IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	**3427 EDA 2010**
V.	
AARON PHILLIPS	

BRIEF FOR APPELLANT

Appeal From Order Of The Court Of Common Pleas Of Montgomery County, Criminal Division, Dismissing PCRA Petition Without a Hearing Entered November 30, 2010 in CP-46-CR-0025720-1986

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TABLE OF AUTHORITIES

Cases

Atkins v. Virginia, 536 U.S. 304 (2002) 28

Bellotti v. Baird, 443 U.S. 662 (1979) 17

Commonwealth v. Batts, 603 Pa. 65, 981 A.2d 1283 (2009) 11

Commonwealth v. Edmunds, 526 Pa. 374 (1991) 35

Commonwealth v. Kocher, 529 Pa. 303 (1992) 36

Commonwealth v. Legg, 491 Pa. 78 (1980) 38

Commonwealth v. Ortiz, 2011 PA Super 56 (Pa. Super. Ct. 2011) 11

Commonwealth v. Phillips, 557 A.2d 652 (Pa. Super. Ct. April 18, 1990) 4

Commonwealth v. Phillips, 564 Pa. 729 (2001) 5

Commonwealth v. Williams, 504 Pa. 511 (1984) 36

Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982) 35, 36

Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727 (1996) 17

Enmund v. Florida, 458 U.S. 782 (1982) 21, 23, 24

Gallegos v. Colorado, 370 U.S. 49 (1962) 16

Ginsburg v. New York, 390 U.S. 629 (1968) 17

Graham v. Florida, 130 S.Ct. 2011 (2010) ..... passim

Haley v. Ohio, 332 U.S. 596 (1948) 16

Hodgson v. Minnesota, 497 U.S. 417 (1990) 17

Human Rights Watch, The Rest of Their Lives: Life without Parole for Child Offenders in the United States (2005), http://www.hrw.org/en/ reports/2005/10/11/rest-their-lives 26, 29, 33

Kennedy v. Louisiana, 128 S. Ct. 2641 (2008) 13

Lee v. Weissman, 505 U.S. 577 (1992) 17

May v. Anderson, 345 U.S. 528 (1953) 27

McKeiver v. Pennsylvania, 403 U.S. 528 (1971) 17

Medellin v. Texas, 552 U.S. 491 (2008) 32

Naovarath v. State, 105 Nev. 525 (1989) 22, 25, 38

Ohio v. Akron Center For Reproductive Health, 497 U.S. 502 (1990) 17

Phillips v. Vaughn, 55 Fed. Appx. 100 (3d Cir. 2003) 5

Prince v. Massachusetts, 321 U.S. 158 (1944) 17

Roper v. Simmons, 543 U.S. 551 (2005) ..... passim

Santa Fe Independent Sch. Dist. v. Doe, 530 U.S. 290 (2000) 17

The Paquete Habana, 175 U.S. 677 (1900) 32

Thompson v. Oklahoma, 487 U.S. 815 (1988) 14

Workman v. Kentucky, 429 S.W.2d 374 (Ky. 1968) 38

Statutes

10 Pa. Stat. § 305(c)(1) 37

18 Pa. Cons. Stat. § 2502(a) 20

18 Pa. Cons. Stat. § 2502(b) 20

18 Pa. Cons. Stat. § 6311 37

18 Pa. Cons. Stat. Ann. § 1102 (b) 28

18 Pa. Cons. Stat. Ann. § 6305 37

18 Pa. Cons. Stat. Ann. § 6308 37

23 Pa. Cons. Stat. § 1304(a) 37

23 Pa. Cons. Stat. § 5101 37

4 Pa. Stat. § 325.228 37

42 Pa. Cons. Stat. § 6301(b)(2) 37

72 Pa. Stat. § 3761-309(a) 37

Colo. Rev. Stat. § 17-22.5-104(IV) 28

Fla. Stat. § 75.087 28

Fla. Stat. § 775.0861 28

Fla. Stat. § 775.0875 28

Fla. Stat. § 782.04(3) 28

K.S.A. 21-4622 (2009) 28

La. Rev. Stat. Ann. §14:30.1 A 28

La. Rev. Stat. Ann. §14:30.1 B 28

Mont. Code Ann. §46-18-222 (1) 28

N.J. Stat. Ann. § 2502(b) 28

N.J. Stat. Ann. §2C:11-3 (a) 28

N.J. Stat. Ann. §2C:11-3 (b)(1) 28

S.D. Codified Laws §22-16-4 28

S.D. Codified Laws §22-6-1 28

Tex. Penal Code Ann. § 12.31 28

Other Authorities

"The Growing Brain - Interactive Graphic" http://www.nytimes.com/interactive/2008/09/15/health/20080915-brain-development.html?scp=1&sq=interactive%20compare%20brain%20development%20in%20various%20areas%20&st=cse 19

A Shameful Record, N.Y. Times, Feb. 6, 2008 34

Ashley Nellis & Ryan S. King, Sentencing Project, No Exit: The Expanding Use of Life Sentences in America (2009) 29

Committee Against Torture, Conclusions and Recommendations of the Committee Against Torture: United States of America, U.N. Doc. CAT/USA/CO/2 (July 25, 2006) 33

Concluding Observations of the Human Rights Committee: The United States of America, U.N. Doc. CCPR/C/USA/CO/3/Rev.1, (Dec. 18, 2006) 33

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), 1465 U.N.T.S. 85, entered into force, June 26, 1987, ratified by the United States, Oct. 21, 1994 32

Convention on the Elimination of Racial Discrimination ("CERD"), 660 U.N.T.S. 195, entered into force, Jan. 4, 1969, ratified by the United States, Oct. 21, 1994 ..... 32, 34

David Lee and Justin McCrary, "Crime, Punishment, and Myopia," (Nat'l Bureau of Econ. Research, Working Paper No. W11491, 2005) 23

Donna Bishop, Juvenile Offenders in the Adult Criminal System, 27 Crime & Just. 81 (2000) . 23

Elizabeth S. Scott & Laurence Steinberg, Rethinking Juvenile Justice (2008) 18

Elizabeth Sowell, et al., In vivo evidence for post-adolescent brain maturation in frontal and striatal regions, 2 Nat. Neurosci. 859-861(1999) 19

Eric L. Jensen & Linda K. Metsger, A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime, 40 Crime & Delinq. 96 (1994) 23

International Covenant on Civil and Political Rights ("ICCPR"), 999 U.N.T.S 171, entered into force, Mar. 23, 1976 32

Jeffrey Fagan, Juvenile Crime and Criminal Justice: Resolving Border Disputes, 18 Future of Child. 81 (2008) 23

John H. Laub & Robert J. Sampson, Shared Beginnings, Divergent Lives: Delinquent Boys to Age 70 (2003) 25

Laurence Steinberg & Elizabeth S. Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psych. 1009 (2003) 19

Laurence Steinberg & Robert G. Schwartz, Developmental Psychology Goes to Court, in Youth on Trial: A Developmental Perspective on Juvenile Justice 9 (Thomas Grisso and Robert Schwartz eds., 2000) 24

Michelle Leighton & Connie de la Vega, Sentencing our Children to Die in Prison: Global Law and Practice, 42 U.S.F. L. Rev. 983 (2008) 30, 31

Nitin Gogtay, et al. Dynamic Mapping of Human Cortical Development during Childhood through Early Adulthood, 101 Nat'l Acad. Sci. Proc. 8174-8179 (2004), http://www.loni.ucla.edu/~thompson/DEVEL/PNASDevel04.pdf 19

Richard A. Mendel, Less Hype, More Help: Reducing Juvenile Crime, What Works – and What Doesn't 15 (2000) 19

Richard Redding & Elizabeth Fuller, What Do Juveniles Know About Being Tried as Adults? Implications for Deterrence, Juvenile & Family Court Journal (Summer 2004) 23

Second Chances: 100 Years of the Children's Court: Giving Kids a Chance To Make a Better Choice (Justice Policy Inst. & Children & Family Law Ctr., n.d.), http://www.cjcj.org/files/secondchances.pdf 20

Senate Committee on Foreign Relations, ICCPR, S. Exec. Rep. No. 102-23 (1992) 32

Steinberg, Cauffman, Banich & Graham, Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model, 44 Dev. Psych. 1764 (2008) 18

Steven A. Drizin and Allison McGowan Keegan, Abolishing the Use of the Felony-Murder Rule When the Defendant is a Teenager, 28 Nova L. Rev. 507 (2004) 21, 39

Wayne A. Logan, Proportionality and Punishment: Imposing Life Without Parole on Juveniles, 33 Wake Forest L. Rev. 681, (1998) 26

United Nations General Assembly, Rights of the Child, A/HRC/7/RES/29, para. 30 (a) (2008); A/HRC/10/2.11 31

United States Constitution, article IV 32

I. STATEMENT OF JURISDICTION

This Court's jurisdiction to hear an appeal from an order from the Montgomery County Court of Common Pleas dismissing Appellant's petition for post-conviction relief is established by Section 2 of the Judiciary Act of 1976, P.L. 586, No. 142, § 2, 42 Pa. Cons. Stat. § 742.

II. STATEMENT OF SCOPE AND STANDARD OF REVIEW

The issue presented here is whether a juvenile convicted of second degree (felony) murder can constitutionally be sentenced to life imprisonment without the possibility of parole. This is a legal issue for which this Court has a plenary standard and scope of review.

III. STATEMENT OF QUESTIONS PRESENTED

1. Pursuant to *Graham v. Florida*, 130 S. Ct. 2010 (2010), is it unconstitutional to sentence a juvenile convicted of second degree (felony) murder to life imprisonment without the possibility of parole?
2. Pursuant to *Graham*, is the mandatory nature of a life without parole sentence for any juvenile convicted of second degree (felony) murder unconstitutional?
3. Pursuant to *Graham*, is Pennsylvania's second degree murder statute unconstitutional as applied to juveniles?
4. Did the trial court err in denying the petition for post-conviction relief without granting a hearing?

IV. STATEMENT OF THE CASE

A. Procedural History

On January 4, 1988, Petitioner Aaron Phillips was found guilty of second degree murder, aggravated assault, simple assault, robbery, burglary, theft by unlawful taking, criminal conspiracy, and recklessly endangering another person following a bench trial before the Honorable Paul W. Tressler in the Court of Common Pleas of Montgomery County. Mr. Phillips was arrested for these charges on August 14, 1986. At the time of the arrest, Mr. Phillips, who was born on May 23, 1969, was seventeen years old.

On September 16, 1988, Mr. Phillips was sentenced to life imprisonment without parole. Docket No. CP-46-CR-0025720-1986. On September 23, 1988, Mr. Phillips appealed his sentence. The Superior Court affirmed the sentence. *See Commonwealth v. Phillips*, 557 A.2d 652 (Pa. Super. Ct. April 18, 1990). The Pennsylvania Supreme Court denied allowance of appeal on March 28, 1991. Doc. No. 474 E.D. Allocatur Dkt. 1990.

On July 27, 1995, Mr. Phillips filed a *pro se* petition in the Court of Common Pleas of Montgomery County pursuant to the Post Conviction Relief Act (No. (B) 5720-86). Counsel was appointed to represent Mr. Phillips. On January 30, 1998, that petition was denied. The Superior Court affirmed the denial on October 21, 1998. Doc. No. 716 PHL 1998.

On July 1, 1999, Mr. Phillips filed his second *pro se* PCRA petition in the Montgomery Court of Common Pleas. Counsel was appointed to review Mr. Phillips' claims that he was denied effective assistance of counsel at his trial and his first PCRA petition. On August 23, 1999, the Court of Common Pleas dismissed the petition. On September 20, 1999, Mr. Phillips appealed this decision in the Superior Court. The Superior Court affirmed the dismissal. On

January 8, 2001, the Supreme Court denied the petition for review. *See Commonwealth v. Phillips*, 564 Pa. 729 (2001).

On May 5, 2005, Mr. Phillips filed his third *pro se* PCRA petition in the Court of Common Pleas of Montgomery County. On June 7, 2005, the court dismissed the petition. On September 20, 2006, the Superior Court affirmed the denial of relief. *See* No. 2727 E.D.A. 2005. This petition was denied on July 31, 2007. *See* Doc. No. 887 MAL 2006.

On September 6, 2001, Mr. Phillips filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the U.S. District Court of the Eastern District of Pennsylvania. Doc. No. 01-CV-4529. On March 19, 2002, the District Court dismissed the petition as untimely. On January 29, 2003, the United States Court of Appeals for the Third Circuit affirmed the dismissal. *See Phillips v. Vaughn*, 55 Fed. Appx. 100 (3d Cir. 2003). The U.S. Supreme Court denied Mr. Phillips' petition for a writ of certiorari on April 7, 2003. *See Phillips v. Vaughn*, 538 U.S. 966 (2003).

On July 16, 2010, Mr. Phillips, represented by the undersigned counsel, filed a fourth petition for post-conviction relief, challenging his sentence in light of the U.S. Supreme Court's May 17, 2010 ruling in *Graham v. Florida*, ___ U.S. ___, 130 S. Ct. 2010 (2010). Mr. Phillips had not previously raised a claim that his sentence of life without parole is unconstitutional pursuant to the Supreme Court's ruling in *Graham*. On August 19, 2010, the Montgomery County District Attorney's Office filed a motion to dismiss. Appellant filed an answer on August 30, 2010. On November 8, 2010, the trial court issued a notice of intention to dismiss the PCRA petition without a hearing. Appellant filed a response on November 26, 2010. On November 29, 2010, the trial court issued a Final Order of Dismissal of the PCRA Petition

(attached hereto as Exhibit B). On November 30, 2010, the trial court issued an Amended Final Order (attached hereto as Exhibit C). On December 13, 2010, Appellant filed this appeal. On December 13, 2010, the trial court issued a Rule 1925(b) Concise Statement Order (attached hereto as Exhibit D). On December 22, 2010, Appellant filed a Concise Statement of Errors Complained of on Appeal (attached hereto as Exhibit E). The trial court issued an opinion on February 3, 2011 (attached hereto as Exhibit A).

B. Factual History

In 1986, at the age of seventeen, Mr. Phillips was involved in an unarmed robbery with twenty-two year old Andrew Dennis Gibbs. In the course of the robbery, the victim, Edward McEvoy, age 87, was grabbed, his wallet was removed from his pocket, and he was knocked down to the floor. (N.T. 12/28/87, 38; 12/30/87, 365). At trial, there was conflicting testimony about Mr. Phillips' involvement in the incident. One witness testified that Mr. Gibbs told him that Mr. Gibbs choked the victim and took his wallet (N.T. 12/28/87, 190), though Mr. Gibbs testified that Mr. Phillips grabbed the victim. (N.T. 12/28/87, 226-27.)[1]

After the incident, Mr. McEvoy's daughter-in-law arrived at his home and observed blood on his face and the fact that he was holding his side. (N.T. 12/28/87, 43, 44). She observed no other injuries. (N.T. 12/28/87, 43.) That evening, Mr. McEvoy was taken to the hospital, x-rayed and then went home. (N.T. 12/30/87, 44, 290). Mr. McEvoy returned to the hospital the next day. (N.T. 12/28/87, 51; 12/30/87, 292). His hip was fractured and he had surgery that successfully repaired the fracture. (N.T. 12/30/87, 293). Though he recovered from the procedure, he developed a secondary problem with his intestines. (N.T. 12/30/87, 293.) Because

of previous surgery for bowel cancer, Mr. McEvoy had scar tissue on his intestines, and air could not get through his intestines due to that scar tissue. (N.T. 12/30/87, 310). Mr. McEvoy had another surgery in which adhesions were removed from his small intestine. (N.T. 12/30/87, 294). After the second surgery, Mr. McEvoy developed an irregular heartbeat and could not be resuscitated. (N.T. 12/30/87, 294). Mr. McEvoy died from ventricular arrhythmia on July 27 – eighteen days after the robbery. (N.T. 12/30/87, 299, 313). The immediate cause of death was hypertensive arterioschlerotic heart disease with severe coronary sclerosis (hardening of the arteries) and myocardial ischemia (deprivation of blood to the heart) as a result of his injuries. (N.T. 12/30/87, 330). Because of Mr. McEvoy's badly diseased heart, the stress of the fracture, the surgery to repair the fracture, and the operation of the bowel obstruction resulted in too much stress on the heart. (N.T. 12/30/87, 340).

When Mr. Phillips was informed by police that Mr. McEvoy had died, tears welled up in his eyes. (N.T. 12/28/87, 33; N.T. 12/29/87, 110.)

Mr. Phillips, who is now forty-one years old, is currently incarcerated at S.C.I. – Green.

[1] Mr. Gibbs pleaded guilty to involuntary manslaughter, aggravated assault, robbery, burglary, theft, conspiracy to commit robbery and recklessly endangering another person. (N.T. 12/28/87, 212). He was released from state prison on June 27, 1994, nearly seventeen years ago. (*See* Doc. No. CP-46-CR-0015720-1986).

V. SUMMARY OF ARGUMENT

A mandatory sentence of life without the possibility of parole for a juvenile convicted of second degree (felony) homicide violates both the United States and Pennsylvania Constitutions. In *Graham v. Florida*, the United States Supreme Court held the sentence of life without parole unconstitutional as applied to a juvenile convicted of violating his probation by committing a home invasion robbery, possessing a firearm, and associating with persons engaged in criminal activity. The holding was grounded in developmental and scientific research that demonstrates that juveniles possess a greater capacity for rehabilitation, change and growth than adults. Considering this research in light of the four accepted rationales for the imposition of criminal sanctions – incapacitation, deterrence, retribution and rehabilitation – the *Graham* Court held that a life without parole sentence served no legitimate penological purpose when applied to juveniles under the age of eighteen. The *Graham* Court also held that such a sentence was contrary to evolving standards of decency under the Eight Amendment's cruel and unusual punishments clause, noting that a majority of states prohibited the practice and that, even among those that permitted it, the sentence was rarely imposed. A life without parole sentence for a juvenile lacks empirical justification in light of the distinctive developmental characteristics of juvenile offenders, and therefore serves none of the traditional justifications for punishment. Striking this punishment is also consistent with longstanding specialized treatment of juveniles under the Constitution.

Graham applies to the sentence challenged here. The Court's analysis in *Graham* rested on the principle that the severe and irrevocable punishment of life without parole was not appropriate for a juvenile offender who did not "kill or intend to kill." 130 S. Ct. at 2027. Here,

Mr. Phillips was convicted of second degree felony murder. Intent to kill is not an element of felony murder. Accordingly, because there was no finding that Mr. Phillips killed or intended to kill, Mr. Phillips' sentence of life imprisonment without the possibility of parole is unconstitutional.

The constitutional problems with life without parole sentences are heightened in Pennsylvania by the mandatory nature of the life imprisonment without parole sentencing scheme. The sentencing scheme not only fails to address the reduced culpability of adolescents, it actually precludes the judge from taking age into account. *Graham* rejected such categorical judgments about juveniles.

The international consensus against imposition of life without parole sentences upon juveniles further underscores that the sentence is unconstitutional. International law prohibits the imposition of life without parole sentences on juveniles. The Pennsylvania Constitution, which is broader than the United States Constitution, barring sentences that are "cruel," rather than only those that are "cruel and unusual," also bars such sentences.

Pursuant to *Graham*, Pennsylvania's second degree murder statute is unconstitutional as applied to juveniles. Intent to kill is not an element of second degree murder; instead, intent is inferred based on the defendant's participation in the underlying felony. The *Graham* majority is clear, however, that a juvenile is developmentally different from the adult in constitutionally relevant ways. Hence, in the case of a juvenile, one cannot properly infer malice to commit murder merely from the juvenile's participation in the underlying felony.

Finally, this Court erred by denying Mr. Phillips' petition for post-conviction relief without granting a hearing to allow an opportunity to demonstrate why his sentence is

unconstitutional pursuant to *Graham*. Specifically, this Court denied Mr. Phillips the opportunity to demonstrate that he neither killed, intended to kill, nor foresaw that life would be taken.

VI. ARGUMENT

A. The Imposition Of A Life Without Parole Sentence On A Juvenile Who Did Not Kill Or Intend to Kill Is Barred By the United States Constitution.

Mr. Phillips' mandatory sentence of juvenile life without parole for felony murder violates the Eighth Amendment of the United States Constitution. In *Graham v. Florida*, the United States Supreme Court held the sentence of life without parole unconstitutional as applied to a juvenile convicted of a felony in which he did not "kill or intend to kill." *Graham v. Florida,* 130 S. Ct. 2011, 2027 (2010). The Court's reasoning was grounded in developmental and scientific research that demonstrates that juveniles possess a greater capacity for rehabilitation, change and growth than adults. In light of this research, the *Graham* Court held that juvenile life without parole sentences for individuals who did not intend to kill serve no legitimate penological purpose. National and international consensus further supported the Court's conclusion. The constitutional infirmity of a life without parole sentences here is heightened by the mandatory nature of the Pennsylvania felony murder sentencing scheme, which precludes the judge from taking age into account.

In *Commonwealth v. Ortiz*, 2011 PA Super 56 (Pa. Super. Ct. 2011), this Court held that the holding of *Graham* does not apply to juveniles convicted of homicide offenses. However, the Court in *Ortiz* was not presented with the question of whether *Graham* applies to juveniles who, like Mr. Phillips, did not kill or intend to kill. Nor did the Court in *Ortiz* consider how the *Graham* decision applies to *mandatory* sentences of life without parole for juveniles. The question of whether mandatory juvenile life without parole sentences are constitutional is currently being considered by the Pennsylvania Supreme Court in *Commonwealth v. Batts*, 603 Pa. 65, 981 A.2d 1283 (2009). Additionally, for the reasons discussed herein and contrary to the

decision in *Ortiz*, *Graham* does apply to the juvenile life without parole sentence imposed upon Mr. Phillips.

1. A Sentence Of Life Without Parole For A Juvenile Under the Age Of Eighteen Who Did Not Kill Or Intend To Kill Constitutes "Cruel And Unusual Punishment" In Violation Of The Eighth Amendment.

In *Graham v. Florida*, the United States Supreme Court held that the sentence of life without parole was unconstitutional under the Eighth Amendment's ban on "cruel and unusual punishment" as applied to a juvenile convicted of violating his probation by committing an armed home invasion robbery, possessing a firearm and associating with persons engaged in criminal activity. The Court's analysis rested heavily on the principle that such a severe and irrevocable punishment was not appropriate for a juvenile offender who did not "kill or intend to kill." *Graham v. Florida,* 130 S.Ct. 2011, 2027 (2010). The Court emphasized that both case law and brain science recognize that children are different from adults – they are less culpable for their actions and at the same time have a greater capacity to change and mature. The *Graham* opinion built upon the Supreme Court's long history of recognizing that the differences between youth and adults compel a distinct, and often more protective, constitutional treatment for youth. The unique characteristics of youth were also central to the *Graham* Court's conclusion that sentences of life without parole served no legitimate penological ends in the case before it. *Id.* at 2033. In light of adolescents' capacity to change, the Court emphasized that juveniles who do not intend to kill must have a meaningful opportunity to have their sentences reviewed. The Court found additional support for its conclusion in the national and international consensus opposing such sentences.

a. The Developmental Differences Between Juveniles And Adults Compel The Conclusion That Life Without Parole Sentences Are Cruel And Unusual Punishment For Juveniles Who Do Not Kill Or Intend To Kill.

i. The *Graham* Decision Clarifies That Juvenile Life Without Parole Sentences Are Unconstitutional Because Juveniles Who Do Not Kill Or Intend To Kill Must Be Treated Differently Than Adults.

In determining the constitutionality of a punishment, courts must look to the "evolving standards of decency that mark the progress of a maturing society," recognizing the "essential principle" that "the State must respect the human attributes even of those who have committed serious crimes." *Graham*, 130 S. Ct. at 2021. In doing so, the court must exercise its independent judgment, considering the culpability of the offenders and the severity of the punishment. *Graham*, 130 S. Ct. at 2026 (citing *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2658 (2008).

The *Graham* Court emphasized that the unique characteristics of juveniles who do not kill or intend to kill required a distinct and protective treatment under the Constitution. Thus the Court considered the appropriateness of the sentence as applied to an "entire class of offenders," rather than considering the individual culpability of the offender before it. This analysis put the question of juvenile culpability at the center of the Court's reasoning. The Court emphasized that this categorical approach was necessary to ensure that a juvenile would not receive a sentence that classified him or her as "irredeemably depraved." *Id.* at 2031.

The *Graham* decision was rooted in the Court's earlier analysis in *Roper v. Simmons*, 543 U.S. 551 (2005) which had held the death penalty unconstitutional as applied to juveniles. The

Graham Court echoed the reasoning in *Roper* that three essential characteristics distinguish youth from adults for culpability purposes: they lack maturity and responsibility, they are vulnerable and susceptible to peer pressure, and their characters are unformed. *Graham,* 130 S. Ct. at 2026 (quoting *Roper*, 543 U.S. at 569-70). Accordingly, the *Graham* Court concluded that "[a] juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.'" *Id.* (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988). As both *Roper* and *Graham* recognized, even for brutal and cold-blooded crimes – in fact *especially* for such crimes – a categorical rule must recognize juveniles' reduced culpability. This is because "[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity" should require a less severe sentence. *Id.* at 2032, *citing Roper*, 543 U.S. at 573.

Central to the *Graham* Court's determination about juvenile culpability was its understanding that the personalities of adolescents are still developing and capable of change and thus that an irrevocable penalty, with no opportunity for review, was developmentally inappropriate. The Court explained that

> Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. *Roper*, 543 U. S., at 570. It remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Ibid.*

Id. at 2026-27. The Court's holding rested largely on the incongruity of imposing a final and

irrevocable penalty on an adolescent, who had capacity to change and grow. The Court explained that "[t]hose who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." However, the Eighth Amendment forbids States from "making the judgment at the outset that those offenders never will be fit to reenter society." Thus, "[w]hat the State must do . . . is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 2030. The Court further underscored the point, noting that the "juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential." *Id.* at 2032. A categorical rule "avoids the perverse consequence in which the lack of maturity that led to an offender's crime is reinforced by the prison term." *Id.* at 2033.

The *Graham* Court relied upon an emerging body of research confirming the distinct emotional, psychological and neurological status of youth. The Court clarified that, since *Roper,* "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." Thus, the Court underscored that because juveniles are more likely to be reformed than adults, the "status of the offender" is central to the question of whether a punishment is constitutional. *Id.* at 2027.

ii. The United States Supreme Court Has Long Recognized That Adolescents Deserve Distinct Treatment Under The Constitution.

While *Graham* and *Roper* enriched the constitutional analysis by embedding science in the Court's reasoning, they also built upon the Supreme Court's longstanding recognition that the

differences between youth and adults merit distinct and protective treatment under the Constitution. Indeed, the Court has been explicit that constitutional standards cannot be applied in a vacuum, but instead must take into account the reality of adolescent development. *See e.g., Haley v. Ohio,* 332 U.S. 596, 601 (1948) ("Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them.") For example, in *Haley v. Ohio,* the Supreme Court recognized that when it comes to criminal procedure, a teenager cannot be judged by the more exacting standards applied to adults. *Id.* (holding that police improperly obtained the confession of a fifteen-year old defendant in violation of his due process rights). The *Haley* Court emphasized the unique vulnerability of youth during the period of adolescence:

> Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces.

Id. at 599. Similarly, in *Gallegos v. Colorado*, involving the admissibility of a juvenile's statement, the Court observed that an adolescent "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. . . . Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had." 370 U.S. 49, 54 (1962).

The Supreme Court has similarly recognized the unique attributes of youth at other key points of their involvement in the juvenile and criminal justice systems. For example, the Court has acknowledged that a child has a particular need for the "guiding hand of counsel at every step in the proceedings against him." *Gault,* 387 U.S. at 36. The Court has also sought to promote the well-being of youth by ensuring their ongoing access to rehabilitative, rather than punitive,

juvenile justice systems. *See McKeiver v. Pennsylvania,* 403 U.S. 528, 539-40 (1971); *Gault,* 387 U.S. at 15-16.

In civil cases, as well, the Supreme Court has frequently expressed its view that children are different from adults, and has tailored its constitutional analysis accordingly. Reasoning that "during the formative years of childhood and adolescence, minors often lack . . . experience, perspective, and judgment," *Bellotti v. Baird,* 443 U.S. 662, 635 (1979), the Court has upheld greater state restrictions on minors' exercise of reproductive choice. *Id.* S*ee also Hodgson v. Minnesota,* 497 U.S. 417, 444 (1990); *Ohio v. Akron Center For Reproductive Health,* 497 U.S. 502, 520 (1990). The Court has also held that different obscenity standards apply to children than to adults, *Ginsburg v. New York,* 390 U.S. 629, 637 (1968), and has concluded that the state has a compelling interest in protecting children from images that are "harmful to minors." *Denver Area Educational Telecommunications Consortium, Inc. v. FCC,* 518 U.S. 727, 743 (1996) . Similarly, the Court has upheld a state's right to restrict when a minor can work, guided by the premise that "[t]he state's authority over children's activities is broader than over the actions of adults." *Prince v. Massachusetts,* 321 U.S. 158, 168 (1944).

The Court's school prayer cases similarly take account of the unique vulnerabilities of youth, and their particular susceptibility to coercion. *See Lee v. Weissman,* 505 U.S. 577, 593 (1992) (observing that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressures in the elementary and secondary public schools."). *See also Santa Fe Independent Sch. Dist. v. Doe,* 530 U.S. 290, 311-12, 317 (2000) .

The *Graham* decision builds upon the Supreme Court's long history of constitutional rulings that both recognize and respond to the key developmental differences between

adolescents and adults.

iii. Social Science Research Confirms The Transitory Nature Of Adolescence And The Capacity Of Youth For Rehabilitation.

As the *Graham* Court recognized, social science research confirms the unique characteristics of youth – and the problems associated with imposing life without parole on an adolescent still in the process of maturing. *Graham,* 130 S. Ct. at 2027. A large body of work by psychologists further supports this conclusion. In particular, research reveals that because adolescence is a transitory stage, an irrevocable sentence is inherently disproportionate. "Contemporary psychologists universally view adolescence as a period of development distinct from either childhood or adulthood with unique and characteristic features." Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 31 (2008). A central feature of adolescence is its transitory nature. As Scott and Steinberg explain:

> The period is *transitional* because it is marked by rapid and dramatic change within the individual in the realms of biology, cognition, emotion, and interpersonal relationships. . . . Even the word "adolescence" has origins that connote its transitional nature: it derives from the Latin verb *adolescere,* to grow into adulthood.

Id. at 32.

Studies show that youthful criminal behavior can be distinguished from permanent personality traits. Rates of impulsivity are high during adolescence and early adulthood and decline thereafter. *See* Steinberg, Cauffman, Banich & Graham, *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 Dev. Psych. 1764 (2008). As youth grow, so do their self-management skills, long-term planning, judgment and decision-making, regulation of emotion, and evaluation of risk and

reward. *See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psych. 1009, 1011 (2003). As a result, "[t]he typical delinquent youth does not grow up to be an adult criminal. . . " *Id.* at 54. As one report explained, "the criminal careers of most violent juvenile offenders span only a single year. Richard A. Mendel, *Less Hype, More Help: Reducing Juvenile Crime, What Works – and What Doesn't* 15 (2000). Thus, not only are youth developmentally capable of change, research also demonstrates that when given a chance, youth with histories of violent crime can and do become productive and law abiding citizens, even without any interventions. These findings are consistent with recent research in developmental neuroscience. Brain imaging techniques show that areas of the brain associated with impulse control, judgment, and the rational integration of cognitive, social, and emotional information do not fully mature until early adulthood. Scott & Steinberg, *Rethinking Juvenile Justice* 46-68. *See also* Elizabeth Sowell, et al., *In vivo evidence for post-adolescent brain maturation in frontal and striatal regions*, 2 Nat. Neurosci. 859-861 (1999); Nitin Gogtay, et al. *Dynamic Mapping of Human Cortical Development during Childhood through Early Adulthood*, 101 Nat'l Acad. Sci. Proc. 8174-8179 (2004).[2]

While the process of physiological and psychological growth alone will lead to rehabilitation for most adolescents, research over the last fifteen years on interventions for juvenile offenders has also yielded rich data on the effectiveness of programs that reduce

[2] One of the clearest visual representations of these differences can be found at http://www.nytimes.com/interactive/2008/09/15/health/20080915-brain-development.html?scp=1&sq=interactive%20compare%20brain%20development%20in%20various%20areas%20&st=cse, an interactive web-based link allowing visitors to compare brain development at different ages, and illustrating that the structures related to executive functioning and decision-making are not typically fully developed until a child reaches his or her mid-twenties.

recidivism and save money, underscoring that rehabilitation is a realistic goal for the overwhelming majority of juvenile offenders, including violent and repeat offenders. Indeed, there is compelling evidence that many juvenile offenders, even those charged with serious and violent offenses, can and do achieve rehabilitation and change their lives to become productive citizens. *See* Second Chances: 100 Years of the Children's Court: Giving Kids a Chance To Make a Better Choice (Justice Policy Inst. & Children & Family Law Ctr., n.d.), http://www.cjcj.org/files/secondchances.pdf (last visited Jun. 12, 2009). As *Graham* recognized and held, the reduced culpability of adolescents as well as their distinctive constitutional status makes the sentence of juvenile life without parole unconstitutional.

For juveniles convicted of felony murder, the constitutional problems with life without parole sentences are even more pronounced. Felony murder is a legal fiction that allows convictions for murder even though the defendant lacked the intent to kill. It requires only the intent to commit or be an accomplice to the underlying felony. *See* 18 Pa. Cons. Stat. § 2502(b) ("A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony.") *Cf.* 18 Pa. Cons. Stat. § 2502(a) ("A criminal homicide constitutes murder of the *first* degree when it is committed by an *intentional* killing.") (emphasis added). Primary justifications for the felony-murder rule include deterrence (because a felony could result in such a sentence, individuals should avoid the underlying felony in the first instance) and retribution (because the individual was engaged in a felony, the defendant is a bad actor and we are less concerned that he or she lacked the intent to kill). *See* Steven A. Drizin and Allison McGowan Keegan, *Abolishing the Use of the Felony-Murder Rule When the Defendant is a Teenager,* 28 Nova L. Rev. 507, 527-28

(2004). These justifications are inapt for juveniles who, "lacking the foresight and judgment of fully competent adults, are prone to make decisions without careful deliberation, and do not fully understand the consequences of their actions." *Id.* at 534.

In *Graham*, the majority explicitly recognized that "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." Thus the Court explicitly included juveniles such as Mr. Phillips in its holding. There was no legal finding that Mr. Phillips killed or intended to kill, and the fact that Mr. Phillips was involved in a snatch-and-grab *unarmed* robbery controverts any claim that Mr. Phillips intended to kill or that Mr. McEvoy's death was even forseeable.

Indeed, the Supreme Court has consistently emphasized that those who do not intend to kill must be spared the most severe penalties under the law. Thus in *Enmund v. Florida,* 458 U.S. 782 (1982), the Court held that the Eighth Amendment bars imposing the death penalty on an individual convicted of felony murder where there is no finding of an intent to kill. Because the defendant caused harm "unintentionally," he should not suffer the most severe punishment. *Id.* at 798. Instead, the defendant's "criminal culpability must be limited to his [actions], and his punishment must be tailored to his personal responsibility and moral guilt." *Id.* at 801. Aaron Phillips is certainly culpable for his criminal conduct. However, by participating in a felony as a juvenile without the intent to kill, he is not as culpable as an adult murderer.

b. Because the Sentence of Juvenile Life Without the Possibility of Parole for Felony-Murder Serves No Legitimate Penological Interest, It Is Unconstitutional.

The *Graham* Court underscored the uniquely severe nature of a life without parole sentence. According to the Court, although the death penalty is a unique sentence deserving of

special protections under the law, the sentence of life without parole does "share some characteristics with death sentences that are shared by no other sentences" because it is "irrevocable" and "deprives the convict of the most basic liberties without giving hope of restoration." *Graham,* 130 S. Ct. at 2027. Thus, the sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." *Id.* (citing *Naovarath* v. *State*, 105 Nev. 525, 526, 779 P. 2d 944 (1989)).

The Court then concluded that no penological justification warrants a sentence of life without parole as applied to juveniles. According to the Court, a sentence "lacking any legitimate penological justification is by its nature disproportionate to the offense" and was therefore unconstitutional. *Id.*

i. Deterrence

Relying on the analysis set forth in *Roper,* the *Graham* Court concluded that the goal of deterrence did not justify the imposition of life without parole sentences on juveniles.

> *Roper* noted that "the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence." *Ibid.* Because juveniles' "lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions," *Johnson* v. *Texas*, 509 U.S. 350, 367 (1993), they are less likely to take a possible punishment into consideration when making decisions. This is particularly so when that punishment is rarely imposed.

Graham, 130 S. Ct. at 2028-29. Because youth would not likely be deterred by the fear of a life without parole sentence, the goal did not justify the sentence. This is even more apt in a case like the present one, in which the defendant had no intent to kill. As the Supreme Court recognized

in *Enmund,* "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation," *Enmund* at 798-99 (internal citations omitted). Similarly, the harsh sentence of life without parole for homicide can only deter an intentional killing. Criminological studies showing that adult sentences fail to deter youth further underscore the point that the goals of deterrence are not well-served by juvenile life without parole sentences. *See* Jeffrey Fagan, *Juvenile Crime and Criminal Justice: Resolving Border Disputes*, 18 Future of Child. 81, 102-103 (2008); David Lee and Justin McCrary, "*Crime, Punishment, and Myopia,*" (Nat'l Bureau of Econ. Research, Working Paper No. W11491, 2005). *See also* Eric L. Jensen & Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime,* 40 *Crime & Delinq.* 96, 96-104 (1994), cited in Donna Bishop, *Juvenile Offenders in the Adult Criminal System*, 27 *Crime & Just.* 81 (2000); Richard Redding & Elizabeth Fuller, *What Do Juveniles Know About Being Tried as Adults? Implications for Deterrence*, Juvenile & Family Court Journal (Summer 2004) (cited in Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 199 (2008).

ii. Retribution

The *Graham* Court also concluded that retribution does not justify the imposition of life without parole sentences for juveniles. The *Graham* Court echoed *Roper's* assessment that "'retribution is not proportional if the law's most severe penalty is imposed' on the juvenile murderer." *Graham,* 130 S. Ct. at 2028 (citing *Roper*, 543 U.S. at 571), and emphasized that "the case for retribution is not as strong with a minor as with an adult." *Id.* As the *Roper* Court had explained, such a severe retributive punishment was inappropriate in light of juvenile immaturity and capacity to change. The *Graham* Court recognized that these same

considerations applied to "imposing the second most severe penalty on the less culpable juvenile." *Id.* As the Supreme Court recognized in *Enmund,* the case for retribution is even weaker in felony murder cases. Imposing the most severe sanction for a crime the defendant "did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts." *Enmund,* 458 U.S. 801 (holding the death penalty unconstitutional in a felony murder case).

This conclusion about juveniles' reduced culpability also finds ample support in behavioral and neurobiological research. As described above, a significant body of research recognizes the malleability and transitory nature of adolescence. *See, e.g.,* Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court, in Youth on Trial: A Developmental Perspective on Juvenile Justice* 9, 23 (Thomas Grisso and Robert Schwartz eds., 2000) (describing adolescence as a period of "tremendous malleability" and "tremendous plasticity in response to features of the environment"); Scott & Steinberg, *Rethinking Juvenile Justice* 32, 49 (describing adolescence as a transitional stage in which individuals display a reduced capacity for impulse control).

iii. Incapacitation

The *Graham* Court also held that incapacitation could not justify the sentence of juvenile life without parole. To justify incapacitation for life "requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable." *Graham,* 130 U.S. at 2029. Indeed, at core, the developmental analysis of juveniles proves the opposite – their natures are transient and they must be given "a chance to demonstrate growth and maturity." *Id.* Sociological and psychological research supports this

conclusion as well. *See* Steinberg & Schwartz, "*Developmental Psychology Goes to Court*," 23 (explaining that 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 & Robert J. Sampson, *Shared Beginnings, Divergent Lives: Delinquent Boys to Age 70* (2003) (following 500 individuals who had been adjudicated delinquents and showing that their youthful characteristics were not immutable; they were able to change and have law-abiding lives as adults). As a result, a child sent to prison should have the opportunity to rehabilitate and qualify for release after a reasonable term of years. Mechanisms such as parole boards can provide a crucial check to ensure that the purposes of punishment are satisfied without unnecessarily incapacitating fully rehabilitated individuals and keeping youth "in prison until they die." *Naovarath*, 779 P.2d at 948.

iv. Rehabilitation

Finally, *Graham* concluded that a life without parole sentence "cannot be justified by the goal of rehabilitation. The penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society." *Id.* at 2030. The Court also underscored that the denial of rehabilitation was not just theoretical: the reality of prison conditions prevented juveniles from growth and development they could otherwise achieve, and making the "disproportionality of the sentence all the more evident." *Id.* at 2030. Research further bears out the many ways in which lengthy adult sentences – especially life sentences – work against a youth's rehabilitation. Understandably, many juveniles sent to prison fall into despair. They lack incentive to try to improve their character or skills. Indeed, many juveniles sentenced to spend the rest of their lives

in prison commit suicide, or attempt to commit suicide. *See* Human Rights Watch, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States* 63-64 (2005), http://www.hrw.org/en/ reports/2005/10/11/rest-their-lives; *See also*, Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 Wake Forest L. Rev. 681, 712, nn.141-47 (1998).

Because a sentence of life without parole serves no legitimate penological purpose in this case, it is unconstitutional.

c. The Mandatory Nature Of Pennsylvania's Life Without Parole Sentencing Scheme Makes It Unconstitutional

A sentencing scheme like 18 Pa. Cons. Stat. § 1102(b) mandating juvenile life without parole sentences for felony murder poses particular Constitutional problems. The statute renders courts impotent to give a more just sentence by precluding courts from considering a child's age, immaturity, reduced mental capacity, reduced role in the offense, or any other factors related to his or her young age – the precise characteristics that the United States Supreme Court in *Graham* concluded categorically apply to all juvenile offenders under 18, 130 S. Ct. at 2026, and which the Court found conclusive in abolishing the penalty of life without parole in that case. *Id.* at 2034.

The *Graham* majority was unequivocal in its insistence that irrevocable judgments about the character of juvenile offenders are impermissible under the Constitution – at least where they deny juveniles any opportunity to prove their rehabilitation and their eligibility to re-enter society. 130 S. Ct. at 2030. As described above, both *Graham* and *Roper* are explicit in their belief that juvenile offenders' capacity to change and grow, combined with their reduced blameworthiness and inherent immaturity of judgment, set them apart from adult offenders in

fundamental – and constitutionally relevant – ways. Mandatory sentencing schemes by definition allow for no individualized determinations. It is precisely this "one size fits all" feature that is so directly at odds with the Court's holding in these cases, prohibiting consideration of age as a factor at all in sentencing while simultaneously proscribing any "realistic opportunity" for release. *Id.* at 2034. *Graham* prohibits a judgment of irredeemability to be made "at the outset." *Id.* at 2029. The Pennsylvania statute requires that just such a judgment be made – not only because the sentence allows for no review, but because it *must* be imposed regardless of the individual circumstances of the case.

As Justice Frankfurter wrote over fifty years ago in *May v. Anderson*, 345 U.S. 528, 536 (1953), "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." Even today, adult sentencing practices that take no account of youth – indeed permit no consideration of youth – are unconstitutional as applied to juveniles who do not kill or intend to kill.

d. The National Consensus Against Mandatory Life Without Parole Sentences For Juveniles Convicted On Felony Murder Charges Further Underscores That They Are Unconstitutional

A national consensus exists against the mandatory imposition of life without parole sentences on juveniles convicted of felony murder. In both *Roper* and *Atkins,* the Supreme Court found national consensus against a practice because thirty states prohibited it. Here, the consensus weighs much more strongly against the punishment: only five other states mandate the sentence of life without parole for felony murder by a juvenile accomplice who did not

intentionally kill.[3]

The direction of change in state laws further underscores the national consensus against juvenile life without parole. *Roper* and *Atkins* make clear that a legislative trend against imposing such sentences provides further evidence of the national consensus against it. *See, e.g., Roper v. Simmons*, 543 U.S. at 565-67; *Atkins v. Virginia,* 536 U.S. 304, 315 (2002). In *Roper,* for example, five states had abolished the death penalty in the prior 15 years – four through legislative enactments, and one through a decision from the judiciary. *Roper,* 543 U.S. at 565. Here, the rate of change is even faster. In the last six years, four states have imposed new limits on life without parole sentences imposed on minors. In 2005, Colorado outlawed juvenile life without parole sentences altogether, Colo. Rev. Stat. § 17-22.5-104(IV) (2009); Texas followed suit in 2009, Tex. Penal Code Ann. § 12.31 (2010); and Montana barred applying mandatory minimum sentences and limits on eligibility for parole against anyone below eighteen. Mont. Code Ann. § 46-18-222 (1) (2010). In 2004, Kansas eliminated the death penalty, but created the new option of life without parole for adult offenders. The legislature explicitly precluded the imposition of the penalty on juveniles. Kan. Stat. Ann. § 21-4622 (2009).

A review of sentencing practices further demonstrates the national consensus against imposing life without parole sentences on juveniles convicted of felony murder. In *Graham,* the Court concluded that legislative enactments alone did not determine a national consensus. *See Graham*, 130 S. Ct. at 2025-26 ("[T]he statutory eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full

[3] Ark. Code Ann. § 5-10-101; La. Rev. Stat. Ann. §14:30.1 A (2009); La. Rev. Stat. Ann. §14:30.1 B (2009); N.J. Stat. Ann. §2C:11-3 (a) and (b)(1) (2007); S.D. Codified Laws §22-16-4 (2005); S.D. Codified Laws §22-6-1 (2005); Fla. Stat. § 782.04(3) (2010); § 775.0861 (2010); Fla. Stat. § 775.087 (2005); Fla. Stat. § 775.0875 (1998).

legislative consideration.") Instead, the Court looked to the number of individuals serving the sentence. It concluded that because only 109 juvenile offenders were serving life without parole sentences for non-homicide offenses, there was a national consensus against the practice. *Id.* at 2023. The Court further recognized that while the statistics available to the Court were not precise, the information was sufficient to demonstrate that the punishment is rarely imposed. *Id.* at 2024.

While the number of individuals sentenced to life without parole is hard to ascertain, it is clear that the sentence is rarely imposed in any case, let alone felony murder. Just 54 juveniles nationwide received life without parole sentences in 2003 – including those convicted of homicide or non-homicide offenses. Human Rights Watch, Amnesty International, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 31 (2005) (hereinafter "HRW Report").

There is also trend in practice against imposing life without parole sentences. According to an Amnesty International study, juvenile life without parole began to be used in the United States in the early 1980s, peaked in the late 1990s, and was on the decline as of 2004. HRW Report 31, fig. 3. The same report observed that the sentence was meted out 152 times in 1996 but just 54 times in 2003. *Id.* This is particularly notable given that the use of life without parole sentences for adults increased significantly during the same time period. Ashley Nellis & Ryan S. King, Sentencing Project, *No Exit: The Expanding Use of Life Sentences in America* (2009).

The limited number of states permitting mandatory life without parole sentences for felony murder, the rarity with which such sentences are imposed in practice, and the trend against their use all demonstrate the national consensus against the sentence.

B. International Law, The Practice Of Other Nations, And Treaty Obligations Establish A Global Consensus Against Life Without Parole Sentences For Juveniles That Render Such Sentences Unconstitutional.

1. The Global Consensus Against Life Without Parole Supports The Conclusion That The Sentence Is Cruel And Unusual Under The United States Constitution.

The United States Supreme Court has expressly recognized that international law and the practice of other nations are relevant to the question of whether a life without parole sentence imposed on a juvenile is cruel and unusual. The *Graham* Court noted, "The Court has looked beyond our Nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual. . . . Today we continue that longstanding practice in noting the global consensus against the sentencing practice in question." 130 S. Ct. at 849.

The United States is the only nation in the world that currently imposes life without parole sentences on juveniles for committing *any* crime, whether a homicide or nonhomicide. Michelle Leighton & Connie de la Vega, *Sentencing our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. Rev. 983 (2008). Most governments either have expressly prohibited, never allowed, or do not impose such sentences on children. *Id.* at 989-90. Of the ten countries other than the United States that have laws that arguably permit sentencing child offenders to life without parole,[4] there are no known cases where the sentence has been imposed on a juvenile. *Id.* at 990. As the *Graham* Court recognized, this international consensus is further reflected in the ratification by every nation except the United States and Somalia of Article 37(a) of the United Nations Convention on the Rights of the Child, which prohibits juvenile life without parole. *Graham*, 130 S. Ct. at 849.

[4] These countries are Antigua and Barbuda, Argentina, Australia, Belize, Brunei, Cuba, Dominica, Saint Vincent and

A near-universal consensus has coalesced over the past fifteen years that the juvenile life without parole sentence must be legally abolished. Many United Nations resolutions have passed by consensus or, upon vote, by every country represented *except* the United States. *Sentencing our Children to Die*, *supra* at 1016-18. Every year since 2006, the United Nations General Assembly has adopted in its Rights of the Child resolution a call for the immediate abrogation of the juvenile life without parole sentence by law and practice in any country applying the penalty. Rights of the Child, A/HRC/7/RES/29, para. 30 (a) (2008); A/HRC/10/2.11, para. 11 (adopted March 25, 2009).

Moreover, as noted above, all countries other than the United States that had maintained a juvenile life without parole sentence have ended the practice in accordance with their treaty and international human rights obligations. *Sentencing our Children to Die*, *supra*, at 996-1004. For example, Tanzania committed to allowing parole for the one person potentially serving the sentence and to clarifying its laws to prohibit the practice; Israel clarified that parole petitions may be reviewed by its High Court; and South Africa clarified that such sentences are not permitted. *Sentencing our Children to Die*, *supra*, at 996-1003. This clarification that parole hearings must be allowed in accordance with the international legal norm is further evidence that countries agree that no derogation is permitted.

2. The Imposition Of A Mandatory Life Without Parole Sentence On A Juvenile Offender Violates United States Treaty Obligations And Customary International Law.

In determining whether the United States Constitution permits the challenged sentence, this Court should consider the mandates of the Supremacy Clause, which provides that "[a]ll

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the Grenadines, the Solomon Islands, and Sri Lanka.

Treaties made . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const. art. VI, cl. 2. Further, the United States Supreme Court has noted that customary international law is "part of our law, and must be ascertained and administered by the 31 courts of justice of appropriate jurisdiction." *The Paquete Habana*, 175 U.S. 677, 700 (1900). As Justice Stevens has stated: "[o]ne consequence of our form of government is that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation." *Medellin v. Texas*, 552 U.S. 491, 536 (2008) (Stevens, J. concurring). Accordingly, Pennsylvania has an obligation to ensure that its criminal punishments comply with the United States' international treaty obligations. Thus, this Court must consider treaties to which the United States is a party, including: (1) the International Covenant on Civil and Political Rights ("ICCPR"), 999 U.N.T.S 171, *entered into force*, Mar. 23, 1976, ratified by the United States; (2) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), 1465 U.N.T.S. 85, entered into force, June 26, 1987, ratified by the United States, Oct. 21, 1994; and (3) the Convention on the Elimination of Racial Discrimination ("CERD"), 660 U.N.T.S. 195, entered into force, Jan. 4, 1969, ratified by the United States, Oct. 21, 1994. In ratifying the ICCPR, Congress stated, "The United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the State and local governments;. . ." Senate Committee on Foreign Relations, ICCPR, S. Exec. Rep. No. 102-23, at 19 (1992).

Under Pennsylvania law, the life without parole sentence imposed in this case was mandatory because of the offense at issue. International treaty law to which the United States is

a party requires that the *age of the juvenile* and his *status as a minor* be considered in sentencing, but a mandatory life without parole sentencing scheme prevents such consideration. In 2006, the Human Rights Committee, oversight authority for the ICCPR, determined that allowing the sentence contravenes Article 24(1), which states that every child shall have "the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State", and Article 7, which prohibits cruel and unusual punishment. Concluding Observations of the Human Rights Committee: The United States of America, U.N. Doc. CCPR/C/USA/CO/3/Rev.1, para. 34, (Dec. 18, 2006).

The Committee Against Torture, the official oversight body for the Convention Against Torture, in evaluating the United States' compliance with that treaty, found that life imprisonment of children "could constitute cruel, inhuman or degrading treatment or punishment" in violation of the treaty. Committee Against Torture, Conclusions and Recommendations of the Committee Against Torture: United States of America, at para. 34, U.N. Doc. CAT/USA/CO/2 (July 25, 2006).

Moreover, in 2008, the Committee on the Elimination of Racial Discrimination, the oversight body for the Convention on the Elimination of Racial Discrimination ("CERD"), found the juvenile life without parole sentence incompatible with Article 5(a) of the CERD because the sentence is applied disproportionately to youth of color and the United States has done nothing to reduce what has become pervasive discrimination. Nationwide, Black youth are more than ten times more likely to be serving a sentence of life without parole than white youth. Human Rights Watch, Publications, "Executive Summary: The Rest of Their Lives," May 1, 2008, available at http://www/hrw/en/reports/2008/05/01/executive-summary-rest-their-lives. The Committee on

the Elimination of Racial Discrimination referred to both the Human Rights Committee and Committee Against Torture's reports on the United States, noting the concern raised in regard to the sentence, and recommending that the State party discontinue the use of juvenile life without parole sentences. CERD, Concluding Observations of the United States, at para 21, U.N. Doc. CERD/C/USA/CO/6 (Feb. 6, 2008).

This Court should treat the laws and practices of other nations and international agreements as relevant to the Court's interpretation of the Eighth Amendment. As the Court noted in *Graham*, in the inquiry of whether a punishment is cruel and unusual, "'the overwhelming weight of international opinion against' life without parole for nonhomicide offenses committed by juveniles 'provide[s] respected and significant confirmation for our own conclusions.'" 130 S. Ct. at 850 (citing *Roper, supra* at 578). The weight of global law and practice against life without parole for *any* offense similarly supports the conclusion that these sentences are unconstitutional.

C. A Sentence Of Life Without Parole For A Juvenile Violates Article I, Section 13 Of The Pennsylvania Constitution Which Prohibits Cruel Punishment.

Pennsylvania's youth are neither the most violent nor the most criminal children in the world, yet Pennsylvania has more inmates serving juvenile life without parole sentences than *any other jurisdiction in the nation or the world. See A Shameful Record*, N.Y. Times, Feb. 6, 2008. In addition to violating the United States Constitution, these sentences also violate the Pennsylvania Constitution, whose protections are at least as broad as the federal Constitution. With respect to juvenile sentences, Article I, Section 13 of the Pennsylvania Constitution should

be interpreted more broadly than the Eighth Amendment of the U.S. Constitution.[5] In considering whether a protection under the Pennsylvania Constitution is greater than under 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. *See Commonwealth v. Edmunds*, 526 Pa. 374, 390, 586 A.2d 887, 895 (1991).[6]

The Pennsylvania Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." Pa. Const. art. I, § 5. The text of the Pennsylvania Constitution is broader than the United States Constitution; where the U.S. Constitution bars punishments that are both "cruel" and "unusual," the Pennsylvania Constitution is broader and bars punishments that are merely "cruel."

The history of juvenile life without parole sentences in Pennsylvania also supports a holding that the sentence is unconstitutional under the Pennsylvania Constitution. The Pennsylvania Supreme Court has acknowledged that Pennsylvania's prohibition against cruel punishment is not a static concept and courts must draw its meaning from "the evolving standards of decency that mark the progress of a maturing society." *Zettlemoyer*, 500 Pa. at 74 (internal quotations omitted). Though courts may typically look to the legislature to "respond to

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[5] Although Pennsylvania courts have, in the context of the death penalty, held that Pennsylvania's ban on cruel punishments is coextensive with the Eighth Amendment, *see Commonwealth v. Zettlemoyer*, 500 Pa. 16, 72-74, 454 A.2d 937, 967 (1982), the courts have not examined the issue in the context of life without parole sentences imposed on juvenile offenders, nor have those cases considered the jurisprudence of *Roper* and *Graham*, which both establish that there is a constitutional difference between defendants below age 18 and above age 18 regarding punishment (as discussed above). Significantly, *Zettlemoyer* was also decided before *Commonwealth v. Edmunds*, 526 Pa. 374 (1991), which established the method to determine whether the Pennsylvania Constitution is broader than the federal Constitution.

[6] For purposes of the *Edmunds* argument, rather than repeat the case law and policy arguments contained in Arguments A and B, *supra* counsel incorporates them by reference in this argument.

the consensus of the people of this Commonwealth," *id.* (quoting *Commonwealth v. Story*, 497 Pa. 273, 297 (1981)), the Pennsylvania legislature has never explicitly authorized the practice of sentencing juveniles to life without parole sentences. Instead, juveniles in Pennsylvania are subject to life without parole sentences because of the interaction between Pennsylvania's juvenile transfer law and its homicide sentencing law. Thus, a statutory accident rather than a considered act of the Pennsylvania legislature led to this sentence. As the U.S. Supreme Court noted in *Graham,* such sentencing schemes do not reflect an intent to impose life without parole sentences on juveniles:

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

130 S.Ct. at 2025.

Indeed, Pennsylvania history reveals a longstanding commitment to providing special protections for minors against the full weight of criminal punishment. The Pennsylvania Supreme Court has recognized the special status of adolescents, and has held, for example, that a court determining the voluntariness of a youth's confession must consider the youth's age, experience, comprehension, and the presence or absence of an interested adult. *Commonwealth v. Williams*, 504 Pa. 511, 521 (1984). In *Commonwealth v. Kocher*, 529 Pa. 303, 311 (1992), involving the prosecution of a nine year old for murder, the Pennsylvania Supreme Court referred to the common law presumption that children under the age of 14 are incapable of forming the

requisite criminal intent to commit a crime. While this common law presumption was replaced by the Juvenile Act, its existence for decades demonstrates that Pennsylvania's common law was especially protective of minors. The Juvenile Act also recognizes the special status of minors in its aim "to provide for children committing delinquent acts programs of supervision, care and rehabilitation which provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the development of competencies to enable children to become responsible and productive members of the community." 42 Pa. Cons. Stat. § 6301(b)(2). This focus on rehabilitation and competency development underscores Pennsylvania's recognition that children are still changing and deserve special protections under the law.[7]

Finally, policy considerations support broadly interpreting the Pennsylvania's prohibition against cruel punishments. As discussed above, the U.S. Supreme Court held that "penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders." *Graham*, 130 S. Ct. at 2030. While finding that juvenile life without parole sentences are unconstitutional under the Pennsylvania Constitution would entitle the juveniles to meaningful parole opportunities, it would not "guarantee eventual freedom to a juvenile offender." *Id.* Those juvenile offenders who have "not demonstrated maturity and rehabilitation," *id.*, could remain incarcerated, allowing the Commonwealth to simultaneously protect public safety while

[7] Additionally, Pennsylvania statutory law consistently recognizes that children lack the same judgment, maturity and responsibility as adults. *See, e.g.*, 23 Pa. Cons. Stat. § 5101 (the ability to sue and be sued or form binding contracts attaches at age 18); 18 Pa. Cons. Stat. Ann. §§ 6308, 6305 (a person cannot legally purchase alcohol until age 21 and cannot legally purchase tobacco products until age 18); 10 Pa. Stat. § 305(c)(1) (no person under the age of 18 in Pennsylvania may play bingo unless accompanied by an adult); 18 Pa. Cons. Stat. § 6311 (a person under age 18 cannot get a tattoo or body piercing without parental consent); 72 Pa. Stat. § 3761-309(a) (a person under age 18 cannot buy a lottery ticket); 4 Pa. Stat. § 325.228 (no one under age 18 may make a wager at a racetrack); 23 Pa. Cons. Stat. § 1304(a) (youth under the age of 18 cannot get married in Pennsylvania without parental consent or, if under 16, judicial authorization).

also recognizing that a young, immature, and not fully developed juvenile offender might rehabilitate over the course of his life.[8]

In light of the text of the Pennsylvania Constitution, the Commonwealth's historic recognition of the special status of juveniles, recent knowledge about adolescent development, and Pennsylvania's policies, juvenile life without parole sentences are unconstitutionally "cruel" under the Pennsylvania Constitution.

D. Pennsylvania's Second Degree Felony Murder Statute Is Unconstitutional As Applied to Juveniles.

Pursuant to *Graham v. Florida*, Pennsylvania's second degree murder statute is unconstitutional as applied to juveniles. As discussed in Section VI.A.1.a.iii, intent to kill is not an element of second degree murder; instead, intent is inferred based on the defendant's participation in the underlying felony because the defendant, "*as held to a standard of a reasonable man*, knew or should have known that death might result from the felony." *Commonwealth v. Legg*, 491 Pa. 78, 82 (1980) (emphasis added). The *Graham* majority is clear, however, that a juvenile is developmentally different from the adult "reasonable person" in constitutionally relevant ways. *See Graham*, 130 S. Ct. at 2026, 2028. As discussed in Section VI.A.1.a.iii., the primary justifications for the felony-murder rule – deterrence and retribution – are inapt for juveniles who, "lacking the foresight and judgment of fully competent adults, are

[8] At least two other states have interpreted their constitutions as barring life without parole sentences against children in particular cases. *Workman v. Kentucky*, 429 S.W.2d 374, 377 (Ky. 1968) (holding that life without parole sentences for children convicted of rape 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. Nevada*, 105 Nev. 525, 527, 779 P.2d 944, 946 (Nev. 1989) (holding that life without parole sentence for a thirteen-year old violated Nevada and United States Constitutions, and noting that the sentence announced that the boy must be "permanently unregenerate and an unreclaimable danger to society who must be caged until he dies").

prone to make decisions without careful deliberation, and do not fully understand the consequences of their actions." *See* Steven A. Drizin and Allison McGowan Keegan, *Abolishing the Use of the Felony-Murder Rule When the Defendant is a Teenager,* 28 Nova L. Rev. 507, 527-28, 534 (2004). Hence, in the case of a juvenile, one cannot properly infer malice to commit murder merely from the juvenile's participation in the underlying felony. This is especially true for juveniles such as Mr. Phillips whose involvement was limited to participation in an unarmed robbery in which the victim died from unforeseeable medical complications.

E. The Trial Court Erred by Denying Appellant's Petition for Post-Conviction Relief Without A Hearing.

The lower court erred by denying Mr. Phillips' petition for post-conviction relief without granting a hearing to allow an opportunity to demonstrate why his sentence is unconstitutional pursuant to *Graham*. Specifically, the court denied Mr. Phillips the opportunity to demonstrate that he neither killed, intended to kill, nor foresaw that life would be taken. *See Graham,* 130 S. Ct. at 2027 ("defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment").

VII. CONCLUSION

Appellant respectfully requests that this Court hold the sentence of life without parole unconstitutional as applied to juvenile defendants who did not kill or intend to kill. This Court should remand the instant matter for resentencing where the imposition of a sentence of life imprisonment without parole is barred.

Respectfully submitted,

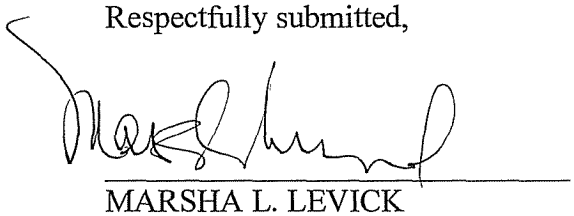

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EXHIBIT A

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL ACTION

COMMONWEALTH OF PENNSYLVANIA	:	NO. 0025720-86
VS	:	
AARON PHILLIPS	:	

OPINION

HODGSON, P. J. **FEBRUARY 3, 2011**

Appellant, Aaron Phillips, appeals to the Superior Court from the Order of Dismissal of PCRA relief imposed upon him by this Court on November 30, 2010.

FACTS AND PROCEDURAL HISTORY

On January 4, 1988, following a bench trial before the Honorable Paul W. Tressler, Appellant Aaron Phillips ("Appellant") was convicted of second degree murder, burglary, and related offenses. Thereafter, on September 16, 1988, the Appellant was sentenced to life imprisonment without parole for his second-degree murder conviction. The Appellant filed a timely notice of appeal on September 23, 1988. The Superior Court affirmed the judgment of sentence. On March 28, 1991, the Supreme Court denied Appellant allocatur.

Subsequently, Appellant filed his first *pro se* Petition for Collateral Relief pursuant to the Post–Conviction Relief Act, 42 Pa.C.S.A. Section 9541, on July 27, 1995. At the November 10, 1997 hearing on this Petition, the Honorable Paul W. Tressler granted Appellant's request for recusal and appointed the undersigned to this matter. After an evidentiary hearing before the undersigned, this Court denied Appellant's Petition. Appellant appealed the Court's denial, which was affirmed by the Superior Court on October 1, 1998.

On July 1, 1999, the Appellant filed a second *pro se* PCRA Petition in which he alleged the ineffective assistance of both trial counsel and PCRA counsel. Following the filing of a "no merit" letter pursuant to Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988), by court-appointed counsel, we dismissed Appellant's second *pro se* Petition. Thereafter, Appellant appealed said Order; and the Superior Court affirmed this Court's dismissal.

On May 5, 2005, Appellant filed a third *pro se* PCRA Petition. In this petition, Appellant alleged that his sentence was in violation of Roper v. Simmons, 125 S.Ct. 1183 (2005), which held that the Eighth and Fourteenth Amendments prohibit the imposition of the death penalty on

those who were under the age of eighteen at the time they committed their crimes. We dismissed this petition as untimely. The Superior Court affirmed this Court's dismissal.

On July 16, 2010, the Appellant filed the instant, fourth PCRA Petition. Upon consideration of the Appellant's Petition and an independent review of the record, this Court, pursuant to Pennsylvania Rule of Criminal Procedure 907, gave Notice of Intention to Dismiss on November 8, 2010. After subsequent consideration of Appellant's response to the Notice of Intention to Dismiss, this Court dismissed the PCRA Petition without a hearing on November 30, 2010. Appellant filed a timely notice of appeal to the Pennsylvania Superior Court on December 13, 2010. In accordance with Rule 1925(b) of the Pennsylvania Rules of Appellate Procedure, this Court issued an order for a concise statement of matters complained of on appeal. Appellant timely filed a concise statement on December 22, 2010.

LEGAL DISCUSSION

The Appellant raises the following issues on appeal: (1) Pursuant to the Supreme Court's ruling in Graham v. Florida, 130 S. Ct. 2011 (2010), the Court erred by imposing a life sentence without parole on Appellant, a juvenile, as such a sentence violates Appellant's Eighth and Fourteenth Amendment rights under the U.S. Constitution and Article 1 Section 13 of the Pennsylvania Constitution; (2) the Court's sentence violates international law and *jus cogens* norms; (3) pursuant to the ruling in Graham, Pennsylvania's second degree murder statute is unconstitutional as applied to juveniles; and (4) the Court erred by denying Appellant's PCRA Petition without granting a hearing to allow an opportunity to demonstrate why his sentence is unconstitutional pursuant to Graham.

All PCRA petitions are to be filed within one year of the date that the judgment becomes final unless the petition alleges and the petitioner proves that one of the three statutory exceptions applies. 42 Pa.C.S.A. § 9545(b)(1). Judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking such review. 42 Pa.C.S.A. § 9545(b)(3). The PCRA time restrictions are jurisdictional in nature; thus, both the trial court and the Supreme Court do not have jurisdiction to review the merits of an untimely PCRA petition. Commonwealth v. Albrecht, 994 A.2d 1091, 1093 (Pa. 2010).

The Pennsylvania Supreme Court denied the Appellant's allocatur petition on March 28, 1991. Appellant then had ninety days to petition for certiorari in the United States Supreme

Court. The Appellant chose not to petition for allocatur; thus, the judgment became final on June 28, 1991. Appellant's fourth PCRA was filed on July 16, 2010, more than nineteen years since judgment became final. Although Appellant's PCRA is facially time barred, Appellant alleges that he is entitled to review as he has met the requirements of the PCRA's timeliness exception for constitutional rights pursuant to 42 Pa.C.S.A. Section 9545(b)(1)(iii). Under the constitutional rights exception, the petitioner must prove that the right asserted is a constitutional right that was recognized by the United States Supreme Court or the Supreme Court of Pennsylvania after the time period provided in Section 9545(b) and has been held by that court to apply retroactively. 42 Pa.C.S.A. § 9545(b)(1)(iii).

For purposes of clarity and judicial economy, Appellant's four issues will be addressed together as the issues raise similar constitutional claims. Appellant asserts that the decision in Graham affords the Appellant retroactive constitutional relief. We find this assertion to be without merit as the Appellant's reliance on Graham is misplaced. In Graham, the United States Supreme Court determined that the Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. 130 S. Ct. at 2034. The Court reasoned that the Eighth Amendment does not permit a state to deny a juvenile the opportunity to demonstrate that he is fit to rejoin society based solely on a *non-homicide* crime. Id. at 2033.

Given that the Appellant was convicted of a homicide crime, namely, second-degree murder, the alleged constitutional right recognized in Graham is inapplicable to the Appellant. Further, the Supreme Court in Graham explicitly stated at the outset of its opinion that "the instant case concerns only those juvenile offenders sentenced to life without parole solely for a non-homicide offense." 130 S. Ct. at 2023. Thus, the decision in Graham does not concern the Appellant.

Appellant argues that the Court's sentence violates international law and *jus cogens* norms. Although international opinion concerning the acceptability of a particular punishment is not irrelevant, the judgments of other nations are not dispositive as to Eighth Amendment issues. Graham, 130 S. Ct. at 2033, citing Enmund v. Florida, 102 S. Ct. 3368 (1982). What is more, the differential treatment of juvenile offenders for homicide and non-homicide crimes is in accordance with the Juvenile Act and Pennsylvania case law. Under Section 6355(e) of the Juvenile Act, when a juvenile is charged with murder, the offense is to be prosecuted under the criminal law and procedures. 42 Pa.C.S.A. § 6355(e). Once the juvenile's case is vested in the

criminal court, the "public policies affording juveniles different treatment than adults are no longer applicable." Commonwealth v. Carter, 855 A.2d 885, 892 (Pa. Super. 2004), citing Commonwealth v. Berry, 785 A.2d 994 (Pa. Super. 2001). In Carter, the Superior Court determined that a life sentence without parole for a juvenile that commits murder did not constitute cruel and unusual punishment. 855 A.2d at 892. When the crime of murder is charged, the offender's age does not entitle him to differential treatment. Id.

Prior to the Supreme Court's decision in Carter, the Superior Court determined that a life sentence imposed upon an adult for felony murder, i.e., second-degree murder, did not constitute cruel and unusual punishment. See Commonwealth v. Middleton, 467 A.2d 841 (Pa. Super. 1983). The Court in Middleton determined that the taking of a life during the commission of an enumerated felony demonstrated a disregard for the "property, safety, sanctity, integrity, and especially, the life of the victim." Id. at 847. Such disregard, the Court reasoned, warranted a severe penalty. Id. Here, like the offender in Middleton, the Appellant demonstrated the same disregard for a life during the commission of a felony. Thus, just as the offender in Middleton was sentenced to life imprisonment, the Appellant was properly sentenced to a life without parole sentence. As such, the holding in Graham does not apply to Appellant.

Since the instant PCRA does not meet any of the exceptions of Section 9545(b)(1), Appellant's PCRA was untimely and properly dismissed.

CONCLUSION

Based on the foregoing, the undersigned respectfully requests that the Court's Order of Dismissal be **AFFIRMED**.

BY THE COURT:

P.J.

Copies sent 2/3/11 to:
By Interoffice Mail:
District Attorney's Office – Appellate Division
By First Class Mail:
Marsha L. Levick, Esq. - Jessica Feierman, Esq. - Emily C. Keller, Esq.
By Certified Mail:
Aaron Phillips

EXHIBIT B

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : NO. CR-00025720-1986

VS :

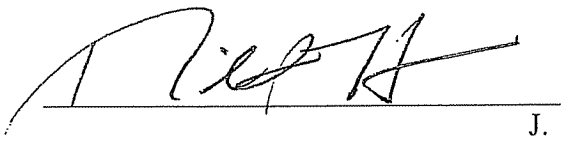
AARON PHILLIPS :

ORDER

AND NOW, this 29th day of November, 2010, upon consideration of the Defendant's PCRA Petition, the response thereto by the Commonwealth and upon consideration of the Defendant's Response to its Notice of Intention to Dismiss PCRA Motion Without Hearing, IT IS HEREBY ORDERED that said PCRA Petition is dismissed without a hearing.

The Defendant is hereby advised of his right to appeal from the Final Order of Dismissal of his PCRA Petition within 30 days of the date of this order to the Superior Court of Pennsylvania. Defendant is further advised of his right to proceed on his own (pro se) or with the aid of private counsel engaged by him to appeal this Final Order of Dismissal.

BY THE COURT:



J.

Copies sent 11/29/10 to:
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District Attorney's Office - Appeals Division
By first class mail:
Marshal Levick, Esquire
Jessica Feierman, Esquire
Karl Baker, Esquire - Chief - Appeals Unit (Defender Assoc of Phila)
By certified mail:
Aaron Phillips - Defendant

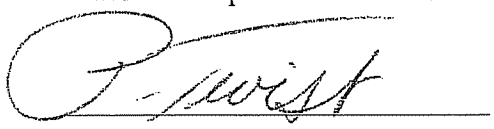

EXHIBIT C

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : NO. CR-0025720-1986

VS :

AARON PHILLIPS :

AMENDED ORDER

AND NOW, this 30th day of November, 2010, the Order of this Court dated November 29, 2010 is AMENDED to read as follows:

Upon consideration of the Defendant's PCRA Petition, the response thereto by the Commonwealth and after reviewing Defendant's Response[1] to the Commonwealth's Motion to Dismiss, IT IS HEREBY ORDERED that said PCRA Petition is dismissed without a hearing.

The Defendant is hereby advised of his right to appeal from the Final Order of Dismissal of his PCRA Petition within 30 days of the date of this order to the Superior Court of Pennsylvania. Defendant is further advised of his right to proceed on his own (pro se) or with the aid of private counsel engaged by him to appeal this Final Order of Dismissal.

BY THE COURT:

J.

Copies sent 11/30/10 to:
By interoffice mail:
District Attorney's Office - Appeals Division
By first class mail:
Marshal Levick, esquire
Jessica Feierman, Esquire
Karl Baker, Esquire - Chief - Appeals Unit (Defender Assoc. of Phila.)
By certified mail:
Aaron Phillips - Defendant

[1] The Court considers Defendant's Answer to Commonwealth's Motion to Dismiss as an answer to the Court's Notice of Intention to Dismiss sent on November 8, 2010.

EXHIBIT D

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	NO. CR-0025720-1986
VS	:	
AARON PHILLIPS	:	

ORDER

AND NOW, this 13th day of December, 2010, Pursuant to Pennsylvania Rule of Appellate Procedure No. 1925(b), Appellant is hereby DIRECTED to:

(a) file with the Office of the Clerk of Courts a Concise Statement of Matters Complained of with regard to the instant appeal to the Superior Court of Pennsylvania **within 21 days from the date of this Order;**

(b) concurrent with the filing of said Statement, Appellant shall **serve a copy of said Statement on the undersigned;**

(c) failure to timely file **and** serve said Statement shall be deemed a waiver of all claimed errors; and

(d) any issues not properly included in the Statement timely filed and served shall be deemed waived.

BY THE COURT:

P.J

Copies sent 12/13/10 to:
By first class mail:
Marshal L. Levick, Esquire / Jessica Feierman, Esquire / Emily Keller, Esquire
Bradley S. Bridge, Esquire / Ellen T. Greenlee, Esquire
Aaron Phillips - Defendant / Appellant
By interoffice mail to:
District Attorney's Office - Appeals Division

EXHIBIT E

THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY

COMMONWEALTH OF PENNSYLVANIA	CP-46-CR-0025720-1986
VS.	
AARON PHILLIPS	

2010 DEC 22 PM 3:21
CLERK OF COURTS
OFFICE
MONTGOMERY COUNTY
PENNA.

STATEMENT OF ERRORS COMPLAINED OF ON APPEAL

On November 30, 2010, this Court issued a final order dismissing Defendant/Appellant Aaron Phillips' motion for post-conviction relief. On December 13, 2010, this Court requested that counsel file a Statement of Errors Complained of on Appeal. Because this Court did not outline the basis for its decision to dismiss the motion for post-conviction relief without a hearing, this Statement identifies the errors complained of on appeal in general terms.

This Court erred in imposing a mandatory life imprisonment sentence for second degree murder because Mr. Phillips was a juvenile at the time he allegedly committed the offense. The United States Constitution bars "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. On May 17, 2010, the U.S. Supreme Court held that a sentence of life imprisonment without the possibility of parole for a child under eighteen is cruel and unusual. *Graham v. Florida*, 130 S. Ct. 2010 (2010).[1] The Court's analysis in *Graham* rested on the principle that the severe and irrevocable punishment of life without parole was not appropriate for a juvenile offender who did not "kill or intend to kill." 130 S. Ct. at 2027. Here, Mr. Phillips was convicted of second degree felony murder. Intent to kill is not an element of felony murder. Accordingly, because

[1] Though a defendant must typically file a petition for post-conviction relief within one year of the date on which his judgment of sentence became final, an exception exists where "the right asserted is a constitutional right that was recognized by the Supreme Court of the United States . . . and has been held by that court to apply retroactively." 42 Pa. Cons. Stat. § 9545(b)(1)(iii). Any claims based on this exception must be filed no later than 60 days after the right is first recognized. 42 Pa. Cons. Stat. § 9545(b)(2). The *Graham* decision was issued on May 17, 2010. Mr. Phillips timely filed his motion for post-conviction relief pursuant to *Graham* on July 16, 2010.

there was no finding that Mr. Phillips killed or intended to kill, Mr. Phillips' sentence of life imprisonment without the possibility of parole is unconstitutional.

The mandatory nature of Mr. Phillips' life without parole sentence is also unconstitutional pursuant to *Graham*. The *Graham* majority was unequivocal in its insistence that irrevocable judgments about the character of juvenile offenders are impermissible under the Constitution – at least where they deny juveniles any opportunity to prove their rehabilitation and their eligibility to re-enter society. *Id.* at 2030. Pennsylvania's second degree murder sentencing statute precludes courts from considering a child's age, immaturity, reduced mental capacity, reduced role in the offense, or any other factors related to his young age – the precise characteristics that the *Graham* majority concluded categorically apply to all juvenile offenders under eighteen, 130 S. Ct. at 2026, and which the Court found conclusive in abolishing the penalty of life without parole in that case. *Id.* at 2034.

Sentencing a juvenile such as Mr. Phillips to a mandatory life without parole sentence also violates international law and *jus cogens* norms. *See* International Covenant on Civil and Political Rights ("ICCPR"). It further violates the separate and broader protections of Article I, Section 13 of the Pennsylvania Constitution which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted."

Additionally, pursuant to *Graham*, Pennsylvania's second degree murder statute is unconstitutional as applied to juveniles. Intent to kill is not an element of second degree murder; instead, intent is inferred based on the defendant's participation in the underlying felony because the defendant, "*as held to a standard of a reasonable man*, knew or should have known that death might result from the felony." *Commonwealth v. Legg*, 491 Pa. 78, 82 (1980) (emphasis added). The *Graham* majority is clear, however, that a juvenile is developmentally different

from the adult "reasonable person" in constitutionally relevant ways. *See Graham*, 130 S. Ct. at 2026, 2028. Hence, in the case of a juvenile, one cannot properly infer malice to commit murder merely from the juvenile's participation in the underlying felony. This is especially true for juveniles such as Mr. Phillips whose involvement was limited to participation in an unarmed robbery in which the victim died from unforeseeable medical complications.

Finally, this Court erred by denying Mr. Phillips' petition for post-conviction relief without granting a hearing to allow an opportunity to demonstrate why his sentence is unconstitutional pursuant to *Graham*. Specifically, this Court denied Mr. Phillips the opportunity to demonstrate that he neither killed, intended to kill, nor foresaw that life would be taken. See *Graham,* 130 S. Ct. at 2027 ("defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment").

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