No. 08-7412

In The
Supreme Court of the United States

TERRANCE JAMAR GRAHAM, PETITIONER,

v.

STATE OF FLORIDA

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

REPLY BRIEF

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REPLY BRIEF

It is cruel and unusual to impose a criminal sentence that declares a juvenile forever incapable of reform and forever unfit for return to society when the juvenile has not killed or intended to kill. This conclusion rests on two intersecting principles: (1) juveniles are inherently less culpable and more capable of reform than adults; and (2) offenders who do not kill are less culpable than those who do. And the conclusion is confirmed by the objective consensus before this Court, primarily the scarcity, outside of Florida, of any non-homicide juvenile offenders serving sentences of life without parole.[1] Nothing in the briefs of respondent or its amici undermines this conclusion or the principles and objective indicia that support it.

I. AN OFFENDER'S STATUS AS A JUVENILE UNDER AGE 18 IS RELEVANT TO DETERMINE WHETHER HIS SENTENCE COMPORTS WITH THE EIGHTH AMENDMENT

Respondent admits that an offender's age could be relevant to the Eighth Amendment's proportionality analysis in a non-homicide case. In *Sullivan v. Florida*, respondent acknowledged that "at a certain point an offender's young age could play into the

[1] For brevity's sake, we generally refer to petitioner's sentence and others like it as being "life without parole." However, it is more accurate to state that petitioner's sentence is life imprisonment without the opportunity or possibility to seek parole ever.

gross disproportionality analysis for prison sentences in ways it does not for adult offenders." No. 08-7621 Resp. Br. 21. This concession is fatal to respondent's categorical claim in this case that the age of the offender is always irrelevant. Having conceded that age is relevant at least to some offenders less than 13 years old, respondent proffers no rational justification for treating older juvenile offenders as if they were adults and for deviating from the reasoning of *Roper v. Simmons*, 543 U.S. 551 (2005).

A. *Roper*'s Rationale Cannot Be Cabined Solely To Capital Cases

Roper is the latest chapter of this Court's consistent jurisprudence holding that constitutional protections apply differently to juveniles because they, as a class, differ from adults in constitutionally significant ways. *See* Juvenile Law Center *et al.* Amicus Br. 6-9.

This Court established in *Roper* that juveniles who were under age 18 at the time of their criminal offense are not yet fully formed human beings and, consequently, less morally culpable for their actions and more capable of reform than adults. *See* 543 U.S. at 569-570. Thus, although juveniles may be criminally punished for their conduct, the Eighth Amendment protects them from harsh punishments that, in its independent judgment, this Court determines are particularly cruel in light of the uncontested differences between adults and juveniles.

Respondent and the amici States do not contest that modern science establishes a biological basis for the previously well-understood proposition that juveniles are more malleable to peer pressure and environmental factors than adults, and that the overwhelming majority of juveniles literally grow out of their anti-social phase as their brains develop. These uncontested scientific truths are confirmed by the real-life testaments and experiences of former juvenile offenders like Charles Dutton and former Senator Alan Simpson, as well as by educators and correctional supervisors, *see* Former Juvenile Offenders Amicus Br. 7-32; Council of Juvenile Corr. Adm'rs Amicus Br. 16-27; Educators Amicus Br. 14-30.

The undisputed science also confirms this Court's holding in *Roper* that it is impossible to discern *ex ante* which juveniles will become law-abiding citizens and which will continue to be a threat to society for the rest of their lives. Am. Psychological Ass'n. *et al*. 19-22; Aber *et al.* Amicus Br. 28-31. These scientific findings do not suggest, nor do we, that biology causes juveniles to commit crimes. But biology does explain why many juveniles who commit crimes stop doing so once they reach adulthood.[2]

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[2] Notably, not a single mental health or medical professional or organization joined the two amici briefs in support of respondent that criticize some of the statements made by the multiple respected mental health and medical professionals and organizations in their amicus briefs to this Court. While they

(Continued on following page)

Respondent argues—inconsistently with its concession—that, because "death is different," this Court may consider *only* the nature of the offense, and not the youth of the offender, as part of its Eighth Amendment proportionality analysis for non-capital cases. Resp. Br. 23-31. But the insights of *Roper*, and the differences between youth and adulthood, do not evaporate simply because non-capital rather than capital punishment is at issue.[3] Moreover, none of the six pre-*Roper* cases challenging non-capital sentences upon which respondent relies (Resp. Br. 24) for its "death is different" argument involved a juvenile offender, and none says, much less holds, that age is not an appropriate consideration under the Eighth Amendment.

The nature of the offense is not the *only* factor that has been or must be considered under the Eighth

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question the legal ramifications of these findings, neither undermines the core of petitioner's Eighth Amendment claim: Juveniles are inherently less culpable and more capable of reform than adults. This proposition is common sense that every parent knows and that merely has been confirmed and explained by science. *See Roper*, 543 U.S. at 569-570.

[3] No party or amici has presented a logical reason to draw in this case a different age line between maturity and immaturity when dealing with another extremely harsh punishment. There has been no change in the state statutes relied upon in *Roper* to establish age 18 as the demarcation between youth and adulthood for Eighth Amendment purposes. Pet. Br. 40 & n.12. The statutes protecting younger teens in other areas, cited by the *Sullivan* petitioner, were in effect at the time of *Roper* and thus should not alter this Court's analysis.

Amendment in determining whether a sentence is grossly disproportionate. To the contrary, this Court's non-capital precedents have made the offender's characteristics relevant by considering the offender's recidivism. Pet. Br. 25, 32.

Respondent argues that the consideration of recidivism involves the offender's prior "conduct," not the offender's "personal traits." Resp. Br. 31 n.13. Putting those unhelpful labels to one side, recidivism is like age in all critical respects. First, both are irrelevant to guilt for the underlying offense. Second, both are material to moral culpability and the capacity to reform in the future: adult recidivism demonstrates a long-term inability or unwillingness to comply with society's rules, *see Ewing v. California*, 538 U.S. 11, 29 (2003) (plurality opinion) (noting that a State was justified in incapacitating a recidivist offender because his recidivism showed that he was "incapable of conforming to society's norms"), while, in contrast, a juvenile offender's age points in the opposite direction by demonstrating decreased moral culpability and a capacity for reform. Finally, both recidivism and age are easy for courts to determine, and do not require intricate, death-penalty-like sentencing proceedings.

B. Age Should Be Considered When Assessing The Constitutionality Of A Life-Without-Parole Sentence Because It Shares Important Similarities With A Capital Sentence

The severity of a sentence of life without parole cannot be seriously questioned, notwithstanding respondent's claims to the contrary. Resp. Br. 46-47. Life without parole, like the death penalty, forever infringes on the offender's human dignity, individuality, freedom, and autonomy. Though the death penalty alone affirmatively extinguishes a life, the death penalty and life without parole both declare the offender perpetually unfit for return to society and forever incapable of reform. Petitioner's sentence is different from, and more severe than, sentences for a term of years – even very long sentences – because it conclusively determines that an offender is irreparable and must die in prison.

Moreover, the endlessness of a life-without-parole sentence compounds the shear hopelessness of a juvenile's life in prison. Before death in prison, the offender's life will be marked by, among other things, the "ever-present risks of being assaulted, raped, or even turned into a gang sex slave; contracting HIV, tuberculosis, or other diseases; being put into isolated confinement, or twenty-three hour a day lockdown; and being thrown into a cell with a severely mentally disturbed and potentially violent inmate." Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Disclosure*,

41 U.C. Davis L. Rev. 111, 123-124 (2007) (internal footnote omitted).

The harshness of a sentence of life without opportunity for parole is not mitigated by the limited "rights" enjoyed by the inmate during the scores of years he is imprisoned without any hope of release (exercise of religion, due process, access of courts, etc.). *Contra* Resp. Br. 46-47. Death-row inmates also enjoy these same rights prior to their execution. Ultimately, however, both the death-row inmate and the life-without-parole inmate face death in a state-controlled institution without any possibility of ever living outside that institution absent clemency. It is this reality of an inevitable death in a state-controlled institution that is harsh, irrespective of the rights that may be exercised during the intervening years between initial incarceration and death.

Nor is petitioner's harsh punishment significantly mitigated by the "slew" of educational programs in Florida's prison system that respondent promotes. Resp. Br. 47 n.27. These programs generally are not available to life-without-parole inmates because their purpose is to assist the inmate to "make a successful transition back into society,"[4] a purpose totally at odds with a life-without-parole sentence.

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[4] Florida Dep't of Corrs. Institutional Programs: *A Positive Impact on Inmate Lives*, *available at* http://www.dc.state.fl.us/orginfo/programs/index.html (last visited Oct. 12, 2009) (cited at Resp. Br. 47 n.27).

See Human Rights Watch/Amnesty Int'l, *The Rest of their Lives: Life Without Parole for Child Offenders in the United States* 69 (2005) (*available at* http://www.hrw.org/en/reports/2005/10/11/rest-their-lives-0) (last visited Oct. 12, 2009) (noting how most juvenile offenders sentenced to life without parole are denied access to educational and vocational programs).

For these and other reasons, our Nation's major religions, as well as doctors, lawyers and other important segments of civil society, all reject life without the possibility of parole as a morally unacceptable punishment because it denies the real possibility that a juvenile will change and be able to rejoin society. *See, e.g.,* Am. Assoc. of Jewish Lawyers & Jurists *et al.* Amicus Br. 6-8, 14-27; *see also Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing as "further support to our conclusion that there is a consensus" the views of "representatives of widely diverse religious communities in the United States").

C. A State's Consideration Of Age In The Criminal Justice System Before Sentencing Does Not Satisfy The Eighth Amendment

Florida's age-based legislative judgments and classifications for transferring a juvenile to adult court do not remedy the constitutional infirmity of petitioner's life-without-parole sentence because the Eighth Amendment is not concerned with the *forum* in which an offender is prosecuted, but rather with the *punishment* imposed. *Contra* Resp. Br. 50-56; *see*

also State v. Pittman, 647 S.E.2d 144, 163 (S.C. 2007) (cited at Resp. Br. 50 n.29) (noting that the Eighth Amendment's concern is "punishment, not forum of trial"), *cert. denied*, 128 S. Ct. 1872 (2008). Indeed, the States' age-based classifications for prosecuting juveniles in adult court "tells us nothing about the judgment the[ ] States have made regarding the *appropriate punishment* for * * * youthful offenders." *Thompson v. Oklahoma*, 487 U.S. 815, 826 n.24 (1987) (plurality opinion) (emphasis altered).

In any event, Florida's transfer statutes do not serve as a check against cruel and unusual punishments of juveniles, as the Supreme Court of Florida itself has concluded. *See Brennan v. State*, 754 So. 2d 1, 9 (Fla. 1999). This is so because Florida's transfer statutes authorize a juvenile of *any age* to be indicted and prosecuted in adult court and, if convicted, to be sentenced to death or life without parole. *See, e.g.,* Fla. Stat. § 985.225(1) (2003) *re-codified at* Fla. Stat. § 985.56(1) (2009) (mandating that a juvenile of "any age * * * must be tried and handled in every respect as an adult" if the juvenile is indicted for any "violation of state law punishable by death or by life imprisonment"). Even absent an indictment, a Florida prosecutor may, at his or her unreviewable discretion, charge most juveniles in adult court for most crimes, as was true for petitioner in this case. Pet. Br. 3-5. Once he is charged in a Florida adult court, a juvenile offender is subject to a sentence of life without parole if convicted of over 50 different

offenses (even if the juvenile offender has no prior convictions). Pet. Br. 8-9 & n.5.

Florida likewise grants virtually unfettered discretion to its trial judges at sentencing. Neither the juvenile law nor the general criminal law of Florida authorizes any review of a Florida trial judge's discretionary decision of what sentence to impose, so long as it is within the range authorized by statute. *See Winther v. State*, 812 So. 2d 527 (Fla. Dist. Ct. App. 2002); *Willingham v. State*, 781 So. 2d 512 (Fla. Dist. Ct. App. 2001). Indeed, this very case demonstrates the lack of any checks in Florida's sentencing system for protecting juvenile offenders convicted in adult court. Although the prosecutor, the Department of Corrections, and Graham's defense counsel all urged the sentencing judge to impose a sentence less than life without parole, the judge exercised his unreviewable, unchecked power to forever condemn Graham, a juvenile offender, as unfit for living in society. Pet. Br. 20-21.[5]

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[5] This case is akin to *Solem*, in that ultimately a single individual judge determined Graham's sentence. The sentence thus does not warrant the same respect to which a legislatively-mandated judgment might be entitled. *See Harmelin v. Michigan*, 501 U.S. 957, 1006 (1991) (Kennedy, J. concurring in part and concurring in judgment) (distinguishing *Solem v. Helm*, 463 U.S. 277 (1983)). Respondent wrongly asserts that the life-without-parole sentence at issue in *Solem* was mandatory. Resp. Br. 24, 26. The sentence there was "discretionary rather than mandatory," 463 U.S. at 299 n.26.

Lastly, Graham did not waive the right to challenge his sentence under the Eighth Amendment, even assuming such an agreement by a juvenile is enforceable. *Contra* Resp. Br. 18, 50 n.29. As part of his plea bargain, Graham waived only his statutory rights under Section 985.233 of the Florida Statutes. J.A. 22-26, 33-38. That statute permits, but does not require, a trial judge to go below the adult mandatory minimum sentence and to impose a lesser "juvenile" or "youthful offender" sanction. Pet. Br. 6-8 (citing *Ruth v. State*, 949 So. 2d 288, 290 (Fla. Dist. Ct. App. 2007)). Thus, Graham waived only the opportunity for the judge to sentence him to less than 60 months imprisonment. Pet. Br. 20. He did not waive any opportunity to argue that his youth was relevant under the Eighth Amendment to the length of his sentence. Indeed, in the same plea bargain, Graham expressly waived several constitutional rights (e.g., the right to remain silent, the right to confront witnesses, the right to a trial, etc.). Nowhere, however, is there any mention of a waiver of the Eighth Amendment or one's right to be free from cruel and unusual punishments or to challenge the sentence on appeal. J.A. 21, 31-38.

II. PETITIONER'S INTERPRETATION OF THE EIGHTH AMENDMENT IS WORKABLE AND LEAVES SIGNIFICANT DISCRETION FOR THE STATES TO CONTROL JUVENILE CRIME

Petitioner does not seek to require States to craft from whole cloth a complicated parole system. Petitioner seeks only a narrow ruling from this Court: a life-without-parole sentence violates the Eighth Amendment if imposed for a non-homicide offense committed by an offender under age 18. Such a ruling would preserve many types of sentences for States to impose in furtherance of their legislative policies, and it would not, in any way, guarantee petitioner's eventual release.

A. Invalidating Petitioner's Sentence Will Not Deprive States Of The Ability To Punish Juvenile Offenders And Deter Criminal Activity

This Court may not ignore what, in its independent judgment, it determines is an unconstitutional punishment solely because invalidating that punishment would eliminate a sentencing option for the States. *Contra* Resp. Br. 57-60; States of Louisiana *et al.* Amicus Br. 30. In *Thompson*, *Coker*, *Enmund*, *Atkins*, *Roper*, and *Kennedy*, the Court narrowed the circumstances in which States could impose the death penalty, without regard to the fact that such rulings deprived States of a punishment that their legislatures sought to impose. Nor is this result limited to the death penalty. *See, e.g., Hope v.*

Pelzer, 536 U.S. 730 (2002) (use of the hitching post violates clearly established Eighth Amendment jurisprudence); *Weems v. United States*, 217 U.S. 349 (1910) (holding that a punishment of 12 years jailed in irons, at hard and painful labor, violated the Eighth Amendment); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) ("[I]t is safe to affirm that punishments of torture, * * * and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.").

Invalidating petitioner's sentence will not "mandate adoption of any one penological theory." Resp. Br. 58 (quoting *Ewing*, 538 U.S. at 25 (plurality opinion)). Respondent will remain free to exercise legislative judgment and emphasize retribution and deterrence over rehabilitation in its criminal justice system.[6] Indeed, this Court has previously found no conflict between the invalidation of certain sentences and "the broad authority that legislatures necessarily

[6] Respondent points to a temporal decline in the rate of crime both nationally and in Florida during the past 10 to 15 years (Resp. Br. 4-6) but it does not cite a single study showing that this decrease stems from the deterrence of juvenile crime due to long prison sentences (like life without parole). And respondent does not refute the multiple studies demonstrating that longer adult punishments do not deter juvenile offenders. Pet. Br. 46-48 & n.13. A recent study focused on Florida's juvenile crime comports with these earlier studies. *See* David S. Lee & Justin McCrary, *The Deterrence Effect of Prison: Dynamic Theory and Evidence* (Aug. 2009) (*available at* http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1240&context=blewp) (last visited Oct. 12, 2009).

possess in determining the types and limits of punishments for crimes." *Solem*, 463 U.S. at 290. Accordingly, that the Eighth Amendment precludes a State from sentencing a non-homicide juvenile offender to life without parole does not preclude a State from meeting its goals of retribution or deterrence by sentencing such offenders to very long sentences – or even a life sentence, so long as there is some process at a later date that accounts for the fundamental differences between juveniles and adults.

More significantly, the Eighth Amendment does not preclude a State from imposing life without parole on a juvenile offender who commits a homicide. This is because society's interest in retribution against the homicide offender is different in kind, not just in degree, from its interest in retribution against the non-homicide offender given the "fundamental, moral distinction between a 'murderer' and a 'robber.'" *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2660 (2008) (quoting *Enmund v. Florida*, 458 U.S. 782, 797 (1982)); *see Harmelin*, 501 U.S. at 1004 (Kennedy, J., concurring) (murder is "a crime for which 'no sentence of imprisonment would be disproportionate'" (quoting *Solem*, 463 U.S. at 290 n.15)).[7] This is the basis for

[7] Even if the difference between a homicide and a violent non-homicide may occasionally turn on a "fortuity," Resp. Br. 18, society has made a judgment that a felony resulting in death is more serious and deserves greater punishment than a felony *not* resulting in death, as reflected by the widespread use of the felony-murder rule. *See* Joshua Dressler, *Understanding Criminal Law* § 31.06[B][3] (5th ed. 2009). In addition, unlike

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the Court's judgment that the Eighth Amendment bars the death penalty as a punishment for crimes that "did not result, or [were] not intended to result, in the death of the victim." *Id.* at 2650. Thus, the dictum in *Roper* that a juvenile offender who committed a homicide may be sentenced to life without parole is not contrary to the argument made in this case.[8]

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with non-homicides, no national consensus exists that life without parole is disproportionate for a juvenile homicide offender, as the best estimates currently show that 42 States have actually imposed life-without-parole sentences on approximately 2500 juvenile homicide offenders, Human Rights Watch, *supra*, at 2-3 & Figure 1, whereas only 7 States have actually imposed such sentences on 107 juvenile non-homicide offenders, *see* pages 20, 23-26 *infra*.

[8] Just as the Court has drawn distinctions between those offenses that support the death penalty and those that do not in a narrow and sometimes incremental manner, *see Coker v. Georgia*, 433 U.S. 584 (1977) (declaring unconstitutional the death penalty for the rape of an adult woman); *Kennedy*, 128 S. Ct. at 2641 (31 years later declaring unconstitutional the death penalty for the rape of a child), the Court could rule narrowly in this case and hold only that petitioner's sentence of life without parole was unconstitutionally disproportionate for his first and only conviction of armed burglary, not for all non-homicide crimes. This narrower ruling would be confirmed by the undisputed fact that only two States permit such a punishment and only Florida has actually imposed it. *See* pages 20, 22, 26 *infra*.

B. Invalidating Petitioner's Sentence Will Not Require States To Create Any Particular Or Unworkable Sentencing Regime

A ruling prohibiting a sentence of life without parole for non-homicide juvenile offenders would be "workable." *Contra* Resp. Br. 60-63. Respondent, in fact, concedes that the ruling sought by petitioner would be "categorical." *Id.* at 60. That is, it would be a bright-line rule, far from the unworkable rule with "endless" permutations that respondent suggests. Categorically invalidating life-without-parole sentences for offenders of a set age (under 18) would not require extensive processes like those dictated by this Court's rejection of the death penalty for the insane or mentally retarded. And, with respect to the offense category (non-homicides), it is the same categorical distinction drawn in *Kennedy*, where the Court held that the death penalty for crimes against individuals must be reserved "for crimes that take the life of the victim." 128 S. Ct. at 2665.

Far from being unprecedented, this Court previously has required similar processes when there is a likelihood that the person has changed in ways relevant to the basis of his sentence or confinement. *See Ford v. Wainwright*, 477 U.S. 399, 413-417 (1986) (discussing minimum process required to determine that an offender is sufficiently sane to permit execution of the offender in accordance with the Eighth Amendment); *cf. Parham v. J.R.*, 442 U.S. 584, 607, 617 (1979) (holding that, at a minimum, "periodic

reviews" are required when child is committed to psychiatric hospital for indefinite period).

States can, and do, employ multiple permutations in sentencing juveniles without resorting to an unconstitutional punishment. Respondent could, for example, sentence a juvenile offender to a term of years that would expire before the end of a typical offender's expected natural life.

Alternatively, respondent could sentence a juvenile offender to a life sentence and also provide, after some term of years that vindicates society's interest in punishment, a state-initiated hearing to evaluate relevant factors such as maturity, future dangerousness, and fitness for return to society of the now-adult former juvenile offender. For example, Colorado recently enacted a law that provides that juveniles who have been convicted of a felony punishable by life imprisonment or death must be sentenced to life imprisonment with the possibility of parole after 40 years. *See* Colo. Rev. Stat. § 18-1.3-401(4)(b).

Likewise, the Eighth Amendment could be satisfied if, for example, juvenile offenders serving life were made eligible for parole under Florida's parole system that is still in place for those offenders convicted before Florida abolished parole.[9] That

[9] Respondent would not need to "recreate" the Parole Commission (Resp. Br. 62) as the Commission continues to hear cases involving inmates. Applying Florida's parole system to the 77 non-homicide juvenile offenders serving life without parole

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system includes objective parole guidelines and judicial review. *See* Fla. Stat. § 947.165; *Jackson v. Florida Parole & Probation Comm'n*, 429 So. 2d 1306, 1308 (Fla. Dist. Ct. App. 1983). And the decision-making process for release turns on whether the offender can be a "law-abiding person" whose "release will be compatible with his or her own welfare and the welfare of society." Fla. Stat. § 947.18. We do not suggest that Florida *must* apply its parole system to juvenile offenders like petitioner; it is one of many constitutional solutions.

Respondent raises the possibility of executive clemency or commutation. Resp. Br. 47, 62. But that alone does not remedy the unconstitutional nature of petitioner's life-without-parole sentence. Florida's executive clemency (like in many States) is a pure "act of mercy" that is vested in the "unfettered discretion" of the Governor and two members of the Cabinet. Fla. R. Executive Clemency §§ 1, 4. It does not require, after an appropriate period of punishment, that the Governor determine whether the

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would have, at most, a marginal impact given that approximately 6,000 Florida inmates are currently eligible for parole and, last year alone, the Commission, made 1,795 parole determinations. *See* Florida Parole Comm'n, *2007-2008 Annual Report* 21 (*available at* http://fpc.state.fl.us/RP.htm) (last visited on Oct. 12, 2009). Further, the other six States that currently have juveniles serving life without parole sentences also have functioning parole systems. *See* Cal. Penal Code §§ 3044-3053; Del. Code tit. 11, §§ 4341-4353; Iowa Code §§ 904A.1-904A.6; La. Rev. Stat. §§ 15:574.2-574.13; Neb. Rev. Stat. §§ 83-188-83-196; S.C. Code §§ 24-21-10-24-21-90.

juvenile offender has matured so that his return to society will not impose any danger. And, even if the Governor voluntarily elects to be guided by that standard, his process is not currently structured to make a reliable determination to that effect. *See Ford*, 477 U.S. at 416 (holding that Florida's clemency process did not provide a reliable, neutral factfinding process sufficient for Eighth Amendment purposes for determining whether inmate was sufficiently sane to be executed); *see also District Attorney's Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2319 (2009) ("We have held that noncapital defendants do not have a liberty interest in traditional state executive clemency, to which no particular claimant is *entitled* as a matter of state law.")

III. THE INTRA-STATE, INTER-STATE AND INTERNATIONAL COMPARISONS DEMONSTRATE THAT GRAHAM'S SENTENCE IS CRUEL AND UNUSUAL

Many numbers have been cited in this case to quantify the phenomenon of juvenile offenders sentenced to life without parole. The combined research of Florida and its amici have clarified, and not impugned, the constitutional significance of the following numbers:

- Number of States where a juvenile offender may theoretically be sentenced to life without parole for a non-homicide conviction: **38**

- Number of States, including Florida, where a juvenile offender is currently serving life without parole for solely non-homicide convictions: **7**
- Number of juvenile offenders nationally currently serving life without parole for solely non-homicide convictions: **107**

The numbers are even starker for a first conviction for armed burglary (the crime for which petitioner was sentenced to life without parole):[10]

- Number of States, including Florida, where a first conviction for armed burglary can result in life without parole for a juvenile offender: **2**
- Number of States, including Florida, where non-homicide juvenile offenders, without any prior convictions, are currently serving life without parole for a burglary or robbery offense: **1**

Because additional reports have been issued since the opening brief, and because respondent has offered an array of obfuscatory challenges to the relevant numbers, petitioner briefly addresses each of these sets of numbers.

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[10] One amicus wrongly asserts that Graham had "a long record of prior offenses." Nat'l Dist. Attorney's Ass'n Amicus Br. 8. The armed burglary for which Graham is serving life without parole, along with the attempted armed robbery arising from the same incident (for which the statute authorizes a 15 year maximum sentence), are the first and only crimes of which Graham has ever been convicted. J.A. 440. Nor did Graham have any prior adjudications of delinquency in juvenile court. *Ibid*.

A. Petitioner's Life-Without-Parole Sentence For Armed Burglary Is Unusually Harsh Compared To Other Sentences Imposed By Florida

Life without parole is the harshest sentence any person, adult or juvenile, can receive for any non-homicide offense. Life without parole has not, however, been reserved by Florida for the worst crimes. Nor has it been authorized for crimes of greater consequence. Pet. Br. 61.

Respondent does not rebut the evidence showing that petitioner's sentence far exceeds the average sentence for a wide variety of offenses (many of which are more serious than armed burglary) imposed on both juvenile and adult offenders. For example, respondent does not refute that Graham's sentence is two times greater than the average sentence for murder and/or manslaughter for adult and juvenile offenders. Pet. Br. 58-59. Instead, respondent criticizes (Resp. Br. 35) the comparative data of other sentences for robbery and burglary in Florida because the data do not distinguish between degrees of those crimes. But that is the best that the respondent itself provides to the general public and, despite providing the Court with additional data from its Bureau of Research & Data Analysis (Resp. Br. 36, 51 n.31, 55), it does not provide the comparative numbers it views as material.

B. Although Most States Authorize Life Without Parole For Non-Homicide Juvenile Offenders, The Infrequent Use Of That Sentence Demonstrates That It Is Cruel And Unusual

The parties agree that there are 38 States in which a juvenile offender could, under some combination of circumstances, receive a sentence of life without parole for a non-homicide.[11] Even the amicus brief of Louisiana admits (at 33-34), that that number of States has shrunk in recent years. Further, neither respondent nor its amici contest that only two States (Florida and South Carolina) authorize life without parole for a first conviction of burglary.

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[11] Petitioner stated in its opening brief that there were 36 such States, but as respondent (Resp. Br. 37-38 n.21) and its amicus (States of Louisiana *et al.* Amicus Br. 13-22) show, Arizona and Oregon also permit the imposition of a life-without-parole sentence on juveniles convicted of non-homicide offenses, although neither authorizes such a sentence for a burglary offense and neither State has imposed such a sentence. Our count of 38 states does not include Mississippi because, as we explained (Pet. Br. 63 n.18), although labeled "life without parole," the possibility of subsequent release after a term of years is available to people sentenced to life imprisonment, similar to the schemes in Colorado, Kentucky, and Texas. *See* States of Louisiana *et al.* Amicus Br. 23 & n.20. By contrast, unlike amici Louisiana *et al.* (at 11), we do include New Jersey because it is a State where life without parole is a potential sentence for juveniles convicted of certain serious felonies on three separate occasions prior to turning 18. *See* N.J. Stat. §§ 2A:4A-26, 2C:43-7.1(a).

But this tally of States where such a sentence might theoretically be imposed on a juvenile reveals very little of relevance to the Eighth Amendment inquiry. These provisions often cross-reference sentencing provisions without any indication of deliberate decision to incorporate sentences of life without parole for juvenile offenders. Consequently, they cannot be said to reflect the actual moral judgments of the state legislatures to incarcerate juveniles for their entire lives. *See Thompson*, 487 U.S. at 826-829 & nn.24-30 (plurality opinion); *id*. at 850-851 (O'Connor, J., concurring); No. 08-7621 Pet. Br. 46.

Petitioner in *Sullivan* has located statutes from only nine states that expressly set both the age and offense for sentences of life without parole. No. 08-7621 Pet. Br. 47-48 & n.60. Respondent Florida does not contest that these are the only such state statutes. No. 08-7621 Resp. Br. 32. A review of this limited number of statutes reveals that all but one of them either: (i) set the minimum age at 18 for a sentence of life without parole, (ii) contemplate such a sentence only for homicide juvenile offenders, or (iii) do both of these things. No. 08-7621 Pet. Br. 47-48.

Given the paucity of statutes setting an expressed minimum age for life without parole, statistics about the application of the States' laws in practice are a better measure of consensus than legislation. *See Kennedy*, 128 S. Ct. at 2657. The key numbers are the number of States in which non-homicide juvenile offenders are actually sentenced (7 States, including Florida) and the number of such

juvenile offenders actually sentenced in the entire nation (107 juvenile offenders, 77 of whom are incarcerated in Florida). *See* Paolo G. Annino, David W. Rasmussen, & Chelsea Rice, *Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to the Nation* 14 (updated Sept. 14, 2009) (*available at* http://www.law.fsu.edu/faculty/profiles/annino/Report_juvenile_lwop_092009.pdf) (last visited Oct. 12, 2009).[12]

Respondent is mistaken when it asserts that it is "not unusual for a juvenile in the United States to receive a life sentence, even for a non-homicide crime." Resp. Br. 39. Forty-three States (the 12 States that do not authorize life without parole for juveniles for non-homicides and the 31 States that do so only in

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[12] Petitioner's opening brief indicated that there were six States. In the interim, Delaware reported sentencing one non-homicide juvenile offender to life without parole, raising to 7 the number of States and to 30 the total number of persons, outside of Florida, serving a life-without-parole sentence only for a non-homicide offense. *See* Annino, Rasmussen, & Rice, *supra*, at 2 n.8.

A recent report by The Sentencing Project is not to the contrary. *See* Ashley Nellis & Ryan S. King, The Sentencing Project, *No Exit, The Expanding Use of Life Sentences in America* (July 2009). The Sentencing Project report does not distinguish between non-homicide and homicide offenses, which is the basis of the numbers discussed above. Further, The Sentencing Project report relies on state definitions of juvenile, which can exclude 16 and 17 year olds, *see id*. at 16 n.9, unlike the Annino Study, which adopts a uniform definition of juvenile as a person under 18 years of age, *see* Annino, Rasmussen, & Rice, *supra*, at 3.

theory) do not sentence non-homicide juvenile offenders to life without parole. And in five additional States, there are six or fewer such offenders in each state, indicating that in 48 of the 50 states the practice is very infrequent. Annino, Rasmussen, & Rice, *supra,* at 14; *see Roper*, 543 U.S. at 564 (in examining consensus, combining States that did not authorize sentence with States in which even "without a formal prohibition * * * , the practice is infrequent").

If the absence of such sentences is based on the refusal of sentencing judges and juries to impose such sentences, that refusal is itself "a significant and reliable objective index of contemporary values." *Coker*, 433 U.S. at 596 (citation omitted). If the absence of such sentences is because "prosecutors rarely sought" such sentences, that "would tend to indicate that prosecutors, who represent society's interest in punishing crime, consider the [sentence] excessive" for juveniles convicted of non-homicide offenses. *Enmund*, 458 U.S. at 796.

The small number of offenders sentenced to life without parole compared to the total number of juveniles eligible for that offense, including the fact that 82% of States that authorize such sentences (31 out of 38) have not utilized that sentence, reflects the moral judgment of sentencers and prosecutors that this sentence is not appropriate. Such "infrequency [in application] makes it difficult to say that society approve[s]." *Lawrence v. Texas*, 539 U.S. 558, 569 (2003); *see Roper*, 543 U.S. at 567 ("the infrequency of

its use even where it remains on the books" is an "objective indicia of consensus").[13]

This is particularly true for armed burglary, the crime for which Graham was sentenced to life without parole. Only one other State (California) has sentenced a juvenile to life without parole for a similar type of non-homicide offense (robbery). *See* Annino, Rasmussen, & Rice, *supra,* at 6, 16. And under California law, unlike the Florida law under which Graham was sentenced, those offenders "must have served *three* or more prior separate prison terms," Cal. Penal Code § 667.7(a)(2) (emphasis added), in order to be eligible for a life-without-parole sentence. The five remaining States that have actually imposed a life without parole sentence on a non-homicide juvenile offender (Delaware, Iowa, Louisiana, Nebraska, and South Carolina) have imposed this sentence only for the crimes of rape and kidnapping. *See* Annino, Rasmussen, & Rice, *supra,* at 16.

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[13] Given the rarity of such sentences for non-homicide, juvenile offenders in 48 of the 50 states, it is unlikely that state legislators—faced with a myriad of difficult problems—will expend their scarce legislative resources to enact a bill to provide relief to the very few, if any, non-homicide juvenile offenders serving such a sentence in their States. The fact that legislation providing relief for *all* juvenile offenders sentenced to life without parole has not passed in some States—where all or almost all of the pertinent offenders committed *homicides*—does not demonstrate that society favors imprisoning *non-homicide* juvenile offenders for their entire lives.

Respondent and its amici generally suggest that national numbers are inaccurate, but they do not point to any additional States that have imposed such a sentence or additional juveniles who have received such a sentence.[14] Instead, respondent objects because the reports from which these numbers are drawn

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[14] Respondent's citation (Resp. Br. 39 n.23) to case law to support its claim that juveniles are sentenced to life without parole in additional States is faulty.

First, the prisoner in *Calderon v. Schribner*, No. 2:06-cv-00770, 2009 WL 89279 (E.D. Cal. Jan. 12, 2009), is one of four individuals sentenced to life without parole in California for a non-homicide juvenile offense. Second, in *State v. Standard*, 569 S.E.2d 325 (S.C. 2002), *cert. denied*, 537 U.S. 1195 (2003), the offender was sentenced to life without parole for a crime committed at age 20.

Third, the four other cases cited by respondent involved sentences that permitted parole. *See State v. Warren*, 887 N.E.2d 1145, 1147 n.2 (Ohio 2008) (noting opportunity of parole); *State v. Ira*, 43 P.3d 359, 367 (N.M. 2002) ("he does have the possibility of parole in this case"); *Hawkins v. Hargett*, 200 F.3d 1279, 1284 (10th Cir. 1999) (he "will be eligible for parole in approximately fifteen years"), *cert. denied*, 531 U.S. 830 (2000). Although not discussed in the opinion, the defendant in *State v. Green*, 502 S.E.2d 819 (N.C. 1998), *cert. denied*, 525 U.S. 1111 (1999), was eligible for release after 25 years despite being given a "life" sentence. *See State v. Smith*, 607 S.E.2d 607, 626 (N.C.) (Brady, J., concurring) (explaining that, for convictions occurring prior to 1998, a defendant sentenced to life imprisonment was entitled to "biennial review of [his] life sentence by a superior court judge after [he] had served twenty-five years of imprisonment"), *cert. denied*, 546 U.S. 850 (2005); *State v. Stinnett*, 497 S.E.2d 696, 701 (N.C. App.) ("a sentence of life imprisonment without parole may confine a defendant for his natural life or may amount to an active sentence of twenty-five years imprisonment"), *cert. denied*, 525 U.S. 1008 (1998).

have not been subject to "peer review." Resp. Br. 40. But the inquiry here is simply head counting, not complex statistical analysis. And the Annino Study, which is the most recent and comprehensive, drew its data from reports by the States themselves. *See* Annino, Rasmussen, & Rice, *supra,* at 9-13 (listing source of data for each State).

Respondent also suggests that the Annino Study may underreport the number of States because six States had not provided data to the study's authors. Resp. Br. 40. But an updated version of the Annino Study, issued contemporaneously to the filing of respondent's brief, now contains data from 47 of the 50 States. *See* Annino, Rasmussen, & Rice, *supra,* at 1. Two States that declined to release data regarding the number of juvenile offenders sentenced to life without parole in their prisons—Virginia and Utah, *see id*. at 12-13—have joined the amicus brief of Louisiana, and have not indicated that they have ever meted out that sentence to a non-homicide juvenile offender.

Notably, that amicus brief describes these sentences as "rare." States of Louisiana *et al.* Amicus Br. 8; *accord* Nat'l Dist. Attorney's Ass'n Amicus Br. 19 ("it is rare for a juvenile to receive an adult sentence of life without parole – even in Florida, the State where such sentences are the most common"). Indeed, the amicus briefs of Louisiana *et al.* and the National District Attorney's Association do not identify any incorrect data in the Annino Study, even though they represent 19 States and the largest

professional organization of state and local prosecutors.

Respondent also seeks to increase the number of non-homicide juvenile offenders in Florida who have received this sentence (but not the number of States that have imposed it) by suggesting that the Annino Study undercounts by excluding 73 juvenile offenders who were sentenced to life without parole for both non-homicide and homicide offenses. Resp. Br. 34. But those 73 offenders are properly excluded from the count for two overlapping reasons. First, virtually all of these offenders committed the homicide and non-homicide offenses at the same time, and given that a life-without-parole sentence is generally mandatory for a homicide, *see, e.g.,* Fla. Stat. § 775.082(1), the judge likely did not dwell independently on the appropriate sentence for the non-homicide offense. Second, were this Court to hold, consistent with petitioner's primary contention, that there is a distinction between crimes where the defendant caused or intended to cause death and all other crimes, then none of these 73 offenders would have the possibility of being released.

But even if the number of juvenile offenders sentenced to life without parole for non-homicides in these States were doubled, the constitutional result would be no different. This collection of juvenile offenders is cumulative of decades of sentencing. For example, the longest serving non-homicide juvenile

offender sentenced in Florida to life without parole committed his offense in 1973.[15] A few hundred juvenile offenders in seven States sentenced over the past 30 or 40 years to life without parole is the quintessential definition of an unusual sentence. *Cf. Enmund*, 458 U.S. at 795 ("there were 72 executions for rape in this country between 1955 and this Court's decision in *Coker v. Georgia* in 1977").

C. International Law And Practice Also Reflect The Cruel And Unusual Nature Of Sentencing Juveniles To Life Without Parole.

As respondent concedes (Resp. Br. 42), international law and practice can serve "as confirmation for the Court's determination about the evolving standards of decency in our own country." However, respondent suggests (Resp. Br. 44), and one of its amici asserts (Sixteen Members of Congress Amicus Br. 18-38), that Section 37(a) of the United Nations Convention on the Rights of the Child ("CRC"), which requires each country to "ensure" that "life imprisonment without the possibility of release shall [not] be imposed for offences committed by persons below eighteen years of age," United Nations Convention on Rights of the Child, Art. 37(a), U.N. Doc. A/44/736, 28 I.L.M. 1456, 1470 (Nov. 20, 1989), is not universally

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[15] *See* http://www.dc.state.fl.us/AppCommon/ (last visited on Oct. 12, 2009). At this Florida Department of Corrections webpage, one can locate Robert Saunder's offender profile by typing his DC number (165371).

adhered to in other countries' domestic law and practice.

But it is shared ground that 193 countries have become parties to the CRC and that the CRC establishes an oversight committee to determine whether a country "employs [life without parole] or allows for its use in its domestic law." Sixteen Members of Congress Amicus Br. 20, 25-26. According to respondent's amicus, that oversight committee identified 11 countries of which (with significant overlap) 8 authorized capital punishment on juveniles and 8 authorized life without parole sentences on juveniles. *Id.* at 26-31.[16] Even accepting the accuracy of amicus' description, which seems in some instances contrary to the text and context of the reports it summarizes,[17] that simply demonstrates that some countries are still striving to meet their international obligations regarding both capital punishment and life-without-parole sentences for juveniles. And amicus does not point to one actual individual outside the United States who is currently serving a life-without-parole sentence for offenses committed while a juvenile, much less for non-homicide offenses.

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[16] Those eleven countries are Bangladesh, Belize, Burkina Faso, Dominica, Gambia, Guatemala, Kenya, Liberia, Niger, Saudi Arabia, and St. Lucia.

[17] A country-by-country rebuttal to the claims by this amicus has been published by the authors of the Amnesty International *et al.* amicus brief. *Available at* http://www.law.usfca.edu/centers/documents/grahamresponse.pdf (last visited on Oct. 14, 2009).

Amicus' description of these reports certainly does not draw into question the overwhelming rejection of life-without-parole sentences for juveniles in the international community, particularly in those countries such as the United Kingdom, *see* Amnesty Int'l *et al.* Amicus Br. 32-38, which are of particular importance because they share a common legal heritage with the United States, *see Roper*, 543 U.S. at 577.

CONCLUSION

This Court should reverse the judgment of the Florida First District Court of Appeal with instructions to vacate petitioner's life-without-parole sentence, and remand the case for further proceedings.

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