IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

EDA 2005 NO. 2729

COMMONWEALTH OF PENNSYLVANIA,
Appellee
VS.

AARON PHILLIPS,
Appellant

BRIEF OF AMICUS CURIAE DEFENDER ASSOCIATION OF PHILADELPHIA AND JUVENILE LAW CENTER ON BEHALF OF APPELLANT AARON PHILLIPS

Appeal From The June 7, 2005 Order Of The Honorable Richard J. Hodgson, J., Denying Aaron Phillips' PCRA Petition, In The Court Of Common Pleas Of Montgomery County, Criminal Division, No. B5720-86.

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June, 2006

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I. INTEREST OF THE AMICUS CURIAE

The Defender Association of Philadelphia is a private, non-profit corporation that represents a substantial percentage of the criminal defendants in Philadelphia County at trial, at probation and parole revocation proceedings, and on appeal. The Association is active in all of the trial and appellate courts, as well as before the Pennsylvania Board of Probation and Parole. The Association attempts to insure a high standard of representation and to prevent the abridgment of the constitutional and other legal rights of the citizens of Philadelphia and Pennsylvania.

The Defender Association of Philadelphia has previously participated as amicus curiae in numerous matters before this Court, as well as before other courts.

Juvenile Law Center (JLC) is the oldest multi-issue public interest law firm for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC advocates in particular on behalf of children involved in the juvenile justice and child welfare systems and, increasingly, children involved in the adult criminal justice system. JLC works to ensure children are treated fairly by these systems, and that children receive the treatment and services that these systems are supposed to provide, including, at a minimum, adequate and appropriate education, and physical and mental health care. In addition to litigation and appellate

advocacy, JLC has participated as amicus curiae in state and federal courts throughout the country, as well as the United States Supreme Court, in cases in which important rights and interests of children are at stake. Of particular relevance, JLC was lead counsel for over 50 advocacy groups nationwide who participated as amici in Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), in which the Supreme Court ruled that it was unconstitutional to impose an adult punishment, there the death penalty, upon children.

II. STATEMENT OF JURISDICTION

This Court's jurisdiction to hear an appeal from the judgment of sentence of the Philadelphia Court of Common Pleas is established by Section 2 of the Judiciary Act of 1976, P.L. 586, No. 142, §2, 42 Pa.C.S.A. §742.

III. STATEMENT OF SCOPE AND STANDARD OF REVIEW

The court below denied Aaron Phillips' PCRA petition as untimely. This is a legal conclusion. Therefore, this Court has a plenary standard of review.

The scope of review is the entire record.

IV. STATEMENT OF QUESTIONS INVOLVED

Does not the recent decision of the United States Supreme Court in Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), which held that it was unconstitutional to give an adult sentence to a child (a sentence of death) similarly bar imposition of an adult sentence on a child here (a sentence of life without the possibility of parole)?

By relying upon recent developments in the area of juvenile psychological and physical maturation, does not the United States Supreme Court in Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) constitute after-discovered evidence within the meaning of the Pennsylvania Post-Conviction Relief Act, an exception to the time constraints under that Act, 42 Pa.C.S.A. §9545(b)(1)(ii)?

By applying retroactively its holding in Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) does not the United States Supreme Court establish an exception to the time constraints under the Pennsylvania Post-Conviction Relief Act, 42 Pa.C.S.A. §9545(b)(1)(iii)?

V. STATEMENT OF THE CASE

The facts of the instant case are relatively simple. This is an appeal from the denial of Aaron Phillips' third post-conviction petition. On March 1, 2005 the United States Supreme Court decided Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). In Simmons the Supreme Court found that based upon recent developments in our understanding of children's psychological and physiological maturation, it was improper to impose adult punishments on children. For this reason, Simmons struck down as unconstitutional the imposition on children of an adult punishment, there the death penalty. Within sixty days of receipt of that decision, Mr. Phillips filed a post-conviction petition contending that Simmons similarly precluded the imposition on children of the adult punishment of life without the possibility of parole.[1]

The post-conviction court judge decided that Mr. Phillips' PCRA petition was untimely. The judge superficially viewed Simmons merely as a death penalty case that had no applicability to Mr. Phillip's sentence of life imprisonment without the possibility of parole. This analysis ignores Simmons' holding that any sentence imposed upon a juvenile must acknowledge that children are not

[1] As a prisoner, Mr. Phillips' ability to access new case law is significantly circumscribed. According to an affidavit submitted with Mr. Phillips' PCRA petition, the advance sheets containing Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) were received at the state prison at Greene on March 22, 2005. It is this date that starts the clock in determining due diligence for federal habeas corpus, Easterwood v. Champion, 213 F.3d 1321 (10th Cir. 2000), and should similarly start the 60 day clock for PCRA in the instant case.

little adults. Any sentence that denies that fact, be it a death sentence as in Simmons or a life imprisonment without the possibility of parole as here, is unconstitutional. Similarly, a second degree murder conviction that bars consideration of Simmons' requirements is similarly unconstitutional.

VI. SUMMARY OF ARGUMENT

The United States Supreme Court in Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) determined that it was unconstitutional to sentence a juvenile as one would an adult. Juveniles do not have the same judgment, understanding, maturation and abilities as adults. For this reason the Supreme Court in Simmons struck down a juvenile's death sentence. For precisely the same reasons, a juvenile's sentence of life imprisonment without the possibility of parole must similarly be struck down as violative of the federal constitution's bar against cruel and unusual punishment.

In addition, a juvenile sentence of life imprisonment without the possibility of parole violates the Pennsylvania Constitution's prohibition against cruel punishment. Pennsylvania has long had a proud tradition of according juveniles greater protections than adults.

Lastly, Aaron Phillips was convicted of second degree (felony) murder. His conviction rests upon an irrebutable presumption that his intent to commit the felony carries over to create the malice necessary to sustain a murder conviction. This presumption can not longer be sustained after Simmons.

VII. ARGUMENT

1. A MANDATORY SENTENCE OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE FOR A SEVENTEEN YEAR OLD BOY IS UNCONSTITUTIONAL UNDER BOTH THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS.

A sentence of life without parole for a child aged seventeen violates both the United States and Pennsylvania Constitutions. At the outset it should be emphasized that as amicus counsel we are not arguing that life without parole sentences are unconstitutional for adults. We are not arguing that Pennsylvania cannot sentence Aaron Phillips or other juveniles convicted of particular crimes to a reasonable term of years in prison. We are not asking that Aaron Phillips be released on parole. Instead, amici are merely arguing that *juveniles cannot constitutionally be sentenced to life imprisonment without the possibility of parole;* constitutionally there must be the *possibility* of release. The United States Supreme Court's recent decision declaring the death penalty for juveniles unconstitutional, Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L.Ed.2d 1 (2005), and Pennsylvania's Constitution and historic commitment to children, all recognize that children are different from adults in their ability to form judgments, in their weakness and vulnerability, in their openness to suggestion, in their ability to change, to grow, to have meaningful lives and to become productive citizens. This recognition demonstrates that a life sentence that denies any possibility of release or parole to

children is a disproportionate punishment under both constitutions. In addition, applying a mandatory adult sentence that is wholly based on the offense and which ignores the culpability of the juvenile contravenes Simmons and violates both the United States and Pennsylvania Constitutions. The United States Constitution will be examined first.[2]

A. Mandatory Sentence Of Life Without Parole For a Seventeen Year Old Child Violates The Eighth Amendment To The United States Constitution As It Constitutes "Cruel And Unusual Punishment."

The United States Constitution prohibits "cruel and unusual punishment." U.S.CONST. Amend. VIII. This provision is applicable to the states through the due process clause. U.S.CONST. Amend. XIV. A mandatory sentence of life imprisonment without the possibility of parole for a seventeen year old child constitutes a "cruel and unusual sentence." The recent United States Supreme Court decision in Simmons provides the appropriate analysis.

In Simmons the United States Supreme Court struck down as violative of the 8TH and 14TH Amendments any sentence of death for a juvenile. Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). The Supreme Court determined that the "evolving standards of decency that mark the progress of a maturing society"

[2] The instant appeal is from the denial of Aaron Phillips' PCRA. While it was dismissed as untimely by the PCRA court below, this was error. There are two timeliness exceptions that apply here. First, the decision of the United States Supreme Court in Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) constitutes after-discovered evidence within the meaning of 42 Pa.C.S.A. §9545(b)(1)(ii). Second, Simmons has been applied retroactively. Little v. Dretke, 407 F. Supp. 2d 819, 823-824 (W.D. Tex. 2005). This is also an exception to the time requirements under PCRA. 42 Pa.C.S.A. §9545(b)(1)(iii).

demonstrate that it was disproportionate to execute a defendant for a murder committed while the defendant was under the age of eighteen. *Id.* at 561, 125 S.Ct. at 1190 (quoting Trop v. Dulles, 356 U.S. 86, 100-101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion)). The Supreme Court pointed out that it must review "objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question" (*id.* at 564, 125 S. Ct. at 1192), as well as state practice. See *Id.* at 563-68, 125 S. Ct. at 1191-94. While current state laws permitted the imposition of a death sentence on children under age 18, the Constitution contemplates that the Supreme Court must "determine, in the exercise of [its] own independent judgment," whether such a penalty is disproportionate. *Id.* at 564, 125 S. Ct. at 1192. In Simmons the Supreme Court exercised its own independent judgment by considering medical, psychological and sociological studies, and common experience, which all show that children who are under age 18 are less culpable and more amenable to rehabilitation than adults over 18 where they commit similar crimes. *Id.* at 568-76, 125 S. Ct. at 1194-99. The Simmons Court concluded that a harsh sentence (death) which is marked by its finality as well as the implication that the offender cannot be rehabilitated cannot be imposed on children who committed crimes when they were younger than 18.

The Supreme Court's reasoning applies with equal force to sentencing juveniles to life in prison without any possibility of

parole[3] in that a sentence of life without parole ("LWOP") is also marked by its finality as well as the implication that the offender

[3] In oral argument in Simmons, Justice Scalia, who dissented from the Court's opinion, concluded that the arguments that apply to the death penalty for juveniles apply with equal force to life without parole for juveniles:

> JUSTICE SCALIA: Why pick – why pick on the death penalty? I mean, if you're going to say that somehow people under 18 are juveniles for all purposes, why – why just pick on the death penalty? Why – why not say they're immune from any criminal penalty?
>
> MR. LAYTON [representing the state of Missouri]: Well, I – well I must assume that if we – if the Court says they are immune from the – from capital punishment then someone will come and say they also must be immune from, for example, life without parole.
>
> JUSTICE SCALIA: I'm sure that – I'm sure that would follow. I – I don't see where there's a logical line."

Transcript of Oral Argument at page 6, lines 12-24, Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183 (No. 03-366), available http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-633.pdf (accessed February 18, 2006). Of course, Justice Scalia began this exchange with a *reductio ad absurdam*/slippery slope argument. However, there is an enormous amount of slope between a death sentence and immunity "from any criminal penalty." There is far less slope between death and LWOP, "the second most severe punishment known to the law," Harmelin v. Michigan, 501 U.S. 957, 996, 111 S.Ct. 2680, 2702, 115 L.Ed.2d 836 (1991) -- especially for a juvenile. Indeed, some thinkers, such as John Stuart Mill, have suggested that life in prison is indistinguishable or even worse than death:

> What comparison can there really be, in point of severity between consigning a man to the short pang of rapid death, and immuring him in a living tomb, there to linger out what may be a long life in the hardest and most monotonous toil, without any of its alleviation or rewards – debarred from all pleasant sights and sounds, and cut off from all earthly hope, except a slight mitigation of bodily restraint, or a small improvement of diet?

John Stuart Mill, Parliamentary Debate on Capital Punishment Within Prisons Bill (Apr. 21, 1868) quoted in Wayne A. Logan, Proportionality and Punishment: Imposing Life Without Parole on Juveniles , 33 Wake Forest L. Rev. 681, 712 (1998). See also *Id.* at footnotes 141-47 (discussing cases and sources suggesting that LWOP may be a fate worse than the death penalty).

cannot be rehabilitated. The Supreme Court considered also its precedents that supported treating juveniles differently in a variety of contexts, both inside and outside of criminal law and procedure, based on the differences in their development and maturity. The Supreme Court considered international law, the law and practice of other nations, and the views of the international community. *Id.* at 575-79, 125 S. Ct. at 1198-1200.

Finally, it should be noted that Simmons itself should not be misconstrued as precedent supporting LWOP for juveniles based on the fact that ultimately a LWOP sentence was substituted for the death penalty in that case. The Simmons Court's judgment affirmed the Missouri Supreme Court's setting aside of the death penalty, and no more. *Id.* at 578-79, 125 S. Ct. at 1200. The constitutionality, or even the appropriateness of LWOP for Christopher Simmons was not an issue in that case. Nevertheless, the Simmons Court did comment on the harshness of LWOP for juveniles: "[I]t is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person." *Id.* at 572, 125 S. Ct. at 1196. Indeed, the reasoning of Simmons leads to the conclusion that juveniles are categorically different from adults when it comes to the criminal law, and that sentences for juveniles must take this categorical difference into consideration.

1. The Law of the States Provides Objective Indicia of a Consensus Against Mandatory LWOP Sentences for Juveniles.

In reaching its holding in Simmons, the Supreme Court examined how the states treated juveniles who committed murder and determined that 30 states prohibited the juvenile death penalty "by express prohibition or judicial interpretation." Simmons, 543 U.S. at 563-65, 125 S. Ct. at 1192. The juvenile death penalty was imposed in the remaining 20 states that did not prohibit it, but only infrequently. *Id.* at 563-65, 125 S. Ct. at 1192. The Court gave particular weight to recently-passed state laws that prohibit the death penalty for juveniles, out of recognition that the popularity of current anti-crime initiatives, which include harsh sentences for juveniles, makes it difficult for politicians to support any measures that would make the law more humane or lenient, even to juvenile offenders. *Id.* at 565-67, 125 S. Ct. at 1193. From the Supreme Court's analysis, it is clear that courts are not supposed merely to count up the number of states robotically or in a vacuum; courts should look at trends, contexts, practice, and other realities.

Although 43 states permit LWOP sentences for juveniles, to evaluate whether such a sentence may be constitutionally imposed on a juvenile requires use of a framework similar to that set out in Simmons. A close look at how these states impose LWOP sentences on juveniles, in law and in practice, reveals that these sentences in all but a few states are imposed on juveniles only *infrequently.*[4]

[4] According to a report prepared by Amnesty International and Human Rights Watch, while New Jersey, Utah and Vermont have laws (continued...)

In addition, unlike Pennsylvania, most states require that a defendant be at least a minimum age before a LWOP sentence may be imposed. This minimum age may be applied either directly to LWOP sentences (two states),[5] or by barring LWOP sentences for all juveniles (five states, and the District of Columbia),[6] or age limits may be applied against waiving juveniles into adult court, including for murder (27 states).[7] The two states

(...continued)
permitting juvenile LWOP sentences, at the end of 2003 they had no one serving a juvenile LWOP sentence. Pennsylvania, on the other hand, leads the nation with juvenile LWOP sentences and had 332. Report, Human Rights Watch, The Rest of Their Lives: Life Without Parole for Child Offenders in the United States 34-35 (October, 2005).

[5] California and Indiana. See Cal. Penal Code § 190.5(b) (Deering 2006) (no LWOP below age 16); Ind. Code Ann. § 35-50-2-3(b) (LexisNexis 2002) (no LWOP below age 16).

[6] District of Columbia, Kansas, Nebraska, New York, Oregon, and Texas. See D.C. Code. § 22-2104(a) (2005); Kan. Stat. Ann. §§ 21-4622, 21-4635 (2005 Supp.) (LWOP not permitted as a sentence for capital murder or first degree murder where defendant is less than 18 years old); Neb. Rev. Stat. § 29-2204(3) (West 2003) (prohibiting LWOP for anyone under 18 years old, maximum sentence is life with parole only if mandatory, otherwise life with parole is discretionary); N.Y. Penal Law §§ 70.00(5) (LWOP available only for first-degree murder), 125.127(1)(b) (Gould 2005) (required element of first-degree murder is that the defendant is over 18 years old); Or. Rev. Stat. §161.620 (2005), State v. Davilla, 157 Ore.App. 639, 972 P.2d 902 (Or. Ct. App. 1998) (interpreting §161.620 to bar juvenile LWOP); Tex. Fam. Code Ann. § 54.04 (Vernon 2005) (blended sentencing technique where child commits serious felony, including capital murder and first degree murder, but juvenile court declines to waive its jurisdiction; juvenile court can sentence a juvenile felon to commitment in a juvenile facility until they reach the age of majority, upon which time they may be transferred to an adult facility to serve the remainder of their term, not to exceed 40 years).

[7] Alabama (age 14), Arizona (age 14), Arkansas (age 14), Colorado (age 12), Connecticut (age 14), Illinois (age 13), Iowa (age 14), Kentucky (age 14), Louisiana (age 15), Massachusetts (age 14), Michigan (age 14), Minnesota (age 14), Mississippi (age 13), (continued...)

(...continued)
Missouri (age 12), Montana (age 12), New Jersey (age 14), North Dakota (age 14), Ohio (age 14), Oklahoma (age 13), South Dakota (age 10), Utah (age 14), Vermont (age 10), Virginia (age 14), Washington (age 15), Wisconsin (age 10), Wyoming (age 13). See Ala.Code § 12-15-34 (1994 & Supp. 2005) (prosecutorial discretion to transfer any child 14 years or older to adult criminal court); Ariz. Rev. Stat. Ann. § 13-501(A)(1) (2001 & Supp. 2005) (Juvenile age 15, 16, and 17 "must" be prosecuted as an adult for first degree murder) and Ariz. Rev. Stat. Ann. § 13-501(B)(1) (2001 & Supp. 2005) (Juvenile at least age 14 "may" be prosecuted as an adult for class one felonies); Ark. Code Ann. § 9-27-318 (2002 & Supp. 2005) (if the juvenile is at least 14 years of age and commits a felony, he or she can be transferred to adult court and tried as an adult); Colo. Rev. Stat. § 19-2-518(1)(a)(I)(A)-(B) (2004) (discretionary transfer to adult court for juveniles age 12 and above for class one or two felonies); Conn. Gen. Stat. Ann. § 46b-127 (West 2004 & Supp. 2005) (mandatory transfer to adult court for children age 14 and above for enumerated felonies); 705 Ill. Comp. Stat. Ann. 405/5-805(3) (West 1999 & Supp. 2005) (When a child is 13-14 the transfer to adult court is discretionary); Iowa Code Ann. § 232.45 (6)(a) (West 2000 & Supp. 2006) (juvenile court may waive jurisdiction over a child as young as 14); Ky. Rev. Stat. Ann. §§ 635.020, 640.010 (LexisNexis 1999 & Supp. 2005) (mandatory hearing to consider transfer to adult court for enumerated offenses, age limit of 14), see also Ky. Rev. Stat. Ann. § 532.025 (LexisNexis 1999 & Supp. 2005) (setting forth age of defendant as mitigating factor to be considered in sentencing defendant to LWOP); La. Child. Code Ann. art. 305 (West 2004) (any juvenile 15 years old or older charged with first-degree murder, second-degree murder, aggravated rape or aggravated kidnapping must be tried as an adult); Mass. Gen. Laws Ann. ch. 119, § 72(b) (West 2003 & Supp. 2005) (treating as an adult any juvenile, 14 or older, charged with murder in the first or second degree); Mich. Comp. Laws Ann. § 712A.4 (West 2002 & Supp. 2005) (discretionary waiver age 14 and above); Minn. Stat. Ann. § 260B.125 (2003 & Supp. 2006) (discretionary waiver, age limit 14); Miss. Code Ann., § 43-21-151(a) (West 1999), and Miss. Code Ann., § 43-21-157(8) (West 1999 & Supp. 2005) (mandatory adult court jurisdiction, age limited to 13, for any felony punishable by life imprisonment or death, no reverse transfer); Mo. Ann. Stat. § 211.071 (West 2004 & Supp. 2006) (discretionary transfer, age limit of 12); Mont. Code Ann. § 41-5-206 (2005) (discretionary transfer if the child is 12 years of age or older for enumerated offenses; when the minor is 16 years of age, more types of offenses are added to the list; if a child is of the age of 17 and commits an offense listed above, the county attorney "shall" file with the district court); N.J. Stat. Ann. 2a:4A-26 (West 1987 & Supp. 2005) (discretionary waiver age 14 or over); N.D. Cent. Code § 12.1-04-01 (1997) (juveniles under 7 are not capable of committing a crime, and a juvenile cannot be tried
(continued...)

that do not impose LWOP at all (Alaska and New Mexico)[8] should be included with these states, see Simmons, *supra* at 564, 125 S. Ct. at 1192 (including non-death penalty states with non-juvenile death penalty states total), as it reflects a conclusion that no one, not even an adult, should be sentenced to LWOP. Therefore, 35 states and the District of Columbia refuse to impose LWOP sentences on juveniles below a certain age.

(...continued)
as adult if less than 14 years old); Ohio Rev. Code Ann. § 2152.10(B) (LexisNexis 2002 & Supp. 2005) (discretionary transfer, age limit of 14, for felonies, mandatory if previously adjudicated delinquent); Okla. Stat. Ann. tit 10, § 7306-1.1(B) (West 1998 & Supp. 2006) (mandatory transfer age 13 and above for first degree murder); S.D. Codified Laws § 26-11-3.1 (2004) (mandatory transfer to adult court of juveniles 16 or older who commit enumerated felonies, hearing at option of juvenile charged where they must prove transfer back to juvenile court is in the best interests of the public; discretionary transfer ages 10-16); Utah Code Ann. § 78-3a-502(3) (2002) (discretionary age limit of 14 for adult court jurisdiction); Vt. Stat. Ann. tit. 33, § 5506 (1998) (discretionary, limit age 10); Va. Code Ann. § 16.1-269.1 (2003 & Supp. 2005) (mandatory transfer, age limit 14, upon finding of probable cause for enumerated felonies); Wash. Rev. Code Ann. § 13.040.030 (Westlaw 2006) (exclusive adult court jurisdiction over 16 or 17 year old accused of committing serious violent offense), Wash. Rev. Code Ann. § 13.040.110 (Westlaw 2006) (juvenile court required to hold waiver hearing whenever child as young as 15 accused of class A felony or attempt, solicitation or conspiracy to commit class A felony); Wis. Stat. Ann. § 938.18 (West 2000 & Supp. 2005) (exclusive adult court jurisdiction, age limit 10, for first degree murder, first degree reckless murder, second degree intentional homicide; limit of 14 for other felonies); Wyo. Stat. Ann. § 14-6-203(f)(3) (2005) (concurrent adult and juvenile court jurisdiction, age limit 14, for enumerated felonies), and Wyo. Stat. Ann. § 14-6-237 (2005) (discretionary transfer between adult and juvenile court).

[8] See Alaska Stat. § 12.15.125(a), (h), & (j) (LexisNexis 2004) (providing mandatory 99 year sentences for enumerated crimes, discretionary 99 year sentence in others, but permitting prisoner serving such sentence to apply once for modification or reduction of sentence after serving half of the sentence; N.M. Stat. Ann. § 31-21-10 (Supp. 2005) (maximum sentence in state has parole eligibility after 30 years).

On the other hand, 15 states, including Pennsylvania, have no age limit on LWOP sentences; that is, these states permit a child of any age who commits certain enumerated crimes to be transferred to adult court and, if convicted, these states permit LWOP sentences to be imposed on a child of any age.[9]

[9] The 15 no-age-limit states are: Delaware, Florida, Georgia, Hawaii, Idaho, Maine, Maryland, Nevada, New Hampshire, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, and West Virginia. See Del. Code Ann. tit. 10, §§ 1010, 1011 (1999 & Supp. 2004) ("child shall be proceeded against as an adult" when accused of enumerated felonies; child can request transfer hearing, and court may transfer back at its discretion), Del. Code Ann. tit. 11, § 4209 (2001 & Supp. 2004) (mandatory LWOP for "any person" convicted of first degree murder); Fla. Stat. §§ 985.225(1)(a), 985.227 (2005) (prosecutor may directly file for capital crime and child is under jurisdiction of juvenile court "unless and until an indictment" is delivered by the grand jury; when indicted, child "must be tried and handled in every respect as an adult ... on the offense punishable by death or by life imprisonment"), Fla. Stat. § 985.225(3) (2005) ("if the child is found to have committed the offense punishable by death or life imprisonment, the child shall be sentenced as an adult"); Ga. Code. Ann. § 15-11-28 (2002) (concurrent juvenile and adult court jurisdiction over child of any age accused of crime where adult would be punished by death, LWOP, or life; mandatory adult court jurisdiction for such crimes if committed by child over 13 years old, no reverse transfer if child over 13), Ga. Code. Ann. § 17-10-6 (Westlaw 2006) (LWOP or life discretionary sentence for murder by juvenile), Ga. Code. Ann. § 17-10-6.1(a)(2) and 17-10-7(b)(1 & 2) (authorizing mandatory LWOP for recidivist offenders); Haw. Rev. Stat. Ann. § 571-22 (LexisNexis 2005 & Supp. 2005) (discretionary transfer to adult court of juveniles, no age limit, who commit murder), Haw. Rev. Stat. Ann. § 706-656 (LexisNexis 2003 & Supp. 2005) (mandatory LWOP for enumerated felonies); Idaho Code Ann. § 18-4004 (Michie 2004) (mandatory LWOP ("fixed life sentence") if death penalty is not sought, or jury finds it unjust, and jury concludes beyond a reasonable doubt that at least one aggravating factor exists; otherwise, life sentence with no parole for at least 10 years); Idaho Code Ann. § 20-509 (Michie 2004) (mandatory transfer for juveniles age 14-18 accused of enumerated crimes, discretionary transfer for children below age 14 accused of enumerated crimes); Me. Rev. Stat. Ann. tit. 15, § 3101 (2003 and West Supp. 2005) (discretionary hearing to determine whether to transfer juvenile of any age to adult court for trial for murder or enumerated felonies), Me. Rev. Stat. Ann. tit. 17-A, § 1251 (West Supp. 2005) (allowing life sentences), see State v. St. Pierre, 584 A.2d 618, (continued...)

The fact that legislatives have established *any* age limit in states that apply LWOP sentences to juveniles is critical after Simmons.

(...continued)
621 (Me. 1990) (LWOP sentences are discretionary under § 1251); Md. Code Ann., Cts. & Jud. Proc. § 3-8A-06 (West 2002 & Supp. 2005) (discretionary transfer to adult court for any age for murder), Md. Code Ann., Crim. Law § 2-202 (West 2002 & Supp. 2005) (discretionary LWOP or life if defendant is below 18); Nev. Rev. Stat. Ann. § 62.B330 (LexisNexis 2002 & Supp. 2003) (mandatory murder exception to juvenile court jurisdiction for any age, no reverse transfer), Nev. Rev. Stat. Ann. § 200.030 (LexisNexis 2001 & Supp. 2003) (discretionary LWOP sentence for murder); N.H. Rev. Stat. Ann. § 169-B:24 (LexisNexis 2001 & Supp. 2005) (presumption that conditions for transfer of juveniles of any age is met where juvenile accused of enumerated crimes; transfer is at court's discretion), N.H. Rev. Stat. Ann. § 630:1-a (LexisNexis 2006) (mandatory LWOP for any juvenile convicted of first degree murder); N.C. Gen. Stat. § 7B-2200 (2005) (mandatory transfer to adult court where there is probable cause that juvenile committed certain enumerated felonies; reverse transfer does not appear possible), N.C. Gen. Stat. § 14-17 (2005) (providing for mandatory LWOP sentence for anyone 17 or under who committed a murder in the first degree); 42 Pa.C.S.A. §§ 6302, 6355 (West 2000 & Supp. 2005) (murder must be tried in adult court, yet court can transfer case to juvenile court at its discretion); 18 Pa.C.S.A. § 1102 (West 1998 & Supp. 2005) (mandatory minimum punishment for murder is life imprisonment), 61 Pa.C.S.A. § 331.21 (West 1999 & Supp. 2005) (no parole until minimum term of sentence served, i.e., life means LWOP); R.I. Gen. Laws § 14-1-7 (2002) (no age limit for transfer of juvenile for enumerated crimes; discretionary, because hearing required), R.I. Gen. Laws § 12-19.2-4 (2002) (LWOP sentence discretionary, not minimum); S.C. Code Ann. § 20-7-7605(6) (1985 & Supp. 2005) (discretionary transfer, no age limit, for murder or "criminal sexual conduct"), see also State v. Corey, 339 S.C. 107, 529 S.E.2d (S.C. 2000) (construing the lack of mention of age in 7605(6) as requiring no age limit), S.C. Code Ann. § 17-25-45 (2003 & Supp. 2005) (except in cases that impose the death penalty, when convicted of a serious offense as defined in statute, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has prior convictions for enumerated crimes); Tenn. Code Ann. § 37-1-134 (2005) (mandatory transfer for enumerated crimes, no age limit), Tenn. Code Ann. § 39-13-202 (2003 & Supp. 2005) (sentence for first degree murder discretionary as to death, imprisonment for life without possibility of parole); W. Va. Code § 49-5-10 (Michie Supp. 2004) (discretionary transfer of child below age 14 accused of committing murder or other enumerated felony), W. Va. Code § 61-2-2 (Michie Supp. 2005) (mandatory LWOP for first degree murder).

As the Supreme Court's reasoning in Simmons shows, there is no constitutional distinction between a child 16-18 years old and those below age 16; that is why the Simmons Court reversed Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989), which had permitted the death penalty for juveniles age 16 and above. In Stanford the Court concluded that juveniles below age 16 had certain characteristics that made them less culpable for their crimes; in Simmons the Court stated, "We conclude the same reasoning applies to all juvenile offenders under 18." *Id.* at 571, 125 S.Ct. at 1196. The Court drew a bright line for juvenile culpability at 18, based on recent studies about brain development and psychology. *Id.* at 573-74, 125 S.Ct. at 1197-98. As will be shown in more detail below, Simmons rejected the notion that the line reasonably can be drawn anywhere below age 18. Drawing it earlier is to apply a distinction without a constitutionally meaningful difference. Such age distinctions, established by many state legislatures in their juvenile LWOP sentences before the Supreme Court's decision in Simmons, are not grounded in the sorts of scientific studies that the Supreme Court relied on in Simmons. Even so, the consensus of 35 states and the District of Columbia that there should be a minimum age limit in order to impose a LWOP sentence demonstates that LWOP sentences are inappropriate for juveniles of a particular age or younger.

The actual practice in the states even more sharply reveals this national consensus against juvenile LWOP. The 20 states that permit a sentencing court to use its discretion in whether to

sentence a convicted juvenile to LWOP for the most heinous crimes, such as murder,[10] have sentenced markedly fewer juveniles

[10] LWOP sentences are discretionary for juveniles, i.e., not a mandatory minimum for the highest degree of murder in the following states: Arizona, California, Georgia, Idaho, Illinois, Indiana, Kentucky, Maryland, Mississippi, Nevada, North Dakota, Ohio (unless sexual motivation for the crime), Oklahoma, Rhode Island, South Carolina (unless prior convictions for enumerated crimes), Tennessee, Utah, Vermont, West Virginia, Wisconsin, Wyoming. See Ariz. Rev. Stat. Ann. § 13-703.01(A) (Westlaw 2006) (LWOP ("natural life") or life sentence for specified time for defendants convicted of first degree murder); Cal. Penal Code § 190.5(b) (West 1999) (LWOP, or at the discretion of the court, 25 years to life, for first degree murder committed by juveniles at (least age) 16 and 17 at the time of the commission of the crime); Ga. Code. Ann. § 17-10-6 (Westlaw 2006) (LWOP or life discretionary sentence for murder by juvenile), Ga. Code. Ann. § 17-10-6.1(a)(2) and 17-10-7(b)(1 & 2) (authorizing mandatory LWOP for recidivist offenders); Idaho Code Ann. § 20-509(3)-(4) (Michie 2004) (juvenile tried as an adult can be sentenced pursuant to adult sentencing measures, pursuant to juvenile sentencing options, or a court can commit the juvenile to the custody of the department of juvenile corrections and suspend the sentence or withhold judgment); 730 Ill. Comp. Stat. 5/5-8-1 (West Supp. 2005) (details mandatory minimum sentences for felonies; for first degree murder, if death cannot be imposed and one aggravating factor is proven the mandatory sentence is LWOP, if no aggravating circumstances, the sentence is 20-60 years); Ind. Code Ann. § 35-50-2-3 (West Supp. 2005) (LWOP sentences are discretionary for 16 and 17 year olds and impermissible for defendants below age 16); Ky. Rev. Stat. Ann. § 532.025 (Michie Supp. 2002), Ky. Rev. Stat. Ann. § 532.030 (Michie 1999) (LWOP discretionary for capital offense; age a mitigating factor in sentencing); Md. Code Ann., Crim. Law §§ 2-202, 2-304 (Michie 2002) (discretionary LWOP or life for first degree murder if defendant below 18); Miss. Code Ann., § 97-3-21 (2005) (discretionary LWOP, life for capital murder); Nev. Rev. Stat. Ann. § 200.030 (LexisNexis 2001 & Supp. 2003) (discretionary LWOP sentence for murder); N.D. Cent. Code § 12.1-32-01 (Michie 1997) (LWOP not mandatory but is maximum for Class AA felonies); Ohio. Rev. Code Ann. § 2929.03C(2)(a)(i), -D(2)((b), -D(3)(b) (LexisNexis 2005) (LWOP mandatory only where there was a sexual motivation for the aggravated murder), Ohio. Rev. Code Ann. § 2971.03 (LexisNexis 2005) (mandatory LWOP for sexually violent offender with predator specification); Okla. Stat. tit. 21 § 701.9 (West Supp. 2006) (LWOP or life sentence discretionary for juvenile convicted of first degree murder); R.I. Gen. Laws § 12-19.2-4 (LexisNexis 2002) (LWOP sentence discretionary); S.C. Code Ann. § 17-25-45 (2005) (except in cases that impose the death penalty, when convicted of a serious offense as defined in statute, a person must be sentenced to a term (continued...)

to LWOP than have states where the sentence is a mandatory sentence[11] for conviction for certain crimes. According to data

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of imprisonment for life without the possibility of parole only if person has *prior convictions* for enumerated crimes; otherwise, there is discretion between LWOP and life with possibility of parole); Tenn. Code Ann. §§ 39-13-202, 204 (2003) (sentence for first degree murder discretionary as to death, imprisonment for life without possibility of parole); Utah Code Ann. §76-3-206 (LexisNexis 2003) (LWOP discretionary); Vt. Stat. Ann. tit. 13, § 2303 (2003) (life imprisonment discretionary for first degree murder) (section 2303 was held unconstitutional on other grounds - however, the Vermont House retained discretionary LWOP, see H. B. 874, 2005 Leg., Adjourned Sess. 2005-2006 (Vt. 2006)), see also State v. White, 172 Vt. 493, 787 A.2d 1187 (Vt. 2001) (court has discretion to impose LWOP); W. Va. Code § 49-5-13(e) (Michie Supp. 2005) (notwithstanding any other part of code, court may sentence a child tried and convicted as adult as a juvenile), W. Va. Code § 61-2-2 (Michie Supp. 2005) (mandatory LWOP for first degree murder); Wis. Stat. Ann. § 973.014 (West 1998) (LWOP discretionary, not minimum for first degree murder); Wyo. Stat. Ann. § 6-2-101 (LexisNexis 2005) (LWOP or life for first degree murder).

[11] LWOP sentences are mandatory for juveniles upon conviction for enumerated crimes, including murder, in the following states: Alabama (only if prior convictions for enumerated, serious crimes), Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia (only if prior convictions for enumerated, serious crimes), Hawaii, Iowa, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana (only if prior convictions for enumerated, serious crimes), New Jersey, New Hampshire, North Carolina, Ohio (only if sexual motivation in crime), Pennsylvania, South Carolina (only if prior convictions for enumerated, serious crimes), South Dakota, Virginia, Washington. See Ala. Code §§ 13A-5-6, 13A-5-9 (West 2005) (LWOP available only for various habitual offenders); Ark. Code Ann. § 5-4-104 (2006) (mandatory LWOP or death for capital murder or treason); Colo. Rev. Stat. § 18-1.3-1201(1)(a)-(b) (LexisNexis 2006) (LWOP mandatory for juveniles for class one felonies); Conn. Gen. Stat. § 53a-35a (West 2001) (mandatory sentence of LWOP or death for capital murder); Del. Code Ann. tit. 11, § 4209 (2005) (mandatory LWOP for "any person" convicted of first degree murder); Fla. Stat. §§ 775.082, 985.225 (2005) (mandatory LWOP for juvenile convicted of murder); Ga. Code. Ann. § 17-10-6 (Westlaw 2006) (LWOP or life discretionary sentence for murder by juvenile), Ga. Code. Ann. § 17-10-6.1(a)(2) and 17-10-7(b)(1 & 2) (authorizing mandatory LWOP for recidivist offenders); Haw. Rev. Stat. §§ 706-656, 706-657 (LexisNexis 2003) (mandatory LWOP for first degree murder, first degree attempted murder, and especially "heinous" second degree murder, but, "[a]s part of such sentence the court shall order the (continued...)

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director of public safety and the Hawaii paroling authority to prepare an application for the governor to commute the sentence to life imprisonment with parole at the end of twenty years of imprisonment"); Iowa Code § 902.1 (West 2003) (LWOP sentences are mandatory upon conviction for "Class A Felony"), Iowa Code § 902.2 (West 2003) (LWOP prisoner allowed to apply for commutation at least every 10 years, and director of Iowa department of corrections may make a request for commutation to governor at any time); La. Child. Code Ann. art. 305 (West 2004) (any juvenile 15 years old or older charged with first-degree murder, second-degree murder, aggravated rape or aggravated kidnapping must be tried as an adult), La. Crim. Code. Ann. art. 14:30 (mandatory LWOP for first degree murder), La. Crim. Code. Ann. art. 14:30.1 (mandatory LWOP for second degree murder); Mass. Gen. Laws Ann. ch. 265, § 2 (West 2000) (LWOP is mandatory upon murder conviction of juvenile); Mich. Comp. Laws Ann § 750.316 (West 2004) (mandatory LWOP for first degree murder), and People v. Snider, 239 Mich.App. 393, 608 N.W.2d 502 (Mich. Ct. App. 1999) (life sentence means LWOP); Minn. Stat. § 609.106 (West Supp. 2005) (mandatory LWOP for enumerated "heinous" crimes, including first degree murder); Mo. Rev. Stat. § 565.020 (2005) (mandatory LWOP for first degree murder for juveniles); Mont. Code Ann. § 46-18-219 (2005) (a sentence of life without parole must be given if the defendant has been *previously convicted* of one of the following: deliberate homicide, aggravated kidnapping, sexual intercourse without consent, sexual abuse of children or ritual abuse of a minor), Mont. Code Ann. § 45-5-102 (2005) (LWOP, life, term of years discretionary sentence for deliberate murder); N.H. Rev. Stat. § 630:1-a (LexisNexis 1996) (mandatory LWOP for any juvenile convicted of murder); N.J. Stat. Ann., § 2C:11-3 (West 2005) (b) & (g) (specifically limiting LWOP for juveniles to mandatory LWOP for murder of police officer, killing a child under age 14, or murder in the course of a sexual assault or criminal sexual contact); N.C. Gen. Stat. § 14-17 (2003) (providing for mandatory LWOP sentence for anyone 17 or under who committed a murder in the first degree); Ohio. Rev. Code Ann. § 2929.03C(2)(a)(I), -D(2)((b), -D(3)(b) (LexisNexis 2005) (LWOP mandatory only where there was a sexual motivation for the aggravated murder), Ohio. Rev. Code Ann. § 2971.03 (LexisNexis 2005) (mandatory LWOP for sexually violent offender with predator specification); 18 Pa.C.S.A. § 1102 (West 1998 & Supp. 2005) (mandatory minimum punishment for murder is life imprisonment), 61 Pa.C.S.A. § 331.21 (West 1999 & Supp. 2005) (no parole until minimum term of sentence served, i.e., life means LWOP); S.C. Code Ann. § 17-25-45 (2005) (except in cases that impose the death penalty, when convicted of a serious offense as defined in statute, a person must be sentenced to a term of imprisonment for life without the possibility of parole *only if that person has prior convictions* for enumerated crimes); S.D. Codified Laws § 22-6-1 (West 2004) (life imprisonment is mandatory minimum for juvenile
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collected by Human Rights Watch and Amnesty International, as of 2004, there are 2,225 people serving LWOP sentences for crimes they committed as juveniles.[12] Report, Human Rights Watch, The Rest of Their Lives: Life Without Parole for Child Offenders in the United States, Table 5 at 35 (October, 2005)(hereinafter, "HRW Report"). More than half of that number, 1228, comes from just *four* states – Florida, Louisiana, Michigan, and Pennsylvania: all four states make LWOP sentences a mandatory minimum for particular crimes.[13] In stark contrast, there are only 439 people serving LWOP sentences for crimes they committed as juveniles in 16 of the 20 states that make LWOP a discretionary sentence for juveniles (data are unavailable for five of the 20 states) -- a mere 19 percent of the people overall.[14] The clear pattern of state practice is,

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convicted of class A felony), S.D. Codified Laws § 24-15-4 (West 2004) (life imprisonment means LWOP); Va. Code Ann. § 18.2-10 (2005), Lenz v. Warden of Sussex I State Prison, 267 Va. 318, 593 S.E.2d 292 (Va. 2004) (life imprisonment means LWOP); Wash. Rev. Code Ann. § 10.95.030 (West 2005) (mandatory death or LWOP for aggravated murder in first degree).

[12] HRW Report, at 35. This number does not include people from juvenile LWOP states Idaho, Kentucky, Maine, or West Virginia – these data were not included in the HRW survey. See HRW Report, Appendix D: State Population Data Table.

[13] The breakdown is as follows: Florida, 273; Louisiana, 317; Michigan, 306; Pennsylvania, 332. HRW Report, page 35 and Appendix D: State Population Data Table.

[14] The breakdown is as follows: Arizona, 30; California, 180; Illinois, 103; Indiana, 2; Maryland, 13; Mississippi, 17; Nevada, 16; North Dakota, 1; Oklahoma, 49; Rhode Island, 2; Tennessee, 4; Utah, 0; Vermont, 0; Wisconsin, 16; Wyoming, 6. The five states not included in this total were the ones for which data were not available: Idaho, Kentucky, Maine, and West Virginia. HRW Report, Appendix D: State Population Data Table.

therefore, that most states rarely sentence juveniles to LWOP, even where the sentence is an option.

Last, the fact that 43 states allow LWOP for children, in some shape or form, does not negate the above analysis, which shows that, when given a chance, sentencing courts do not impose LWOP on juveniles, except in the rarest of cases. Indeed, in some of the states whose laws require mandatory LWOP sentences, few if any juveniles have ever been sentenced to LWOP, such as Hawaii (four people serving LWOP sentences for crimes committed as juveniles), Minnesota (2), Montana (1), New Hampshire (3), Rhode Island (2). See Human Rights Watch, *supra*. Again, more than half of all juvenile LWOP sentences in the U.S. are a result of practices in just four states.

The state law landscape shows that there is a national consensus against the type of mandatory LWOP statute at issue here, a statute that does not consider the age of the defendant in determining whether to impose a LWOP sentence.

2. This Court Must Make Its Own Independent Judgment That LWOP Sentences Applied To Juveniles Are Cruel And Unusual And Violate Due Process.

As the Supreme Court teaches in Simmons, courts are not to regard perceived indicia of consensus as controlling as to whether any particular punishment is cruel and unusual. Instead, as the Court stated, "We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles." *Id.* at 564, 125 S.Ct.

at 1192. In short, courts must ask "whether there is a reason to disagree with the judgment reached by the citizenry and its legislators." Atkins v. Virginia, 536 U.S. 304, 313, 122 S.Ct. 2242, 2247-48, 153 L.Ed.2d 335 (2002) (holding that it is cruel and unusual punishment to impose the death penalty on offenders who are mentally retarded). This Court is free to recognize, as did the Supreme Court in Simmons, that it is beyond the bounds of decency to judge any juvenile offender as having the same culpability as an adult who has committed a similar crime, and that it is beyond the bounds of decency to regard any juvenile as irredeemably beyond rehabilitation. This Court should rely on the conclusions that the Supreme Court reached in Simmons after considering the findings reached by studies of the psychological and social development of people younger than age 18: i.e., that because of their lower level of mental and emotional development, offenders who are younger than 18 are less culpable than are adults for similar crimes; that offenders younger than 18 are more amenable to rehabilitation than those who are older; and that it is impossible to determine with any reasonable certainty that any offender below under 18 is beyond redemption. Simmons, 543 U.S. at 568-575, 125 S.Ct. at 1194-98 (differences between juveniles and adults "render suspect any conclusion that a juvenile falls among the worst offenders . . . 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"). Indeed, after Simmons, such understandings about the

culpability and rehabilitative differences between juvenile and adult offenders may be required in all Eighth Amendment cases *as a matter of law*. Thus, the Simmons Court, after noting that a plurality in Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) had "recognized the import of these characteristics with respect to juveniles under 16," stated: "We conclude the same reasoning applies to all juvenile offenders under 18." *Id.* at 571, 125 S.Ct. at 1196. This Court should reach the same conclusions about LWOP sentences for juveniles that the U.S. Supreme Court reached about the death penalty for juveniles: that the sentence is unconstitutional and is not required to fulfill the commonly accepted purposes of punishment. *Id.* at 571-72, 125 S.Ct. at 1196. This Court should also consider Supreme Court precedent that distinguishes between juveniles and adults both inside and outside of the criminal law context, as well as international law, and the law and practice of other nations.

a. The Conclusions of Scientific and Other Studies, Adopted by the Supreme Court in *Simmons*, Apply Equally to the Conclusion that LWOP Sentences are Cruel and Unusual Punishment And Violate Due Process for any Offender Who Committed the Charged Crime When Younger Than 18.

Most significantly in Simmons, the Supreme Court concluded that scientific and sociological studies demonstrated that juveniles possess less maturity and less sense of responsibility than adults, and therefore it was cruel and unusual and violative of due process to consider them as morally culpable as an adult would be for a similar crime. *Id.* 543 U.S. at 569-71, 125 S.Ct. at

1195-96. The Court explained that children under 18 have diminished culpability and should be treated differently than adults:

> *Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his amici cite 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.* .... In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent. ...
>
> *The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.*[15] ...
>
> *The third broad difference is that the character of a juvenile is not as well formed as that of an adult.* The personality traits of juveniles are more transitory, less fixed.... The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." ... 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. at 569-70, 125 S.Ct. at 1195 (internal citations omitted) (emphasis supplied).

[15] Indeed, the crime that Aaron Phillips committed was committed by him and a group of others, where the peer pressure that affects juveniles far more severely than it affects adults – and is part of the juvenile's reduced culpability -- was able to reign.

The scientific and sociological studies that the United States Supreme Court found persuasive in demonstrating that juveniles were less mature and possessed less sense of responsibility (and therefore were less deserving of the death penalty) apply equally to juvenile LWOP sentences.[16] LWOP sentences are harsh. In states that prohibit the death penalty, they are the harshest possible sentence for any offender, adult or juvenile. They represent a determination that the offender's culpability is not mitigated in any meaningful way. Given what the Supreme Court has held about juveniles' culpability and how it is mitigated quite meaningfully by the juveniles' lack of development and maturity, LWOP sentences

[16] The Court cited the following articles and studies in its opinion: J. Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Review 339 (1992); Laurence Steinberg & Elizabeth Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003); E. Erikson, Identity: Youth and Crisis (1968). In addition, there are numerous other studies that support the idea that the brain is not fully developed until at least age 25. See Elizabeth Cauffman and Laurence Steinberg, (Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults, 18 *Behavioral Sciences and the Law* 741-760 (2000); Elizabeth S. Scott and Thomas Grisso, Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform, 88(1) Journal of Criminal Law and Criminology 137, 137-189 (1997); 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(22) The Journal of Neuroscience 8819, 8819-8829 (2001); National Institute of Mental Health, Teenage Brain: A work in progress, A brief overview of research into brain development during adolescence, NIH Publication No. 01-4929 (2001); Kristen Gerencher, Understand your teen's brain to be a better parent. Detroit Free Press, Feb. 2, 2005; Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 Hofstra L. Rev. 463, 515-522 (2003) (discussing scientific studies on adolescent neurological development).

for juveniles must share the same constitutional fate of the juvenile death penalty.

In addition, LWOP sentences are final. Yet the Simmons Court concluded that children younger than age 18 who commit crimes are more amenable to rehabilitation than older defendants and as a result should not be treated the same way at sentencing. *Id.* at 570, 125 S.Ct. at 1195-96 ("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 minor's character deficiencies will be reformed."). It follows that denying the possibility of parole and dictating that a child spend the rest of his/her life in prison is particularly cruel and unusual. Consistent with the protections provided by the 8th and 14th Amendments, the possibility of parole should be removed only when the court is certain that the defendant is irredeemable. The Supreme Court concluded that recent scientific studies show that such a determination about *anybody* below the age of eighteen cannot be made with any reasonable certainty, even by psychiatrists and psychologists. *Id.* at 573-74, 125 S.Ct. at 1197.[17] Therefore, a law

[17] There have been studies concluding that the likelihood of an offender's committing further crimes after release from prison decreases with age. Erica Beecher-Monas, Edgar Garcia-Rill, Ph.D., *Danger at the Edge of Chaos: Predicting Violent Behavior in a Post-Daubert World*, 24 CARDOZO L. REV. 1845, 1899 (2003) ("The decrease in violence and criminal activity with age is a well-established principle of criminology. Base rates of violence are far lower after the age of sixty (when most life prisoners would be eligible for parole) than in the twenties."). That is, the juvenile offender, especially with rehabilitation, is less likely to commit crimes later on. The Supreme Court recognized this dynamic in Simmons: "Indeed, the relevance of youth as a mitigating factor (continued...)

that is based largely on the notion that a child cannot be rehabilitated is not only cruel and unusual and violative of due process, but is unreasonable. U.S.CONST., Amend. VIII, XIV.

b. LWOP Sentences for Juveniles Are Excessive When Considered Within the Commonly Accepted Purposes of Punishment.

Juvenile LWOP sentences cannot be justified as fulfilling the purposes of punishment: deterrence, retribution, incapacitation and rehabilitation.[18]

1. LWOP Sentences Are An Ineffective Deterrent For Juveniles.

These sentences cannot deter other juveniles from committing similar crimes any more reliably than can less harsh sentences. In Simmons the Court noted that even the death penalty could not be regarded as an effective deterrent, given that juveniles generally lack the mental ability to weigh the possible consequences of their actions. *Id.* at 571, 125 S.Ct. at 1196 (discussing psychological studies). In making this point about the inefficacy of the death penalty as a deterrent for juveniles, the Simmons Court noted that, if a harsh penalty is needed for deterrence, many states still had LWOP for juveniles. *Id.* at 572, 125 S.Ct. at 1196. The Supreme

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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." Simmons, 543 U.S. at 570, 125 S.Ct. at 1195 (quoting Johnson v. Texas, 509 U.S. 350, 368, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993)).

[18] These are the four purposes typically set forth in criminal law casebooks. See, e.g., Paul Robinson, Criminal Law: Case Studies and Controversies 82-90 (2005).

Court's mention of juvenile LWOP is noteworthy. The Supreme Court stated that a LWOP sentence is "a severe sanction, in particular for a young person" and indicated that LWOP is closely related to the death penalty. *Id.* at 570-572, 125 S.Ct. at 1196. Logic dictates that if the harsher penalty, death, is not an effective deterrent for young people who typically fail to weigh consequences, life without parole is not apt to have any more deterrent value. See also Naovarath v. State, 105 Nev. 525, 531, 779 P.2d 944, 948 (Nev. 1989) (holding that LWOP for 13 year old defendant was unconstitutional and questioning whether the sentence could even serve as a deterrent for other teenagers). In exercising its independent judgment, this Court should recognize the unreasonableness, and excessiveness, of LWOP for juveniles.

2. LWOP Sentences Exact Disproportionate Retribution From Juveniles.

As for retribution, LWOP sentences are similarly improper. As the Supreme Court in Simmons stated about the death penalty: "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." Simmons, 543 U.S. at 571, 125 S.Ct. at 1196. This reasoning applies with equal force to juvenile LWOP sentences.

3. LWOP Sentences Exceed What Is Necessary To Incapacitate A Juvenile.

Although LWOP sentences incapacitate offenders, such incapacitation would be unreasonable and disproportionate where the

offender no longer poses a danger to the community. See United States v. Jackson, 835 F.2d 1195, 1200 (7th Cir. 1987) (Posner, J., concurring) ("A civilized society locks up [criminals] until age makes them harmless but it does not keep them in prison until they die."). Since, according to the Simmons Court, not even a psychiatrist or psychologist can assess with any reasonable certainty at sentencing whether a child convicted of murder is beyond rehabilitation, see Simmons, 543 U.S. at 573, 125 S.Ct. at 1197, a child sent to prison should have the opportunity to rehabilitate and qualify for release after a reasonable term of years. See Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in Youth on Trial: A Developmental Prospective on Juvenile Justice 23 (Thomas Grisso & Robert G. Schwartz, eds., 2000) ("the malleability of adolescence suggests that a youthful offender is capable of altering his life course and developing a moral character as an adult"); John H. Laub and Robert J. Sampson, Shared Beginnings, Divergent Lives: Delinquent Boys to Age 70 (2003) (presenting lives of adjudicated delinquent and showing that their youthful characteristics were not immutable; change to a law-abiding life was possible and depended in many instances upon aspects of their adult lives).

4. LWOP Sentences Frustrate Rehabilitation Of Juvenile Offenders.

Last, LWOP sentences do not promote rehabilitation for juveniles; they frustrate it. Understandably, many juveniles sent to prison fall into despair. They lack incentive to try to improve

their character or skills for eventual release because there will be no release. Instead, the incentives, if any, are for the young offender – often placed into the same prisons as adult offenders – to adapt to prison life, which can include "improving" at inflicting violence on others as a means of self-defense and as a means of domination and increased standing in the prison "pecking order." See Human Rights Watch, *supra* at Pt. VI, at 4 (discussing youth offenders in general, and citing Institute on Crime, Justice and Corrections and the National Council on Crime and Delinquency—U.S. Department, Office of Justice Programs, Bureau of Justice Assistance, Juveniles in Adult Prisons and Jails: A National Assessment p.63 (Oct. 2000).[19] The HRW Report also reveals that many juveniles sentenced to spend the rest of their lives in prison commit suicide, or attempt to commit suicide. *Id.* at PT. VI, at 2. See Logan, Proportionality, *supra* note 1, at 712 (discussing "psychological toll associated with LWOP"). Obviously, these sentences promote the very antithesis of rehabilitation.

LWOP sentences meted out to juveniles are unconstitutional. They do not act as a deterrent, they are disproportionate, are beyond the time necessary to incapacitate an offender, and frustrate rehabilitation. This Court should strike down Aaron Phillips' sentence.

[19] Available at http://www.ncjrs.org/pdffiles1/bja/182503-1.pdf (last visited Dec. 16, 2005)).

c. Supreme Court Precedent Has Regularly Categorized Children Differently From Adults In Various Contexts Other Than for Punishment.

Outside of the Eighth Amendment, the Supreme Court has often ensured that governmental power would be constrained from harming juveniles. Moreover, governmental power should be used to protect juveniles in light of their undeveloped capacity for making reasonable judgments.

The Supreme Court has intervened throughout the criminal justice process to protect juveniles from the consequences of their actions and decisions where those consequences are far less severe than the death penalty or a LWOP sentence. See e.g., Kaupp v. Texas, 538 U.S. 626, 123 S.Ct. 1843, 155 L.Ed.2d 814 (2003) (considering age and experience in voluntariness of confession by 17-year-old); Fare v. Michael C., 442 U.S. 707, 725, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979) (determining whether juvenile has waived Miranda rights "mandates . . . evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of the Fifth Amendment rights, and the consequences of waiving those rights . . . [courts must] take into account those special concerns that are present when young persons . . . are involved"); Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) (in examining voluntariness of consent to search under Fourth Amendment, courts must consider, among totality of circumstances, the youth of the accused). The Court has also noted that the distinction between the juvenile and adult justice

systems is rehabilitation, a goal based on the understanding that children are less culpable, and more amenable to rehabilitation, than adults who commit similar crimes. See McKeiver v. Pennsylvania, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971); In re Gault, 387 U.S. 1, 15-16, 87 S.Ct. 1428, 1437-38, 18 L.Ed.2d 527 (1967).

The Supreme Court has also allowed states to exercise power over juveniles that would be unconstitutional if exercised over adults, based on the differences between minors and adults, and the need to protect minors from the consequences of their decisions. Again, these consequences are far less severe than a LWOP sentence. See e.g., Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 666-68, 124 S.Ct. 2783, 2792, 159 L.Ed.2d 690 (2004) (compelling government interest in protecting young minors from harmful images on Internet); Bd. of Educ. v. Earls, 536 U.S. 822, 838, 122 S.Ct. 2559, 2569, 153 L.Ed.2d 735 (2002) (upheld random, suspicionless drug testing of students engaged in extracurricular activities, including marching band); Veronia School Dist. 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) (same, but where drug testing was limited to athletes, in part because of the danger that drug-abusing athletes could end up as "role models" for other, impressionable high school students); Hazelwood Sch. Dist. V. Kuhlmeier, 484 U.S. 260, 273, 108 S.Ct. 562, 571 (1988) (public school officials may censor school-sponsored, student publications); Ginsburg v. New York, 390 U.S. 629, 637, 88 S.Ct. 1274, 1279 (1968) (states may prevent sale of obscene materials to

minors). The Supreme Court even has allowed states to use their power of *parens patriae* to *preventively* detain children in order to serve the best interests of the child, to keep them "from the downward spiral of criminal activity. . ." Schall v. Martin, 467 U.S. 253, 265-66, 104 S.Ct. 2403, 2410-11 (1984) (upholding New York's power to detain certain at-risk juveniles for up to 17 days).

This Court should consider these many, longstanding protections for children, and the reasons for them. Children have long been treated differentially under the law. Imposing a LWOP sentence upon a juvenile is cruel and unusual and violates due process. U.S.CONST., Amend. V, VIII, XIV.

d. International Law, the Law of Other Nations, and Those Nations' Practices Provide Overwhelming Evidence of a World-Wide Consensus Against LWOP Sentences for Juveniles.

In determining the standards of decency, American courts must consider international law. Simmons, 543 U.S. at 575, 125 S.Ct at 1198 ("at least from the time of the Court's decision in Trop [v. Dulles, 356 U.S. 86, 102-103, 78 S.Ct. 590, 599 (1958)], the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments'"). In Simmons, the Court emphasized "the stark reality" that the United States was the only country in the world that executed juveniles as a criminal punishment. *Id.* at 575, 125 S.Ct. at 1198. The Court found persuasive the United Nations Convention on the Rights of the

Child (CRC), Article 37, which expressly forbids the juvenile death penalty. Id. at 576, 125 S.Ct. at 1199.

This same CRC article expressly forbids LWOP sentences for juveniles:

> No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment *nor life imprisonment without possibility of release* shall be imposed for offences committed by persons below eighteen years of age.

United Nations Convention on the Rights of the Child, Art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3 (emphasis supplied).

As with the juvenile death penalty, the "stark reality" is that only the United States and Somalia have not ratified the CRC.[20] *Id.* Another international law instrument, the Covenant for Civil and Political Rights, expressly states that rehabilitation is the goal of criminal justice systems. United Nations International Covenant for Civil and Political Rights, Art. 10(3), Dec. 16, 1966, 999 U.N.T.S., at 175 ("The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation") (signed and ratified by the United States subject to an understanding that the article "does not diminish the goals of punishment, deterrence, and

[20] That Somalia has not signed onto this convention, however, is not necessarily evidence that official Somali policy supports juvenile LWOP sentences. According to the United Nations International Children's Emergency Fund (UNICEF), Somalia has not signed because it lacks a government. UNICEF, "Frequently Asked Questions." http://www.unicef.org/crc/index_30229.html (last visited June 4, 2006).

incapacitation as additional legitimate purposes for a penitentiary system," and with a reservation that "Nevertheless, the United States reserves the right, in exceptional circumstances, to treat juveniles as adults").

In Simmons the Supreme Court also discussed the practice of foreign countries and found persuasive the fact that only seven countries besides the United States had executed juvenile offenders since 1990, and that each nation had, by the time of the Court's opinion, abolished or publicly disapproved of the practice. See Simmons, 543 U.S. at 577, 125 S.Ct. at 1199. This is also true internationally for juvenile LWOP sentences. According to the HRW Report, in 2005 there were no more than 12 people serving LWOP sentences in all of the countries outside the United States combined. Human Rights Watch, *supra* at Pt. VI, at 6 (noting that four of the offenders are in South Africa, one in Tanzania, and that between five and seven are in Israeli prisons). In particular, LWOP sentences for juveniles are prohibited by "other nations that share our Anglo-American heritage, and by the leading members of the Western European community." See Simmons, 543 U.S. at 574-76, 125 S.Ct. at 1198 (quoting Thompson, 487 U.S. at 830, 108 S.Ct. at 2696, and discussing the death penalty). For example, the 15 original member nations of the European Union (which includes the United Kingdom) prohibit LWOP sentences for juveniles. Human Rights Watch, *supra* at Pt. VI, at 6. The European Convention on Human Rights has been interpreted by the European Court of Human Rights to prohibit imprisoning juveniles without possibility of

release. Hussain v. The United Kingdom, 22 Eur.Ct.H.R.1 (1996)[21] (http://www.worldlii.org/eu/cases/ECHR/1996/8.html).

Indeed, the European Union is currently urging the United States to ratify the Convention on the Rights of the Child, stating that the Convention "prohibits sentencing minors both to death and also to *imprisonment for life without the possibility of release*." Memorandum from European Union on the Death Penalty, available at: http://www.eurunion.org/legislat/Deathpenalty/Demarche.htm (emphasis supplied) (last visited June 4, 2006). "These are juvenile justice standards of paramount relevance *and the EU urges the USA to ratify the Convention*." *Id.* That the United States is

[21] The Court stated,

> [para.] 53. It is recalled that the applicant was sentenced to be detained during Her Majesty's pleasure because of his young age at the time of the commission of the offence. In the case of young persons convicted of serious crimes, the corresponding sentence undoubtedly contains a punitive element and accordingly a tariff is set to reflect the requirements of retribution and deterrence. However an indeterminate term of detention for a convicted young person, which may be as long as that person's life, can only be justified by considerations based on the need to protect the public. These considerations, centered on an assessment of the young offender's character and mental state and of his or her resulting dangerousness to society, must of necessity take into account any developments in the young offender's personality and attitude as he or she grows older. A failure to have regard to the changes that inevitably occur with maturation would mean that young persons detained under section 53 would be treated as having forfeited their liberty for the rest of their lives, a situation which, as the applicant and the Delegate of the Commission pointed out, might give rise to questions under Article 3 (art. 3) of the Convention.

Hussain v. The United Kingdom, 22 Eur. Ct. H.R. 1, para. 53 (1996).

out of step with the rest of the world on this issue could not be clearer, nor after Simmons, more relevant.[22]

In conclusion, the 5th, 8th and 14th Amendments to the United States Constitution forbid juvenile LWOP sentences. Such a sentence is contrary to the evolving sense of decency that marks a maturing society, is disproportionate to the crime, and fails to recognize the lack of maturity and responsibility that distinguishes juveniles from adults.

B. A Sentence of Life Without Parole for a 17 Year-Old Child Violates Article I, Section 13 Of The Pennsylvania Constitution Which Prohibits "Cruel Punishment."

The juvenile LWOP sentence in this case violates the Pennsylvania Constitution. In concluding that a protection guaranteed by the Pennsylvania Constitution is greater than its counterpart in the United States Constitution, this Court may consider: the text of the Pennsylvania Constitution; the provision's history, including case law; related case law from other states; and policy considerations unique to Pennsylvania.

[22] In addition, while not necessarily considered as part of this Court's consideration, recent attention in the American mainstream media and the work of human rights experts show a growing awareness of the cruelty of LWOP sentences for juveniles. *See, e.g.,* Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*, (October, 2005), available at http://hrw.org/reports/2005/us1005/ (last visited June 4, 2006); Adam Liptak, *To More Inmates, Life Term Means Dying Behind Bars*, N.Y. Times, Oct. 2, 2005 at A36; Adam Liptak, *Locked Away Forever After Crimes as Teenagers*, N.Y. Times, Oct. 3, 2005, at A1; Adam Liptak, *Years of Regret Follow a Hasty Guilty Plea Made at 16*, N.Y. Times, Oct. 3, 2005 at A16; Adam Liptak, *Serving Life, With No Chance of Redemption*, N.Y. Times, October 5, 2005 at A1. See Appendix B.

Commonwealth v. Edmunds, 526 Pa. 374, 586 A.2d 887 (1991); Commonwealth v. Matos, 543 Pa. 449, 454, n.3, 672 A.2d 769, 772 n.3 (1996). Here there is no case law to directly guide this Court, as no Pennsylvania Court has addressed this specific issue in the aftermath of the United States Supreme Court's decision in Simmons, a decision that concluded that juveniles and adults are categorically different when it comes to culpability and amenability and, therefore, must be treated differently at sentencing. Common law and case law have long provided additional protections for children. The constitutional prohibition against cruel punishment must be read with this in mind. As for policy considerations, LWOP sentences: for juveniles contravene the longstanding protections the common law and Commonwealth law have provided for children in the criminal and civil process, ignore the illogic and the cruelty of the Commonwealth's simultaneously barring children from engaging in various activities until they are 18 in order to protect them from the consequences of their possible bad decisions, yet forcing them to bear full, criminal responsibility as adults without any recognition of their youth; and deprive juvenile offenders of a meaningful opportunity to rehabilitate.

Article I, Section 13 of the Pennsylvania Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." PA.CONST. Art. I, § 13. A plain reading suggests that the Pennsylvania Constitution here provides greater protection than its federal counterpart: the

Pennsylvania Constitution prohibits "cruel punishments" while the United States Constitution bars punishments that are both "cruel" *and* "unusual." U.S.CONST., Amend. VIII. Hence, the United States Constitution would permit a "cruel" punishment that is common (i.e., usual).

Before engaging in the comparative analysis suggested by Edmunds to determine if the Pennsylvania Constitution provides greater protection to the citizens of this Commonwealth, a recognition is required of Pennsylvania cases that have rejected the argument that the Pennsylvania Constitution's ban on "cruel punishments" is broader than its federal counterpart. See Commonwealth v. Zettlemoyer, 500 Pa. 16, 72-74, 454 A.2d 937, 967 (1982), *cert. denied sub nom.*, Zettlemoyer v. Pennsylvania, 461 U.S. 970, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983) (holding that Pennsylvania's constitutional ban on excessive punishment was co-extensive with United States constitutional ban where defendant argued that death penalty violated Pennsylvania constitution); Commonwealth v. Lucas, 424 Pa. Super. 173, 177, 622 A.2d 325, 327 (1993) (housing juvenile in adult prison instead of juvenile facility to serve sentence of two to four years does not violate United States or Pennsylvania constitutional prohibitions against excessive punishment), Commonwealth v. Strunk, 400 Pa. Super. 25, 582 A.2d 1326 (1990) (90-day driver's license suspension for a minor's possession and consumption of alcoholic beverages does not violate federal or Pennsylvania constitutional ban on excessive punishment).

However, those courts rejected the instant argument in response to claims substantially different from that presented by Aaron Phillips here. Unlike this Court, the courts in those cases were not asked to apply the reasoning of a recent United States Supreme Court case that relied on recent scientific studies to construe the Eighth Amendment in an analogous context. The reasoning and scientific studies that lead the Supreme Court in Simmons to conclude that there is a categorical difference in culpability and amenability to rehabilitation between juveniles and adults in a death penalty case applies equally to a juvenile LWOP sentence. See also Barry C. Feld, Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents, 32 Hofstra L. Rev. 463, 535-46 (2003) (using similar studies and conclusions about juvenile culpability to argue, pre-Simmons, that LWOP sentences for juveniles violate Eighth Amendment).

The key Pennsylvania case dealing with the co-extensive nature of the Pennsylvania and United States Constitutional prohibition against cruel (and unusual) punishments is Zettlemoyer. Zettlemoyer, however, was decided before Edmunds which established the method to determine whether the Pennsylvania Constitution is broader than the federal Constitution.

Recently this Court considered and rejected an argument that LWOP sentences are unconstitutional under the United States and Pennsylvania constitutions. Commonwealth v. Carter, 855 A.2d 885 (Pa. Super. 2004). However, this Court should decline to follow

that holding because it was reached before the decision in Simmons. In Carter this Court was operating under the erroneous conclusion that it could not distinguish between juveniles and adults at sentencing. It was for this reason that the Carter Court dismissed the juvenile's argument that his counsel had been ineffective in not raising the argument that his LWOP sentence was unconstitutional as applied to a juvenile convicted of felony murder, merely by calling the argument "preposterous." Commonwealth v. Carter, 855 A.2d at 892. Carter held that it could not honor the juvenile's request to distinguish between a juvenile and an adult after the juvenile's case was transferred into adult court and he was convicted of a crime: it regarded the distinction between juvenile and adult as an impossible one at that point in the sentencing proceedings. The reasoning of the Carter Court would similarly uphold the juvenile death penalty.

However, less than a year later, in Simmons, the United States Supreme Court made precisely that distinction at precisely that point in the proceedings: the Supreme Court determined that a juvenile, even one whose case had been transferred into adult court and was subsequently convicted, cannot be sentenced to death, based solely on the fact that he was younger than 18 and that children younger than 18 are less culpable and more amenable to rehabilitation than adults who commit similar crimes. Therefore, there is no longer any question that this Court can address the distinction between adults and juveniles at sentencing and benefit from the conclusions about juveniles' culpability and amenability

to rehabilitation that the Supreme Court reached in Simmons. Indeed, under the reasoning in Simmons, it is an inescapable conclusion that the Eighth Amendment requires that Pennsylvania and other states distinguish between juveniles and adults when it comes to sentencing.

Applying the reasoning of Simmons to this case would also comport with Pennsylvania's historical tradition of providing special protections for juveniles. For example, given juveniles' susceptible nature, contracts entered into by juveniles for items other than necessities are void *ab initio*. Ruchizky v. DeHaven, 97 Pa. 202 (1881). Negligence for juveniles has historically been assessed under a more protective standard than for adults. Kuhns v. Brugger, 390 Pa. 331, 135 A.2d 395 (1957).

Even though all juvenile murder cases start in adult court, a juvenile can petition to send the case to juvenile court. 42 Pa.C.S.A. §6322 (2005); Commonwealth v. Pyle, 462 Pa. 613, 342 A.2d 101 (1975). Special rules govern the admissibility of a confession by a juvenile: the juvenile's age must be considered among the totality of the circumstances regarding whether the confession was voluntary. Commonwealth v. Williams, 504 Pa. 511, 521, 475 A.2d 1283, 1288 (1984). In Commonwealth v. Kocher, 529 Pa. 303, 602 A.2d 1308 (1992) the Pennsylvania Supreme Court, in vacating and remanding the Court of Common Pleas' refusal to transfer the murder prosecution of a 9-year-old boy back to juvenile court, referred to the common law presumption that children under the age of 14 are not capable of forming the requisite criminal intent to commit a

crime, citing Commonwealth v. Durham, 255 Pa. Super. 539, 389 A.2d 108 (1978) (*en banc*), *overruled by,* In re G.T., 409 Pa. Super. 15, 597 A.2d 638 (1991) (*en banc*).[23] While the common law presumption was subsequently explicitly overruled by statute, see 42 Pa.C.S.A. § 6301 (2005), its existence demonstrates that Pennsylvania's common law was especially protective of juveniles. This common law protection predated and has existed side-by-side with Pennsylvania's Constitution, and must be considered in interpreting the Pennsylvania Constitution. All of these authorities demonstrate the special consideration that Pennsylvania's criminal justice system gives to juveniles, and that it would be appropriate to apply Simmons' holding that there is, insofar as culpability and amenability to rehabilitation are concerned, a categorical difference between adults and juveniles.

The special treatment accorded juveniles historically under Pennsylvania law comports with our legislature's determination in numerous statues that juveniles are to be treated differently than adults: See 18 Pa.C.S.A. §3206 (2005) (abortion prohibited for people below age 18 without parental consent); 1 Pa.C.S.A. §1991 (2005) (age of majority is 21); 18 Pa.C.S.A. §6308 (2005) (consumption of alcohol prohibited to people less than age 21); 18

[23] Indeed, the two Justices tersely concurred and wrote (and here their opinion is reprinted in full), "I join the well reasoned opinion of the majority, but would go further and express that the public policy of Pennsylvania does not allow the criminal prosecution of a nine year old child for murder. That it was attempted in this instance shocks my conscience." Commonwealth v. Kocher, 529 Pa. 303, 315-16, 602 A.2d 1308, 1315 (1992) (Flaherty and Cappy, JJ., concurring).

Pa.C.S.A. §6305 (2005) (possession and purchase of cigarettes prohibited for people under 18); 13 Pa.C.S.A. §3305 (2005) (infancy is a defense to suit for contract enforcement); 23 Pa.C.S.A. §5101 (2005) (age requirement of 18 to enter into contracts); 75 Pa.C.S.A. §1503 (2005) (age limit of 18 for drivers license free and clear of restrictions); 18 Pa.C.S.A. §6302 (2005) (prohibiting sale or delivery of firearms to people under 18); 18 Pa.C.S.A. §6110.1 (2005) (banning possession of certain firearms for people under 18); 72 Pa.C.S.A. §3761-309 (2005) (sale of lottery tickets to people under 18 prohibited); 10 Pa.C.S.A. §305 (bingo prohibited for people under 18); 4 Pa.C.S.A. §325.228 (2005) (placing pari-mutual bets prohibited for people under 18); 42 Pa.C.S.A. § 4502 (2005) (jury duty limited to people 18 and older); 23 Pa.C.S.A. §1304 (2005) (marriage prohibited to those under 18); 63 Pa.C.S.A. §281-29 (2005) (pawning property prohibited for people under 18); 18 Pa.C.S.A. §5903 (2005) (prohibiting sale or delivery of pornography to people under 18); 18 Pa.C.S.A. § 6311 (2005) (prohibiting tattoos to people under age 18 without parental consent); 25 Pa.C.S.A., § 2811 (2005) (age 18 limit for voting); 20 Pa.C.S.A. § 2501 (2005) (age 18 limit for making a will). Pennsylvania case law, Pennsylvania common law and Pennsylvania statutes demonstrate that juveniles in the Commonwealth are not treated the same way as adults because of the perception that juveniles' are less capable of intelligently exercising rights.

It is precisely this well established history that demonstrates the special and distinctive nature of the treatment of

juveniles in Pennsylvania. Hence, while Zettlemoyer might have said that the Pennsylvania constitutional prohibition of "cruel punishment" was co-extensive with the federal constitutional prohibition, Keith Zettlemoyer was an adult and the decision, therefore, did not take into account the historically special way in which juveniles were treated. Zettlemoyer did not consider juvenile protections and cannot be considered as precedent regarding juveniles.

There is a final case relevant to the assessment of whether the Pennsylvania Constitution's prohibition against "cruel punishment" provides greater protections for juveniles. The Supreme Court in Commonwealth v. Sourbeer, 492 Pa. 17, 422 A.2d 116 (1980) upheld the constitutionality of life imprisonment for first degree murder. Interestingly, while the defendant was fourteen years old, the Court never discussed the significance of this fact. The Court established the test for determining whether a statutory punishment can be a "cruel" punishment: whether it is an excessive and unnecessary punishment disproportionate to the crime that shocks the moral conscience of the community. The excessive and disproportionate nature of life imprisonment for juveniles has been discussed above. Moreover, given the above special treatment accorded juveniles under Pennsylvania case law, Pennsylvania statutes and Pennsylvania common law, it would indeed shock the moral conscience of the community to punish children exactly the same way as one would punish an adult. It must be noted that Sourbeer is pre-Edmunds. This further diminishes its relevance.

At least two other states have interpreted their constitutions as barring life imprisonment without parole sentences for juveniles. Workman v. Commonwealth, 429 S.W.2d 374, 377 (Ky. 1968) (holding that LWOP sentence for juvenile violates United States and Kentucky constitutions, stating: "It seems inconsistent that one be denied the fruits of the tree of law, yet subjected to all its thorns."); Naovarath v. State, 105 Nev. 525, 779 P.2d 944 (Nev. 1989)(holding that LWOP sentence for a juvenile violates both the Nevada and United States constitutions).

An examination of the text of the Pennsylvania Constitution's prohibition against "cruel punishment" demonstrates that, grammatically, it is broader than the United States Constitution's prohibition against "cruel and unusual" punishment. Pennsylvania history, case law and common law have consistently treated juveniles more protectively than adults. Therefore, it would violate the Pennsylvania Constitution to impose a life without parole sentence upon a juvenile.

C. Even if LWOP Sentences Were Not Unconstitutional for Juveniles, a *Mandatory* LWOP Sentence for Juveniles Violates Both the U.S. and Pennsylvania Constitutions.

The mandatory nature of the imposition of a life sentence without the possibility of parole for both first and second degree murder precludes judges from even considering a juvenile's age, immaturity, reduced mental capacity, reduced role in the offense, or any other invalidating factors related to his young age. These age-related factors include the special characteristics of

juveniles that make them less culpable than adults -- the precise characteristics that the United States Supreme Court relied upon in striking down the imposition of the death penalty for juveniles in Simmons. The contention here is that even assuming that LWOP sentences could be constitutionally applied to juveniles, a mandatory LWOP sentence for first or second degree murder would not be.

The United States Supreme Court has struck as unconstitutional statutes imposing a mandatory death sentence for particular offenses or against particular categories of defendants because the statutes did not provide for individualized-sentencing procedures that allow for consideration of particularized mitigating factors. See e.g., Sumner v. Shuman, 483 U.S. 66, 85, 107 S.Ct. 2716, 2727 (1987) (striking statute mandating death penalty for inmate convicted of murder while serving life sentence without possibility of parole); Harry Roberts v. Louisiana, 431 U.S. 633, 638, 97 S.Ct. 1993, 1996 (1977) (striking statute mandating death penalty for defendants convicted of first degree murder of a police officer); Stanislaus Roberts v. Louisiana, 428 U.S. 325, 336, 96 S.Ct. 3001, 3007 (1976) (striking statute mandating death penalty for first degree murder); Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991 (1976) (striking statute mandating death penalty for first degree murder, including felony murder).

These cases rejecting the mandatory imposition of the death penalty are based on the constitutional requirement in capital cases that "the sentencing authority have information sufficient to

enable it to consider the character and individual circumstances of a defendant prior to the imposition of a death sentence." See Sumner, *supra* 72 (internal quotation omitted) (quoting Gregg v. Georgia, 428 U.S. at 189, n. 38, 96 S.Ct. 2909, 2933, n.3).

Although these cases highlight that death is qualitatively different from imprisonment, they do so within the context of adult sentencing. More recently in Simmons the United States Supreme Court made clear that juveniles are in a different class and category than adults when it comes to sentencing. Simmons stands for the proposition that it is unconstitutional to impose adult sentences, such as the death penalty, on juveniles. A mandatory sentence of life imprisonment without the possibility of parole is certainly an adult sentence. In Simmons the Supreme Court recognized a heightened need for reliability in punishing juveniles based upon their unique characteristics as a class -- namely, their immaturity, susceptibility to negative influences, and lack of a well-formed character. This heightened concern for reliability applies equally to the harsh sentence of mandatory life without the possibility of parole.

Like the death penalty, mandatory life imprisonment without any possibility of parole disregards the special characteristics of juveniles and their capability for reform. Life imprisonment without the possibility of parole no more allows for rehabilitation than does the death penalty. For a juvenile sentenced to life in prison without parole, any opportunity to learn from his/her mistakes and transform is also eliminated. A mandatory life

without parole sentence automatically precludes any possibility for reform, rehabilitation, and eventual contribution to society.

In Simmons the United States Supreme Court found that the "reality that juveniles still struggle to define their identity means it is less supportable to conclude even a heinous crime committed by a juvenile is evidence of an irretrievably depraved character" and, therefore, "[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." *Id.* at 570. As juveniles mature into adults, "the impetuousness and recklessness that may dominate in their younger years may subside." *Id.* Yet, a mandatory sentence of life imprisonment without the possibility of parole does not allow for reformation or rehabilitation; the juvenile sentenced to mandatory life without parole will, by definition, die in prison. Such a harsh sentence should be reserved only for the worst offenders -- those offenders whose character we can be certain are "irretrievably depraved" and who are beyond rehabilitation. Simmons made clear in that this does not include juveniles whose characters are not yet well-formed.

Further, Simmons recognized that juveniles' "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.* at 570. Given their immature decision-making and susceptibility to external influences, juveniles' conduct is not as

morally reprehensible as that of adults. In short, life in prison without the possibility of parole, like the death penalty, should be reserved for a category of persons who are considered the worst offenders. Because "juvenile offenders cannot with reliability be classified among the worst offenders," *Id.* at 569, life without parole constitutes an unconstitutional sentence for juveniles.

Eight months prior to the Supreme Court's decision in Simmons, this Court upheld the imposition of a mandatory life sentence without parole on a juvenile convicted of felony murder in Commonwealth v. Carter, 855 A.2d 885, 892 (Pa. Super. 2004), *appeal denied,* 581 Pa. 670, 863 A.2d 1142 (2004). This Court reasoned that given that there is no federal constitutional guarantee of special treatment for juveniles and that a juvenile's due process rights are not violated if tried for murder in adult, criminal court, it cannot be considered cruel and unusual punishment to subject that juvenile to an adult sentence upon conviction in adult, criminal court. However, Simmons has changed the legal landscape and necessarily calls into question this Court's prior conclusion that a defendant's "age does not entitle him to differential treatment." In fact, the United States Supreme Court specifically found that age ***was*** relevant to sentencing, at least in the death penalty context, and that social science research exploring the differences between adults and juveniles does entitle juveniles to differential treatment. Accordingly, this Court's decision in Carter must be reconsidered in light of Simmons.

Even if LWOP sentences were not unconstitutional for juveniles, Pennsylvania law that makes mandatory LWOP sentences for juveniles convicted of first and second degree murder would be. Such mandatory sentences fail to take into account the age, immaturity and mental incapacity of juveniles.

2. IT VIOLATES A JUVENILE'S RIGHT TO DUE PROCESS TO MANDATE THE IMPOSITION OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE FOR SECOND DEGREE (FELONY) MURDER.

Under Pennsylvania law a defendant is guilty of second degree (felony) murder where a person dies during the commission of a felony. It is not necessary for the prosecutor to prove intent to kill. Instead, the malice necessary to prove murder is imputed by the commission of the underlying felony. While such an irrebutable presumption might be constitutionally applied to an adult, it would be unconstitutional to apply that same presumption to children given that children do not have an adult understanding of the consequences of their behavior. This Court should strike down as unconstitutional Aaron Phillips' second degree murder conviction because there is no evidence of malice apart from the irrebutable presumption.

The PCRA court below did not reach this issue as it was operating under the erroneous assumption that the instant PCRA petition was untimely filed. As discussed above (see footnote 2, *supra*), this was error. There is jurisdiction for this Court to consider this issue.

The felony-murder rule imposes liability for murder when death results from actions taken during the commission of a felony. This rule allows prosecutors to charge a defendant with murder even if the defendant did not intend to kill the victim. The felony-murder rule imputes malice, an element of the crime of murder, where it does not exist expressly. Prosecutors must only prove that the defendant intended to commit the underlying felony and are not required to offer any separate proof of intent with regard to the death. Homicidal malice is constructively inferred from the malice necessary for the perpetuation of the underlying enumerated felony. Commonwealth v. Tarver, 493 Pa. 320, 426 A.2d 569 (1981).

While inferring and imputing homicidal malice where it does not expressly exist may be constitutionally valid for adults, it cannot be constitutionally applied to juveniles because the United States Supreme Court has recognized juveniles as less blameworthy and less culpable as a class than adults. Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). Developmental psychology supports the common stereotype that adolescents are more willing to take risks than adults and more likely to believe that they will avoid the negative consequences of risky behavior. Not only do adolescents prefer to engage in risky or sensation-seeking behavior, but, perhaps just as important, they may have different perceptions of risk itself. See Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 Law & Hum. Behav. 249, 260 (1996) ("The few extant comparisons of adults and adolescents suggest that

thrill seeking and disinhibition [as assessed via measures of sensation seeking] may be higher during adolescence than adulthood."). For example, adolescents appear to be unaware of some risks of which adults are aware, and to calculate the probability of positive and negative consequences differently than adults.

As the United States Supreme Court made clear in Simmons, juveniles are subject to immature decision-making, susceptible to negative influences, and are less able to extricate themselves from criminogenic settings. *Id.* at 569. As a result, juveniles characteristically act recklessly and impetuously without consideration of or appreciation for the consequences of their acts. Given their lack of appreciation for the consequences of their acts, a juvenile is less likely to appreciate that their actions may harm someone. For this reason, the requisite malice for murder cannot be constitutionally be imputed to juveniles from their commission of other, non-homicide felonies. It is simply inappropriate to infer that a juvenile possesses homicidal malice from the mere fact that the juvenile committed an underlying, non-homicide crime.

Further, the underlying rationale for the felony-murder doctrine does not apply to juveniles. The felony-murder rule is justified as a deterrent for negligent and accidental killings during the commission of a felony. See Joshua Dressler, *Understanding Criminal Law*, 480 (2d Ed. 1995). Given that juveniles are less capable of appreciating the consequences of

their actions and therefore less culpable than adults, the deterrence rationale cannot be applied to juvenile offenders. From a developmental perspective, it is grossly unfair to apply the felony-murder rule to juveniles because they lack the foresight and judgment of fully competent adults and are prone to make decisions without careful deliberation.

Moreover, the felony-murder statute creates an unconstitutional irrebuttable presumption violative of juveniles' right to due process. Due process entitles juveniles, like adults, to proof beyond a reasonable doubt of every fact necessary to constitute a crime for which they are charged. In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970). In Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979), the United States Supreme Court held that where intent is an element of a crime, a presumption (expressed in a jury instruction) that a defendant intends the ordinary consequences of his voluntary acts violates the 14th Amendment's requirement that the state prove every element of a criminal offense beyond a reasonable doubt.

This Court in Commonwealth v. Rawls, 328 Pa. Super. 469, 473, 477 A.2d 540 (1984) concluded that Pennsylvania's felony-murder statute does not create an unconstitutional irrebuttable presumption of malice. Rawls held that, unlike the jury instruction in Sandstrom, Pennsylvania's felony-murder statute does not relieve the Commonwealth of its burden to prove that the defendant engaged in the underlying felony with the requisite intent. *Id.* at 543. Rather, this Court reasoned, the felony-

murder statute imputes the malice from the underlying felony over to the murder committed in furtherance of the intentional felony, and this is a "permissive legislative choice reflecting the gravity with which this Commonwealth views killings perpetuated in the course of serious felonies." *Id.*

The social science research that the United States Supreme Court relied upon in determining that juveniles are less blameworthy than adults in Simmons compels narrowing this Court's decision Rawls to exclude juveniles from the grasp of felony murder. The alternative would be that Pennsylvania's felony-murder statute creates an unconstitutional irrebuttable presumption that juvenile offenders act with homicidal malice, regardless of their proven inability as a class to appreciate the consequences of their actions, their propensity toward reckless behavior, and their immature decision-making. The statute thus relies on a basic fact, that juveniles have committed an underlying felony that resulted in death, and uses it to presume that these juveniles acted with malice to commit murder. See, e.g., Vlandis v. Kline, 412 U.S. 441, 452, 93 S.Ct. 2230, 2236 (1973) (if it is not "necessarily or universally true in fact" that the basic fact implies the presumed fact, then the statute's irrebuttable presumption denies due process of law). This presumption violates juveniles' right to due process. See Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632, 94 S.Ct. 791 (1974) (invalidating regulations requiring mandatory maternity leave for school teachers); United States Department of Agriculture v. Murry, 413 U.S. 508, 93 S.Ct. 2832 (1973) (finding

irrebuttable presumption regarding food stamp eligibility invalid for lacking critical ingredients of due process by failing to allow recipients a right to challenge); Vlandis, 412 U.S. 441 (invalidating Connecticut statute that presumed students to be non-residents at time of admission to state university, and afforded student no opportunity to challenge that designation throughout their attendance); Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208 (1972) (invalidating statutory presumption under Illinois law that unmarried fathers were unsuitable and neglectful parents as violative of due process); Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586 (1971) (invalidating Georgia statute that applied a general presumption that uninsured drivers who are involved in auto accidents will be deemed negligent and held liable for those accidents, even when there was no reasonable possibility of a judgment being rendered against the licensee); Department of Transportation, Bureau of Driver Licensing v. Clayton, 546 Pa. 342, 684 A.2d 1060 (1996) (affirming trial court and Commonwealth Court decisions invalidating a statute on the grounds that it created an irrebuttable presumption in violation of due process).

Lastly, juveniles convicted of felony-murder are automatically sentenced to life imprisonment without parole. Once convicted of felony-murder, juveniles are not afforded a forum in which to challenge the mandatory life without parole sentence on the basis of their diminished culpability and blameworthiness. Yet under the due process clause, juveniles have the right to rebut the presumption that they are blameworthy for murder. See Commonwealth

v. Aziz, 724 A.2d 371, 375 n.2 (Pa. Super. 1999) (noting that there is a right to reject the presumption asserted).

The felony-murder statute as applied to juveniles identifies a class of persons by a single trait -- their status as offenders who committed an underlying felony that resulted in death -- and then imposes upon everyone in this group a mandatory life sentence without the possibility of parole, irrespective of their inability to fully appreciate the consequences of their actions and their immature decision-making ability. These latter characteristics are precisely the characteristics that the Simmons Court deemed crucial to treating juveniles differently than adults. The creation of an irrebuttable presumption of malice violated Aaron Phillips right to due process. U.S.CONST., Amend. V, XIV.

VIII. CONCLUSION

After Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) a sentence of life imprisonment without the possibility of parole for a juvenile violates both the United States and Pennsylvania Constitutional prohibitions against cruel punishment. Even if life imprisonment could be constitutionally applied to a juvenile, the imposition of a mandatory life imprisonment sentence would violate Aaron Phillips' right to due process. Additionally, here Aaron Phillips' second degree murder conviction cannot stand because it rests upon an irrebutable

presumption, an irrebutable presumption that is no longer viable after Simmons.

Respectfully submitted,

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