

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS

**SUPERIOR COURT DEPT.
WORCESTER DIVISION
INDICTMENT NO. 06-0722**

COMMONWEALTH

v.

PATRICK POWELL

)
)
)
)
)

**BRIEF OF *AMICUS CURIAE* JUVENILE LAW CENTER
IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS**

MARSHA L. LEVICK
JESSICA R. FEIERMAN
RIYA S. SHAH
NEHA DESAI
JUVENILE LAW CENTER
The Philadelphia Building
1315 Walnut Street, 4th Floor
Philadelphia, PA 19107

TABLE OF CONTENTS

<u>TABLE OF CONTENTS</u>	i
<u>TABLE OF AUTHORITIES</u>	iii
<u>INTEREST OF THE <i>AMICUS CURIAE</i></u>	1
<u>SUMMARY OF ARGUMENT</u>	1
<u>ARGUMENT</u>	3
I. <u>A MANDATORY SENTENCE OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE FOR A SIXTEEN YEAR OLD CHILD CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT</u>	3
A. <u>State Laws Provide Objective Indicia of a Consensus Against Mandatory LWOP Sentences for Juveniles</u>	7
B. <u>This Court Must Exercise Its Own Independent Judgment In Evaluating the Constitutionality of LWOP Sentences for Juveniles</u>	12
1. <u>The Research Adopted by the Supreme Court in <i>Simmons</i> Applies Equally to this Challenge to the Constitutionality of Juvenile LWOP</u>	14
2. <u>LWOP Sentences for Juveniles Are Excessive When Considered In Light of the Commonly Accepted Purposes of Punishment</u>	17
C. <u>Supreme Court Precedent as well as State and Federal Legislation Reflect and Incorporate the Reduced Judgment and Decision-Making Capacity of Children in Regulating Their Behavior and Evaluating Their Rights</u>	21
II. <u>A Mandatory Sentence Of Life Without Parole For a Sixteen Year Old Child Violates Article 26 of the Massachusetts Constitution As It Constitutes “Cruel Or Unusual Punishment.”</u>	24
III. <u>Mandatory and Unreviewable LWOP Sentence for Juveniles Violates Both the U.S. and Massachusetts Constitutions</u>	26
IV. <u>International Law, the Law of Other Nations, and Those Nations’ Practices Provide Overwhelming Evidence of a World-Wide Consensus Against LWOP Sentences for Juveniles</u>	29
A. <u>The Prohibition Against Juvenile LWOP is a <i>Jus Cogens</i> Norm and Therefore Constitutes Binding Authority on the U.S.</u>	30
B. <u>The International Covenant on Civil and Political Rights Prohibiting Juvenile LWOP is Binding Authority on the U.S.</u>	34
C. <u>The Convention on the Rights of the Child constitutes persuasive authority prohibiting juvenile LWOP</u>	35
D. <u>United Nations’ Resolutions Reinforce the International Opposition to Juvenile LWOP</u>	38

<u>CONCLUSION</u>	39
APPENDIX A	App-1
APPENDIX B.....	App-3
APPENDIX C.....	App-5
APPENDIX D	App-7

TABLE OF AUTHORITIES

Cases

Alvarez v. Commonwealth, 413 Mass. 224 (1992).....26

Ashcroft v. American Civil Liberties Union, 542 U.S. 656 (2004).....23

Atkins v. Virginia, 536 U.S. 304, 313 (2002)..... 13, 17, 18, 31

Board of Educ. v. Earls, 536 U.S. 822 (2002).....23

Coker v. Georgia, 433 U.S. 584 (1977).....31

Commonwealth v. A Juvenile, 389 Mass. 128 (1983).....24

Commonwealth v. Jackson, 369 Mass. 904, 910 (1976)26

Domingues v. U.S., Case 12.285, Report No. 62/02, Inter-Am. C.H.R., Doc. 5
rev. 1 (2002) 32, 33

Enmund v. Florida, 458 U.S. 782, 798 (1982) 18

Fare v. Michael C., 442 U.S. 707 (1979).....22

Furman v. Georgia, 408 U.S. 238 (1972)..... 17, 20

Ginsburg v. New York, 390 U.S. 629 (1968).....23

Gregg v. Georgia, 428 U.S. 153 (1976).....28

Harmelin v. Michigan, 501 U.S. 957 (1991).....5, 6

Harry Roberts v. Louisiana, 431 U.S. 633 (1977).....27

Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).....23

Johnson v. Texas, 509 U.S. 350 (1993)16

Kaupp v. Texas, 538 U.S. 626 (2003).....22

McDonald v. Commonwealth, 173 Mass. 322 (1899).....25

Naovarath v. State, 779 P.2d 944 (Nev. 1989)..... 18, 20, 28

Opinion of the Justices, 378 Mass. 822 (1979)25

Schall v. Martin, 467 U.S. 253 (1984).....23

Schneckloth v. Bustamonte, 412 U.S. 218 (1973).....22

Stanford v. Kentucky, 492 U.S. 361 (1989).....9

Stanislaus Roberts v. Louisiana, 428 U.S. 325 (1976)27

State v. Davilla, 972 P.2d 902 (Or. Ct. App. 1998).....8

Sumner v. Shuman, 483 U.S. 66 (1987)27, 28

The Paquete Habana, 175 U.S. 677(1900).....31

Trop v. Dulles, 356 U.S. 86, 100-101 (1958)..... 4, 17, 31

United States v. Jackson, 835 F.2d 1195 (7th Cir. 1987)19

Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995).....23

Weems v. United States, 217 U.S. 349 (1910).....25

Woodson v. North Carolina, 428 U.S. 280 (1976).....27

Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. Ct. App. 1968).....2, 22

Statutes

Ala. Code § 12-15-34.1.....12

Ala. Code § 12-15-34.1.....12

Ala. Code § 12-15-34.1.....14

Ala. Code § 12-15-34.1.....14

Ala. Code §13A-5-39.....	14
Alaska Stat. § 12.55.125 (LexisNexis 2007).....	9
Cal. Penal Code § 190.5(b) (Deering 2006).....	8, 11
D.C. Code. § 22-2104 1(a) (2007).....	9
Ind. Code Ann. § 35-50-2-3(b) (LexisNexis 2002).....	8
Ind. Code Ann. § 35-50-2-3(b) (LexisNexis 2002).....	11
Kan. Stat. Ann. § 21-4622.....	9
Kan. Stat. Ann. § 21-4635.....	9
Mass Gen. Laws Ann. ch. 231, § 850.....	26
Mass. Gen. Laws Ann. ch. 106, § 3-305.....	26
Mass. Gen. Laws Ann. ch. 51, § 1.....	26
Mass. Gen. Laws Ann. ch.111, § 211.....	26
Mass. Gen. Laws Ann. ch.265 § 2 (West 2000).....	12
Mass. Gen. Laws Ann. ch.265, § 34.....	26
Mass. Gen. Laws Ann. ch.270, § 6.....	27
Mass. Gen. Laws ch. 207, § 7.....	26
Mass. Gen. Laws ch.138, § 34A.....	27
Mass. Gen. Laws. Ann. ch. 90, § 8.....	26
N.M. Stat. Ann. § 31-21-10 (Supp. 2007).....	9
N.Y. Penal Law 125.27(1)(b) (McKinney 2007).....	9
N.Y. Penal Law § 70.00(5) (McKinney 2007).....	9
N.Y. Penal Law 70.05 (McKinney 2007).....	9
Or. Rev. Stat. §161.620 (2005).....	9
<u>Robinson v. California</u> , 370 U.S. 660 (1962).....	19, 20
U.S. Const. amend. VIII, XIV.....	19
U.S. Const. amend. XIV.....	3

Other Authorities

Amnesty International and Human Rights Watch, <u>The Rest of Their Lives: Life Without Parole for Child Offenders in the United States</u> 34-35 (October 2005)	passim
Barry C. Feld, <u>Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents</u> , 32 Hofstra L. Rev. 463 (2003) ...	17
Betty King, Statement as United States Representative on the Economic and Social Council, to the Plenary of the 54 th Session of the General Assembly on the Tenth Anniversary of the Convention on the Rights of the Child, (Nov. 11, 1999) (transcript available at http://www.hrw.org/reports/2005/us1005/9.htm)	40
Center for Law and Global Justice, <u>Sentencing Our Children To Die In Prison</u> , University of San Francisco School of Law (November 2007)	passim
Committee Concluding Observations of the Human Rights Committee on the United States of America, 87 th Sess. Held of 27 July 2006 (CCCPR/C/SR.2395)	38
Committee on the Rights of the Child, “General Comment No. 10: Children’s Rights in Juvenile Justice,” UN Doc. No. CRC/C/GC/10 (9 February 2007) ..	39

Elizabeth Cauffman & Laurence Steinberg, <u>(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults</u> , 18 Behavioral Sciences and the Law 741 (2000)	17
Elizabeth R. Sowell et al., <u>Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships during Postadolescent Brain Maturation</u> , 21(22) The Journal of Neuroscience 8819 (2001)	17
Elizabeth S. Scott and Thomas Grisso, <u>Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform</u> , 88(1) Journal of Criminal Law and Criminology 137 (1997).....	17
Erica Beecher-Monas & Edgar Garcia-Rill, <u>Danger at the Edge of Chaos: Predicting Violent Behavior in a Post-Daubert World</u> , 24 Cardozo L. Rev. 1845 (2003)	18
Erik H. Erikson, <u>Identity: Youth and Crisis</u> (1968).....	17
G.A. Res. 44/25, U.N. Doc. A/44/49 (Nov. 20, 1989)	41
G.A. Resolution 40/33, 29 November 1985.....	43
General Assembly Resolution 61/146, “Promotion and protection of the rights of children,” UN Doc. No. A/Res/61/146. (19 Dec. 2006)	42
International Covenant on Civil and Political Rights, Declarations and Reservations <u>available at</u> http://www2.ohchr.org/english/bodies/ratification/4.htm	38
International Justice Project <u>available at</u> http://www.internationaljusticeproject.org	40, 41
Jeffrey Jensen Arnett, <u>Reckless Behavior in Adolescence: A Developmental Perspective</u> , 12 Developmental Review 339 (1992).....	17
John H. Laub & Robert J. Sampson, <u>Shared Beginnings, Divergent Lives: Delinquent Boys to Age 70</u> (2003)	22
John Stuart Mill, <u>Parliamentary Debate on Capital Punishment Within Prisons Bill</u> (Apr. 21, 1868).....	6
Kristen Gerencher, <u>Understand your teen’s brain to be a better parent</u> . Detroit Free Press, Feb. 2, 2005	17
Laurence Steinberg & Elizabeth Scott, <u>Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty</u> , 58 Am. Psychologist 1009 (2003).....	17
Laurence Steinberg & Robert G. Schwartz, “Developmental Psychology Goes to Court,” in <u>Youth on Trial: A Developmental Prospective on Juvenile Justice</u> 23 (Thomas Grisso & Robert G. Schwartz eds., 2000)	22
Madeline K. Albright, Remarks as United States Permanent Representative to the United Nations on the Occasion of the Signing of the U.N. Convention on the Rights of the Child, U.S. Press Release (Feb.16, 1995) (transcript available at http://www.hrw.org/reports/2005/us1005/9.htm).....	40
National Institute of Mental Health, <u>Teenage Brain: A work in progress, A brief overview of research into brain development during adolescence</u> , NIH Publication No. 01-4929 (2001)	17
Restatement (Third) of Foreign Relations Law § 102.	34

<u>Riyadh Guidelines</u> , G.A. Resolution 45/112, 1990	43
Transcript of Oral Argument, <u>Roper v. Simmons</u> , 543 U.S. 551 (No. 03-366), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-633.pdf (last visited January 11, 2008)	5
U.N. General Assembly, Third Committee, U.N. Doc. A/C.3/62/L.24 (23 Oct. 2007)	42
U.S. Department, Office of Justice Programs, Bureau of Justice Assistance, <u>Juveniles in Adult Prisons and Jails: A National Assessment</u> at 63 (Oct. 2000)	23
United Nations Convention on the Rights of the Child, Art. 37, Nov. 20, 1989, 1577 U.N.U.S. 3.....	39
<u>United Nations Rules for the Protection of Juveniles Deprived of their Liberty</u> , G.A. Resolution 45/113, 14 December 1990	43
United Nations Treaty Collection Database, available at http://untreaty.un.org/ ..	40
Wayne A. Logan, <u>Proportionality and Punishment: Imposing Life Without Parole on Juveniles</u> , 33 Wake Forest L. Rev. 681 (1998).....	6, 23

INTEREST OF THE *AMICUS CURIAE*

Juvenile Law Center (JLC) is the oldest multi-issue public interest law firm for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC advocates in particular on behalf of children involved in the juvenile justice and child welfare systems and, increasingly, children involved in the adult criminal justice system. JLC works to ensure children are treated fairly by these systems, and that children receive the treatment and services that these systems are supposed to provide, including, at a minimum, adequate and appropriate education, and physical and mental health care. In addition to litigation and appellate advocacy, JLC has participated as *amicus curiae* in state and federal courts throughout the country, as well as the United States Supreme Court, in cases in which important rights and interests of children are at stake. Of particular relevance, JLC was lead counsel for over 50 advocacy groups nationwide who participated as *amici* in Roper v. Simmons, 543 U.S. 551 (2005), in which the Supreme Court ruled that it was unconstitutional to impose an adult punishment, there the death penalty, upon children.

SUMMARY OF ARGUMENT

In forbidding the execution of offenders under the age of eighteen, the United States Supreme Court in Roper v. Simmons, 543 U.S. 551 (2005) held that it was a violation of the Eighth Amendment's ban on cruel and unusual punishment to sentence a juvenile as one would an adult. The Court struck the juvenile death penalty because juveniles do not have the same judgment, understanding, maturation and abilities as adults. These developmental

characteristics of young offenders likewise support Patrick Powell's challenge here to a mandatory, unreviewable sentence of life imprisonment without the possibility of parole. As the Kentucky Court of Appeals explained in finding a juvenile sentence of life without parole unconstitutional, "We believe that incorrigibility is inconsistent with youth; that it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life." Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. Ct. App. 1968).

In addition, a juvenile sentence of life imprisonment without the possibility of parole ("LWOP") violates the Massachusetts Constitution's prohibition against cruel punishment. Massachusetts has a long and proud tradition of according juveniles greater protections than adults. The current sentencing scheme, however, prohibits the court from considering any mitigating factors for youth, including age, as it does for adults. This bar on considering any mitigating or individualizing factors contravenes Simmons as well as the due process clause of the United States and Massachusetts Constitutions. Finally, binding international law, and the law and practice of other nations provide overwhelming evidence of worldwide consensus against LWOP sentences for youth.

ARGUMENT

A life sentence that denies any possibility of release or parole to children is a disproportionate punishment under both the United States and Massachusetts Constitutions. As the harshest penalty available under Massachusetts law for any offender in the Commonwealth, Roper v. Simmons requires some calibration of the Commonwealth's sentencing options that takes into account the distinct developmental characteristics of youth.¹ Applying a mandatory adult sentence that is wholly based on the offense, without review and without regard to the individual culpability of the juvenile, violates Simmons and its constitutional underpinnings.

I. A MANDATORY SENTENCE OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE FOR A SIXTEEN YEAR OLD CHILD CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT.

The United States Constitution prohibits "cruel and unusual punishment." U.S. Const. amend. VIII. This provision is applicable to the states through the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend. XIV. A mandatory sentence of life imprisonment without the possibility of parole for a sixteen year old child constitutes a cruel and unusual sentence. The recent United States Supreme Court decision in Simmons governs the analysis.

¹ This argument has no bearing, however, on the constitutionality of life without parole sentences for adults, which are not at issue here. Nor does *Amicus* argue that Massachusetts cannot sentence Patrick Powell, or other juveniles convicted of particular crimes to a reasonable term of years in prison. Rather, *amicus* argue only that pursuant to Roper v. Simmons, *juveniles cannot constitutionally be sentenced to life imprisonment without the possibility of parole*, there must be the *possibility* of release.

In Simmons the United States Supreme Court struck down as violative of the 8th and 14th Amendments any sentence of death for offenders who were under the age of eighteen at the time the underlying crime was committed. Simmons, 543 U.S. 551 (2005). The Supreme Court determined that such a sentence was disproportionate when considered in light of the “evolving standards of decency that mark the progress of a maturing society.” Id. at 551 (quoting Trop v. Dulles, 356 U.S. 86, 100-101 (1958) (plurality opinion)). In discerning these ‘evolving standards,’ the Court pointed out that it must review “objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question,” id. at 564, as well as state practice. See Id. Ultimately, however, the Court must “determine, in the exercise of [its] own independent judgment,” whether such a penalty is disproportionate. Id. at 564. In Simmons, this involved the Court’s consideration of medical, psychological and sociological studies, as well as common experience, which all showed that children who are under age 18 are less culpable and more amenable to rehabilitation than adults who commit similar crimes. Id. at 568-76. The Simmons Court concluded that the harsh sentence of death, which is marked both by its finality as well as the implication that the offender cannot be rehabilitated, cannot be imposed on children.

Importantly, the Simmons Court reasoned that because juveniles are categorically less culpable than adults who commit the same offenses, juveniles cannot be subjected to the harshest penalty reserved for the most deprived offenders; their punishment must be moderated to some degree to reflect their

lesser blameworthiness. In Massachusetts, the harshest punishment reserved for adults convicted of murder is a sentence of LWOP; Massachusetts has no death penalty. Applying the reasoning of Simmons, Massachusetts must lessen the harshest available sentence for juveniles convicted of murder, both because of their reduced culpability for their criminal conduct, and because of their inherently greater capacity to change and be rehabilitated – characteristics which a sentence of life without the possibility of parole takes no account of.²

² In oral argument in Simmons, Justice Scalia, who dissented from the Court’s opinion, concluded that the arguments that apply to the death penalty for juveniles apply with equal force to life without parole for juveniles:

JUSTICE SCALIA: Why pick – why pick on the death penalty? I mean, if you’re going to say that somehow people under 18 are juveniles for all purposes, why – why just pick on the death penalty? Why – why not say they’re immune from any criminal penalty?

MR. LAYTON [representing the state of Missouri]: Well, I – well I must assume that if we – if the Court says they are immune from the – from capital punishment then someone will come and say they also must be immune from, for example, life without parole.

JUSTICE SCALIA: I’m sure that – I’m sure that would follow. I – I don’t see where there’s a logical line.”

Transcript of Oral Argument at page 6, lines 12-24, Roper v. Simmons, 543 U.S. 551 (No. 03-366), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-633.pdf (last visited January 11, 2008). Of course, Justice Scalia began this exchange with a *reductio ad absurdum*/slippery slope argument. However, there is an enormous amount of slope between a death sentence and immunity “from any criminal penalty.” Harmelin v. Michigan, 501 U.S. 957, 1001 (1991). There is far less slope between death and LWOP, “the second most severe punishment known to the law,” Id. at 966, – especially for a juvenile. Indeed, some thinkers, such as John Stuart Mill, have suggested that life in prison is indistinguishable or even worse than death:

What comparison can there really be, in point of severity between

Consistent with Simmons, objective indicia of a consensus against LWOP for juveniles can be seen through an analysis of state, federal, and international law, as well as a review of the scientific data reviewed and relied upon in Simmons. LWOP also fails constitutional analysis because the purposes of punishment are not served by imposing LWOP on juveniles. Respondent's argument that Simmons is relevant only to capital cases falls short. Simmons is firmly rooted in the Court's consideration of the meaning of adolescence, not solely in its "death-is-different" jurisprudence.

Finally, it should be noted that Simmons itself should not be misconstrued as precedent supporting LWOP for juveniles based on the fact that ultimately a LWOP sentence was substituted for the death penalty in that case. The Simmons Court's judgment affirmed the Missouri Supreme Court's setting aside of the death penalty, and no more. Id. at 578-79. The constitutionality of a sentence of LWOP for Christopher Simmons was not before the Court. Nevertheless, the Simmons Court did comment on the harshness of LWOP for juveniles: "[I]t is worth noting that the punishment of life imprisonment without the possibility of

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

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

parole is itself a severe sanction, in particular for a young person.” *Id.* at 572.

Indeed, the reasoning of *Simmons* is that juveniles are categorically different from adults when it comes to the criminal law, and that sentences for juveniles must take this categorical difference into consideration.

A. State Laws Provide Objective Indicia of a Consensus Against Mandatory LWOP Sentences for Juveniles.

The *Simmons* Court examined how the states treated juveniles who committed murder and determined that 30 states prohibited the juvenile death penalty “by express provision or judicial interpretation.” *Simmons*, 543 U.S. at 563-65. The juvenile death penalty was imposed in the remaining 20 states that did not prohibit it, but only infrequently. *Id.* at 563-65. The Court gave particular weight to recently-passed state laws to prohibit the death penalty for juveniles, noting that these laws ran counter to the popularity of general anti-crime initiatives underway at the same time. *Id.* at 565-67. The Supreme Court’s analysis teaches that courts should not merely count up the number of states robotically or in a vacuum; courts should look at trends, contexts, practice, and other realities.

Although 45 states permit LWOP sentences for juveniles, a closer look at how these states impose LWOP sentences reveals that in all but a few states LWOP is imposed on juveniles only *infrequently*.³ In addition, most states limit a

³ According to a report prepared by Amnesty International and Human Rights Watch, while New Jersey, Utah and Vermont have laws permitting juvenile LWOP sentences, at the end of 2003 they had no one serving a juvenile LWOP sentence. Furthermore, of the remaining jurisdictions that allow LWOP for juveniles, 13 had less than 10 youth serving sentences of life imprisonment without the possibility of parole. Amnesty International and Human Rights

juvenile offender's eligibility for LWOP based on his age at the time of the offense, suggesting a national consensus that LWOP is a very serious punishment that is inappropriate for at least some youth. This minimum age requirement can be reflected in the state's LWOP legislation itself (two states),⁴ legislation barring LWOP sentences for all juveniles (three states, and the District of Columbia),⁵ or, legislation setting age limits for the transfer of juveniles into adult court for serious crimes, including for murder (26 states).⁶ The two states that do not impose LWOP at all (Alaska and New Mexico)⁷ should be included among these states, as it reflects the state's view that no offender, including adult offenders,

Watch, The Rest of Their Lives: Life Without Parole for Child Offenders in the United States 34-35 (October 2005) [hereinafter HRW Report].

⁴ California and Indiana. See Cal. Penal Code § 190.5(b) (Deering 2006) (no LWOP below age 16); Ind. Code Ann. § 35-50-2-3(b) (LexisNexis 2002) (no LWOP below age 16).

⁵ District of Columbia, Kansas, New York, and Oregon. See D.C. Code. § 22-2104 1(a) (2007) (no person who was less than 18 years of age at the time of committing a murder can be sentenced to LWOP); Kan. Stat. Ann. §§ 21-4622, 21-4635 (2007) (No sentence of life without parole for capital murder where defendant is less than 18 years old); N.Y. Penal Law § 70.00(5) (McKinney 2007) (LWOP available only for first-degree murder), N.Y. Penal Law 70.05 (McKinney 2007) (proscribing indeterminate sentencing for youthful offenders), N.Y. Penal Law 125.27(1)(b) (McKinney 2007) (required element of first-degree murder is that the defendant is over 18 years old); Or. Rev. Stat. §161.620 (2005), State v. Davilla, 972 P.2d 902 (Or. Ct. App. 1998) (interpreting §161.620 to bar juvenile LWOP).

⁶ See Appendix A for a complete list of states that apply age limits against waiving juveniles into adult court.

⁷ See Alaska Stat. § 12.55.125(a), (h), & (j) (LexisNexis 2007) (providing mandatory 99 year sentences for enumerated crimes, discretionary 99 year sentence in others, but permitting prisoner serving such sentence to apply once for modification or reduction of sentence after serving half of the sentence; N.M. Stat. Ann. § 31-21-10 (Supp. 2007) (maximum sentence in state has parole eligibility after 30 years).

should be sentenced to LWOP. Simmons, 543 U.S. at 564, (including non-death penalty states with non-juvenile death penalty states total). Therefore, 33 states and the District of Columbia refuse to impose LWOP sentences on juveniles below a certain age.

On the other hand, 17 states do permit LWOP sentences to be imposed on a child of any age.⁸ Yet, as the Supreme Court reasoned in Simmons, there is no longer any constitutional distinction between a child 16-18 years old and those below age 16 with respect to their eligibility for the most severe adult sentences. In Simmons, the Court specifically reversed Stanford v. Kentucky, 492 U.S. 361 (1989), which had permitted the death penalty for juveniles age 16 and above, stating “[w]e conclude the same reasoning applies to all juvenile offenders under 18.” Simmons, 543 U.S. at 571.

The Court drew a bright line for reduced juvenile culpability at age 18 based on widely accepted research that juveniles have an undeveloped sense of responsibility and lack of maturity that make them less culpable than adults, and therefore not properly classified as “among the worst offenders.” Id. at 569-570. As will be discussed in more detail below, Simmons rejected the notion that the line can be drawn reasonably anywhere below age 18. Although the average age for LWOP eligibility in states that impose LWOP is 16,⁹ this is generally tied to

⁸ See Appendix B for a complete list of states that impose LWOP sentences on children of any age.

⁹ California and Indiana. See Cal. Penal Code § 190.5(b) (Deering 2006) (no LWOP below age 16); Ind. Code Ann. § 35-50-2-3(b) (LexisNexis 2002) (no LWOP below age 16).

the age for waiver into the adult court system, rather than the product of a deliberate decision about the age at which LWOP can be properly imposed.

Indeed, the fact that so many state legislatures have established *any* age limit for juvenile LWOP sentences is critical in the wake of Simmons. Such age distinctions, established in almost all states before the Supreme Court's decision in Simmons, are not grounded in the scientific studies that Simmons relied on. Moreover, it is imperative to note that LWOP sentences were not created with youth in mind. Historically, LWOP is a punishment that has been imposed on the most serious adult offenders. Youth became eligible for LWOP sentences as a consequence of their transfer into the adult system, but without any consideration of the adolescent development research relied upon in Simmons. This research is especially significant because it convinced the Court to hold that children convicted of the same crimes as adults should be given lesser punishments because of their lesser culpability.

The actual practice in the states further suggests a national consensus against juvenile LWOP. The 22 states that permit a sentencing court to use its *discretion* in sentencing a convicted juvenile to LWOP¹⁰ have sentenced markedly fewer juveniles to this sentence than have states where LWOP is a mandatory sentence,¹¹ as in Massachusetts.¹² According to data collected by Human Rights

¹⁰ See Appendix C for a complete list of states where LWOP sentences are discretionary for juveniles, i.e., not a mandatory minimum for the highest degree of murder in the following states (note exceptions in some states for repeat offenders).

¹¹ See Appendix D for a complete list of states where LWOP sentences are mandatory for juveniles upon conviction as adults for enumerated crimes,

Watch and Amnesty International, as of 2004, there were at least 2,225 people serving LWOP sentences for crimes they committed as juveniles.¹³ Amnesty International and Human Rights Watch, The Rest of Their Lives: Life Without Parole for Child Offenders in the United States 35 (Table 5) (October 2005) (hereinafter HRW Report). More than half that number, 1228, comes from just *four* states – Florida, Louisiana, Michigan, and Pennsylvania, all of which make LWOP sentences mandatory for particular crimes.¹⁴ In stark contrast, there are only 439 people serving LWOP sentences for crimes they committed as juveniles in the 19 states that make LWOP for juveniles a discretionary sentence– 21 percent of people serving juvenile LWOP sentences overall.¹⁵ Massachusetts follows the national pattern. With mandatory LWOP sentences for particular crimes, Massachusetts currently incarcerates 60 people serving LWOP sentences

including murder.

¹² In Massachusetts, a sentence of life without the possibility of parole is mandatory upon a conviction of murder, regardless of whether the offender was a juvenile at the time of the offense. Mass. Gen. Laws Ann. ch.265 § 2 (West 2000).

¹³ This number does not include individuals from Idaho, Kentucky, Maine, Texas or West Virginia – all states which provide for juvenile LWOP, but did not respond to the HRW survey. See HRW Report, Appendix D: State Population Data Table.

¹⁴ The breakdown is as follows: Pennsylvania, 332; Louisiana, 317; Michigan, 306; Florida, 273. HRW Report at 35 (Table 5) and Appendix D: State Population Data Table.

¹⁵ HRW Report at 35 (Table 5) and Appendix D: State Population Table. The breakdown by state is as follows: Arizona, 30; California, 180; Georgia, 8; Illinois, 103; Indiana, 2; Maryland, 13; Mississippi, 17; Montana, 1; Nevada, 16; North Dakota, 1; Ohio, 1; Oklahoma, 49; Rhode Island, 2; South Carolina, 26; Tennessee, 4; Utah, 0; Vermont, 0; Wisconsin, 16; Wyoming, 6. The report does not provide data for 3 of the 22 states with discretionary LWOP sentences: Idaho, Kentucky, and West Virginia, which were not included in this total.

for crimes they committed as juveniles. This ranks Massachusetts eighth in the country for the most youth serving LWOP sentences.

Last, the fact that 43 states allow LWOP for children, in some manner, does not negate the above analysis, which repeatedly shows that sentencing courts do not impose LWOP on juveniles, except in the rarest of cases. Again, more than half of all juvenile LWOP sentences in the U.S. are a result of practices in just four states. In fact, the eight states with the highest rates of sentencing youth to LWOP mandate LWOP for certain crimes while the five states with the lowest rate of sentencing youth to LWOP leave the sentence discretionary.¹⁶ The state law landscape shows that there is a national consensus¹⁷ against imposing LWOP sentences on juveniles.

B. This Court Must Exercise Its Own Independent Judgment In Evaluating the Constitutionality of LWOP Sentences for Juveniles.

As the Supreme Court teaches in Simmons, courts should not rely exclusively on perceived indicia of consensus as controlling whether any particular punishment is cruel and unusual. Instead, as the Court stated, “[w]e

¹⁶ Id. at 37.

¹⁷ 26 states and the District of Columbia oppose such mandated LWOP for juveniles, including the 5 states and the District of Columbia that do not allow the sentence of LWOP for juveniles at all and the 21 states that make such a sentence discretionary unless the juvenile has prior convictions for enumerated serious crimes. C.f. Ala. Code §§ 12-15-34.1 (mandating juveniles age 16 and over be tried as adults for serious crimes, including a capital offense), 13A-5-39 (mandating death or LWOP as the only possible punishments for capital offenses).

then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles.” Simmons, 543 U.S. at 564. In short, courts must ask “whether there is reason to disagree with the judgment reached by the citizenry and its legislators.” Atkins v. Virginia, 536 U.S. 304, 313 (2002) (holding that it is cruel and unusual punishment to impose the death penalty on offenders who are mentally retarded). This Court is free to recognize, as did the Supreme Court in Simmons, that it is beyond the bounds of decency to judge any juvenile offender as having the same culpability as an adult who has committed a similar crime, and that it is beyond the bounds of decency to regard any juvenile as irredeemably beyond rehabilitation.

This Court, like Simmons, should find that because of juveniles’ stage of mental and emotional development, offenders who are younger than 18 are less culpable than are adults for similar crimes; they are more amenable to rehabilitation than those who are older; and that it is impossible to determine with any reasonable certainty that any offender below under 18 is beyond redemption. Simmons, 543 U.S. at 568-75 (differences between juveniles and adults “render suspect any conclusion that a juvenile falls among the worst offenders. . . . The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character”). Indeed, after Simmons, its findings about the relative culpability and capacity for rehabilitation between juvenile and adult offenders may be applicable in all Eighth Amendment cases *as a matter of law*.

Applying the reasoning and analysis of Simmons, this Court should find that Powell's LWOP sentence is unconstitutional and does not meet the commonly accepted purposes of punishment. Id. at 571-72. This Court should also consider Supreme Court precedent that distinguishes between juveniles and adults both inside and outside of the criminal law context, as well as international law, and the law and practice of other nations.

1. The Research Adopted by the Supreme Court in Simmons Applies Equally to this Challenge to the Constitutionality of Juvenile LWOP.

Relying on widely accepted psychological and sociological research, the Simmons Court concluded that children under 18 have diminished culpability and should be treated differently than adults:

Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young... In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent....

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure....

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more

transitory, less fixed...The susceptibility of juveniles to immature and irresponsible behavior means “their irresponsible conduct is not as morally reprehensible as that of an adult.”...Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.

Id. at 569-70 (internal citations omitted) (emphasis added).

The research applies with equal force here.¹⁸ LWOP sentences are harsh. In states that prohibit the death penalty, as in Massachusetts, they are the harshest possible sentence for any offender, adult or juvenile. They represent a determination that the offender’s culpability is not mitigated in any meaningful way. This determination cannot be squared with Simmons. Like the death

¹⁸ The Court cited the following articles and studies in its opinion: Jeffrey Jensen Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Review 339 (1992); Laurence Steinberg & Elizabeth Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003); Erik H. Erikson, Identity: Youth and Crisis (1968). In addition, there are numerous other studies that support the idea that the brain is not fully developed until at least age 25. See Elizabeth Cauffman & Laurence Steinberg, (Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults, 18 Behavioral Sciences and the Law 741-760 (2000); Elizabeth S. Scott and Thomas Grisso, Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform, 88(1) Journal of Criminal Law and Criminology 137, 137-189 (1997); Elizabeth R. Sowell et al., Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships during Postadolescent Brain Maturation, 21(22) The Journal of Neuroscience 8819, 8819-8829 (2001); National Institute of Mental Health, Teenage Brain: A work in progress, A brief overview of research into brain development during adolescence, NIH Publication No. 01-4929 (2001); Kristen Gerencher, Understand your teen’s brain to be a better parent. Detroit Free Press, Feb. 2, 2005; Barry C. Feld, Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents, 32 Hofstra L. Rev. 463, 515-522 (2003) (discussing scientific studies on adolescent neurological development).

penalty, LWOP is also based on the presumption that the individual is irredeemable. Yet, the Supreme Court concluded that a determination about the long term “depravity” of *anybody* below the age of eighteen cannot be made with any reasonable certainty, even by psychiatrists and psychologists. *Id.* at 573-74.¹⁹

In addition, LWOP sentences are final. Yet the Simmons Court concluded that children younger than age 18 who commit crimes are more amenable to rehabilitation than older defendants and as a result should not be treated the same way at sentencing. *Id.* at 570 (“From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that minor’s character deficiencies will be reformed.”). It follows that denying a child the possibility of parole is particularly cruel and unusual. Consistent with the protections provided by the 8th and 14th Amendments, the possibility of parole should be removed only when the court is certain that the defendant is irredeemable, an un-sustainable finding after Simmons. *Id.* at 573-74. Today, a sentence that is based largely on the notion

¹⁹ There have been studies concluding that the likelihood of an offender’s committing further crimes after release from prison decreases with age. Erica Beecher-Monas & Edgar Garcia-Rill, Danger at the Edge of Chaos: Predicting Violent Behavior in a Post-Daubert World, 24 *Cardozo L. Rev.* 1845, 1899 (2003) (“The decrease in violence and criminal activity with age is a well-established principle of criminology. Base rates of violence are far lower after the age of sixty (when most life prisoners would be eligible for parole) than in the twenties.”). That is, the juvenile offender, especially with rehabilitation, is less likely to commit crimes later on. The Supreme Court recognized this dynamic in Simmons: “Indeed, ‘the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.’” Simmons, 543 U.S. at 570 (quoting Johnson v. Texas, 509 U.S. 350, 368 (1993)).

that a child cannot be rehabilitated is not only cruel and unusual and violative of due process, it is also unreasonable. U.S. Const. amend. VIII, XIV.

2. LWOP Sentences for Juveniles Are Excessive When Considered In Light of the Commonly Accepted Purposes of Punishment.

A punishment that serves no legitimate penological purpose inflicts needless pain and suffering, and violates the Eighth Amendment. Robinson v. California, 370 U.S. 660 (1962); Thompson, 487 U.S. 815; Trop, 356 U.S. at 86; Furman v. Georgia, 408 U.S. 238 (1972). Juvenile LWOP sentences cannot be justified as fulfilling the traditional purposes of punishment: deterrence, retribution, incapacitation and rehabilitation.²⁰ As the Court reasoned in Atkins, unless the imposition of a punishment “measurably contributes to one ...of these goals, it ‘is nothing more than the purposeless and needless imposition of pain and suffering,’ and hence an unconstitutional punishment.” Enmund v. Florida, 458 U.S. 782, 798 (1982); Atkins, 536 U.S. at 319.

First, juvenile LWOP sentences cannot deter other juveniles from committing similar crimes. In Simmons the Court noted that even the death penalty could not be regarded as an effective deterrent, given that juveniles generally lack the mental ability to weigh the possible consequences of their actions. Simmons, 543 U.S. at 571 (discussing psychological studies). The Supreme Court stated that a LWOP sentence is “a severe sanction, in particular for a young person” and indicated that LWOP is closely related to the death

²⁰ The four purposes for punishment typically set forth in criminal law casebooks are: deterrence, retribution, incapacitation, and rehabilitation. See, e.g., Paul Robinson, Criminal Law: Case Studies and Controversies 82-90 (2005).

penalty. Id. at 570-72.²¹ Logic dictates that if the harsher penalty of death is not an effective deterrent for young people who typically fail to weigh consequences, a sentence of LWOP is not apt to have any more deterrent value. See also Naovarath v. State, 779 P.2d 944, 948 (Nev. 1989) (holding that LWOP for 13 year old defendant was unconstitutional and questioning whether the sentence could even serve as a deterrent for other teenagers.)

As for retribution, LWOP sentences are similarly improper. As Simmons observed about the death penalty: “Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.” Simmons, 543 U.S. at 571. This reasoning applies with equal force here. Retribution can be a valid purpose for punishment; however, because “[t]he differences between juvenile and adult offenders are too marked and well understood,” it is necessary to limit punishments of juveniles like Simmons, to avoid the “unacceptable likelihood [that] exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth.” Id. at 572-73.

Although LWOP sentences incapacitate offenders, such incapacitation would be unreasonable and disproportionate where the offender no longer poses a

²¹ The court’s mention that many states still had LWOP for juveniles, does not suggest that the court endorsed this penalty. Simmons, 543 U.S. at 572. As described above, the Supreme Court has never directly considered the issue. Moreover, the Simmons’ Court’s description of juvenile LWOP as an extremely harsh penalty underscores the applicability of the Simmons analysis to LWOP cases.

danger to the community. See United States v. Jackson, 835 F.2d 1195, 1200 (7th Cir. 1987) (Posner, J., concurring) (“A civilized society locks up [criminals] until age makes them harmless but it does not keep them in prison until they die.”). Because, according to Simmons, not even a psychiatrist or psychologist can assess with any reasonable certainty at sentencing whether a child convicted of murder is beyond rehabilitation, 543 U.S. at 573 a child sent to prison should have the opportunity to rehabilitate and qualify for release after a reasonable term of years. See Laurence Steinberg & Robert G. Schwartz, “Developmental Psychology Goes to Court,” in Youth on Trial: A Developmental Prospective on Juvenile Justice 23 (Thomas Grisso & Robert G. Schwartz eds., 2000) (“the malleability of adolescence suggests that a youthful offender is capable of altering his life course and developing a moral character as an adult”); John H. Laub & Robert J. Sampson, Shared Beginnings, Divergent Lives: Delinquent Boys to Age 70 (2003) (presenting lives of adjudicated delinquent and showing that their youthful characteristics were not immutable; change to a law-abiding life was possible and depended in many instances upon aspects of their adult lives). There are other mechanisms available, such as parole boards with the expertise to evaluate the youth’s ability to redeem himself and function in society. Naovarath, 779 P.2d at 948. Such mechanisms can ensure that the purposes of punishment are satisfied, without arbitrarily keeping youth “in prison until they die.”

Last, LWOP sentences do not promote rehabilitation for juveniles; they frustrate it. Under a mandatory sentence of life imprisonment without the possibility of parole, the offender will never regain his freedom. Because such a

sentence does not even purport to serve a rehabilitative function, the sentence must rest on a rational determination that the punished ‘criminal conduct is so atrocious that society’s interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator.’ Furman, 408 U.S. at 307 (Stewart, J., concurring). Understandably, many juveniles sent to prison fall into despair. They lack incentive to try to improve their character or skills for eventual release because there will be no release. Instead, the incentives, if any, are for the young offender – often placed into the same prisons as adult offenders – to adapt to prison life, which can include “improving” at inflicting violence on others as a means of self-defense and as a means of domination and increased standing in the prison “pecking order.” See HRW Report at Pt. VI, at 4 (discussing youth offenders in general, and citing Institute on Crime, Justice and Corrections and the National Council on Crime and Delinquency—U.S. Department, Office of Justice Programs, Bureau of Justice Assistance, Juveniles in Adult Prisons and Jails: A National Assessment at 63 (Oct. 2000).²² The HRW Report also reveals that many juveniles sentenced to spend the rest of their lives in prison commit suicide, or attempt to commit suicide. Id. at Pt. VI, at 2. See Logan, Proportionality, supra at 712 n.1 (discussing “psychological toll associated with LWOP”). Obviously, these sentences promote the very antithesis of rehabilitation.

²² Available at <http://www.ncjrs.org/pdffiles1/bja/182503-1.pdf> (last visited Jan. 11, 2008).

LWOP sentences meted out to juveniles are unconstitutional. They do not act as a deterrent, they are disproportionate, extend beyond the time necessary to incapacitate an offender, and frustrate rehabilitation.

C. Supreme Court Precedent as well as State and Federal Legislation Reflect the Reduced Judgment and Decision-Making Capacity of Children in Regulating Their Behavior and Rights.

In both civil and criminal law, youth are treated differently from adults. Statutes and case law recognize that children do not have adult decision-making capacity. For example, youth are denied the right to vote, to contract, to purchase or consume alcoholic beverages, or even to consent to medical care. These differences must be considered when assessing punishments for juveniles. As the Kentucky Court of Appeals explained, “It seems inconsistent that one be denied the fruits of the tree of the law, yet subjected to all of its thorns.” Workman, 429 S.W.2d at 377.

Outside of the Eighth Amendment, the Supreme Court has repeatedly acted to ensure that governmental power is constrained from harming juveniles, and that governmental power be wielded to protect juveniles in light of their immature judgment. The Supreme Court has moved to protect juveniles from the consequences of their actions and decisions where those consequences are far less severe than the death penalty or a LWOP sentence. See e.g., Kaupp v. Texas, 538 U.S. 626 (2003) (considering age and experience in voluntariness of confession by 17-year-old); Fare v. Michael C., 442 U.S. 707, 725 (1979) (determining whether juvenile has waived Miranda rights “mandates. . . evaluation of the

juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of the Fifth Amendment rights, and the consequences of waiving those rights. . . [courts must] take into account those special concerns that are present when young persons. . . are involved"); Schneekloth v. Bustamonte, 412 U.S. 218 (1973) (in examining voluntariness of consent to search under Fourth Amendment, courts must consider, among the totality of circumstances, the youth of the accused). The Court has also clung to the historic distinction between the juvenile and adult criminal justice systems, ruling in McKeiver v. Pennsylvania, 403 U.S. 528 (1971) that preserving the rehabilitative purpose of the juvenile court was of greater importance than according juveniles the full benefit of jury trials as guaranteed to adult defendants under the Sixth Amendment.

The Supreme Court has also allowed states to exercise power over juveniles that would be unconstitutional if exercised over adults, based on the developmental differences between minors and adults. While these restraints are intended to protect youth from certain consequences of their poor judgment, these consequences again are far less severe than a LWOP sentence. See e.g., Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 666-68 (2004) (Court found compelling government interest in protecting young minors from harmful images on Internet); Board of Educ. v. Earls, 536 U.S. 822, 838 (2002) (upheld random, suspicionless drug testing of students engaged in extracurricular activities, including marching band); Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995) (same, but drug testing was limited to athletes in part because of the

danger that drug-abusing athletes could end up as “role models” for other, impressionable high school students); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (public school officials may censor school-sponsored, student publications); Ginsburg v. New York, 390 U.S. 629, 637 (1968) (states may prevent sale of obscene materials to minors). The Supreme Court even has allowed states to use their *parens patriae* power to *preventively* detain children in order to serve the best interests of the child, to keep them “from the downward spiral of criminal activity. . .” Schall v. Martin, 467 U.S. 253, 265-66 (1984) (upholding New York’s power to detain certain at-risk juveniles for up to 17 days).

In Massachusetts, the Commonwealth similarly provides special protections for youth in various circumstances. For example, juveniles in Massachusetts must have the opportunity to consult with an interested adult prior to waiving their Miranda rights. See Commonwealth v. A Juvenile, 389 Mass. 128, 134, 449 N.E.2d 654, 657 (1983). The Court reasoned that “[t]he law presumes different levels of responsibility for juveniles and adults and, realizing that juveniles frequently lack the capacity to appreciate the consequences of their actions, seeks to protect them from the possible consequences of their immaturity.” Id. at 132. This reasoning is echoed throughout the legislature’s restrictions on activities for youth. For example, a person must be eighteen years old to obtain a driver’s license free of any restrictions, Mass. Gen. Laws Ann. ch. 90, § 8; to enter into a contract, Mass. Gen. Laws Ann. ch. 106, § 3-305, ch. 231, § 850; to vote, Mass. Gen. Laws Ann. ch. 51, § 1; to get married without parental

consent, Mass. Gen. Laws ch. 207, §§ 7, 24, 25; to use artificial sun tanning facilities without parental consent, Mass. Gen. Laws Ann. ch.111, § 211; to get a tattoo without parental consent, Mass. Gen. Laws Ann. ch.265, § 34; or to purchase cigarettes, Mass. Gen. Laws Ann. ch.270, §§ 6, 6A. To drink or purchase alcohol, a person in Massachusetts must be twenty-one-years old. Mass. Gen. Laws ch.138, § 34A.

Children have long been granted protection by the law – and denied benefits – in recognition that they are not as capable, or as culpable, as adults. The Commonwealth’s adult sentencing provisions should be similarly scrutinized before automatically applying them to juveniles transferred to the adult system. Imposing a LWOP sentence upon a juvenile is cruel and unusual and violates due process.

II. A Mandatory Sentence Of Life Without Parole For a Sixteen Year Old Child Violates Article 26 of the Massachusetts Constitution As It Constitutes “Cruel Or Unusual Punishment.”

Both the mandatory aspect of Powell’s sentence and the statutory requirement that his charge be directly filed in adult criminal court render the Massachusetts statutory scheme unconstitutional. The Massachusetts courts have long recognized that “imprisonment in the state prison for a long term of years might be so disproportionate to the offence as to constitute cruel and unusual punishment.” Opinion of the Justices, 378 Mass. 822, 829-30, 393 N.E.2d 313 (1979) (quoting McDonald v. Commonwealth, 173 Mass. 322, 328, 53 N.E.2d 874, 875 (1899)). Underlying this principle is “a precept of justice that punishment for crime should be graduated and proportioned to offense.” Opinion

of the Justices, 378 Mass. at 830 (quoting Weems v. United States, 217 U.S. 349, 367 (1910)). Powell argues that the sentencing scheme he is subjected to is so disproportionate to the offense that it is in violation of Article 26 of the Massachusetts Declaration of Rights prohibiting cruel or unusual punishment. State courts also look to whether the challenged punishment is so disproportionate to the offense that it “shocks the conscience and offends fundamental notions of human dignity.” Commonwealth v. Jackson, 369 Mass. 904, 910, 344 N.E.2d 166, 170 (1976) (quoting In re Lynch, 503 P.2d 921, 930 (1972)). Exposing a sixteen-year-old child to a sentence of life imprisonment without the possibility of parole, measured by objective standards, undoubtedly shocks the conscience and traditional notions of human dignity.

To test proportionality, Massachusetts courts consider the nature of the offender and the offense in the light of the degree or harm to society, the sentencing provisions in other jurisdictions for similar offenses, and sentences for more severe offenses within the Commonwealth. See Commonwealth v. Alvarez, 413 Mass. 224, 233-34, 596 N.E.2d 325, 330 (1992). The principal brief outlines each prong of this test in great detail, demonstrating that a sentence of LWOP for a juvenile aged sixteen is clearly disproportionate, especially in light of the reduced culpability of youth found in Simmons. See Defendant’s Memorandum of Law in Support of His Motion to Dismiss at 16-40. Furthermore, as this brief has shown, the pattern of sentencing across the nation clearly disfavors sentencing juveniles to life without the possibility of parole.

III. Mandatory LWOP Sentences for Juveniles Violate Both the U.S. and Massachusetts Constitutions.

The *mandatory* nature of the Massachusetts LWOP sentence for both first and second degree murder precludes judges from even considering a juvenile's age, immaturity, reduced mental capacity, reduced role in the offense, or any other mitigating factors related to his young age. These age-related factors include the special characteristics of juveniles that make them less culpable than adults – the precise characteristics that the United States Supreme Court relied upon in striking down the imposition of the death penalty for juveniles in Simmons. Even if LWOP sentences could be constitutionally applied to juveniles under some circumstances, a *mandatory* LWOP sentence for first or second degree murder cannot pass constitutional muster.

The United States Supreme Court has struck statutes imposing a mandatory death sentence for particular offenses or against particular categories of defendants because the statutory schemes did not provide for consideration of particularized mitigating factors. See e.g., Sumner v. Shuman, 483 U.S. 66, 85 (1987) (striking statute mandating death penalty for inmate convicted of murder while serving life sentence without possibility of parole); Harry Roberts v. Louisiana, 431 U.S. 633, 638 (1977) (striking statute mandating death penalty for defendants convicted of first degree murder of a police officer); Stanislaus Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (striking statute mandating death penalty for first degree murder); Woodson v. North Carolina, 428 U.S. 280, 305

(1976) (striking statute mandating death penalty for first degree murder, including felony murder).

These cases are based on the constitutional requirement in capital cases “that the sentencing authority ha[s] information sufficient to enable it to consider the character and individual circumstances of a defendant prior to the imposition of a death sentence.” See Sumner, 483 U.S. at 72 (internal quotation omitted) (quoting Gregg v. Georgia, 428 U.S. 153, 189, n.38 (1976)). For a juvenile, or for any person—adult or youth—in Massachusetts, life without the possibility of parole is the harshest possible sentence. As the Nevada Supreme Court observed:

Before proceeding we pause first to contemplate the meaning of a sentence “without possibility of parole,” especially as it bears upon a seventh grader. All but the deadliest and most unsalvageable of prisoners have the right to appear before the board of parole to try and show that they have behaved well in prison confines and that their moral and spiritual betterment merits consideration of some adjustment of their sentences. Denial of this vital opportunity 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 youth], he will remain in prison for the rest of his days.

The court concluded that this was a “severe penalty indeed” to impose upon an adolescent. Naovarath v. State, 779 P.2d 944 (Nev. 1989).

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

mandatory LWOP sentence automatically precludes any possibility for reform, rehabilitation, and eventual contribution to society.

In Simmons the Court found that the “reality that juveniles still struggle to define their identity means it is less supportable to conclude even a heinous crime committed by a juvenile is evidence of an irretrievably depraved character.” Therefore, the Court continued, “[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.” 543 U.S. at 570. As juveniles mature into adults, “the impetuosity and recklessness that may dominate in their younger years may subside.” Id. Further, Simmons recognized that juveniles’ “own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.” Id. at 570. Yet, a mandatory sentence of LWOP does not allow for reformation or rehabilitation; the juvenile sentenced to mandatory LWOP will, by definition, die in prison. Such a harsh sentence should be reserved only for the worst offenders – those offenders who are “irretrievably depraved” and who are beyond rehabilitation. Simmons rejects the argument that juveniles are among this class of offenders. Id. at 569.

Additionally, *mandatory* LWOP sentences for juveniles convicted of first and second degree murder, which fail to take into account the age, immaturity and mental incapacity of juveniles violates the minor’s right to due process.²³ As

²³ In Massachusetts, the same reasoning is applied when evaluating a U.S.

articulated earlier, in Massachusetts there exists no penalty more severe than LWOP. Therefore, adults convicted of the most serious offenses for which the harshest penalty is required by law are given no opportunity to mitigate their sentences to anything less than LWOP. Youth are treated in the same way when convicted of similar offenses. Without an opportunity to demonstrate that a lesser sentencing scheme will meet legitimate governmental interests, imposing a life sentence without parole on a sixteen-year-old child is a violation of due process under Articles 1, 10, and 12 of the Massachusetts Declaration of Rights. The Massachusetts Constitutional due process provisions guarantee that a defendant should be given the opportunity to seek a lesser sentence. See Mass. Const. Art. 12 providing that “every subject shall have a right to produce all proofs that may be favorable to him...and to be fully heard in his defence.”

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

The United States accounts for 99.9 percent of all cases of juvenile offenders serving LWOP sentences. Center for Law and Global Justice, Sentencing Our Children To Die In Prison, University of San Francisco School of Law (November 2007) [hereinafter USF Report]. The United States is radically out of step with international policy and practice regarding juvenile LWOP. Just a few years ago, the U.S. was radically out of step with international policy and practice regarding the juvenile death penalty. However, the Simmons Court was

Constitutional due process violation as a Massachusetts State Constitutional due process violation.

persuaded by customary international law arguments regarding “the stark reality” that the United States was the only country in the world that executed juveniles as a criminal punishment. Simmons, 543 U.S. at 575. Not only is it reasonable to consider foreign and international law in assessing evolving standards of human rights, it is also a requisite step in assessing a nation’s compliance with binding international authority.²⁴ As explained below, once a norm of customary international law rises to the status of a *jus cogens* norm, it becomes *mandatory* authority applicable to *all* nation-states without exception.

A. The Prohibition Against Juvenile LWOP is a *Jus Cogens* Norm and

²⁴ The U.S. Supreme Court has recognized the value of considering international consensus in a variety of cases going back over one hundred years. “International law is part of our law, and must be ascertained and administered . . . as often as questions of right depending upon it are duly presented.” The Paquete Habana, 175 U.S. 677, 700 (1900). The Court referred to the rule of comity, that we observe certain rules because we want reciprocal treatment, and held that “where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of [c]ivilized nations.” Id. In Trop, the Court looked to the international consensus against taking away someone’s citizenship, noting, “[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime. . . . The United Nations’ survey of the nationality laws of 84 nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion.” Trop, 356 U.S. at 102-103. The Court went on to conclude that the Eighth Amendment forbid denationalization. In Atkins v. Virginia, 536 U.S. 304 (2002), the Court considered that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.” Atkins, 536 U.S. at 316 n.21. The Court went on to note, “[a]lthough these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue.” Id. Additionally, in Coker v. Georgia, 433 U.S. 584 (1977), the Court looked to Trop as support for considering international opinion, noting that, “the plurality took pains to note the climate of international opinion concerning the acceptability of a particular punishment. It is thus not irrelevant here that out of 60 nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.” Coker, 433 U.S. at 596, n.10.

Therefore Constitutes Binding Authority on the U.S.

While there is no singular, established method for evaluating whether a principle qualifies as a *jus cogens* norm,²⁵ it is instructive to consider how courts have approached this analysis. In 2002, the Inter-American Commission on Human Rights (“Commission”)²⁶ held that the prohibition on the juvenile death penalty is a *jus cogens* norm, and consequently that the United States was bound by this norm. Applying the Commission’s analysis to juvenile LWOP likewise leads to the conclusion that the prohibition against juvenile LWOP is a *jus cogens* norm.

In Domingues v. U.S. the Commission stated:

[The] U.S. stands alone amongst traditional developed world nations and those of the inter-American system, and has also become increasingly isolated within the entire global community.

²⁵ Article 53 of the Vienna Convention on the law of Treaties defines a *jus cogens* norm as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

According to the Restatement (Third) of the Foreign Relations Law, a *jus cogens* norm is established where there is an acceptance and recognition by a “large majority” of States, even if over dissent by “a very small number of States.” Restatement (Third) of Foreign Relations Law § 102. Examples of *jus cogens* norms include the prohibitions against juvenile death penalty, slavery, and genocide. *Jus cogens* norms “cannot be validly derogated from, whether by treaty or by the objection of a state, persistent or otherwise.” Domingues v. U.S., Case 12.285, Report No. 62/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 913 (2002) at para. 85. Thus, once a principle has reached the threshold of a *jus cogens* norm, nations that fail to comply with this norm are in violation of international law.

²⁶ The Inter-American Commission on Human Rights (IACHR) is one of two bodies in the inter-American system for the promotion and protection of human rights. The Commission has its headquarters in Washington, D.C. The other human rights body is the Inter-American Court of Human Rights, which is located in San José, Costa Rica. See <http://www.cidh.org/what.htm>.

The overwhelming evidence of global state practice as set out above displays a consistency and generality amongst world states indicating that the world community considers the execution of offenders aged below 18 years at the time of their offence to be inconsistent with prevailing standards of decency.

Domingues v. U.S., Case 12.285, Report No. 62/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 913 (2002).

The Commission thus concluded that the U.S. “is bound by a norm of *jus cogens* not to impose capital punishment on individuals who committed their crimes when they had not yet reached 18 years of age.” Id. at para. 85. The court’s opinion emphasized that such a norm “binds the community of States, including the United States. The norm cannot be validly derogated from, whether by treaty or by the objection of a state, persistent or otherwise.” Id.

In finding that the prohibition of the juvenile death penalty meets the threshold of a *jus cogens* norm, the Commission looked to the near-universal ratification of the United Nations Convention on the Rights of the Child (CRC) without reservation to article 37(a) and found that “the extent of ratification of this instrument alone constitutes compelling evidence of a broad consensus on the part of the international community” against the juvenile death penalty.

Domingues at para. 57. The prohibition against juvenile LWOP is part of the same sentence in the CRC that prohibits the juvenile death penalty, and international policy is analogous in terms of opposition to LWOP. The factors that the Commission considered regarding the juvenile death penalty suggest that in order to evaluate whether juvenile LWOP qualifies as a *jus cogens* norm, the Commission would heavily weigh the near universal ratification of the CRC, and

the virtual lack of juvenile LWOP in practice or in law anywhere else in the world, aside from the U.S. and Israel. Thus, the Commission’s reasoning in Domingues strongly supports a finding that the prohibition on juvenile LWOP constitutes a *jus cogens* norm.

There is “widespread and consistent” international practice to refrain from the imposition of juvenile LWOP. USF Report at 17. Even here and in Israel, where it is currently applied, it hasn’t been consistently and historically applied to child offenders. Prior to the 1990s, juvenile LWOP was rarely imposed in the U.S. An average of two juveniles per year was sentenced to LWOP between 1962 and 1981. Id., citing HRW Report at 31. In Israel, it appears that the sentence has not been applied since 2004 and currently no more than seven juvenile offenders are serving LWOP sentences, suggesting that the sentence is rarely imposed. USF Report at 17. The few other nations that permitted juvenile LWOP in law or practice have “clarified their practice and/or law to prohibit LWOP sentences for juveniles.”²⁷ USF Report at 9. There is unambiguous international consensus,

²⁷ Tanzania and South Africa have altered their practice and Burkina Faso and Kenya have modified their laws. USF Report at 17. All children in Tanzania who had originally been sentenced to LWOP are now eligible for parole. Id. In fact, Tanzania has committed to making all necessary legal changes in order to explicitly prohibit LWOP as a sentencing option, and come into full compliance with CRC. As recently as 1999, South Africa had 4 children serving LWOP; South Africa now categorically prohibits the sentence. The juveniles who were serving LWOP are now eligible for parole. Id. Burkino Faso and Kenya which had left open the legal possibility of juvenile LWOP have both recently asserted their compliance with CRC. In Burkino Faso no child under 16 can be given life sentences. No juvenile under 18 has ever been sentenced to life; officials have clarified that in order to do so, the country would contravene their obligations under CRC, all of which directly apply in domestic law. Id. at 11-12. Kenya passed a bill explicitly outlawing juvenile LWOP. Id. at 12. Thus, the several residual states that had been holding on in law or in practice to the use of juvenile

with only two outliers, on the impropriety of juvenile LWOP, the prohibition against juvenile LWOP rises to the level of a *jus cogens* norm.

B. The International Covenant on Civil and Political Rights Prohibiting Juvenile LWOP is Binding Authority on the U.S.

In addition to violating the binding authority of a *jus cogens* norm, the U.S. is in direct violation of its treaty obligations in applying LWOP sentences to youth. The U.S. ratified the International Covenant on Civil and Political Rights (“ICCPR”) in 1992. Because the ICCPR is a treaty, it constitutes the “supreme law of the land” based on Article VI, Clause 2 of the U.S. Constitution – the Supremacy Clause.

In its ratification of the treaty, the U.S. reserved the right to treat juveniles as adults in “*exceptional* circumstances.” (emphasis added) See International Covenant on Civil and Political Rights, Declarations and Reservations available at <http://www2.ohchr.org/english/bodies/ratification/4.htm>. However, the Committee on Human Rights, which monitors treaty compliance concluded in 2006 that the U.S.’s use of juvenile LWOP violates the ICCPR in spite of the “exceptional circumstances” reservation. USF Report at 15. The Committee found in essence that, “the extraordinary breadth and rapid development” of juvenile LWOP “since the U.S. ratification of the ICCPR contradicts the assertion that the United States has applied this sentence in only exceptional circumstances—the total children tried as adults and sentenced to LWOP now exceeds 2,381, many of whom were first-time offenders.” USF Report at 15. The

LWOP have all submitted to the international consensus that it is an inappropriate, impermissible sentence for children.

Committee on Human Rights concluded that juvenile LWOP violates article 24(1) which states “every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor...” See Committee Concluding Observations of the Human Rights Committee on the United States of America, 87th Sess. Held of 27 July 2006 (CCCPR/C/SR.2395), para. 24, cited in USF Report at 15. The Committee thus concluded that the U.S. is not limiting its use of juvenile LWOP to “exceptional circumstances” only, and furthermore that sentencing juveniles to LWOP in any circumstances violates the ICCPR, in spite of the U.S.’s reservation. In persisting in its use of juvenile LWOP, the U.S. is violating binding international law.²⁸

C. The Convention on the Rights of the Child constitutes persuasive authority prohibiting juvenile LWOP.

The Convention on the Rights of the Child (CRC) explicitly prohibits juvenile LWOP. The CRC states, “[n]either capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below eighteen years of age.” United Nations Convention

²⁸ Sentencing juveniles to LWOP may violate another treaty as well. Since ratification in 1994, the U.S. has been legally bound to comply with the Convention Against Torture, Cruel, Inhuman or Degrading Treatment or Punishment (CAT). See <http://www2.ohchr.org/english/bodies/ratification/9.htm>. As with the ICCPR, the CAT is the “supreme law of the land.” The official oversight body for the CAT commented in 2006 during its evaluation of U.S. compliance that life imprisonment of children “could constitute cruel, inhuman or degrading treatment or punishment” in violation of the treaty. USF Report at 15, citing Committee Against Torture, 36th Session, “Conclusion and Recommendations of the Committee Against Torture: United States of America,” at para. 35, UN Doc. No. CAT/C/USA/CO/2, 25 July 2006.

on the Rights of the Child, Art. 37, Nov. 20, 1989, 1577 U.N.U.S. 3. In early 2007 the implementing authority for the CRC, the Committee on the Rights of the Child issued a General Comment stating that a “life sentence without the possibility of parole [is] explicitly prohibited in article 37(a) CRC.” Committee on the Rights of the Child, “General Comment No. 10: Children’s Rights in Juvenile Justice,” at para.4(c), UN Doc. No. CRC/C/GC/10 (9 February 2007) (*unedited version*). 192 out of a total of 194 countries have joined the CRC as parties. Not one of the parties to the treaty has registered a reservation to the CRC’s prohibition on life imprisonment without release for children. See United Nations Treaty Collection Database, available at <http://untreaty.un.org/> (last visited Jan. 3, 2008). The only two countries that have failed to ratify the treaty, U.S. and Somalia, have both signed the treaty.²⁹ Despite its reluctance to ratify the treaty, the U.S has repeatedly proclaimed its commitment to CRC principles.³⁰

²⁹ Until recently, Somalia lacked a recognizable government, however, on May 9, 2002 Somalia signed the CRC and declared its intention to ratify the treaty. See International Justice Project, available at <http://www.internationaljusticeproject.org/juvJusCogens.cfm> (last visited Jan. 3, 2008).

³⁰ When Ambassador Madeline Albright, as the U.S. Permanent Representative to the U.N., signed the CRC on behalf of the United States in 1995, she declared: “The convention is a comprehensive statement of international concern about the importance of improving the lives of the most vulnerable among us, our children. Its purpose is to increase awareness with the intention of ending the many abuses committed against children around the world...United States’ participation in the Convention reflects the deep and long-standing commitment of the American people.” Madeline K. Albright, Remarks as United States Permanent Representative to the United Nations on the Occasion of the Signing of the U.N. Convention on the Rights of the Child, U.S. Press Release (Feb.16, 1995) (transcript available at <http://www.hrw.org/reports/2005/us1005/9.htm>). The U.S. has reaffirmed this commitment on subsequent occasions. For example, in 1999 Ambassador Betty King, U.S Representative to the U.N. Economic and Social

As a signatory to the CRC the U.S. is bound in good faith to “ensure that nothing is done which would defeat the object and purpose of the treaty.” See International Justice Project available at <http://www.internationaljusticeproject.org>. Two major principles of the CRC are non-discrimination; and the best interests of the child. G.A. Res. 44/25, U.N. Doc. A/44/49 (Nov. 20, 1989), Art. 1. However, gross racial disparities permeate juvenile sentencing. For example, African-American children are twenty times more likely than white children to be sentenced to LWOP in California. USF Report at i. Nationally, African-American children are ten times more likely than white children to be sentenced to LWOP. Id. Clearly the principle of non-discrimination is being violated in dramatic, consequential ways. The best-interests principle is violated by juvenile LWOP as well. Whereas juvenile sentences are generally grounded in the principle of rehabilitation, LWOP disregards the possibility of an offender rehabilitating and reintegrating into society. Thus, the U.S. is violating its good faith obligation as a signatory to the CRC to adhere to the primary objectives of the treaty.

Although the CRC does not constitute the “supreme law of the land” as

Council stated: “Although the United States has not ratified the Convention on the Rights of the Child, our actions to protect and defend children both at home and abroad clearly demonstrate our commitment to the welfare of children. The international community can remain assured that we, as a nation, stand ready to assist in any way we can to enhance and protect the human rights of children wherever they may be.” Betty King, Statement as United States Representative on the Economic and Social Council, to the Plenary of the 54th Session of the General Assembly on the Tenth Anniversary of the Convention on the Rights of the Child, (Nov. 11, 1999) (transcript available at <http://www.hrw.org/reports/2005/us1005/9.htm>).

does the ICCPR, it represents persuasive authority. In determining whether the juvenile death penalty was lawful, the U.S. Supreme Court found persuasive that the CRC expressly forbids the juvenile death penalty. Simmons, 543 U.S. at 576. In fact, the Simmons Court went to great lengths to acknowledge and validate its use of international and foreign law. “It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty...The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.” Id. at 578. The “overwhelming weight of international opinion” against juvenile LWOP, as evidenced by its prohibition in the CRC, ratified by every country save two, should be acknowledged and considered by any court considering the legality of the sentence.

D. Resolutions of the United Nations Reinforce the International Opposition to Juvenile LWOP.

The United Nations General Assembly (G.A.) has demonstrated its definitive commitment to the abolition of juvenile LWOP through two recent resolutions. In December 2006, the G.A. passed a resolution by a vote of 185 to 1 (U.S. was the only nation to oppose) urging states to “abolish by law, as soon as possible, the death penalty and life imprisonment without possibility of release for those under the age of 18 years at the time of the commission of the offence.” USF Report at 15, citing General Assembly Resolution 61/146, “Promotion and protection of the rights of children,” Para. 31(a), UN Doc. No. A/Res/61/146. (19 Dec. 2006), passed by the Third Committee November 22, 2006. In October

2007 a similar resolution was introduced calling for a prohibition of juvenile LWOP sentences. USF Report at 15, citing U.N. General Assembly, Third Committee, para. 34, U.N. Doc. A/C.3/62/L.24 (23 Oct. 2007).

In the past several decades, the U.N. has consistently and repeatedly adopted standards and resolutions urging nations to limit the incarceration of children to the shortest possible period of time. The G.A. adopted the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (known as the Beijing Rules), which declared that incarceration should be restricted to the shortest possible time frame. G.A. Resolution 40/33, 29 November 1985, at para. 17.1(b). The G.A. passed two resolutions in the 1990s, the U.N. Rules for the Protection of Juveniles Deprived of Their Liberty and the U.N. Guidelines for the Prevention of Juvenile Delinquency (known as the “Riyadh Guidelines”), both of which were concerned with the destructive impact incarceration has on juveniles and urged a focus on rehabilitation rather than punishment. United Nations Rules for the Protection of Juveniles Deprived of their Liberty, G.A. Resolution 45/113, 14 December 1990; Riyadh Guidelines, G.A. Resolution 45/112, 1990. While resolutions, they reflect the acceptance of an international norm. The various resolutions from 1990 to 2007, illustrate the consistent and emphatic voice of the United Nations urging the global community to use incarceration sparingly for juveniles and to prohibit the use of juvenile LWOP.

CONCLUSION

In the wake of the Supreme Court’s decision in Roper v. Simmons, a mandatory sentence of life imprisonment without the possibility of parole for a juvenile violates the prohibitions against cruel and unusual punishment in both the U.S. and Massachusetts Constitutions. The reasoning of Simmons is particularly apt in Massachusetts, where, in the absence of the death penalty even for adult offenders, life without parole is the harshest sentence that can be meted out to the ‘worst of the worst’ offenders in the state, and its imposition is mandatory in cases such as this, stripping judges of any discretion at all to take mitigating factors of youth into account. Even if life imprisonment could be constitutionally applied to a juvenile, the imposition of a mandatory life imprisonment sentence without the possibility of judicial review would violate Powell’s right to due process. Finally, the overwhelming international consensus against the imposition of LWOP sentences on youth demonstrates the worldwide community’s opposition to such harsh punishments for youth. For these reasons, *Amicus* Juvenile Law Center supports Powell’s motion to dismiss.

Respectfully submitted,

MARSHA L. LEVICK
JESSICA R. FEIERMAN
RIYA S. SHAH
NEHA DESAI
JUVENILE LAW CENTER
The Philadelphia Building
1315 Walnut Street, 4th Floor
Philadelphia, PA 19107

APPENDIX A

States that apply an age limit against waiver of juveniles into adult court.

Alabama (age 14) Ala.Code § 12-15-34 (2007) (prosecutorial discretion to transfer any child 14 years or older to adult criminal court) Ala. Code § 12-15-34.1 (2007) (mandatory prosecution as adult for age 16 and older for enumerated crimes).

Arizona (age 14) Ariz. Rev. Stat. Ann. § 13-501(A)(1) (2001 & Supp. 2005) (Juvenile age 15 16 and 17 "must" be prosecuted as an adult for first degree murder) and Ariz. Rev. Stat. Ann. § 13-501(B)(1) (2001 & Supp. 2005) (Juvenile at least age 14 "may" be prosecuted as an adult for class one felonies).

Arkansas (age 14) Ark. Code Ann. § 9-27-318 (2002 & Supp. 2005) (if the juvenile is at least 14 years of age and commits a felony he or she can be transferred to adult court and tried as an adult).

Colorado (age 12) Colo. Rev. Stat. § 19-2-518(1)(a)(I)(A)-(B) (2004) (discretionary transfer to adult court for juveniles age 12 and above for class one or two felonies).

Connecticut (age 14) Conn. Gen. Stat. Ann. § 46b-127 (West 2004 & Supp. 2005) (mandatory transfer to adult court for children age 14 and above for enumerated felonies).

Illinois (age 13) 705 Ill. Comp. Stat. Ann. 405/5-805(3) (West 1999 & Supp. 2005) (When a child is 13-14 the transfer to adult court is discretionary).

Iowa (age 14) Iowa Code Ann. § 232.45 (6)(a) (West 2000 & Supp. 2006) (juvenile court may waive jurisdiction over a child as young as 14).

Kentucky (age 16) Ky. Rev. Stat. Ann. §§ 635.020 640.010 (LexisNexis 1999 & Supp. 2006) (mandatory hearing to consider transfer to adult court for enumerated offenses age limit of 14) Ky. Rev. Stat. §640.040 (LexisNexis 2006) (Juveniles age 16-17 can receive adult penalty for capital offenses. other juvenile offenders can receive maximum sentence of life imprisonment with the possibility of parole in 25 years) see also Ky. Rev. Stat. Ann. § 532.025 (LexisNexis 1999 & Supp. 2006) (setting forth age of defendant as mitigating factor to be considered in sentencing defendant to LWOP).

Louisiana (age 15) La. Child. Code Ann. art. 305 (West 2004) (any juvenile 15 years old or older charged with first-degree murder second-degree murder aggravated rape or aggravated kidnapping must be tried as an adult).

Massachusetts (age 14) Mass. Gen. Laws Ann. ch. 119 § 72(b) (West 2003 & Supp. 2005) (treating as an adult any juvenile 14 or older charged with murder in the first or second degree).

Minnesota (age 14) Minn. Stat. Ann. § 260B.125 (2003 & Supp. 2006)

(discretionary waiver age limit 14).

Mississippi (age 13) Miss. Code Ann. § 43-21-151(a) (West 1999) and Miss. Code Ann. § 43-21-157(8) (West 1999 & Supp. 2005) (mandatory adult court jurisdiction age limited to 13 for any felony punishable by life imprisonment or death no reverse transfer).

Missouri (age 12) Mo. Ann. Stat. § 211.021 (2007) (Individuals age 17 and older legally adults for criminal purposes) Mo. Ann. Stat. § 211.071 (2007) (discretionary transfer for juveniles age 12 and older).

Montana (age 12) Mont. Code Ann. § 41-5-206 (2005) (discretionary transfer if the child is 12 years of age or older for enumerated offenses; when the minor is 16 years of age more types of offenses are added to the list; if a child is of the age of 17 and commits an offense listed above the county attorney "shall" file with the district court).

New Jersey (age 14) N.J. Stat. Ann. 2a:4A-26 (West 1987 & Supp. 2005) (discretionary waiver age 14 or over).

North Carolina (age 13) N.C. Gen. Stat. § 7B-2200 (2007) (discretionary transfer for juveniles age 13 and older at the time they commit offenses that would be felonies); N.C. Gen. Stat. § 14-17 (2007) (providing for mandatory LWOP sentence for anyone 17 or under who committed a murder in the first degree).

North Dakota (age 14) N.D. Cent. Code § 12.1-04-01 (1997) (juveniles under 7 are not capable of committing a crime and a juvenile cannot be tried as adult if less than 14 years old).

Ohio (age 14) Ohio Rev. Code Ann. § 2152.10(B) (LexisNexis 2002 & Supp. 2005) (discretionary transfer age limit of 14 for felonies mandatory if previously adjudicated delinquent).

Oklahoma (age 13) Okla. Stat. Ann. tit 10 § 7306-1.1(B) (West 1998 & Supp. 2006) (mandatory transfer age 13 and above for first degree murder).

South Dakota (age 10) S.D. Codified Laws § 26-11-3.1 (2004) (mandatory transfer to adult court of juveniles 16 or older who commit enumerated felonies hearing at option of juvenile charged where they must prove transfer back to juvenile court is in the best interests of the public; discretionary transfer ages 10-16).

Utah (age 14) Utah Code Ann. § 78-3a-502(3) (2002) (discretionary age limit of 14 for adult court jurisdiction).

Vermont (age 10) Vt. Stat. Ann. tit. 33 § 5506 (1998) (discretionary limit age 10).

Virginia (age 14) Va. Code Ann. § 16.1-269.1 (2003 & Supp. 2005) (mandatory transfer age limit 14 upon finding of probable cause for enumerated felonies).

Washington (age 15) Wash. Rev. Code Ann. § 13.040.030 (Westlaw 2006)

(exclusive adult court jurisdiction over 16 or 17 year old accused of committing serious violent offense) Wash. Rev. Code Ann. § 13.040.110 (Westlaw 2006) (juvenile court required to hold waiver hearing whenever child as young as 15 accused of class A felony or attempt solicitation or conspiracy to commit class A felony).

Wisconsin (age 10) Wis. Stat. Ann. § 938.18 (West 2000 & Supp. 2005) (exclusive adult court jurisdiction age limit 10 for first degree murder first degree reckless murder second degree intentional homicide; limit of 14 for other felonies).

Wyoming (age 13) Wyo. Stat. Ann. § 14-6-203(f)(3) (2005) (concurrent adult and juvenile court jurisdiction age limit 14 for enumerated felonies) and Wyo. Stat. Ann. § 14-6-237 (2005) (discretionary transfer between adult and juvenile court).

APPENDIX B

States that impose LWOP sentences on children of any age.

Delaware Del. Code Ann. tit. 10 §§ 1010 1011 (1999 & Supp. 2004) ("child shall be proceeded against as an adult" when accused of enumerated felonies; child can request transfer hearing and court may transfer back at its discretion) Del. Code Ann. tit. 11 § 4209 (2001 & Supp. 2004) (mandatory LWOP for "any person" convicted of first degree murder).

Florida Fla. Stat. §§ 985.225(1)(a) 985.227 (2005) (prosecutor may directly file for capital crime and child is under jurisdiction of juvenile court "unless and until an indictment" is delivered by the grand jury; when indicted child "must be tried and handled in every respect as an adult ... on the offense punishable by death or by life imprisonment") Fla. Stat. § 985.225(3) (2005) ("if the child is found to have committed the offense punishable by death or life imprisonment the child shall be sentenced as an adult").

Georgia Ga. Code. Ann. § 15-11-28 (2007) (concurrent juvenile and adult court jurisdiction over child of any age accused of crime where punishment in criminal court would be death LWOP or life imprisonment; mandatory adult court jurisdiction for such crimes if committed by child over 13 years old) Ga. Code. Ann. § 17-10-6.1(a)(2) and 17-10-7(b)(1 & 2) (authorizing mandatory LWOP for recidivist serious violent felons).

Hawaii Haw. Rev. Stat. Ann. § 571-22 (LexisNexis 2005 & Supp. 2005) (discretionary transfer to adult court of juveniles no age limit who commit murder) Haw. Rev. Stat. Ann. § 706-656 (LexisNexis 2003 & Supp. 2005) (mandatory LWOP for enumerated felonies).

Idaho Idaho Code Ann. § 18-4004 (LexisNexis 2007) (mandatory LWOP ("fixed life sentence") if death penalty is not sought or jury finds it unjust and jury

concludes beyond a reasonable doubt that at least one aggravating factor exists; otherwise life sentence with no parole for at least 10 years); Idaho Code Ann. §§ 20-508 20-509 (2007) (mandatory transfer for juveniles age 14-18 accused of enumerated crimes discretionary transfer for children below age 14 accused of enumerated crimes).

Maine Me. Rev. Stat. Ann. tit. 15 § 3101 (2007) (discretionary hearing to determine whether to transfer juvenile of any age to adult court for trial for murder or enumerated felonies) Me. Rev. Stat. Ann. tit. 17-A § 1251 (2007) (allowing life sentences) see State v. St. Pierre 584 A.2d 618 621 (Me. 1990) (LWOP sentences are discretionary under § 1251).

Maryland Md. Code Ann. Cts. & Jud. Proc. § 3-8A-06 (West 2002 & Supp. 2005) (discretionary transfer to adult court for any age for murder) Md. Code Ann. Crim. Law § 2-202 (West 2002 & Supp. 2005) (discretionary LWOP or life if defendant is below 18).

Michigan Mich. Comp. Laws Ann. § 712A.2d (2007) (prosecutor can file a motion for juvenile of any age “to be tried in the same manner as an adult”) Mich. Comp. Laws Ann. § 712A.4 (2007) (discretionary waiver age 14 and above for crimes equivalent to felonies).

Nebraska Neb. Rev. Stat. § 29-2204(3) (2007) (mandatory life sentences when “required by law” otherwise individuals under 18 at the time they committed a crime may receive discretionary adult or juvenile sentence); Nev. Rev. Stat. Ann. § 62B.330 (West 2007) (mandatory murder exception to juvenile court jurisdiction for any age no reverse transfer).

Nevada Nev. Rev. Stat. Ann. § 200.030 (West 2007) (discretionary LWOP sentence for murder).

New Hampshire N.H. Rev. Stat. Ann. § 169-B:24 (LexisNexis 2007) (presumption that conditions for transfer of juveniles of any age is met where juvenile accused of enumerated crimes; transfer is at court’s discretion) N.H. Rev. Stat. Ann. § 630:1-a (LexisNexis 2007) (mandatory LWOP for anyone convicted of first degree murder).

Pennsylvania 42 Pa.C.S.A. §§ 6302 6355 (West 2000 & Supp. 2005) (murder must be tried in adult court yet court can transfer case to juvenile court at its discretion); 18 Pa.C.S.A. § 1102 (West 1998 & Supp. 2005) (mandatory minimum punishment for murder is life imprisonment) 61 Pa.C.S.A. § 331.21 (West 1999 & Supp. 2005) (no parole until minimum term of sentence served i.e. life means LWOP).

Rhode Island R.I. Gen. Laws § 14-1-7 (2002) (no age limit for transfer of juvenile for enumerated crimes; discretionary because hearing required) R.I. Gen. Laws § 12-19.2-4 (2002) (LWOP sentence discretionary not minimum).

South Carolina S.C. Code Ann. § 20-7-7605(6) (1985 & Supp. 2005) (discretionary transfer no age limit for murder or "criminal sexual conduct") see also State v. Corey 339 S.C. 107 529 S.E.2d (S.C. 2000) (construing the lack of

mention of age in 7605(6) as requiring no age limit) S.C. Code Ann. § 17-25-45 (2003 & Supp. 2005) (except in cases that impose the death penalty when convicted of a serious offense as defined in statute a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has prior convictions for enumerated crimes).

Tennessee Tenn. Code Ann. § 37-1-134 (2005) (mandatory transfer for enumerated crimes no age limit) Tenn. Code Ann. § 39-13-202 (2003 & Supp. 2005) (sentence for first degree murder discretionary as to death imprisonment for life without possibility of parole).

Texas Tex. Penal Code §8.07 (Vernon 2005 & Supp. 2007) (capital felony is exception to the age limit of 15 for being tried as an adult) Tex. Penal Code § 12.31 (sentence of life imprisonment without parole is mandatory when state does not seek the death penalty in capital felony cases).

West Virginia W. Va. Code § 49-5-10 (LexisNexis 2007) (discretionary transfer of child below age 14 accused of committing murder or other enumerated felony) W. Va. Code § 61-2-2 (LexisNexis 2007) (mandatory LWOP for first degree murder).

APPENDIX C

States where LWOP sentences are discretionary for juveniles.

Arizona Ariz. Rev. Stat. Ann. § 13-703.01(A) (Westlaw 2006) (LWOP ("natural life") or life sentence for specified time for defendants convicted of first degree murder).

California Cal. Penal Code § 190.5(b) (West 1999) (LWOP or at the discretion of the court 25 years to life for first degree murder committed by juveniles at (least age) 16 and 17 at the time of the commission of the crime).

Georgia (unless prior convictions for enumerated crimes) Ga. Code Ann. §17-10-30.1 (Imprisonment for life without parole for first time violent offender requires finding of aggravating circumstances and weighing of any mitigating circumstances) but see Ga. Code Ann. § 17-10-6.1(a)(2) and 17-10-7(b)(1 & 2) (authorizing mandatory LWOP for recidivist serious violent felons).

Idaho Idaho Code Ann. § 20-509(3)-(4) (Michie 2004) (juvenile tried as an adult can be sentenced pursuant to adult sentencing measures pursuant to juvenile sentencing options or a court can commit the juvenile to the custody of the department of juvenile corrections and suspend the sentence or withhold judgment).

Illinois 730 Ill. Comp. Stat. 5/5-8-1 (West Supp. 2005) (details mandatory minimum sentences for felonies; for first degree murder if death cannot be imposed and one aggravating factor is proven the mandatory sentence is LWOP if

no aggravating circumstances the sentence is 20-60 years).

Indiana Ind. Code Ann. § 35-50-2-3 (West Supp. 2005) (LWOP sentences are discretionary for 16 and 17 year olds and impermissible for defendants below age 16).

Kentucky Ky. Rev. Stat. Ann. § 532.025 (Michie Supp. 2002) Ky. Rev. Stat. Ann. § 532.030 (Michie 1999) (LWOP discretionary for capital offense; age a mitigating factor in sentencing).

Maryland Md. Code Ann. Crim. Law §§ 2-202 2-304 (Michie 2002) (discretionary LWOP or life for first degree murder if defendant below 18).

Mississippi Miss. Code Ann. § 97-3-21 (2005) (discretionary LWOP life for capital murder).

Montana (unless prior convictions for enumerated crimes) Mont. Code Ann. § 46-18-219 (2005) (a sentence of life without parole must be given if the defendant has been *previously convicted* of one of the following: deliberate homicide aggravated kidnapping sexual intercourse without consent sexual abuse of children or ritual abuse of a minor) Mont. Code Ann. § 45-5-102 (2005) (LWOP life term of years discretionary sentence for deliberate homicide).

Nevada Nev. Rev. Stat. Ann. § 200.030 (LexisNexis 2001 & Supp. 2003) (discretionary LWOP sentence for murder).

North Dakota N.D. Cent. Code § 12.1-32-01 (Michie 1997) (LWOP not mandatory but is maximum for Class AA felonies).

Ohio (unless sexual motivation for the crime) Ohio. Rev. Code Ann. § 2929.03C(2)(a)(i) -D(2)(b) -D(3)(b) (LexisNexis 2005) (LWOP mandatory only where there was a sexual motivation for the aggravated murder) Ohio. Rev. Code Ann. § 2971.03 (LexisNexis 2005) (mandatory LWOP for sexually violent offender with predator specification).

Oklahoma Okla. Stat. tit. 21 § 701.9 (West Supp. 2006) (LWOP or life sentence discretionary for juvenile convicted of first degree murder).

Rhode Island R.I. Gen. Laws § 12-19.2-4 (LexisNexis 2002) (LWOP sentence discretionary).

South Carolina (unless prior convictions for enumerated crimes) S.C. Code Ann. § 17-25-45 (2005) (except in cases that impose the death penalty when convicted of a serious offense as defined in statute a person must be sentenced to a term of imprisonment for life without the possibility of parole only if person has *prior convictions* for enumerated crimes; otherwise there is discretion between LWOP and life with possibility of parole).

Tennessee Tenn. Code Ann. §§ 39-13-202 204 (2003) (sentence for first degree murder discretionary as to death imprisonment for life without possibility of parole).

Utah Utah Code Ann. §76-3-206 (LexisNexis 2003) (LWOP discretionary).

Vermont Vt. Stat. Ann. tit. 13 § 2303 (2003) (life imprisonment discretionary for first degree murder) (section 2303 was held unconstitutional on other grounds - however the Vermont House retained discretionary LWOP see H. B. 874 2005 Leg. Adjourned Sess. 2005-2006 (Vt. 2006)) see also State v. White 172 Vt. 493 787 A.2d 1187 (Vt. 2001) (court has discretion to impose LWOP).

West Virginia W. Va. Code § 49-5-13(e) (Michie Supp. 2005) (notwithstanding any other part of code court may sentence a child tried and convicted as adult as a juvenile) W. Va. Code § 61-2-2 (Michie Supp. 2005) (mandatory LWOP for first degree murder).

Wisconsin Wis. Stat. Ann. § 973.014 (West 1998) (LWOP discretionary not minimum for first degree murder).

Wyoming Wyo. Stat. Ann. § 6-2-101 (LexisNexis 2005) (LWOP or life for first degree murder).

APPENDIX D

States where LWOP sentences are mandatory for juveniles upon conviction as adults for enumerated crimes including murder.

Alabama (for capital offenses or with prior convictions for enumerated serious crimes) Ala. Code § 13A-5-39 (2007) (capital offenses are punishable by sentence of death or life imprisonment) Ala. Code § 13A-5-40 (2007) (defining elements of a capital offense) Ala. Code §§ 13A-5-46 13A-5-48 (2007) (explaining that aggravating and mitigating factors only affect whether the sentence is death or life imprisonment without parole; imposition of either the death penalty or LWOP is mandatory for a defendant convicted of a capital offense) Ala. Code §§ 13A-5-6 13A-5-9 (West 2005) (LWOP available for various serious habitual offenders).

Arkansas Ark. Code Ann. § 5-4-104 (2006) (mandatory LWOP or death for capital murder or treason).

Colorado Colo. Rev. Stat. § 18-1.3-1201(1)(a)-(b) (LexisNexis 2006) (LWOP mandatory for juveniles for class one felonies).

Connecticut Conn. Gen. Stat. § 53a-35a (West 2001) (mandatory sentence of LWOP or death for capital murder).

Delaware Del. Code Ann. tit. 11 § 4209 (2005) (mandatory LWOP for "any person" convicted of first degree murder).

Florida Fla. Stat. §§ 775.082 985.225 (2005) (mandatory LWOP for juvenile convicted of murder).

Georgia (only if prior convictions for enumerated serious crimes) Ga. Code. Ann. § 17-10-6.1(a)(2) and 17-10-7(b)(1 & 2) (mandatory LWOP for certain

recidivist offenders).

Hawaii Haw. Rev. Stat. §§ 706-656 706-657 (LexisNexis 2003) (mandatory LWOP for first degree murder first degree attempted murder and especially "heinous" second degree murder but "[a]s part of such sentence the court shall order the director of public safety and the Hawaii paroling authority to prepare an application for the governor to commute the sentence to life imprisonment with parole at the end of twenty years of imprisonment").

Iowa Iowa Code § 902.1 (West 2003) (LWOP sentences are mandatory upon conviction for "Class A Felony") Iowa Code § 902.2 (West 2003) (LWOP prisoner allowed to apply for commutation at least every 10 years and director of Iowa department of corrections may make a request for commutation to governor at any time).

Louisiana La. Child. Code Ann. art. 305 (West 2004) (any juvenile 15 years old or older charged with first-degree murder second-degree murder aggravated rape or aggravated kidnapping must be tried as an adult) La. Crim. Code. Ann. art. 14:30 (mandatory LWOP for first degree murder) La. Crim. Code. Ann. art. 14:30.1 (mandatory LWOP for second degree murder).

Massachusetts Mass. Gen. Laws Ann. ch. 265 § 2 (West 2000) (LWOP is mandatory upon murder conviction of juvenile).

Michigan Mich. Comp. Laws Ann § 750.316 (West 2004) (mandatory LWOP for first degree murder) and People v. Snider 239 Mich.App. 393 608 N.W.2d 502 (Mich. Ct. App. 1999) (life sentence means LWOP).

Minnesota Minn. Stat. § 609.106 (West Supp. 2005) (mandatory LWOP for enumerated "heinous" crimes including first degree murder).

Missouri Mo. Rev. Stat. § 565.020 (2005) (mandatory LWOP for first degree murder for juveniles).

Montana (only if prior convictions for enumerated serious crimes) Mont. Code Ann. § 46-18-219 (2005) (a sentence of life without parole must be given if the defendant has been *previously convicted* of one of the following: deliberate homicide aggravated kidnapping sexual intercourse without consent sexual abuse of children or ritual abuse of a minor) Mont. Code Ann. § 45-5-102 (2005) (LWOP life term of years discretionary sentence for deliberate homicide).

Nebraska Neb. Rev. Stat. § 29-2204(3) (2007) (mandatory life sentences when "required by law" otherwise individuals under 18 at the time they committed a crime may receive discretionary adult or juvenile sentence).

New Hampshire N.H. Rev. Stat. § 630:1-a (LexisNexis 1996) (mandatory LWOP for any juvenile convicted of murder).

New Jersey N.J. Stat. Ann. § 2C:11-3 (West 2005) (b) & (g) (specifically limiting LWOP for juveniles to mandatory LWOP for murder of police officer killing a child under age 14 or murder in the course of a sexual assault or criminal sexual contact).

North Carolina N.C. Gen. Stat. § 14-17 (2003) (providing for mandatory LWOP sentence for anyone 17 or under who committed a murder in the first degree).

Ohio (only if sexual motivation in crime) Ohio. Rev. Code Ann. § 2929.03C(2)(a)(I) -D(2)(b) -D(3)(b) (LexisNexis 2005) (LWOP mandatory only where there was a sexual motivation for the aggravated murder) Ohio. Rev. Code Ann. § 2971.03 (LexisNexis 2005) (mandatory LWOP for sexually violent offender with predator specification).

Pennsylvania 18 Pa.C.S.A. § 1102 (West 1998 & Supp. 2005) (mandatory minimum punishment for murder is life imprisonment) 61 Pa.C.S.A. § 331.21 (West 1999 & Supp. 2005) (no parole until minimum term of sentence served i.e. life means LWOP).

South Carolina (only if prior convictions for enumerated serious crimes) S.C. Code Ann. § 17-25-45 (2005) (except in cases that impose the death penalty when convicted of a serious offense as defined in statute a person must be sentenced to a term of imprisonment for life without the possibility of parole *only if that person has prior convictions* for enumerated crimes).

South Dakota S.D. Codified Laws § 22-6-1 (West 2004) (life imprisonment is mandatory minimum for juvenile convicted of class A felony) S.D. Codified Laws § 24-15-4 (West 2004) (life imprisonment means LWOP).

Texas Tex. Penal Code §8.07 (Vernon 2005 & Supp. 2007) (capital felony is exception to the age limit of 15 for being tried as an adult) Tex. Penal Code § 12.31 (sentence of life imprisonment without parole is mandatory when state does not seek the death penalty in capital felony cases).

Virginia Va. Code Ann. § 18.2-10 (2005) Lenz v. Warden of Sussex I State Prison 267 Va. 318 593 S.E.2d 292 (Va. 2004) (life imprisonment means LWOP).

Washington Wash. Rev. Code Ann. § 10.95.030 (West 2005) (mandatory death or LWOP for aggravated murder in first degree).

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this motion on this the ____
day of January, 2008 to:

Mr. Dennis P. McManus
Clerk, Superior Court
Courthouse
225 Main St.
Worcester, MA 01608

Eduardo Velazquez
Office of the District Attorney
Courthouse
225 Main St.
Worcester, MA 01608

Kenneth J. King
Counsel for Patrick Powell
Suffolk University Law School
Juvenile Justice Center
45 Bromfield St., 7th Floor
Boston, MA 02108