 16—

24; Brief for American Psychological Association et al. as *Amici Curiae* 22–27 (hereinafter APA Brief)), and that juveniles are "more likely [than adults] to engage in risky behaviors," *id.*, at 7. But even if such generalizations from social science were relevant to constitutional rulemaking, the Court misstates the data on which it relies.

The Court equates the propensity of a fairly substantial number of youths to engage in "risky" or antisocial behaviors with the propensity of a much smaller group to commit violent crimes. Ante, at 26. But research relied upon by the *amici* cited in the Court's opinion differentiates between adolescents for whom antisocial behavior is a fleeting symptom and those for whom it is a lifelong pattern. See Moffitt, Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy, 100 Psychological Rev. 674, 678 (1993) (cited in APA Brief 8, 17, 20) (distinguishing between adolescents who are "antisocial only during adolescence" and a smaller group who engage in antisocial behavior "at every life stage" despite "drift[ing] through successive systems aimed at curbing their deviance"). That research further suggests that the pattern of behavior in the latter group often sets in before 18. See Moffitt, supra, at 684 ("The well-documented resistance of antisocial personality disorder to treatments of all kinds seems to suggest that the life-course-persistent style is fixed sometime before age 18"). And, notably, it suggests that violence itself is evidence that an adolescent offender's antisocial behavior is not transient. See Moffitt, A Review of Research on the Taxonomy of Life-Course Persistent Versus Adolescence-Limited Antisocial Behavior, in Taking Stock: the Status of Criminological Theory 277, 292–293 (F. Cullen, J. Wright, & K. Blevins eds. 2006) (observing that "lifecourse persistent" males "tended to specialize in serious offenses (carrying a hidden weapon, assault, robbery, violating court orders), whereas adolescence-limited" ones

"specialized in non-serious offenses (theft less than \$5, public drunkenness, giving false information on application forms, pirating computer software, etc.)").

In sum, even if it were relevant, none of this psychological or sociological data is sufficient to support the Court's "'moral'" conclusion that youth defeats culpability in *every* case. *Ante*, at 17 (quoting *Roper*, 543 U. S., at 570); see *id.*, at 618 (SCALIA, J., dissenting); R. Epstein, The Case Against Adolescence 171 (2007) (reporting on a study of juvenile reasoning skills and concluding that "most teens are capable of conventional, adult-like moral reasoning").

The Court responds that a categorical rule is nonetheless necessary to prevent the "'unacceptable likelihood'" that a judge or jury, unduly swayed by "'the brutality or cold-blooded nature" of a juvenile's nonhomicide crime, will sentence him to a life-without-parole sentence for which he possesses "insufficient culpability," ante, at 27 (quoting Roper, supra, at 572–573). I find that justification entirely insufficient. The integrity of our criminal justice system depends on the ability of citizens to stand between the defendant and an outraged public and dispassionately determine his guilt and the proper amount of punishment based on the evidence presented. That process necessarily admits of human error. But so does the process of judging in which we engage. As between the two, I find far more "unacceptable" that this Court, swayed by studies reflecting the general tendencies of youth, decree that the people of this country are not fit to decide for themselves when the rare case requires different treatment.

2

That is especially so because, in the end, the Court does not even believe its pronouncements about the juvenile mind. If it did, the categorical rule it announces today would be most peculiar because it leaves intact state and

federal laws that permit life-without-parole sentences for juveniles who commit homicides. See *ante*, at 23. The Court thus acknowledges that there is nothing inherent in the psyche of a person less than 18 that prevents him from acquiring the moral agency necessary to warrant a life-without-parole sentence. Instead, the Court rejects overwhelming legislative consensus only on the question of which *acts* are sufficient to demonstrate that moral agency.

The Court is quite willing to accept that a 17-year-old who pulls the trigger on a firearm can demonstrate sufficient depravity and irredeemability to be denied reentry into society, but insists that a 17-year-old who rapes an 8year-old and leaves her for dead does not. See ante, at 17-19; cf. ante, at 9 (ROBERTS, C. J., concurring in judgment) (describing the crime of life-without-parole offender Milagro Cunningham). Thus, the Court's conclusion that life-without-parole sentences are "grossly disproportionate" for juvenile nonhomicide offenders in fact has very little to do with its view of juveniles, and much more to do with its perception 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." Ante, at 18.

That the Court is willing to impose such an exacting constraint on democratic sentencing choices based on such an untestable philosophical conclusion is remarkable. The question of what acts are "deserving" of what punishments is bound so tightly with questions of morality and social conditions as to make it, almost by definition, a question for legislative resolution. It is true that the Court previously has relied on the notion of proportionality in holding certain classes of offenses categorically exempt from capital punishment. See *supra*, at 4. But never before today has the Court relied on its own view of just deserts to impose a categorical limit on the imposition of a lesser punishment. Its willingness to cross that well-established

boundary raises the question whether any democratic choice regarding appropriate punishment is safe from the Court's ever-expanding constitutional veto.

ΙV

Although the concurrence avoids the problems associated with expanding categorical proportionality review to noncapital cases, it employs noncapital proportionality analysis in a way that raises the same fundamental concern. Although I do not believe Solem merits stare decisis treatment, Graham's claim cannot prevail even under that test (as it has been limited by the Court's subsequent precedents). Solem instructs a court first to compare the "gravity" of an offender's conduct to the "harshness of the penalty" to determine whether an "inference" of gross disproportionality exists. 463 U.S., at 290-291. Only in "the rare case" in which such an inference is present should the court proceed to the "objective" part of the inquiry—an intra- and interjurisdictional comparison of the defendant's sentence with others similarly situated. Harmelin, 501 U.S., at 1000, 1005 (opinion of KENNEDY, J.).

Under the Court's precedents, I fail to see how an "inference" of gross disproportionality arises here. The concurrence notes several arguably mitigating facts—Graham's "lack of prior criminal convictions, his youth and immaturity, and the difficult circumstances of his upbringing." Ante, at 7 (ROBERTS, C. J., concurring in judgment). But the Court previously has upheld a life-without-parole sentence imposed on a first-time offender who committed a nonviolent drug crime. See Harmelin, supra, at 1002–1004. Graham's conviction for an actual violent felony is surely more severe than that offense. As for Graham's age, it is true that Roper held juveniles categorically ineligible for capital punishment, but as the concurrence explains, Roper was based on the "explicit conclusion that

[juveniles] 'cannot with reliability be classified among the worst offenders'"; it did "not establish that juveniles can never be eligible for life without parole." Ante, at 5 (ROBERTS, C. J., concurring in judgment) (quoting Roper, 543 U. S., at 569 (emphasis added in opinion of ROBERTS, C. J.)). In my view, Roper's principles are thus not generally applicable outside the capital sentencing context.

By holding otherwise, the concurrence relies on the same type of subjective judgment as the Court, only it restrains itself to a case-by-case rather than a categorical ruling. The concurrence is quite ready to hand Graham "the general presumption of diminished culpability" for juveniles, ante, at 7, apparently because it believes that Graham's armed burglary and home invasion crimes were "certainly less serious" than murder or rape, *ibid*. It recoils only from the prospect that the Court would extend the same presumption to a juvenile who commits a sex crime. See *ante*, at 10. I simply cannot accept that these subjective judgments of proportionality are ones the Eighth Amendment authorizes us to make.

The "objective" elements of the *Solem* test provide no additional support for the concurrence's conclusion. The concurrence compares Graham's sentence to "similar" sentences in Florida and concludes that Graham's sentence was "far more severe." *Ante*, at 8 (ROBERTS, C. J, concurring in judgment). But strangely, the concurrence uses average sentences for burglary or robbery offenses as examples of "similar" offenses, even though it seems that a run-of-the-mill burglary or robbery is not at all similar to Graham's criminal history, which includes a charge for armed burglary *with assault, and* a probation violation for invading a home at gunpoint.

And even if Graham's sentence is higher than ones he might have received for an armed burglary with assault in other jurisdictions, see *ante*, at 8–9, this hardly seems relevant if one takes seriously the principle that "[a]bsent

a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State." Harmelin, supra, at 1000 (opinion of KENNEDY, J.) (quoting Rummel, 445 U.S., at 282; emphasis added). Applying *Solem*, the Court has upheld a 25-years-to-life sentence for theft under California's recidivist statute, despite the fact that the State and its amici could cite only "a single instance of a similar sentence imposed outside the context of California's three strikes law, out of a prison population [then] approaching two million individuals." Ewing, 538 U.S., at 47 (BREYER, J., dissenting). It has also upheld a life-without-parole sentence for a first-time drug offender in Michigan charged with possessing 672 grams of cocaine despite the fact that only one other State would have authorized such a stiff penalty for a first-time drug offense, and even that State required a far greater quantity of cocaine (10 kilograms) to trigger the penalty. See Harmelin, supra, at 1026 (White, J., dissenting). Graham's sentence is certainly less rare than the sentences upheld in these cases, so his claim fails even under *Solem*.

* * *

Both the Court and the concurrence claim their decisions to be narrow ones, but both invite a host of line-drawing problems to which courts must seek answers beyond the strictures of the Constitution. The Court holds that "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," but must provide the offender with "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Ante*, at 24. But what, exactly, does such a "meaningful" opportunity entail? When must it occur? And what Eighth Amendment principles will govern review by the parole boards the

Court now demands that States empanel? The Court provides no answers to these questions, which will no doubt embroil the courts for years.¹²

V

The ultimate question in this case is not whether a life-without-parole sentence 'fits' the crime at issue here or the crimes of juvenile nonhomicide offenders more generally, but to whom the Constitution assigns that decision. The Florida Legislature has concluded that such sentences should be available for persons under 18 who commit certain crimes, and the trial judge in this case decided to impose that legislatively authorized sentence here. Because a life-without-parole prison sentence is not a "cruel and unusual" method of punishment under any standard, the Eighth Amendment gives this Court no authority to reject those judgments.

It would be unjustifiable for the Court to declare otherwise even if it could claim that a bare majority of state laws supported its independent moral view. The fact that the Court categorically prohibits life-without-parole sentences for juvenile nonhomicide offenders in the face of an overwhelming legislative majority *in favor* of leaving that sentencing option available under certain cases simply illustrates how far beyond any cognizable constitutional

¹² It bears noting that Colorado, one of the five States that prohibit life-without-parole sentences for juvenile nonhomicide offenders, permits such offenders to be sentenced to mandatory terms of imprisonment for up to 40 years. Colo. Rev. Stat. §18–1.3–401(4)(b) (2009). In light of the volume of state and federal legislation that presently permits life-without-parole sentences for juvenile nonhomicide offenders, it would be impossible to argue that there is any objective evidence of agreement that a juvenile is constitutionally entitled to a parole hearing any sooner than 40 years after conviction. See Tr. of Oral Arg. 6–7 (counsel for Graham, stating that, "[o]ur position is that it should be left up to the States to decide. We think that the . . . Colorado provision would probably be constitutional").

principle the Court has reached to ensure that its own sense of morality and retributive justice pre-empts that of the people and their representatives.

I agree with JUSTICE STEVENS that "[w]e learn, sometimes, from our mistakes." *Ante*, at 1 (concurring opinion). Perhaps one day the Court will learn from this one.

I respectfully dissent.

ALITO, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 08-7412

TERRANCE JAMAR GRAHAM, PETITIONER v. FLORIDA

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

[May 17, 2010]

JUSTICE ALITO, dissenting.

I join Parts I and III of JUSTICE THOMAS's dissenting opinion. I write separately to make two points.

First, the Court holds only that "for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of *life without parole*." Ante, at 23–24 (emphasis added). Nothing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole. Indeed, petitioner conceded at oral argument that a sentence of as much as 40 years without the possibility of parole "probably" would be constitutional. Tr. of Oral Arg. 6–7; see also *ante*, at 28, n. 12 (THOMAS, J., dissenting).

Second, the question whether petitioner's sentence violates the narrow, as-applied proportionality principle that applies to noncapital sentences is not properly before us in this case. Although petitioner asserted an as-applied proportionality challenge to his sentence before the Florida courts, see 982 So. 2d 43, 51–53 (Fla. App. 2008), he did not include an as-applied claim in his petition for certiorari or in his merits briefs before this Court. Instead, petitioner argued for only a categorical rule banning the imposition of life without parole on any juvenile convicted of a nonhomicide offense. Because petitioner abandoned his as-applied claim, I would not reach that issue.

ALITO, J., dissenting

See this Court's Rule 14.1(a); Yee v. Escondido, 503 U. S. 519, 534–538 (1992).

Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to Nation

Updated September 14, 2009

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Preface: Data Update

On July 14, 2009, researchers published a preliminary report of the same title. At the time of publication of the preliminary report, researchers had information regarding 43 states. The preliminary report lacked data on seven states. Since July 14, 2009, researchers received data from four of the seven states. This updated report is based on data from 47 states.¹

Introduction

This is the first nationwide, empirical study focused exclusively on juvenile offenders who received life without parole sentences (JLWOP) for non-homicides.² The 2009 update of "The Rest of Their Lives: Life Without Parole for Child Offenders in the United States," a Human Rights Watch/ Amnesty International Report, found that there are 2,574 inmates in the United States, who at the time of their criminal offense were juveniles and who received a sentence of life without the possibility of parole.³ These teenagers will spend their natural life in prison and will only be "released" at time of death.⁴ In contrast to the 2,574 JLWOP inmates in the U.S., no other country in the world, in practice, imprisons juvenile offenders to life without parole sentences.⁵

This study's exclusive focus is on a subgroup of this JLWOP population: those who have committed non-homicide offenses. This study sheds light on the often hidden population of youths who are sentenced to life without parole for non-homicides. See Appendix I for a profile of one of these youths. The objective of this study is to provide the judiciary, policy makers, and the public the latest data on juvenile life without parole sentences for non-homicides.

¹ This update also corrects a few points: (1) the number of juvenile offenders serving life without parole sentences in Mississippi is two not five, (2) Kentucky does not permit life without parole sentences for any juvenile offenders under the age of 18, (3) Montana does not permit life without parole sentences for any juvenile offenders under the age of 18, (4) Texas does not permit life without parole sentences for juvenile offenders under the age of 17 (rather than under 18) (beginning September 1, 2009).

² Hereinafter in this report, "juvenile offender" means an individual who committed his or her offense before the age of 18, even if at the time of sentencing the juvenile offender was over age 18.

Human Rights Watch, State Distribution of Estimated 2,574 Juvenile Offenders Serving Juvenile Life Without Parole (Rest of Their Lives 2009 Update) (2009), http://www.hrw.org/sites/default/files/related_material/JLWOP_Table_May_7_2009.pdf. See also, HUMAN Rights Watch and Amnesty International, The Rest of Their Lives: Life without Parole for Child Offenders in the United States (Rest of Their Lives 2005) (2005), http://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf and Human Rights Watch, The Rest of Their Lives: Life without Parole for Youth Offenders in the United States in 2008 (Rest of Their Lives 2008 Update) (2008), http://www.hrw.org/sites/default/files/reports/us1005execsum.pdf.

⁴ See, Nebraska Department of Correctional Services' Inmate Locator at http://dcs-inmatesearch.ne.gov/Corrections/InmateDisplayServlet?DcsId=42980, which shows the "release" of Terrance Johnson, an inmate who was serving a life without parole sentence for a crime committed as a juvenile, on the day of his death.

⁵ Rest of Their Lives 2008 Update at 1, 8. See also, Connie de la Vega and Michelle Leighton, Sentencing Our Children to Die in Prison: Global Law and Practice, 42 U.S.F.L.Rev. 983 (Spring 2008).

The U.S. Supreme Court has accepted certiorari in two cases - *Terrance Graham v. State of Florida*⁶ and *Joe Sullivan v. State of Florida*.⁷ In the Graham case, the juvenile life without parole offense was armed burglary, and in the Sullivan case, the juvenile life without parole offense was sexual battery. Graham was 16 at time of offense and Sullivan was 13. Both cases are non-homicides (no murder was involved) and both Graham and Sullivan were convicted and sentenced to life without parole sentences based on Florida criminal law.

These two cases raise the identical legal issue: whether a juvenile life without parole sentence for a non-homicide offense violates the Eighth Amendment prohibition of cruel and unusual punishment. The question before the Court addresses the non-homicide subgroup, which is the subject matter of this study.

I. Summary of Juvenile Life without Parole Non-Homicide Facts

- <u>109</u> is the estimated total number of juveniles who received life without parole for non-homicides in the 50 states.⁸ See Table A.
- <u>77</u> is the total number of juveniles with life without parole sentences for non-homicides in Florida. See Table A.
- <u>39</u> states have zero juveniles serving life without parole sentences for non-homicides. See Table A.
- Only 8 of the states with confirmed data have any juvenile offenders sentenced to life without parole for non-homicide offenses. See Table A.
- <u>Florida</u> sentences juvenile offenders to life without parole for non-homicide offenses at <u>19</u> <u>times</u> the rate expected based on analysis of other comparable states.
- <u>Florida</u> is the only state, with confirmed data, in the nation that has sentenced juveniles to life without parole for burglary, battery, or carjacking. See Chart C.
- <u>84%</u> of the total non-homicide juvenile life without parole population in Florida is Black. See Chart D.
- <u>13</u> years old is the earliest age at offense for youths who have received life without parole sentences in Florida. See Chart E.

⁶ Terrance Graham v. State of Florida, 129 S.Ct. 2157 (2009) (Opinion granting certiorari). See also, Petition for Writ of Certiorari, Terrance Graham v. State of Florida, 2008 WL 6031405 (Nov. 20, 2008) (No. 08-7412).

⁷ *Joe Sullivan v. State of Florida*, 129 S.Ct. 2157 (2009) (Opinion granting certiorari). *See also*, Petition for Writ of Certiorari, *Joe Sullivan v. State of Florida*, 2008 WL 6031406 (Dec. 4, 2008) (No. 08-7621).

⁸ The total number has changed from the preliminary report due to new information from Mississippi that 3 of the previously reported individuals are in fact eligible for parole and new data received from Delaware that there is 1 individual serving a JLWOP sentence in Delaware for a non-homicide offense.

• There are <u>3</u> states for which the researchers have no reliable data on juvenile offenders sentenced to life without parole for non-homicides: Nevada, Utah, and Virginia.⁹

II. Summary of Conclusion

Florida's practice of sentencing juvenile offenders to life without parole for non-homicide cases is unique among American states. The data presented here provide overwhelming evidence that Florida is out of step with the nation: it stands alone in its willingness to condemn young people for non-homicide offenses to life in prison without a chance of a reassessment of their lives at some future time.

III. Questions

This study asks the following questions:

- 1) How many non-homicide juvenile life without parole inmates are there presently in the 50 states?
- 2) What is the distribution nationally of non-homicide juvenile life without parole inmates?
- 3) What is the distribution nationally of types of non-homicide offenses for which juveniles are sentenced to life without parole?
- 4) What is the age and race profile of Florida inmates with JLWOP sentences for non-homicides?
- 5) How does Florida compare with all states and with just other JLWOP states on number and type of juvenile life without parole sentences for non-homicides?
- 6) Is Florida's practice of sentencing juveniles to life without parole sentences unusual in the context of all states and in the context of JLWOP states?

IV. Definitions

What is a "juvenile life without parole sentence for non-homicide?" This study defines the key terms of this question as follows. "Juvenile" means any person under the age of 18 at the time of the criminal offense. Second, "life" means the natural life span of the individual. Third, "without parole" means the juvenile is not eligible for release by a state parole board. Fourth, "non-homicide" is any criminal conviction where the juvenile

⁹ The researchers have reliable data on all other states or have determined that no JLWOP sentences are permitted in the state.

is not convicted of any type or degree of homicide. "Non-homicide" does not include any convictions for attempted homicides or any convictions for felony murder, where the juvenile did not kill anyone but was convicted as an accomplice to a murder.¹⁰ Individuals convicted of attempted homicide or felony murder are defined as homicide offenders.

V. Methodology

The study's primary source of data is individual state government departments of corrections.¹¹ In 2009, the researchers of this study sent public record requests to 46 states.¹² See Appendix II for discussion of individual state data collection.

VI. Discussion

Florida's practice of sentencing juvenile offenders to life without parole for non-homicide offenses is unusual in this country. This conclusion is based on data regarding 47 states. Three states- Nevada, Utah, and Virginia- did not provide researchers any data.

Seven states do not legally permit sentencing juvenile offenders to life without parole for any offense: homicide or non-homicide. Those are Alaska, Colorado (2005 and after), Kansas, ¹³ Kentucky, ¹⁴ Montana ¹⁵, New Mexico, and Oregon. Texas does not permit sentencing juveniles under the age of 17 to life without parole sentences (September 1, 2009 and after). ¹⁶

Table A

The total estimate of JLWOP sentences for non-homicides in the U.S. is 109. Table A shows the distribution of the estimated 109 juvenile offenders serving life without parole in the 47 states for which there is confirmed data. See Appendix II for data sources.¹⁷ Only 8 states of the 47 with confirmed data have juvenile offenders sentenced to life without parole for non-homicide crimes. Among the states shown in Table A, Florida accounts for 77 (70.6)

¹⁰ In this study all individuals with one or more JLWOP sentences for homicide crimes were excluded from consideration as non-homicide offenders, even if they had additional JLWOP sentences for non-homicide crimes.

¹¹ Data regarding 11 states were obtained through secondary sources. See Appendix II.

¹² The four states that were not contacted are Alaska, Kansas, New Mexico, and Oregon. These states do not legally permit the sentence of JLWOP.

¹³ Rest of Their Lives 2009 Update (for Alaska, Colorado, Kansas, New Mexico, and Oregon).

¹⁴ Shepherd v. Commonwealth of Kentucky, 251 S.W. 3d 309 (KY 2008). KY. Rev. Stat. §640.040 (effective date July 1, 1987)

¹⁵ Mont. Code Ann. § 46-18-222(1) (2007)

¹⁶ S.B. 839, 81st Leg., Reg. Sess. (Tex. 2009) (signed by Governor June 19, 2009).

¹⁷ Appendix II also discusses the states for which the researchers have no data and the reasons for this.

percent) of the national total of JLWOP for non-homicide, followed by, Louisiana 17 (15.6 percent), Iowa 6 (5.5 percent), California 4 (3.7 percent), and Mississippi 2 (1.8 percent). Three states (Delaware, Nebraska, and South Carolina) have only one juvenile serving life without parole for a non-homicide offense; the remaining 39 states in Table A have zero juveniles serving life without parole sentences for non-homicides. As shown in Table A, Florida is unique among these jurisdictions: no other state comes close to its practice of sentencing juveniles to life without parole for non-homicide offenses.

Table B

As Table B shows, 10 states account for 1,966 (76.4 percent) of the total national JLWOP population of 2,574 (homicides and non-homicides).¹⁸

Three of those ten large JLWOP states, California, Florida, and Louisiana, account for 89.9 percent of the national total (109) of juveniles sentenced to JLWOP for non-homicides.

While these ten states with large a number of JLWOPs (over 50) have rendered a total of 1,966 JLWOP sentences, only 98 juveniles (5 percent of the total of the 10 states) received this sentence for a non-homicide offense. 78 percent of those 98 juveniles sentenced to life without parole for non-homicides were sentenced in Florida.

The Percentage Column on Table B shows the portion of JLWOP sentences in each state that were given for non-homicides. By this measure, Florida once again is clearly unique among these states. The proportion of all juvenile life without parole sentences that were for non-homicides in Florida is 25.5 percent, *five times* higher than second place Louisiana. Put another way, suppose Florida's penchant for incarcerating juvenile non-homicide offenders to life without parole was limited to the average (5 percent) of the states shown in Table B. Under this scenario Florida would have sentenced only 15 juveniles to life without parole for non-homicide offenders. The actual figure of 77 is five times higher.

It is clear that Florida's high rate of JLWOP incarcerations for non-homicides distorts the "average" use of JLWOP sentencing shown in Table B. Subtracting Florida from the calculations in Table B, the remaining states account for 21 JLWOP sentences for non-homicide offenses – 1.3 percent of all JLWOP sentences in these 9 states.¹⁹

If Florida limited its sentencing of non-homicide juvenile offenders to life without parole to the average percent of the nine other states with a large number of JLWOPs (over 50), i.e., 1.3 percent, only four juveniles would have received such a sentence in Florida.

¹⁸ The total figure of 2,574 juvenile offenders serving life without parole sentences comes from the Rest of Their Lives 2009 Update, *supra* n. 2.

¹⁹ Subtracting Florida's 302 total JLWOPs from the total JLWOP column and 77 non-homicide JLWOPs from the non-homicide JLWOP column leaves a total of 1664 and only 21 for non-homicide offenses (21 is 1.3 percent of 1664).

Thus, if we use as a benchmark these other states which account for a large portion of all JLWOP sentences in the U.S., we see that *Florida's tendency to incarcerate non-homicide juvenile offenders to life sentences without parole is over 19 times the number that we would expect when Florida's own sentencing practices are eliminated from the data.*

Table C

Across the nation, juvenile offenders have been sentenced to life without parole for the following non-homicide crimes: kidnapping, sexual battery, robbery, battery, burglary, and carjacking. 64 juvenile offenders have been sentenced to life without parole in the country for robbery, burglary, battery, and carjacking. 61 of these juvenile offenders were sentenced in Florida. Table C shows, by state, the non-homicide offenses for which juvenile offenders have been sentenced to life without parole. Florida is the only state with confirmed data to have sentenced youths to life without parole for burglary, battery, and car jacking. Twenty four of the seventy seven non-homicide juvenile offenders have a JLWOP conviction for a burglary. Of these twenty four offenders, three have only one JLWOP conviction. Florida has sentenced 46 youths to JLWOP for armed robbery. Only three other armed robbery JLWOP convictions exists in the nation. All other reported JLWOP sentences for non-homicide crimes in the U.S. were for kidnapping and sexual battery (rape).

Chart D and Chart E

In this study, the researchers surveyed the race, age, and offense category of juveniles who received life without parole sentences for non-homicides in Florida. Table D shows that 84% of this population is Black. Table E shows that the youngest age at the time of offense is 13 years old. 24

²⁰ There may be other individuals in the country with JLWOP sentences for these crimes that are not included in this study because they also have a JLWOP sentence for homicide.

²¹ *See* n. 20, *supra*. The one inmate in Mississippi sentenced for armed robbery was originally eligible for parole, but violated parole on more than one occasion and now has no possibility of parole. (Mississippi Department of Corrections, July 8, 2009).

²² The offense dates for these offenders begin in the early 1970s.

²³ Of the juvenile offenders in Florida sentenced to life without parole for homicide offenses, 62% are Black. (Florida Department of Corrections, June 10, 2009).

²⁴ The Florida Department of Corrections lists two inmates as 13 years old at the time of their JLWOP offense. These are Joe Sullivan and Douglas Blackshear. While Joe Sullivan was sentenced to life without parole for his original crime at the age of 13, Douglas Blackshear received his life without parole sentences as violations of probation when he was 19 years old. The original crimes he was violated on occurred when he was 13 years old.

Conclusion

The data presented here provide overwhelming evidence that Florida is out of step with the nation: it stands alone in its willingness to condemn young people to life in prison for non-homicides without a chance of a reassessment of their lives in some future time.

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APPENDIX I

Kenneth Young:

Profile of a Florida Juvenile Sentenced to Life without Parole for Non-Homicide

Kenneth Young,²⁵ now 24 years old, is serving four life without parole sentences for three armed robberies which occurred within a month's time in the year 2000 in and around Tampa, Florida. During this period Kenneth turned 15 years old. When Kenneth was 14 years old, his mother's 25 year-old drug dealer, Jacques Bethea, told him that his mother owed a three thousand dollar drug debt. This drug dealer threatened Kenneth that if he did not participate in these robberies his mother would be harmed.

Kenneth's part in these robberies was to take the money and the surveillance tapes, while the drug dealer held a gun on the clerk and made the demands. No shots were ever fired. Kenneth did not have a prior criminal history. The 25 year-old drug dealer had an extensive criminal history. The drug dealer received one life without parole sentence; in contrast, Kenneth received four life without parole sentences.

Kenneth's mother was addicted to crack cocaine while Kenneth was growing up. She was rarely home. Kenneth's older sister, a minor herself, was generally the only person around to care for Kenneth. Kenneth's father died before Kenneth was born. By the time Kenneth was 13 years old he had stopped going to school completely. He was young, uneducated, and alone when he was brought into crime by an adult.

At the conclusion of Kenneth's first trial, the Judge sentenced him to a term of prison for the rest of his natural life. Kenneth was so immature and uneducated he did not understand what this meant. After the sentencing was over he asked what his sentence was. When he was told he had received a life sentence, he did not believe it. He thought the officers were trying to scare him.

Since incarceration, Kenneth has been a model inmate. He has received only one disciplinary report during his time in prison. It was for failing to make his bed. He is working towards obtaining his G.E.D. Previously, he was employed as an aide to a disabled inmate, and since his transfer to a new correctional institution he has become a barber. Since incarceration, Kenneth has grown from a young boy to a young man.

Kenneth is one of the 77 juveniles sentenced to life without parole for non-homicide crimes in Florida. Like 84% of the juvenile offenders sentenced to life without parole for non-homicide crimes in Florida, Kenneth is Black.

²⁵ The information in this profile was gathered by the researchers through personal interviews with Mr. Young between 2006 and 2009. Affidavit of Kenneth Young on file with researchers. *See*, Florida Department of Corrections Offender Search page for Kenneth Young at http://www.dc.state.fl.us/ActiveInmates/detail.asp?Bookmark=1&From=list&SessionID=484412624.

APPENDIX II Data Sources by State

Alabama: Data received from Alabama Department of Corrections, August 10,

2009, with the assistance of the Alabama Sentencing Commission.

Alaska: Alaska prohibits sentencing juveniles to life without parole. Rest of

Their Lives 2009 Update.

Arizona: Arizona did not provide total number of juveniles sentenced to life

without parole. Arizona does not have any juveniles sentenced to life without parole for non-homicides according to correspondence from the Arizona Department of Corrections General Counsel, dated June 26,

2009, on file with researchers.

Arkansas: Data received from Arkansas Department of Corrections, July 7, 2009.

California: Data received from California Department of Corrections and

Rehabilitation, August 4, 2009. California reports five (5) individuals with JLWOP sentences for non-homicide offenses. Researchers have included only four (4), because the sentence of one (1) of the five (5) has been held unconstitutional by the California Court of Appeals. *See, In re*

Nunez, 93 Cal. Rptr. 3d 242 (Cal. Ct. App. 2009).

Colorado: Data received from Colorado Department of Corrections, June 26, 2009.

Connecticut: Connecticut did not provide total number of juveniles sentenced to life

without parole. Connecticut does not have any juveniles sentenced to life without parole for non-homicides according to correspondence from the Connecticut Department of Corrections, dated June 8, 2009, on file

with the researchers.

Delaware: Data received from Delaware Department of Corrections, September 1,

2009.

Florida: Data received from the Florida Department of Corrections, June 10, 2009.

Georgia: Data retrieved from Georgia Department of Corrections Inmate Query,

available at http://www.dcor.state.ga.us/GDC/OffenderQuery/ jsp/OffQryForm.jsp. From the Inmate Query, researchers confirmed 5 individuals serving life without parole sentences in Georgia for crimes

committed before the age of 18- all had convictions for homicide.

Researchers found 11 individuals serving life without parole sentences in Georgia who were either 17 or 18 years old at the time of their offense -

all had convictions for homicide.

Hawaii: Hawaii did not provide total number of juveniles sentenced to life

without parole. Hawaii does not have any juveniles sentenced to life without parole for non-homicides according to correspondence from the Hawaii Department of Corrections, dated June 26, 2009, which states, "[i] n Hawaii, the only individuals sentenced to Life without Parole are for

Murder in the First Degree," on file with the researchers.

Idaho: Data received from Idaho Department of Corrections, July 1, 2009.

Illinois: Data for this report received from Juvenile Life without Parole Project,

Children and Family Justice Center, Northwestern University School of Law, and Illinois Coalition for Fair Sentencing of Children, June 25, 2009.

Data last updated February 2008.

Indiana: Data received from Indiana Department of Correction, June 3, 2009.

Iowa: Data received from Iowa Department of Corrections, June 24, 2009.

Kansas: Kansas prohibits life without parole sentences for juveniles. Rest of Their

Lives 2009 Update.

Kentucky: Data received from Kentucky Department of Corrections, July 9, 2009.

Louisiana: Louisiana Department of Corrections provided data on juveniles

sentenced to life without parole for non-homicides, June 24, 2009. Louisiana Department of Corrections did not provide total number of all juveniles sentenced to life without parole. Total number used in this

report is from Rest of Their Lives 2009 Update.

Maine: Data received from Maine Department of Corrections, July 7, 2009.

Maryland: Data received from Maryland Department of Corrections, June 10, 2009.

Massachusetts: Data for this report received from Children's Law Center of

Massachusetts, June 24, 2009.

Michigan: Data for this report received from ACLU Juvenile Life without Parole

Initiative, July 1, 2009.

Minnesota: Data received from Minnesota Department of Corrections, June 8, 2009.

Mississippi: Data received from Mississippi Department of Corrections, June 29, 2009.

Mississippi DOC supplemented this data with analysis of some of the data on July 8, 2009. On July 29, 2009 researchers received additional information from the Mississippi Department of Corrections correcting

the previous data. Three of the five individuals reported in the July 14, 2009 version of this report are parole eligible at this time. Of the two that remain in this report, one is considered a habitual offender and thus is not eligible for parole. Mississippi Department of Corrections reports that the other individual has a life without parole sentence, but "should be eligible for conditional release" at the age of 65. E-mail correspondence with Assistant Attorney General Jane Mapp, July 29, 2009. Researchers chose to include this individual because of the difference between conditional release and parole and the uncertainty as to whether he would be eligible for conditional release. Mississippi allows an inmate, under certain circumstances, at the age of 65, to petition the trial court for "conditional release." See Miss. Stat. 47-5-139(1) and Miss. Stat. 47-7-3. Mississippi Assistant Attorney General Jane Mapp reports (1) that Mississippi's conditional release process is not part of Mississippi's parole system, (2) no inmate, as of present, is eligible to petition the sentencing court for conditional release under these statutes, and (3) once an inmate petitions for conditional release the sentencing court has total discretion. E-mail correspondence, dated July 14, 2009, on file with researchers and telephonic conversation with research assistant.

Missouri: Data received from Missouri Department of Corrections, June 26, 2009.

Montana: Data received from Montana Department of Corrections, June 4, 2009.

Nebraska: Data received from Nebraska Department of Correctional Services,

August 20, 2007. Updated by Family and Friends of Inmates, Omaha

August 2008.

Nevada: Data not available. Nevada Department of Corrections denied

researchers request for information on June 26, 2009 and June 29, 2009.

New Hampshire: Data received from New Hampshire Department of Corrections, June 5,

2009.

New Jersey: New Jersey has no juveniles sentenced to life without parole. Ashley

Nellis, Ph.D., Research Analyst, The Sentencing Project, Testimony to the Pennsylvania Senate Committee on the Judiciary, Public Hearing on the Issue of Juvenile Lifers (Sept. 22, 2008). *See also*, Rest of Their Lives 2009

Update.

New Mexico: New Mexico prohibits sentencing juveniles to life without parole. Rest

of Their Lives 2009 Update.

New York: New York has no juveniles sentenced to life without parole. Ashley

Nellis, Ph.D., Research Analyst, The Sentencing Project, Testimony to the Pennsylvania Senate Committee on the Judiciary, Public Hearing on the Issue of Juvenile Lifers (Sept. 22, 2008). *See also*, Rest of Their Lives 2009

Update.

North Carolina: Data received from North Carolina Department of Corrections, June 30,

2009.

North Dakota: Data received from North Dakota Department of Corrections, June 5,

2009.

Ohio: Data received from Ohio Department of Corrections, June 30, 2009.

Oklahoma: On July 22, 2009, researchers received a list of all inmates sentenced to

life without the possibility of parole in Oklahoma from the Oklahoma Department of Corrections (DOC). The Oklahoma DOC does not keep records of inmates' offense dates. Researchers reviewed every person with a life without parole sentence who was admitted to prison at the age of 19 or younger to determine their crime of conviction. None of these individuals were sentenced to life without parole for a non-

homicide crime.

Oregon: Oregon prohibits life without parole sentences for juveniles. Rest of

Their Lives 2009 Update.

Pennsylvania: Data received from Pennsylvania Department of Corrections, June 30,

2009.

Rhode Island: Data received from Rhode Island Department of Corrections, July 1,

2009.

South Carolina: Data received from South Carolina Department of Corrections, June 16,

2009.

South Dakota: Data received from South Dakota Department of Corrections, June 16,

2009.

Tennessee: Data received from Tennessee Department of Corrections, June 26, 2009.

Texas: Data received from Texas Department of Corrections, June 8, 2009.

Utah: Data are not available. In a letter dated, June 29, 2009, Utah Department

of Corrections stated Utah does not have any inmates sentenced to life without parole who were admitted to prison before the age of 18. In

August 2009, Utah Department of Corrections denied researchers request for information on whether Utah has any individuals who committed their crime before the age of 18 and were sentenced to life without parole, but were not admitted to prison until after age 18.

Vermont: Vermont has no juvenile offenders serving life without parole. Rest of

Their Lives, 2009 Update.

Virginia: Data are not available at time of publication. Virginia Department of

Corrections denied researchers public records request, June 5, 2009. Virginia Department of Corrections denied researchers' subsequent

public records request on August 18, 2009.

Washington: Data are from trial court files. Columbia Legal Services, Institutions

Project and DLA Piper reviewed all trial files between May 2007 and January 2009. Data was confirmed by the Washington Sentencing

Guidelines Commission, February 2009.

West Virginia: West Virginia has no juveniles sentenced to life without parole. Ashley

Nellis, Ph.D., Research Analyst, The Sentencing Project, Testimony to the Pennsylvania Senate Committee on the Judiciary, Public Hearing on the Issue of Juvenile Lifers (Sept. 22, 2008). *See also*, Rest of Their Lives 2009 Update. On July 28, 2009 researchers received a list of all inmates sentenced to life without the possibility of parole in West Virginia from the West Virginia Department of Corrections (DOC). West Virginia DOC does not keep records of inmates' offense dates. Researchers reviewed every person with a life without parole sentence who was admitted to prison at the age of 19 or younger to determine their crime of conviction. None of these individuals were sentenced to life without parole for a

non-homicide crime.

Wisconsin: Data received from Wisconsin Department of Corrections, August 26,

2009.

Wyoming: Data received from Wyoming Department of Corrections, June 15, 2009.

Estimated National Distribution of Non-Homicide Juvenile Offenders Serving Life without Parole

Ci-i-	Namelian	T-4-I D4
State	Number	Total Percentage
Florida	77	70.6%
Louisiana	17	15.6%
lowa	6	5.5%
California	4	3.7%
Mississippi	2	1.8%
Nebraska	1	0.9%
South Carolina	1	0.9%
Delaware	1	0.9%
Alaska	0	0.0%
Alabama	0	0.0%
Arizona	0	0.0%
Arkansas	0	0.0%
Colorado	0	0.0%
Connecticut	0	0.0%
Georgia	0	0.0%
Hawaii	0	0.0%
Idaho	0	0.0%
Illinois	0	0.0%
Indiana	0	0.0%
Kansas	0	0.0%
Kentucky	0	0.0%
Maine	0	0.0%
Maryland	0	0.0%
Massachusetts	0	0.0%
Michigan	0	0.0%
Minnesota	0	0.0%
Missouri	0	0.0%
Montana	0	0.0%
New Hampshire	0	0.0%
New Jersey	0	0.0%
New Mexico	0	0.0%
New York	0	0.0%
North Carolina	0	0.0%
North Dakota	0	0.0%
Ohio	0	0.0%
Oklahoma	0	0.0%
Oregon	0	0.0%
Pennsylvania	0	0.0%
Rhode Island	0	0.0%
South Dakota	0	0.0%
Tennessee	0	0.0%
Texas	0	0.0%
Vermont	0	0.0%
Washington	0	0.0%
West Virginia	0	0.0%
Wisconsin	0	0.0%
Wyoming	0	0.0%
Total	109	100.00%

State Distribution of Non-Homicide Juvenile Offenders Serving Life Without Parole in States With More Than 50 Total Juvenile Life without Parole (JLWOP) Offenders

State	Total JLWOP*	Non-Homicide JLWOP	Percentage
Arkansas	58	0	0.00%
California	249	4	1.6%
Florida	302	77	25.5%
Illinois	103	0	0.0%
Louisiana	335	17	5.1%
Massachusetts	57	0	0.0%
Michigan	347	0	0.0%
Missouri	78	0	0.0%
North Carolina	62	0	0.0%
Pennsylvania	375	0	0.0%
Total	1966	98	5.0%
Percent of U.S total^	76.4%	89.9%	

^{*} This data comes from two different sources. The total number nationally comes from Rest of Their Lives, 2009 Update. The above state totals were compiled by researchers from updated departments of correction data sources and from other reliable sources. See Appendix II. Researchers were not able to compile an independent national total for all juvenile life without parole sentences, but were able to do so for non-homicide offenses.

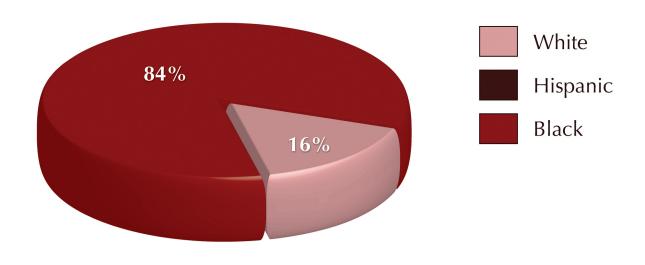
 $^{^{\}wedge}$ 1,966 is 76.4% of 2,574, which is the total estimated number of juvenile offenders serving life without parole in the United States. (Rest of Their Lives, 2009 Update).

⁹⁸ is 89.9% of 109, which is the total estimated number of juvenile offenders serving life without parole for non-homicides in the United States. (Shown on Table A).

Non-homicide Offenses for which Juvenile Offenders are Serving Life without Parole (JLWOP) Sentences in the Nation

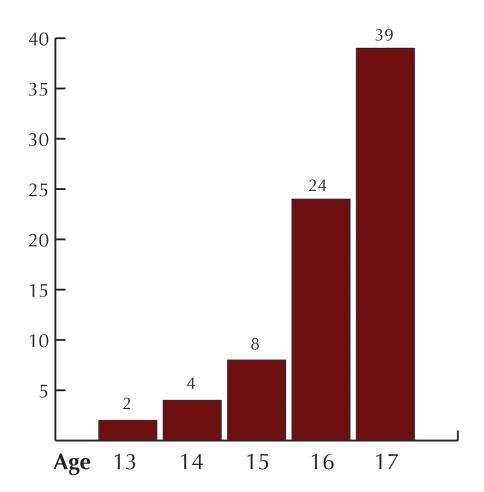
California	Kidnapping, Robbery	
Iowa	Kidnapping	
Louisiana	Kidnapping, Aggravated Rape	
Mississippi	Kidnapping, Armed Robbery	
Nebraska	Kidnapping	
South Carolina	Kidnapping	
Delaware	Rape	
Florida	Kidnapping, Sexual Battery, Armed Robbery, Burglary, Battery, Carjacking	

Florida Distribution of Non-Homicide Juvenile Life without Parole (JLWOP) Offenders by Race



Total JLWOP Non-Homicide Offenders: 77

Florida Distribution of Non-Homicide Juvenile Life without Parole (JLWOP) Offenders by Age



Total JLWOP Non-Homicide: 77





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20. **CONFIDENTIALITY OF RECORDS** – Juvenile arrest records of first time nonviolent offenders shall remain confidential and not available for sale or disclosure by FDLE or any other government agency so long as the juvenile remains crime free. The legislature should amend Florida law to protect the confidentiality of those juvenile arrest records, while allowing law enforcement and prosecutors access to such information. Notwithstanding these changes, the victim of the offense shall continue to have the right to receive a copy of the offense report, as provided under current law.

KEY FINDING: Inmates who were sentenced as adults for offenses committed prior to reaching 18 years of age are eligible for parole on the same basis as other inmates. Parole is not available for many crimes that were committed on or after October 1, 1983.

BLUEPRINT COMMISSION RECOMMENDATION

47. CONDITIONAL RELEASE AND PAROLE

—Require the Parole Commission establish a mandatory parole hearing for those inmates sentenced to adult corrections, as a juvenile and who have received more than a 10 year adult prison sentence. Only those inmates who have served at least 8 years of their sentence and who meet established criteria would be eligible for a parole hearing for determination of conditional release or parole. It is imperative that victims are notified prior to the hearing and are afforded opportunity to provide comment and concerns to the Commission.

KEY FINDING: Court practices and procedures regarding the handling of juveniles should be formulated to most appropriately meet the needs of the youth and their families.

BLUEPRINT COMMISSION RECOMMENDATIONS

DUALLY-SERVED YOUTH - The Department of Juvenile Justice and the Department of Children and Families should review and update the interagency agreement concerning the dually served youth to include defining the role of the Department of Children and Family community based care providers. The Courts assigned to hear dependency and delinquency cases are encouraged to communicate and collaborate concerning children in both court systems resulting in the most appropriate disposition for the child's well-being. Foster children in Department of Juvenile Justice residential commitment are especially vulnerable, need frequent case management, judicial review, and opportunity to attend dependency hearings in person or telephonically.

IN THE

Supreme Court of the United States

TERRANCE JAMAR GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL, FIRST DISTRICT

BRIEF FOR THE AMERICAN PSYCHOLOGICAL ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND MENTAL HEALTH AMERICA AS AMICI CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE¹

The American Psychological Association is a voluntary nonprofit scientific and professional organization with more than 152,000 members and affiliates. Since 1892, the Association has been the principal organization of psychologists in the United States. Its membership includes the vast majority of psychologists holding doctoral degrees from accredited universities in the United States.²

An integral part of the Association's mission is to increase and disseminate knowledge regarding human behavior and to advance psychology as a science, profession, and means of promoting health, education, and human welfare. Based on the well-developed body of research distinguishing the developmental characteristics of juveniles from those of adults, the Association has endorsed the policy reflected in the United Nations Convention on the Rights of the Child, which rejects life imprisonment without possibility of release for offenses committed by persons below 18 years of age.

¹ The parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), letters consenting to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than the amici curiae, their members, or their counsel made any monetary contribution to the preparation or submission of this brief.

² Amici acknowledge the assistance of Laurence Steinberg, Ph.D., Thomas Grisso, Ph.D., Joel Dvoskin, Ph.D., and Brian Wilcox, Ph.D., in the preparation of this brief.

Research cited in this brief includes data from studies conducted using the scientific method. Such research typically is subject to critical review by outside experts, usually during the peer review process preceding publication in a scholarly journal.

The American Psychiatric Association, with roughly 35,000 members, is the principal association of physicians who specialize in psychiatry. It has an interest in this Court's understanding of the lessons of scientific study and professional experience as the Court applies constitutional principles to individuals who often are patients of the organization's members.

The National Association of Social Workers (NASW) is the largest association of professional social workers in the world, with 147,000 members and 56 chapters throughout the United States and abroad. NASW conducts research, publishes books and studies, promulgates professional criteria, and develops policy statements on relevant issues of importance. NASW opposes any legislation or prosecutorial discretion permitting children to be charged and punished under adult standards.

Mental Health America (MHA) (formerly known as the National Mental Health Association) is the oldest mental health advocacy and education organization in the United States. Its board and staff are comprised of professionals with expertise in the diagnosis and treatment of mental illnesses, persons with mental illnesses, and other persons with expertise in mental health public policy. MHA is interested in ensuring that determinations about criminal sanctions imposed upon juveniles reflect the scientific consensus regarding juveniles' ability to understand the nature and consequences of their acts, their response to deterrence, and the likelihood that they can be successfully treated or rehabilitated.

INTRODUCTION AND SUMMARY OF ARGUMENT

In Roper v. Simmons, this Court held that imposition of the death penalty on those under the age of 18 violated the basic precept that punishment should be proportionate to the culpability of the offender. 543 U.S. 551, 568-575 (2005). The Court explained that juveniles differ from adults in several ways that without excusing their crimes—reduce juveniles' culpability and undermine any justification for definitively ending their free lives: they lack adults' capacity for mature judgment; they are more vulnerable to negative external influences; and their characters are not yet fully formed. Id. at 569-570. "The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult." Id. at 570 (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (plurality opinion)). Juveniles' vulnerability and lack of control over their surroundings "mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their ... environment." Id. And "[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of [an] irretrievably depraved character." Id.

Research in developmental psychology and neuroscience—including the research presented to the Court in *Simmons* and additional research conducted since *Simmons* was decided—confirms and strengthens the conclusion that juveniles, as a group, differ from adults in the salient ways the Court identified. Juveniles including older adolescents—are less able to restrain their impulses and exercise self-control; less capable than adults of considering alternative courses of action and maturely weighing risks and rewards; and less oriented to the future and thus less capable of apprehending the consequences of their often-impulsive actions. For all those reasons, even once their general cognitive abilities approximate those of adults, juveniles are less capable than adults of mature judgment, and more likely to engage in risky, even criminal, behavior as a result of that immaturity. Research also demonstrates that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," while at the same time they lack the freedom and autonomy that adults possess to escape such pressures. Simmons, 543 U.S. at 569. Finally, because juveniles are still in the process of forming a coherent identity, adolescent crime often reflects the "signature"—and transient—"qualities of youth" itself, id. at 570, rather than an entrenched bad character. Research has documented that the vast majority of youthful offenders will desist from criminal behavior in adulthood. And the malleability of adolescence means that there is no reliable way to identify the minority who will not.

Consistently with these recognized developmental characteristics of adolescents, recent neuroscience research shows that adolescent brains are not yet fully developed in regions related to higher-order executive functions such as impulse control, planning ahead, and risk evaluation. That anatomical immaturity is consonant with juveniles' demonstrated psychosocial (that is, social and emotional) immaturity.

This Court held in *Simmons* that juveniles' developmental characteristics mitigated their culpability and made death a disproportionate punishment for juvenile offenders. Those same characteristics support the conclusion that sentencing juveniles to die in prison for the crimes at issue here is likewise a disproportionate pun-

ishment. While this Court has recognized that imposition of the death penalty raises special concern and calls for special precautions in light of death's finality and irreversibility, it has also recognized that the Eighth Amendment forbids any punishment that is seriously disproportionate to the culpability of the offender. A sentence of life imprisonment without the possibility of parole, like a sentence of death, is in a very real sense final: it condemns the offender to die in prison without affording him any opportunity to demonstrate a reformed moral character that might warrant release. And that sentence is particularly harsh as applied to a juvenile, who will never experience free adulthood.

Yet juveniles' immaturity and vulnerability mean that "the case for retribution is not as strong with a minor as with an adult." Simmons, 543 U.S. at 571. Moreover, "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." Id. Finally, the imposition of life without parole for a crime committed as a juvenile—a sentence that rejects the possibility of redemption—cannot be reconciled with juveniles' unformed characters and the likelihood that they will change as adults. "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." Id. at 570. In cases like those presented here, condemning an immature, vulnerable, and not-yet-fully-formed adolescent to die in prison is a constitutionally disproportionate punishment.

ARGUMENT

I. RESEARCH IN DEVELOPMENTAL PSYCHOLOGY AND NEUROSCIENCE DOCUMENTS JUVENILES' GREATER IMMATURITY, VULNERABILITY, AND CHANGEABILITY

In *Simmons*, this Court concluded that developmental differences between juveniles, including 16- and 17-year-old adolescents, and adults both diminish juveniles' blameworthiness for their criminal acts and enhance their prospects of change and reform.³ Based on the scientific evidence presented by Simmons and his amici, the Court concluded that these differences between juvenile and adult offenders were "marked and well understood." 543 U.S. at 572. Continuing research in developmental psychology and neuroscience reinforces that conclusion, confirming that the three developmental characteristics of juveniles that *Simmons* identified—their immaturity, their vulnerability, and their changeability—render them, as a group, very different from adults. As this Court has recognized, those

³ In this brief, we use the terms "juvenile" and "adolescent" to refer to individuals between the ages of 12 and 17. Science cannot, of course, draw bright lines precisely demarcating the boundaries between childhood, adolescence, and adulthood; the "qualities that distinguish juveniles from adults do not disappear when an individual turns 18." Simmons, 543 U.S. at 574. Likewise, younger adolescents differ in some respects from the 16- and 17-year-olds discussed in Simmons. Nonetheless, because those under 18, on the whole, share certain developmental characteristics that mitigate their culpability, and because "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood," this Court concluded in Simmons that it was appropriate to draw the line for death-eligibility at age 18. *Id.* The research discussed in this brief accordingly applies to adolescents under age 18, including older adolescents, unless otherwise noted.

differences are central to the calculus of culpability and the proportionality of punishment imposed on juvenile offenders.

- A. Developmental Psychology And Social Science Research Confirms That Juveniles Are Less Mature, More Vulnerable, And More Changeable Than Adults
 - Juveniles have a lesser capacity for mature judgment

As this Court recognized in *Simmons*, adolescents have a significantly diminished capacity for mature judgment as compared to adults, and as a result are more likely to engage in risky behaviors. "[A]s any parent knows and as ... scientific and sociological studies ... tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." 543 U.S. at 569 (quoting *Johnson* v. *Texas*, 509 U.S. 350, 367 (1993)).

As Simmons noted, "adolescents are overrepresented statistically in virtually every category of reckless behavior." 543 U.S. at 569 (quoting Jeffrey Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Rev. 339, 339 (1992)). Indeed, such behavior is "virtually a normative characteristic of adolescent development." Juveniles' risky behavior frequently includes criminal activity; in

⁴ Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339, 344 (1992).

fact, "numerous ... self-report studies have documented that it is statistically aberrant to refrain from crime during adolescence." When crime rates are plotted against age, both the total number of offenses and frequency of offending are highest during adolescence. Both violent crimes and less serious offenses "peak sharply" in late adolescence—around age 17^7 —and "drop precipitously in young adulthood." Studies show a steep decrease in antisocial behavior after age 17, as adolescents mature.

Adolescents' striking tendency to engage in risky and even illegal behavior stems at least in part from their lesser capacity for mature judgment. Research has shown that adolescents' decision-making differs

⁵ Terrie E. Moffitt, Adolescent-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy, 100 Psychol. Rev. 674, 685-686 (1993); see also Terrie E. Moffitt, Natural Histories of Delinquency, in Cross-National Longitudinal Research on Human Development and Criminal Behavior 3, 29 (Elmar G.M. Weitekamp & Hans-Jürgen Kerner eds., 1994).

⁶ Moffitt, Natural Histories of Delinquency, supra note 5, at 4.

⁷ Moffitt, Adolescent-Limited and Life-Course-Persistent Antisocial Behavior, supra note 5, at 675; Moffitt, Natural Histories of Delinquency, supra note 5, at 4, 7; Arnett, supra note 4, at 343; see also DOJ Statistical Briefing Book, available at www.ojjdp.ncjrs.org/ojstatbb/crime/qa05301.asp?qaDate=20040801 and www.ojjdp.ncjrs.org/ojstatbb/crime/qa05305.asp?qaDate=20040801 (last visited July 20, 2009) (statistics showing that arrests for both serious violent crimes and property crimes peak in late adolescence).

⁸ Moffitt, Adolescent-Limited and Life-Course-Persistent Antisocial Behavior, supra note 5, at 675; Moffitt, Natural Histories of Delinquency, supra note 5, at 4, 7.

 $^{^9}$ Moffitt, Natural Histories of Delinquency, supra note 5, at 7.

from that of adults in several respects: adolescents are less able to control their impulses; they weigh the risks and rewards of their conduct differently; and they are less able to envision the future and apprehend the consequences of their actions. Even late adolescents who have developed general cognitive capacities similar to those of adults show deficits in these aspects of social and emotional maturity.

First, empirical research confirms that adolescents, including older adolescents, are more impulsive than adults and less able to exercise self-control. For example, one study of maturity of judgment found that adolescents, including 17-year-olds, scored significantly lower than adults on measures of "temperance," which included "impulse control" and "suppression of aggression." A more recent study examining differences in impulsivity between ages 10 and 30, using both self-report and performance measures, similarly concluded that impulsivity declined throughout that period, with "gains in impulse control occur[ring] throughout adolescence" and into young adulthood. [1] "[T]he develop-

¹⁰ Elizabeth Cauffman & Laurence Steinberg, (Im)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults, 18 Behav. Sci. & L. 741, 748-749, 754 & tbl. 4 (2000).

¹¹ Laurence Steinberg et al., Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model, 44 Developmental Psychol. 1764, 1774-1776 (2008); see also Adriana Galvan et al., Risk Taking and the Adolescent Brain: Who is at Risk?, 10 Developmental Sci. F8, F13 (2007) (in study of individuals aged 7 to 29, finding that impulse control continues to develop over the course of adolescence and early adulthood); Rotem Leshem & Joseph Glicksohn, The Construct of Impulsivity Revisited, 43 Personality & Individual Differences 681, 684-686 (2007) (reporting significant decline in

ing adolescent can only learn his or her way to fully developed control by experience. This process will probably not be completed until very late in the teen years.... [E]xpecting the experience-based ability to resist impulses ... to be fully formed prior to age eighteen or nineteen would seem on present evidence to be wishful thinking."¹²

Second, adolescents generally do not perceive and evaluate the costs and benefits of their actions in the same way adults do. "In general, adolescents use a risk-reward calculus that places relatively less weight on risk, in relation to reward, than that used by adults." For example, one study comparing adolescent and adult decision-making found that when asked to evaluate hypothetical decisions, adolescents as old as 17 were less likely than adults to mention possible long-term consequences, to evaluate both risks and benefits,

impulsivity from ages 14-16 to 20-22 on two different impulsivity scales).

¹² Franklin E. Zimring, *Penal Proportionality for the Young Offender, in Youth on Trial* 271, 280, 282 (Thomas Grisso & Robert G. Schwartz eds., 2000).

¹³ Laurence Steinberg & Elizabeth S. Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1012 (2003); see also Arnett, supra note 4, at 350-353 (summarizing evidence that adolescents' poor capacity for assessing probabilities plays a role in their reckless behavior); Bonnie L. Halpern-Felsher & Elizabeth Cauffman, Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults, 22 J. Applied Developmental Psychol. 257, 265, 268 (2001); Susan G. Millstein & Bonnie L. Halpern-Felsher, Perceptions of Risk and Vulnerability, in Adolescent Risk and Vulnerability 15, 34-35 (Baruch Fischoff et al. eds., 2001).

and to examine possible alternative options. 4 A forthcoming study of performance on a gambling task likewise found that, in a group of more than 900 individuals aged 10 to 30, adolescents and adults displayed "significant differences" in their behavior relative to risk and reward: while adolescents "may attend more to the potential rewards of a risky decision than to the potential costs, adults tend to consider both."15 The study concluded that decision-making with regard to risk and reward "improves throughout adolescence," likely "due not to cognitive maturation but to changes in affective processing"—that is, the ability to regulate responses to emotional and social influences. 16 Adolescents' less mature weighing of risk and reward may lead them to be more likely to engage in criminal activity, as well as other kinds of risk-taking.¹⁷

Finally, juveniles differ from adults in their ability to foresee and take into account the consequences of their behavior. By definition, adolescents have less life experience on which to draw, making it less likely that

¹⁴ Halpern-Felsher & Cauffman, *supra* note 13, at 261, 264-270 (comparing 12th-graders with mean age of 17.5 to adults with mean age of 23). Even greater differences prevailed between adults and younger adolescents. *See id.*

¹⁵ Elizabeth Cauffman et al., Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Test, Developmental Psychol. 1, 11, 14 (forthcoming 2009).

¹⁶ *Id.* at 14.

¹⁷ Arnett, *supra* note 4, at 344, 350-351 (noting that adolescents' distortion of perceived risks and rewards may explain why half or more adolescents reported driving while intoxicated, engaging in sex without contraception, illegal drug use, or some form of minor criminal activity).

they will fully apprehend the potential negative consequences of their actions. 18 Moreover, adolescents are less able than adults to envision and plan for the future, a capacity still developing during adolescence. 19 The study of maturity of judgment, discussed above, found that adolescents' future orientation is weaker than adults': that study, which compared maturity of judgment in over 1,000 adolescents and adults, found that even 17-year-olds scored lower than adults on measures of "perspective," which encompassed "the ability to see short and long term consequences," as well as the ability to "take other people's perspectives into account."²⁰ Similarly, studies have shown that, among 15- to 17year-olds, realism in thinking about the future increases with age, and that the skills required for future planning continue to develop until the early 20s.²¹

The ability to resist impulses and control emotions, the ability to gauge risks and benefits as an adult would, and the ability to envision the future consequences of one's actions—even in the face of environmental or peer pressures—are critical components of social and emotional maturity, necessary in order to

¹⁸ *Id.* at 351-352.

¹⁹ See, e.g., Jari-Erik Nurmi, How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning, 11 Developmental Rev. 1, 28-29 (1991); Laurence Steinberg et al., Age Differences in Future Orientation and Delay Discounting, 80 Child Dev. 28, 30, 35-36 (2009).

 $^{^{20}}$ Cauffman & Steinberg, supra note 10, at 746, 748, 754 & tbl. 4 (comparing adults with 12th-graders with mean age of 17.5).

²¹ Nurmi, supra note 19, at 28-29; see also Steinberg et al., Age Differences in Future Orientation and Delay Discounting, supra note 19, at 35-36.

make mature, fully considered decisions.²² Empirical research confirms that adolescents—even older adolescents—have not fully developed these abilities and hence lack an adult's capacity for mature judgment.²³

²² Cauffman & Steinberg, *supra* note 10, at 741, 756 (finding a correlation between "responsibility," "temperance," and "perspective" and mature decision-making regarding antisocial or risky behavior).

 $^{^{23}\,\}mathrm{The}$ dissent in Simmons criticized the American Psychological Association for allegedly having taken inconsistent positions regarding adolescent maturity in *Simmons* and in a previous case, Hodgson v. Minnesota, 497 U.S. 417 (1990), raising the question whether parental notification posed an undue burden on a minor girl's right to obtain an abortion. 543 U.S. at 617-618 (Scalia, J., dissenting). The Association's briefs in Simmons and Hodgson, however, addressed different questions and accordingly focused on distinct aspects of mature judgment. Hodgson addressed competence to make medical decisions, which can be made in a relatively unhurried manner in consultation with medical professionals, and thus focused on adolescents' cognitive abilities, noting that by midadolescence those abilities approximated those of adults. By contrast, the question in Simmons, as here, was the degree of adolescent *culpability* and (relatedly) adolescents' potential reformability when they commit criminal acts, acts that often result from impulsive and ill-considered choices driven by psychosocial immaturity. As discussed further below, cognitive capabilities mature before an adolescent has acquired the psychosocial capacities necessary for impulse control, self-government, and mature assessment of future consequences in the face of social and emotional pressures. Laurence Steinberg et al., Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop", Am. Psychologist (forthcoming 2009) at 10; see also Elizabeth S. Scott et al., Evaluating Adolescent Decision Making in Legal Contexts, 19 Law & Hum. Behav. 221, 226-235 (1995). Moreover, because culpability and competence are distinct, adolescents' psychosocial immaturity mitigates their culpability (and enhances their prospects of reform) even if it does not render them incompetent for all purposes. Cf. Tennard v. Dretke, 542 U.S. 274, 288 (2004).

"[I]t is clear that important progress in the development of [social and emotional maturity] occurs sometime during late adolescence, and that these changes have a profound effect on the ability to make consistently mature decisions."²⁴

It should be noted that the multiple abilities that contribute to mature judgment develop at different rates. Sound judgment requires both cognitive and social and emotional skills, but the former mature sooner than the latter. Studies of general cognitive capacity show an increase from pre-adolescence until about age 16, when gains in cognitive capacity begin to plateau.²⁵ As discussed above, however, social and emotional maturity continues to develop throughout adolescence. Thus, older adolescents (aged 16-17) might have logical reasoning skills that approximate those of adults, but

²⁴ Cauffman & Steinberg, *supra* note 10, at 756, 758 (finding that the most dramatic increase in psychosocial maturity occurs between the ages of 16 and 19); *see also* Halpern-Felsher & Cauffman, *supra* note 13, at 271 ("[I]mportant progress in the development of decision-making competence occurs sometime during late adolescence.").

²⁵ See, e.g., Thomas Grisso et al., Juveniles' Competence to Stand Trial, 27 Law & Hum. Behav. 333, 343-344 (2003) (16- to 17-year-olds did not differ from 18- to 24-year-old adults but performed significantly better than 14- to 15-year-olds on test of basic cognitive abilities); Daniel P. Keating, Cognitive and Brain Development, in Handbook of Adolescent Psychology 45, 64 (Richard M. Lerner & Laurence Steinberg eds., 2004) (cognitive functions exhibited robust growth at earlier ages and began to approach the limits of growth in the 14- to 16-year-old group); Steinberg et al., Are Adolescents Less Mature Than Adults?, supra note 23, at 8-9 & fig. 2 (study showed almost linear increase in cognitive abilities from age 10-11 until age 16-17, when cognitive abilities began to plateau).

nonetheless lack the abilities to exercise self-restraint, to weigh risk and reward appropriately, and to envision the future that are just as critical to mature judgment. Younger adolescents are even less capable of mature judgment, since they may be lacking not only those social and emotional skills but basic cognitive capabilities as well.

2. Juveniles are more vulnerable to negative external influences

As Simmons also recognized, "juveniles are more vulnerable ... to negative influences and outside pressures, including peer pressure." 543 U.S. at 569. Because of their developmental immaturity, adolescents are more susceptible than adults to the negative influences of their environment—and, indeed, their actions are shaped directly by family and peers in ways that adults' are not. "Adolescents are dependent on living circumstances of their parents and families and hence are vulnerable to the impact of conditions well beyond their control." Both the family and the neighborhood in which an adolescent finds himself play a major role in juvenile delinquency. Yet, precisely because of their

²⁶ Cauffman & Steinberg, *supra* note 10, at 743-745; *see also* Halpern-Felsher & Cauffman, *supra* note 13, at 264-271; Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 Ann. Rev. Clinical Psychol. 47, 55-59 (2008).

²⁷ Alan E. Kazdin, Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths, in Youth on Trial 33, 47 (Thomas Grisso & Robert G. Schwartz eds., 2000).

²⁸ Id. at 47-48; Jeffrey Fagan, Contexts of Choice by Adolescents in Criminal Events, in Youth on Trial 371-394 (Thomas Grisso & Robert G. Schwartz eds., 2000).

legal minority, juveniles lack the freedom and autonomy to remove themselves from external influences that may exert pressure toward crime. Put simply, juveniles lack the control over themselves and over their lives that adults possess.

Juveniles not only lack control over their environment generally but are also less capable than adults of withstanding the negative influence of peer pressure which is difficult for older juveniles to resist and even more difficult for younger juveniles to resist. Research has shown that susceptibility to peer influence, particularly in situations involving pressure to engage in antisocial behavior, increases between childhood and early adolescence, peaks at around age 14, and then declines slowly during the late adolescent years, with relatively little change after age 18.29 One recent experimental study found that exposure to peers during a risk-taking task doubled the amount of risky behavior among midadolescents (with a mean age of 14), increased it by 50 percent among college undergraduates (with a mean age of 19), and had no impact at all among young adults.³⁰ "[T]he presence of peers makes adolescents

Thomas J. Berndt, Developmental Changes in Conformity to Peers and Parents, 15 Developmental Psychol. 608, 612, 615-616 (1979); Laurence Steinberg & Susan B. Silverberg, The Vicissitudes of Autonomy in Early Adolescence, 57 Child Dev. 841, 848 (1986); Elizabeth S. Scott & Laurence Steinberg, Rethinking Juvenile Justice 38 (2008); see also Kristan Erickson et al., A Social Process Model of Adolescent Deviance: Combining Social Control and Differential Association Perspectives, 29 J. Youth & Adolescence 395, 420-421 (2000) (discussing peer influence on delinquency); Fagan, supra note 28, at 382-384 (discussing coercive effect of social context on adolescents).

³⁰ Margo Gardner & Laurence Steinberg, Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in

and youth, but not adults, more likely to take risks and more likely to make risky decisions."³¹

Juveniles' lesser ability to resist peer influence affects their judgment and behavior both directly and indirectly, leading juveniles to take risks that adults might not. "In some contexts, adolescents might make choices in response to direct peer pressure, as when they are coerced to take risks that they might otherwise avoid. More indirectly, adolescents' desire for peer approval, and consequent fear of rejection, affect their choices even without direct coercion. The increased salience of peers in adolescence likely makes approval-seeking especially important in group situations." ³²

Adolescents are thus more likely than adults to alter their behavior in response to peer pressure—such as by engaging in antisocial behavior to conform to peer expectations or to achieve respect and status among their peers.³³ Juvenile crime is significantly correlated with exposure to delinquent peers.³⁴ Not surprisingly,

Adolescence and Adulthood: An Experimental Study, 41 Developmental Psychol. 625, 626-634 (2005); see also Laurence Steinberg & Kathryn C. Monahan, Age Differences in Resistance to Peer Influence, 43 Developmental Psychol. 1531, 1531 (2007) (describing Gardner and Steinberg study).

³¹ Gardner & Steinberg, *supra* note 30, at 634.

³² Scott & Steinberg, supra note 29, at 38-39; see also Moffitt, Adolescent-Limited and Life-Course-Persistent Antisocial Behavior, supra note 5, at 686; Zimring, supra note 12, at 280-281.

³³ See, e.g., Moffitt, Adolescent-Limited and Life-Course-Persistent Antisocial Behavior, supra note 5, at 686.

³⁴ See id. at 687-688.

therefore, adolescents are much more likely than adults to commit crimes in groups.³⁵ "No matter the crime, if a teenager is the offender, he is usually not committing the offense alone."³⁶ Indeed, "[m]ost adolescent decisions to break the law take place on a social stage where the immediate pressure of peers is the real motive."³⁷ "A necessary condition for an adolescent to stay law-abiding is the ability to deflect or resist peerpressure," a social skill that is not fully developed in adolescents.³⁸

In short, as this Court has observed, "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings* v. *Oklahoma*, 455 U.S. 104, 115 (1982). Because juveniles' developmental immaturity and legal minority render them both more susceptible to, and less capable of escaping, negative external pressures, they "have a greater claim than adults to be forgiven" for the criminal acts that are the result of such pressures. *Simmons*, 543 U.S. at 570.

³⁵ Scott & Steinberg, *supra* note 29, at 39; *see also* Howard N. Snyder & Melissa Sickmund, National Center for Juvenile Justice, *Juvenile Offenders and Victims: 1999 National Report* 63 (1999) (in 1997, juveniles were twice as likely as adults to commit serious violent crimes in groups).

³⁶ Zimring, *supra* note 12, at 281; *see also* Joan McCord & Kevin P. Conway, *Co-Offending and Patterns of Juvenile Crime* 9 (Dec. 2005) (finding that group offenses outnumbered solo offenses by almost 2 to 1 for those under 13, by 1.5 to 1 for 13- to 15-year-olds, and by 1.2 to 1 for 16- to 17-year-olds).

³⁷ Zimring, *supra* note 12, at 280.

³⁸ *Id.* at 280-281.

3. Juveniles' unformed identity makes it less likely that their offenses evince a fixed bad character and more likely that they will reform

Finally, as *Simmons* recognized, juveniles differ from adults—and juvenile crime and culpability differ from adults'—because "the character of a juvenile is not as well formed as that of an adult," and "[t]he personality traits of juveniles are more transitory, less fixed." 543 U.S. at 570. Indeed, the defining quality of adolescence is that character is not yet fully formed. Adolescents are still in the process of forging an identity, a process that will not be complete at least until early adulthood.³⁹

Given juveniles' relatively unformed identity, their transgressions do not necessarily indicate an entrenched "bad" character requiring permanent incapacitation. Instead, their actions often reflect the immaturity, impulsivity, and vulnerability that are the "signature qualities of youth" itself. *Simmons*, 543 U.S. at 570 (internal quotation marks omitted). And these characteristics of adolescence are transient. As this Court has recognized, for that reason, it is more

³⁹ See, e.g., Alan S. Waterman, *Identity Development from Adolescence to Adulthood*, 18 Developmental Psychol. 341, 355 (1982) ("The most extensive advances in identity formation occur during the time spent in college."); Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court, in Youth on Trial* 9, 27 (Thomas Grisso & Robert G. Schwartz eds., 2000) ("[M]ost identity development takes place during the late teens and early twenties."); Scott & Steinberg, *supra* note 29, at 52 (coherent integration of identity does not occur until late adolescence or early adulthood; the final stages of this process often occur in the college years).

likely that juveniles' "character deficiencies will be reformed" as the "impetuousness and recklessness" of youth subside in adulthood. *Id.* (internal quotation marks omitted). In other words, it is "the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 573.

Indeed, youth mitigates culpability precisely because its "signature qualities" are transient: a youthful offender is not yet the person he will become in adulthood. Simmons, 543 U.S. at 570. Adolescent criminal conduct typically results from normative experimentation with risky behavior and not from deep-seated moral deficiency reflective of "bad" character. 40 For most juveniles, therefore, antisocial behavior is fleeting and will "cease with maturity as individual identity becomes settled." Simmons, 543 U.S. at 570 (quoting Steinberg & Scott, supra note 13, at 1014). Only a small proportion of adolescents who experiment with illegal activities will develop an entrenched pattern of criminal behavior that persists into adulthood. 41 "[T]he vast majority of adolescents who engage in criminal or delinquent behavior desist from crime as they mature.",42

⁴⁰ Moffitt, Adolescent-Limited and Life-Course-Persistent Antisocial Behavior, supra note 5, at 686, 690; Steinberg & Scott, supra note 13, at 1015; see also Arnett, supra note 4, at 344, 366-367.

⁴¹ Moffitt, Adolescent-Limited and Life-Course-Persistent Antisocial Behavior, supra note 5, at 685-686; Steinberg & Scott, supra note 13, at 1014.

⁴² Steinberg & Scott, supra note 13, at 1015; see also Moffitt, Adolescent-Limited and Life-Course-Persistent Antisocial Behavior, supra note 5, at 685-686.

Moreover, juveniles' unformed selves mean that their future character and conduct cannot be reliably or accurately predicted. Researchers have consistently concluded that behavior can be identical in adolescents who will continue as criminal offenders through adulthood and those who will not.⁴³ When confronted with a delinquent adolescent, it is very difficult to predict accurately whether that individual will persist in criminal behavior or will desist from crime in adulthood, as the vast majority of delinquent adolescents do.

Indeed, as this Court concluded in *Simmons*, "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." 543 U.S. at 573. For similar reasons, as the Court noted, psychiatrists generally will not diagnose antisocial personality disorder—also known as psychopathy or sociopathy—before the age of 18. *Id.* (citing American Psychiatric Association, *Diagnostic and Sta-*

⁴³ Edward P. Mulvey & Elizabeth Cauffman, *The Inherent Limits of Predicting School Violence*, 56 Am. Psychologist 797, 799 (2001) ("Assessing adolescents ... presents the formidable challenge of trying to capture a rapidly changing process with few trustworthy markers."); Thomas Grisso, *Double Jeopardy: Adolescent Offenders with Mental Disorders* 64-65 (2005) (discontinuity of disorders in adolescence creates "moving targets" for identification of mental disorders); John F. Edens et al., *Assessment of "Juvenile Psychopathy" and Its Association with Violence: A Critical Review*, 19 Behav. Sci. & L. 53, 59 (2001) (citing studies and noting difficulty of predicting juveniles' future behavior, such as antisocial conduct or psychopathy, because juveniles' social and emotional abilities are not fully developed).

tistical Manual of Mental Disorders 701-706 (4th ed. rev. 2000)).⁴⁴

In sum, juveniles are still developing their character and identity, and it is likely that a juvenile offender will desist from crime in adulthood. Simmons, 543 U.S. at 570. Because juvenile crime is likely to be the product of the "signature qualities of youth," id., there is no reliable way to determine that a juvenile's offenses are the result of an irredeemably corrupt character, and no reliable way to conclude that a person deserves to die in prison—without any opportunity to demonstrate change or reform—for an offense committed as a juvenile.

B. Juveniles' Psychosocial Immaturity Is Consistent With Emerging Research Regarding Brain Development

Emerging research shows that the brain is still developing during adolescence in ways consistent with adolescents' demonstrated psychosocial immaturity. Specifically, adolescent brains are not yet fully devel-

⁴⁴ The difficulty in predicting an adolescent's future character and conduct is particularly acute in attempting to identify individuals with psychopathy. Although some emerging research has suggested that some psychopathic traits might be more stable over time than previously thought, even these studies demonstrate that the predictive power of juvenile psychopathy assessments is quite weak. For example, one study found that if diagnostic scores on a measure of juvenile psychopathy were used to predict adult psychopathy, the prediction that juveniles who scored in the top 20 percent of psychopathic traits at age 13 would be psychopathic at age 24 would be wrong in 86 percent of cases. Donald R. Lynam et al., *Longitudinal Evidence That Psychopathy Scores in Early Adolescence Predict Adult Psychopathy*, 116 J. Abnormal Psychol. 155, 160, 162 (2007).

oped in regions related to risk evaluation, emotional regulation, and impulse control. "[O]ur emerging understanding of adolescent brain maturation ... suggests that brain systems responsible for logical reasoning and basic information processing mature earlier than those that undergird more advanced executive functions and the coordination of affect and cognition necessary for psychosocial maturity."⁴⁵ As discussed above, mature judgment requires both cognitive and psychosocial skills—as well as the ability to coordinate the two. Recent neurobiological research suggests that the brain systems that govern many aspects of social and emotional maturity, such as impulse control, weighing risks and rewards, planning ahead, and simultaneously considering multiple sources of information, as well as the coordination of emotion and cognition, continue to mature throughout adolescence.⁴⁶

Advances in magnetic resonance imaging (MRI) have contributed to scientists' greater understanding of

⁴⁵ Steinberg et al., Are Adolescents Less Mature Than Adults?, supra note 23, at 10; see also Neir Eshel et al., Neural Substrates of Choice Selection in Adults and Adolescents: Development of the Ventrolateral Prefrontal and Anterior Cingulate Cortices, 45 Neuropsychologia 1270, 1270-1271 (2007) (prefrontal brain areas associated with higher-order cognition and emotional regulation are some of the last to mature; this lag in maturation in areas associated with reward values and control of behavior may explain why adolescents demonstrate poor decision-making); Laurence Steinberg, A Social Neuroscience Perspective on Adolescent Risk-Taking, 28 Developmental Rev. 78, 93 (2008).

⁴⁶ See, e.g., Eshel et al., supra note 45, at 1270-1271; Kathryn Modecki, Addressing Gaps in the Maturity of Judgment Literature: Age Differences and Delinquency, 32 Law & Hum. Behav. 78, 79-80 (2008); Steinberg et al., Age Differences in Sensation Seeking and Impulsivity, supra note 11, at 1765.

adolescent brain development. Research using MRI technology (available only since the 1990s) has allowed scientists to examine brain activity while an individual performs tasks involving speech, perception, reasoning, and decision-making. In addition, scientists have been able to study developmental changes in the structure of the brain during childhood and adolescence, by examining the same individuals over time at periodic intervals.⁴⁷

The frontal lobes—and in particular the prefrontal cortex—of the brain play an essential part in higher-order cognitive functions. These regions of the brain are central to the process of planning and decision-making, including the evaluation of future consequences and the weighing of risk and reward.⁴⁸ They

⁴⁷ See, e.g., Kenneth K. Kwong et al., Dynamic Magnetic Resonance Imaging of Human Brain Activity During Primary Sensory Stimulation, 89 Proc. Nat'l Acad. Sci. 5675, 5676-5678 (1992) (describing MRI mapping of brain activity); Jay N. Giedd et al., Brain Development During Childhood and Adolescence: A Longitudinal MRI Study, 2 Nature Neurosci. 861, 861 (1999) (describing study of 145 children and adolescents scanned up to five times over approximately ten years); Tomáš Paus, Brain Development, in Handbook of Adolescent Psychology 95, 97-98 (Richard M. Lerner & Laurence Steinberg eds., 2009); Linda Spear, The Behavioral Neuroscience of Adolescence 108-111 (forthcoming 2009).

⁴⁸ Antoine Bechara et al., Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions, 123 Brain 2189, 2198-2200 (2000) (patients with lesions in the prefrontal cortex suffered from impairments in the ability to make real-life decisions because of an insensitivity to future consequences, whether reward or punishment); Antoine Bechara et al., Dissociation of Working Memory from Decision Making Within the Human Prefrontal Cortex, 18 J. Neurosci. 428, 428, 434 (1998) (prefrontal cortex is necessary for decision-making in tasks involv-

are also essential to the ability to control emotions and inhibit impulses.⁴⁹ In short, fully developed and properly functioning frontal lobes play a critical role in a person's capacity to be a rational moral actor, capable of mature decision-making.

Yet, as MRI studies have shown, the prefrontal cortex is one of the last regions of the brain to mature.⁵⁰ During childhood and adolescence, the brain is maturing in at least two major ways relevant here. First, the brain undergoes myelination, the process through which the neural pathways connecting different parts of the brain become insulated with white fatty tissue called myelin.⁵¹ That insulation "speeds … neural signal transmission," making "communication between dif-

ing evaluation of risk and reward); Antonio R. Damasio & Steven W. Anderson, *The Frontal Lobes, in Clinical Neuropsychology* 404, 434 (Kenneth M. Heilman & Edward Valenstein eds., 4th ed. 2003) (one "hallmark of frontal lobe dysfunction is difficulty making decisions that are in the long-term best interests" of the individual); *see also* Elizabeth R. Sowell et al., In Vivo *Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 Nature Neurosci. 859, 860 (1999) (frontal lobes are essential for planning and organization).

⁴⁹ See, e.g., Elkhonon Goldberg, The Executive Brain: Frontal Lobes and the Civilized Mind 23, 24, 141 (2001); see also B.J. Casey et al., Structural and Functional Brain Development and its Relation to Cognitive Development, 54 Biological Psychol. 241, 244-246 (2000).

⁵⁰ Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 Proc. Nat'l Acad. Sci. 8174, 8177 (2004); Casey et al., *supra* note 49, at 243; Spear, *supra* note 47, at 87-88.

 $^{^{51}}$ See, e.g., Goldberg, supra note 49, at 144.

ferent parts of the brain faster and more reliable."⁵² Myelination improves both neural connections within the prefrontal cortex itself and the neural connections between the prefrontal cortex and subcortical regions that are important for the processing of emotions and social information.⁵³

Second, during childhood and adolescence, the brain is undergoing "pruning"—the paring away of unused synapses, leading to more efficient neural connections.⁵⁴ During adolescence, synaptic pruning is more characteristic of the prefrontal cortex than other brain regions, consistent with the observation that adolescence is a time of marked improvement in executive functions.⁵⁵

Through myelination and pruning, the brain's frontal lobes change, with "white matter"—the tissue that

⁵² *Id*.

⁵³ See, e.g., Casey et al., supra note 49, at 245-246; Allan L. Reiss et al., Brain Development, Gender and IQ in Children: A Volumetric Imaging Study, 119 Brain 1763, 1770 (1996); Elizabeth R. Sowell et al., Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation, 21 J. Neurosci. 8819, 8828 (2001); Steinberg, A Social Neuroscience Perspective on Adolescent Risk-Taking, supra note 45, at 93-99.

Casey et al., supra note 49, at 242-243; Gogtay et al., supra note 50, at 8175; Sowell et al., Mapping Continued Brain Growth and Gray Matter Density Reduction, supra note 53, at 8828; Spear, supra note 47, at 81-90; Peter R. Huttenlocher, Neural Plasticity: The Effects of Environment on the Development of the Cerebral Cortex 41, 46-47, 52-58, 67 (2002).

 $^{^{55}\,}$ Eshel et al., supra note 45, at 1270-1271; Spear, supra note 47, at 87-90.

forms pathways among different parts of the brain—increasing, and "gray matter"—the neurons that are the building blocks of the brain—decreasing.⁵⁶ These changes in the brain's composition are thought to help the brain work faster and more efficiently, improving the "executive" functions of the frontal lobes, including impulse control and risk evaluation.⁵⁷ This shift in the brain's composition continues throughout adolescence; indeed, studies indicate that myelination continues into young adulthood.⁵⁸

Although the precise underlying mechanisms of brain development continue to be studied, it is clear that, in late adolescence, important aspects of brain maturation remain incomplete, particularly those involving the brain's executive functions and the coordinated activity of regions involved in emotion and cognition. ⁵⁹ In short, the part of the brain that is critical for control of impulses and emotions and mature, considered decision-making is still developing during adolescence, consistent with the demonstrated behavioral and psychosocial immaturity of juveniles.

 $^{^{56}}$ See, e.g., Casey et al., supra note 49, at 243; Goldberg, supra note 49, at 27.

⁵⁷ See, e.g., Sowell et al., Mapping Continued Brain Growth and Gray Matter Density Reduction, supra note 53, at 8828; Casey et al., supra note 49, at 245-246; Reiss et al., supra note 53, at 1770.

 $^{^{58}}$ Huttenlocher, supra note 54, at 62; $see\ also$ Giedd et al., supra note 47, at 861, 862 (longitudinal MRI study documenting an increase in white matter until age 22); Reiss et al., supra note 53, at 1770 (observing increase in white matter in prefrontal region of the brain throughout adolescence and into young adulthood).

⁵⁹ See, e.g., Steinberg, A Social Neuroscience Perspective on Adolescent Risk-Taking, supra note 45, at 93-99.

II. SENTENCING THE JUVENILE OFFENDERS IN THESE CASES TO DIE IN PRISON WITH NO OPPORTUNITY TO DEMONSTRATE REFORM IS A DISPROPORTIONATE PUNISHMENT

As this Court recognized in Simmons, juveniles' immaturity, vulnerability, and changeability—while they in no way excuse juveniles' crimes—substantially lessen their culpability and undermine any justification for definitively ending their free lives. "The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult." 543 U.S. at 570 (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988)). "Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." Id. And "[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." Id. For those reasons, "the death penalty is a disproportionate punishment for offenders under 18." Id. at 575. Those same mitigating characteristics support the conclusion that condemning a juvenile to die in prison for the offenses at issue here is a constitutionally disproportionate punishment.

This Court has held that, in light of death's finality and irreversibility, capital punishment warrants especially close scrutiny, and necessitates procedural protections not otherwise required, in order to ensure that its imposition complies with the Eighth Amendment's dictates. See, e.g., Harmelin v. Michigan, 501 U.S. 957, 1006 (1991) (Kennedy, J., concurring in part and concurring in the judgment); Eddings, 455 U.S. at 110;

Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion). Yet it has consistently held that "[t]he Eighth Amendment proportionality principle also applies to noncapital sentences," *Harmelin*, 501 U.S. at 997 (Kennedy, J., concurring in part and concurring in the judgment), and that the Eighth Amendment forbids any punishment that is "grossly disproportionate" to the crime, *id.* at 1001 (internal quotation marks omitted).

The Court has recognized that, under certain circumstances, the punishment of life in prison without parole may be grossly disproportionate in light of the gravity of the offense and the blameworthiness of the offender. See Solem v. Helm, 463 U.S. 277, 290-294 (1983). In particular, the Solem Court explained that it was appropriate to examine not merely the nature of the crime, but also the "culpability of the offender," including the offender's level of participation in the crime and his intent or motive in committing it. Id. at 293. The Court concluded that a sentence of life without parole was an unconstitutionally disproportionate punishment for a seventh non-violent felony committed by an adult offender. See id. at 303.

The Court has subsequently rejected Eighth Amendment challenges to a sentence of life without parole for possession by an adult of a large quantity of cocaine, see Harmelin, 501 U.S. at 994-996, and to lengthy sentences of terms of years with the possibility of eventual parole imposed on adults for repeated felony offenses that included serious or violent felonies, see Lockyer v. Andrade, 538 U.S. 63 (2003); Ewing v. California, 538 U.S. 11, 29-31 (2003) (plurality opinion). But it has reaffirmed Solem's basic holding that the imposition of a sentence of imprisonment is constrained by a requirement of proportionality to the offense and the offender. See Harmelin, 501 U.S. at 997-998, 1001

(Kennedy, J., concurring in part and in the judgment); Lockyer, 538 U.S. at 72, 74; Ewing, 538 U.S. at 22-24. This Court has never yet had occasion to examine the constitutionality of the rare sentence at issue here: a sentence of life without the possibility of parole imposed on a juvenile for a non-homicide crime. But the principles articulated in this Court's Eighth Amendment jurisprudence support the conclusion that such a sentence is grossly disproportionate.

As an initial matter, while a sentence of death unquestionably differs from a sentence of imprisonment, imprisonment for life without the possibility of parole, like death, is in a very real sense final and irrevocable. It condemns the offender to live out his entire life and die in prison, precluding release regardless of anything he may do to redeem himself or demonstrate a changed character. Such a sentence is particularly harsh when imposed on a juvenile, who will spend his entire life in prison as a result of a crime committed as a minor, without ever experiencing adulthood—or the ability "to attain a mature understanding of his own humanity," Simmons, 543 U.S. at 574—as a free person.

The same characteristics of juveniles that this Court has already recognized mitigate their culpability and render a sentence of death an unconstitutionally disproportionate response to their offenses are relevant to the constitutionality of a sentence of life without parole. As discussed above, even older juveniles are significantly less capable than adults of mature, considered judgment. And the susceptibility of even late adolescents "to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult." 543 U.S. at 570 (quoting *Thompson*, 487 U.S. at 835). Younger juveniles are still less able to make mature decisions, as

their basic cognitive capacities may not yet be fully developed—a particularly compelling factor mitigating culpability. See Atkins v. Virginia, 536 U.S. 304, 318 (2002). In short, because juveniles "have less capacity [than adults] to control their conduct and to think in long-range terms," juveniles "deserve less punishment" for their crimes. Eddings, 455 U.S. at 115 n.11 (internal quotation marks omitted).

Similarly, juveniles' vulnerability to negative influences that may be beyond their control "mean[s] juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." Simmons, 543 U.S. at 570. Because of their developmental immaturity, adolescents are more susceptible to the influence of the family and environment that produced them. Yet, because of their legal minority, juveniles "lack the freedom that adults have to extricate themselves from a criminogenic setting." Id. at 569 (quoting Steinberg & Scott, supra note 13, at 1014). Juveniles' susceptibility to peer pressure also leads them to make unwise choices they would not be likely to make as adults and leads directly or indirectly to a significant proportion of juvenile crime. Because a key element of culpability is the notion that the criminal actor, exercising self-determination, made a choice to offend, juveniles' greater vulnerability to their environment and peers further mitigates their culpability. Cf. Morissette v. United States, 342 U.S. 246, 250 (1952) (culpability based on intentional conduct is rooted in our belief in the "freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil").

Finally, the transitory nature of adolescence itself, and the fact that juveniles' character is still being formed, means that juveniles' criminal conduct cannot be morally equated with that of adults: "The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. 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." *Simmons*, 543 U.S. at 570.

The penological justifications for a sentence of life imprisonment without parole—like a sentence of death—are thus significantly weaker when applied to juveniles. The retributive purpose of such a punishment has substantially less force when applied to those "whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." Simmons, 543 U.S. at 571. Likewise, the same characteristics of juveniles that render them less culpable—their impulsivity, rash decision-making, biased attention to the anticipated immediate rewards of a choice rather than its potential longer-term costs, and lesser ability to consider and evaluate the future consequences of their actions—substantially weaken the deterrence justification for such punishment. Id. 60 And

⁶⁰ Indeed, empirical studies evaluating the deterrent effect of laws mandating that juvenile offenders be transferred to the adult criminal justice system for certain crimes have concluded that the threat of adult criminal sanctions had no measurable effect on juvenile crime. Simon I. Singer & David McDowall, *Criminalizing Delinquency: The Deterrent Effect of the New York Juvenile Offender Law*, 22 Law & Soc'y Rev. 521, 526-531 (1988) (comparing juvenile arrest statistics for four years prior to enactment of New York's transfer legislation with juvenile arrest statistics in the sixyear period after enactment and finding little measurable impact on serious juvenile crime); Eric L. Jensen & Linda K. Metsger, A

while life without parole will unquestionably incapacitate a juvenile offender, life imprisonment with the possibility of parole would also serve that function, while allowing for the significant possibility that a juvenile will change and develop a moral character as an adult.

By contrast, condemning an offender to die in prison for a crime committed as a juvenile forecloses that possibility. As discussed above, and as Simmons recognized, adolescence is transitory, and adolescents change. Indeed, most adolescents who commit crimes will desist from criminal activity in adulthood. Because the adolescent self is not yet fully formed, there is no way reliably to conclude that an adolescent's crime is the expression of an entrenched and irredeemably malign character that might justify permanent incarceration, and no way to distinguish the hypothetical juvenile offender who is a hardened criminal from the offender whose crime is a product of the transient influences of adolescence itself. Sentencing a juvenile to die in prison, without any possibility of release, thus cannot rest on the conclusion that he is incapable of change or redemption. That simply cannot be said with any confidence of juveniles.

For all these reasons, sentencing an immature and less culpable juvenile to die in prison, particularly for the non-homicide offenses at issue here, is a grossly disproportionate punishment.

Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime, 40 Crime & Delinq. 96, 100-102 (1994) (comparing juvenile arrest statistics for the five-year periods before and after enactment of Idaho's transfer legislation and finding no deterrent effect on violent juvenile crime).

CONCLUSION

The judgments below should be reversed.

Respectfully submitted.

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JULY 2009

IN THE Supreme Court of the United States

TERRANCE JAMAR GRAHAM

Petitioner,

v.

FLORIDA

Respondent.

JOE HARRIS SULLIVAN

Petitioner,

v.

FLORIDA

Respondent.

On Writs of Certiorari from the District Court of Appeal of Florida, First District

BRIEF OF FORMER JUVENILE OFFENDERS
CHARLES S. DUTTON, FORMER SEN. ALAN K. SIMPSON,
R. DWAYNE BETTS, LUIS RODRIGUEZ, TERRY K. RAY,
T.J. PARSELL, AND ISHMAEL BEAH AS
AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE 1

The *Amici* who submit this brief are former juvenile offenders who were able to become productive, law-abiding adults and make meaningful contributions to society. *Amici* believe that their experiences may assist the Court in resolving the difficult issues presented by these cases by providing insight into the unique capacity of children to rehabilitate themselves.

As juveniles, *Amici* in many ways resembled Joe Harris Sullivan and Terrance Jamar Graham, the petitioners in this case. Each of them engaged in serious criminal conduct. Some of them were convicted of crimes that, in Florida and elsewhere, are punishable today by life sentences. Others committed acts that quite easily could have led to such a conviction had circumstances been different or had a prosecutor taken a harder line.

Yet because *Amici* were not sentenced to life imprisonment – because they ultimately were given another chance, in part because of the young age at which they had committed criminal offenses – they were able to make significant contributions to their communities and even, in some cases, the nation and the world. The life stories of the *Amici* show how much could have been lost by concluding too quickly

¹ The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

that they were beyond hope. *Amici* seek to share their individual stories with the Court.

Charles S. Dutton attended Yale University's School of Drama. He made his Broadway debut in 1984 and has received two Tony nominations. He also has starred in several major motion pictures and a television series, and won an Emmy for directing the HBO mini-series "The Corner."

Alan K. Simpson served in the United States Senate from 1979 to 1997, serving, among other positions, as Republican Whip and Chairman of the Veterans Affairs Committee. He has also served several terms in the Wyoming legislature, directed Harvard University's Institute of Politics, and participated in the Iraq Study Group.

R. Dwayne Betts is a published author and poet. He recently graduated from the University of Maryland, College Park, where he was selected for the honor of delivering a commencement address.

Luis Rodriguez is an acclaimed writer, activist, and poet. He has published fourteen books, including his memoir, *Always Running: La Vida Loca, Gang Days in L.A.*, which has won numerous awards. He has also published articles in leading newspapers, and he founded Youth Struggling for Survival, a community organization for troubled youths in Chicago.

Terry K. Ray attended Luther College and the Northwestern University School of Law. He has served as a trial attorney for the Department of Justice Tax Division and as an Assistant United States Attorney, prosecuting tax crimes. Today he is a white-collar defense attorney in Dallas. He has participated in and initiated mock trials at inner city

schools and received a grant from the State of Illinois to teach youngsters in the Venice School District how to resolve conflicts without resorting to violence.

T.J. Parsell is a successful software executive and one of the country's leading advocates against prison rape. He authored a book about his experiences in prison, *FISH: A Memoir of a Boy in a Man's Prison*, which was published in 2006. This fall he will enter the graduate film school at New York University.

Ishmael Beah is a United Nations Children's Fund (UNICEF) Advocate for Children Affected by War. He speaks at conferences on children's welfare around the world. A graduate of Oberlin College, he has written a memoir, *A Long Way Gone*, which has become an international best-seller.

Although they are now successful adults, *Amici* made terrible mistakes as teenagers. They are living, breathing testaments to the resiliency, adaptability, and rehabilitative potential of juvenile offenders.

SUMMARY OF ARGUMENT

the experiences of *Amici* show, it is fundamentally inhumane to give up on a youthful offender. The same distinctive characteristics of punishment vouth that render capital unconstitutional for juvenile offenders make it equally improper to sentence them to life in prison without the possibility of parole. As this Court recognized in Roper v. Simmons, 543 U.S. 551 (2005), children are less susceptible to deterrence, less deserving of retribution, and, crucially, much more capable of rehabilitation. Like a death sentence, a

sentence of life in prison without the possibility of parole ignores these important differences between adults and children.

As individuals who committed serious criminal offenses as juveniles but who subsequently have realized their mistakes, at ned for them, and rehabilitated themselves. Amici are situated to provide insight into the difficult issues presented in these cases. One of the *Amici* has helped to enforce the laws of the United States; another helped to write them. Others have made and important national even international contributions to social justice, culture and the arts, and business. Their stories, and the stories of others like them, prove that no matter how broken their spirit, nor how violent their actions, juveniles can be redeemed and can make contributions to society that would be tragic to lose. It is impossible to know what any juvenile offender will grow up to become. But it is also impossible to conclude that any juvenile offender has no redeeming potential, and therefore should be locked away for life with no possibility of Although Amici come from a variety of backgrounds, each of them understands firsthand and proves the limitless potential of young people to change. They speak today with one voice and urge this Court to rule in Petitioners' favor in these cases.

ARGUMENT

I. THIS COURT HAS RECOGNIZED THAT YOUTHFUL OFFENDERS ARE INHERENTLY DIFFERENT.

This Court has repeatedly endorsed the view that juveniles are "categorically less culpable than the average criminal." Roper, 543 U.S. at 567 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)); Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (plurality opinion). In *Roper*, the Court pointed to three "general differences" between juveniles and adults that "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." 543 U.S. at 569-70. iuveniles' immaturity and susceptibility irresponsible behavior makes their irresponsible conduct less morally reprehensible than that of adults. Id. Second, juveniles are more vulnerable to negative environmental influences and pressures, including peer pressure. *Id.* at 569. vulnerability, combined with a relative lack of control over their immediate surroundings, allows greater forgiveness to juveniles for bad behavior. Id. at 570. Finally, juvenile personalities are not fully The signature qualities of youth are developed. transient, leaving open the possibility of maturity and personal growth. *Id.* at 569-70.

This Court has also explained that punishments are justified under one or more of three principal rationales: retribution, deterrence, and rehabilitation. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008), *modified on denial of reh'g*, 129 S. Ct. 1 (2008). In *Roper*, this Court recognized that the first two of these justifications apply to juveniles "with lesser force" than to adults. 543 U.S. at 571. The case for retribution is less strong for a minor because the culpability and blameworthiness of juveniles is significantly diminished by their youth and immaturity. *Id.* These same characteristics also

suggest that juveniles will be "less susceptible to deterrence." *Id.*

third justification for punishment rehabilitation – is of course not applicable to a sentence of life imprisonment without parole, just as it does not apply to the death penalty. Yet the same characteristics that decrease the culpability juveniles and make them less susceptible deterrence increase their prospects for rehabilitation. As the Court noted in *Roper*, the reality that juveniles are still in the process of defining their identity diminishes the presumption that a heinous crime is evidence of irretrievably depraved character. Id. at 570. 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." Id. The incredible potential for such reformation is the focus of this brief.

When a juvenile offender commits a serious criminal offense, the State retains authority to take basic liberties away from that offender. *Id.* at 573-74. What the State cannot do, however, is to "extinguish his life and his potential to attain a mature understanding of his own humanity." *Id.* This brief provides examples of the important contributions that can be made by youth when they are given a second chance – the chance to attain a mature understanding of their own humanity, and to share it.

These examples are necessarily anecdotal. Undoubtedly there are many more former juvenile offenders with stories like those of the *Amici*, just as there are others who do *not* go on to become

Senators, authors, and human rights activists. However, the examples set forth in this Brief do dramatically illustrate that the goals rehabilitation, deterrence, and retribution are not served by sentencing juveniles to life in prison without parole. Had the Amici received such sentences. thev would have had never discover and cultivate their opportunity to impressive talents, and society never would have benefited from their undeniable contributions.²

II. THE LIFE STORIES OF THE AMICI SHOW THAT YOUTHFUL OFFENDERS ARE INHERENTLY DIFFERENT AND THAT INCARCERATING A YOUTHFUL OFFENDER FOR LIFE WITHOUT PAROLE CAN BE A TREMENDOUS LOSS TO SOCIETY.

A. Charles S. Dutton

Charles S. Dutton is one of the nation's most respected actors and directors. He has received two Tony Award nominations for his performances on the Broadway stage and has been honored with Emmy Awards for his acting and directing on television.

² Amici do not condone in any way the crimes committed by the petitioners in the cases before the Court. Nor are Amici in a position to evaluate the appropriate criminal sanctions that these particular defendants, or any other defendants convicted of serious offenses, should receive for their crimes. Strong criminal sanctions, including lengthy periods of incarceration, often are appropriate for individuals who have committed serious criminal offenses. However, Amici also strongly believe that when a juvenile commits a crime, even a serious offense, a constitutional system of justice cannot conclude that no possibility of rehabilitation exists and that the only recourse is a term of life imprisonment without the possibility of parole.

Yet his path to success did not begin at the Yale School of Drama, from which he earned his Masters of Fine Arts degree, but years earlier, during his third and final stint in Maryland State Prison.

Dutton grew up in the Latrobe Homes housing projects in Baltimore. His childhood bedroom overlooked the Maryland Penitentiary, an imposing and dark gothic structure built in the early 1800s. Dutton saw that prison every day and night from birth. "We all expected to end up there," he says, "because all the older guys we knew were there. It was as if I was born for it."³

Dutton was first sent to a juvenile reform school when he was thirteen, and he bounced around the juvenile system for several years. "I thought there

³ Amici speak directly to the Court in this Brief, and each adopts the statements attributed to him herein as his own. However, the stories of the Amici have been told before in a wide spectrum of public media. See, e.g., Ishmael Beah, A Long Way Gone (2007) (Ishmael Beah); Ernest Hooper, After Jail, Arts Pave Way Back Into Life, St. Petersburg Times, Sept. 14, 2007. available athttp://www.sptimes.com/2007/09/14/ Columns/After_jail__arts_pave.shtml (Charles Dutton); Second Chances: 100 Years of the Children's Court: Giving Kids a Chance to Make a Better Choice at 35, 41 (Justice Policy Institute & Children and Family Justice Center, 1999), available at http://www.cjcj.org/files/secondchances.pdf (Alan Simpson and Terry Ray); T.J. Parsell, FISH: A Memoir of a Boy in a Man's Prison (2006) (T.J. Parsell); Lonnae O'Neal Parker, From Inmate to Mentor, Through Power of Books, Post, Oct. 2, 2006,at A01, available http://www.washingtonpost.com/wp-dyn/content/article/2006/ 10/01/AR2006100101160.html (Dwayne Betts); Mike Sonksen, The Redeemer Speaks, O.C. Weekly, Dec. 1, 2005, available at http://www.ocweekly.com/2005-12-01/culture/the-redeemerspeaks/ (Luis Rodriguez).

was more going on in the street corner than in the classroom." In order to look "tough" to his cohorts, Dutton felt the need to be imprisoned in more and more severe establishments, in what he describes as a "morbid rite of passage." "You gained 'rep' by being tough. If you were in City Jail, people would say, 'you ain't tough. You need to go to the Farm, or the Cut," slang for other Maryland detention facilities. "You ain't done nothin'."

When he was seventeen, Dutton was involved in a street fight that escalated into a knife fight. He and his assailant stabbed each other. Only Dutton survived. He was convicted of manslaughter and sentenced to five years of imprisonment. Dutton was out on parole for only a few months when he returned to prison for possession of a deadly weapon (a handgun). When a prison riot broke out, Dutton participated and punched a guard. sentenced to an additional eight years imprisonment. "I knew what I was doing," he says. "For a long time I didn't want to hear anything positive. I just wanted to know when we were going to burn down the prison."

In 1974, during his last prison stint, Dutton was put in the "hole" – solitary confinement – for refusing to clean toilets. He was fed only every seventy-two hours. "The only thing you were allowed to bring with you into the hole was one book. I brought in an anthology of plays that my girlfriend sent me from the outside. I had meant to grab a different book, actually, but took the plays by mistake," he says. "For the first three days, I couldn't read it. The hunger hurt too badly. But after that, by the light that shone through the two inches between the door

and the floor, I lay flat on my stomach and read for days." One play in the anthology was *A Day of Absence* by the famous African-American playwright Douglas Turner Ward. "Reading that play sparked me in a way that allowed me to rediscover my own humanity," Dutton recalls.

When Dutton left "the hole," he convinced the warden and a prison teacher, who was also a local actress, to start a prison drama program. Preparing for the group's weekly meetings and rehearsals gave him purpose. While in prison, he received his G.E.D. and then an Associate's Degree in theater. After his release, he earned a Bachelor's Degree in theater from Towson State University and acted for two years in Baltimore. He applied and was accepted to Yale University's School of Drama — one of the top drama schools in the country. "When I used to wander the campus at night, looking at the buildings and statues, I used to think, 'wow, I don't believe this.' I have that same feeling today when I shoot a film or perform on a Broadway stage."

Dutton made his Broadway debut in 1984 in August Wilson's "Ma Rainey's Black Bottom," a performance that earned him a Theater World award and the first of his two Tony nominations. In 1991, Towson State University bestowed him with an honorary doctorate degree. Dutton has co-starred in several major motion pictures, and from 1991-1994 starred in the television series "Roc." In 2000, Dutton earned an Emmy Award for directing the acclaimed HBO mini-series "The Corner."

Dutton emphasizes that his redemption is not unusual. "I have buddies who are plumbers and brick masons and carpenters who've been out as long as I've been out and been as productive with their lives," he says. He firmly believes the chance for a productive life is at its height with juvenile offenders. "I just can't fathom sentencing juveniles to life without parole," Dutton says. "I just talked in Florida to some kids with that sentence. It was just dawning on them after ten or twelve years that their lives were over. They were kids and now they're finished. There's a heart-wrenching sadness on their faces, and you can see the fight is out of them. If they were given a second chance, they'd be changed human beings."

"As long as it's a young mind," he says, "they're salvageable. At those tender ages, the mind is still pliable and can be shaped. It's not too late."

B. Senator Alan K. Simpson

Alan K. Simpson is an accomplished former Member of the United States Senate and a leader of the Republican Party. He served in the Senate for eighteen years, from 1979 to 1997, rising to become the Republican Whip. When Simpson announced his candidacy for the Senate in 1977, one man stood out in the crowd: J.B. Mosley, Simpson's probation officer. When Simpson was a juvenile – long before he finished college, law school, and eventually became a candidate for the Senate - Simpson was convicted of a serious federal offense and engaged in other conduct that could have led to other serious criminal offenses and, under certain regimes, a potential life sentence. In Simpson's words to this Court, "I was a monster."

One day in Cody, Wyoming, when Simpson was in high school, he and some friends "went out to do damage." They went to an abandoned war relocation structure and decided to "torch" it. They committed arson on federal property, a crime now punishable by up to twenty years in prison if no one is hurt, see 18 U.S.C. § 844(f)(1), and punishable by up to life in prison if the arson causes a person's death, see id. § 844(f)(3). Luckily for Simpson, no one was injured in the blaze.

Simpson not only played with fire, but also with guns. He played a game with his friends in which they shot at rocks close to one another, at times using bullets they stole from the local hardware store. The goal of the game was to come as close as possible to striking someone without actually doing so. Again, Simpson was lucky: no one was killed or seriously injured.

Simpson and his friends went shooting throughout their community. They fired their rifles at mailboxes, blowing holes in several and killing a cow. They fired their weapons at a road grader. "We just raised hell," Simpson says. Federal authorities Simpson with destroying charged government property and Simpson pleaded guilty. He received two years of probation and was required to make restitution from his own funds – funds that he was supposed to obtain by holding down a job.

J.B. Mosley became Simpson's probation officer. Simpson resisted Mosley's efforts, earning money at the local pool hall and reporting to Mosley (sarcastically) that he was going to "choir practice." One late night in Laramie, Simpson arrived at a bar popular with African-Americans. He saw a man leaving the bar who had just been in a knife fight inside. Simpson asked what happened. The man

uttered racial slurs, and Simpson responded that, with that attitude, the man was at the wrong bar. The man attacked Simpson and Simpson shoved the man down – just as the police arrived.

The police separated the men and, believing Simpson was responsible for the man's knife wounds, attempted to arrest Simpson. In his words, Simpson then "belted the cop" who was holding him. The officer responded by striking Simpson in the head with a billy club. As Simpson reports, "I still carry a lovely little crescent above my eyebrow as a reminder of how stupid one can get." The officers arrested Simpson and locked him up. His girlfriend (and now wife of fifty-five years) refused to bail him out. Simpson spent the night in a "sea of puke and urine."

For Simpson, that night triggered what he describes as "creeping maturity" – a resolve that he would avoid further trouble with the law and become a productive member of society. As he has described it, "The older you get, the more you realize . . . your own attitude is stupefying, and arrogant, and cocky, and a miserable way to live." With the help of Probation Officer Mosley, Simpson began to redeem himself.

Simpson went on to graduate from the University of Wyoming with a Bachelor of Science degree in 1954 and a law degree in 1958. He served in the United States Army from 1954 to 1956, in various state-level attorney positions from 1958 to 1959, as a United States Commissioner from 1959 to 1969, as a private attorney for many years, and as a member of the Wyoming House of Representatives from 1965 to 1977. He and his wife Ann also raised three children.

Simpson was elected to the United States Senate in 1978. During his tenure, he served as Republican Whip from 1984 to 1994, and he was considered as a potential candidate for Vice President in 1988. He served principally as Chairman of the Senate Veterans Affairs Committee, and also held many other posts in the Senate.

Simpson declined to run for reelection in 1996 and went on to teach at and later to direct the Institute of Politics at Harvard University's John F. Kennedy School of Government. In 2006, he was a member of the Iraq Study Group. He has been an outspoken advocate for equality for all persons regardless of race, color, creed, gender, or sexual orientation. Among many other honors, Simpson has received Honorary Doctor of Laws degrees from the University of Wyoming, Notre Dame, and American University, as well as the Thomas Jefferson Award in Law at the University of Virginia.

Alan Simpson was involved in activities as a youth that could have led to a lengthy prison term. He engaged in felonious and violent conduct that posed a serious risk to life and property. Had circumstances been different – had he not been fortunate regarding where his stolen bullets struck or what was damaged by his arson – he might have been jailed for the rest of his life. But the system did not treat him so harshly. It gave him a second chance, including the help of a probation officer who, in Simpson's view, had a great influence on his life and helped him make it to the moment where he stood before a crowd in Wyoming, asking to be elected to the United States Senate.

C. R. Dwayne Betts

On May 21, 2009, Reginald Dwayne Betts became his family's first college graduate when he received his bachelor's degree in English from the University of Maryland. He had the honor of being chosen to give a commencement address at graduation. Standing before thousands of spectators and his fellow graduates, Betts recalled a day twelve years earlier when he stood as a teenager in a Virginia courtroom and was sentenced to prison. "My journey," Betts said, "began the moment my life became a derailed train headed toward the state penitentiary."

In 1997, sixteen-year-old Betts and a friend took a joyride in a stolen car. They came across a man asleep in his car near a Northern Virginia shopping mall and decided to carjack the man. Betts had a gun. He pointed it at the car window, stole the man's wallet, and drove off with the car. Betts was arrested the next day. Asked later about his motivations, Betts said, "I did it for all kinds of reasons I can't clearly reason out. At that moment I wanted to do it, and I had no idea that it would define me for the rest of my life."

Betts was convicted of carjacking, use of a firearm during a felony, and attempted robbery. Although he had never before been arrested, he was certified as an adult. He faced a possible life sentence, but was sentenced to fifteen years for carjacking, five years for attempted robbery and three years for the use of a firearm in the commission of a felony. After the judge suspended all but six years of the fifteen-year sentence, and ran

it concurrently with the five-year robbery sentence, Betts was left facing a nine-year prison sentence. He recalls the judge saying, "I'm under no illusions that sending you to prison will help you."

Prior to his arrest, Betts had drifted between his school life and his social life. An avid reader, he qualified for his school's gifted program, made the honor roll, and was elected class treasurer. Betts was restless and, as his mother noted, thought he could talk his way out of anything. His group of friends consisted of boys who were mainly failing, so Betts hid his college potential and aspirations. Although he remained on the honor roll and excelled in his honors classes, Betts began to get into trouble. He started getting high with the boys in his neighborhood after school. Over time, his drug use and he increased began cutting Nevertheless, his mother and teachers did not notice his downward spiral, because he continued to excel in class. Looking back, Betts says, "I guess I didn't set off any alarms in anybody's head."

After his arrest, Betts "closed my eyes hoping it would go away." But of course it did not, and he soon realized he would remain locked up for a long time. He spent the rest of his adolescent years trying to maintain his sanity and sense of self, living in a prison environment ruled by violence. In that world, Betts learned, "you are either predator or prey." During his first two years in prison, Betts spent almost a full year in solitary confinement for what he calls "incidental contact with correctional officers." Although solitary protected Betts from the danger of always being the youngest person in the room, his constant fears of violence gave way to a worry that

prison would harden him, would turn him into someone he knew he was not.

As he had done as a child, Betts escaped into books. He began writing as well to pass the time. He wrote to his mother every week, and he started writing essays and poetry. Betts knew that one day he would be released back into society, and he did not want to have wasted the years he was incarcerated. He knew he needed a skill once he was released from prison, and he focused on writing. "I took everything seriously because I knew I had a release date," he says. "I wrote my way out of that world."

Betts says that "if I had gotten life without parole, I would never have written those poems and essays." There is an "absolute loss of hope" for juveniles sentenced to life in prison, and "no push to do anything at all." Betts met several such inmates while in jail, and none of them tried to develop skills or improve themselves. Instead they became "part of that world, predator or prey," uninterested in doing anything constructive with their lives.

Betts now has been out of prison for four years. He is making the most of his second chance. "Prison gave me a skill to market, and a story to tell," he says. "I had seventeen hours a day for nine years just to read, study, and exercise – all to prepare for my release." Since his release, Betts has proved he can be a productive member of society. He is, indeed, "not the person I was when I was locked up."

After his release, Betts enrolled at Prince George's Community College. He served in the student government, was the Phi Theta Kappa honor society president, and edited the college's literary journal. His grades earned him a spot in the school's Honors Academy and a full tuition scholarship to attend the University of Maryland. "The reason why I'm here today is because there were a number of people willing to give me a chance, who were willing to say 'no' to the voices that said I wasn't good enough," Betts has said. "To say 'no' to the voices that said I didn't deserve a chance."

His poetry has been published in several national magazines and journals, and he has won a number of writing contests and scholarships, including the Breadloaf Writer's Conference scholarship and a Holden Fellowship to attend the graduate program at Warren Wilson College. Later this year, Betts will publish a memoir, "A Question of Freedom," as well as a book of poetry. He is married and has a child.

Betts also has worked to give back to his community. At Karibu Books in Bowie, Maryland, Betts started a book club for young boys, to provide a space where the boys could read and share their thoughts about literature and life. Betts wanted to provide the boys with the kind of role model that he never had, so that they could avoid the mistakes he made. Betts also teaches poetry workshops for middle school students in Washington, D.C., as part of the D.C. Creative Writing Workshop.

Betts is remorseful for his actions and grateful for the opportunity to prove that he is not a criminal at heart, not a menace to society. "I made one mistake," he says. "It was not the sum total of who I was." He knows how fortunate he is to have this second chance. "It's difficult to see, right after trouble, that someone is deserving of an

opportunity," he says. "People are dying from the lack of opportunity every day. I'm very blessed."

Knowing that he would have another chance — that he had a release date — is what motivated Betts to work hard to prepare for life after prison. "I always knew I'd have this day, standing on a porch, looking outside," he muses. "Without that, there would just be no reason to think about life beyond a jail cell."

D. Luis Rodriguez

Luis Rodriguez was stealing things by the time he was seven years old, and at the age of eleven, he joined Las Lomas, a Los Angeles gang. As a teenager, Rodriguez says, "I was destructive and self-destructive. I was willing to shoot, stab and even kill for the gang – and I was willing to die for the gang as well. My world was extremely limited and I ended up becoming small to fit in this world."

Beginning when he was thirteen years old, Rodriguez repeatedly was arrested for stealing, fighting and disturbing the peace. He also became addicted to drugs. By age fifteen, Rodriguez had been expelled from school and thrown out of his house by his mother.

When Rodriguez was seventeen, a member of his gang was assaulted by a neighborhood club of white bikers. Rodriguez, deeply ensconced in gang culture, addicted to heroin, and seeking retaliation, shot one of the bikers. He was arrested as he fled the scene and was charged with assault with the intent to commit murder. Although those charges were dropped, a year later Rodriguez faced a six-year prison sentence for assaulting a police officer and

resisting arrest. Instead of giving up on him, the criminal justice system – based partly on letters of support from community members – gave him another chance, directing him to a county jail based on a lesser conviction.

Rodriguez has spent his life paying back the second chance he was given and doing so in spades. At nineteen, Rodriguez broke free of his drug addiction and took a series of low-skill jobs. Over the next four years he worked at Bethlehem Steel, with various periods spent as a carpenter, mechanic, foundry smelter, paper mill worker, and truck and school bus driver. He went back to complete high school, and after taking night classes at East L.A. Community College worked as a reporter and photographer for local weekly newspapers. He subsequently was accepted into a summer program for minority journalists at Berkeley, and at the age of twenty-six was hired as a daily reporter for the *San Bernardino Sun*.

Today, Rodriguez is an acclaimed writer, activist, and poet. He has published fourteen books of fiction, nonfiction, literature, and poetry. In 1993, Rodriguez wrote his memoir and signature work Always Running: La Vida Loca, Gang Days in L.A., which he dedicated to twenty-five close friends who died during his gang days. The book, intended to steer Rodriguez's son away from gang life, has sold more than 300,000 copies, and received numerous accolades, including being named a New York Times Notable Book, and receiving the Carl Sandburg Literary Award and a Chicago Sun-Times Book Award. His freelance journalism has appeared in U.S. News & World Report, The Chicago Tribune,

The L.A. Times, and The New York Times. Rodriguez also has appeared on National Public Radio, the Oprah Winfrey Show, Good Morning America, CNN, BBC, Fox TV News, and Jim Lehrer's NewsHour.

Returning full circle, in 1994 Rodriguez helped found Youth Struggling for Survival, a community organization that works with gang and non-gang youth in Chicago. He believes that "if properly seen, mentored, assisted, guided, and initiated, young people have immense capacities for change and transcendence. I have seen this in the work I do with gang and other troubled youth, as well as in my own teen years when I left the gang and drugs, including heroin." Today, he testifies as a gang expert and has filed affidavits and appeared in over fifty cases. Rodriguez also spends time speaking in juvenile facilities, prisons, homeless shelters, and detention centers. He says, "Adults today give up on youth when the going gets rough. Youth is youth for a good reason. Youth are very malleable and it is society's obligation to try to change them. living proof of the capacity for change."

E. Terry K. Ray

In 1961, eleven-year-old Terry Ray entered Chicago's primary juvenile detention center, the Audy Home, after injuring a friend during a neighborhood rock fight. Ray had regularly been abused at home. Over the years that followed, Ray's anger swelled and he committed a series of increasingly violent offenses.

As a youth, Ray bore all the hallmarks of an incorrigible, recidivist violent criminal. He

repeatedly fought with other students, at times responding with extreme violence to the slightest provocation. At age eleven, he stabbed a classmate in the leg with scissors, and then stabbed the teacher who tried to break up the fight. He attached a combination lock to a metal chain and then pummeled another student with it. One day when he was sixteen, he marched toward his school with a gun, intending to attack a teacher. An alert police officer intercepted Ray, beating him severely. "I was a very violent young man," Ray says. "I was a very angry young man."

Ray spent his teen years drifting in and out of the juvenile justice system. For Ray, incarceration meant stability and safety. It meant protection from the abuse he faced at home. He explains, "I felt much, much better locked up than on the streets. The food was better. The living conditions were better. I had friends."

After his final release from juvenile detention, Ray enrolled in a junior college and took a job as an orderly at a local hospital. One counselor at the college recognized that he had significant academic potential and encouraged him to avoid further trouble by leaving Chicago to complete his education. Ray listened, transferring to and eventually graduating with honors from Iowa's Luther College. He then attended Northwestern University School of Law. After graduating, Ray earned a Master of Legal Letters degree in taxation from Washington University School of Law.

Despite these degrees, Ray initially had trouble finding a job. After he had worked for fourteen months for an insurance company, two law school professors helped him arrange for an interview with Department of Justice Tax Division Washington, D.C. Ray – who at one point had seemed destined to spend his adult life in and out of prison – became a trial attorney for the United States. He later became an Assistant United States prosecuting street crime Washington, D.C., and eventually was hired to lead the Tax Fraud Prosecution Unit in the U.S. Attorney's Office in Dallas, Texas. When he left that post in 1987, the Internal Revenue Service thanked him for his service by making him an honorary special agent.

Ray is now an attorney in private practice in Dallas. Throughout his career, he has reached out to juvenile offenders and at-risk youths, teaching them to resolve conflicts without resorting to violence. "Sometimes we don't take the time to look at someone as an individual," Ray says. "We look at something a person did in one second, five seconds, or ten minutes and say that the person has no possibility of ever overcoming that moment. But those people who make it out – they have an extra gear, and they can do remarkable things."

F. T.J. Parsell

T.J. Parsell is a successful software executive, author, and human rights activist. But after convictions for larceny and armed robbery as a juvenile, his life might have been quite different.

Parsell grew up in Michigan, raised by a family with a "long history of trouble." As he relates, "my grandfather, father, uncle, brother, and stepbrother all served time in a juvenile reform school or went to prison." Parsell describes a family with "twisted ethics" – where it was almost expected that he would end up behind bars.

In 1978, Parsell was seventeen and worked at a hotel, and so he had keys to all of the guest rooms. He often invited friends to drink alcohol, party, and stay the night in the empty rooms. He even stole items from occupied rooms. He was caught and agreed to plead guilty in exchange for probation. The larceny charge could have carried a ten-year prison sentence. See Mich. Comp. Laws § 750.356. While out on bail for that offense, Parsell held up a Photo Mat with an imitation gun and stole money from the proprietor. Parsell was arrested the following day and charged with armed robbery, a crime for which he could have spent the rest of his life in prison. See Mich. Comp. Laws § 750.529.

The state courts sentenced Parsell as an adult to two-and-a-half to four years of imprisonment on the larceny charge (because Parsell already had violated any probation he might have been granted) and delayed sentencing on the armed robbery for several months. While in the county jail, awaiting assignment to a state prison, Parsell met with the prison psychologist who informed him that because he had not yet been sentenced for armed robbery, and because armed robbery could subject him to a life sentence, Parsell would be "going inside" meaning "inside the walls of maximum security." After the psychologist noted that Parsell was "dangerous," Parsell was transferred to the Riverside Correctional Facility - "a close-custody prison for inmates serving long sentences, usually ten or more years."

Parsell was terrified. When he arrived at Riverside, he "felt a sudden urge to scream," but kept it hidden. "I could not let the other inmates see how the sight of the prison's massive walls hit me like I was entering a slaughterhouse." On his first day in the general population, an inmate spiked Parsell's drink with Thorazine, a powerful sedative. Parsell was dragged to a cell, where four inmates gang-raped him. They flipped a coin to see who would "own" him for the rest of his prison time. Only a few weeks earlier, Parsell was reading comic books at home. Now, after stealing property from a Photo Mat, Parsell was the property of another person: an inmate nicknamed Slide Step, who won the coin toss.

Parsell was then transferred back to county jail for sentencing on his armed-robbery charge. Here, outside of Slide Step's "protection," Parsell was gangraped even more brutally than he had been at Riverside. When the probation officer preparing his presentence report made a sexual advance, Parsell rebuffed it. He then received a harsh sentencing recommendation, and the judge sentenced him to four-and-a-half to fifteen years in prison.

Parsell was transferred to a medium-security facility called the Michigan Training Unit, which stressed rehabilitation. It helped Parsell turn his life around. "The school and the library became my sanctuaries," he reports. A woman named Miss Burt, the classification director, was starting a prison newspaper. "She brought her passion for making a difference to the position, and so she stood out," he recounts. "She was like an angel." Simply by calling Parsell by his first name (Tim), she made him "believe that I was human again." As he recalls,

"what a difference it made to be treated with dignity in a place that didn't seem to value it much."

Parsell wrote for the prison newspaper - called the *Oracle*, because the inmates on the paper analogized Miss Burt to a priestess "through whom a deity is believed to speak." Recounting Miss Burt's impact, Parsell says: "Here was this woman, a black woman in a man's world, who was better educated than anyone I'd ever known. She stuck up for me as my mother never had. Now that I was getting an education I was starting to understand what it meant not to have one." Finally, Parsell says, "I through education could see that there was Parsell completed his G.E.D. and possibility." twenty months of his college education in prison.

Parsell left prison in 1982. He took a typing job—"it was my only marketable skill"—and put himself through night school to complete his undergraduate degree. He graduated with honors from St. Francis College and went on to work in the software industry. "I got therapy, I got sober, and I started to do well." He went on to become a top executive at several technology firms, ultimately rising to become vice president of sales at a major publicly traded software company.

Following his brother's death and the September 11, 2001 terrorist attacks, Parsell made a decision to confront issues he long had repressed. "I felt extremely fortunate to have been able to transcend the mistakes of my earlier life." He decided to write and talk about his experiences in prison. His memoir, FISH: A Memoir of a Boy in a Man's Prison (Carrol & Graf), was published in 2006 and won the Pass Award for Literature by The National Council

on Crime and Delinquency. Since then, Parsell has become one of the nation's leading advocates against prison rape. He is president of the human rights group Stop Prisoner Rape. He worked with the Justice Department to set up the National Prison Rape Elimination Commission and with the Bureau of Justice Statistics and the National Institute of Corrections on various ways of quantifying and preventing prison rape. He helped produce an inmate orientation video, which is shown to all new incoming prisoners in the United States, outlining ways in which inmates can avoid prisoner rape.

This fall, Parsell will enter the graduate film school at New York University. He plans to turn his memoir into a feature film. Unsurprisingly, "being a poster child for prisoner rape was not high on my list of ambitions," Parsell says. "I'm taking back the voice that was stolen from me when I was seventeen years old. And I know that others, no matter how far down a wrong path they may have gone, or how far they've fallen, can do the same."

G. Ishmael Beah

Like the other *Amici*, Ishmael Beah is today a highly accomplished individual who is making the world a better place. His background is very different from the others, however, and far more extreme. In a foreign country, as a literal child-soldier in a militia army, Beah engaged in the atrocities of murder and torture. But his story equally illustrates the potential of youth to grow and change.

Today Beah is a best-selling author, a United Nations Children's Fund (UNICEF) Advocate for Children Affected by War, and a member of the Human Rights Watch Children's Rights Division. He has devoted his adult life to advocating rehabilitation for children who have committed brutal acts, focusing on the amazing capacity of young people to transform their lives.

Beah grew up in Sierra Leone, and his home region was engulfed in warfare in his early teenage years. After the death of his family, he tried to flee to safety until he was forced to join the government army, as this became the only way to ensure his survival. He was initially reluctant to be a soldier, but rapidly became accustomed to the extreme violence that surrounded him. At age thirteen, he learned to fire a gun, to handle a bayonet, and to find motivation by focusing on his hatred for the rebel army, which had killed his family.

In the years after he enlisted, Beah aspired to be a fierce and deadly soldier, modeling himself after the Rambo movies. He practiced beheading rebels with a bayonet; he shot prisoners in their feet and kept them living for hours in excruciating pain before finally killing them; he led small bands of soldiers in massacring entire villages. When Beah was fifteen, UNICEF workers managed to get him out of the army – entirely against his will – and into a refugee camp. On his first night in the camp, as the UNICEF workers looked on in horror, Beah and other former child soldiers started a pitched battle of fists, grenades, and bayonets that eventually left six boys dead. As the UNICEF workers struggled to bring the boys back to some semblance of normalcy, the boys ripped apart furniture, walls, windows, and

anything else they could find, so inured had they become to a lifestyle of violence and ruin.

Looking back on that time now, Beah recognizes that the violence was a way to keep himself from thinking about what he and his family had suffered. But it was only the opportunity given to him by the UNICEF workers that allowed him to "discover himself" and realize that he could be more than a mindless agent of destruction. At the camp. UNICEF workers constantly told Beah that he had been just a boy when he committed his crimes, and that it wasn't his fault. After being given "time and space" to heal, Beah began to come to terms with what he had done as a teenager. He moved to the United States in 1998 and finished his last two years of high school at the United Nations International School in New York. In 2004, he graduated from Oberlin College with a Bachelor of Arts degree in Within a few years, he was political science. speaking at conferences on children's welfare all around the world. In 2007, he published the memoir Long Wav Gone. which has become international best-seller.

Beah's time spent immersed in fighting and acts of criminality gives him a deep sympathy for other children trapped in a similar cycle of violence. Although the circumstances in America are very different from those in Africa, he believes that the forces that push people to criminal activity are fundamentally the same in both places. "Not every child who fights wants to be a child soldier," he explains. "Many have bad home lives and can fall victim to those who would pull them into a life of violence as a solution from their abuse or suffering."

Whether in Florida or Sierra Leone, violence or theft "becomes normalized because it becomes the only way to live." What children see, he believes, is what they will do.

Beah knows that there is no easy solution for juvenile crime, and that different methods are effective for different people. Still, he is certain that a lifetime in prison is not the answer: "There's more trauma in prison than what I'd been put through. Punitive measures for kids just don't help." If Beah had been in an American-style prison, he believes, he would have been left to "push myself into despair, wallowing in the trauma of what happened" instead of getting a chance to discover his own potential and eventually educating the world about African wars and the rehabilitation of child soldiers.

Beah has seen some of the worst things that teenagers can do, if pushed far enough, and he grasps the fundamental similarity between his own life and some of the excruciating histories of juveniles serving life sentences in America. His goal now is to prevent such sentences from being imposed, so that young people like him "can tell others, instead of being locked away."

"Children who commit crimes lack the moral and psychological underpinnings of adults," he says, "but they're also more resilient, so it is very possible to change. And it is only through rehabilitating such children and youth that we are able to learn how to prevent a similar situation from happening to others." Beah's own story illustrates that a youth who has committed even the most horrific crimes can, given another chance, build a joyful and meaningful life. Because he was not judged solely on

who he was as a fifteen-year-old, he says, "I discovered my own potential and have become a productive member of society."

* * * * * * * * *

The stories of the *Amici* are only a handful of countless more that exist, many of which properly are confidential under existing juvenile court rules. Not every juvenile offender goes on to become an acclaimed actor, a United States Senator, a poet, or a software executive. Indeed, not every juvenile offender will be rehabilitated. But because no child is a finished product, every child has the potential to be redeemed, and if given the opportunity many will accomplish great things.

A sentence of life in prison without the possibility of parole, like a death sentence, extinguishes all hope that a juvenile offender might one day contribute to his or her community as have Charles Dutton, Senator Alan Simpson, Dwayne Betts, Luis Rodriguez, Terry Ray, T.J. Parsell, Ishmael Beah, and others like them.⁴ "When you get a life sentence, you have no reason to think about the future. You only think about the day to day," says Betts. "If I know I can never get out of prison, that's as good as dead to me," says Dutton. "I would prefer the death penalty to a life sentence without the possibility of parole."

This Court found in *Roper* that juveniles are less culpable than adults, that their minds are not fully developed, and that they are more subject to peer pressure and other environmental factors. *Amici*

⁴ See Second Chances, supra.

know from their experiences that, upon attaining adulthood, juvenile offenders often can overcome their troubled pasts.

The Eighth Amendment's Cruel and Unusual Punishment Clause "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion). Amici submit that evolving standards of decency compel the conclusion that a juvenile offender may not be sentenced to life in prison without parole as punishment for a non-homicide offense. The personality of such an offender is still too unformed, and the potential for productive contributions to society simply too great, to allow such a result. In Senator Simpson's characteristically blunt and common-sense words, "Anybody in our society unless they are totally out to lunch - can understand that a guy of twenty-five or thirty-five is not the same guy of seventeen. You can't just throw a kid in the clink forever."

CONCLUSION

For the foregoing reasons, the decisions of the District Court of Appeal of Florida, First District, should be reversed.

Respectfully submitted,

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In the

Supreme Court of the United States

TERRANCE JAMAR GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRITS OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

BRIEF OF AMICI CURIAE OF THE AMERICAN ASSOCIATION OF JEWISH LAWYERS AND JURISTS, AMERICAN CATHOLIC CORRECTIONAL CHAPLAINS ASSOCIATION, AMERICAN CORRECTIONAL CHAPLAINS (Continued on inside cover)

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INTEREST OF AMICI CURIAE

A coalition of Christian, Jewish, Muslim, and Buddhist religious organizations and individuals join here as amici curiae on behalf of Petitioners Joe Harris Sullivan and Terrance Jamar Graham. Amici's faith traditions, while varied and diverse, all agree that it is morally unjustifiable to sentence juveniles convicted of non-homicide offenses to life imprisonment without the possibility of parole. The imposition of such a harsh punishment on youth contravenes contemporary standards of decency and, as such, violates the Eighth Amendment's guarantee against cruel and unusual punishment.

Individual statements of interest are provided in the Appendix to the Brief.

SUMMARY OF ARGUMENT

Amici, despite the highly nuanced and well-publicized differences in theology and moral outlook within and among Christianity, Judaism, Islam, and Buddhism, unite to object to the imposition of life imprisonment without the possibility of parole on juveniles convicted of non-homicide offenses. First, amici's faith traditions, secular law generally, and contemporary American society all accord juveniles

¹ Counsel of record for all parties received notice of amici curiae's intention to file this brief. Letters of consent by the parties to the filing of this briefing have been lodged with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

special treatment because of their unique status. Juveniles are still developing and maturing; they do not grasp the full consequences of their actions, and therefore are less morally culpable for their conduct and less susceptible to deterrents. Sentencing a juvenile to die in prison callously disregards this special status and diminished capacity. Second, amici's fundamental religious texts teach that all individuals are deserving of mercy, forgiveness, and compassion. This is particularly true of members of vulnerable populations, such as children. Imposing such a punitive sentence on youth—especially those who, like Mr. Sullivan, committed non-homicide offenses when they were only thirteen years old—is to act without regard to any such considerations. Finally, life imprisonment without the possibility of parole is a sentence that conflicts with the concept of restorative justice, which is embraced by all of amici's faith traditions, because it denies juvenile offenders the possibility of meaningfully rehabilitating and redemption.

Juvenile offenders should not be rendered immune from punishment. However, amici cannot endorse subjecting youth who commit non-homicide offenses to the permanent condemnation of a sentence of life imprisonment without the possibility of parole. Such an overly harsh punishment cannot be reconciled with the fundamental values espoused by amici's religious traditions and is contrary to contemporary standards of decency. Accordingly, it violates the Eighth Amendment's prohibition against cruel and unusual punishment.

ARGUMENT

I. The Perspectives of Religious Organizations Are Important to This Court's Interpretation of the Eighth Amendment

The Eighth Amendment's prohibition against cruel and unusual punishment is not a static doctrine "fastened to the obsolete," *Thompson v. Oklahoma*, 487 U.S. 815, 821 (U.S. 1988) (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)), but should be interpreted according to "the evolving standards of decency that mark the progress of a maturing society." *Roper v. Simmons*, 543 U.S. 551, 561 (U.S. 2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality)).

The importance of a society's religious organizations' views on issues of morality, crime, and punishment to that society's standards of decency is well recognized. Indeed, "[f]or the vast majority of humankind, crime, punishment, and reform are still inextricably bound up with religious views about sin, judgment, and forgiveness." David R. Loy, *Healing Justice: A Buddhist Perspective, in* The Spiritual Roots of Restorative Justice, 81 (Michael L. Hadley ed., 2001). There are few, if any, institutions that can claim a greater tradition of working with and studying the conscience of the human person and related questions of guilt, blame, and suffering than those of the religious community.

This Court has frequently taken notice of the opinions of religious organizations when confronting

issues involving contemporary standards of decency and morality. For example, in *Atkins v. Virginia*, this Court cited the brief of amici curiae filed by the United States Conference of Catholic Bishops and other religious organizations as "evidence" of a broad "social and professional consensus" against the execution of persons with mental retardation. 536 U.S. 304, 316 n.21 (2002); see also Stanford v. Kentucky, 492 U.S. 361, 388 n.4 (1989) (Brennan, J. joined by Marshall, Blackmun, and Stevens, JJ., dissenting) (relying on the opinion of a coalition of religious groups when considering the constitutionality of the juvenile death penalty).

Amici, as members of the religious community, are uniquely positioned to provide invaluable guidance regarding the issue presented in these cases: whether sentencing juveniles to life imprisonment without the possibility of parole for non-homicide offenses is contrary to contemporary standards of decency and therefore violates the Eighth Amendment's prohibition of cruel and unusual punishment. Their religious traditions—Christianity, Judaism, Islam, and Buddhism—have played influential roles in societal discourses about morality and criminal punishment throughout history, and continue to do so today. An overwhelming majority of Americans continue to rely on the teachings and instructions of these faith traditions on matters of morality and justice.²

² According to the 2008 American Religious Identification Survey, nearly 80% of American adults identified themselves as an adherent of at least one of the religious traditions represented by amici. Barry A. Kosmin & Ariela Keysar, American Religious Identification Survey (2008), http://www.americanreligionsurvey-aris.org/reports/ARIS_Report 2008.pdf.

For the reasons set forth below, amici unanimously assert that imposing life imprisonment without the possibility of parole on juveniles convicted of non-homicide offenses is contrary to the values and beliefs of the faith traditions they represent. Such a punishment violates contemporary standards of decency and, accordingly, must be held unconstitutional.

II. Sentencing Juvenile Offenders to Life Imprisonment Without the Possibility of Parole for Non-Homicide Crimes Disregards the Special Status That Juveniles Are Accorded Due to Their Diminished Capacity

Juveniles are not simply small adults. They are still in the process of mental and physical development. They lack the wealth of life experience, appreciation of the consequences of their actions, and the maturity that adults possess. Consequently, juveniles are recognized as less able to control their impulses and to conform their conduct to the requirements of civilized society and as more likely to make poor decisions.

Throughout human history, social institutions and societies themselves have drawn distinctions between the behavior that is expected of children and of adults and have imposed different consequences when those expectations are not met. In particular, all of the religions represented by amici have recognized juveniles' special developmental status, assigned them less moral culpability, and accorded them more lenient treatment in criminal matters. Secular law at the state, federal, and international levels mirrors these distinctions. To condemn juveniles who commit non-

homicide offenses to spend their entire lives incarcerated is to disregard the accumulated experience of all of these societal institutions. Doing so is an act so far outside of the moral standards of modern American society as to constitute cruel and unusual punishment.

A. Christianity, Judaism, Islam, and Buddhism Accord Juveniles Special Treatment on Account of Their Lesser Mental Sophistication, Both Generally and with Respect to Criminal Matters in Particular

The fact that children are less mature and responsible than their adult counterparts is well-recognized within all of amici's religious traditions.³ Children's view of the world, their understanding of moral behavior, and the degree to which they are able to comprehend the consequences of their actions, are far more limited than those of adults. As noted in the New Testament: "When I was a child, I spoke as a child, I understood as a child, I thought as a child: but when I became a man, I put away childish things." 1 Corinthians 13:11. Likewise, the Prophet Muhammad is recorded to have said that "the pen (of legal capacity and legal obligation) has been lifted from three (classes): the insane, until he regains intellectual capacity, the minor

³ Admittedly, variation exists among and within amici's various religions as to the exact age when one ceases being a juvenile and becomes an adult. *See, e.g.*, 4 Al-Fiqh al-Islami wa Adillatuh (Islamic Jurisprudence and its Proofs) (11 volumes) 2971 (Damascus: Dar al-Fikr al-Mu'asser, 1997) (looking to local culture to determine the line between being a juvenile and adulthood). This does not detract from the larger point, however, that all of amici's faith traditions draw this distinction.

until he reaches the age of majority, and the sleeping person until he awakens." 4 'Abd al Ghafar Sulayman al-Bandari (ed.) Sunan al-Nasa'i al-Kubra li Ahmad ibn Shu'ayb al-Nasa'i 324 ##7346 (Beirut: Dar al-Kutub al-'Ilmiya, 9th century reprint 1991).

These distinctions have been enshrined within amici's religious doctrines, as evidenced in the Talmud, which explains that because minors have limited mental capacity they are to be excluded from certain ritual activity: for example, they are prohibited from writing particular legal documents unless an adult co-writes such documents, and they are exempted from certain religious obligations. Babylonian Talmud ("BT") Hagiga 2b; BT Gittin 23a. Similarly, Islamic law states that minors are inherently deficient in judgment until they reach the age of majority. 8 Al-Mawsu'ah al-Fiqhiyyah 195-196 (Kuwait: Ministry of Awqaf [Religious Endowments], 1995).

Religious teachings concerning crime and punishment uniformly accord juveniles special treatment in light of their partially developed mental and moral state. It is a point of consensus in the Islamic legal tradition, for example, that minors as a class are not considered to hold full legal capacity and are therefore exempt from legal obligations and severe penalties. Al-Mawsu'ah al-Fiqhiyyah, supra, at 196. Consequently, the Islamic legal tradition prohibits the imposition of lifetime imprisonment without the possibility of parole on minors, as it is considered to be an extreme punishment greater than any crime that could be committed by an individual lacking full legal capacity. Similarly, minors, as a class, are also exempt

from the most dire forms of punishment under Jewish law. *BT Sanhedrin* 52b, 54a, 54b.

B. The Distinctions Drawn by Christianity, Judaism, Islam, and Buddhism with Respect to Juveniles Are Supported by Science and Mirrored in State and Federal Law, As Well As the Laws of Other Nations

Amici's faith traditions are not alone in according juveniles special treatment; society at large recognizes the meaningful differences between adults and juveniles. Scientific studies, for example, have confirmed what we all know from experience: the brain continues to develop through late adolescence, as do core mental functions like planning, judgment and emotional control. See Laurence Steinberg & Elizabeth S. Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, American Psychologist 58(12) 1009-18 (Dec. 2003). These findings have led

⁴ See also 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/content/page.php?cat_id=2&content_id=28; Human Rights Watch, The Rest of Their Lives: Life without Parole for Child Offenders in the United States (Oct. 2005) (citing Jay N. Giedd, et al., Brain Development During Childhood and Adolescence: A Longitudinal MRI Study, 2 Nature Neuroscience 861(1999) and Kenneth K. Kwong, et al., Dynamic Magnetic Resonance Imaging of Human Brain Activity During Primary Sensory Stimulation, 89 Proceedings of the National Academy of Science 5675 (1992)), available at http://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf.

researchers to conclude that juveniles should not be held to the same standards of criminal responsibility as adults, because adolescents' decision-making capacity is diminished, they are less able to resist coercive influence, they do not fully appreciate the negative consequences of their actions, they are less susceptible to deterrents, and their character is still developing. *See id*.

American law also draws many distinctions between adults and juveniles on account of children's reduced mental development. All fifty states have established minimum age requirements to vote,⁵ marry,⁶ join the military,⁷ obtain a driver's license,⁸ and consume alcohol.⁹ The federal government makes similar distinctions, and even the United States Constitution itself imposes minimum age limitations for elected officials.¹⁰ Underlying all of these laws is our collective belief that the physical and mental immaturity of youth requires special treatment because individuals are only able to

 $^{^5}$ See, e.g., Cal. Elec. Code $\$ 2000 (2008); Fla. Stat. Ann. $\$ 97.041 (2009); 25 Pa. Stat. Ann. $\$ 2811 (2008).

 $^{^6}$ See, e.g., Ind. Code § 31-11-1-4 (2009); Wash. Rev. Code § 26.04.010 (2009); Ohio Rev. Code Ann. § 3101.01 (2009).

 $^{^7}$ See, e.g., Ga. Code Ann. § 38-2-3 (2009); N.Y. Mil. Law § 2 (Consol. 2009); 20 Ill. Comp. Stat. Ann. 1805/1 (2009).

 $^{^{8}}$ See, e.g., Conn. Gen. Stat. § 14-36 (2009); Del. Code Ann. tit. 21, § 2710 (2009); Minn. Stat. § 171.04 (2009).

 $^{^9}$ See, e.g., Vt. Stat. Ann. tit. 7, $658 \ (2009);$ N.C. Gen. Stat. $18B-302 \ (2009);$ R.I. Gen. Laws $3-8-4 \ (2009).$

¹⁰ U.S. Const. art. I, §§ 2, 3; U.S. Const. art. II, § 1.

understand and anticipate the consequences of their actions upon the transition from childhood to adulthood. Indeed, this Court, in reversing a sentence of capital punishment for a defendant who was sixteen at the time he was convicted, has acknowledged the important differences between juveniles and adults:

[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly, "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults.

Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982) (quoting Bellotti v. Baird, 443 U.S. 622, 635 (1979)) (footnotes omitted); see also Roper v. Simmons, 543 U.S. 551, 569 (U.S. 2005) (relying on the "general differences between juveniles under 18 and adults" to hold that imposing the death penalty on any juvenile offender violated the Eighth Amendment).

The laws of other nations also recognize the special status of juveniles, as does international law. Essentially all nations have laws that, like the American laws discussed above, restrict certain rights to adults because of their increased maturity and mental development.¹¹

This international consensus regarding juveniles' developing status has also translated into universal special treatment for juveniles under criminal laws. To take one example, the United Nations General Assembly has adopted a sequence of resolutions stating that the primary aim of juvenile justice is not retribution but promoting the well-being of the juvenile, that longterm incarceration of juveniles does them great harm, and that confinement shall be imposed on juveniles for the shortest possible period, and only as a last resort. See G.A. Res. 40/33, U.N. GAOR, 40th Sess., U.N. Doc. A/RES/40/33 (1985) (1985 Beijing Rules); G.A. Res. 45/ 113, U.N. GAOR, 45th, Sess., 68th plen. mtg., U.N. A/ RES/45/113 (1990) (1990 U.N. Rules for the Protection of Juveniles Deprived of Their Liberty); G.A. Res. 45/ 112, U.N. GAOR, 45th Sess., Supp. No. 49A, at 201, U.N. Doc. A/45/RES/112 (1990) (1990 Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)). In addition, the Convention on the Rights of the Child, ratified by every nation except for the United States and Somalia, requires signatory states to give juveniles special treatment in criminal justice matters. See, e.g., Convention on the Rights of the Child,

¹¹ See, e.g., Armed Forces Act, 2006, c. 52, § 328 (providing minimum age requirements for persons enlisting in the military in the United Kingdom), available at http://www.opsi,gov.uk/acts/acts.2006/pdf/ukpga_20060052_en.pdf.; Austl. Cap. Terr. Consolidated Acts, Liquor Act 1975, Part 10, Division 10.2, § 151-58 (establishing minimum age requirements for drinking alcoholic beverages in Australia), available at http://www.austlii.edu.au/au/legis/act/consol_act/la1975107/.

G.A. Res. 44/25, U.N. GAOR, 44th Sess., art. 37(c), U.N. Doc. A/RES/44/25 (1989; entry into force Sept. 2, 1990). ("Every child deprived of liberty shall be treated . . . in a manner which takes into account the needs of persons of his or her age.").

Further, there is near consensus among nations that it is never appropriate to sentence juvenile offenders to life imprisonment without the possibility of parole. The Convention on the Rights of the Child prohibits sentencing children to life imprisonment without the possibility of release for any crime, including homicide offenses. Id. art. 37(a). The United Nations General Assembly recently passed a resolution calling for the immediate elimination of sentences of life imprisonment without the possibility of release for all juveniles. G.A. Res. 61/146, ¶ 31, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/146 (2007).

According to a recent report, the United States is one of only two countries in which individuals who committed their underlying offenses while minors are currently serving such sentences. Center for Law and Global Justice, University of San Francisco School of Law, Report on Human Rights Violations, Sentencing Our Children to Die in Prison, Global Law and Practice 4 (2007). Subjecting juvenile offenders—particularly those who have not committed homicide offenses—to sentences that guarantee they will spend their entire lives incarcerated is far outside of international practice in every other nation in the world. See also Roper v. Simmons, 543 U.S. 551 (2005) ("It 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.").

C. Sentencing Juveniles to Life Imprisonment Without the Possibility of Parole for Non-Homicide Offenses Constitutes Cruel and Unusual Punishment Because It Disregards the Longstanding Societal Consensus That Juveniles Merit Special Treatment

To impose the punitive sentence of life imprisonment without the possibility of parole—the most severe punishment in the American criminal justice system, other than capital punishment, see Solem v. Helm, 463 U.S. 277, 303 (1983)—on individuals under the age of eighteen is to ignore the special status that juveniles hold in our society due to their immaturity and inexperience. Mr. Graham was only sixteen years old at the time he committed the underlying offense that led to his sentence of life imprisonment without the possibility of parole; Mr. Sullivan was only thirteen years old when he committed his offense. Condemning Mr. Graham, Mr. Sullivan, and similar offenders to die in prison without the possibility of ever becoming eligible for release stands in clear violation of amici's religious traditions.

Such a punishment is especially inappropriate for juvenile offenders like Mr. Sullivan and Mr. Graham because their crimes, while grave, were non-homicides. Mr. Sullivan is one of only two thirteen-year-olds in the United States to have received such a sentence for an offense in which no one was killed. Brief of Petitioner-

Appellant at i, Sullivan v. Florida, No. 08-7621 (U.S. filed July 16, 2009). In light of this Court's holding in Roper, 543 U.S. at 579, that it is unconstitutional to impose the death penalty on individuals under the age of eighteen when their offenses are committed, life without the possibility of parole is the **most** severe sentence available to juvenile offenders in this country. Yet it is axiomatic within this country's legal system that only the most deserving class of offenders receive the most punitive sentences. Cf. Kennedy v. Louisiana, 128 S. Ct. 2641, (2008) (holding that it is unconstitutional to impose the death penalty on adults who have not committed capital murder). Sentencing juveniles who commit non-homicide offenses to life imprisonment without the possibility of parole violates that bedrock principle.

The overly punitive sentence of life imprisonment without the possibility of parole for juveniles convicted of non-homicide offenses fails to account for the inherent differences between youth and adults. Such blindness cannot be reconciled with amici's faith traditions or the morals and ethics of contemporary American society.

III. Imposing Life Imprisonment Without the Possibility of Parole on Juvenile Offenders Contravenes Fundamental Religious Values

In addition to being morally unjustifiable because it does not recognize the special status of children, such a sentence offends the well-established religious principle that all individuals—especially those who are weak and vulnerable, such as children—are entitled to mercy, forgiveness, and compassion. Moreover, the

sentence of life imprisonment without the possibility of parole also denies juvenile offenders the opportunity for meaningful rehabilitation and conflicts with the concept of restorative justice, which all of amici's faith traditions embrace. Any punishment that so thoroughly conflicts with the values and principles that have been adopted by all the religions represented by amici and embraced by a majority of Americans must violate contemporary "standards of decency."

A. Imposing Such a Punitive Sentence on Juvenile Offenders Contravenes Religious Teachings That Tell Us That All Individuals, and Particularly Juveniles, Are Deserving of Mercy, Forgiveness, and Compassion

Amici, despite the diversity within their beliefs and religious traditions, champion mercy, forgiveness, and compassion as fundamental values that must be extended to everyone.

First, each religion acknowledges the centrality of mercy. In Christianity, for instance, Jesus' self-sacrificial death on the cross for the sins of humanity is viewed as the ultimate act of mercy, *Titus* 3:5 ("[Jesus] saved us, not because of righteous things we had done, but because of his mercy."), and Christians are called to replicate his example in their daily interactions. *See, e.g., Matthew* 5:7 ("Blessed are the merciful, for they shall obtain mercy."). Likewise, mercy is a foundational principle in Islam, *Qur'an* 7:156 ("My mercy encompasses all things"); *Qur'an* 6:54 ("Your Lord hath inscribed for Himself (the rule of) mercy.... He is Oft-Forgiving, Most Merciful."), and Muslims are obligated

to show mercy. Judaism depicts God as "merciful and gracious, long-suffering, and abundant in goodness and truth." *Exodus* 34:6. The *Talmud* discusses the idea of *imitatio dei*, that man is supposed to emulate God and be compassionate and merciful, *BT Shabbat* 133b, *JT Pe'ah* 1:1, and it commands judges to be merciful and compassionate when deciding cases. *See Sanhedrin* 29a.

Second, amici's religions also stress the importance of forgiveness, urging their adherents to forgive those who have wronged them. Jesus' admonition to his disciples to "turn the other cheek" is well known; the Bible also commands that we should "[b]ear with each other and forgive whatever grievances [we] may have against one another."12 The Qur'an describes the righteous as those who "spend freely [in charity] whether in prosperity or adversity, restrain anger, and forgive others," 3:134. It also commands people to forgive each other: "Hold to forgiveness, enjoin what is right, and turn away from the ignorant." 7:199. While the Qur'an states that "the recompense for an injury is an injury equal thereto," it immediately continues to say "but if a person forgives and makes reconciliation, his reward is due from God, for God loveth not those who do wrong . . . indeed if any show patience and forgive that would truly be an exercise of courageous will and resolution in the conduct of affairs." 42:40-43.

¹² The following, oft-repeated conversation between Jesus and his disciple Peter reveals the centrality of forgiveness in Christian theology: "Then Peter came up and said to him, 'Lord, how often shall my brother sin against me, and I forgive him? As many as seven times?' Jesus said to him, 'I do not say to you seven times, but seventy times seven.'" *Matthew* 18: 21-2.

Third, underlying the focus on mercy and forgiveness is the belief, found in all faith traditions represented by amici, that human action should be guided by compassion. For example, prominent Jewish philosopher and rabbi Maimonides once explained that "[t]he purpose of the laws of the Torah is to promote compassion, loving-kindness and peace in the world." Maimonides, Yad Hachazakah, Hilchot Shabbat 2:3; see also Ethics of the Fathers 1:2 ("On three things the world is sustained: on the Torah, on the (Temple) service, and on deeds of loving kindness."). Likewise, compassion is stressed within Islam as well. Muslims are encouraged to "urge each other to patience, deeds of kindness and compassion; indeed those are the companions of the right." Qur'an 90: 17-18. Similarly, the importance of compassion in Buddhism is exemplified by the teaching to "not show disregard for thy unhappy kindred, compassion for all creatures is the true religion." Aèvaghoùa, The Buddha-Carita, or The Life of Buddha, Book IX: 17 (Edward B. Cowell, ed. & trans., New Delhi 1977).

In short, religious texts make clear that each of these three values—mercy, forgiveness, and compassion—must guide interpersonal and societal relations, and are to serve as the bedrock principles for a just and fair society. These values are so essential that those who fail to apply them risk delegitimizing the sincerity of their claim of devotion. One Talmudic source explains:

[I]f a person exhibits impudence, cruelty, or misanthropy, and does not perform acts of loving-kindness, one should strongly suspect that he is of non-Jewish descent; for Israel, the holy nation, has the three distinctive traits of "modesty, mercy, and loving-kindness."

Yevamot 79a. Similar concepts are found in all of amici's faith traditions.¹³

Inflicting the sentence of life imprisonment without the possibility of parole, the most severe punishment available to juvenile offenders, on a young person who has committed a non-homicide offense is an act without mercy, forgiveness, or compassion. This is especially true given that juveniles who commit serious crimes often come from disadvantaged backgrounds: many are poor, and frequently they have been the victims of abuse and neglect. These are exactly the type of children amici's faith traditions stress are most deserving of kindness and compassion. *Cf.*, *e.g.*, *Psalms* 82:3 ("Defend the cause of the weak and fatherless; maintain the rights of the poor and oppressed."); *Qur'an* 2:83 ("[T]reat with

¹³ For example, Jesus criticized the Pharisees for emphasizing legalism over more fundamental concerns for mercy and compassion. *Matthew* 23:23 ("Woe to you, scribes and Pharisees, hypocrites! For you tithe mint, dill, and cumin, and have neglected the weightier matters of the law: justice and mercy and faith. It is these you ought to have practiced without neglecting the others.").

¹⁴ See The Center for Law and Global Justice, University of San Francisco School of Law, Report on Human Rights Violations, Sentencing Our Children to Die in Prison, Global Law and Practice 20 (2007) (explaining that juvenile offenders often face "problems such as lack of familial support, insufficient access or motivation for education, poverty, and lack of access to employment opportunities").

kindness your parents and kindred, and orphans and those in need; speak fair to the people . . . and practice regular charity."); *James* 1:27 ("Religion that God our Father accepts as pure and faultless is this: to look after orphans and widows in their distress."). Imposing such a harsh punishment on such a vulnerable population cannot be reconciled with the fundamental values represented by amici's faith traditions and broadly accepted by American society.

This does not suggest that juvenile offenders should be rendered immune from punishment. Amici agree that the law must be followed and that those who fail to comply should suffer sanction. But, in amici's religions, the sanction, must be tempered by mercy, forgiveness, and compassion in order to be just. A prominent rabbi, Emanuel Rackman, has observed that the notions of justice and charity are "grafted" together within the Jewish tradition; "[i]n the Bible one invariably finds the two words 'charity and justice' as a compound phrase." Martin Sicker, *The Political Culture of Judaism* 100 (2001). Similarly, St. Augustine once wrote:

Fulfill, Christian judge, the duty of an affectionate father; let your indignation against their crimes be tempered by consideration of humanity; be not provoked by the atrocity of their sinful deeds to gratify the passion of revenge, but rather be moved by the wounds which these deeds have inflicted on their souls to exercise a desire to heal them.

Letter 133 from Saint Augustine to Marcellinus (A.D. 412), in 1 Nicene and Post-Nicene Fathers, First Series, Vol. 1 (J.G. Cunningham trans., Philip Schaff ed., 1887), available at http://www.newadvent.org/fathers/1102133.htm (revised and edited for New Advent by Kevin Knight). 15

Imposing life imprisonment without the possibility of parole on juvenile offenders convicted of non-homicide offenses stands in marked contrast to the message of mercy, forgiveness, and compassion embraced by all of the religious traditions represented by amici. There is no mercy or compassion in sentencing an adolescent who, while still in the immaturity and indiscretion of youth, has made mistakes and broken the law, to a life confined within the walls of a prison. Such a punishment is cruel and unusual and undoubtedly violates contemporary "standards of decency."

B. Sentencing Juvenile Offenders to Life Imprisonment Without the Possibility of Parole Denies Them Their Potential for Rehabilitation and Development

When sentencing Mr. Graham to life imprisonment without the possibility of parole, the Florida court

¹⁵ Muslim jurists also agree that justice and mercy go hand in hand. The famous medieval jurist Ibn al-Qayyem explains that "Shari'ah law in its foundation and construction is based upon . . . [serving] public interest . . . and it is all justice and all mercy" 7 Al-Fiqh al-Islami wa Adillatuh (islamic Jurisprudence and its Proofs) (11 volumes) 5552 (Damascus: Dar al-Fikr al-Mu'asser, 1997).

concluded from his "escalating pattern of criminal conduct," that "there is nothing we can do for you." Brief of Petitioner-Appellant at 22, *Graham v. Florida*, No. 08-7412 (U.S. filed July 16, 2009). Such a statement epitomizes the travesty of imposing life imprisonment without the possibility of parole on juvenile offenders convicted of non-homicide offenses: it fails to recognize the tremendous potential that juveniles have to grow, develop, and be rehabilitated. The *Graham* court's nihilistic view of juvenile offenders is antithetical to the perspectives of amici's faith traditions and of American society at large.

Children, by definition, are in a state of partial and incomplete development. *See supra* pp. 5-10. Because they are still maturing and learning to interact with society, they are uniquely suited to rehabilitation if placed within the right environment. Many juvenile offenders have been raised in abusive or neglectful home environments and have lacked positive influences in their lives to guide them and prepare them to become productive members of society. Amici believe that it is possible to reform any juvenile offender over the course of his or her lifetime and prepare him or her to lead a responsible, low-abiding existence outside of prison.

In *Roper*, this Court adopted the same view, acknowledging juvenile offenders' potential for growth and rehabilitation:

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. Indeed, the 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.

543 U.S. at 570 (quotation marks and citation omitted).

Amici embrace the notion that just punishment must allow for the offender to be rehabilitated and restored to the community when possible. For example, Jewish law states that the purpose of the judicial system is not merely to punish or exact revenge, but to facilitate human development and tshuvah ("returning from bad deeds" or "repentance"). Similarly, the Islamic legal concept of ta'zir punishment, if imposed for non-homicidal crimes, is concerned with both deterring the criminal from committing future crimes and reforming and rehabilitating him. Mohamed S. El Awa, Punishment in Islamic Law 96, (Indianapolis: American Trust Publications, 1982).

The focus on rehabilitation within amici's faith traditions is also evident through each of their embrace of the principle of "restorative justice." This concept involves constructing a system of justice "that moves from punishment to reconciliation, from vengeance against offenders to healing for victims, from alienation

¹⁶ The word *ta'zir* is derived from the Arabic verb *azar*, which means to prevent, to respect, and to reform. *See* Mohamed S. El Awa, *Punishment in Islamic Law* 96, (Indianapolis: American Trust Publications, 1982).

and harshness to community and wholeness, from negativity and destructiveness to healing, forgiveness, and mercy." Michael L. Hadley, *Introduction: Multifaith Reflection on Criminal Justice*, in The Spiritual Roots of Restorative Justice 8 (Michael L. Hadley ed., 2001). True restorative justice is achieved when an offender turns away from his or her misdeeds and returns to the community to contribute as an active member of society.¹⁷

In Buddhism, this type of justice is represented most vividly through the story of Angulimala, a merciless bandit and murderer, who abandons his life of lawlessness and violence after a peaceful encounter with the Buddha. *Theragatha* 866-91; *Majhima Nikaya*, Angulia Sutta. When the king and his subjects learn that Angulimala has been reformed, they decide that he has suffered enough and that there is no need to further punish him for his past wrongs and sins. *Id.* This story, one of the most important within the Buddhist tradition, "highlights the only reason Buddhism accepts for punishing an offender: to help re-

as well. Mohamed S. El Awa, *Punishment in Islamic Law* 104 (Indianapolis: American Trust Publications, 1982). For example, in the Islamic legal tradition, the *ta'zir* punishment of lifetime imprisonment without parole is imposed on habitual criminals who cannot be reformed. *Id.* However, there is an important condition for the imposition of this punishment: it can only be applied as long as the reform of the offender is viewed as completely impossible. *Id.* It is presumed that all minors have the potential to reform their behavior and redeem themselves upon reaching adulthood. Consequently, Islamic law prohibits the imposition of lifetime imprisonment without parole on minors, as a punishment greater than any crime that could be committed by someone of such a status. *Id.*

form his or her character." David R. Loy, *Healing Justice: A Buddhist Perspective*, in The Spiritual Roots of Restorative Justice, 81 (Michael L. Hadley ed., 2001).

The sentences that Mr. Graham and Mr. Sullivan received cannot be reconciled with the principle of restorative justice because such sentences never give offenders the opportunity to rejoin society. It is impossible to create a fully actualized system of restorative justice without this possibility; in order to be fully effective, "restorative justice should not be allowed to end with punishment or at the walls of the prison." Luc Roberts & Tony Peters, How Restorative Justice Is Able To Transcend the Prison Walls: A Discussion of the "Restorative Detention" Project, in Restorative Justice in Context: International Practice and Directions 95, 98 (Elmar G.M. Weitekamp & Hans-Jurgen Kerner eds., 2003).

The sentence of life imprisonment without the possibility of parole for juveniles convicted of non-homicide offenses is unjust because it does not reflect juveniles' vast potential for change and denies them any meaningful opportunity to ever rejoin society.

C. The Fundamental Values Espoused by Christianity, Judaism, Islam, and Buddhism Demand That Juvenile Offenders Like Mr. Sullivan and Mr. Graham Be Given the Possibility of Parole

In contemporary American society, both retribution and incapacitation are among several justifications for punishment, see, e.g., Kennedy v. Louisiana, 128 S. Ct. 2641, 2649 (2008) ("[P]unishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution."); *United States v. LaBonte*, 520 U.S. 751, 779 (1997) ("the basic goals of punishment [are] . . . deterrence, incapacitation, just deserts, [and] rehabilitation"), and amici acknowledge that incarcerating juveniles who pose a danger to the public is recognized a valid penological goal. However, sentencing juveniles who are convicted of severe, but non-homicide, crimes to life imprisonment without the possibility of parole runs afoul of amici's shared belief that justice requires that this class of offenders be given the opportunity of release.

The institution of parole serves an important function within our criminal justice system. See Morrissey v. Brewer, 408 U.S. 471, 477 (1972) (explaining that "the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system"). Under the systems of parole used by a number of states, "parole is granted by the discretionary action of a board, which evaluates an array of information about a prisoner and makes a prediction whether he is ready to reintegrate into society." Id. at 477-78. Thus, parole boards and similar institutions and programs that allow for the conditional or early release of prisoners not only allow for correctional departments to make informed and individualized judgments about the continued threat that offenders pose to the public, but they also provide offenders with an opportunity to make a case for why, given their efforts at reform and rehabilitation, they are deserving of release.

Mr. Sullivan and Mr. Graham, under the sentences they are currently serving, will never have such an opportunity. Any efforts they have taken to atone for their crimes, seek rehabilitation, or lay the groundwork for leading a productive, responsible life outside of their prison walls cannot be factored into their punishment. They are joined by over one hundred other juveniles in this country who like them have not committed the most serious offense—homicide¹⁸—but can never hope for the possibility of release, even if they avail themselves of the full array of rehabilitative options available within prison.¹⁹ It is simply impossible to reconcile amici's faith

¹⁸ A study prepared by Florida State University found that there are currently at least 111 juveniles convicted of non-homicide offenses serving sentences of life imprisonment without the possibility of parole. Paolo Annino, et al., Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to Nation (2009), available at http://www.law.fsu.edu/faculty/profiles/annino/Report JuvenileLifeSentence.pdf.

¹⁹ There is a broad variety of programs that take widely differing approaches to reforming and rehabilitating offenders. and the diversity of offerings continues to expand. See, e.g., Barry Krisberg, Reforming Juvenile Justice, The American Prospect, August 14, 2005, available at http://www.prospect.org/cs/ articles?article=reforming juvenile justice (discussing how many jurisdictions are embracing a federal initiative called Balanced and Restorative Justice, which provides "the youthful offender . . . a way to restore his or her role in the community" through, among other things, involving victims in the rehabilitation process); The Right Model for Juvenile Justice, N.Y. Times, Editorial, Oct. 28, 2007, available at http:// www.nytimes.com/2007/10/28/opinion/28sun2.html (discussing another model, pioneered by Missouri and being imitated across the country, that does away with "mass kiddle prisons in favor (Cont'd)

traditions with the imposition of this permanent, unforgiving sanction on individuals who, at the time of their respective offenses, were not even old enough to fully comprehend their actions and the attendant consequences.

Parole and similar programs are among the few places within our criminal justice system that allow for consideration of the values and principles discussed above: mercy, forgiveness, compassion, redemption, and restorative justice. In order for our nation's criminal justice system to comport with these values and principles, which have been embraced by a majority of the American people, juvenile offenders convicted of non-homicide offenses must be provided with the opportunity to demonstrate that they are no longer a danger to the community and can rejoin society.

(Cont'd)

of small community-based centers that stress therapy, not punishment" and that, to the extent possible, keeps young people "near their homes so their parents can participate in rehabilitation that includes extensive family therapy").

CONCLUSION

For the foregoing reasons, amici respectfully request that this Court vacate Messrs. Graham and Sullivan's sentences on the ground that the imposition of life imprisonment without the possibility of parole on juveniles convicted of non-homicide offenses violates the Eighth Amendment's guarantee against cruel and unusual punishment.

Respectfully submitted,

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APPENDIX

- 1. American Association of Jewish Lawyers and Jurists. The American Association of Jewish Lawvers and Jurists ("AAJLJ") is a membership association of lawyers and jurists open to all members of the professions regardless of religion. It is an affiliate of the International Association of Jewish Lawyers and Jurists, which is based in Israel and was founded by the late Justice Arthur Goldberg of the United States Supreme Court and the late Justice Haim Cohen of the Supreme Court of Israel. The mission of AAJLJ is to promote an understanding of the principles of traditional Jewish law among the bar, the judiciary and the public, including an understanding of the relevance and applicability of Jewish law to current legal issues and controversies, through participation as amici in appropriate cases, educational programs and other means of outreach.
- 2. American Catholic Correctional Chaplains Association. The American Catholic Correctional Chaplains Association ("ACCCA") is a national Catholic organization committed to promoting the principles of restorative justice for all involved with, or affected by, the criminal justice system.
- 3. American Correctional Chaplains Association. The American Correctional Chaplain's Association ("ACCA"), an affiliate of the American Correctional Association, serves as a professional organization for pastoral care personnel in the corrections field. It provides a network for the sharing of information and resources amongst its members and with corrections administrators, and it formulates standards for

chaplaincy and religious programming in correctional facilities. ACCA strongly believes that the accommodation of spiritual development and religious study in the prison context are exceptionally valuable aids to rehabilitation.

- 4. American Friends Service Committee. The American Friends Service Committee ("AFSC"), the social justice and peace organization formed by the Religious Society of Friends (Quakers) in 1917, has worked with prisoners, their families, and prison officials since 1947. AFSC's work stems from the belief that the way a society treats people convicted of crimes is an indicator of the human values of that society and Quakers' belief in the intrinsic worth of all human beings.
- 5. Buddhist Peace Fellowship. The Buddhist Peace Fellowship ("BPF") was founded in 1978 to serve as a catalyst for socially engaged Buddhism. BPF envisions a future in which people from all backgrounds come into a heartfelt realization of our interconnection to each other and to the Earth. We believe that actions generated from this understanding will create societies guided by generosity, compassion, wisdom, and justice. We are committed to helping beings liberate themselves from the suffering that manifests in individuals, relationships, institutions, and social systems.
- 6. Church Women United. Since our founding in 1941, Church Women United ("CWU") has worked for and supported the rights of women and children. CWU strives to express God's love, mercy, kindness, and

forgiveness through its work for peace and justice, and we call upon the criminal justice system to do the same.

- 7. The Council of Churches of the City of New York, Inc. The Council of Churches of the City of New York, Inc., is the oldest ecumenical council in the United States. Founded in 1895, it is today a council of the major representative religious organizations representing the several Protestant and Orthodox denominations having ministry in the City of New York. It is governed by a Board of Directors comprised of the bishop or equivalent officer of each local diocese, association, synod, presbytery, conference, or district of its member denominations and of the president and executive officer of the local councils of churches serving in each of the boroughs of the City of New York.
- 8. Engaged Zen Foundation. The Engaged Zen Foundation ("EZF") is an American Buddhist group originally founded as a prison outreach group. Its experience working in prisons throughout the United States since 1994 has compelled it to expand its efforts to focus on the complete circle of human rights imperatives. EZF has called for a comprehensive investigation into the validity of the concept of "punishment" itself by religious people, scholars, psychologists and clinical researchers. EZF's experiences have brought the Foundation to question the efficacy of the criminal justice system's treatment of offenders and in particular the treatment of juvenile offenders who are most vulnerable.

- 9. General Synod of the United Church of Christ. Amicus curiae General Synod of the United Church of Christ ("UCC") is the representative body of the national setting of the United Church of Christ and is composed of delegates chosen by its conferences from member churches, voting members of Boards of Directors of Covenanted Ministries who have been elected by General Synod as described in the Bylaws of the UCC, and ex officio delegates. The UCC was formed in 1957, by the Union of the Evangelical and Reformed Church and The General Council of the Congregational Christian Churches of the United States in order to express more fully the oneness in Christ of the churches composing it, to make effective their common witness to Christ, and to serve God's people in the world. The UCC has 5,600 churches in the United States, with a membership of 1.2 million.
- 10. Islamic Shura Council of Southern California. The Islamic Shura Council is an umbrella organization of Mosques and Muslim organizations, serving more than half a million Muslims in Southern California.
- 11. Karamah: Muslim Women Lawyers for Human Rights. Karamah is a charitable, educational organization that focuses on the domestic and global issues of human rights, especially those of Muslim women. It is founded upon the ideal that education, dialogue, and action can counter the dangerous and destructive effects of ignorance, silence, and prejudice. Karamah envisions a world in which all human beings, regardless of their gender or other differences, enjoy

their God-given right to dignity, which cannot be achieved without liberty and justice. The name Karamah is rooted in the Qur'anic verse: "We have given dignity (karamah) to the children of Adam." (17:70).

- 12. Mormons for Equality and Social Justice. Mormons for Equality and Social Justice ("MESJ") is a grassroots organization of Latter-day Saint individuals who are "anxiously engaged" (D&C 58:27) in working for the gospel values of peace, equality, justice, and wise stewardship of the earth in a spirit of Christ-like charity and concern. As Latter-day Saints, we come from a heritage of people who had "a vision of a different world, a world where injustice and oppression, poverty and ignorance would be dispelled and a world where men and women would be brothers and sisters." Alexander B. Morrison, Church News, Oct. 14, 1995.
- 13. National Council of the Churches of Christ in the United States of America. The National Council of the Churches of Christ in the USA ("NCC") is a community of 35 national Christian denominations, communions and conventions with 45 million adherents in 100,000 local congregations located in every state. The Council publishes the Revised and New Revised Standard Versions of the Bible and the Yearbook of American and Canadian Churches, and is engaged in interfaith dialogue, education and communication projects. The Council's member churches also maintain a strong witness on the moral and ethical dimensions of national policy issues ranging from the environment and peace to poverty and religious liberty. This witness is

based on a carefully crafted body of agreement on these issues developed over many decades of work together.

- 14. National Council of Jewish Women. The National Council of Jewish Women ("NCJW") is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Principles and Resolutions state that NCJW resolves to work for "the recognition and protection of children by the legal system and the provision for their unique needs." Consistent with our Principles and Resolutions, NCJW joins this brief.
- 15. New Jersey Regional Coalition. The New Jersey Regional Coalition is a faith-based, grassroots organization comprised of groups from throughout New Jersey devoted to working together for the common good in eradicating all forms of segregation and in promoting equality in education, criminal justice, and wherever systemic inequality exists.
- 16. Office of Restorative Justice, Archdiocese of Los Angeles. The Office of Restorative Justice (ORJ) provides pastoral care for offenders, victims, and families of both. We employ education and outreach to effect changes in public policy and to transform the criminal justice system. We challenge the Church to respond to Jesus' invitation to walk with the prisoner

and comfort those who mourn. ORJ is a catalyst that sparks the radical transformation of Society's attitudes toward and treatment of offenders, victims, and families of both.

- 17. Prison Fellowship Ministries. Prison Fellowship Ministries is a tax-exempt, charitable religious organization, that ministers to prisoners, exprisoners and their families. Founded in 1976 PFM offers ministry in every state and in over 100 countries. It seeks to give offenders hope in the midst of their very difficult circumstances.
- 18. Progressive Jewish Alliance. The Progressive Jewish Alliance ("PJA") is a California-based social justice organization that educates, advocates and organizes on issues of peace, equality, diversity and justice. PJA serves as a vehicle for connecting Jews to the critical social issues of the day, to the life of the cities in which they live, and to the Jewish tradition of working for repair of the world (tikkun olam). Moreover, PJA is committed to the pursuit of a more just and humane world fashioned on principles of restorative, rather than retributive, justice.
- 19. Queens Federation of Churches, Inc. The Queens Federation of Churches, Inc., was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a Board of Directors composed of equal number of clergy and lay members elected by the delegates of member congregations at an annual

assembly meeting. Over 390 local churches representing every major Christian denomination and many independent congregations participate in the Federation's ministry. We believe that a legal system that is mechanistically brutal, especially to children, lacks any moral claim to be a system of justice.

- 20. Rev. Dwight Lundgren. Rev. Dwight Lundgren currently serves as the director of Reconciliation Ministries for National Ministries, American Baptist Churches USA. While the American Baptist Churches USA does not have a Policy Statement of Resolution on the issue of life imprisonment for those of minor age, there are other policy statements and resolutions which reflect principles that would argue against such a practice. See American Baptist Policy Statement on Criminal Justice (7034:12/83); American Baptist Resolution on Restorative Justice (8212:11/01).
- 21. Sister JoAnne Talarico. As a 55 year member of the Roman Catholic Congregation of Humility of Mary (CHM) of Davenport, Iowa in good standing, I am called "to be attentive to the call of the spirit in the signs of our times, especially the needs of the poor and powerless . . . and to work for justice within the human family" CHM Mission Statement. For 20 years, I have been visiting a woman at the Iowa Correctional Institution for Women who was sentenced to life without parole at the age of 17. Up until that first encounter with the prison system, I had never given much thought to Juvenile Life Without Parole (JLWOP), but when I connected a real face to this issue, I felt called to pursue

it. As a Christian, I believe that Jesus gave us the supreme example of forgiveness in his work with the poor and powerless. Even though it is very difficult at times, I believe that I, along with our criminal justice system, am called to do the same.

- 22. Trinity United Methodist Church. Trinity United Methodist Church is a member of the Iowa Annual Conference of the United Methodist Church in good standing. As followers of Jesus Christ our faith is built on the foundation of belief in God's unfailing love for all God's children and God's grace which offers justice, redemption, and forgiveness to all. As United Methodists, our responsibilities to minister to children are spelled out in "The Social Principles of The United Methodist Church." They call for special attention to the rights of children and youth.
- 23. United Methodist Church, General Board of Church and Society. The General Board of Church and Society is the presence of The United Methodist Church on Capitol Hill. "The prime responsibility of the board is to seek implementation of the Social Principles and other policy statements of the General Conference on Christian social concerns. Furthermore, the board and its executives shall provide forthright witness and action on issues of human well-being, just, peace, and the integrity of creation that call Christians to respond as forgiven people for whom Christ died. In particular, the board shall conduct a program of research, education, and action on the wide range of issues that confront the Church." (2008 Book of Discipline).

IN THE

Supreme Court of the United States

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TERRANCE JAMAR GRAHAM,	Petitioner,
—v.—	1 0000001,
FLORIDA,	Respondent.
Joe Harris Sullivan,	пезрониет.
JOE IMMINIS SCIENTIN,	Petitioner,
—V.—	
Florida,	Respondent.

APPEAL OF FLORIDA, FIRST DISTRICT, STATE OF FLORIDA

ON WRITS OF CERTIORARI TO THE DISTRICT COURT OF

BRIEF OF COUNCIL OF JUVENILE CORRECTIONAL ADMINISTRATORS, NATIONAL ASSOCIATION FOR JUVENILE CORRECTIONAL AGENCIES, NATIONAL JUVENILE DETENTION ASSOCIATION, NATIONAL PARTNERSHIP FOR JUVENILE SERVICES, AMERICAN PROBATION AND PAROLE ASSOCIATION, AND INTERNATIONAL COMMUNITY CORRECTIONS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI¹

We are Corrections professionals, working within and outside the prison system as corrections officers, probation/parole officers, community corrections workers and prison administrators with juvenile and adult offenders. It is our responsibility to protect society, maintain order within our facilities, and to be responsive to the needs of those committed to our care and supervision.

The Council of Juvenile Correctional Administrators (CJCA) represents the youth correctional CEOs in fifty states, Puerto Rico, Washington, D.C. and some major metropolitan counties. Through the collaborative efforts of its members, CJCA has developed an expertise in designing and implementing the most effective practices for the treatment of juveniles within their care.

The National Association of Juvenile Correction Agencies (NAJCA) was founded in 1903 and is an affiliate of the American Corrections Association. Its members represent the broad spectrum of researchers, administrators and caretakers working in the juvenile corrections field.

¹ The parties have consented to the filing of this brief and their consent letters have been filed with the clerk. No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

The National Juvenile Detention Association (NJDA) is an national organization with over 400 individual members consisting of juvenile detention practitioners and administrators as well as 12 affiliate state juvenile detention associations. Since 1968, the NJDA has existed exclusively to advance the science and processes of juvenile detention services.

The National Partnership of Juvenile Services was formed in 2001 and is the operating structure of five distinct organizations including *amici* NAJCA and NJDA, as well as the Juvenile Justice Trainers Association, the Council of Educators for At-Risk and Delinquent Youth and the National Association of Children of Incarcerated Parents.

The American **Probation** and **Parole** (APPA) Association is an international organization, which represents approximately 35,000 probations and parole practitioners within juvenile corrections. including and adult line supervisors and administrators. The APPA seeks to develop a system of probation and parole services that provides public safety by ensuring humane, effective and individualized sentences for offenders, and support and protection for victims.

The International Community Corrections Association (ICCA) represents more than 250 private agencies operating over 1500 residential and other community-based correction programs for children and adults; it also has over 1000 individual members. The ICCA member agencies offer a variety of services to the courts, Departments of Corrections, counties, cities and states throughout the United

States including drug treatment, counseling, supervision, and aftercare.

SUMMARY OF ARGUMENT

While we strongly believe that juveniles must be held accountable for their actions, condemning a juvenile to prison for the rest of his life at a point where his true character and potential cannot be accurately assessed is deeply troubling. In our professional capacities, we have experienced great successes with juveniles who others believed could not succeed. We believe the critical question for this Court is not "whether" but "when" - when is the proper and humane time to decide if a juvenile deserves to spend his life in prison. Empirical data, medical science and practical experience overwhelmingly shows that juvenile offenders are distinct from adult offenders and that these distinctions evince a unique potential for rehabilitation. We submit, therefore, that this determination can be made only in a postadolescence review of the development and treatment progress of a juvenile offender.

ARGUMENT

LIFE WITHOUT PAROLE SENTENCING FAILS TO RECOGNIZE THAT, UNLIKE MANY ADULT OFFENDERS, JUVENILE OFFENDERS POSSESS UNIQUE POTENTIAL FOR REHABILITATION

1. JUVENILE OFFENDERS ARE A DISTINCT OFFENDER CATEGORY BECAUSE THEY POSSESS BROAD POTENTIAL FOR CHANGE AND REHABILITATION

Corrections professionals have long regarded juvenile offenders as a distinct offender category and recognize a responsibility to address the unique needs of these offenders. The American Corrections the oldest and largest Association ("ACA") – corrections association in the world² – recognizes that "[c]hildren and youths have distinct personal and developmental needs and must be kept separate from adult offenders." The ACA has found that the developmental needs of juveniles "require highly specialized management and treatment corrections professionals", irrespective of whether

² See American Corrections Association, Professional Certification, Standards and Accreditation, http://www.aca.org/(last visited July 21, 2009). The ACA provides professional development to the corrections workforce and promulgates national standards for the accreditation of corrections systems. See id.

³ American Corrections Association, Public Correctional Policy on Juvenile Justice Policy ("ACA Juvenile Justice Policy"), (adopted Aug. 23, 1984, last amended Jan. 24. 2007), available at

http://www.aca.org/government/policyresolution/view.asp?ID=2 5&origin=results&QS='PoliciesAndResolutionsYMGHFREType =Policy&reversesearch=false&viewby=50&union=AND&startre c=1&top_parent=360 (last visited July 21, 2009).

juveniles are within the juvenile justice system or have been adjudicated as an adult and sentenced to prison.⁴ To that end, the ACA has adopted a policy mandating separate housing and special programming for youth transferred to the adult criminal system.⁵

Similarly the American Jail Association ("AJA") – the only national association that exclusively focuses on the issues specific to the operation of local correctional facilities, 6— resolved that the AJA "be opposed in concept to housing juveniles in any jail unless that facility is specifically designed for juvenile detention and staffed with specially trained personnel."

⁴ American Corrections Association, Public Correctional Policy on Youthful Offenders Transferred to Adult Criminal Jurisdiction ("ACA Youthful Offender Policy"), (adopted Jan. 20, 1999; amended Jan. 14, 2004), available at http://www.aca.org/government/policyresolution/view.asp?ID=5 1&origin=results&QS='PoliciesAndResolutionsYMGHFREType =Policy&reversesearch=false&viewby=50&union=AND&startre c=1&pg_360=2&top_parent=360 (last visited July 21, 2009). ⁵ See id.

⁶ See American Jail Association: About AJA, http://www.aja.org/aja/about/index.shtml (last visited July 21, 2009).

⁷ American Jail Association, Resolution: Juveniles in Jails (adopted May 22, 1990, re-affirmed May 3, 2008), http://www.aja.org/aja/about/resolutions.shtml#JUVENILES_I N_JAILS. In adopting this position, the AJA relied in part on its determination that juveniles housed with adults may be victimized through homosexual rape and other violence, and that "the care and legal requirement of housing juveniles are not a part of an adult jail facility's responsibilities, and require specially trained staff and specially designed programming which are not readily available in an adult facility." *Id*.

The Association of State Correctional Administrators ("ASCA") - has also resolved, with regard to juveniles adjudicated as adults that:

By virtue of their unique needs and legal circumstances, it is appropriates to qualify "juveniles," or youthful offenders, as a "special needs" population when they are admitted to adult corrections agencies, and to house and treat them accordingly.

• • •

It is appropriate to provide special programs for these populations based on statutory requirements and individual needs assessments.8

The International Community Corrections Association ("ICCA") also regards children and youth as having "distinct personal and developmental needs that require specialized programs completely apart from adult offenders."9

The American Probation and Parole Association has similarly urged that juvenile justice both be responsive to the needs of a broad range of

⁸ Association of State Correctional Administrators Resolutions, Resolution #2 – Evaluating the Effects of Incarceration in Adult Facilities on Youthful Offenders (adopted Aug. 10, 1997; amended Sept. 22, 2006),

http://www.asca.net/documents/Youthful.pdf.

⁹ ICCA Public Policy on Juvenile Justice (Jan. 29, 2006), available at http://www.iccaweb.org/public.html (last visited July 21, 2009).

children and youth – even the most violent offenders – and to protecting society.¹⁰

Across the spectrum, corrections professionals have concluded that juvenile offenders, even within the adult corrections system, are a population with needs and characteristics that cannot be addressed through a traditional penological methodology. This belief is at the core of the juvenile corrections system, and is now underlying the establishment of Young Offender Divisions within adult corrections systems in many states.¹¹

As widely recognized within corrections, proper treatment of juveniles within the corrections system must recognize and address developmental needs. Medical science confirms both the need for categorical distinctions in the treatment of juvenile vs. adult offenders and the importance of addressing the developmental needs of juvenile offenders within both adult and juvenile corrections. Studies conclusively establish that the brain of an adolescent is not fully developed, particularly in the area of the prefrontal cortex, which is critical to higher order cognitive functioning and impulse

¹⁰ American Probation and Parole Association, Position Statement – Juvenile Justice (enacted Jan. 1996), http://www.appa-

net.org/eweb/Dynamicpage.aspx?site=APPA_2&webcode=IB_PositionStatement&wps_key=85432f61-443f-451a-bc59-29a37574f94e.

¹¹ See Patricia Torbet et al, State Responses to Serious and Violent Juvenile Crime, OJJDP RESEARCH REPORT (Office of Juvenile Justice and Delinquency Prevention, Wash. D.C.), July 1996, at 25-34 (describing the attempts by some states to address the influx of juvenile offenders into the adult system through the establishment of Youthful Offender Divisions).

control.¹² When a juvenile is confined either to the juvenile or adult corrections system, regardless of sentence, the institution is responsible for addressing those neurobiological-based deficiencies by providing the tools for that juvenile's positive maturation into adulthood. It is therefore incongruous to impose a sentence that fails to acknowledge any such development.

Kids today may be maturing physically earlier than before, but mentally they still require teaching, training, loving, skill-building, and learning through years of maturity. Bodies may be growing faster but no child is born with morals, with judgment, or with remorse; they learn these and other emotions and controls.

James A. Gondles, Jr. Executive Director, American Correctional Association¹³

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¹² See Josh Day et al., Structure and Function of the Adolescent Brain: Findings from Neuroimaging Studies, 175 Adolescent Psychiatry, Jan. 1, 2005, at 1-34; B.J. Casey et al., Structural and Functional Brain Development and Its Relation to Cognitive Development, 54 Biological Psychol. 241, 243 (2000); Elizabeth R. Sowell et al., In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions, 2 Nature Neuroscience 859, 860-61 (1999); Jay N. Giedd et al., Brain Development During Childhood and Adolescence: A Logitudinal MRI Study, 2 Nature Neuroscience 861, 861 (1999).

¹³ James A. Gondles, Jr., Editorial, *Kids are Kids, Not Adults*, CORRECTIONS TODAY (Amer. Corrections Assoc., Alexandria, Va), Feb. 2004, at 6.

a. The needs and characteristics which so define this population also identify the unique opportunity to repair and transform juvenile offenders

While this Court has recognized, and medical research has confirmed, the categorical immaturity and vulnerability ascribed to juveniles, *see Roper v. Simmons*, 543 U.S. 551, 569 (2005), in the juvenile offender population these developmental deficiencies coalesce with personal and environmental challenges that contribute to delinquent and criminal behavior.¹⁴

Corrections professionals working with the juvenile offender population encounter youth that are commonly simultaneously both victim and offender. A strong correlation between child maltreatment – abuse or neglect – and delinquent and criminal behavior in juveniles is well established. Studies examining the prevalence of child maltreatment among juvenile offenders in various states reported results ranging from 29% to

¹⁴ See J. David Hawkins et al., A Review of Predictors of Youth Violence, in SERIOUS AND VIOLENT JUVENILE OFFENDERS: RISK FACTORS FOR SUCCESSFUL INTERVENTIONS 119-146 (Loeber & Farrington, eds. 1998) (discussing the influence of family, community and peer factors in violent offending).

¹⁵ See Richard Wiebush, Raelene Freitag, & Christopher Baird, Preventing Delinquency through Improved Child Protection Services, JUVENILE JUSTICE BULLETIN, (Office of Juvenile Justice & Delinquency Prevention, Wash. D.C.), July 2001, at 1-3 (reviewing research establishing this link); Janet Wiig & Cathy Spatz Widom with John A. Tuell, Understanding Child Maltreatment & Juvenile Delinquency: From Research to Effective Program, Practice, and Systemic Solutions, CWLA PRESS, at 1-9 (2003) (same).

66% of offenders with reported or substantiated cases of child maltreatment.¹⁶

Juveniles who committed violent offenses are also more likely to have been victimized outside their The Office of Juvenile home. Justice and Delinquency Prevention reported a "strong link" between violent offending and violent victimization, with victimization defined as being shot or stabbed, threatened with a weapon or "jumped." Jennifer N. Shaffer & R. Barry Ruback, Violent Victimization as a Risk Factor for Violent Offending Among Juveniles, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice & Delinquency Prevention, Wash. D.C.), December 2002, at 3. According to this study, juveniles who were victimized in year 1 were 3 times more likely than nonvictims to offend in year 2 (52% versus 17%).¹⁷ Id. at 4. Clinical and epidemiological

Richard Wiehush et al

ranked 1st in the country for substantiated victims of child maltreatment and 1st in the country for the number of African-American maltreated youth in out-of-home placements. John A. Tuell, Child Welfare League of America, Building Bridges to Better Outcomes for Children: The Link Between Juvenile Justice and Child Welfare, at 1 (final draft), available at http://www.cwla.org/programs/juvenilejustice/flwhitepaper.pdf (last visited July 21, 2009). The number of victims of child maltreatment in Florida that end up in the juvenile justice system is unknown, but a review by Florida's Office of Program Policy and Government Accountability of 90 case files of girls in juvenile justice residential programs found that 68% experienced physical or sexual abuse or neglect. Id. at 7.

¹⁷ The study also reported that:

Within year 1, juveniles who offended were 5.3 times more likely than nonoffenders to be victimized (37% versus 7%), and those who were victimized were 2.4 times more likely than nonvictims to offend (78% versus 32 percent).

studies indicate that at least three in four youth in the juvenile justice system have been exposed to severe victimization. Vulnerability to victimization continues to be a significant issue for juvenile offenders while incarcerated. See infra n. 62.

Witnessing acts of violence alone is a substantial risk factor for juvenile violent offending. Children who witness interparental domestic violence fare far worse than children with no exposure to this kind of violence, experiencing a range of emotional, behavioral, social and academic problems. 20

According to [State Correctional Institute] Houtzdale's Drug and Alcohol Treatment Specialist Heather Yasolsky,

Within year 2, juveniles who offended were 6 times more likely than nonoffenders to be victimized (42% versus 7%), and those who were victimized were 4 times more likely than nonvicitms to offend (66% versus 16%).

Jennifer N. Shaffer & R. Barry Ruback, supra, at 2-3.

¹⁸ Julian Ford, et al., National Center for Mental Health and Juvenile Justice, *Trauma Among Youth in the Juvenile Justice System: Critical Issues and New Directions*, June 2007, at 3.

¹⁹ See Stacey Nofziger & Don Kurtz, Violent Lives: A Lifestyle Model Linking Exposure to Violence to Juvenile Violent Offending, 42 J. OF RESEARCH IN CRIME AND DELINQUENCY 3, 17-19 (2005) (finding that being a witness to violence increases the risk of offending by 769%).

²⁰ See Katherine Kitzmann et al., Child Witnesses to Domestic Violence: A Meta-Analytic Review, 71 J. OF CONSULTING AND CLINICAL PSYCH., 339, 344, 345 (2003) (performing a meta-analysis of 118 studies and finding that 63% of child witnesses to interparental domestic violence were faring poorly as compared to their peers with no exposure).

[Young Adult Offenders']²¹ favorite programs are COPS-type of television shows.

"I find it interesting that they are always so concerned with scenes that involve kids," Yasolsky said. "They were really concerned when one reenactment showed a highly explosive chemical used to make methamphetamines sitting right next to children's toothbrushes."

Yasolsky said YAOs are very protective of kids. She believes that they wish someone had protected them, thus avoiding their incarceration.

Pennsylvania's Young Adult Offenders - Treatment Staff Stories and Experiences, CORRECTIONAL NEWSFRONT (Pa. Dept. of Corrections, Pa.), 2001, Vol. XXVII, at 15.

The negative impact of trauma on the development of adolescents is plainly evident among the juvenile offender population.²² "Traumatized adolescents typically do not lack a sense of self or values, but are often too anxious, angry, or confused to rely upon these psychological resources while struggling with a sense of being in constant danger."²³ Moreover trauma involving victimization by others is more likely than other forms "to lead to impairment in psychosocial functioning and physical

²¹ Juveniles sentenced for committing adult crimes in Pennsylvania are designated Young Adult Offenders.

²² Cf. Julian D. Ford et al., supra n. 18, at 1-3 (discussing the negative impact of trauma on development).

 $^{^{23}}$ *Id.* at 2.

health."²⁴ Trauma can, therefore, further exacerbate the neurobiological and psychological immaturity of youth and, as a result, impair an adolescent's already more limited cognitive processing and behavioral regulation.²⁵

When exposed to trauma or mistreatment, a youth may cope by resorting to indifference, defiance, or aggression as self-protective reactions. In these cases, risk-taking, breaking rules, fighting back, and hurting others who are perceived to be powerful or vulnerable may become a way to survive emotionally or literally.²⁶

As a result, perhaps, of the twin effects of trauma and developmental deficiencies, corrections professionals see a significant number of juvenile offenders with mental health issues. As many as 70 percent of juvenile offenders are affected with a mental disorder – depression, anxiety, post-traumatic stress, conduct disorders – and one in five suffer from a mental illness that impairs their ability to function.²⁷ Two-thirds of juvenile offenders with

 $^{^{24}}$ *Id*.

²⁵ See Frank W. Putnam, The Impact of Trauma on Child Development, 57 Juv. & Fam. Ct. J., Winter 2006, at 1, 1-7 (discussing the neurological effects of child maltreatment on youth); Henry R. Cellini, Child Abuse, Neglect and Delinquency: The Neurological Link, 55 Juv. & Fam. Ct. J., Fall 2004, at 1, 1-14 (discussing research showing the "clear connection" between child maltreatment and negative changes in a youth's neurological development).

²⁶ Julian D. Ford et al, *supra* n. 18, at 3.

²⁷ Sarah Hammond, National Conference of State Legislatures, Mental Health Needs of Juvenile Offenders, at 4 (2007); see

any mental health diagnosis most often had a dual diagnosis, typically substance abuse.²⁸

In order to address the developmental needs of these offenders, corrections professions must first confront and repair the effects of trauma and victimization that have impaired normal development and socialization. While exposure to violence and victimization creates a significant risk for juvenile violent offending, the formation of positive social learning and social control factors – i.e. family and school attachments and other environmental factors that can serve to reject the propriety of violent behavior - mediates the risk of engaging in violent behavior.²⁹ As discussed infra, corrections professional have the ability to treat and reform these offenders.

Howard N. Snyder & Melissa Sickmund, Juvenile Offenders and Victims: 2006 National Report, OJJDP NATIONAL REPORT (Office of Juvenile Justice & Delinquency Prevention, Wash. D.C.), 2006, at 233. (reporting results of a survey designed to detect emotional problems showing that 90% of committed youth presented as having some type of emotional disorder; 71% more than one). 81% of committed youth surveyed indicated some degree of anger management problem; 61% also presented as experiencing anxiety and 59%, depression. Howard N. Snyder & Melissa Sickmund, supra, at 233. 27% of these youth reported suicidal feelings or ideation and 21% had attempted suicide at least once in their life. Id.

²⁸ Sarah Hammond, *supra* n. 27, at 5.

²⁹ See Angela R. Gover, The Effects of Child Maltreatment on Violent Offending Among Institutionalized Youth, 17 VIOLENCE AND VICTIMS 655, 657, 662 (2002) (discussing various studies and reporting that in a study of over 3000 juvenile offenders across the country, the increased likelihood of violent offending created by the effect of child maltreatment was mediated by social learning and social control factors).

My philosophy in working with Young Adult Offenders (YAOs) is that if you keep them feeling safe, they will grow and develop and allow you to lead them. If for any reason that YAO feels that safety is jeopardized, he has a tendency to revert to behavior he knows from the streets and that often includes violence. The inmates who enter the Young Adult Offender Program often come into the facility in what we refer to as "survival mode." Until we can teach them that there is more to life than just survival, they test us as staff. One day you come to work, and the inmate who has been the biggest problem in the program has a new look about him. He is following the rules and being respectful, for the first time taking responsibility for himself. That is the day you know that you have been able to reach that inmate.

J. Barry Johnson, former Superintendent (2000-2007) SCI Pine Grove – a maximum-security correction facility for Young Adult Offenders in Pennsylvania.³⁰

³⁰ Pennsylvania's Young Adult Offenders - Message from Superintendent Johnson, CORRECTIONAL NEWSFRONT (Pa. Dept. of Corrections, Pa.), 2001, Vol. XXVII, at 3.

2. JUVENILE AND ADULT CORRECTIONS CAN REHABILITATE THESE OFFENDERS AND PROTECT THE COMMUNITY.

We know so much more today about "what works" than we knew 30, 20 and even 10 years ago. Evidenceand research-based approaches reducing juvenile crime and improving recidivism rates are gaining acceptance and implementation. We are getting better at targeting prevention resources for high-risk children before they have serious involvement in the system. We are improving screening our assessment tools to better understand both the strengths and weaknesses of the families and young people we see. We are doing a better job of training our work force to meet the challenges of juvenile crime in the new millennium.

Francisco "Frank" J. Alarcon, Deputy Secretary, Florida Department of Juvenile Justice³¹

Despite the widespread and inaccurate misconception that violent juvenile offenders are – as evidenced by the nature of the offenses they have committed – incapable of being rehabilitated, we see a remarkable amount of success with these offenders. The wealth of research now available on violent behavior in youth has provided corrections

Francisco "Frank" J. Alarcon, Commentary, Juvenile Corrections: Why Would Anyone Want to Work in This Business?, CORRECTIONS TODAY (Amer. Correctional Assoc., Alexandria, Va), Feb. 2004, at 8.

administrators, staff and probations officers with the tools needed to implement effective rehabilitation efforts. In recent years, there has been an increase in the availability and use of evidence-based practices - practices that controlled research shows to have resulted in improved outcomes - in treating iuvenile offenders.³² Research indicating that aspects of the brain regulating cognitive behavioral responses are undeveloped adolescents³³ has guided corrections professionals toward effective cognitive and behavioral therapies. According to a 2007 survey, 88% of states utilize Cognitive-Behavioral Therapy in their juvenile facilities, 57% use Aggression Replacement Therapy, and many also use a number of other therapies – Functional Family Therapy, Multi-systemic Therapy, and Therapeutic Foster Care among others designed to address the social and environmental stressors that contribute to delinquent and criminal behavior.34

³² Edward J. Loughran & Kim Godfrey, CJCA YEARBOOK 2007: A NATIONAL PERSPECTIVE OF JUVENILE CORRECTIONS, (Council of Juvenile Correctional Administrators) ("CJCA YEARBOOK") 55 (2008).

³³ See R.K. Lenroot & J.N. Giedd, Brain Development In Children And Adolescents: Insights From Anatomical Magnetic Resonance Imaging, 30 NEUROSCI. & BEHAV. REVS. 718, 723 (2006) (discussing the neurobiological basis for adolescents' lesser ability as compared to adults, to self-regulate their behavior); Elizabeth Cauffman & Lawrence Steinberg, (Im)Maturity of Judgment in Adolescences: Why Adolescents May Be Less Culpable Than Adults, 18 BEHAV. SCI. & L. 741, 756-57 (2000) (discussing cognitive and psychosocial immaturity in adolescents); see also supra n. 12.

³⁴ CJCA YEARBOOK, supra n. 32, at 55-56.

Performance-based Standards (PbS), a system launched by the Office of Juvenile Justice and Delinquency Prevention and directed by the Council for Juvenile Correctional Administrators ("CJCA"), now sets national standards establishing the highest practices and treatment services quality incarcerated vouth and monitors participating facilities by outcome measures that report on the safety, security, order and climate within facilities as education, health/mental programming and reintegration services. Welcome to Performance-based Standards, http://pbstandards.org/ (2009). For serious and and adult violent juvenile offenders, juvenile corrections embrace a model that balances accountability and security with the delivery of services – developmental, educational, mental health - that address the special needs of this population.³⁵

i. Model programs within juvenile corrections

While some violent offenders are transferred into the adult system, the juvenile system also retains a significant number — either adjudicated delinquent or tried as an adult but serving all or part of their sentence in a juvenile facility. The 2006 Census of Juveniles in Residential Placement revealed that of the approximately 92,000 youth held in juvenile residential facilities, 23% committed violent crime index offenses (criminal homicide,

³⁵ See Council of Juvenile Correctional Administrators, Position Paper on Waiver and Transfer of Youth to Adult Systems, available at http://cjca.net/photos/content/documents/Waiver.pdf (last visited July 21, 2009); ACA Youthful Offender Policy, supra n. 4.

assault, robbery, violent sexual aggravated assault).36 Melissa Sickmund, T.J. Sladky, and Wei Kang, Census of Juveniles in Residential Placement ("CJRP Databook (2008)Databook"), http://www.ojjdp.ncjrs.gov/ojstatbb/cjrp/asp/state_offe Further, 10% of all the juveniles in nse.asp. residential placement were placed there for a burglary offense. Id. Only 5% of all juveniles in these facilities were held for status offenses (running away, truancy, incorrigibility, underage drinking).³⁷

The experience of juvenile corrections in treating this population has led to improved outcomes³⁸ and models for success. More

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In 2006, juvenile facilities held 6792 juveniles committed for sexual assault, 6707 committed for robbery, 7289 committed for aggravated assault, and 988 committed for homicide. Melissa Sickmund, T.J. Sladky, and Wei Kang, Census of Juveniles in Residential Placement Databook (2008) ("CJRP Databook"), http://www.ojjdp.ncjrs.gov/ojstatbb/cjrp/asp/state_offense.asp. A 2007 survey by the CJCA including youth in residential and non-residential juvenile corrections services reported a population of more than 225,000 youth, 27% of whom committed violent crime index offenses. CJCA YEARBOOK 2007, supra, at 26.

³⁷ The remaining categories of juveniles confined include 15% committed for other property offenses (theft, arson, other), 11% committed for public order offenses (weapons, other), 9% committed for drug offenses, and 11% committed for simple assault or other person offenses. CJRP Databook, *supra* n. 36.

³⁸ Shelley Zavlek, Planning Community-Based Facilities for Violent Juvenile Offenders as Part of a System of Graduated Sanctions, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice and Delinquency Prevention, Wash., DC), August 2005, at 6; see Mark W. Lipsey & David B. Wilson, Effective Intervention for Serious Juvenile Offenders: A Synthesis of Research, in Serious and Violent Juvenile Offenders: Risk Factors for Successful Interventions 338 (Loeber &

importantly, positive results are not difficult to replicate. The efficacy of rehabilitation programs do not vary based on the characteristics of the juvenile offenders treated (including the nature of the offenses committed and prior offense history).39 Rather, program characteristics – the way a program is organized, staffed, administered – have been found to be the most important factor impacting program effectiveness; in particular, larger treatment effects were found for more well-established programs.⁴⁰ Treatment type and amount was next in significance - the longer the treatment, the greater the effectiveness.41 The type of treatment shown most effective was interpersonal skills programs – those that focused on social skills training. management, moral education, etc.⁴² Aftercare programs upon release that prepare juveniles for reentry into the community, are also essential to

Farrington, eds. 1998) (conducting a meta-analysis of 200 studies of interventions with institutionalized and non-institutionalized youth and finding that treatment programs for serious and violent offenders have been shown reduce recidivism by as much as 40%).

³⁹ See Mark W. Lipsey, David B. Wilson, & Lynn Cothern, Effective Intervention for Serious Offenders, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice and Delinquency Prevention, Wash., DC), April 2000, at 3 (finding in a meta-analysis of 83 studies of programs for institutionalized serious violent and nonviolent offenders that offender characteristics had the smallest effect on outcomes).

⁴⁰ *Id.* at 3, 4.

 $^{^{41}}$ *Id.* at 3.

⁴² Id. at 3-4; Office of Juvenile Justice and Delinquency Prevention, Critical Findings: Serious and Violent Juvenile Offenders.

http://ojjdp.ncjrs.org/pubs/makingadiffer/critical_1.html (last visited July 21, 2009).

continued progress once juvenile offenders are released.⁴³

1. The Missouri Department of Youth Services

Missouri's system has had extraordinary success reducing recidivism through a system of regional small-scale secure correction centers and an array of community-based non-residential programs and group homes.⁴⁴ In Missouri's Department of Youth Services ("MDYS") for 2008, 13% of the youth were committed for the most serious felonies (A&B felonies) and 41% for other felonies.⁴⁵ Division of Youth Services: Research & Evaluation. Annual Report: Fiscal Year 2008 ("MDYS 2008 Annual Report"), at vi (2009). The Division of Youth Services receives juveniles tried as adults with blended sentences – juvenile and adult sentences imposed with the execution of the adult sentence suspended.46 In 2008, 46% of youth admitted to MDYS had a history of prior mental health services, 54% had a history of prior substance abuse involvement, and 23% were identified as having an educational disability. MDYS 2008 Annual Report, supra at vi.

⁴³ Serious and Violent Juvenile Offenders, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice and Delinquency Prevention, Wash. D.C.), May 1998, at 6.

⁴⁴ Zavlek, *supra* n. 38 at 8.

⁴⁵ 37% were committed for misdemeanors and other non-felonies; 10% for juvenile (status) offenses. *MDYS 2008 Annual Report, supra,* at vi.

⁴⁶ Missouri Division of Youth Services, *Dual Jurisdiction Program: A Sentencing Option for Youthful Offenders*, at 2, *available at* http://www.dss.mo.gov/dys/pdf/djp021705.pdf (last visited July 21, 2009).

Three-fourths of offenders committed to MDYS are assigned to non-residential community programs and less secure facilities. Zavlek, *supra* n. 38 at 8. This allows the medium to high-security facilities to smaller population maintain a and individualized treatment for each youth. Treatment addresses issues including victim empathy, social skills, anger/emotions management, healthy thinking patterns and coping skills, peer influences, substance abuse, and self-esteem; much of the programming centers around group dynamics and processes.⁴⁷ Missouri's approach utilizes constant therapeutic interventions and minimal force.

In a typical juvenile corrections environment, Mr. Decker [Director of MDYS] said, if a youth becomes aggressive "you would have guards drag him into isolation" for three days.

"But," he added, "the problem is that a young person doesn't learn how to avoid that aggressive behavior and it will get worse."

In Missouri Hills [one of the MDYS facilities], isolation rooms were used only about a dozen times last year, Mr. Decker said, and never for more than a few hours. Pepper spray is banned, and youth are taught to deescalate fights or apply grappling holds, a form of restraint.

⁴⁷ DYS Frequently Asked Questions: Treatment Services, http://www.dss.mo.gov/dys/faq/treatserv.htm (last visited July 21, 2009).

[One juvenile] explained how her housing unit does a "circle-up," or ad hoc counseling session, several times a day, whenever there is a conflict, like cursing.

. . . .

When someone becomes unruly, the other youth are trained to talk him down.⁴⁸

MDYS's recidivism rate based on the recommitment to MDYS after 24 months of release was 10% for 2008 and had been between 7-9% for the 4 years prior to 2008. MDYS 2008 Annual Report, at 18. Moreover, as of 2005, only 7% of youth released from MDYS were in Missouri's prisons 5 years after their release. Zavlek, supra n. 38 at 30. Missouri's model is also cost-effective – MDYS's budget in 2000 amounted to about \$94 per youth in Missouri's population, while the average budget in the eight states surrounding Missouri was approximately \$140 per youth. *Id*.

2. The Texas Youth Commission

The Texas Youth Commission ("TYC"), although undergoing some changes in programming,⁴⁹ has had proven success treating

⁴⁸ Solomon Moore, *Missouri System Treats Juvenile Offenders with Lighter Hand*, N.Y. TIMES, March 27, 2009, available at http://www.nytimes.com/2009/03/27/us/27juvenile.html?pagewa nted=1&_r=1 (last visited July 21, 2009).

⁴⁹ TYC is now in the process of implementing a new general treatment program CoNEXTions - that combines cognitive-behavioral based interventions, an aggressive skills and motivation component, an aggressive community integration and a strong academic or workforce development component.

youth convicted of serious violent offenses and sex offenses. TYC in 2008 had 83% of committed youth with an IQ less than 100, 58% had prior out of home placements, 33% had a history of abuse and neglect, 49% had a family history of criminal behavior, 36% was special education eligible and 32% had a serious mental health diagnosis. Texas Youth Commission: Research and Planning Department, Review of Agency Treatment Effectiveness: Fiscal Year 2008 ("TYC Review 2008"), at 3 (2008). TYC offered Resocialization as its primary treatment intervention, which focused on three major areas: academic and workforce development, behavior modification, and correctional therapy. *Id.* at 7.

The specialized treatment programs were based on the Resocialization model but with emphasis on the specific treatment need.⁵⁰ *Id.* at 7-8.

TYC Review 2008, supra at 16. The Specialized treatment programs are currently being updated to integrate practices from this treatment model. *Id.* at 7-8.

⁵⁰ In the general program, an offender progressed through a system of four "phases" in each area - Orientation, Life Story, Offense Cycle, and Success Plan - that required youth to learn and demonstrate competency in a series of objectives designed to reduce the probability of offending. *Id.* at 7. In the specialized program:

Life Stories included additional focus on the etiology and development of those specific risk areas associated with the specialized need being addressed. Offense cycles were expanded to include understanding of how aggressive, sexual or drug related behavior patterns emerged and were maintained with emphasis on how they could be modified. Success Planning addressed specific risk management issues in the community to address these specialized risks. In addition, those in the specialized programs

The Capital and Serious Violent Offender Treatment Program, operated within the high-security Giddings State School, is an intensive 24-week program, where vouth enroll after spending years in general population.⁵¹ Through extended group therapy sessions "[t]he program helps these young people connect feelings associated with their violent behavior and to identify alternative ways to respond when faced with risky situations in the future. Participants in this program are required to reenact their crimes and to play the role of both perpetrator Texas Youth Commission, Specialized and victim." CorrectionalTreatment,

http://www.tyc.state.tx.us/programs/

special_treat.html (last visited July 21, 2009). The Sexual Behavior Treatment Program is a structured 12-18 month program operating at three TYC institutions. TYC Review 2008, supra at 8. The program builds on the agencies treatment program with individual and group counseling focusing on the youth deviant sexual behavior, includes psychosexual education and, for youth with abuse histories, trauma resolution therapies. Texas Youth Commission, Specialized Correctional Treatment, supra.

Both programs have been shown effective in reducing recidivism. Notably, in 2008, the re-arrest rate within 12 months for a violent offense was 3% for those in the sex offender program and 2% for the

received Psycho-educational programming to help them better understand "normal" development and social customs.

TYC Review 2008, supra, at 8.

⁵¹ John Hubner, LAST CHANCE IN TEXAS xxiv(2005); TYC Review 2008, supra, at 8.

violent offender program. TYC Review 2008 at 10-11. The treatment effectiveness of the programs were measured as compared to a control group (offenders with high risk for sexual or violent re-offense who did not participate in this program) and both showed large differences. Id. at 5, 18. The violent offender program participants were 36% less likely to be arrested for any offense and 68% less likely to be arrested for a violent offense within 1 year; the sex offender program participants were 62% less likely to be rearrested for a violent offense within one year and 18% less likely to be incarcerated for any offense within three years. *Id.* at 10, 11.

Other states and jurisdictions have embraced these models. The District of Columbia, Santa Clara County (Ca.), San Francisco City and County (Ca.), New York, Louisiana and New Mexico are now working with the Missouri Youth Services Institute⁵³ to implement changes to their systems.⁵⁴ The District of Columbia has recently announced the

⁵² The sex offender control group had a 5% rate of re-arrest and the violent offender control group had an 8% rate of re-arrest rate for violent offenses. While there was a statistically significant difference for the sex offender group, the difference between the capital offender group and the control group was not significant because of the small sample size. *Id.* at 18.

⁵³ The Missouri Youth Services Institute is a not-for-profit founded by Mark D. Steward, former Director of Missouri Youth Services to assist juvenile systems in their reform efforts. *Missouri Youth Services Institute: Home*, http://mysiconsulting.org/index.php (last visited July 21, 2009). ⁵⁴ *See About Missouri Youth Services Institute: Where We Are Working*, http://mysiconsulting.org/about.php (last visited July 21, 2009).

opening of a new secure facility for serious juvenile offenders – the "New Beginnings Youth Development Center" - that will adopt a nine-to-twelve month behavior modification program modeled after the Missouri approach for the most serious and chronic young offenders.⁵⁵ The D.C. Department of Youth Rehabilitation Services has reported a 50% decrease in recidivism among their youth in secure custody since 2005through an increased focus rehabilitation.⁵⁶ Rhode Island recently announced a proposal to implement the Resocialization System utilized by the TYC.⁵⁷

Though information-sharing and the implementation of research-based practices, the rehabilitation of violent juvenile offenders is not a theoretical possibility, it is a practical reality.

DYRS: Secure Program, http://dyrs.dc.gov/dyrs/cwp/view,a,3,q,599546.asp (last visited July 21, 2009). Department of Youth Rehabilitation Services Opens State of the Art Facility for District Youth, Press Release, May 30, 2009, http://newsroom.dc.gov/show.aspx/agency/dyrs/section/2/release/

⁵⁶ Department of Youth Rehabilitation Services Opens State of the Art Facility for District Youth, supra.

⁵⁷ See generally Rhode Island Dept of Children, Youth and Families, Proposal to Implement a New Treatment and Resocialization System for Adjudicated Youth in Rhode Island, http://www.dcyf.state.ri.us/docs/rits_resocial.pdf (last visited July 21, 2009).

3. The appropriateness of a life sentence imposed on a juvenile offender can properly be measured only by a post-sentencing review of his or her development

A lifetime in prison is a punishment reserved for few offenders. 95% of all those incarcerated in state prison will be released.⁵⁸ In 2007, the median sentence length for felons sentenced to incarceration was 72 months for rape, 60 months for robbery, 24 months for aggravated assault, and 24 months for burglary.⁵⁹ Even in the 75 largest counties in the nation, which account for about half of all reported violent crime in this country, the median sentence was not significantly higher.⁶⁰ From 1990 to 2002, in these counties, the median sentence received was 120 months for rape, 60 months for robbery and 48 months for assault.⁶¹

⁵⁸ Timothy Hughes & Doris James Wilson, Bureau of Justice Statistics, Reentry Trends in the United States: Inmate Returning to the Community After Serving Time in Prison, http://www.ojp.usdoj.gov/bjs/reentry/reentry.htm (last visited July 21, 2009).

Bureau of Justice Statistics, State Court Sentencing of Convicted Felons, 2004- Statistical Tables – Table 1.3 Mean and Median Felony Sentence Lengths in State Courts, by Offense and Type of Sentence, 2004, available at http://www.ojp.usdoj.gov/bjs/pub/html/scscf04/tables/scs04103ta b.htm (last visited July 21, 2009). The median calculation includes those sentenced to life or death sentences. *Id.* The mean calculation, which excludes life and death sentences were higher – 123 months for rape, 86 months for robbery, 41 months for aggravated assault, and 40 months for burglary. *Id.*

⁶⁰ See Brian A. Reaves, Violent Felons in Large Urban Counties, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT (BJS, Wash, D.C.), July 2006, at 1, 8.

⁶¹ *Id*. at 8.

For juveniles, a lifetime in prison has a greater and harsher significance than for adults. Juveniles will grow into adulthood in prison and will serve much longer than adult offenders. Moreover, younger offenders are a vulnerable population in adult facilities, with higher suicide rates and greater risk of physical and sexual assault than adult offenders⁶² – of particular concern for those juveniles placed in general population with adults.⁶³

In addition, the separate juvenile and adult adjudications of violent offenses distorts a criminal court judge's ability to assess the proportionality of the imposition of a life sentence on a youth. In 2005, juvenile courts disposed of an estimated⁶⁴ 81,600 delinquency cases involving violent crime index offenses (murder, non-negligent manslaughter,

⁶² See Martin Forst, Jeffrey Fagan & T. Scott Vivona, Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment Custody Dichotomy, 40 Juv. & Fam. Ct. J., 1989, at 1, 9-10. (finding that young people in adult prisons are at greater risk for sexual and physical assault than both older inmates and comparable youths in juvenile facilities); Michael G. Flaherty, The National Incidence of Juvenile Suicide in Adult Jails and Juvenile Detention Centers, 13 Suicide And Life Threatening Behavior, 85-94 (1983) (finding that the suicide rate for juveniles in jail is eight times that of juveniles in detention centers).

⁶³ In 1995, "[t]wenty-seven [Department of Corrections] house those offenders under age 18 in the general population of adult institutions or in protective custody within those institutions if needed." Offenders Under 18 in State Adult Correctional Systems: A National Picture, SPECIAL ISSUES IN CORRECTIONS, (LIS, Inc., Longmont, Co.), Feb. 1995, at 3, 5-6.

⁶⁴ Estimates are based on data from over 2100 courts with jurisdiction over 80% of the juvenile population. Melissa Sickmund, *Delinquency Cases in Juvenile Court*, 2005, OJJDP FACT SHEET, (Office of Juvenile Justice and Delinquency Prevention, Wash. D.C.), June 2009, at 1.

forcible rape, robbery, and aggravated assault).⁶⁵ Of the estimated 429,500 total person offense cases disposed of by the juvenile court in 2005, only 3,500 were waived to criminal court.⁶⁶ Although cases transferred by judicial waiver do not represent the entire universe of juvenile cases filed in criminal court (statutory exclusion and prosecutor direct file cases), 2005 juvenile arrests data suggests that the vast majority of these violent crime index cases are resolved in juvenile court.⁶⁷ Therefore, juvenile courts adjudicated a substantial number of cases involving similarly situated violent offenders never exposed to a life without parole sentence. One study revealed that violent young offenders in the adult system received sentences five times longer than those retained in the juvenile system with similar offense characteristics.⁶⁸

⁶⁵ According to estimates, juvenile court disposed of 1,400 criminal homicide, 4,400 forcible rape, 26,000 robbery, and 49,900 aggravated assault cases. *Id.* at 2.

⁶⁶ Id. at 3

 $^{^{67}}$ In 2005, an estimated 95,300 violent crime index arrests of juveniles were made, which even assuming that all the person offenses waived to criminal court were violent offenses, still suggests that a substantial number of these cases were resolved in juvenile court -95,300-81,600 (cases in juvenile court) +3500 (judicial waiver) =17,200 (cases in criminal court). Howard N. Snyder, *Juvenile Arrests 2005*, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice & Delinquency Prevention, Wash. D.C.), April 2009, at 3. In 2005, an estimated 7% of all juvenile arrests -149,800 out of 2.14 million total arrests - were referred directly to criminal court. Id at 5.

⁶⁸ Cary Rudman et. al, Violent Youth in Adult Court: Process and Punishment, 2 CRIME & DELINQUENCY 75, 88-89 (1986); see also Marcy Rasmussen Podkopacz & Barry C. Feld, The End of the Line: An Empirical Study of Judicial Waiver, 86 J. OF CRIM. L. & CRIMINOLOGY 449, 485-89 (1996) (finding that violent

The imposition of a life without parole sentence on juveniles must take some account of a juvenile offenders' unique capacity for rehabilitation. Decades of social research shows that most youth "age-out" of engaging in reckless and criminal behavior. During the period of adolescence, because of the developmental deficiencies discussed *infra*, recklessness and most criminal behavior is at its peak.69 "[M]ost participants in adolescent delinquency desist from involvement by early adulthood. even those most involved during adolescence."70

Thus, confidently predicting that a juvenile offender's criminal behavior will persist is almost impossible. Jurists are unable to predict serious criminal behavior in juveniles.⁷¹ The American

young offenders in adult courts received sentences about five times longer than violent juvenile offenders).

⁶⁹ See Jeffrey Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 DEVELOPMENTAL REV. 339, 339 (1992); see Patrick H. Tolan & Deborah Gorman-Smith, Development of Serious and Violent Offending Careers, in Serious and Violent Juvenile Offending Careers, in Successful Interventions 73 (Rolf Loeber and David Farrington, eds. 1998) (discussing established findings that crime prevalence increases during early adolescence for most crimes, except drug sales, which peaks in early adulthood).

⁷⁰ Tolan & Gorman Smith, *supra* n. 69, at 73.

⁷¹ See Jeffrey Fagan & Martin Guggenheim, Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment, 86 J. OF CRIM. L. & CRIMINOLOGY, 415, 437-38, 447 (1996) (reporting results of a study showing that judges rendered inaccurate predictions of future dangerousness of juveniles in more than eight-out-of-ten cases for preventive detention determinations); See generally Norval Morris & Marc Miller, Predictions of Dangerousness, 6 CRIME & JUST. 1, 1 (1985) (arguing that, because of limited reliability, "[t]he use of predictions of dangerousness to alter

Psychiatric Association holds the position that "[a]lthough mental health professionals are able to characterize the functional and behavioral features of an individual adolescent, their ability to reliably predict future character formation, dangerousness, or amenability to rehabilitation is inherently limited." Brief for the American Psychological Ass'n, & Missouri Psychological Ass'n as *Amici Curiae* Supporting Respondent at 19, *Roper v. Simmons*, 543 U.S. 551 (2005).

Prior dire predictions about the trends in juvenile offender behavior and patterns similarly have proved inaccurate. Despite forecasts in the 1990's of the juvenile super-predator, the threat never materialized.⁷² Since then violent juvenile crime has decreased significantly - the juvenile arrest rate for murder is down 77% from its 1993 peak: the rate for forcible rape is 54% less than its 1991 peak and even below the 1980 level; the rate for robbery is 47% less than its 1995 peak; and the arrest rate for aggravated assault has reached its lowest level since 1980, down 41% from its 1994 peak. Charles Puzzanchera, Juvenile Arrests 2007, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice & Delinquency Prevention, Wash. D.C.), April 2009, at 6.

individual dispositions should be allowed only to the extent that such dispositions would be justified as deserved independent of those predictions").

⁷² See generally Shay Bilchik, Challenging the Myths, 1999 National Report Series, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice and Delinquency Prevention, Wash. D.C.), Feb. 2000 (discussing the lack of statistical support for the "superpredator" theory).

Predictions as to juvenile behavior, both globally and individually, have proven erroneous. To ensure that those juveniles sentenced to a lifetime in prison are deserving of such a sentence requires the ability to assess that juvenile once he has entered adulthood. This does not prevent a child with sufficient culpability who does not respond to treatment from serving a very lengthy sentence.

CONCLUSION

Only a post-adolescence review can assure the suitability of a life sentence. Moreover, an opportunity for post-sentencing review of the progress of juveniles allows corrections and social service professionals working closely with juveniles to provide an educated evaluation of that youth's development and progress toward rehabilitation.

Respectfully submitted,

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Testimony by The Sentencing Project for Submission to the Florida Senate's Criminal Justice Meeting Senator Evers, Chair Senator Dean, Vice Chair

January 11, 2011

Good afternoon. My name is Ashley Nellis and I am a research analyst at The Sentencing Project. The Sentencing Project is a national nonprofit organization engaged in research and education on criminal justice and juvenile justice policy. I have been actively engaged on the issue of juvenile life without parole at a national level, and our organization submitted an amicus brief in the *Graham* that was cited by the U.S. Supreme Court in its decision. I am also currently conducting a national survey on the more than 2,000 persons sentenced to life without parole for crimes committed under the age of 18. The findings of this study will be published later this year, and will include an analysis of offense, offender demographics, childhood circumstances, and experiences since incarceration.

As a result of the *Graham* decision and research findings on youth development, it has become increasingly clear and necessary to reconsider previous approaches to punishment for juveniles who engage in serious crime. Given that Florida leads the nation in these cases, it is critical that policymakers develop responses to the decision that are constructive and can serve as a model for other states.

Research findings now demonstrate that youth are categorically less culpable than adults, lack the maturity to fully understand the implications of their actions, and are capable of turning their lives around in a positive direction. There is also clear evidence that youth and adolescents are highly vulnerable to peer pressure in their developing years and thus may go along with activities that they know are wrong because they lack the judgment or confidence to separate themselves from such situations. In 2005, the U.S. Supreme Court acknowledged these realities in *Roper v. Simmons*, the historic decision to overturn the death penalty for juveniles.

In *Graham v. Florida*, the Court extended this same reasoning to young people serving life sentences for non-homicides. In its opinion the Court reasoned that juveniles are fundamentally different from adults and have a unique ability to reform their lives. The Court ruled that young people must be given some "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."

The decision is nowhere more important than in Florida, with the Supreme Court having identified that Florida is the nation's leader in sentencing youth who have not committed a homicide to prison for life. The state has more youth sentenced under these provisions than all other states combined. As the legislature seeks to remedy its sentencing structure to comport with the *Graham* decision, it should note that many of the individuals have already been in prison for decades. In fact, more than half of Florida's non-homicide cases have been in prison for 10 years or more. The average age of these offenders is 30, and some individuals are in their forties and fifties. The oldest inmate serving a life sentence for a nonhomicide is now 52 years old and has been in prison since 1975.

Florida is thus in a significant position nationally, and policymakers throughout the country will be looking carefully at how the state develops a remedy for these cases. In this regard, it is critical that policy decisions be informed by science rather than emotion. It is true that many of these offenders committed very serious crimes and incarceration is an appropriate response. However, criminologists, psychiatrists, child behavior specialists, and psychologists have demonstrated that young people have a unique capacity to change. By the age of 30, many of these individuals have matured and are far different than they were in their teenage years. Thus, proposals to establish a waiting period of 25 years before parole consideration for non-homicide offenses impose unnecessarily lengthy periods of incarceration in many cases, and would violate the spirit of the *Graham* decision.

A meaningful opportunity for parole does not guarantee the release of these offenders. If adequate maturity and rehabilitation has not occurred during the individual's years in prison, as decided by a professional parole board or a judge, he or she should remain in prison and his/her case should be reviewed again at an appropriate time.

At this time of national fiscal crisis, states across the country are reevaluating their criminal justice policies. Based out of necessity they are compelled to consider areas in which responsible budget reductions can be enacted. Such actions enable states to shift their public safety resources to more cost-effective initiatives. Incarcerating people who have been successfully rehabilitated and are no longer a threat to public safety is fiscally irresponsible as well as morally wrong. The minds and behaviors of these individuals can be changed with rehabilitation. A meaningful opportunity at parole is critical to this.

Florida is well-situated to set the stage for the next era of crime policy for our young people who commit serious crimes. It should take this opportunity to consider what is best for these children, the budget, and most important, the public's safety.



FLORIDA PAROLE COMMISSION

Senate Criminal Justice Committee Tuesday, January 11, 2011

1:45p.m. – 3:45 p.m. Room 37 Senate Office Building

COMMISSION POSITION IN SUPPORT OF PAROLE FOR JUVENILES

Executive Summary: The Parole Commission supports the concept of parole eligibility for juveniles sentenced to life-without-parole for non-homicide crimes or the course of action the Legislature deems best.

Comments: On May 17, 2010, in Graham v. Florida, the United States Supreme Court addressed the issue of whether a sentence of life-without-parole is cruel and unusual punishment as applied to all juveniles convicted of non-homicide offenses. The Court held that these sentences are unconstitutional, finding that States can not sentence any juvenile convicted of a non-homicide offense to a life sentence without the possibility of any release. In reaching this finding, the Court determined that such a sentence is disproportionate to the crime, when considering age as a factor. The Court determined that life without parole is the second harshest punishment, next to the death penalty, and should be applied only in rare circumstances. Even the penological goals of retribution, deterrence, incapacitation, and rehabilitation do not save this sentence as applied to juveniles as being grossly disproportionate to a non-homicide crime.

The recent Supreme Court decision of <u>Graham v. Florida</u> necessitates sentencing changes for all inmates who (1) were sentenced as an adult at the time he or she was a juvenile, (2) are incarcerated for crimes other than murder and (3) are sentenced to life without parole. The following are three possible solutions to the <u>Graham</u> decision:

- 1. Statutory changes enacted by the Legislature.
 - a. In this preferred proposal, the Florida Legislature could create an exception to the abolishment of parole and allow parole for a specific limited class of offenders or offenses.
 - b. The possible specifics are endless; for example, the statute could consider age at the time of conviction, sentence length, crime, criminal history, incarceration history, program participation, etc.
 - c. Objective Parole Guidelines are currently in place and could be implemented seamlessly.
 - These guidelines have the Commission consider prior convictions, number of commitments, length of commitments, age of the offender at the time of his or her first incarceration, and violations of probation or escapes, and if the present offense of conviction involved a home invasion or other burglary.
 - The Commission also considers substance abuse issues, mental health concerns, the nature of the offense, influence of co-defendants, and other mitigating and aggravating circumstances in its risk assessments.
 - The Commission has previously reviewed similarly-situated inmates by applying a youthful offender matrix prior to the abolition of parole. This youthful offender matrix is still in rule and available for use.
 - Furthermore, if any juveniles were paroled, the Commission currently has statutes in place to allow for the placement of conditions of supervision and, in the event

that the offender is unsuccessful, revocation procedures which protect the offender's rights to due process.

- 2. The affected juveniles are granted a form of clemency by the Governor and Cabinet.
 - a. This proposed solution involves an executive order from the Governor and Clemency Board which commutes the life without parole sentences to life with the possibility of parole after a mandatory minimum term of years.
 - b. The main problem with this proposal is the violation of the separation of powers clause; specifically if this Executive option can effectively override the legislative abolition of parole.

3. Resentencing.

- a. Each case is handled on a case-by-case basis as it returns to the trial courts for resentencing and no further sentences are imposed.
- b. If the Legislature does not choose to act, the courts would be required to resentence the affected juveniles.
- c. Courts are already struggling with this problem. In one case, a resentencing to a term of years is being challenged as a violation of <u>Graham</u>, arguing that the term of years is the functional equivalent to a life without parole sentence.

Fiscal Comments: The Department of Corrections (Department) reports the cost to house a male youthful offender is approximately \$22,487.65 annually. Several bills proposals on juvenile parole from previous legislative sessions have the Department reviewing juveniles to determine their eligibility for parole. During the 2010 Session, the Department indicated this eligibility review would only have a minimal impact on their workload (see HB 23 & SB 184 bill analysis), and by their estimates, of a possible pool of 432 eligible inmates, only 23 would appear to be eligible under the proposals considered by the 2010 Legislature. The Department also indicated it did not anticipate a significant number of inmates being paroled to justify additional probation and parole officers.

The Parole Commission believes any workload increase from reviewing existing and future juvenile parole cases would be minimal and also does not anticipate a need for additional staff.

CONTACT INFORMATION

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Cost-Savings Recommendations for the Criminal and Juvenile Justice System

Based on the Report and Recommendations of the Government Cost Savings Task Force for FY2011-12



Presented to the Senate Justice Committee January 11, 2011

Who is Florida TaxWatch?

Florida TaxWatch is a nonpartisan, non-profit research institute and state and local government watchdog whose mission is to provide the citizens of Florida and public officials with high quality, independent research and education on government revenues, expenditures, taxation, public policies and programs and to increase the productivity and accountability of Florida Government.



31 Years of Success



Florida TaxWatch has published numerous success reports and recommendations in cost savings across all areas of government:

- ✓ Constructive Ideas to Help Florida Address the Budget Shortfall, January 2009
- **✓ Report and Recommendations of the Government Cost Savings Task Force to Save More than \$3 Billion**, March
 2010
- ✓ Report and Recommendations of the Government Cost Savings Task Force for FY2011-12, December 2010 Florida

TaxWatch

Report and Recommendations of the Government Cost Savings Task Force for FY2011-12

New Report contains **125** innovative, cost-saving ideas worth **more than \$4 billion**, if fully implemented.

Subject Areas:

- ✓ Pension Reform
- ✓ Justice Reform
- ✓ Medicaid Reform
- ✓ Healthcare Reform
- ✓ Procurement Reform
- ✓ Revenue Enhancement
- ✓ General Government Operations
- ✓ Productivity Enhancement and Workforce Optimization

Florida \

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Some Examples

- ✓ Eliminate DB plan and switch all FRS members to DC plan **Estimated Savings for FY2011-12: \$337 million
- ✓ Expand nursing home diversion programs
 ** Estimated Savings for FY2011-12: \$397 million
- ✓ Require purchase of generic equivalent for off-the-shelf products **Estimated Savings for FY2011-12: \$305 million
- ✓ Contingency Contract to drawdown federal funds already earned
 ** Estimated Savings for FY2011-12: \$150 million
- ✓ Create benchmarks for administration costs & overhead across agencies **Estimated Savings for FY2011-12: **\$277 million**
- ✓ Implement pre-payment audit system for PBM claims

 ** Estimated Savings for FY2011-12: \$40 millionFlorida

 TaxWatch

Why Justice Reform?

☐ Prison Population of more than 100,000

☐ Dramatic

11.4-fold

increase in

Prison

Population from

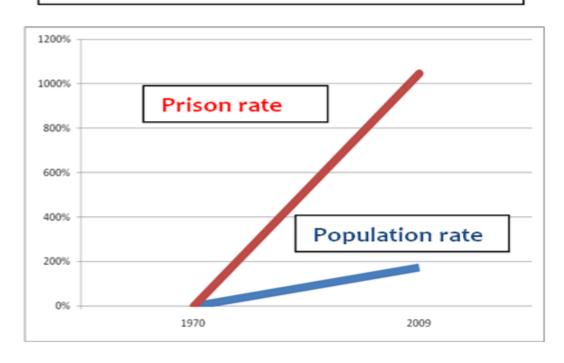
1970 to 2009

while

Population only
increased 2.7-fold
during the same
time period

Stunning Corrections Growth

1970 – 2009 Growth Rates Florida population vs. prison population

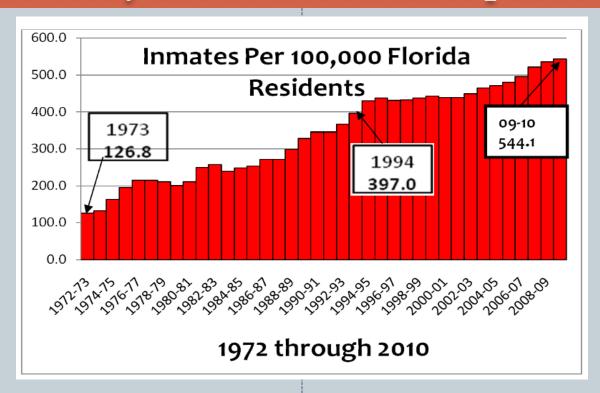


Sources: Legislative Committee on Intergovernmental Relations (LCIR) and Office of Economic and Demographic Research



Increase Caused by Higher Incarceration Rate

Increased rates of incarceration offer diminishing returns that are costly and do not enhance public safety



 Florida spent \$2.4 billion to maintain its prison population in FY2009-10



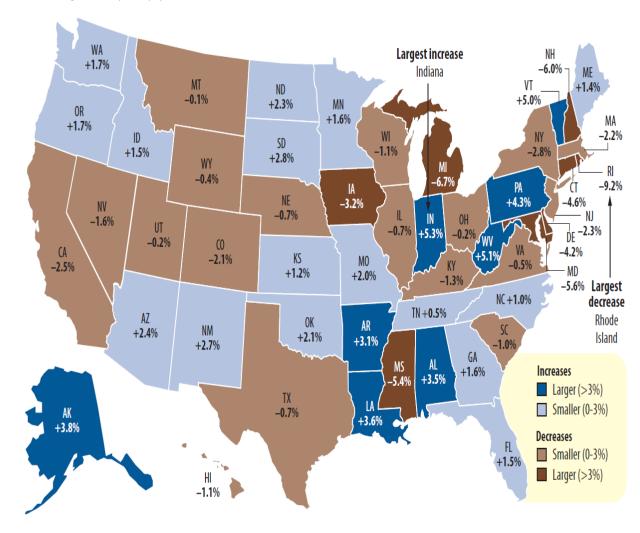
Other States Have Decreased Crime While Decreasing Incarceration Rates

26 states reduced prison rolls last year, even tough on crime states such as Texas, Mississippi, & South Carolina

Florida's had second largest uptick nationwide

STATES MOVE IN DIFFERENT DIRECTIONS

Percent change in state prison populations, 2008–2009.



NOTE: Percent change is from December 31, 2008 to January 1, 2010 unless otherwise noted in the jurisdictional notes. SOURCE: Pew Center on the States, Public Safety Performance Project

Prison Population Drivers

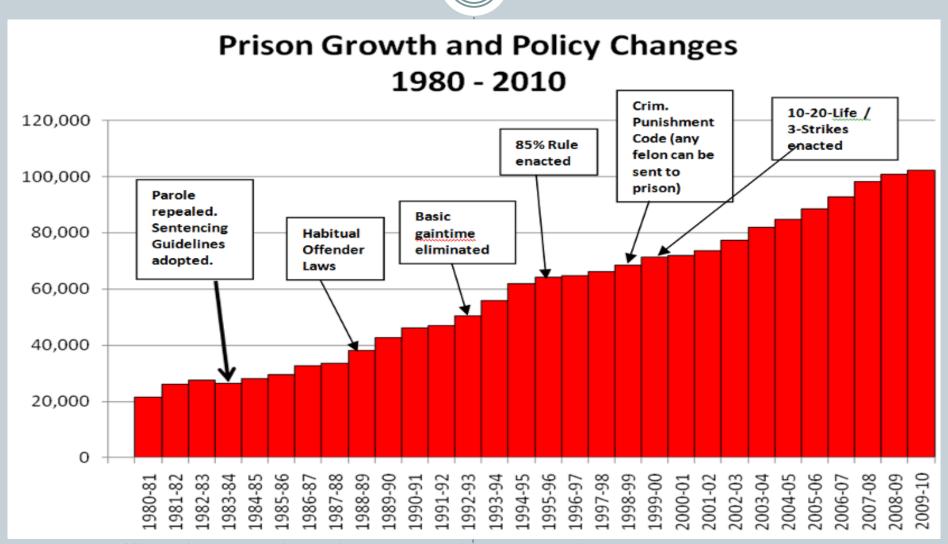
- Elimination of Parole and Lengthened Sentences and Period of Incarceration
- Widespread Use of Short State Prison Sentences

State Prison
 Incarceration for
 Technical Probation
 Violations for Adults
 and Juveniles

Recidivism



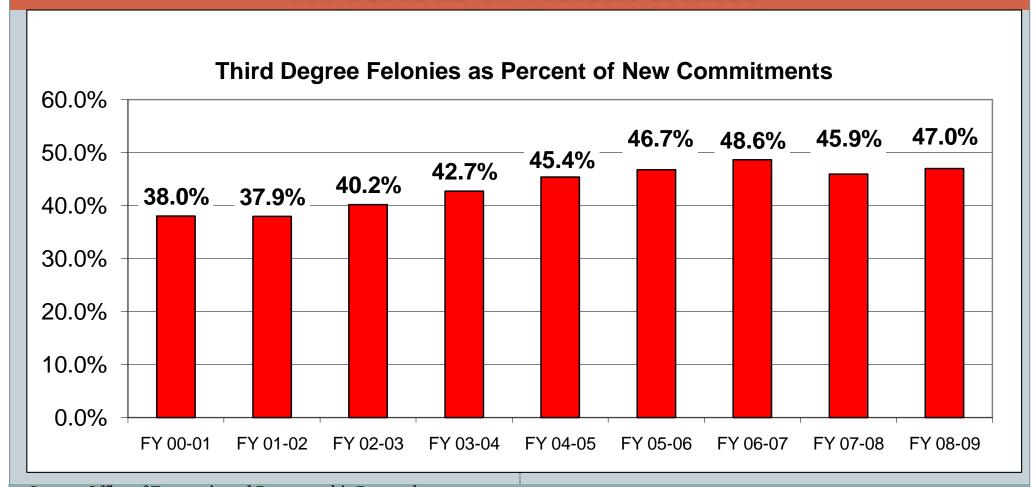
Elimination of Parole and Lengthened Sentences and Period of Incarceration Cause Growth



Source: Office of Economic and Demographic Research

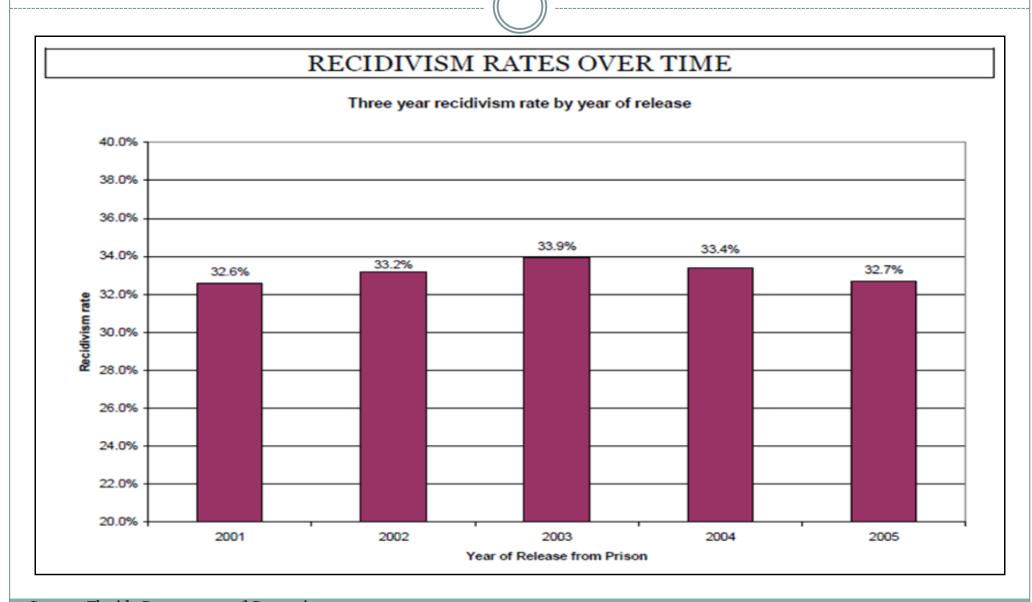
State Prison Incarceration for Technical Probation Violations for Adults and Juveniles

The majority of prison inmates have NOT been sentenced for serious or violent crimes



Source: Office of Economic and Demographic Research

Recidivism Drives Growth



Source: Florida Department of Corrections

Other Issues that Spur Growth

People with Serious Mental Illnesses

- ➤ Represents the fastest growing sub-population within Florida's prison system
- Over past 15 years, inmates suffering from mental illness has tripled

Other Issues that Spur Growth - DJJ

Criminalizing Youth Instead of Offenses

- Most youth offenders charged with non-violent property or drug crimes
- > 40% of all children are committed for technical violations of probation or misdemeanors

- > \$50 million spent on youth committed to residential facilities
- ➤ Average length of stay has increased 30% in past ten years trend that cost nearly \$20 million last year

Recommendations for Justice Reform

Current Trends in Florida's Corrections, Criminal, and Juveniles Justice System are <u>Unsustainable.</u>

Report contains **24 Recommendations** worth nearly \$400 million in cost-savings to help save taxpayer dollars, improve public safety, & hold offenders accountable.



Section I: Big Picture Recommendations

Ideas that are essential to long-term cost containment and improved public safety

Create a Commission to do a top-to-bottom review of the Criminal Justice System & Corrections

Recommendation: Create a Commission composed of members of the executive and judicial branches along with experts in the field to do a data-driven assessment of the System to find comprehensive, actionable reforms to improve public safety and slow prison growth

Establish an Independent Oversight Body over DOC and DJJ

Recommendation: An independent entity responsible to the Governor and Legislature should be established with oversight, investigating, inspecting, monitoring, and reporting authority over state corrections and juvenile justice to review and report on the departments based on established performance measures.

Develop risk/needs assessment & costanalysis tools to be used at the time of sentencing (Missouri Model)

Recommendation: Develop a web-based tool that will assess an individual's sentencing options, defendant risk reduction, and sentencing costs to be available to judges, attorneys, and the public

Section II:

Cost-Saving
Recommendations
Related to Sentencing People
Convicted of
Low-level Offenses/
short-term sentences

Require written justification for state prison sentences give to individuals with low sentencing scores – 44 or less

- ➤ Currently 22 or less to require written justification
- ➤If 50% of individuals with 44 or less were to be diverted from prison,

the state could save \$31.4 million annually

Incentivize localities for reducing their rates of state incarceration & increasing local alternatives

- Change incentives to impose state prison sentences on people that would be better served in the local communities
- Expanding state prison diversion programs, could save the state up to \$93 million within the next three years

Align Florida's marijuana and cocaine possession laws with Texas and other states

➤States are making change to their drug laws to reduce penalties from felonies to misdemeanors

i.e. Felony Marijuana Possession:

➤ Florida: 7/10 of an ounce

> Texas: 4 ounces

Expanding state prison diversion programs, could **save the state up to \$93 million** within the next three years

Update Value Thresholds for Property Felonies

- ➤ Most theft, fraud, and other property offenses are felonies at \$300
- ➤ Increasing the dollar threshold that make property offenses a felony in line with other states could **save the state nearly \$300,000 annually** for every 1% of inmates diverted from prison

Amend the Driving with a Suspended License Law to Reduce the Penalty from a Felony to Misdemeanor when the reason for suspension is inability to pay a financial obligation

- ➤ More failures-to-pay, such as court fines and child support, are now punished with suspended license that has spiked prison commitments in the recent years
- ➤ For every 1% of these individuals diverted from prison, the state could **save nearly \$180,000 annually**

Expand Electronic Monitoring as an Alternative to State Prison Sentences

- ➤ Studies have found that the release of nonviolent offenders at different levels of their incarceration to electronic monitoring for the remainder of their sentence reduces the likelihood of recidivism
- ➤ If EM is used for the last 20% of the sentence, the state could save more than \$43 million annually

Section III:

Cost-Saving
Recommendations
Related to Incarceration,
Release, Supervision, and
Reducing Recidivism

Expand Adult Post-adjudicatory Drug Courts

Recommendation: Expand drug court criteria to serve offenders who are cited for technical probation violations; give judges discretion to allow offenders with prior violent offenses who are appropriate for treatment to participate.

Institute Adult Post-incarceration Drug Courts

- > 50% of those sentenced for drug crimes need substance abuse treatment
- > Current programs serve only a small portion of those needing treatment

Recommendation: Allow some nonviolent offenders to participate in drug court programs after serving 60% of their sentence so as to continue their monitoring but receive treatment at a lower cost to the state

Increase the maximum gain time accrual allowed

- > Currently, DOC may not grant incentive gain time that exceeds 15% of an offender's sentence
- ➤ Adjusting the cap would incentivize the prisoners to engage in constructive behavior and reentry programming that would result in savings to the state without a risk to public safety
- ➤ Flexibility to the 85% rule could save Florida up to \$53 million in FY2011-12

Authorize the possibility of parole for certain elderly offenders

- ➤ Florida is increasingly saddled with medical costs of an elderly prison population when some pose little, if any, risk to the public out of prison
- > Create minimum qualification of 20 to 25 years served before reaching 65 and no capital murder for release
- ➤If Florida released elderly prisoners who have served minimally 20 years, the **state could save \$2.6 million in FY2011-12**

Expand Prison Work Release Programs

- Expand programs to allow pre-screened, low-risk inmates to work at paid employment in the community and live at work release centers outside of prison during the last 15 months of their sentence and capped at 4 % of the inmate population
- ➤ Rescind the informal DOC policy of holding one prison bed in reserve for every work release bed
- >Florida could save more than \$20 million annually

Expand Evidence-based Prison-based Programs that Reduce Recidivism

- > 1/3 of inmates return to prison within 3 years of release
- ➤ Yet, Florida allocates only 1% of the Corrections budget to prison-based programming aimed at reducing recidivism

Recommendation: A portion of the savings from front-end reforms should be reinvested in expanding prison and community-based programs that slow prison growth

Expand Evidence-based Literacy, Educational, and Vocational Training

- ➤ More than 50% of DOC inmates have been tested as reading at or below the 6th grade level
- For every education level an inmate gains, that person is 3% to 4% less likely to come back to prison.

Recommendation: An aggressive approach to find innovative ways to partner with community colleges and public and private workforce development entities to improve skill levels of inmates

Expand Life Management Skills Training

- ➤ There is a distinct lack of programming that addresses criminal thinking in transition/release programs
- Expanding currently available rehabilitative and training programs to those offenders who are on waiting lists or otherwise eligible could curb the rising inmate population and curb recidivism

Expand Faith- and Character-based Prisons

- ➤ Faith- and Character-based prisons have been found to improve institutional safety, reduce recidivism rates, and attract more volunteers
- Currently, there are more than 10,000 on the waiting lists for such facilities

Help inmates apply for Medicaid, Social Security Income, and Veterans benefits prior to release

Assistance in helping offenders receive benefits to which they are entitled prior to release will help them succeed in the community and reduce the likelihood they will return to prison

Review and Revise State-created Employment Restrictions Based on Criminal Records

- ➤ Many hurdles face people released from incarceration in successfully reentering into society and securing a job
- ➤ There is a patchwork of state-created restrictions on employers and employees regarding candidates with criminal records

Recommendation: Revisit and adopt the employment restriction reform recommendations made by the Governor's Ex-Offender Task Force

Expand the Florida Accountability Initiative for Responsible (FAIR) Probation

Targets probationers who are at highest risk of reoffending and discourages such offending with swift, predictable, and immediate sanctions

Recommendation: Implement a pilot FAIR program in collaboration with state courts as a viable alternative to incarceration

Expand Veterans Courts

- ➤ Up to 50% of Veterans return from war with PTSD and many do not seek treatment
- ➤ Veterans Courts offer treatment and diversion for non-violent offender with high success rates
- > Such programs are also eligible for Federal grants

Reduce costs of inmate hospitalization (in non-DOC hospitals)

- >DOC spends approx. \$50 million annually on hospitalization
- ➤ Paying these costs through Medicaid would lower total cost (Medicaid does not pay for care provided in DOC facilities)

Recommendation: Measures should be taken to ensure inmate remain Medicaid-eligible during incarceration so Medicaid can cover hospitalization costs when inmates receive care in non-DOC settings

Section IV:

Cost-Saving
Recommendations
Related to Juveniles in the
Justice System

Study the Effects of Barring Commitment of Misdemeanants to State Custody

- ➤ More than 2,500 children were admitted to DJJ residential facilities for misdemeanors or probation violation in FY2008-09
- ➤States, such as Texas, North Carolina, and Virginia, have already implemented this with great success
- ➤If Florida were to do the same, the **state would save \$30 million**

Expand the Redirection program to avoid custodial care of juveniles

- ➤Youth who successfully completed the Redirection program are more than 30% less likely to subsequent rearrest
- >Florida's Redirection program has saved the state more than \$50 million since it began five years ago

Recommendation: The Redirection Program should be expanded to serve a wider geographical and socio-demographic populations

Expand the use of Juvenile Civil Citations

- ➤ Utilizes early intervention and effective diversion programs at the local level for juveniles who commit minor crimes
- ➤If the practice of Civil Citations were expanded statewide, Florida could save nearly \$140 million annually

Increase Operational Efficiencies and Public Safety by Aligning the Average Length of Stay by Delinquents with Best Practices in residential facilities

- ➤ Average lengths of stay have been steadily increasing at a significant cost to the state -- \$20 million per year
- >Studies have found that children kept in facilities for prolonged periods are more likely to re-offend once released

THANK YOU





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Government Cost Savings Task Force

Chapter 2: Criminal and Juvenile Justice Reform

Report p. 29 - 44
Recommendations p. 45
Section I: Big Picture Recommendations 11. Create a commission to do a top-to-bottom review of the Criminal Justice System and Corrections
12. Establish an independent oversight body over the Departments of Corrections and Juvenile Justice
13. Develop risk / needs assessment and cost-analysis tools to be used at the time of sentencing (Missouri model)
Section II: Recommendations Related to Sentencing People Convicted of Low-level/Short-term Sentences
14. Require written justification for state prison sentences given to individuals with low sentencing scores – 44 or less (currently 22 or less)
15. Incentivize localities for reducing their rates of state incarceration and increasing local alternatives
16. Align Florida's marijuana and cocaine possession laws with Texas and other similar states
17. Update value thresholds for property felonies
18. Amend the driving with a suspended license law to reduce the penalty from felony to misdemeanor when the reason for the suspension is inability to pay a financial obligation
19. Expand electronic monitoring as an alternative to state prison sentences
20. Expand adult post-adjudicatory drug courts
Section III: Recommendations Related Incarceration, Release, Supervision, and Reducing Recidivism
21. Institute adult post-incarceration drug courts
22. Increase the maximum gain time accrual allowed
23. Authorize the possibility of parole for certain elderly offenders

24. Expand prison work release programs

- 25. Expand evidence-based prison-based programs that reduce recidivism
 - A. Expand evidence-based substance abuse treatment
 - B. Expand evidence-based mental health treatment
 - C. Expand evidence-based literacy, education and vocational training
 - D. Expand life management skills training
 - E. Expand faith- and character-based prisons
 - F. Apply inmates for Medicaid, SSI, and VA benefits prior to release
- 26. Review and revise state-created employment restrictions based on criminal records
- 27. Expand the Florida Accountability Initiative for Responsible (FAIR) Probation
- 28. Expand Veterans Courts
- 29. Reduce costs of inmate hospitalization (in non-DOC hospitals)

Section IV: Recommendations Related to Juvenile in the Justice System

- 30. Comprehensively review and implement Blueprint Commission recommendations
- 31. Study the effects of barring commitment of misdemeanants to state custody
- 32. Expand the Redirection program to avoid custodial care of juveniles
- 33. Expand the use of juvenile civil citations
- 34. Increase operational efficiencies and public safety by aligning the average length of stay by delinquents with best practices in residential facilities

Introduction

For the last year, Florida TaxWatch and the Government Cost Savings Task Force have given special attention to the rising costs of Florida's criminal justice system, especially the state Department of Corrections.

With a prison population of over a hundred thousand costing taxpayers \$2.4 billion this year, we can no longer afford the broken policy choices that have led to this out of control growth without making our communities any safer or offenders more accountable.

We recognize that a myriad of factors are driving these rising costs and thus a multi-pronged approach is essential. It is not enough to home in on reducing recidivism through new prisoner reentry strategies. It is not enough to reform probation and reduce the number of people sent to prison on technical probation violations. It is not enough to address the growing share of the prison population doing very short-term sentences. It is not enough to look at sentence length or scale back some crimes from felonies to misdemeanors. And it is not enough to revisit our release policies.

Furthermore, Florida spent more \$400 million on the Department of Juvenile Justice in FY2010-11. In total, the FY 2010-11 Florida state budget appropriated more than \$2.7 billion to the Departments of Corrections and Juvenile Justice and authorized more than 34,000 FTEs.

All of these policies – and many more – must be addressed if we are to succeed in saving tax dollars, improving public safety and holding offenders more accountable.

We know that the 24 cost-saving recommendations set forth here do not exhaust all the possibilities. That is why Florida needs the contributions that an expert, data-driven criminal justice and corrections commission could add to the deliberations about justice reform. And that is why creating such a body is our first recommendation.

Background – Florida's stunning corrections growth

Over the last forty years, Florida, like states across the nation, made a series of policy decisions that have driven a dramatic increase in its prison population, which reached 102,440 inmates on September 30, 2010,⁵⁷ up from 33,681 on June 30, 1988.⁵⁸ Inevitably, the costs associated with incarceration have increased just as dramatically. In 1988, the Corrections budget was \$502 million; in FY2010-11 it had jumped to nearly \$2.4 billion.

The growth in the prison population is not attributable to Florida's overall population growth. From 1970 through 2009, Florida experienced significant growth - a 2.7-fold growth in its population. But during that same period, the prisons grew 11.4-fold.

⁵⁷ Criminal Justice Estimating Conference, 10/19/09, Office of Economic and Demographic Research, The Florida Legislature

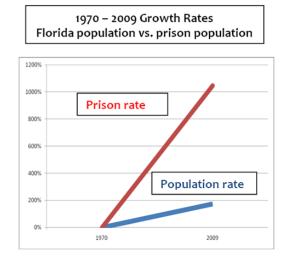
⁵⁸ Florida Department of Corrections. Available at: www.dc.state.fl.us/oth/timeline/1988-1990.html (last retrieved December 6, 2010).

Figure 9

	FI	orida ropulation grov	vth and prison popula	don growth		
	1970	1980	1990	2000	2009	
Florida Population	6,791,418	9,746,961	12,938,071	15,982,824	18,537,969	
		1970-1980	1980-1990	1990-2000	2000-2009	1970-2009
Percent Increase		43-5	32.7	23.5	15.9	172
		1970-1980	1980-1990	1990-2000	2000-2009	1970-2009
FL Prison						
Population	8793	19722	46223	71223	100894	
Percent Increase		124.3	134.3	54.1	41.7	1047

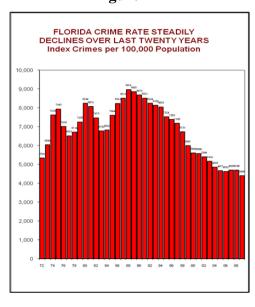
Crime rates do not explain the growth either. Crime rates fluctuated up and down during the seventies and eighties, but starting in 1988, the crime rate has declined steadily each year but one. The crime rate certainly did not increase more than 11-fold as the prison population has.

Figure 10



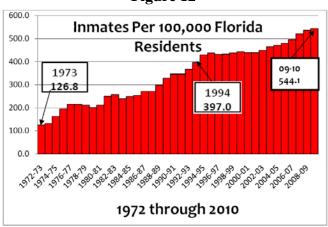
Sources: Legislative Committee on Intergovernmental Relations (LCIR) and Office of Economic and Demographic Research

Figure 11



Source: Office of Economic and Demographic Research

Figure 12



The increase in the prison population was achieved by increasing the *rate* of incarceration. Policy choices dictated that result. The rate of incarceration is the percent of people that Florida locks up in prison. It has jumped from .13 percent to .54 percent. Forty years ago the rate of incarceration was one quarter of what it is today.

If Florida incarerated people today at the same rate as in FY1972-73 (126.8 per 100,000), the prison population would be 23,848, at a cost of \$446 million instead of the \$2.4 billion Florida spent in FY2009-10.

It is tempting to credit the decline in crime to the increase in the rate of incarceration. Some have tried hard to make such a case, but research shows that while some decrease in crime is attributable to incarcerating dangerous criminals, after a point, increased rates of incarceration offer diminishing returns and a negative benefit-to-cost ratio. This is especially true when we increasingly incarcerate people for nonviolent drug offenses and other low-level crimes. ⁵⁹

The Vera Institute for Justice examined the key studies on this issue and found that; "Analysts are nearly unanimous in their conclusion that continued growth in incarceration will prevent considerably fewer, if any, crimes – and at substantially greater cost to taxpayers."

Indeed, several states are finding that they can decrease their crime rates while simultaneously decreasing their incarceration rates, as demonstrated in **Figure 13**.

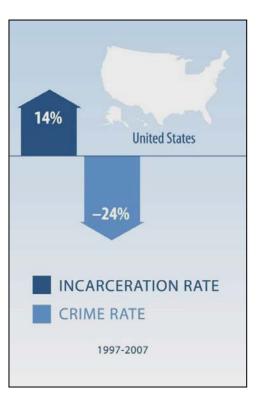
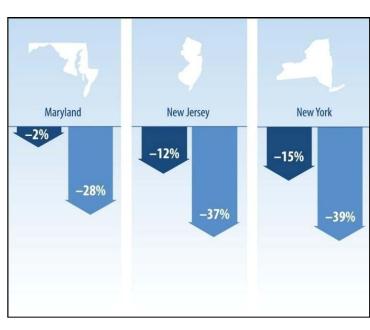


Figure 13



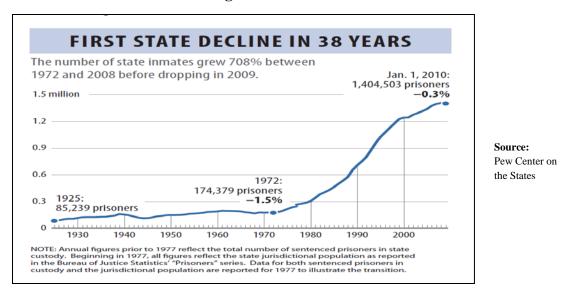
Source: Pew Center on the States

How has this been achieved? By data-driven strategies designed both to improve public safety and save taxpayers money.

⁵⁹ Pew Center on the States, Public Safety Performance Project, *One in 31: The Long Reach of American Corrections*, March 2009, at 17-21.

⁶⁰ Stemen, Don, *Reconsidering Incarceration, New Directions for Reducing Crime*, Vera Institute of Justice, January 2007.

Figure 14



States are now reexamining and revising the policy choices that led to such spectacular prison growth. As a result, in 2009, the United States prison population declined for the first time in 38 years. Twenty-six states reduced their prison rolls in 2009, including some of the toughest on crime states such as Texas, Mississippi and South Carolina, which have enacted reforms to stem the tide of growing prison populations.

Unfortunately, Florida was not among them. While modest policy changes over the last couple of years have caused Florida's prison admissions to decline (by 5.6 percent in FY2009-10 over the previous year, and by 5.3 percent in FY2008-09 – after increases in each of the previous 11 years), Florida's prison population nonetheless grew by 1,527 inmates in 2009, making it the state with the second largest uptick in its prison population last year. And on October 19, 2010, the Legislature's Criminal Justice Estimating Conference predicts that Florida's prisons will continue to grow – reaching 109,178 by FY2015-16.

The four main drivers of prison population growth

The policy changes Florida has made over the last thirty years are still very much being felt. Reviewing patterns of growth over the past thirty years, the Florida TaxWatch Government Cost Savings Task Force has identified four primary drivers of growth:

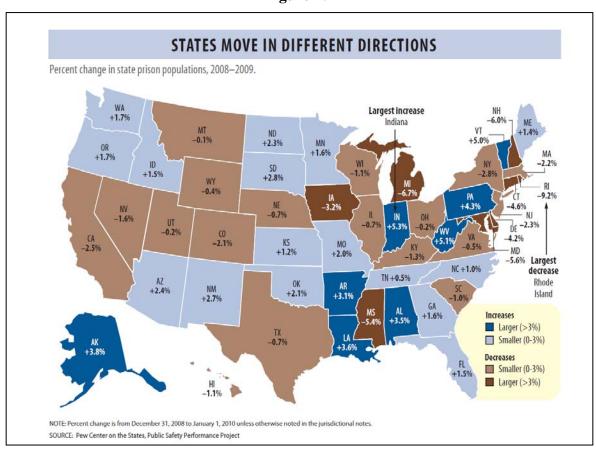
- The elimination of parole and the adoption of policies lengthening both sentences and the period of incarceration
- Widespread use of very short state prison sentences in lieu of community-based alternatives (e.g., jail, probation, treatment, electronic monitoring)
- State prison incarceration for technical probation violations
- Recidivism people *returning* to prison for new crimes or violations

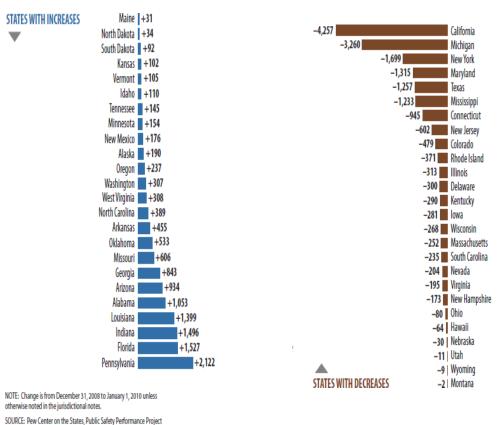
32

⁶¹ Pew Center on the States, *Prison Count 2010*, April 2010.

⁶² Pennsylvania had the largest increase.

Figure 15





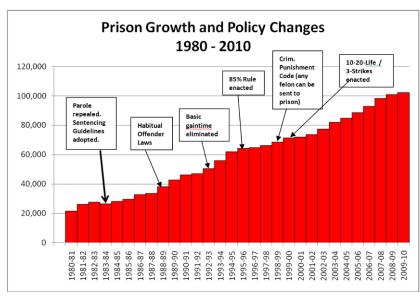
Florida's policy changes affected both sentencing and the period of actual incarceration in cases both of people convicted of minor nonviolent offenses (who after 1998 could be sent to prison for any felony) and those convicted of serious violent offenses (whose sentences were lengthened).

The elimination of parole and the adoption of policies lengthening sentences and incarceration have driven prison growth.

Parole was eliminated in 1983, which, in 1980, had been the method of release for 62% of the state's prisoners. eliminating parole, Florida followed the national "truth in sentencing" trend. Instead of the state evaluating whether an individual is appropriate for release under supervision, the majority of prisoners are not assessed for readiness fitness. Nor are they supervised upon release.

In FY2009-10, 64 percent of prisoners (23,909) were

Figure 16



Source: Florida Office of Economic and Demographic Research

released upon the expiration of their sentence, completely reversing the practice prior to 1983.

Approximately 5,000 are still eligible for parole; they were sentenced before 1983. But in FY 2008-9, 0.1 percent -- just 42 of the **37,391** inmates released -- were paroled. ⁶³

When parole was eliminated, basic gain time (which reduced the number of days of incarceration without regard to the inmate's conduct) came to be used as a tool in the eighties and early nineties to reduce prison overcrowding.

In 1995, in response to the use of gain time simply to decrease overcrowding and the resulting relatively low percentage of sentenced time actually served, and in response to certain high profile crimes, the Legislature enacted a law [944.275 (4)(b)(3), F.S.] requiring prisoners to serve 85 percent of their sentences and eliminated basic (non-merit) gain time, though it preserved incentive gain time.

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⁶³ Florida Dept. of Corrections Annual Report, 2008-09.

With the elimination of basic gain time and the restrictions placed on incentive gain time (based on good conduct) pursuant to the law mandating serving 85 percent of one's sentence, inmates began serving significantly higher percentages of their sentences.

Figure 17

Time Served is Lengthening: Truth in Sentencing (85% rule – Gain-time slashed)

In 1995, the Legislature enacted a requirement that individuals sentenced to prison must serve a minimum of 85% of their court-imposed sentence. Since imposition of 85% requirement, average time served in state prison has increased.

Average time served 87.0% 86.5

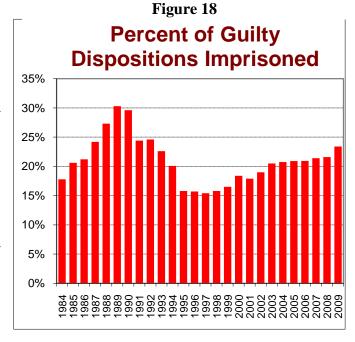
FY 2008-00 35.5 months

Incentive gain-time is limited to up to 10 days per month. When the inmate's tentative release date becomes equivalent to the 85% minimum service date, the inmate is prohibited from earning further gain-time awards.

In 1995, the Legislature also reduced the sentencing discretion of judges by creating presumptive minimum sentences through the establishment of sentencing guidelines, which were modified in

1994, and then again in 1995, 1996 and 1997, each time increasing the penalties. In 1998, the guidelines were prospectively repealed and replaced by the Criminal Punishment Code [921.002, et seq., F.S.] which maintains the basic structure of presumptive minimum sentences, while preserving upward discretion.

The Criminal Punishment Code allows a judge to sentence any person convicted of a felony to prison, whereas under the repealed Guidelines, people convicted of low-level felonies and without much in the way of a criminal history could not be sentenced to prison.

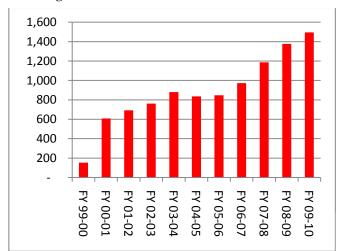


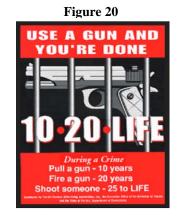
Source: Florida Office of Economic and Demographic Research

Presumptive sentencing generally serves to increase the percentage of people who are convicted being sent to prison, as has happened in Florida.

In 1999, the Legislature also increased the instances in which longer sentences and life sentences could be meted out. The law, officially 3-10-20-Life but colloquially called 10-20-Life, mandates stiff sentences for gun crimes. Incarceration under this law has increased by more than 145% since 2000, the first year of implementation.

Figure 19: Incarceration under 3-10-20-Life





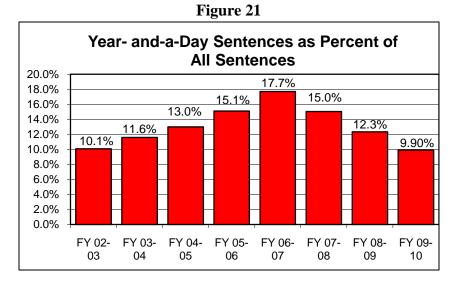
Source:

Florida Office of Economic and Demographic Research

Widespread use of very short sentences drives growth.

While stiffer sentences for serious crimes became the norm over the last few decades, another trend emerged as well. When judges were given the discretion to sentence people to prison who were convicted of the very least serious felonies (and as increasing numbers of felonies were created), that discretion came to be exercised in many counties to hand out sentences just long enough (one year and a day) that it would be served in state prisons (at state cost) rather than in local jails or community alternatives (at county cost). Such sentencing varies widely among the counties.

Source: Florida Office of Economic and Demographic Research



Clearly, the practice of year and a day sentences is not as widespread as just a few years ago, but the wide variations in its use are as prevalent as ever.

Figure 22

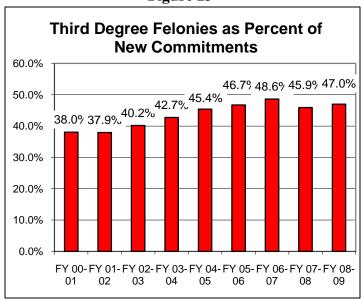
New Commitments and Change in New Commitments by County

	Counties Decreasing	Use of Year and A Da	Counties Decreasing Use of Year and A Day Sentences				
County	FY 2007-08	FY 2008-09	Change	Change %			
Hillsborough	3,846	3,090	(756)	-19.7%			
Broward	3,734	3,170	(564)	-15.1%			
Polk	2,429	2,049	(381)	-15.7%			
Pinellas	2,674	2,310	(364)	-13.6%			
Alachua	821	634	(187)	-22.8%			
Marion	1,349	1,173	(177)	-13.1%			
Miami-Dade	2,575	2,449	(126)	-4.9%			
Seminole	478	363	(115)	-24.1%			
Bay	1,146	1,039	(107)	-9.3%			
Volusia	1,157	1,054	(103)	-8.9%			
Okaloosa	519	426	(94)	-18.0%			
Sub-total	20,729	17,756	(2,973)	-14.3%			
	Counties Increasing	Use of Year and A Day	y Sentences				
Santa Rosa	239	321	82	34.3%			
Pasco	782	864	83	10.6%			
Martin	340	439	98	28.9%			
Escambia	1,136	1,275	1381	2.2%			
Brevard	1,194	1,340	145	12.2%			
SaintLucie	720	959	239	33.1%			
Orange	1,649	2,025	376	22.8%			
Duval	1,694	2,113	419	24.7%			
Sub-total	7,754	9,335	1,581	20.4%			
All other counties	12,008	11,641	(367)	-3.1%			
Total	40,491	38,732	(1,759)	-4.3%			

Source: Florida Office of Economic and Demographic Research

What is also apparent from analysis of the data is that there is no correlation among the counties regarding their relative population sizes, crime rates, felony filings, and prison admissions. For example, Miami-Dade County, with the largest population and the most felony filings sends *fewer* people to prison than Broward or Hillsborough County.

Figure 23



Contrary to common wisdom (and common sense), the majority of prison inmates have not been sentenced for serious or violent offenses.

In fact, Chart X shows that an increasing high percentage of Florida inmates are serving prison sentences for non-violent third-degree felonies (which is the lowest level of felony in Florida), which is largely due to the discretion granted to judges in 1995 to sentences such low level offenders to

Source: Florida Office of Economic and demographic Research

state incarceration (instead of jail sentences of less than 365 days). This situation also contributes to the growing share of inmates sentenced to short stents in prison.

Further contributing to the large share of short sentences is the percent of prisoners sentenced for crimes denominated "other."

Over the past thirteen years, the share of violent offenses accounting for prison admissions decreased by 28 percent. During that same period, the share of admissions for "other" offenses, i.e., offenses that are nonviolent, are not property crimes, and are not drug crimes increased by 189 percent.⁶⁴

One of the "other" offenses is driving with a suspended license -- the charge that landed a 78-year-old grandmother in the Broward County jail for 15 days in January 2010.65

Figure 24

FLOR	RIDA NEW CO	MMITMENT	S FOR OTHER O	FFENSES			
	Time period FY 2008-09 FY 2009-10		Percent FY 2008-09 FY 2009-10		Change	Percent Change	
Drive with license suspended/revoked	1,311	769	31.6%	23.9%	(542)	-41.3%	
Felony DUI (3rd or 4th conviction)	462	350	11.1%	10.9%	(112)	-24.2%	
Fleeing/eluding LEO offenses	1,072	918	25.8%	28.6%	(154)	-14.4%	
Sex offender registration offenses	567	512	13.7%	15.9%	(55)	-9.7%	
Remainder of offenses in "Other" category	741	666	17.8%	20.7%	(75)	-10.1%	
Total	4,153	3,215	100.0%	100.0%	(938)	-22.6%	

Some efforts have been made to address this problem, and fewer offenders were committed for "other" offenses in FY2009-10 than in FY2008-09, but even so 3,215 people were sentenced in FY 2009-10 to prison for "other" offenses, including 769 (accounting for 24% of all "other" offenses) for driving with a suspended or revoked license.

A final factor driving growth for low-level crimes – here drug and property offenses – is that the core definitions have not been revised in many years. When the dollar threshold making it a third-degree felony to steal \$300 in property was enacted, and when possession of less than an ounce of marijuana was made a felony, judges could not sentence most first-time third-degree felony offenders to prison.

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⁶⁴ Florida Dept. of Corrections Annual Reports, 1995-96 and 2007-08.

⁶⁵ Christensen, Dan, "Hallandale Beach grandma sent to jail -- and forgotten," Miami Herald, January 12, 2010.

Incarcerating people for technical probation violations drives growth, too

The terms of probation are set by the court at sentencing and typically include: reporting to the probation officer; permitting home visits by the probation officer; obtaining and maintaining employment; abiding by travel restrictions; paying restitution, fines and child support; complying with restrictions on living arrangements, associations, and contact with the victim; and submitting to required drug testing. Violating any of these terms can result in a technical probation violation, which can result in the implementation of a prison sentence by a judge.

Under the Criminal Punishment Code, judges have retained a measure of discretion in sentencing those convicted of low-level offenses (e.g., third-degree felonies) and may sentence those with fewer than 44 points on the required score sheet to a non-prison sentence. Often, this means placing the individual on probation. If the person sentenced to supervision violates the terms of supervision, the offender can be sent to prison *at the discretion of a judge*.

In 2003, the DOC implemented a "zero tolerance" approach to probation violations in the wake of a couple of high profile crimes committed by individuals under state supervision. Although the zero tolerance policy has since been rescinded and a more flexible approach relying on a judge's discretion has been implemented, probation violations and subsequent revocations are still driving growth. In fact, in FY 2009-10, 7,479 people were sent to prison not for committing a new crime but for technical probation violations.

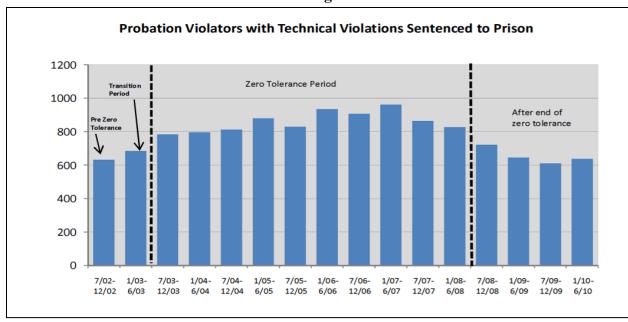


Figure 25

Finally, recidivism drives growth

While the Department of Corrections has revised its mission statement to include "reentry" [defined as "to protect the public safety, to ensure the safety of Department personnel, and to provide proper care and supervision of all offenders under our jurisdiction while assisting, as

appropriate, their re-entry into society"], and has committed to focusing on reducing recidivism, recidivism (as measured by returning to prison for a new crime or a probation violation) continues to drive prison growth.

Recidivism: Return to prison for a new offense or a technical violation

RECIDIVISM RATES OVER TIME

Three year recidivism rate by year of release

40.0%

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Figure 26

Other important issues in the growth of the criminal justice system

In addition to the four main drivers of prison population, people with mental illnesses in the criminal justice system raise important challenges because they are poorly addressed by the current system and add to the overall population levels. Likewise, the lack of intervention programs for juvenile delinquents and the failure of the current system to deter those delinquents from becoming tomorrow's prison inmates will continue to result in a more costly corrections system for Florida's taxpayers.

People with mental illnesses involved in the criminal justice system

Approximately 125,000 people experiencing serious mental illnesses (e.g., schizophrenia, bipolar disorder, major depression) are arrested and booked into Florida jails annually. On any given day, there are nearly 18,000 state prison inmates, 15,000 local jail detainees, and 40,000 individuals under correctional supervision in communities around the state who suffer from

serious mental illnesses. Although about half of these individuals are charged with low-level, non-violent offenses, many languish in prisons, jails and state-funded forensic treatment facilities for months or years because more cost effective placement alternatives do not exist.

Figure 27

Population on	Total prison	Number of inmates with	Inmates with mental illness as a percentage of
June 30th	population	mental illnesses	total inmate population
1996	64,333	6,777	10.5%
2009	100,894	17,957	17.8%
Growth:	56.8%	165.0%	69.0%

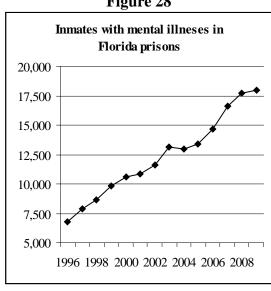
People with mental illnesses represent the fastest growing sub-population within Florida's prison system. Between 1996 and 2009, the overall inmate population in Florida prisons increased by 57 percent, but the number of inmates suffering from mental illness increased almost three times more over the same period.⁶⁶

Expand evidence-based mental health treatment.

Florida currently spends exorbitant amounts of money to provide mental health treatment services in prisons and other institutional settings; however the policies and practices that drive this investment are based on an outdated system of care that does little to prevent individuals from becoming involved in the justice system or to break cycles of crime and recidivism. In addition, the current system of care fails to account for the unique treatment needs and life experiences of people with justice system involvement.

Over the past several years, a task force convened by the Supreme Court of Florida has been working

Figure 28



with leaders from all three branches of government, as well as the state's leading experts on mental health and criminal justice, to address issues relating to the disproportionate representation of people with mental illnesses involved in the justice system. developed a report titled "Transforming Florida's Mental Health System," which details comprehensive recommendations for planning, leadership, financing, and service development. The recommendations made target evidence-based and sustainable approaches to treatment and service delivery that will help divert people with mental illnesses from the justice system into

⁶⁶ From 1996 – 2009 (the same time period), the number of prison inmates receiving ongoing mental health treatment in state prison increased by 165 percent. It is important to note that at least some of the increase in the number of people with mental health problems in prison is due to an increase in assessments and diagnosis of such conditions.

more appropriate community-based treatment and support services, while at the same time helping to ensure public safety. The report also outlines steps to begin shifting investment of state dollars from costly, deep-end services provided in institutional settings into more effective, efficient, and sustainable front-end services provided in the community. The Community Mental Health and Substance Abuse Treatment and Crime Reduction Act, which would implement many of the task force's recommendations, has been considered during past legislative sessions.

Recently, the Florida Senate released an interim project report reviewing preliminary outcomes of a pilot program implemented in Miami-Dade County which is based on recommendations made by the Supreme Court task force and targeted toward diversion of individuals from state forensic hospitals into community-based treatment and support services. The report identifies key systems level features necessary to ensure continuity of care and to effectively divert people away from the justice system including cross systems collaboration, effective communication, and leadership. In addition, the report identifies essential treatment elements necessary to ensure successful outcomes among justice system-involved individuals. Based on the early success of the program in Miami-Dade County, the Senate report suggests that the legislature may wish to expand the pilot program to other communities around the state. In addition, the Senate report recommends authorizing county court judges to order involuntary outpatient treatment as a condition of release for defendants re-entering the community who meet statutory criteria.

Florida's juvenile justice system – criminalizing youth instead of offenses

In Florida, prevention, diversion and progressive sanctions policies have resulted in safely implementing a significant reduction in commitments to DJJ between FY2005-06 and FY2009-10.⁶⁷ More than \$85 million was saved in FY2008-09 alone as a result of these policies. These outcomes are notable, but reform was long overdue in Florida. In 2006, Florida incarcerated children at a rate 50% higher than the national average.

Recently, much work has been done focused on improving Florida's juvenile justice system. One important example of the progress toward a smarter juvenile justice system is the creation of the Florida Department of Juvenile Justice's Blueprint Commission. The 25-member Blueprint Commission addressed key concerns in the juvenile justice system such as repeat offenders, overrepresentation of minorities, and a growing female population.

In January 2008, the Blueprint Commission published *Getting Smart About Juvenile Justice*, which focuses rehabilitating youth offenders and reducing the use of restrictive sanctions for low-risk and misdemeanant offenders while reserving those restrictive sanctions for serious and habitual offenders. The report offers numerous suggestions for reforming Florida's juvenile justice system in ways that will rehabilitate and improve the lives of juvenile offenders, increase

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⁶⁷ From FY2005-06 to FY 2009-10, the number of DJJ commitments decreased by 28%. During the same period the overall crime rate also fell, which undoubtedly accounts for some portion of the decrease.

public safety, and produce significant savings for the state. Some of the recommendations have been implemented, but many have not yet been.

In spite of determined efforts and substantial progress over the past five years, there is still significant room for improvement.

Florida has adopted a practice of criminalizing youth offenders instead of criminalizing the offenses. From 2000 to 2008, the average length of stay for juveniles in residential facilities increased by 30%, a trend that cost nearly \$20 million last year alone. ⁶⁸ Not only is the average length of stay too long, the number of incarcerated youth is too high.

DJJ continues to incarcerate large numbers of relatively low-risk youth. Nearly half (44%) of all children admitted to DJJ facilities in FY2008-09 were committed for misdemeanors and violations of probation.

Florida will spend more than \$50 million on children committed to non-secure residential facilities on misdemeanors and probation violations this year. Most of these youth are housed in large, congregate-care detention centers awaiting court hearings and are held in custody at costs ranging from \$100 to more than \$300 per day.

Few of these youth offenders are confined for serious offenses. Most are charged with non-violent property or drug crimes and 40% of all children are committed for technical violations of probation or misdemeanors, including non-violent property offenses and public order violations.

Reforms, such as prevention, intervention, diversion, and treatment, cost less than commitment. They are also better at holding youth accountable and reducing recidivism. While Florida must continue to incarcerate youth who pose serious risks to public safety, detention and incarceration of young people should be an option of last resort.

Tools such as risk assessment and sentencing guidelines let jurisdictions distinguish between youth who pose risks to public safety and those who would be better and more cost effectively served in less-restrictive settings.

Many juvenile justice systems have embraced community-based alternatives to institutionalization. These systems improve the life chances of juveniles in the justice system and reduce unwarranted costs while enhancing public safety.

Getting smart on crime requires efficient and effective use of limited resources in prevention, diversion, and intervention programs, especially when it comes to juvenile justice.

Conclusion

As we have seen, Florida's 11.4-fold rate of prison population growth is simply unsustainable. There are more effective, less costly policy choices we can make to protect and improve public

⁶⁸ Analysis by the Southern Poverty Law Center (unpublished report).

safety. The recommendations below address each of the policy choices that have led to these drivers of prison growth:

- The elimination of parole and the adoption of policies lengthening sentences and incarceration
- Widespread use of very short sentences
- Incarcerating people for technical probation violations
- Recidivism people returning to prison for new crimes or violations
- The lack of alternatives for people with mental illnesses
- The juvenile justice's failure to rehabilitate system (i.e., criminalizing youth instead of offenses)

Justice Reform Recommendations

Section I: Big Picture Recommendations

The first four recommendations will not result in immediate (i.e., July 1, 2011) cost savings, but are essential to long-term cost containment and the improvement of public safety.

11. <u>Create a commission to do a top-to-bottom review of the Criminal Justice System and Corrections</u>

Florida has not conducted a comprehensive review of the laws and policies that have been driving its prison growth, nor does it have an entity charged with the responsibility of doing so.

Senate Bill 2000, passed in 2008 (Chapter No. 2008-54), established the Correctional Policy Advisory Council, which was to evaluate "correctional policies, justice reinvestment initiatives, and laws affecting or applicable to corrections, and for the purpose of making findings and recommendations on changes to such policy, reinvestment initiatives, and laws," and to advise the Legislature and Governor on such matters. Members were appointed but the Council never met; and the enabling legislation provides that the Council shall be abolished on July 1, 2011.

Such a body, but expanded in both scope and membership, is essential to the deliberative process necessary for meaningful, sustainable, cost-effective justice reforms. Virtually every state that has made the substantive policy changes that have succeeded in reducing the size of their corrections population has accomplished this through a bipartisan deliberative body engaging all three branches of government. Indeed, the Pew Center on the States' Public Safety Performance Project requires such a cooperative effort for it to provide technical assistance in identifying the key drivers of prison growth and developing a menu of options to reverse the trend.

While this report contains many recommendations that can save tax dollars and improve public safety, we know it does not address all of the possibilities. Florida needs the contributions that such a deliberative body could add to justice reform.

Recommendation: The Governor, with the bipartisan, bicameral cooperation of the legislature and judiciary, create a commission composed of members of the executive, legislative and judicial branches along with experts in criminology, sentencing, corrections, veterans affairs, mental health, substance abuse, reentry, and community supervision to do a top-to-bottom data-driven assessment of Florida's corrections and criminal justice system with a focus on cost-effective ways to improve public safety while slowing prison growth. This commission should be required to produce comprehensive, actionable reforms in time for consideration by the legislature in 2012.

12. <u>Establish an independent oversight body over the Departments of Corrections and</u> Juvenile Justice

As the bipartisan Commission on Safety and Abuse in America's Prisons found in 2006, "All public institutions, from hospitals to schools, need and benefit from strong oversight. Citizens demand it because they understand what is at stake if these institutions fail. Prisons and jails should be no exception. They are directly responsible for the health and safety of millions of people every year, and what happens in correctional facilities has a significant impact on the health and safety of our communities. Corrections leaders work hard to oversee their own institutions and hold themselves accountable, but their vital efforts are not sufficient and cannot substitute for external forms of oversight."

As the March 2010 Florida TaxWatch report⁶⁹ and *Florida Trend* reported in July 2009, the critical component of any such oversight is the entity's independence. Under current law, the Corrections and Juvenile Justice inspectors general are appointed by the agency's secretary and may be removed without cause by the secretary. Indeed, in 2003, the Secretary of DOC fired the Inspector General who was uncovering the misconduct of a DOC employee who was a friend of the Secretary. Later, both the Secretary and the employee who was being investigated were indicted and incarcerated by the federal government – but by then, correctional oversight had already been compromised.

No scandal involving the Florida DOC inspector general's office has emerged since that time, but structurally, with the IG responsible to no one but the Secretary and able to be fired at will, there simply is not the independence needed. Nor is there adequate transparency. The IG's very brief annual report (most of it lays out its duties and authority rather than what has been accomplished) provides data on the number and types of investigation, but nothing whatever about their disposition, except how many cases are referred for prosecution.

There are a number of models for independent corrections oversight. California, for instance, created an independent inspector general's office, which has broad oversight -- investigatory, monitoring and inspecting, along with a requirement that each warden be audited one year after appointment and each prison audited every four years.

Currently, Florida has oversight of medical and mental healthcare established through the Correctional Medical Authority (CMA) and this could serve as a model for general oversight.

The American Bar Association has studied the various types of oversight of corrections agencies in place among the states and in other nations and has developed a set of key requirements of effective correctional monitoring. Among these requirements are:

• Independence from corrections

⁶⁹ Bragg, Cecil T., CPA, "How Independent Are Florida Inspectors General?," March 2010

- Headed by a person appointed for a fixed term by an elected official, subject to legislative confirmation, and subject to removal only for just cause
- Sufficient expert and trained staff
- Duty to conduct regular inspections of the facilities, as well as the authority to examine, and issue reports on, a particular problem at one or more facilities.
- Authorization to inspect or examine all aspects of a facility's operations and conditions
 including, but not limited to: staff recruitment, training, supervision, and discipline;
 inmate deaths; medical and mental health care; use of force; inmate violence; conditions
 of confinement; inmate disciplinary processes; inmate grievance processes; substanceabuse treatment; educational, vocational, and other programming; and reentry planning.
- Authority to conduct both scheduled and unannounced inspections
- Authority to obtain and inspect any and all records, including inmate and personnel records, bearing on the facility's operations or conditions.
- Authority to conduct confidential interviews with any person, including line staff and inmates, concerning the facility's operations and conditions; to hold public hearings; to subpoena witnesses and documents; and to require that witnesses testify under oath.
- Requirement of an annual report of its findings and activities that is public, accessible through the Internet, and distributed to the media, the jurisdiction's legislative body, and its top elected official.⁷⁰

Recommendation: An independent entity, accountable to the governor, legislature and the people of Florida, should be established with oversight, investigating, inspecting, monitoring and reporting authority over state corrections and juvenile justice and their facilities. It should also establish performance measures and review and report on the data collected pursuant to such measures.

13. <u>Develop risk / needs assessment and cost-analysis tools to be used at the time of sentencing (Missouri model)</u>

Since Florida first enacted its Sentencing Guidelines in 1983, Florida's sentencing policy has explicitly rejected rehabilitation as a primary purpose of sentencing. Today, under the Criminal Punishment Code, adopted in 1998, the policy reads: "The primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment."⁷¹

⁷⁰ American Bar Association, "Key Requirements for the Effective Monitoring of Correctional and Detention Facilities", August 2008.

⁷¹ 921.002 (b), The Criminal Punishment Code

Thus, the calculation used to determine the sentence focuses not on risk or needs, or the likelihood of reoffending, but on the appropriate dose of punishment, based on static risk factors such as the nature of the primary offense and any additional offenses, prior criminal history, and injury to the victim. These are factors that cannot change and thus cannot be addressed through targeted interventions.

Florida's sentencing policy is consistent with the trend across the U.S. that began in the late seventies with determinant sentencing, focusing on punishment (called "just deserts"), deterrence and incapacitation. (It must be said that all states did not move in this direction. For instance, Article 1, Section 12 of the Alaska constitution provides that "Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation.")

Yet, as a 2006 National Conference of State Courts survey found, "the top concerns of state trial judges hearing felony cases included the high rates of recidivism among felony offenders, the ineffectiveness of traditional probation supervision and other criminal sanctions in reducing recidivism, restrictions on judicial discretion that limited the ability of judges to sentence more fairly and effectively, and the absence of effective community corrections programs. The survey also found that the state chief justices believed that the most important sentencing reform objective facing the state courts was to improve public safety and reduce recidivism through expanded use of evidence-based practices and programs, including offender risk and needs assessment tools."⁷²

While evidence-based approaches to rehabilitation have been most commonly associated with prison and community-based programs, states, in response to this frustration and stubborn recidivism rates, have been developing policies and practices that address risk at the time of sentencing so that the sentence is most appropriate to the individual defendant's risks of recidivating.73

Accordingly, states are moving away from policies that barely consider the public safety objective of reducing recidivism (and thus reducing crime) and are instead embracing sentencing policies and practices based on what research has demonstrated and which helps to rehabilitate people convicted of crimes and to reduce recidivism. This is at the heart of drug courts and other treatment-oriented courts (also called problem-solving courts), regardless of whether the official state policy favors or eschews rehabilitation.

Among the practices being adopted are:

⁷² Warren, Roger K., Evidence-Based Practice to Reduce Recidivism: Implications for State Judiciaries, for the Crime and Justice Institute, National Institute of Corrections, and National Center for State Courts, The Crime and Justice Institute and the National Institute of Corrections, Community Corrections Division, 2007.

⁷³ See. e.g., Pew Center on the States, Public Safety Policy Brief, "Arming the Courts with Research: 10 Evidence-Based Sentencing Initiatives to Control Crime and Reduce Cost," May 2009.

- Establishing recidivism reduction as an explicit sentencing goal. The Oregon Judicial Conference, for example, requires judges to consider the sentence's potential impact on reducing future criminal conduct.
- Building flexibility into the sentencing laws so that judges can mete out sentences that are aimed at reducing recidivism. As the Pew Center on the States has found, "The research indicates that whether a particular offender is an appropriate candidate for recidivism reduction cannot accurately be assessed relying solely on the type of offense committed and the offender's prior criminal history. Individual offender characteristics must also be taken into consideration. This means shorter or probationary sentences for some offenders, and perhaps longer prison terms for others."⁷⁴
- Using risk and needs assessments in formulating a sentence. Rather than focusing only on the unchangeable static factors (nature of the crime, criminal history, etc.) a validated tool that assesses "dynamic" risks and criminogenic needs (e.g. low self-control, substance abuse, antisocial attitudes, criminal thinking) can guide sentencing so that it results in effective treatment.

Missouri's Sentencing Commission has developed a web-based tool for judges to use in sentencing that provides them extensive information about sentencing options and the risks and costs associated with each alternative. The tool is available for use by judges, prosecution, defendants and their attorneys, and the public. The user simply types in the code number for the highest level offense upon which the defendant has been (or will be) convicted, along with demographic, criminal history, substance abuse involvement, education and other information about the defendant, and the tool provides the user with the recommended sentences, the risk assessment, recidivism projections and the costs of incarceration, supervision, and community alternatives, including treatment where warranted.

Recommendation: The commission appointed pursuant to Recommendation #12 should lead the development of a similar web-based tool for purposes of illuminating sentencing options, defendant risk reduction and sentencing costs.

Section II: Cost-saving recommendations related to sentencing people convicted of Low-level offenses /short-term sentences

As DOC reports in its annual sentencing report,⁷⁵ one of the notable impacts of the 1998 repeal of the Sentencing Guidelines and the enactment of the Criminal Punishment Code is that "all felony offenders have the potential to receive a prison sentence, whereas many under the

⁷⁴ *Id*.

⁷⁵ Florida Department of Corrections, Florida's Criminal Punishment Code: A Comparative Assessment, September 2009.

guidelines were, by policy, excluded from such a possibility." In FY2008-09, only 28.2 percent of the new admissions to prison were incarcerated for violent crimes; the rest were admitted for drug, property or "other" offenses. Sentencing practices vary considerably from county to county, but all counties send increasing numbers of nonviolent low-level offenders to prison.

14. Require written justification for state prison sentences given to individuals with low sentencing scores – 44 or less (currently 22 or less)

Under Florida law, a person who has been convicted of a felony in the third-degree may be punished by a term of imprisonment not exceeding 5 years. The discretion provided judges is limited, however, by the Criminal Punishment Code, which essentially establishes minimum sentences. Under the Code, sentencing scores are used to calculate the *lowest* permissible sentence. Offenses are ranked under this law according to the seriousness of the most serious offense from one to ten. Calculation of the total sentence points includes multiple factors, such as secondary offenses, injury to the victim, and prior record.

If the total number of sentence points equals or is less than 44 points, the *lowest* permissible sentence is a non-state prison sanction, ⁷⁸ but the non-state sanction is still within the discretion of judge to impose or not. Until 2009, a judge had unfettered discretion to sentence any person convicted of a third-degree felony for up to five years in prison, regardless of the total sentence score calculated under the Criminal Punishment Code. That year, the Legislature had discovered that thousands of defendants with point scores less than the 44-point threshold recommended for a prison sanction were nonetheless sentenced to state prison.

Effective July 1, 2009, 775.082, F.S., (SB 1722) was amended to require the court to sentence those with 22 points or less (and that have not been convicted of a forcible felony) to a non-state prison sanction unless the court makes written findings that a non-state prison sanction could present a danger to the public.

Still, as OPPAGA reported in October 2010, in FY2009-10, 11.5% of defendants with sentencing scores between 22 and 44 were sent to prison (1,470 individuals), and 2.6% (364 people) of those with scores of 22 and below were sent to prison.⁷⁹ This is a reduction over the previous fiscal years, but it is not sufficient.

⁷⁶ Section 775.082, F.S., specifies the penalty structure for the different felony classifications.

⁷⁷ (Chapter 921, the Criminal Punishment Code applies to defendants whose non-capital felony offenses were committed on or after October 1, 1998.)

⁷⁸ Section 775.082, F.S., specifies the penalty structure for the different felony classifications.

⁷⁹ OPPAGA, Without Changes, Expansion Drug Courts Unlikely to Realize Expected Cost Savings, Report No. 10-54, October 2010

Figure 29: Sentencing Scores and Sentences FY 2007-08 and FY 2008-09

	Recommended Sanction Category								
Sanction Imposed	FY 2007-2008 Sentence Dates ¹				FY 2008-2009 Sentence Dates ²				
	22.0 Points or Less	22.1 to 44.0 Points	More than 44.0 Points	Total	22.0 Points or Less	22.1 to 44.0 Points	More than 44.0 Points	Total	
Ctata Driana	1,230	5,150	13,530	19,910	1,204	5,145	13,325	19,67	
State Prison	3.4%	13.2%	60.7%	20.4%	3.9%	13.8%	61.2%	21.89	
	997	2,234	1,203	4,434	872	2,152	1,273	4,29	
Community Control	2.8%	5.7%	5.4%	4.6%	2.8%	5.8%	5.8%	4.89	
	23,160	18,009	4,507	45,676	19,914	17,625	4,491	42,03	
Probation	64.1%	46.3%	20.2%	46.9%	63.9%	47.4%	20.6%	46.79	
22 2 2 2	10,416	13,022	2,903	26,341	8,910	11,911	2,551	23,37	
County Jail	28.8%	33.4%	13.0%	27.1%	28.6%	32.0%	11.7%	25.99	
2	336	520	154	1,010	245	338	124	70	
Other	0.9%	1.3%	0.7%	1.0%	0.8%	0.9%	0.6%	0.89	
	36,139	38,935	22,297	97,371	31,145	37,171	21,764	90,08	
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.09	

According to the data provided in the above figure, a 10% diversion of individuals with 44 or less points would save \$1.6 million, annually. If half of these individuals could be successfully diverted from prison, the state could realize an annual savings of \$31.4 million. ⁸⁰

<u>Recommendation:</u> 775.082, Fl. Statutes should be further revised to require written justification for sentencing individuals with 44 or fewer points to state prisons.

15. <u>Incentivize localities for reducing their rates of state incarceration and increasing local alternatives</u>

Florida, like many other states, has been tracking and wrestling with the increasing phenomenon of local courts sentencing individuals to state prison under circumstances that would have equally warranted, under existing law, local jail sentences or community-based alternatives.

In some states, the cost of local incarceration is borne by local governments (in Florida, it is the counties), while the cost of state prisons is borne wholly by the state. In Florida, this may be one of the reasons behind the common use of year-and-a-day sentences (and year-and-a-month in one county), which, by law, send individuals to state prison at state cost. A sentence of just one day less and the costs would inure to the county.

In many cases, the state prison sentence actually served is just a few months because the majority of the sentence has already been served (and credited against the total) in jail, pending disposition of the case. Significantly, on a per-bed basis, the first six weeks of the sentence are the most costly because every new prisoner begins the sentence at a reception center and the per-

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⁸⁰ The average daily cost of \$44.03 per inmate was used in calculations (weighted average that excludes the daily cost of reception centers based on the Florida Department of Corrections FY08-09 Budget Report.) These estimates accounted for \$5,000 in assumed diversion program costs per diverted offender.

diem at such facilities (\$85.94) is more than twice the cost of a bed, for instance, in a typical male facility (\$42.31). Thus, the cost of a short-term sentence can be far greater per day than that of a longer term sentence.

In light of this phenomenon, some states are looking to reverse or lessen the incentives to impose state prison sentences on people who would be equally or better served in the local community – or specifically incentivize counties for keeping low-level offenders out of state prison.

In Illinois, for example, the Crime Reduction Act (Public Act 96-0761) established the Adult Redeploy Illinois program (based on its successful Juvenile Redeploy program), which provides financial incentives to local jurisdictions for designing community-based programs to treat offenders in the community instead of sending them to state prisons.

In states such as California, Colorado, Arizona, Kansas and Alabama, incentive funds are also being made available to localities to reduce recidivism and to reduce the number of probation revocations that land people back in prison. Indeed, in 1968, when Ronald Reagan was governor of California, one of the strategies employed to reduce the prison population by 34 percent over the course of his governorship was to provide counties incentives to keep individuals from being sent to prison.⁸¹

There are many possible approaches to incentivizing local sentences. If, for example, the state reimbursed counties 50 percent of the savings achieved when counties reduce the number of offenders sent to state prison that are instead sentenced to local options (jail or community-based alternatives, including electronic monitoring), taxpayers would save 50% of the cost of diverting each such person from state prison, and the localities would reap the benefit of funds they would not have otherwise. Of course, critical to such an approach is assurance that these are true diversions and not local sentences of people who would have been locally sentenced anyway. Therefore, counties would be able to access state funds only if they materially reduce the number of low-level offenders sent to state prison, which would be measured against a baseline rate of offenders that each county sent to state prison in previous years.

From FY 2005-FY 2009, an average of 14% of all new commitments has been sentenced under the year-and-a-day practice. This is an average decline of approximately 9% in year-and-a-day sentencing over the previous five years. 82 Assuming that many of the individuals sentenced to a year and a day would be the ones that would avoid prison if proper incentives were provided to the counties, and assuming the percent of new commitments sentenced to a year-and-a-day remains constant at 14%, it is **estimated that expanding state prison diversion would result in \$4.7 million to \$93 million savings over the next three years. Assuming the percent of**

⁸¹ Palta, Rena, Prison Overcrowding: What Would Reagan Do?: San Francisco Chronicle, Oct. 4, 2010

⁸² Calculations use prison data and projected new commitments from the Justice Estimating Conference. The average daily cost of \$44.03 per inmate was used in calculations (weighted average that excludes the daily cost of reception centers based on the Florida Department of Corrections FY08-09 Budget Report). These estimates accounted for \$5,000 in assumed diversion program cost per diverted offender.

inmates sentenced to a year-and-a-day continues to decline 9% annually, it is estimated that Florida would save between \$2.6 million and \$51.3 million.

Figure 30: Estimated Cost Savings

8							
Scenario 1- Approximately 14% of new commitments sentenced year-and-a-day							
	Number of Eligible New Entrants	50% Diverted	25% Diverted	10% Diverted			
FY2011-12	4,934	\$30,930,877.98	\$15,465,438.99	\$1,546,543.90			
FY2012-13	5,008	\$31,395,152.71	\$15,697,576.36	\$1,569,757.64			
FY2013-14	5,108	\$32,022,669.60	\$16,011,334.80	\$1,601,133.48			
Scena	Scenario 2 - Average 9% annual decline in number of new commitments with						
	yea	ar-and-a-day senter	ices	,			
Number of Eligible New Entrants 50% Diverted 25% Diverted 10% Diverted							
FY2011-12	2,986	\$18,718,286.51	\$9,359,143.25	\$935,914.33			
FY2012-13	2,719	\$17,047,166.95	\$8,523,583.47	\$852,358.35			
FY2013-14	2,477	\$15,525,240.56	\$7,762,620.28	\$776,262.03			

<u>Recommendation:</u> Florida should reverse the incentives counties now have to send people convicted of low-level nonviolent crimes to state prisons and reward them for sentencing them to community-based alternatives.

16. Align Florida's marijuana and cocaine possession laws with other Texas and other similar states

Florida laws authorize the incarceration in state prisons for the possession of very low quantities of drugs. Possession without intent to deliver or distribute of over 20 grams (7/10th of an ounce) of marijuana in Florida is a felony punishable by up to five years in prison. By contrast, in Kentucky and New York to reach felony level, the accused must have possessed 8 ounces or more (11 times the Florida felony amount); in Texas, it's 4 ounces.

Possession of *any* amount of cocaine is also a felony in Florida and this offense has been a major driver of prison growth.

People convicted of drug offenses make up 19.8% of the prison population; those convicted of simple possession of cocaine made up 19% of new commitments (1,938 people) for drug offenses in 2009. According to OPPAGA, "1,265 drug possession inmates currently in prison scored fewer than 5 prior record points (likely no significant prior offenses). If half were diverted, the state would save \$10.4 million annually." ⁸³

⁸³ OPPAGA, Research Memorandum, Options for Reducing Prison Costs, March 3, 2009.

Across the country, states are making changes in their drug laws to reduce penalties from felonies to misdemeanors.⁸⁴ For instance, in 2010, the Colorado legislature amended its drug possession laws to make possession of most drugs (e.g., cocaine and heroin) a misdemeanor rather than a felony (and marijuana possession is decriminalized in Colorado). Colorado is reinvesting the money saved in treatment programs.⁸⁵

As of July 1, 2010, there were 2,260 inmates in custody of the Florida Department of Corrections due to charges of illegal possession of marijuana or cocaine. One third of these inmates were first-time offenders. The average maximum sentence for illegal possession is 2.9 years with an average of 2.17 years for first time offenders. If half of the first-time offenders were diverted from prison, the state could save approximately \$6.7 million, annually. A 50% reduction in all current drug offenders serving time for cocaine or marijuana possession would constitute a savings of \$21.2 million.

<u>Recommendation:</u> The Florida Legislature should amend 893.13(6)(b), Florida Statutes, to reclassify low-level marijuana and/or cocaine possession as a misdemeanor.

17. Update value thresholds for property felonies

In Florida, most theft, fraud and other property offense laws establish the dollar threshold that makes the crime a felony at \$300; other thresholds are even lower. For instance, for food stamp fraud it is \$200. For fraud through issuing a worthless check or stopping payment on a check, it is \$150. And for removal of a from rental property if a landlord's lien has been placed on it, it is \$50. Florida also makes the theft of specific objects (e.g., pigs) a felonious theft regardless of value.

As with the changes other states are making to their drug laws by raising the weight level thresholds that make drug possession crimes a felony, other states are also raising the dollar value thresholds that make property crimes felonies.

Among the states that have raised their thresholds for felony property crimes are South Carolina (increasing the threshold for felony malicious injury to animal or property from \$5,000 to \$10,000); Delaware (Class G felony computer crimes from \$500 to \$1,500); Montana (increased threshold dollar amounts for a number of felony property crimes from \$1,000 to \$1,500); Washington (increased minimum threshold of Class C felony property crimes from \$250 to \$750).87

See, e.g., Vera Institute of Justice, Criminal Justice Trends; Key Legislative Changes in Sentencing Policy, 2001–2010; September 2010.

⁸⁵ Colorado Criminal Justice Reform Coalition, 2010 Legislative Summary.

⁸⁶ As of July 1, 2010, 712 were first-time offenders. Estimates assume an average per diem cost of \$52.00 for public institutions and \$45.53 for private institutions.

⁸⁷ *Id*.

As of July 1, 2010 there were 1,581 inmates in custody of the Florida Department of Corrections with carrying charges of grand theft between \$300 and \$5,000. The average maximum sentence for all of these individuals is 2.93 years. For every 1% inmates with grand theft charges diverted from prison, the state could save approximately \$296,000 annually.⁸⁸

<u>Recommendation:</u> The Florida Legislature should increase the dollar thresholds that make property offenses a felony and reexamine offenses made felonious based solely on the type of property stolen.

18. Amend the driving with a suspended license law to reduce the penalty from felony to misdemeanor when the reason for the suspension is inability to pay a financial obligation

Just a few years ago there was a spike in the number of people being sent to state prison for driving with a suspended license. This happened as a result of the Legislature having made a number of changes in the law over the years that made the failure to meet an increasing list of financial obligations (for instance, court fines and child support) cause to suspend a driver's license.

With more such failures punishable by license suspension, there were more felony convictions for driving a third time with a suspended license. In 2003, the increase was 10.8 percent; in 2004, it was another 10.4 percent.

The Legislature responded, passing a law⁸⁹ that changed what had been a felony for repeated convictions for driving with a suspended license to a misdemeanor for the many offenders whose convictions had resulted from the inability to make payments on obligations. However, a qualifier was put in the law, namely that this change did not apply "if a person does not have a prior forcible felony conviction as defined in s. <u>776.08</u>, F.S" – no matter how long ago.

As of July 1, 2010, there were 1,023 inmates in custody of the Florida Department of Corrections held on charges of driving with a suspended license with an average maximum sentence of 4.79 years. For every 1% of these individuals diverted from prison, the state could save approximately \$179,000 annually.⁹⁰

Recommendation: The Legislature should rescind this qualifying language and that driving with a suspended license, when the suspension was due to failure to pay a financial obligation, be recast as a misdemeanor offense in all instances.

⁸⁸ This assumes that this prison population represents an accurate sample of relevant offenders incarcerated by Florida at any given time. Estimates assume an average per diem cost of \$52.00 for public institutions and \$45.53 for private institutions.

⁸⁹ CS/SB 1988.

⁹⁰ An average per diem cost of \$52.00 is used for inmates housed in a public institution and an average per diem cost of \$45.53 is used for inmates housed in a private institutions.

19. Expand electronic monitoring as an alternative to state prison sentences

In January of 2010, a significant study prepared for the National Institute of Justice and produced by Florida State University Center for Criminology and Public Policy Research looked at the impact of Florida's electronic monitoring (EM) policies and practices. It found that "EM reduces the likelihood of failure under community supervision. The reduction in the risk of failure is about 31%, relative to offenders placed on other forms of community supervision." ⁹¹

The findings of this study show that EM is effective for offenders under a variety of different types of supervision and that involve varying levels of control and conditions, and across crime types and age groups.

The research team recommended that "there needs to be a reevaluation of the criteria the judiciary uses in EM placement, as well as laws which unilaterally mandate EM for specified offender types, regardless of whether the research indicates that it will make a difference in behavior."

Cost savings can be realized through the release of nonviolent inmates at different levels of their incarceration and utilize EM throughout the remainder of the sentence versus keeping them until they serve 85% of their sentences. Given varying rates of success, the state could save between \$1.14 million and \$11.4 million for FY2011-2012 if EM is used for the last 20% of the sentence. If that sentence percentage is increased, the state could save between \$4.4 and \$43.8 million if EM is used for the remaining 35% of the sentence, given various success rates. ⁹²

Figure 31: Estimated Cost savings 93 **FY2011-12** (Monitoring the remaining sentence via EM)

Success Rate	Final 20% of Maximum Sentence	Final 25% of Maximum Sentence	Maximum Maximum Sentence Sentence	
100%	\$11,417,106	\$22,655,389	\$33,462,449	\$43,778,758
50%	\$5,708,553	\$11,327,694	\$16,731,224	\$21,889,379
25%	\$2,854,276	\$5,663,847	\$8,365,612	\$10,944,689
10%	\$1,141,711	\$2,265,539	\$3,346,245	\$4,377,876

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⁹¹ Bales, Bill, et al., A Quantitative and Qualitative Assessment of Electronic Monitoring, Report Submitted to the Office of Justice Programs, National Institute of Justice, U.S. Department of Justice, The Florida State University College of Criminology and Criminal Justice, Center for Criminology and Public Policy Research, January 2010

⁹² The savings are calculated for the period between July 1, 2011 and June 30, 2012, using a cross section of the inmate population in custody of the FDOC as of July 1, 2010. An average per diem cost of \$52.00 is used for inmates housed in a public institution and an average per diem cost of \$45.53 is used for inmates housed in a private institution. An average per diem cost of \$8.94 is used for EM.

⁹³ Estimates based on release of nonviolent inmates without any prior commitment to the state prison system. Estimates do not include costs to administer the EM program, which could potentially be off-set through fees to individual offenders (dependent on successful collection of such fees), or any potential increase of workload for DOC patrol officers or other law enforcement officers, if necessary.

Recommendation: The Legislature should expand authority for the use of electronic monitoring as an alternative to incarceration either at sentencing or as part of a reentry program at the end of a prison sentence.

20. Expand adult post-adjudicatory drug courts

In 2009, with federal funds, the Legislature established eight post-adjudicatory drug courts with the goal of diverting otherwise prison-bound offenders and saving corrections costs. At the same time, the legislature directed OPPAGA to evaluate these courts' effectiveness.

In October 2010, OPPAGA released its report, finding that while the drug courts were operating as directed, the cost savings anticipated were not realized because "initial admissions targets overestimated the potential population of offenders who would qualify for the programs and strict eligibility criteria limited admissions. Some programs also appear to be serving offenders who would be unlikely to be sentenced to prison in the absence of drug court."⁹⁴

The 2009 legislation was expected to divert 4,000 people from prison and thereby save \$95 million in Corrections costs. The 2010 midyear target was 900 diversions; instead, the courts served 324 people.

Those admitted met the statutory criteria that they "had no prior or current violent felony offenses, had committed third-degree nonviolent felony offenses or received technical violations of probation, and had sentencing scores of 52 points or fewer." But most participants scored below 44 points.

Significantly, according to OPPAGA, "Judges in six of the eight expansion counties are certifying that the offenders admitted to drug court with sentencing scores below 44 points would have been sentenced to prison in the absence of drug court. [See Recommendation #5 above] However, in Polk and Orange counties it appears that drug court participants would *not* have been sentenced to prison in the absence of this alternative.

OPPAGA found that 92% of offenders in these counties scored below 44 points. (The Legislature's Office of Economic and Demographic Research has found that Polk has recently cut its (related) year-and-a-day commitments by 40%.)

Recommendation: The Legislature should enact legislation adopting the recommendations made by OPPAGA related to expanding drug court criteria by: 1)Authorizing drug courts to serve offenders who are cited for technical violations of probation other than a failed substance abuse test, if substance abuse was the main factor at the time of their violation; and 2)Giving judges discretion to allow offenders with prior violent offenses who are appropriate for treatment and do not present a risk to public safety to participate in expansion drug court.

 $^{^{94}}$ Without Changes, Expansion Drug Courts Unlikely to Realize Expected Cost Savings, Report No. 10-54, October 2010

Section III: Recommendations relating to incarceration, release, supervision and reducing recidivism.

Florida must not only address the front-end drivers of prison growth, but also the policy choices that maintain the large numbers of people in prison and that fail to address recidivism reduction.

21. <u>Institute adult post-incarceration drug courts</u>

While 26.7 percent of those entering Florida prisons in 2009-10 were sentenced for drug crimes, over 50 percent need substance abuse treatment. Approximately 60 percent of all arrests in Florida are for crimes committed either under the influence of drugs and alcohol or are committed to acquire drugs or alcohol.

As of December 31, 2009, there were 23,463 inmates serving time for property crimes (e.g., any burglary, theft or fraud). 97 If at least 30 percent of these inmates committed their crime for drug related reasons, then there are more than 7,040 individuals in Florida's prisons who committed property crimes and are in need of drug rehabilitation.

Concurrently, there are 19,723 drug offenders (e.g., possession, trafficking, and manufacturing) serving in Florida's prison system. Although drug rehabilitation programs exist within state facilities, they serve a fraction of those needing treatment. DOC established a goal of increasing the number of inmates participating in substance abuse treatment programs by 10 percent annually, but it started from a baseline of just 4,902 inmates receiving primary treatment (while 39,361 receive screening assessments) during FY2008-09.

Significant savings could be achieved if certain offenders were allowed to receive treatment outside of the confines of prison during the last portion of their prison sentence, and research shows that programs in the community produce twice the impact on recidivism as the same program behind the walls. Allowing some nonviolent offenders to participate in drug court programs after serving 60 percent of their sentence would ensure that they continue to be monitored but receive treatment at a significantly lower cost to the state and with potentially greater outcomes.

Florida TaxWatch identified approximately 15,000 nonviolent⁹⁸ offenders currently in the state prison system, many of which could be directed towards post-incarceration drug courts

Recommendation: The Legislature should authorize the Florida Parole Commission to permit incarcerated drug-involved offenders who have served at least 60 percent of their original

or AGA Report No. 04-02

⁹⁵ OPPAGA Report No. 04-69

⁹⁶ Supreme Court Task Force on Treatment-Based Drug Courts, "Report on Florida's Drug Courts," July 2009.

⁹⁷ Data provided by the Department of Corrections Bureau of Research and Data Analysis. "Property Crime" as defined by the White House ONDCP, www.whitehousedrugpolicy.gov/publications/factsht/crime/index.htm.

⁹⁸ See Appendix on page 55.

prison sentence to complete the remaining portion of their term as a participant in a community-based drug court program.

22. Increase the maximum gain time accrual allowed

The notion of incentive gain time, that is, days subtracted from one's sentence for good behavior behind bars, has been in effect in Florida since 1989. Gain time is currently discretionary and may be awarded by DOC when "an inmate works diligently, participates in training, uses time constructively, or otherwise engages in positive activities."

In 1995, the Legislature limited the reach of gain time and enacted a law that provides: "for sentences imposed for offenses committed on or after October 1, 1995, the department may grant up to 10 days per month of incentive gain time, except that no prisoner is eligible to earn any type of gain time in an amount that would cause a sentence to expire, end, or terminate, or that would result in a prisoner's release, prior to serving a minimum of 85 percent of the sentence imposed." [Emphasis added] 944.275, F.S.

Accordingly, during the last fifteen percent of an inmate's term in prison, DOC has no discretion to reward good behavior, and inmates have no gain time incentive to comply with reentry planning efforts or participate in programs that are designed to reduce recidivism upon release.

Adjusting the cap on accumulated gain time would provide critically needed incentives for prisoners to engage in constructive behavior and reentry programming and would result in considerable cost savings for the state, with no risk to public safety.

Significant cost savings can be realized by allowing nonviolent inmates to be released at different points of maximum gain time as opposed to preventing release before reaching the 85% threshold of the sentence. 99 Based on a range of maximum gain time levels and percentage of inmates released with maximum gain time, flexibility to the 85% rule could save Florida \$1.4 million to \$53 million in FY2011-12.

FDOC as of July 1, 2010.

⁹⁹ Estimates are based on inmates who have reached maximum gain time and have had no prior commitment to the state prison system. An average per diem cost of \$52.00 is used for inmates housed in a public institution and an average per diem cost of \$45.53 is used for inmates housed in a private institutions. The savings are calculated for the period between July 1, 2011 and June 30, 2012, using a cross section of the inmate population in custody of the

Figure 32: Estimated Cost Savings FY2011-12

Percent of Nonviolent Inmates Released with Maximum Gain Time	20% Maximum Gain Time	25% Maximum Gain Time	30% Maximum Gain Time	35% Maximum Gain Time
100%	\$13,819,336	\$27,423,455	\$40,506,339	\$52,995,892
50%	\$6,909,668	\$13,711,727	\$20,253,169	\$26,497,946
25%	\$3,454,834	\$6,855,864	\$10,126,585	\$13,248,973
10%	\$1,381,933.61	\$2,742,345.47	\$4,050,633.85	\$5,299,589.25

<u>Recommendation:</u> The legislature should revisit its 1995 amendments to the gain time law, or include consideration of the gain time laws as part of the top-to-bottom commission review (from Recommendation 11).

23. Authorize the possibility of parole for certain elderly offenders

While the literature shows that most offenders age out of their crime-committing years, the nation's prison population is graying; nationally 10 percent of the U.S. prison population is 50 years old or older. ¹⁰⁰ In Florida, it is far higher and surging. As of June of 2010, 16.1 percent (16,483 people) of the Florida prison population were 50 years or older. In 1996, 5.7 percent of Florida's prisoners were elderly; in 2000, 8.0 percent were 50 years or older.

According to Florida Senate staff research, the cost of incarcerating a person over the age of 50 is three times greater than that of incarcerating younger people, primarily due to medical costs. Individuals in the community or nursing homes who are disabled or elderly are eligible for federally funded Medicaid (with state match) and/or Medicare, but people who are incarcerated are not eligible for such federal health care support, nor are the prisons.

Thus, Florida is increasingly saddled with the medical costs of an elderly prison population when some of these offenders would pose little, if any, risk to the public out of prison.

Many elderly prisoners were sentenced prior to 1983 when Florida abolished parole and thus are parole eligible. However, while approximately 5,000 inmates in Florida's prisons are parole eligible, only 42 of the 37,391 inmates released from prison in FY2008-09 were actually paroled.

Alteration of parole standards for inmates over the age of 65 would save the state a significant amount without compromising public safety. Although determination should likely be made based on level of disability and potential risk, and must be made by the Florida Parole Commission or other appropriate body based on the individual offender, assuming only prisoners over 65 further limits the total number of prisoners eligible under such a program.

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¹⁰⁰ BJS, Prisoners in 2008.

Assuming only inmates who have minimally served 20 to 25 years of their maximum sentence prior to the age of 65 and have not committed capital murder, ¹⁰¹ but without specific consideration of level of disability, **Florida could save between \$263,000 and \$2.6 million in FY2011-12 if elderly inmates were released after 20 years** – considering varying levels of approval by the Florida Parole Commission based on level of disability and individual offenders potential risk. Assuming the same factors, **Florida could save between \$172,500 and \$1.7 million if varying levels of elderly inmates were granted parole after commuting 25 years of their sentences**.

Figure 33: Estimated Cost Savings

Percent of eligible inmates approved for parole by Parole Commission after 20 years of sentence 25% 100% Approved 50% Approved 10% Approved Approved \$2,632,387 \$658,097 \$263,239 FY2011-12 \$1,316,194 FY2012-13 \$3,404,545 \$1,702,272 \$851,136 \$340,454 \$2,088,351 FY2013-14 \$4,176,702 \$1,044,176 \$417,670

Percent of eligible inmates approved for parole by Parole Commission after 25 years of sentence					
	100% Approved 50% Approved		25% Approved	10% Approved	
FY2011-12	\$1,724,793	\$862,396	\$431,198	\$172,479	
FY2012-13	\$1,949,363	\$974,681	\$487,341	\$194,936	
FY2013-14	\$2,597,975	\$1,298,988	\$649,494	\$259,798	

<u>Recommendation:</u> The Florida Legislature should pursue strategies that allow for release of elderly prisoners who do not pose a risk to public safety.

24. Expand prison work release programs

Florida's work release programs allow selected (i.e., pre-screened as low-risk) inmates to work at paid employment in the community and live at work release centers outside of prison during the last 15 months of their sentence.

Housing inmates at work release centers is significantly cheaper than housing them in a regular prison facility. The average cost of housing an inmate at a work release center is \$25.84 less per

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¹⁰¹ FDOC cross section of inmate population in custody data report on July 1, 2010 was used for these estimates. An average per diem cost of \$52.00 is used for inmates housed in a public institution and an average per diem cost of \$45.53 is used for inmates housed in a private institution.

day than housing them at a regular prison facility.¹⁰² Expanding the work release program to include additional individuals who are currently on the waiting list could produce significant savings for Florida.

The key step to achieve such savings is to incorporate more eligible inmates into the program. DOC should rescind the informal policy of holding one prison bed in reserve for every work release bed and capping work release at 4 percent of the inmate population.

Allowing nonviolent inmates to carry out the remaining portion of their maximum sentence in a work release program is more cost effective than mandating inmates carry out 85% of the sentence in a regular prison facility. Given varying rates of success, the state could save \$536,000 to \$5.4 million annually if 20% of the maximum sentence is completed in work release programs. With 35% of the maximum sentence completed in work release programs, the state would save between \$2.1 million and \$20.9 million in cost savings. 103

Figure 34: Estimated Cost Savings for FY2011-12 (% of final sentences served in work release programs)

Success Rate	Final 20% of Maximum Sentence	Final 25% of Maximum Sentence	Final 30% of Maximum Sentence	Final 35% of Maximum Sentence	
100%	\$5,359,818	\$10,717,792	\$15,915,608	\$20,893,834	
50%	\$2,679,909	\$5,358,896	\$7,957,804	\$10,446,917	
25%	\$1,339,955	\$2,679,448	\$3,978,902	\$5,223,458	
10%	\$535,982	\$1,071,779	\$1,591,561	\$2,089,383	

Recommendation: The legislature should require that DOC establish a process that immediately: 1) expands the current capacity of the work release program to include those eligible individuals who are currently on waiting lists to join; 2) ensures that the capacity of the program is set at the maximum sustainable level and reevaluated on a regular basis; and 3) expedites the movement of individuals into work release so that the average participating population in each program is maintained as close to full capacity as possible.

¹⁰² Collins Center for Public Policy Report, "Smart Justice: Findings and Recommendations for Florida Criminal Justice Reform," February 2010. According to the report the average cost of housing an inmate at a work release center is \$26.16, the average cost of housing an inmate in a prison facility is about \$52.00 (even when work release centers are excluded from the calculation).

¹⁰³ The estimates are calculated for the period between July 1, 2011 and June 30, 2012, using a cross section of the inmate population in custody of the FDOC as of July 1, 2010. An average per diem cost of \$52.00 is used for inmates housed in a public institution and an average per diem cost of \$45.53 is used for inmates housed in a private institution. An average per diem cost of \$30.80 is used for work release facilities. Those individuals who are already housed in work release facilities are not included in the analysis and additional upfront costs of expanding work release are not factored into cost savings.

25. Expand evidence-based prison-based programs that reduce recidivism

Florida allocates about one percent of the Corrections budget to prison-based programming (substance abuse treatment, education, vocational training, release planning, etc.) aimed at improving the chances that the inmates will not return to prison.

While DOC has a goal of reducing recidivism, about one third of the inmates nevertheless do come back within three years of release. Florida has not focused sufficient resources in preparing them during their previous stints in prison to succeed upon being released.

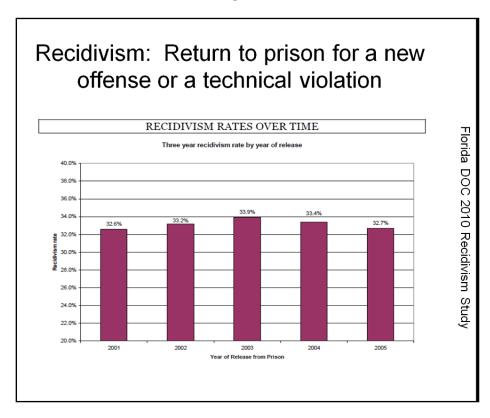


Figure 35

In December 2009, OPPAGA reported DOC was concentrating its rehabilitative programming on evidence-based approaches, which have "four basic components: assessing inmates using validated risk and needs assessment instruments; addressing offender attributes that directly relate to criminal behavior; developing release plans to facilitate offender reentry into society; and evaluating program effectiveness." This is important, especially due to the extremely limited resources available for programming.

At the same time, community-based programs are also in short supply, and research shows that programs in the community produce twice the impact on recidivism as the same program behind the walls.

Recommendation: the Legislature should reinvest a portion of the savings realized from front-end reforms that slow prison growth into expanding prison and community-based

programming to reduce recidivism, thereby slowing prison growth further. In the meantime, these programs could be expanded at no additional cost to the state through the use of "trusties" (i.e., inmates who have earned trust through good behavior) and volunteers.

A. Expand evidence-based substance abuse treatment

While 65.1 percent of DOC inmates (65,706 individuals) were in need of treatment, there were only 4,902 treatment slots available in FY2008-09 (before the \$10 million cut in DOC programming), making treatment available to only 7.4 percent of those who need it.

Recommendation: The legislature should restore the \$10 million in DOC programming and target it to in-prison and community-based treatment

B. Expand evidence-based mental health treatment

In Florida, about 17,957 inmates (17.8% of the total) receive ongoing mental health care; the number of those incarcerated who suffer from mental illness and are not being treated is not known. Compare that to the total forensic and civil commitment state psychiatric beds: 2,723. Prisons and jails are the default mental health system in Florida. Texas enacted an information sharing law that makes it easy to share information on individuals with mental illnesses who are accessing so many deep end services including those in the criminal justice system. It allows them to track individuals with Serious Mental Illness (SMI) to assure case management, consistent medication and re-entry. It has also helped them tremendously to keep people with SMI out of jail and prison.

Recommendation: The Legislature should review and amend statutes to facilitate more effective collaboration among stakeholders involved in the delivery of mental health services, particularly as they relate to continuity of care for individuals involved in or at risk of becoming involved in the justice system. This should include consideration of opportunities to improve information exchange among state and county agencies, as well contracted entities, that provide mental health and/or substance abuse treatment services. Consideration of such information sharing should be for the purposes of facilitating continuity of care only and should not be used as evidence in any criminal proceeding. The Legislature may wish to review chapter 614.017 of the Texas Health and Safety Code as an example of such cross systems collaboration.

The Legislature should pass the Community Mental Health and Substance Abuse Treatment and Crime Reduction Act.

The Legislature should authorize county court judges to order involuntary outpatient treatment as a condition of release for defendants with mental illnesses when appropriate.

C. Expand evidence-based literacy, education and vocational training

DOC reported that 50.5 percent of DOC inmates (44,786 total) in FY2008-09 were tested as reading at or below the 6th grade level and that "for every education level an inmate gains, that

person is 3% to 4% less likely to come back to prison. Inmates with a vocational certificate at release recidivate 14% less than inmates overall."

That year DOC was able to award 1,953 GED certificates and 1,881 vocational certificates. As demonstrated below in DOC's annual report, the completion rates in the literacy, adult basic education, and vocational programs are quite low.

<u>Recommendation:</u> The DOC should continue to aggressively look for innovative ways to partner with community colleges and public and private workforce development entities to improve skill levels of inmates.

Figure 36

Participation in Correctional Education Classes in FY 2008-09

Enrollments*	Mandatory Literacy	Adult Basic Education	ITA ¹	GED	Vocational	Total	
Number of Courses	1,700	8,086	6,201	2,064	5,034	23,085	
Number of Inmates	1,700	8,086	6,201	2,064	4,789	***22,840	
Completions**							
Number of Courses	412	557		1,953	1,881	4,803	
Number of Inmates	412	557		1,953	1,562	***4,484	
** "Completions" are from 7/	**Enrollments" includes inmates enrolled as of 7/1/08 and new enrollments through 6/30/09. **Completions" are from 7/1/08 through 6/30/09. **Inmates who participated in Mandatory Literacy, Adult Basic Education, GED and Vocational courses get counted for participation in all four						

^{***} Inmates who participated in Mandatory Literacy, Adult Basic Education, GED and Vocational courses get counted for participation in all fou programs.

D. Expand life management skills training

OPPAGA notes that there was a lack of programming addressing criminal thinking.¹⁰⁴ This component was to be added to DOC's 100-hour transition / release program; however, during FY2008-09, 8,850 inmates (26.9% of all released inmates who completed the course) took the course via self-study. This is less than optimal not only because of the low literacy rate of the inmates but because without the interaction with a facilitator, the results can be negligible.

Expanding currently available rehabilitative and training programs to those offenders who are on waiting lists, or are otherwise eligible to participate in them, could curb the rising inmate population and eliminate the need for the continued expansion of state prisons.

Recommendation: The DOC should continue its efforts to provide evidence-based programming to address criminal thinking and to provide release programming through facilitators rather than relying on self-study.

[&]quot;Number of Courses" and "Number of Inmates" are different for vocational counts since it is possible for a given inmate to be involved in more than one course in this program year.

For greater detail, Adult Basic Education (course "9900004") is shown in a separate column from the GED (course "9900026").

[&]quot;Completions" are defined as a CMP, ATT or CXS code on the DC32 screen for MLP and ABE participants, a GED certificate for course "9900026" participants, and a vocational certificate for vocational program participants.

¹ITA=Inmate Teaching Assistant Program.

Note that none of the counts in the above tables include program participation or certificates earned at private facilities.

¹⁰⁴ Department of Corrections Should Maximize Use of Best Practices in Inmate Rehabilitation Efforts, Report No. 09-44, December 2009.

E. Expand faith- and character-based prisons

OPPAGA has found that faith- and character-based prisons improve institutional safety, achieve lower recidivism rates and attract more volunteers. Wakulla County's recidivism rate, for example, is 15 percent lower than that of comparable prisons. Yet these more effective prisons had a waiting list of 8,890 inmates for the institution-based programs and 1,600 for the dorm-based programs at the time of October 2009 study. ¹⁰⁵

Recommendation: The DOC should expand its faith- and character-based prisons.

F. <u>Help inmates apply for Medicaid, Social Security Income, and Veterans benefits</u> prior to release

Receiving the benefits of social programs to which they are entitled upon release will help those ex-offenders succeed in the community and reduce the likelihood that those individuals will return to prison. Helping inmates apply for those social benefits before release can improve their chances of successful reentry.

Recommendation: The legislature should expand programs that help reentering inmates apply for government benefits for which they are qualified.

26. Review and revise state-created employment restrictions based on criminal records

Gainful employment is essential to any strategy to reduce recidivism, and thus to reduce crime and make communities safer. ¹⁰⁶ However, among the many hurdles facing people coming home from prisons and jails is in successfully reintegrating into society, getting a good job is often one of the most daunting challenges.

Equally daunting, for both the person with the record and for workforce staff who might attempt to help him search for jobs, is figuring out what occupations and places of employment are possibly open to people with criminal records.

Recognizing this challenge, Governor Jeb Bush, on the advice of the Governor's Ex-Offender Task Force, and concerned about Florida's stubborn recidivism rate, and understanding that

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¹⁰⁵ OPPAGA, Faith- and Character-Based Prison Initiative Yields Institutional Benefits; Effect on Recidivism Modest, Report No. 09-38, October 2009.

¹⁰⁶ "Finding and maintaining a job is a critical dimension of successful prisoner reentry. Research has shown that employment is associated with lower rates of reoffending, and higher wages are associated with lower rates of criminal activity. However, former prisoners face tremendous challenges in finding and maintaining legitimate job opportunities. . ."Baer, et al. Understanding the Challenges of Prisoner Reentry: Research Findings from the Urban Institute's Prisoner Reentry Portfolio, Urban Institute, January 2006, citing, Jared Bernstein and Ellen Houston, *Crime and Work: What We Can Learn from the Low-Wage Labor Market* (Washington, DC: Economic Policy Institute, 2000); Bruce Western and Becky Petit, "Incarceration and Racial Inequality in Men's Employment," *Industrial and Labor Relations Review* 54, no. 3 (2000): 3–16. A Canadian study found that "Offenders who were employed were convicted of less than half the convictions (22.2% versus 42.9%) and one quarter of the new violent convictions (5.6% versus 20.6%) of offenders who did not obtain employment in the first six months of release." Gillis, et al., Prison Work Program (CORCAN) Participation: Post-Release Employment and Recidivism, Research Branch, Correctional Service Canada, March 1998.

gainful employment reduces recidivism, issued an executive order in 2006 requiring his state agencies to inventory the employment restrictions they administer, provide data on their impact and recommend reforms. Bush was the first governor to order such a review, which was hailed as a "landmark" in the Washington Post.

The Florida inventory, the findings of which were laid out in the Task Force's report to the Governor, ¹⁰⁷ revealed a vast, bewildering and unwieldy patchwork of hundreds of state-created restrictions of widely varying severity, often regardless of the trust and responsibility required of the job, affecting over 40% of Florida's public and private sector jobs.

The Task Force reported that sometimes the restrictions offer the employer a measure of hiring discretion after reviewing a background check. Sometimes they give the employer the right to assess the relevance of the past crime to the job. Sometimes they provide the job seeker with an opportunity to demonstrate their rehabilitation. But often the restrictions offer little flexibility to either employers or people looking for work.

Each restriction has its own nuances. Some restrictions put jobs or places of employment offlimits to anyone with a record of a criminal conviction. Some put them off-limits only for those convicted of certain crimes. Sometimes the restriction creates a lifetime ban. Sometimes the restriction is time-limited. Sometimes the time limits depend on the crime.

For employers, it's a minefield. Hiring in violation of the restrictions can lead to a loss of a business license and other harsh penalties.

For job seekers with a criminal record, the impact of restrictions are often both unknown and unknowable until after incurring the costs of a course of study, tests, and fees and the application for a job or license is finally reviewed.

Despite this strong effort to understand the restrictions and the Task Force's reform recommendations, few reforms have been adopted.

<u>Recommendation:</u> The Legislature and the Governor revisit and adopt the Task Force's common sense employment restrictions reform recommendations.

27. Expand the Florida Accountability Initiative for Responsible (FAIR) Probation

Despite, as OPPAGA reported in April 2010, rescission by DOC of its zero-tolerance policy on probation violations adopted in 2003 and a concomitant decrease in the number of technical violators sent to prison, in the 2009-10 fiscal year, 7,479 people were sent to prison on technical probation violations.¹⁰⁸

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¹⁰⁷ <u>Key Findings and Recommendations</u> Based on the Task Force's Analysis of the State Agency Responses to Executive Order 06-89.

¹⁰⁸ Zero Tolerance Policy Rescinded and Alternatives Implemented to Address Technical Violations, Report No. 10-39, April 2010.

FAIR, modeled after Project HOPE, designed by Judge Steven Alm in Hawaii, is a model that challenges what is often in actuality and in perception a kind of "randomized severity" of sanctions, that is, sometimes the violation will be punished harshly, sometimes mildly, sometimes not at all.

A program evaluation of HOPE commissioned by the National Institute of Justice was completed in 2009 and found that among HOPE participants, compared to the control groups: positive drug tests were reduced by 86%; missed probation appointments were reduced by 80%; revocations of probation were reduced by more than 50%; and arrests for new crimes reduced by more than 50%.

Like HOPE, FAIR targets probationers who are at the highest risk of reoffending and discourages such offending with swift, predictable, and immediate sanctions – typically resulting in several days in jail – for each detected violation, such as detected drug use or missed appointments with a probation officer.

A strong nexus exists between drugs, crime and incarceration. FAIR Probation works to lower heavy drug consumption and improve public safety. FAIR Probation is a way to support Florida's drug courts by maximizing limited treatment space. In order to lower incarceration costs and improve public safety, community supervision must be strengthened in order for judges to view it as a viable alternative. FAIR Probation works to make community supervision a cost-effective alternative by instituting swift and certain consequences for non-compliance. The keystone of the project is creating personal responsibility on the part of the offender.

FAIR Probation has not yet been initiated in Florida. FAIR Probation is close to being piloted in Circuit 9 (Orlando). All stakeholders (judge, county jail, prosecutors, public defenders, and probation) have been briefed and are close to starting after January 1. Alachua County (Gainesville Circuit 8) has also been in early discussions about starting the project.

Recommendation: The Department of Corrections should work with the state courts to implement FIAR as a pilot and expand the program if it proves effective. Strengthen community supervision as a viable alternative to costly incarceration by creating and expanding the Florida Accountability Initiative for Responsible (FAIR) Probation.

28. Expand Veterans Courts

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Studies have found that anywhere from 20% to 50% of veterans returning from Iraq and Afghanistan suffer from Post Traumatic Stress Disorder (PTSD). Furthermore, about half of these individuals do not seek treatment. PTSD and other mental health disorders are strongly

¹⁰⁹ The Pew Center on the States, The Impact of Hawaii's HOPE Program on Drug Use, Crime and Recidivism, January 2010.

linked to drug use and related criminal behavior. It is estimated that approximately 10% of all individuals with criminal records are veterans. 110

Many state and local governments across the U.S. have instituted veterans courts to offer treatment and diversion for non-violent offenders in this group, with promising results. For example, a veterans court in Buffalo has a 90% graduation rate and no incidence of recidivisim. According to Florida Senate research, 10 states have or are in process of passing legislation to expand veterans courts.

The momentum to initiate such programs in Florida is also growing. Palm Beach County implemented a veterans court in 2010.¹¹¹ Given the success rate of existing veterans courts targeting non-violent offenders in other states, instituting and expanding similar programs in Florida could help reduce recidivism and save valuable tax dollars. Such programs are also eligible for Federal grants, saving additional state funds.

Recommendation: The Governor should convene a task force of veterans' affairs and criminal justice leaders to identify and resolve issues of veterans' encounters with the criminal justice system and to establish a framework for expanding veterans' courts.

29. Reduce costs of inmate hospitalization (in non-DOC hospitals)

Inmates requiring hospitalization in non-DOC facilities cost the state million each year. Estimates of the total cost of hospitalization put the total cost at approximately \$50 million annually. Paying these costs through Medicaid would lower the total cost to the state because Medicaid is majority funded by the federal government and often pays lower hospitalization rates. While Medicaid will not pay for care provided in DOC facilities, the state should ensure that all potential costs of hospitalization at non-DOC facilities (i.e., when prisoners have to be taken to community hospitals) are shifted to Medicaid.

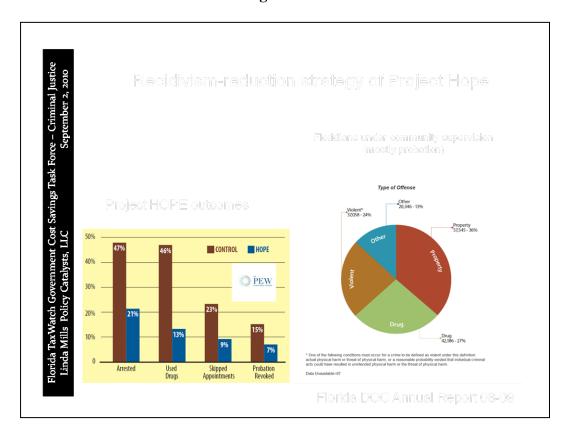
<u>Recommendation:</u> The legislature should ensure that inmates remain Medicaid-eligible during incarceration so that Medicaid can cover hospitalization costs when inmates receive care in non-DOC settings.

Alternative: set state reimbursement rate at the Medicaid rate instead of 110% of Medicare rate.

¹¹⁰ http://www.slate.com/toolbar.aspx?action=print&id=2244158

http://www.chicagotribune.com/topic/fl-palm-new-veterans-court-20101120,0,6995203.story?track=rss-topicgallery

Figure 37



Section IV: Recommendations related to juveniles in the justice system

Getting smart on crime requires efficient and effective use of limited resources in prevention, diversion, and intervention programs, especially when it comes to juvenile justice.

30. Comprehensively review and implement Blueprint Commission recommendations

Although some of the recommendations of the 2008 report have been adopted and implemented, the overwhelming majority of them have not. One key recommendation, the revision of zero-tolerance policies in public schools to ensure that students who are expelled or referred to law enforcement pose a serious threat to school safety and are not expelled or arrested for petty misconduct, was implemented in 2009. Although this measure will reduce costs by removing unnecessary cases from the juvenile justice system, there is still much progress to be made.

Adopting the Blueprint Commission's recommendations will help Florida set out in a new direction that focuses on utilizing community resources and evidence-based approaches to juvenile offender rehabilitation, and increasing public safety while simultaneously producing savings to the state and taxpayers.

Recommendation: The Legislature should conduct a full review of the 2008 Blueprint Commission report and explore the implementation of all cost savings recommendations that have not yet been implemented.

31. Study the effects of barring commitment of misdemeanants to state custody

Texas, North Carolina, and Virginia have adopted legislation to keep misdemeanants out of state custody and have reduced commitment rates substantially. In all three states, the state not only realized significant cost-savings as a result of the legislation, but also saw improvements in public safety. In Texas, youth cannot be committed to residential facilities for misdemeanor offenses unless adjudicated for four or more prior offenses. This resulted in a 36% reduction in commitments in the past three years. At the same time, juvenile arrests for violent offenses dropped. North Carolina has adopted similar legislation that bars youth from being committed to residential facilities for misdemeanor offenses or violations of misdemeanor probation. This had the effect of reducing commitments by 61% from 1998 to 2008. Over the same time period, juvenile arrests for violent offenses dropped by 20%. Legislation in Virginia bars youth from commitment to residential facilities unless the youth has been previously adjudicated for a felony of three or more Class 1 misdemeanors on separate occasions. Virginia saw a 50% drop in commitments from 1999 to 2009, and a 36% drop in juvenile arrests for violent offenses.

More than 2,500 children were admitted to DJJ residential facilities for misdemeanors or violations of probation in FY2008-09. If Florida had a statute barring the commitment of misdemeanants to state custody, DJJ would have reduced admissions by 1,273, or 21% during that period, which could have saved approximately \$30 million (\$25,668,000 for 1,183 children in non-secure residential beds and \$4,421,000 for 90 children in secure residential beds). While Florida must continue to incarcerate youth who pose serious risks to public safety, detention and incarceration of young people should be an option of last resort.

<u>Recommendation:</u> The Legislature should examine the potential savings produced by limiting the commitment of juvenile misdemeanants.

32. Expand the Redirection program to avoid custodial care of juveniles

The Redirection program is a community-based, family-centered alternative to residential juvenile justice commitments. According to a 2009 program evaluation, youth who successfully completed the Redirection Program were 31 percent less likely to be subsequently arrested than similar youth who successfully completed residential commitment programs.

¹¹² Southern Poverty Law Center, *Opportunities to Strengthen Florida's Juvenile Justice System*, September 17, 2010.

An April 2010 OPPAGA study found that the Redirection Program has achieved \$51.2 million in cost savings for the state since it began five years ago, due to its lower operating costs when compared to residential delinquency programs. 113

Redirection began as a way to redirect juvenile offenders with non-law probation violations from residential commitment to lower cost, therapy-based community programs and has expanded to serve additional youth, such as nonviolent offenders being considered for commitment due to misdemeanors and third-degree felonies.

The contracted project director estimates the program could serve 10 percent more juveniles under the current framework. Expanding the program could result in much greater savings in the first year.

Recommendation: The legislature should expand the Redirection Program and we endorse the specific OPPAGA recommendations to expand the program (a) into underserved counties; (b) to serve gang-involved youth; and (c) to implement a program to serve youth who commit certain sex offenses. Additionally, the Legislature should examine potential savings from expanding the program to include youth who have committed certain third-degree felonies.

33. Expand the use of juvenile civil citations

Civil citation programs are an alternative to arresting and taking children who commit misdemeanors into custody. Civil Citation emerged as a way to replace the existing practices of the current arrest model and incorporate early intervention and effective diversion programs for juveniles who commit minor crimes. As stated in Florida Statutes, the Civil Citation process was established "for the purpose of providing an efficient and innovative alternative to the custody by the Department of Juvenile Justice of children who commit non-serious delinquent acts and to ensure swift and appropriate consequences."

The program allows juveniles who have committed a misdemeanor to complete community service hours or participate in intervention programs as an alternative to being arrested and taken into custody by the Department of Juvenile Justice (DJJ). The program is implemented at the local level in coordination with the chief judge of the circuit, state attorney, public defender, and the head of each local law enforcement agency involved.

Authorized by 985.301, F.S., the program allows "any law enforcement officer, upon making contact with a juvenile who admits having committed a misdemeanor [to] issue a civil citation assessing not more than 50 community service hours, and may require participation in intervention services appropriate to identify the needs of the juvenile."

According to a 2010 Senate analysis 114 of a bill related to the citation program, "the programs exist at the local level with the concurrence of the chief judge of the circuit, state attorney, public

¹¹³ Redirection Saves \$51.2 Million and Continues to Reduce Recidivism, Report No. 10-38, April 2010.

defender, and the head of each local law enforcement agency involved. Currently, there are nine civil citation programs funded by the DJJ and seven programs that are funded locally."

Based on data from two major Civil Citation programs in Leon County and Miami-Dade County, a statewide implementation of the Civil Citation program is estimated to reduce the number of youth referred for delinquency by 40%. This would be an equivalent of 30,153 juveniles according to the most recent data. The cost saving per civil citation would be \$4,614 according to a recent study by Florida Juvenile Justice Foundation or \$1, 467 according to the 2009 Hillsborough County Study. Using the number from the first study for Scenario 1 and the second study for Scenario 2, the annual cost savings of implementing statewide Civil Citation programs is estimated to range from \$44 million to \$139 million.

Given the estimated short-term annual savings of \$44 to \$139 million, it makes perfect sense to implement Civil Citation programs throughout the state. Keeping juveniles away from prisons will also generate long-term economic benefits in the form of increased output and employment.

Recommendation: The Legislature, state and local governments, business and community organizations should work together to design and implement statewide Civil Citation programs that give a second chance to all children who commit non-serious delinquent acts.

34. <u>Increase operational efficiencies and public safety by aligning the average length of stay by delinquents with best practices in residential facilities</u>

Over the past eight years, the average length of stay for delinquents in residential facilities has been steadily increasing, even as the number of commitments has fallen. This increase cannot be explained in the change of profile of youth committed to DJJ. In fact, the percentage of youth committed for misdemeanors or probation violations was approximately the same in FY 2008-09 as it was in FY 1999-2000. In fact, the percentage of youth committed for misdemeanors or probation violations was approximately the same in FY 2008-09 as it was in FY 1999-2000. In fact, the percentage of youth committed for misdemeanors or probation violations was approximately the same in FY 2008-09 as it was in FY 1999-2000. In fact, the percentage of youth committed to DJJ. In fact, the percentage of youth committed to DJJ. In fact, the percentage of youth committed for misdemeanors or probation violations was approximately the same in FY 2008-09 as it was in FY 1999-2000. In fact, the percentage of youth committed to DJJ. In fact, the percentage of youth committed for misdemeanors or probation violations was approximately the same in FY 2008-09 as it was in FY 1999-2000. In fact, the percentage of youth committed to DJJ. In fact, the percentage of youth committed for misdemeanors or probation violations was approximately the same in FY 2008-09 as it was in FY 1999-2000.

The Florida Department of Juvenile Justice's 2008 Blueprint Commission Report concluded from the best available research: "...youth who are kept in programs for prolonged length of

¹¹⁵ Florida Juvenile Justice Foundation, "Getting Smart on Juvenile Crime in Florida: Taking It to the Next Level," August 2010.

¹¹⁴ SB 2544 (2010)

¹¹⁶ Dewey & Associates Inc., "Civil Citation of Hillsborough County, Cost Savings Analysis," July 2009.

¹¹⁷ Office of Program Policy Analysis and Government Accountability. 2001. Misdemeanant and Non-Law Violation Youth in Juvenile Justice Commitment Beds, Report No. 01-49.

stays after treatment goals are achieved often begin to deteriorate and may be more likely to reoffend once release is finally achieved." ¹¹⁸

The Blueprint Commission recommends the creation of small, community-based programs that use a continuum of care and the implementation of an "offender review" process that systematically identifies and reviews non-violent and non-serious offenders as well as those who have made significant progress in their treatment programs. Suitable candidates would be referred to the courts for early release or "step down" into community-based programs. ¹¹⁹

Another way to reduce the length of stay is to count services and education received in detention towards the completion of the youth's treatment plan, per the Blueprint Print Commission's recommendation. The Commission also suggests counting these services in competency restoration. This recommendation reduces cost by eliminating the duplication of services.

Recommendation: Florida should examine the increasing average lengths of stay by youth offenders in residential facilities. One possible option is that length of stay be limited to the completion of treatment goals, and enact the Blueprint Commission's specific recommendations to (1) implement an offender review process that would allow for the early release of suitable candidates or a "step-down" to less restrictive, community-based care; (2) count education and services received in detention towards the completion of the youth's treatment plan.

^{118,9,&10} Florida Department of Juvenile Justice. "Report of the Blueprint Commission: Getting Smart About Juvenile Justice," January 2008, p. 69. Available at:

 $www.djj.state.fl.us/blueprint/documents/Report_of_the_Blueprint_Commission.pdf.$

¹¹⁹ *Id*. at 41.

¹²⁰ *Id.* at 42.