STATE OF FLORIDA
FOURTH DISTRICT COURT OF APPEAL

Case No. 4D01-1306

STATE OF FLORIDA,
Appellee

v.

LIONEL TATE,
Appellant

Review of a Decision of the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Case Number 99-14401CF10A, Honorable Joel T. Lazarus Presiding

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Brief of Center on Children & the Law; Center on Juvenile & Criminal Justice; Children & Family Justice Center; Juvenile Justice Project of Louisiana; Juvenile Law Clinic of the District of Columbia School of Law; National Mental Health Association; The Sentencing Project; Youth Law Center; Law Professor Robert E. Shepard, Jr; and Psychology Professor Laurence Steinberg as *AMICI CURIAE* IN SUPPORT OF LIONEL TATE, APPELLANT

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INTEREST OF *AMICI CURIAE*[1]

Amici are organizations and individuals from around the country who have promoted the rights and needs of youth involved in systems that serve adolescents in the United States. *Amici* believe that juvenile justice policy and practice, including state laws on transfer, should be aligned with modern understandings of adolescent development as well as governed by time-honored constitutional principles of fundamental fairness. *Amici* are dismayed by Lionel Tate's case, which applied principles of adult criminal law in a context in which they are so clearly inapplicable. The result was a miscarriage of justice that should be rectified on appeal.

SUMMARY OF ARGUMENT

The ruling below must be reversed because it both failed to properly consider Lionel's age and developmental stage as well as violated federal and state constitutional guarantees of due process, equal protection, separation of powers and the ban on cruel and unusual punishment.

At common law, there is a rebuttable presumption that

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[1] *Amici* file this brief with the consent of all parties. Letters of consent have been lodged with the Clerk of Court. A brief description of each of the organizations and individuals listed on the cover appears in the Appendix. *Amici* also acknowledge the valuable contributions of Northwestern University law student Stephanie E. Sawyer, who researched and drafted portions of the argument herein.

children between ages seven and 14 lack criminal capacity. Lionel should have had the opportunity to address the infancy defense-- which is still viable in Florida in criminal court-- as required by due process. Similarly, the trial judge erred in failing to address, sua sponte, the issue of Lionel's competence to stand trial. There is every reason to believe that Lionel was not competent to direct his defense, to waive his right to avoid self-incrimination, or to determine whether he should enter a plea.

The Florida transfer scheme violates due process because it fails to afford juveniles a hearing prior to the state attorney divesting the juvenile court of jurisdiction by seeking a grand jury indictment. Equal Protection is violated by the statute's failure to distinguish between juveniles charged with crimes punishable by death or life imprisonment for the purposes of juvenile or criminal court jurisdiction; provides no criteria to guide prosecutorial discretion in these cases; and denies these juveniles the opportunity to be sentenced as juveniles upon conviction. The statutory scheme also violates principles of separation of powers, by effectively allowing the state attorney to define the jurisdiction of the juvenile court. Finally, a sentence of life without parole for a 12-year-old violates cruel and unusual punishment.

ARGUMENT

I. INTRODUCTION

> A grown man with a history of abusing his wife beats another man to death at an ice hockey rink, is convicted of manslaughter, and sentenced to six years in prison in a recent celebrated trial in Massachusetts. In an equally prominent Florida case, a 12-year-old boy kills a 6-year-old. Although no one claimed that the boy intended to commit murder, he is tried as an adult and sentenced to life in prison without parole.

Like many tragedies, this case has the potential to set precedents that will serve public policy well or badly. It is tragic first because a child is dead. *Amici*, many of whom work with children, grieve first for Tiffany Eunick. We write, however, because another child's life is also at stake. We believe that the result in this case was unjust because the state failed to recognize that a 12-year-old boy-- in a transitional, developmental stage of life-- is not the same as a fully grown man.

The heart-rending death of Tiffany Eunick should not deter us from hard-headed thinking about the role of punishment and the appropriate balance of retribution, deterrence and rehabilitation in the life of a boy who was 12 at the time of the crime.

A system that ignores the laws of adolescent development is bound to be unfair. Indeed, in this case the system stumbled because it sought to sidestep an American tradition of shaping

justice to fit the blameworthiness and competence of young defendants. *Amici* share a dismay with a system that applied principles of adult criminal law in a context in which they are so clearly inapplicable. This is more than bad policy. It is bad law.

This case offers numerous examples where the state applied the law incorrectly to a 12-year-old defendant.[2] This Court should reverse because the trial court misapplied law that is clear. *Amici* also urge the Court to take the opportunity to interpret gray areas in Florida's statutory scheme. In doing so, the Court should not only resolve those ambiguities in favor of Lionel, as it is required to do consistent with traditional principles of statutory construction, *Wallace v. State*, 724 So. 2d 1176 (Fla. 1998), but it should also render a decision that conforms to the laws of nature, thereby returning common sense and fairness to a system that in Lionel Tate's case lurched out

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[2] Indeed, this case provides a hornbook's worth of instruction on how criminal courts must grapple with issues of adolescent development. Here there were many: at the voir dire potential jurors appear to have been excluded if they believed that Lionel's age was a factor in the case. In his instructions to the jury, the trial judge's only mention of the relevance of age was as it relates to intent. The admissibility of a confession by 12-year-old Lionel was surely at issue, as was his competence to participate as a trial defendant. Lionel's developmental immaturity was the elephant in the courtroom, which seemed visible to everyone in the country except those in the courtroom itself.

of control.

Although most states during the 1990s addressed the question of punishment for young children who are charged with serious crimes by making it easier to try children as adults, the issue is unusually important in Florida. "While 45 states have adopted the get-tough philosophy of 'adult time for adult crime,' ... Florida is the leader in direct filing juvenile to adult court." The Florida Bar Commission on the Legal Needs of Children, *Interim Report*, 7 (March 2001).[3] Florida prosecutors in 1999 transferred almost 4,700 youth to criminal court. Justice Policy Institute, *The Florida Experiment: An Analysis of the Impact of Granting Prosecutors Discretion to try Juveniles As Adults*

[3] Although Florida leads the nation in direct files of youth to criminal court, the evidence consistently shows that the juvenile justice system more effectively promotes public safety: youth in the juvenile justice system have a lower rate of recidivism than similar youth in the adult system; when recidivism occurs, youth coming out of the adult system commit more serious offenses. Florida Department of Juvenile Justice, *A DJJ Success Story: Trends in Transfer of Juveniles to Adult Criminal Court* (January 8, 2002). Similarly, on February 15, 2002, the Florida Bar News reported, "Miami-Dade youths tried as adults and given adult sentences are twice as likely to reoffend as similar youth who are sentenced to juvenile justice programs," citing a study by a former University of Miami researcher. While achieving public safety through rehabilitation is only one purpose of punishment, published reports, cited by Judge Lazarus in his opinion of March 9, 2001, suggest that the state believed that public safety *and* justice could be served by having Lionel serve a "sentence" in juvenile court.

(2000).[4]

As noted in fn. 2, public safety is not at issue here. Justice and fairness are. The gross disparity between the sentence Lionel was initially offered by the state and the one he received has shocked the conscience of much of the nation. *Amici* believe that justice can be done to the memory of Tiffany Eunick while recognizing that Lionel Tate should not have been tried as an adult, that he was neither competent nor culpable as an adult, and that he should not have been sentenced as an adult.

II. THE STATE SHOULD HAVE BEEN REQUIRED TO REBUT THE COMMON LAW PRESUMPTION THAT LIONEL, AS A 12-YEAR-OLD, LACKED THE CAPACITY TO COMMIT CRIMES

Under basic principals of due process, Lionel should have had the opportunity to address the infancy defense in criminal court.[5]

At common law, there is a rebuttable presumption that

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[4] In addition, the Florida system of transfer has a disproportionate impact on minority youth. "The most striking feature of Florida's transferred youth population profile is the extent to which minority youth are overrepresented in the ranks of the youth being referred to adult court. One study conducted by the Florida Department of Juvenile Justice found that black youths were 2.3 times more likely than white youth to be transferred in Florida." *Id.* (citations omitted)

[5] Due process requires that a defendant be blameworthy before he can be punished as an adult criminal, and is the basis for the range of defenses, justifications and excuses embodied in law. *See generally* Scott, *Criminal Responsibility in Adolescence*, *infra*.

children between ages 7 and 14 lack criminal capacity. LaFave, *Criminal Law*, 3d Ed., § 4.11(a)(West 2000). In the middle ages, the presumption of incapacity could be rebutted for children older than seven only with proof of malice. By the 17th Century, the age of irrebuttable capacity was established at age 14. *Id.*, citing 1 E. Coke, Institutes on the Laws of England 247b (1642). This rebuttable presumption of incapacity, which has made its way into modern jurisprudence, is known as the infancy defense.

"The criminal law assumes that most offenders make rational autonomous choices to commit crimes . . ." Scott, *The Legal Construction of Adolescence*, 29 Hofstra L. Rev. 547, 590 (2000). Offenders who act out of free will are thus punishable under the criminal law. The infancy defense recognizes that blameworthiness (i.e., culpability) is diminished because children and young adolescents are not rational, autonomous decision-makers. *Id.* The infancy defense is thus one of several excuses or mitigators that has endured in Western jurisprudence because of the notion that retribution-- a key component of punishment- should not be imposed unless the defendant is culpable- that is blameworthy. *See* Packer, *The Limits of the Criminal Sanction* (Stanford 1968).

The infancy defense was very much part of the jurisprudential landscape prior to the creation of the juvenile

court in 1899. The creation of the juvenile court, with its emphasis on rehabilitation rather than punishment, lessened the importance of the infancy defense; indeed, in those instances in which it has been raised in the juvenile court setting through the 20th century, the majority of appellate courts have rejected the infancy defense as incompatible with the juvenile court itself. Bazelon, *Exploding the Superpredator Myth: Why Infancy is the Preadolescent's Best Defense in Juvenile Court*, 75 N.Y.U. L. Rev. 159, 161 (2000).[6]

A 12-year-old like Lionel should surely be able to raise the defense in criminal court, where he faces life without parole, one of the two most serious sentences imposed on adult defendants.[7]

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[6] On the other hand, at least four states– California, Maryland, New Jersey and Washington– permit the infancy defense in juvenile court. *Id.*

[7] *Mens rea*, which the jury found in Lionel's case in order to convict him of aggravated child abuse, is related to but analytically distinct from the infancy defense:

> The *mens rea* inquiry focuses on whether the accused, when assumed capable of complying with the law's command, possessed the specific state of mind required to consider an act blameworthy. Legal responsibility focuses instead on the question of whether the accused's deficiencies of judgment distinguish him from others in society such that we do not expect him to comply with the law. In that sense legal responsibility defenses may be viewed as precluding the unwarranted exercise of criminal jurisdiction over the defendant.

Indeed, the Florida Supreme Court has implied that the defense is viable. Although the Court has refused to permit claims of diminished capacity based on "abnormal" mental conditions, which may be hard to address through competent evidence, *Chestnut v. State*, 538 So. 2d 820 (Fla. 1989), it has permitted defendants to introduce evidence of "commonly understood conditions, such as intoxication or epilepsy." *Bunney v. State*, 603 So. 2d 1270 (Fla. 1992).

> ... [U]nder this analysis, while evidence of diminished capacity is too potentially misleading to be permitted routinely in the guilt phase of criminal trials, evidence of "intoxication, medication, epilepsy, *infancy,* or senility" is not.

Id. at 1273 (emphasis added).

A. Children are fundamentally different from adults

The Florida Supreme Court's recognition of the vitality of

Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. Rev. 503, 537-38 (1984)(footnotes omitted).

Phrased slightly differently,

> ... while a child may have intended to do the particular bad act for which he is charged, thereby satisfying the traditional *mens rea* requirement for criminal liability, in a jurisdiction recognizing the infancy defense, the child would be precluded from criminal responsibility for the intended bad act if he were too immature to fully understand the wrongfulness of the act.

Foren, 18 QLR 733, 736 (1999)(citing Walkover, *supra*).

the infancy defense is consistent with current knowledge of adolescent decision-making: younger adolescents control their behavior differently than adults. Indeed, "the evidence from developmental psychology challenges the account of adolescence offered by the modern punitive reformers who generally do not accept that relevant differences exist between youthful and adult offenders." Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, in Grisso and Schwartz, eds., *Youth on Trial: A Developmental Perspective on Juvenile Justice*, 291, 307 (Chicago 2000)(hereinafter *Youth On Trial*).

Adolescents warrant different treatment than adults because the organic structure of the adolescent brain is different than the adult brain, and because their decision-making processes are different from adults. Recent scientific research has supported the long-standing body of social science detailing the transitional nature of adolescence and the difference between children and adults.[8] Adolescents actually think differently from adults. D. Keating, *Adolescent Thinking, in At the Threshold*, 54-89 (Feldman et al. eds., 1990); Overton, *Competence and*

[8] Recent findings at a National Academy of Sciences workshop concerning adolescent development concluded that "adolescence is a time of physical, cognitive, social, and emotional growth and change." Adolescent Decision Making, Implications for Prevention Programs, Summary (Baruch Fischhoff et al. eds., 1999), *available at* http://stills.nap.edu/readingroom/books/adolescent.

Procedures, in Reasoning, Necessity and Logic, 1-32 (Overton ed. 1990). Recent neurological studies show that the adolescent brain is not fully developed and undergoes major reorganization in the area associated with social behavior and impulse control. *See* National Institute of Mental Health, *Teenage Brain: A Work In Progress*, http://www.nimh.nih.gov/publicat/teenbrain.cfm; McLean Hospital, *Physical Changes in Adolescent Brains May Account for Turbulent Teen Years, McLean Hospital Study Reveals*, http://www.mclean.harvard.edu/PublicAffairs/TurbulentTeens.htm.[9]

Psychological research also shows that adolescents' decision-making ability differs in important ways from adult decision-making. *See* Cauffman and Steinberg, *Researching Adolescent's Judgment and Culpability*, in *Youth on Trial*, 325, 333 (2000).[10] Cauffman and Steinberg note, "on average,

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[9] Numerous news articles describe how recent neurological studies using MRI to compare brains of adolescents to adults suggest a connection between teen behavior and brain development. *See e.g.*, Matt Crenson, *Brain Changes Shed Light on Teen Behavior*, Times-Picayune, Dec. 31, 2000, at A18; Sharon Begley, *Mind Expansion: Inside the Teenage Brain,* Newsweek, May 8, 2000, at 68; Daniel R. Weinberger, Editorial, *Teen Brains Lack Impulse Control*, Seattle Post-Intelligencer, Mar. 13, 2001, at B-4; Paul Thompson, *A Child Is Not A Man*, Newsday, May 23, 2001, at A33; Shankar Vedantam, *Are Teens Just Wired That Way?*, Wash. Post, June 3, 2001, at A-1.

[10] Three psychological factors impact adolescent decision-making: (1) responsibility (i.e., self-reliance, clarity of identity, autonomy); (2) perspective (i.e., ability to comprehend and contextualize a situation's complexity); and (3) temperance (ability to control impulsivity and evaluate situations prior to

adolescents make poorer (more antisocial) decisions than adults because they are more psychosocially immature." *Id.* at 331. Adolescents' inability to fully weigh costs and benefits and process potential consequences makes them less able to render decisions and, thus, to fully form criminal intent. *See* Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 Crim. L. & Criminology 68, 102-103 (1997).

The obviously lower maturity levels of children and adolescents has been repeatedly acknowledged in American jurisprudence. In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the United States Supreme Court discussed how the law has always recognized that adolescents differ intellectually and emotionally from adults, and therefore deserve to be judged and treated differently. The Court noted:

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

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acting). *Id.* at 331; *see also*, Scott and Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 Crim. L. & Criminology 137, 161 (1997). Adolescents score lower on indices of each of these psychological factors than adults. *Id.*

455 U.S. at 115-116 (citations omitted)(recognizing age was a crucial mitigating factor in determining whether the death penalty was appropriate). Similarly, Justice Stevens wrote in *Thompson v. Oklahoma*, 487 U.S. 815 (1988),

> [T]he Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis for this conclusion is too obvious to require extended explanation. Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not entrusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.

455 U.S. at 835. Advances in psychosocial and medical science now provide even greater support for the common sense notion that children and adolescents are fundamentally different from adults.

This common sense notion was recognized expressly by Judge Lazarus in his Sentencing Order when he stated: "Make no mistake: this judge does consider a twelve year-old a boy or girl, regardless of the crime he or she commits." Sentencing Order at 5; *see also*, McMahon, *Letters Support Mercy for Tate: 80% of Writers to Judge Urge Rehabilitation*, Sun Sentinel, Mar. 9, 2001, at 1-B.

B. <u>The infancy defense remains viable in criminal court</u>

Although the infancy defense is reinforced by modern

knowledge of adolescent development, some courts have rejected the defense, finding that states intended to do away with it when they established schemes that try adolescents in criminal court. *See generally* LaFave, *supra*. This Court should reject this analysis.[11]

The Court's decisions in *Chestnut* and *Bunney, supra*, make clear that it has rejected what the court in *McCray v. State* assumed, that is, that the legislature "repealed the infancy defense by implication" merely because it established a scheme for transferring children to adult criminal court.[12] By definition, the infancy defense was available to a child in the adult system; thus, merely sending youth to the adult system doesn't logically eliminate the defense, especially since Florida has such a wide range of transfer mechanisms. (It would be

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[11] Two decisions of this District have addressed this issue. *McCray v. State*, 424 So. 2d 916 (Fla. 4th DCA 1982); *Morris v. Florida*, 456 So. 2d 925 (Fla 4th DCA 1984). *McCray*, however, which involved a defendant who was two months shy of 14, was ambiguous on the way that the defendant's case reached criminal court. For the reasons set forth in the text, this Court should distinguish or reject *McCray*. It is also important to note that unlike the court in *McCray*, Tate's trial court had no discretion to transfer his case to juvenile court, and thus no opportunity to consider the issue of developmental maturity in deciding whether the case should be in juvenile or adult criminal court. *Morris* simply followed *McCray*.

[12] Of course, repeal of the common law by implication is disfavored in any event. *Nolan v. Moore*, 88 So. 601 (Fla. 1921); *State v. Egan*, 287 So. 2d 1 (Fla. 1973). *See also* § 775.01, Fla. Stat.

ironic if the criminal law of the 19th Century provided more protection to a juvenile facing trial on serious criminal charges than is available in the justice system today.)

As noted in Argument IV, *infra*, Florida has a complex statutory scheme for transferring youth to criminal court. In those instances in which the statutory scheme requires the consideration of certain factors before transfer, it is at least arguable that the entity charged with making the transfer decision has considered the capacities of the youth that are related to blameworthiness.[13] However, in Lionel's case, there is no reason to believe that the grand jury ever considered the issue of capacity– i.e., factors relevant to the infancy defense– in making its decision to indict. Indeed, the grand jury's inquiry is limited to determining whether the prosecutor has established probable cause. *State v. Cain*, 381 So. 2d 1361 (Fla. 1980). This Court should hold squarely that the infancy defense is available to youth ages 12 or 13 who are sent to criminal court via a grand jury indictment for a capital crime.[14]

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[13] *See* § 985.225(3)(c), Fla. Stat.

[14] This view is supported by an American Bar Association task force report, *Youth in the Criminal Justice System* (D.C. 2001)(also available at: www.abanet.org/crimjust/pubs/reports/index.html). The ABA task force was comprised of judges, prosecutors, defense attorneys and academics. The task force did not address the issue of *whether* children should be tried as adults. It instead set forth

III. THE TRIAL JUDGE ERRED IN FAILING TO ADDRESS, *SUA SPONTE*, THE ISSUE OF LIONEL'S COMPETENCE TO STAND TRIAL

While the infancy defense addresses whether Lionel was blameworthy at the time of the crime, the issue of *competence* raises the question of his abilities as a trial defendant. There is every reason to believe that Lionel was not competent to direct his defense. Indeed, in a case of a 13-year-old being

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principles to guide adult courts and corrections when youth are before them. On the issue of criminal responsibility, the task force said:

> The common law infancy defense should be available to youth in the criminal court who are below the age of fourteen to allow the issue of criminal responsibility to be addressed by the court. Children under the age of seven should be conclusively presumed to be incapable of criminal responsibility for their acts. Youths between the ages of seven and fourteen are presumed to lack such responsibility, but this presumption can be overcome by the prosecution. A child or youth who successfully pleads the defense of infancy should be discharged from custody and the charges dismissed.[This appears to have been the law since the early part of the Fourteenth Century in the Anglo-American system of criminal justice.]

Id. at 16 (citations omitted). By endorsing the availability of the infancy defense in all criminal court prosecutions, the task force goes farther than *Amici* ask this Court to go. This Court need only find that Lionel Tate, under the circumstances of his transfer by grand jury indictment, should have had the jury consider the infancy defense. Although the American Bar Association task force report is not ABA policy, on February 4, 2002 the ABA House of Delegates adopted a policy that recognizes developmental differences between adolescents and adults, and "urges policymakers at all levels to take the previously mentioned principles [derived from the task force report] into account in developing and implementing policies involving youth under the age of eighteen."

tried in adult criminal court, it is *per se* error for a trial judge to fail to insist on a thorough inquiry into the child's competence to participate as a trial defendant. *See Pate v. Robinson*, 383 U.S. 375 (1966).

In *Pate*, the Court held that even though no hearing on mental capacity had been requested by defense counsel at trial, the defendant was constitutionally entitled to a hearing on the issue, and the trial judge had a duty to raise the issue, when the facts suggested that the defendant was not competent. The Court also noted that this was not an issue that the defendant could waive, since that would present the contradictory proposition that an incompetent defendant could knowingly and voluntarily waive his right to have the court determine his capacity to stand trial. 383 U.S. at 384.

The lower court misapprehended the nature of the competency inquiry when young adolescents are involved, apparently believing (incorrectly) that one can determine whether an adolescent is competent by observing him in court. See *Order on Motion for Competency Hearing*, March 8, 2001. The young defendant's capacities to participate as a trial defendant– that is, whether or not a young adolescent is incompetent to stand trial by virtue of *developmental immaturity*– can only be determined by a forensic psychologist trained in adolescent psychology after a thorough

examination addressed specifically to the elements of competency. *See* Grisso, *Forensic Evaluation of Juveniles* (Sarasota 1998). *See* also, Schwartz and Rosado, eds., *Evaluating Youth Competence in the Justice System* (2000), module 6 of American Bar Association Juvenile Justice Center, et al., *Understanding Adolescents: A Juvenile Court Training Curriculum* (2000)(available on the Internet at www.abanet.org/crimjust/juvjus/macarthur.html).

The minimum legal requirements for adjudicative competence[15] were established in *Dusky v. United States,* 362 U.S. 402 (1960). These are "whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding– and whether he has a rational as well as factual understanding of the proceeding against him." Experts have broken *Dusky* into *capacities* of the defendant that can be measured: these include 1) understanding, 2) appreciation, 3) reasoning, and 4) choice. *See* Bonnie and Grisso, fn. 15, *supra.*

Whether there should be a *per se* rule regarding whether youth under 14 are competent to stand trial is a legislative

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[15] "Adjudicative competence" is a term created by Prof. Richard Bonnie of University of Virginia Law School to refer to the range of skills required by *Dusky* as well as the *decisional* skills that a defendant will perforce be required to make "as the process of criminal adjudication unfolds." Bonnie and Grisso, *Adjudicative Competence and Youthful Offenders*, 77, in *Youth on Trial.*

matter. This Court, however, can declare that fundamental fairness requires that competence be addressed on a case by case basis through a thorough psychological evaluation in every adult criminal prosecution of a young adolescent.[16]

While there are gray areas for older adolescents who will not differ cognitively from adults, there is overwhelming support for presuming that 12 or 13-year-olds lack the developmental capacities necessary for adjudicative competence. It was for that reason that the ABA Task Force on Youth in the Criminal Justice System, following the advice of developmental psychologists, recommended:

> For any youth fourteen years of age or younger ... the court should order an evaluation of the youth's competency to stand trial or waive any rights. The evaluation should be conducted by a psychiatrist or clinical psychologist who is specifically qualified by training and experience in the evaluation of children and adolescents. This evaluation should assess the capacity of the youth: (1) to understand the proceedings, (2) to assist defense counsel, and (3) to make a meaningful decision about the waiver of substantial rights.

Youth in the Criminal Justice System, *supra*, at 15 (footnotes omitted).[17]

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[16] This is necessary to preserve the integrity of the criminal process, to reduce the risk of erroneous convictions, and to protect the defendant's decision-making autonomy. See Bonnie and Grisso, *supra*.

[17] The issue of competency to waive rights arose as well in two other important contexts. It was an issue with respect to

IV. THE FLORIDA TRANSFER SCHEME VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. Lionel was denied due process of law when the state transferred him from the jurisdiction of the juvenile court to the criminal court

Florida's statutory scheme provides in pertinent part that a child of any age who is charged with an offense punishable by death or life imprisonment is eligible to be tried as a juvenile unless and until a grand jury returns an indictment on that

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Lionel's third confession, which was admitted into evidence. While Lionel was "evaluated" by psychologists, it is unclear from the lower court opinion whether they used instruments designed to illuminate the issue of voluntariness. It is unclear also whether the psychologists were experts on adolescent development. The issue is whether Lionel was competent at the time of the statements to waive his constitutional rights. This Court has an opportunity to provide guidance to lower courts regarding the kind of assessment required to determine the "totality of circumstances" of a 12-year-old's statement. See generally, Feld, *Juvenile's Waiver of Legal Rights: Confession,* Miranda, *and the Right to Counsel* (2000) in *Youth on Trial.* See also Grisso, *Forensic Evaluation of Juveniles*, supra, at 37 ff. (Chapter 2: "Juveniles' Waiver of *Miranda* Rights"); *Evaluating Youth Competence in the Justice System*, supra, at 8.

Lionel's competency was also at issue in the apparent decision of his mother or attorney to decline a plea bargain that would have kept him in juvenile court. However, a decision to enter a plea is uniquely a defendant's; it cannot be made by counsel. *ABA Standards for Criminal Justice: Prosecution Function and Defense Function,* stds. 4- 6.2(b)(3d ed.1993). A guilty plea, like other waivers of constitutional rights "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States,* 397 U.S. 742 (1970). Given Florida's complex transfer scheme, analyzed in Argument IV, *infra*, it is highly unlikely that Lionel was competent to understand and reject the plea offer.

charge. § 985.225(1), Fla. Stat.[18] Pursuant to § 985.225(1), Fla.Stat., once the grand jury issued its indictment, the juvenile court was required to dismiss the delinquency petition and Lionel "was to be tried and handled in every way as an adult."

Lionel was denied the opportunity to be tried as a juvenile– an opportunity plainly accorded him by the legislature– without any type of hearing and without the assistance of counsel. Because the Florida statute that authorized Lionel's transfer does not provide for such a hearing, the statute violates the Due Process Clauses of the Fourteenth Amendment to the U.S. Constitution as well as Article I, Section 9 of the Florida Constitution.

It is undisputed that the legislature has the authority to determine whether certain youths shall come under the jurisdiction of the juvenile court as opposed to the criminal court. *See Johnson v. State*, 314 So. 2d 573, 576-77 (Fla. 1975). However, once the legislature vests the juvenile court with jurisdiction of a youth, the U.S. Constitution mandates that the youth must be accorded due process of law in any attempt to transfer the youth to the jurisdiction of the adult criminal

[18] Because Lionel was 12 years old at the time of the alleged offense, he was plainly within the jurisdiction of the juvenile court. §§ 985.03(6), 985.219(8), 985.225, Fla. Stat. (2001).

court. *Kent v. U.S.*, 383 U.S. 541, 554 (1966).[19] As the Court held in *Kent*, "there is no place in our system of law for reaching a result [waiver of juvenile court jurisdiction over a youth] of such tremendous consequences without ceremony– without hearing, without effective assistance of counsel, without a statement of reasons." *Id.* at 554. Statutory schemes that divest the juvenile court of its original jurisdiction over a youth and transfer the youth to criminal court must include procedural safeguards that "satisfy the basic requirements of due process and fairness." *Id.* at 553.

In *State v. Cain*, 381 So. 2d 1361, 1366-67 (Fla. 1980), the Supreme Court held that a now-superseded statute that vested a prosecutor, rather than a judge, with the discretion to prosecute a juvenile as an adult did not violate due process for failing to provide the juvenile with a hearing. However, for purposes of the

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[19] The Court's holding in *Kent*– that a juvenile is entitled to a waiver hearing where he is represented by counsel and given the opportunity to confront the evidence against him before being transferred from the juvenile court's jurisdiction to that of the adult criminal court– was reached by reading the District of Columbia's waiver statute "in the context of constitutional principles relating to due process and the assistance of counsel." *Kent*, 383 U.S. at 557. The Court's subsequent holding in *In re Gault* confirmed that *Kent*'s holding had constitutional ramifications that extended beyond the interpretation of the waiver statute in question. *In re Gault*, 387 U.S. 1, 12 (noting that "[a]lthough our decision [in *Kent*] turned upon the language of the statute, we emphasized the necessity that `the basic requirements of due process and fairness' be satisfied")(citing *Kent*, 383 U.S. at 553).

due process analysis, the statute challenged in *Cain* differs from the statute at issue here in at least two key respects.

First, the statute in *Cain* did not vest original jurisdiction of the defendant in the juvenile court, *id*. at 1363, citing § 39.04(2)(e)(4), Fla. Stat. (Supp. 1978), whereas § 985.225(1), Fla. Stat. clearly does vest original jurisdiction in juvenile court. The *Cain* court cited a number of cases from other jurisdictions in support of its holding that *Kent* does not mandate a hearing when the statute vests the decision to prosecute a juvenile as an adult in the prosecutor rather than a judge. 381 So. 2d at 1366-65. However, like the statutory provision at issue in *Cain*, most of the statutes at issue in the relied-on cases did *not* vest original jurisdiction of the youth in the juvenile court. *See Russell v. Parratt*, 543 F.2d 1214, 1215 and n. 3 (8th Cir. 1976) (citing Neb. Rev. Stat. § 43-202.01 to 202.02 (Supp. 1974)); *United States v. Quinones*, 516 F.2d 1309, 1311 (1st Cir. 1975) (citing 18 U.S.C. § 5032 (1970)); *Cox v. United States*, 473 F.2d 334, 335 (4th Cir. 1973) (citing 18 U.S.C. § 5032 (1970)); *Myers v. Dist. Ct.*, 518 P.2d 836, 837 (citing Colo. Rev. Stat. § 22--1--4(4)(b)(iii) (1963)); *Nebraska v. Grayer*, 215 N.W.2d 859, 860-61 (Neb. 1974).[20] *Kent* instructs

[20] The remainder of the cases from other jurisdictions relied on in *Cain* do not support the court's holding that a hearing was not required because the statutes at issue either provided that the

that once a legislature has vested the juvenile court with jurisdiction of a youth, any subsequent attempt to transfer jurisdiction to the adult court is a constitutional moment requiring the procedural safeguards of a hearing and representation by counsel.

The statute in *Cain* differs from the statute that Lionel challenges in a second critical respect. The *Cain* defendants argued that the statute violated due process because, *inter alia*, it was an implied conclusive statutory presumption that juveniles charged as adults are unfit for rehabilitation. *Cain*, 381 So. 2d at 1366. The Court found that the now-superseded statute comported with due process because, after transfer and upon conviction, the criminal court was required to hold a disposition hearing to determine whether to impose juvenile or adult sanctions, after considering criteria which substantially mirrored the then-existing criteria for waiving juvenile court

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court would make the transfer decision, *Stokes v. Fair*, 581 F.2d 287, 290 (1st Cir. 1978) (citing Mass. Gen. L. ch. 119, § 61) (1978)); *Illinois v. Sprinkle*, 307 N.E.2d 161, 162 (Ill. 1974) (citing Ill. Rev. Stat. ch. 37, paras. 702--2, 702--7, and 702--8 (1967)), or *a priori* excluded juveniles accused of certain offenses from the jurisdicion of the juvenile court. *United States v. Bland,* 472 F.2d 1329, 1330-31 (D.C. Cir. 1973) (citing 16 D.C. Code § 2301(3)(A) (Supp. IV, 1971)); *Jackson v. Mississippi,* 311 So. 2d 658, 660-61(citing Miss. Code Ann. § 43-21-31 (1972)); *Kansas v. Sherk*, 538 P.2d 1399, 1402 (Kan. 1975) (citing Kan. Stat. Ann. § 21-3611(1)(f) and (3) (1973); *New York v. Drayton,* 350 N.E.2d 377, 378 (N.Y. 1976) (citing N.Y. Law § 720.20 (Consol. 1976)).

jurisdiction in the first place. *Id.* at 1367. The court added that "[u]nlike the statutory scheme faced by the juvenile defendant in *Kent*, here the waiver decision does not automatically expose the juvenile to such disparate maximum dispositions as the death sentence versus five years detention as a juvenile." *Id.*

In the instant case, in contrast to *Cain* and like *Kent*, the waiver statute automatically exposed Lionel to life imprisonment and gave the criminal court no discretion to sentence him as a juvenile. Section 985.225(3) provides in pertinent part that if the youth is found to have committed the offense punishable by life imprisonment, the youth *shall* be sentenced as an adult. (emphasis added) *Cain* instructs that the transfer statute here violates due process because it denied Lionel a hearing on the issue of whether he should be sanctioned as a juvenile or an adult, and gave the criminal court no discretion to impose a juvenile disposition.[21] Indeed, of the states that currently have

[21] *See e.g., Cox v. United States*, 473 F. 2d 334 (4th Cir. 1973),*cert. denied*, 414 U.S. 869 (1973)(upholding prosecutorial discretion under Federal Youth Corrections Act in face of due process challenge, noting in part availability of juvenile sanctions upon conviction). To the extent the court's reasoning in *Cain* undermines its earlier holding in *Johnson v. Florida*, 314 So. 2d 573, 576-77 (Fla. 1975), in which the court upheld the predecessor to the statute at issue in the instant case, *Amici* ask that the Court overrule *Johnson* to that extent. *Amici* also note however that the due process analysis applied in *Johnson* is different than that urged by *Amici* here.

direct file provisions leaving it to the prosecutor to determine whether to initiate a case in juvenile or criminal court, most also have statutory provisions that either allow the juvenile to seek a "reverse waiver" from the criminal court to the juvenile court,[22] or give the criminal court discretion to impose juvenile sanctions or some type of blended sentencing.[23]

For these reasons, the transfer statute that divested the juvenile court of jurisdiction over Lionel violates due process and, therefore, this court must reverse his conviction.[24]

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[22] *See* Patrick Griffin et al., Office of Juvenile Justice and Deliquency Prevention, *Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions* 2 (1998). *See also* Ark. Code Ann. § 9-27-318(e)-(g) (2001; Neb. Rev. Stat. § 43-261 (2001); Wyo. Stat. §§ 14-6-203 and 14-6-237(g) (2001).

[23] *See* Ariz. Rev. Stat. Ann. §§ 13-501(E) and 13-921 (2001); Ga. Code Ann. § 15-11-28(b)(2)(B) (2001); Mass. Gen. L. Ann. Ch. 119, §§ 52 and 58 (2001), or both. *See* Mont. Code Ann. § 41-5-206(3) and (6) (2001); Okl. Stat. tit. 10, §§ 7306-2.2, 2.5, 2.6, and 2.8 (2001).

[24] Cf. *McKnight v. Florida*, 727 So. 2d 314 (Fla. 3d DCA 1999), *aff'd*, 769 So. 2d 1039 (Fla. 1999). In *McKnight*, the defendant challenged her sentence, which was imposed under the state's Prison Releasee Reoffender Punishment Act, § 775.082(8), Fla. Stat. The statute provides in pertinent part that the state's attorney may seek enhanced sentencing at the sentencing hearing by presenting evidence that the defendant is a prison releasee reoffender. § 775.082(8)(a)(2), Fla. Stat.; *McKnight*, 727 So. 2d at 315-16 (noting that the sentencing provisions of § 775.082(8)(a) are mandatory on the court). The *McKnight* defendant challenged the statute on the grounds that, *inter alia*, it violated due process under both the U.S. and Florida Constitutions because it excluded the court from the sentencing process and denied the defendant a meaningful opportunity to be heard. *McKnight*, 727 So. 2d at 315. The Florida Supreme Court

B. Section 985.225 violates the Equal Protection Clause of the Fourteenth Amendment and Article I, Section 2 of the Florida Constitution[25]

The Equal Protection Clause of the Fourteenth Amendment "commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985)(citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

While this commitment to treating alike similarly situated persons is not absolute– the Fourteenth Amendment's "promise that no person shall be denied the equal protection of the laws must

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upheld the district court of appeal's holding that the statute in question comported with due process, based on its finding that (1) the decision to sentence the defendant under the statute remained within the discretion of the judge; and (2) the defendant had the right to a hearing where she was represented by counsel who could confront and rebut the evidence presented against her and present evidence of her own. *Id.*

[25] SECTION 2. Basic rights.

All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability.

co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons," *Romer v. Evans*, 517 U.S. 620, 631 (1996)– it is the bedrock principle against which § 985.225, and the companion transfer provisions of the Florida statute, §§ 985.226 and 985.227, must be measured. Generally, a governmental policy "is presumed to be valid and will be sustained if the classification drawn by the statute [or policy] is rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440. *See also Duncan v. Moore*, 754 So. 2d 708, 712(Fla. 2000)

Section 985.225 violates the Equal Protection clause in two distinct ways. First, it establishes two identical classes of juveniles charged with crimes punishable by death or life imprisonment, and allows one class to be prosecuted as juveniles and the other to be prosecuted as adults– with no statutory criteria to distinguish between the two. Indeed, Section 985.225 is the only provision of Florida's complex transfer scheme that neither provides criteria for transfer, nor requires the development of criteria by state attorneys.

Second, whereas juveniles 13 and under indicted for murder pursuant to § 985.225 *must be sentenced as adults upon conviction*, most juveniles 14 and older who are prosecuted as adults for murder or other crimes punishable by life imprisonment pursuant to

either §§ 985.226 or 985.227 are eligible for sentencing either as a juvenile or as an adult.

1. § 985.225 creates two identical classes of juveniles and treats them differently, with no criteria to guide the selection process

Florida has created a scheme that treats one class of juveniles charged with crime– specifically, juveniles charged with crimes punishable by death or life imprisonment– differently from an identical class of juveniles charged with the exact same crime. By its terms, § 985.225 allows prosecutors to prosecute some members of this group as juveniles, and other group members to be prosecuted as adults– with drastically different consequences.

Even measured against rational basis, the lowest level of scrutiny, this statutory scheme is unconstitutional. On its face, the statute draws no distinction between those juvenile offenders who will remain as juveniles, and those whom the state attorney may elect to prosecute as adults. In both cases, the offenders are under 18, and charged with crimes punishable by death or life imprisonment. The statute offers no characteristics to distinguish the "adult" offenders from the juvenile offenders, and provides no criteria to guide state attorneys in making their selection. Moreover, once the decision is made to prosecute some of these young offenders as adults, the differences in treatment are dramatic. Whereas the offender who remains in juvenile court

will, *inter alia*, have the benefit of a juvenile dispositional scheme that limits juvenile court jurisdiction to age 21, the youth tried in adult court, depending on his age, will face a sentence of death or life imprisonment.

Nor can this scheme be considered rationally related to a legitimate state objective. While the state certainly has a legitimate interest in protecting its citizens from violent crimes committed by youthful offenders, the legitimacy of that goal cannot justify an arbitrary means. *Cleburne*, 473 U.S. at 446-447; *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9 (Fla. 1974). The statute not only does not require that prosecutors have *sound* reasons for selecting certain juveniles for adult prosecution, it does not require that prosecutors have *any* reasons for making their selection. In the absence of any guidelines or criteria to steer prosecutorial discretion, the statute allows arbitrariness without any check to review or insure evenhanded decision making. The potential for a prosecutor bending to public pressure or to prejudice, bias and stereotyping, is too great. While the legislature may itself designate which violent juvenile offenders are to be singled out for adult prosecution, the Equal Protection Clause bars it from creating a statutory scheme which permits the state attorney to make such choices arbitrarily. *See State v. Mohi*, 901 P. 2d 991 (Utah 1995)(statute allowing prosecutor sole

discretion to decide which juveniles charged with certain serious felonies were to be tried as juveniles or adults violated state constitution's "uniform operation of laws" clause). *See also Bush v. Gore*, 531 U.S. 98, 105-06 (2000)(in holding the vote recount mechanism adopted in aftermath of Florida's presidential vote did not satisfy the "requirement for non-arbitrary treatment of voters" required by the Equal Protection Clause, the Court noted "[t]he problem inheres in the absence of specific standards to ensure its equal application.")

The absence of guidelines in Section 985.225 also stands in stark contrast to Florida's two other transfer provisions, §§ 985.226 and 985.227, which set forth detailed procedures which must be followed before transfer to adult court.

Section 985.226, providing for either discretionary or mandatory waiver of certain juveniles 14 years of age or older to criminal court, establishes detailed criteria and guidelines to be followed before such waiver may take place, as well as designates specific offenses for which waiver may be considered. Whether the motion for waiver is mandatory or discretionary, the court must hold a hearing on the request for transfer, § 985.226(3), at which the court must consider eight listed criteria in making its decision. *Id.* These criteria include, *inter alia*, the seriousness of the offense, the circumstances under which the

offense was committed, the sophistication and maturity of the child and the record and previous history of the child. The decision of the court must be in writing, and must reflect consideration of all eight listed criteria. *Id.*

Similarly, § 985.227, providing for discretionary and mandatory direct file of certain juveniles over the age of 14 in criminal court, also provides more detailed procedures. In addition to listing specific crimes for which discretionary or mandatory direct file is applicable, the statute requires that the state attorney exercise such discretion only when the "public interest requires that adult sanctions be considered or imposed." §985.227(1)(a).[26] More importantly, in all instances of direct file, the statute directs each state attorney to develop written policies and guidelines to govern direct filing decisions, which shall be submitted to various state officials for review on a yearly basis. § 985.227(4), Fla. Stat.

All three transfer provisions cited above provide for the transfer to adult court of juveniles charged with murder and other crimes punishable by life imprisonment.[27] Yet only in those cases

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[26] With respect to certain juveniles subject to mandatory direct file under this section, the state attorney may elect not to prosecute the juvenile as an adult if he or she has "good cause" to believe the child should remain in juvenile court.

[27] Among the designated felonies in each provision are §§ 794.011 (sexual battery), 787.01 (kidnaping), 810.02 burglary), 812.13

of juveniles charged with first degree murder, punishable by death (as well as life imprisonment), may the state attorney make a purely discretionary and unreviewable decision as to which juveniles shall remain eligible for handling in juvenile court. Again, this disparate treatment of certain juveniles fails even rational basis scrutiny. The legislature's adoption of a random selection process only in the case of juveniles to be indicted by a grand jury is arbitrary.[28] Moreover, the fact that only juveniles charged with first degree murder are subject to this random selection process does not mitigate the equal protection violation, but exacerbates it. Allowing the state attorney to randomly select for adult prosecution only those youthful offenders subject to the most severe adult sanctions cannot be squared with the legislature's requirement of criteria and guidelines in §§ 985.226, 985.227, where the court remains free, in most cases, to impose juvenile, rather than adult, sanctions.

2. The disparate sentencing scheme authorized by Florida's transfer laws violates the Equal Protection Clause

As noted above, § 985.225 provides that juveniles transferred

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(robbery).

[28] *See, e.g. Fronton Inc. V. Florida State Racing Com'n*, 82 So. 2d 520, 523 (Fla. 1955) (classification must rest on some difference which bears reasonable and just relationship with respect to which classification made and can never be made arbitrarily and without any basis).

to adult court following a grand jury indictment must be sentenced as adults. In Lionel's case, the court was required to sentence him to life imprisonment without parole upon conviction. By contrast, juveniles charged with murder and other crimes punishable by life imprisonment who are transferred to adult court pursuant to the waiver provisions of § 985.226 remain eligible for juvenile sanctions, § 985.226(4)(a), and juveniles who are direct filed into criminal court pursuant to § 985.227 likewise remain eligible for juvenile sanctions, with the exception of certain repeat juvenile offenders and certain offenders previously adjudicated for forcible felonies or felonies committed with firearms. § 985.227(2)(d)2, Fla. Stat.

Florida has thus created a patchwork sentencing scheme for youthful offenders that on its face leaves first-time murderers 14 years or older still eligible for juvenile sanctions, while requiring the imposition of adult sanctions for first-time murderers under the age of fourteen. Because both the waiver and direct file provisions plainly include murder within the designated offenses for which juveniles 14 and older may be transferred to adult court, the only statutory provision by which youth younger than 14 who are charged with an offense punishable by life imprisonment may be transferred to adult court is § 985.225– also the only statutory provision which *requires* the

imposition of adult sanctions upon conviction.

No reasonable basis can be imagined for such disparate- and severe- treatment of Florida's youngest and most vulnerable youthful offenders. As noted in Arguments II & III, *supra*, the developmental immaturity, chronological age, and common law presumption of incapacity of this particular group of juveniles dictates more lenient, not harsher, treatment at sentencing. In the absence of any rational basis for singling out this group of youthful offenders for the most punitive sentencing options available under Florida law, this provision must be struck as violative of Lionel's rights under the Equal Protection clause.

V. SECTION 985.225 OF THE FLORIDA STATUTES VIOLATES FLORIDA'S NON-DELEGATION DOCTRINE, AS SET FORTH IN ARTICLE II, SECTION 3 OF THE FLORIDA CONSTITUTION

Article II, Section 3 of the Florida Constitution provides that "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

> The prohibition contained in the second sentence of Article II, section 3 of the Florida Constitution could not be plainer, as our cases have clearly held. This Court has stated repeatedly and without exception that Florida's Constitution absolutely requires a "strict" separation of powers.

B.H. v State, 645 So. 2d 987 (Fla. 1985).

In criminal law, it is well established under separation of

powers principles that the power to define crimes and fix penalties is vested solely in the legislature, subject to applicable constitutional prohibitions; the power to decide whether to bring charges, against whom to bring charges, and what charges to bring is vested in the state attorney as a member of the executive branch, and; after the charging decisions have been made and the proceedings instituted, the process leading to conviction or acquittal and the choice of sentence or other disposition is a judicial function. *See State v. Cotton*, 769 So. 2d 345, 358-359 (Fla. 2000)(Quince, J, dissenting, citing *State v. Benitez*, 395 So. 2d 514 (Fla. 1981)).

In accordance with separation of powers principles, the legislature is prohibited from conferring upon other branches of government authority which the constitution assigns exclusively to the legislature itself. *D.P. v. Florida*, 597 So. 2d. 952, 954 (Fla. 1st DCA 1992). Additionally, the crucial test in determining whether a statute amounts to an unlawful delegation of legislative power is whether the statute contains sufficient standards or guidelines to enable the executive and the courts to determine whether the executive is carrying out the legislative intent. *Dept. Of Insurance v. Southeast Volusia Hosp. Dist.*, 438 So. 2d 815, 819(Fla. 1983), *appeal dismissed*, 466 U.S. 901 (1984). In the criminal context, "[a]t the very least, all challenged

delegations ... must expressly or tacitly rest on a *legislatively determined* fundamental policy; and the delegations also must *expressly* articulate reasonably definite standards of implementation that do not merely grant open-ended authority, but that impose an actual limit... on what the [executive] may do." *B.H. v State*, 645 So. 2d at 994 (emphasis in original). Section 985.225 violates these principles because it unlawfully transfers the legislature's own authority to define the jurisdiction of the juvenile and criminal courts to the executive branch.

The Florida Constitution states that "[t]he legislative power of the state shall be vested in a legislature of the State of Florida." Art. 3, Sec. 1, Fla. Const. This grant of power embraces both "the power to enact laws" and the power "to declare what the law shall be." *Chiles v. Children A-F,* 589 So. 2d 260, 264 (Fla. 1991). Further, "[w]hen authorized by law, [a] child as therein defined may be charged with a violation of law as an act of delinquency instead of a crime ...." Art. 1, Sec. 15(b), Fla. Const.[29]

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[29] The Constitutional provision was adopted in 1950 by a statewide referendum; the Florida Legislature has since 1951 given exclusive jurisdiction over delinquent children under the age of 18 to the juvenile court. 1951 Fla. Laws, Chapter 26880, Section 1. Under current law, "[t]he circuit court has exclusive original jurisdiction of proceedings in which a child is alleged to have committed a delinquent act or violation of law." § 985.201(1), Fla. Stat. (2000).

Unquestionably, the Legislature has the power to define the jurisdiction of the juvenile court as it sees fit, and to expand or contract that jurisdiction accordingly. *Johnson v. State*, 314 So. 2d 573, 576-77 (Fla. 1975) Likewise, the non-delegation doctrine vests the "power to create crimes and punishments ... solely in the democratic process of the legislative branch." *Perkins v. State*, 576 So. 2d. 1310, 1312 (Fla. 1991). Under the separation of powers doctrine, the Legislature may not delegate these decisions to another branch of government, including the state attorney. Yet that is precisely what the legislature has done by enacting § 985.225.

As the statute provides, it is up to the unfettered discretion of the state attorney to decide whether to seek an indictment of a juvenile charged with a crime punishable by death or life imprisonment. If the grand jury returns the indictment, "the petition for delinquency, if any, must be dismissed and the child must be tried and handled in every respect as an adult." §985.225(1), Fla. Stat. The effect of this provision is to delegate to the state attorney the power to decide with finality whether a particular violation of the law by a juvenile will be within the jurisdiction of the juvenile or criminal court– that is, whether the act constitutes a crime or an act of delinquency, and what sentence shall be imposed– with no standards to guide

that decision.

While the doctrine prohibiting delegations of legislative power to the executive does not preclude reasonable delegations of executive power when adequate safeguards are provided to guide the power's use and protect against misuse, *Askew v. Cross Key Waterways*, 372 So. 2d 913, 925 (Fla. 1978); *McKnight v. Florida*, 727 So. 2d 314 (Fla. 1st DCA 1999), *aff'd*, 769 So. 2d 1039 (Fla. 1999), the lack of such guidelines proves fatal to §985.225. *B.H. v. State*, 645 So. 2d at 993-994.[30] In *B.H.*, the Supreme Court declared unconstitutional, under both the non-delegation doctrine and Florida's due process clause, a statute which established the crime of 'escape' from a juvenile facility of restrictiveness level VI or above– but then delegated to the Department of Health and Rehabilitative Services the authority to designate restrictiveness levels. Noting that "[t]he legislature may not delegate open-ended authority such that 'no one can say with certainty, from the terms of the law itself, what would be deemed

[30] Indeed, *this section alone*, among the various provisions in Florida's statutory scheme providing for the prosecution of certain youth under the age of 18 as adults, establishes no criteria for the governmental branch making this decision. See discussion Argument IV B 2., *supra*. *Cf. Woodward v. Wainwright*, 556 F. 2d 781 (5th Cir. 1977)(court upheld prosecutorial discretion under predecessor statute as traditional exercise of prosecutor's charging authority, but did not address whether this was improper delegation of legislative authority to define jurisdiction of juvenile court, or contrary to judicial authority to sentence.)

an infringement of the law,'" *id*. at 993 (citing *Conner v. Joe Hatton, Inc.*, 216 So. 2d 209, 211) the delegation failed by placing no meaningful limitations on HRS's authority. The Court held, "In sum, HRS was improperly delegated and improperly assumed authority to declare what constituted the crime of juvenile escape, without limit." *Id*. at 994.

Under the statutory transfer scheme challenged herein, the legislature has similarly enacted the law, but then unlawfully delegated to the state attorney the "power to declare what the law shall be."[31] With no guidelines, the state attorney alone is authorized to declare what constitutes an act of delinquency subject to the jurisdiction of the juvenile court, and what constitutes a crime subject to the jurisdiction of the criminal court. Without "reasonably definite standards of implementation," *B.H.*, 645 So. 2d at 994, the state attorney alone is authorized to declare which juveniles are to be subjected to the mandatory adult sentence of life imprisonment without parole, and which juveniles

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[31] In this sense, the provision is clearly distinguishable from the waiver and direct file provisions set forth in §§ 985.226 and 985.227, where the legislature has itself either determined which juveniles are to placed under the jurisdiction of the criminal court and which are to remain in juvenile court, or provided the criteria by which judges are to make this decision. Arguably, these provisions may also be subject to constitutional challenge, but they are not before the court in this appeal. *See also, M.Z. v. State*, 747 So. 2d 798 (Fla. 1st DCA 1999), *review denied*, 767 So. 2d 458 (2000)(court declined to rule on constitutionality of § 985.227 once juvenile defendant received juvenile disposition).

will receive the benefit of a juvenile disposition. This is precisely the type of open-ended *legislative* authority granted to the executive which the Supreme Court condemned in *B.H.*[32]

VI. A SENTENCE OF LIFE WITHOUT PAROLE TO A TWELVE YEAR-OLD OFFENDER VIOLATES BOTH THE U.S. AND FLORIDA CONSTITUTIONS

A. The Florida sentencing statute, which mandates a sentence of natural life without possibility of parole, violates the Florida Constitution as applied to a 12 year-old child

The Florida Constitution prohibits "cruel *or* unusual punishment." Art. 1, § 17, Fla. Const. (emphasis added) The use of the word "or" indicates that alternatives were intended. *Cherry*

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[32] The statute also violates separation of powers principles because it transfers to the executive branch the authority of the judicial branch to make sentencing decisions. Under traditional separation of powers principles, ultimate discretionary sentencing decisions are exercised by the judiciary. *State v. Benitez*, 395 So. 2d 514 (Fla. 1981). Section 985.225, by vesting the prosecutor with the sole discretion to choose juvenile or criminal court for prosecution of a particular child, usurps the traditional sentencing authority of the judiciary, as it leaves no discretion whatsoever for the judge at sentencing. In accordance with Florida law, once the prosecutor elects to seek a grand jury indictment and prosecution as an adult, the prosecutor also determines the penalty that shall be imposed – mandatory life imprisonment– if the youth is convicted. § 775.082, Fla. Stat.

Yet leaving the choice of forum in the hands of the prosecutor flies in the face of separation of powers principles. When the prosecutor is given not only the discretion and power to decide what crime to charge, but also what court to file the charge in, § 985.225 gives the prosecutor the sole discretion to decide the sentence. While this would not be a problem if the trial court had room to modify the sentence *any* amount in either direction, that is not the case here. *Cf. State v. Cotton*, 769 So. 2d 345 (Fla. 2000), which rejected an analogous separation of powers argument because the sentencing court retained discretion to impose a *harsher* sentence.

Lake Farms, Inc. v. Love, 176 So. 486 (Fla. 1937); *Tillman v. State*, 591 So. 2d 167 (Fla. 1991). The Florida Constitution thus "protects against sentences that are either cruel or unusual."*Hale v. State*, 630 So. 2d 521, 526 (Fla. 1994). In this respect the Florida Constitution provides broader protections than does the United States Constitution. *See Traylor v. State,* 596 So. 2d 957, 962 (Fla. 1992)("[T]he federal Constitution ... represents the floor for basic freedom, the state constitution, the ceiling.") Although the length of sentence imposed for certain crimes is generally a matter left to the legislature, *id.* (citing *Leftwich v. State*, 589 So. 2d 385, 386 (Fla. 1st DCA 1991), this Court is duty-bound to overturn sentences that are unconstitutionally unusual under Art. 1, § 17. Lionel Tate's sentence of life imprisonment without parole, the most severe sentence permissible under law for children under the age of sixteen, is just such a sentence.

Two Florida Supreme Court decisions, *Allen v. State*, 636 So. 2d 494 (Fla. 1994), and *Brennan v. State*, 754 So. 2d 1 (Fla. 1999), require that this court consider Lionel's age at the time of the offense in determining whether his sentence is "cruel or unusual" under the Florida Constitution. Defendant Allen, only 15 years old at the time of his crimes, was sentenced to death after his convictions for first-degree murder and related crimes.

Allen, 636 So. 2d at 495. In vacating Allen's death sentence and reducing his sentence to life in prison without possibility of parole for twenty-five years, the Court wrote:

> [M]ore than half a century has elapsed since Florida last executed one who was less than sixteen years of age at the time of committing an offense. . . . There may be a variety of reasons for this scarcity of death penalties imposed on persons less than sixteen years of age. There may be public sentiment against death penalties in these cases, or prosecutors may simply be convinced that juries would not recommend death or the judge would not impose it. We need not conduct a straw poll on this question, in any event. Whatever the reasons, the relevant fact we must confront is that death almost never is imposed on defendants of Allen's age.

Id.

In *Brennan v. State*, the Supreme Court expanded upon *Allen*, holding it unconstitutional to execute one for offenses committed before one's seventeenth birthday. 754 So. 2d at 14. Brennan was convicted of first-degree murder and robbery for offenses committed when he was 16 years old and sentenced to death. The Supreme Court held that "the imposition of the death sentence on Brennan, for a crime committed when he was sixteen years of age, constitutes cruel or unusual punishment in violation of article I, section 17 of the Florida Constitution." *Id.* at 12. Again, the Court was heavily influenced by Brennan's age and the fact that "for over 25 years, no individual under the age of seventeen at the time of the crimes has been executed in Florida." *Id*. at 16.

Although both *Allen* and *Brennan* involve capital punishment, the constitutional ban on cruel or unusual punishment does not apply to capital punishment exclusively. *Allen* and *Brennan* require that courts take into account the petitioner's age at the time of the offense to determine if the punishment is cruel or unusual. This approach signals the Supreme Court's recognition that "children are not as responsible for their acts as adults." *Allen*, 636 So. 2d at 497 n.6.

Additionally, like Allen's sentence, Lionel's sentence is highly unusual and severe given his age and should be vacated by this Court. Sentencing a 14-year-old boy to life imprisonment without possibility of parole for offences committed at age 12 is equally rare. An exhaustive search of Florida court cases, news articles, and the Florida Department of Corrections website, has not turned up a single case in which a boy received a natural life sentence for crimes committed at age 12. According to the Department of Corrections, there is not a single Florida inmate serving LWOP for an offense committed at age 12. E-mail from Chrissy Gest, Florida Department of Corrections, to Lia Rodriguez, Children's Advocacy Center (Jan. 31, 2002, 16:03:29 EST). *See also* Krueger, *When Life Means Life*, St. Petersburg Times, June 3, 2001, at 1-A.

When Lionel Tate's age is accounted for, his life sentence

without parole is clearly "cruel or unusual punishment."[33]

B. A sentence of natural life without possibility of parole, violates the Eighth Amendment of the United States Constitution as applied to a 12-year-old child

The Eighth Amendment to the United States Constitution forbids "cruel and unusual" punishment. Two inquiries are relevant in the cruel and unusual analysis: 1) proportionality between the sentence and the crime, *Solem v. Helm*, 463 U.S. 277 (1983); *Hale v. State*, 630 So. 2d 521 (Fla. 1994) and 2) whether the sentence comports with "evolving standards of decency." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). A mandatory life sentence for 12-year-old Lionel Tate is both disproportionate to his crime and indecent. *Amici* know of no other 12-year-old child in the United

[33] On February 6, 2002, the Second District Court of Appeals held in *Phillips v. State*, No. 2D99-3734, that a mandatory life without parole sentence for a 14-year-old was neither cruel and unusual punishment under the Eighth Amendment nor a violation of the Florida Constitution's "cruel or unusual punishment clause." In its ruling, the Court was swayed by the fact that natural life sentences for teenagers in Florida were "not uncommon" and, by its determination that the heinous nature of Phillips crime outweighed whatever mitigation he was entitled to on account of his youth. *Id.* at 9, 12. *Phillips* is easily distinguishable on its facts. Joshua Phillips was 14 years of age when he stabbed eight year-old Madelyn Clifton in the throat repeatedly and concealed her dead body beneath his waterbed for a week. Although there have been several cases of natural life sentences given to 14-year-olds in Florida and throughout the country, not a single reported case exists of such a sentence being imposed on a 12-year-old. To impose a mandatory life sentence on a 12-year-old for consequences which were neither intended nor anticipated, is not only "unusual," it is a grossly disproportionate penalty in violation of the Eighth Amendment.

States who is living under the yoke of a natural life sentence. The fact that the sentence was mandatory and that it was based on a felony-murder charge are additional compelling reasons for striking it down as cruel and unusual punishment.

1. The sentence of life imprisonment without parole is unconstitutionally disproportionate as applied to 12-year-old Lionel Tate

In *Harmelin v. Michigan*, 501 U.S. 957 (1991), the Supreme Court held that a mandatory life sentence for possession of 650 grams of cocaine did not offend the Eighth Amendment to the United States Constitution because, although cruel, it is not unusual in the constitutional sense. *Id.* at 994. *See* U.S. Const. amend. VIII. The Court disagreed about whether the Eighth Amendment also prohibits punishments that are disproportionate to the crime. Florida has read *Harmelin* to reaffirm the proportionality analysis for noncapital punishments in *Solem*. *See Hale*, 630 So. 2d at 525.

Solem v. Helm, 463 U.S. 277 (1983), established the principles for an Eighth Amendment proportionality analysis. The *Solem* court found that a "sentence of life imprisonment without possibility of parole violated the Eighth Amendment because it was grossly disproportionate to the crime of recidivism based on seven underlying non-violent felonies." *Harmelin*, 501 U.S. at 997-98. (Kennedy, J.) The test for proportionality laid out by the *Solem* Court weighs three factors: the gravity of the offense against the

harshness of the punishment; the challenged sentence against sentences imposed for other crimes in the same jurisdiction; and the challenged sentence against sentences imposed for the same crime in other jurisdictions.

In weighing the first prong of the *Solem* test, Lionel's culpability for the offense, this Court should consider his age. *See, e.g. Phillips v. State*, No. 2D99-3734 (Fla. 2nd DCA Feb. 6, 2002), at 9. *See also*, *Thompson v. Oklahoma*, 487 U.S. 815 (1988). The reasons underlying the *Thompson* opinion show that mandatory life without parole is overly harsh in this case. The *Thompson* Court stated that "punishment should be directly related to the personal culpability of the criminal defendant," *id.* at 834 (citing *California v. Brown*, 479 U.S. 538, 545 (1987)(O'Connor, J., concurring).[34] Because juveniles are less mature and responsible than adults, "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult." *Thompson*, at 835. At age 12, age is an even more

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[34]

> Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.

Thompson, 487 U.S. at 834.

powerful mitigating factor in Lionel's case than it was in *Thompson,* a case involving a boy three years older.

Lionel's culpability is further diminished by the fact that he was convicted under a felony-murder theory. *Compare People v. Dillon*, 668 P.2d 697 (Cal. 1983), in which the California Supreme Court held that a life sentence for first degree murder based on a felony-murder theory was excessive given the defendant's personal culpability. Dillon was 17 years old when he shot and killed an individual guarding a marijuana crop which Dillon was trying to steal. *Id.* Considering, among other things, whether the punishment was "grossly disproportionate to the defendant's individual culpability as shown by . . . his age, prior criminality, personal characteristics and state of mind," *id.* at 721, the Court held that a life sentence for a 17-year-old convicted of first-degree felony murder was "cruel and unusual punishment." *Id.* at 727.

The unprecedented mandatory life without parole sentence for 12-year-old Lionel Tate is clearly punishment that does not fit the crime. It is grossly disproportionate given Lionel's age, immaturity, lack of prior criminal background, and lack of mens rea for first-degree murder.

2. The sentence of life imprisonment without parole violates "evolving standards of decency"

As explained in *Thompson*,

> The authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments, but they made no attempt to define the contours of that category. They delegated that task to future generations of judges who have been guided by the "evolving standards of decency that mark the progress of a maturing society."

487 U.S. 815, 821 (1988) citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (Warren, C. J.). *See also Weems v. United States*, 217 U.S. 349, 373-374, 378 (1910).[35] A mandatory sentence of life imprisonment without parole violates such standards of decency and is cruel and unusual punishment under the Eighth Amendment.

Again, such a sentence imposed upon a child is clearly unusual: a comprehensive examination of reported opinions and media accounts reveals that there is currently no individual in the country serving life imprisonment without parole for an offense committed at the age of 12. The sentence is also cruel according to our standards of decency. The life without parole sentence "means denial of hope . . . it means that whatever the future might hold in store for the mind and spirit of [Lionel Tate], he will remain in prison for the rest of his days."

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[35] "[A] principle to be vital must be capable of wider application than the mischief which gives it birth. The [prohibition against cruel and unusual punishment] . . . is not fastened to the obsolete but may acquire meaning as public opinion become enlightened by a humane justice."

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

The imposition of life without possibility of parole (LWOP) sentences for crimes committed at the age of 12 is unusual for several reasons. First, the overwhelming majority of the most serious crimes punishable by LWOP are committed by adults, not 12-year-olds. Second, a number of jurisdictions refuse to impose this harsh penalty upon children. For example, the District of Columbia, Delaware, Oregon, and Alabama have statutes prohibiting courts from sentencing juveniles under age 16 to LWOP.[36] Likewise, Indiana prohibits courts from sentencing juveniles under age 14 to LWOP. See Ind. Code 35-50-2-3(b)(West 1998). In addition to those states that prohibit the imposition of LWOP sentences on juveniles, Idaho, Kansas, Kentucky, and New Mexico do not employ LWOP at all[37]. Florida's statute is unconstitutional not simply because it allows a sentence of LWOP, but because it *requires* the sentence for all criminal defendants convicted of first-degree murder, regardless of age. Fla. Stat. Ann. §§ 775.082, 985.225 (West 1998). Only 11 states, including

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[36] *See* D.C. Code Ann. § 22-2104(a)(1996); Del. Code Ann. Tit. 10, 1010 (1997), Or. Rev. Stat. § 161.620 (1997); Ala. Code 12-15-34.1 (1997).

[37] *See* Idaho Code § 18-4004 (1998); Kan. Stat. Ann. § 21-4633, -4638 (1995); Ky. Rev. Stat. Ann. § 532.030 (Michie 1990); N.M. Stat. Ann. § 31-21-10 (Michie 1994).

Florida, require mandatory LWOP sentences for juveniles convicted in adult court. In none of these states is an inmate serving LWOP for a crime committed at the age of 12.[38] It is the mandatory nature, coupled with the severity of the punishment imposed, that makes Lionel's sentence unconstitutionally cruel and unusual.

In addition to statutory bans on LWOP sentences for minors, the Supreme Courts of Nevada and Kentucky have struck down LWOP sentences imposed upon minors. *See Naovarath v. State*, 779 P.2d 944 (Nev. 1989); *Workman v. Commonwealth*, 429 S.W.2d 374 (Ky. 1968). In *Naovarath*, Defendant Naovarath, a 13-year-old boy, was convicted of an unspecified degree of murder and, like Lionel, was sentenced to life without possibility of parole. *Navorarath*, 779 P.2d at 944. In overturning the sentence, the Court relied upon Naovarath's age in measuring the cruel and unusual nature of

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38 The states are Connecticut, Iowa, Louisiana, Minnesota, Missouri, New Hampshire, North Carolina, Texas, and Washington. See Conn. Gen. Stat. Ann. § 46b-127 (West Supp. 1998); id. § 53a-35a (West 1994)(applies only to juveniles who have reached age 14); Fla. Stat. Ann. §§ 775.082, 985.225 (West Supp. 1998); Haw. Rev. Stat. § 571-22(b) (Supp. 1997); id. § 706-656 (1993 & Supp. 1997); Iowa Code § 902.1 (West 1994); La. Rev. Stat. Ann. § 14:30.1(B) (1997); Minn. Stat. Ann. §§ 260B.125, 609.184 (West Supp. 1998)(applies only to juveniles who have reached age 14); Mo. Rev. Stat. § 565.020(2) (West Supp. 1997); N.H. Rev. Stat. Ann. §169-B:24 (Supp. 1997); id. §630:1-a(III) (1996); N.C. Gen. Stat. § 14- 17 (Supp. 1997); Tex. Fam. Code Ann. § 54.02(a) (West 1996); Tex. Penal Code Ann. 12.31 (West 1994); Wash. Rev. Code §§ 10.95.030, 13.40.110 (West Supp. 1998).

the punishment:

> We must 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 [Naovarath], he will remain in prison for the rest of his days. This is a severe penalty indeed to impose on a thirteen-year-old.

Naovarath, 779 P.2d at 945.[39]

Because of the rigidity of the sentence, the *Naovarath* court found the LWOP sentence to be unconstitutional. Yet, Lionel's sentence is even more rigid. Lionel's sentence was mandatory, which meant that even the trial court judge was unable to evaluate Lionel's capacity for rehabilitation.

In addition to recognizing the unique severity that a LWOP sentence has for children, the *Naovarath* court also deemed the punishment excessive.

> We do not question the right of society to some

[39] In vacating Naovarath's sentence, the Nevada Supreme Court also noted that "[I]t does not seem to us, from the record, that the trial judge had enough information to make the predictive judgment that this particular thirteen-year-old boy should never again see the light of freedom. A strong argument exists for the proposition that the parole board is best suited to make this kind of judgment at some future time." *Id.* at 948.

> retribution against a child murderer, but given the undeniably lesser culpability of children for their bad actions, their capacity for growth and society's special obligation to children . . . the degree of retribution represented by the hopelessness of a life sentence without possibility of parole, even for the crime of murder . . . is excessive punishment for this thirteen-year-old boy.

Id. at 948.

The Supreme Court of Kentucky expressed a similar sentiment in vacating the LWOP sentence imposed upon two 14 year-old boys for the crime of rape. *Workman v. Kentucky*, 429 S.W.2d 374 (Ky. 1968). "We are of the opinion that life imprisonment without benefit of parole for two fourteen-year-old youths . . . shocks the general conscience of society today and is intolerable to fundamental fairness." *Id.* at 377. The court noted further that the sentence was especially excessive because it failed to consider the possibility that the boys could be rehabilitated. *Id.* Lionel Tate's sentence is both cruel and unusual. According to the standard of decency articulated in *Naovarath* and *Workman*, Lionel's sentence is un-constitutionally cruel because it forecloses the possibility that a 12-year-old boy may ever be rehabilitated and failed to take into consideration Lionel's culpability in light of his age. Lionel's sentence is unconstitutionally unusual because there is currently no other prison inmate in the country who was 12 at the time of his offense

who is serving life imprisonment without parole.[40]

CONCLUSION

For the foregoing reasons and in the interests of justice, *Amici* urge this Court to reverse the conviction of Lionel Tate.

Respectfully submitted,

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[40] Sentences of life without parole for children under 18 are also in conflict with international law. *See* Article 37, *United Nations Convention on the Rights of the Child* (CRC):

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

The United States has signed the CRC, but has not ratified it. However, since 191 nations have ratified and observed the CRC- only Somalia and the United States are not parties to it- it is arguable that the United States is bound by Article 37, since it has become a part of customary international law.

APPENDIX- Description of *Amici*

CENTER ON CHILDREN AND THE LAW

The Center on Children and the Law (CCL) at University of Florida's Fredric G. Levin College of Law is an inter-disciplinary, university-based center whose mission is to promote quality research, skilled advocacy and sound policies for children and youth. CCL's clinic, Gator TeamChild, engages students and faculty in direct representation of abused and neglected children as well as in representation of youths in the juvenile justice system. CCL's faculty includes widely published experts on child abuse and neglect, criminal law, juvenile justice, child development, conflict resolution and constitutional law.

CENTER ON JUVENILE AND CRIMINAL JUSTICE

The Center on Juvenile and Criminal Justice (CJCJ) is a private non- profit organization whose mission is to reduce society's reliance on the use of incarceration as a solution to social problems. CJCJ provides programs to persons facing imprisonment, and technical assistance to entities wishing to establish and/or evaluate programs working with those facing imprisonment. CJCJ staff have prepared over 2000 alternative pre-trial, sentencing and parole proposals; provided technical assistance to state and local correctional agencies throughout the country and developed a variety of other programs demonstrating

the workability of alternatives to incarceration for both adults and juveniles. The Center has offices in San Francisco, California, The District of Columbia, Baltimore, Maryland and Philadelphia, Pennsylvania.

CHILDREN AND FAMILY JUSTICE CENTER

The Children and Family Justice Center (CFJC) of Northwestern University School of Law' s Bluhm Legal Clinic, established in 1992, is a clinical teaching, research, and policy center, engaged with a major urban court, the Juvenile Court of Cook County, in its effort to transform itself into an outstanding and vital community resource. Nine clinical staff attorneys provide legal representation for poor children, youth, and families in a wide variety of matters, including juvenile delinquency, abuse and neglect, criminal domestic violence, adoption, special education, school suspension and expulsion, and immigration and political asylum.

JUVENILE JUSTICE PROJECT OF LOUISIANA

Founded in 1997, the Juvenile Justice Project of Louisiana (JJPL) has established itself as a partner in efforts to reform Louisiana’s juvenile justice system. JJPL has dedicated itself to advocating not only for more effective less expensive alternatives to incarceration, but also for the zealous and effective representation of children in the juvenile justice

system.

JUVENILE LAW CLINIC OF THE DISTRICT OF COLUMBIA

DAVID A. CLARKE SCHOOL OF LAW

Supervising professors and law students in the Juvenile Law Clinic represent children and youth who are involved in the delinquency and criminal systems, as well as parents and children in the child neglect system. In addition, law clinic advocates represent children and families with regard to special education rights, seeking particularly to enforce the rights to special education services on behalf of parents of children who are either in the neglect, delinquency, or criminal systems.

NATIONAL MENTAL HEALTH ASSOCIATION

The National Mental Health Association (NMHA) is the country's oldest and largest nonprofit organization addressing all aspects of mental health and mental illness. With more than 340 affiliates, NMHA works to improve the mental health of all Americans through advocacy, education, research and service. Since 1998, NMHA’s Justice for Juveniles Program has helped to bring attention to the critical unmet needs of the hundreds of thousands of young people with mental health and substance abuse problems caught up in America’s juvenile justice system.

THE SENTENCING PROJECT

The Sentencing Project is a national non-profit organization

which since 1986 has challenged over-reliance upon the use of jails and prisons and promoted alternatives to incarceration. The Sentencing Project has published some of the most widely-read research and information about sentencing and incarceration, including documentation of a highly disproportionate minority representation in the criminal justice system, the unprecedented growth of the American prison population within the last 30 years, and the relative benefits of using therapeutic treatment, rehabilitation, and social programs to reduce crime. It is particularly concerned that children in criminal court are disadvantaged not only when compared to children in juvenile court, but in comparison to adults charged with the same offense, including by the effective denial of due process rights, their inability to present a defense, and the impact of adult sentencing provisions upon them.

YOUTH LAW CENTER

The Youth Law Center (YLC) is a national public interest law firm with offices in San Francisco and Washington, DC, that has worked since 1978 on behalf of children in juvenile justice and child welfare systems. YLC has worked with judges, prosecutors, defense counsel, probation departments, corrections officials, sheriffs, police, legislators, community groups, parents, attorneys, and other child advocates in California and throughout

the country, providing public education, training, technical assistance, legislative and administrative advocacy, and litigation to protect children from violation of their civil and constitutional rights. YLC has worked to promote individualized treatment and rehabilitative goals in the juvenile justice system, effective programs and services for youth at risk and in trouble, consideration of the developmental differences between children and adults, and racial fairness in the justice system.

The Youth Law Center coordinates the Building Blocks for Youth initiative, a nationwide campaign to reduce racial disparities for youth of color in the justice system and to promote rational and effective juvenile justice policies. The Building Blocks for Youth initiative is a diverse alliance of researchers, judicial and law enforcement professionals, academics, children's attorneys, and other advocates for youth that supports new research on transfer to adult court and other issues, analyzes front-line decision making by juvenile justice professionals, works with national, state, and local organizations concerned with the treatment of minority youth in the justice system, and provides public education materials and resources to policymakers, journalists, and the public..

INDIVIDUALS

Robert E. Shepherd, Jr., Emeritus Professor of Law, T.C.

Williams School of Law, University of Richmond has directed the Youth Advocacy Clinic for many years. He was a past Chair of the Juvenile Justice Committee of the American Bar Association and a member of the Board of Fellows of the National Center for Juvenile Justice. For almost forty years Professor Shepherd has been engaged in research, writing and advocacy for and about children and youth, and he is particularly concerned about trying and sentencing young adolescents as adults.

Laurence Steinberg is Distinguished University Professor and Laura H. Carnell Professor of Psychology at Temple University. He is a fellow of the American Psychological Association and Director of the John D. and Catherine T. MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice. Dr. Steinberg is the immediate Past-President of the Society for Research on Adolescence, the largest international organization of social and behavioral scientists interested in adolescent growth and development.