IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

599 WDA 2009

COMMONWEALTH OF PENNSYLVANIA,
Appellee
v.
JOVON KNOX,
Appellant

BRIEF OF *AMICUS CURIAE* ON BEHALF OF JOVON KNOX

Appeal form the judgment of sentence imposed on September 23, 2008 in the Court of Common Pleas of Allegheny County, Criminal Division, Criminal No. CP-02-CR-0011687-2007

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I. INTEREST OF THE AMICUS CURIAE

Founded in 1975, Juvenile Law Center (JLC) is the oldest multi-issue public interest law firm for children in the United States. Juvenile Law Center works generally to advance the rights and well-being of children in jeopardy. JLC works to ensure children are treated fairly by systems that are supposed to help them. JLC also works to ensure that children's due process rights are protected at all stages of juvenile court proceedings, and that the laws policies and practices which govern the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults.

The Defender Association of Philadelphia is a private, non-profit corporation that represents a substantial percentage of the criminal defendants in Philadelphia County at trial and on appeal. The Association attempts to ensure a high standard of representation and to prevent abridgment of the constitutional and other legal rights of the citizens of Philadelphia and Pennsylvania.

JLC and the Defender Association of Philadelphia have previously participated as *amicus curiae* in numerous cases before this Court, as well as before other trial and appellate courts.

Professors Sara Jacobson, Brian Foley, Michelle Leighton and Constance de la Vega each have unique specialties and interests as amicus counsel. Professor Jacobson currently teaches at Temple University, Beasley School of Law; she previously served as the Deputy Chief of the Juvenile Division at the Defender Association of Philadelphia. Professor Foley specializes in criminal law issues and has written extensively on those topics as well as JLWOP issues. Professor Foley is currently on the faculty of Florida Coastal School of Law. Professors Leighton and de la Vega are international law specialists. Their research has been cited and

relied upon by the United States Supreme Court. They both serve on the faculty of University of San Francisco School of Law

II. STATEMENT OF THE CASE

Amicus curiae file this brief on behalf of Appellant Jovon Knox. Our brief, submitted at the invitation of this Court, is limited to the constitutionality of sentencing a juvenile to life without parole.

III. SUMMARY OF ARGUMENT

A mandatory sentence of life without the possibility of parole for a juvenile convicted of second degree (felony) homicide violates both the United States and Pennsylvania Constitutions. In *Graham v. Florida*, ___U.S. ___, 130 S. Ct. 2011 (2010), the United States Supreme Court held the sentence of life without parole unconstitutional as applied to a juvenile convicted of a non-homicide (Graham was convicted of violating his probation by committing a home invasion robbery, possessing a firearm, and associating with persons engaged in criminal activity). The holding was grounded in developmental and scientific research that demonstrates that juveniles possess a greater capacity for rehabilitation, change and growth than adults. Considering this research in light of the four accepted rationales for the imposition of criminal sanctions – incapacitation, deterrence, retribution and rehabilitation – the *Graham* Court held that a life without parole sentence served no legitimate penological purpose when applied to juveniles under the age of eighteen. The *Graham* Court also held that such a sentence was contrary to evolving standards of decency under the Eight Amendment's cruel and unusual punishments clause, noting that a majority of states prohibited the practice and that, even among those that permitted it, the sentence was rarely imposed. A life without parole sentence for a juvenile lacks empirical justification in light of the distinctive developmental characteristics of juvenile offenders, and therefore serves none of the traditional justifications for punishment. Striking this punishment is also consistent with longstanding specialized treatment of juveniles under the Constitution.

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

2027. Here, Mr. Knox was convicted of second degree felony murder. Intent to kill is not an element of felony murder. Accordingly, because there was no finding that Mr. Knox killed or intended to kill, Mr. Knox sentence of life imprisonment without the possibility of parole is unconstitutional.

The unconstitutionality of Pennsylvania's sentencing scheme as applied to Mr. Knox is underscored by the mandatory nature of that scheme. The sentencing scheme not only fails to address the reduced culpability of adolescents, it actually precludes the judge or any other sentencing body from taking age into account – either at the outset when the sentence is imposed or anytime thereafter *Graham* rejected such irrevocable and categorical judgments about juveniles.

The international consensus against imposition of life without parole sentences upon juveniles likewise condemns Pennsylvania's sentencing scheme. International law prohibits the imposition of life without parole sentences on juveniles. Finally, The Pennsylvania Constitution, which is broader than the United States Constitution, barring sentences that are "cruel," rather than only those that are both "cruel and unusual," also bars such sentences.

IV. ARGUMENT

Jovon Knox was convicted of second degree homicide (felony murder). He was sentenced, pursuant to Pennsylvania's mandatory sentencing scheme, to Life without the Possibility of Parole for a crime he committed when he was 17 years old. *See* 18 Pa. Cons. Stat. Ann. § 2502. Pursuant to *Graham v. Florida*, ___U.S.___, 130 S. Ct. 2011, 176 L.Ed.2d 825 (2010), this sentence is unconstitutional.

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

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

In *Commonwealth v. Ortiz*, 17 A.3d 417 (Pa. Super. Ct. 2011), one panel of this Court held that the holding of *Graham* does not apply to juveniles convicted of homicide offenses. *Ortiz*, however, was an appeal of a petition for post-conviction relief and was therefore decided

on the narrow "timeliness" grounds. The instant matter is a direct appeal and hence has a different standard of review. The *Ortiz* Court declined to extend the Supreme Court's findings underlying *Graham* that juvenile life without parole sentences are unconstitutional to juveniles convicted of homicide as well as non-homicide crimes. *Ortiz*, 17 A.3d at 422-23. The Court in *Ortiz* never considered whether *Graham* applies when there was no finding that the juvenile offender killed or intended to kill. The Commonwealth has specifically conceded that Jovon Knox did not kill and at most had the intent to rob. *See* Brief for Appellee at 16, 17. Further, the *Ortiz* Court failed to analyze how the *mandatory* nature of Pennsylvania's juvenile life without parole sentences renders these sentences unconstitutional pursuant to *Graham.*[1]

Additionally, since the panel ruling in *Ortiz*, the United States Supreme Court clarified that the *Graham* analysis that "kids are different" and deserving of different treatment under the Constitution is central to the Court's overall analysis of juveniles' rights under the Constitution. *See J.D.B. v. North Carolina,* ___ U.S. ___, 131 S. Ct. 2394 (2011) (finding that a juvenile's age is a factor that must be considered under the *Miranda* analysis). In *J.D.B.*, the Court reiterated its finding that "children cannot be viewed simply as miniature adults," 131 S. Ct. at 2404, and that the developmental differences between children and adults are relevant to Constitutional analysis and jurisprudence. *Id.* at 2403. For the reasons discussed herein and contrary to the decision in *Ortiz*, the *Graham* reasoning – as further expanded in *J.D.B.*—is applicable to the juvenile life without parole sentence imposed upon Mr. Knox.

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[1] The question of whether mandatory juvenile life without parole sentences are constitutional is currently being considered by the Pennsylvania Supreme Court in *Commonwealth v. Batts*, 603 Pa. 65, 981 A.2d 1283 (2009)

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

In *Graham v. Florida*, the United States Supreme Court held that the sentence of life without parole was unconstitutional under the Eighth Amendment's ban on "cruel and unusual punishment" as applied to a juvenile convicted of violating his probation by committing an armed home invasion robbery, possessing a firearm and associating with persons engaged in criminal activity. The Supreme Court's analysis rested heavily on the principle that such a severe and irrevocable punishment was not appropriate for a juvenile offender who did not "kill or intend to kill." *Graham v. Florida,* 130 S. Ct. 2011, 2027 (2010). And here the Commonwealth concedes that Jovon Knox did not kill and at most had the intent to rob. *See* Brief for Appellee at 16, 17. The Supreme Court emphasized that case law, developmental research and neuroscience research all recognize that children are different from adults – they are less culpable for their actions and at the same time have a greater capacity to change and mature. The *Graham* opinion followed decades of Supreme Court jurisprudence recognizing that the developmental differences between youth and adults compel a distinct, and often more protective, view of youth's rights under the Constitution. The unique characteristics of youth were also central to the *Graham* Court's conclusion that sentences of life without parole served no legitimate penological ends in the case before it. *Id.* at 2033. In light of adolescents' capacity to change, the Court emphasized that juveniles who do not intend to kill must have a meaningful opportunity to have their sentences reviewed. The Court found additional support for its conclusion in the national and international consensus opposing such sentences.

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

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

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

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

The *Graham* decision was rooted in the Court's earlier analysis in *Roper v. Simmons*, 543 U.S. 551 (2005) which had held the death penalty unconstitutional as applied to juveniles. The *Graham* Court echoed the reasoning in *Roper* that three essential characteristics distinguish youth from adults for culpability purposes: they lack maturity and responsibility, they are

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

Central to the *Graham* Court's determination about juvenile culpability was its understanding that the personalities of adolescents are still developing and capable of change and thus that an irrevocable penalty that would sentence a juvenile to die in prison was developmentally inappropriate. The Court explained that

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

Id. at 2026-27 (quoting *Roper*, 543 U.S. at 570). The Court's holding rested largely on the incongruity of imposing a final and irrevocable penalty on an adolescent, who had capacity to change and grow. The Court explained that "[t]hose who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of

their lives." However, the Eighth Amendment forbids States from "making the judgment at the outset that those offenders never will be fit to reenter society." Thus, "[w]hat the State must do ...is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 2030. The Court further underscored the point, noting that the "juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential." *Id.* at 2032. A categorical rule "avoids the perverse consequence in which the lack of maturity that led to an offender's crime is reinforced by the prison term." *Id.* at 2033.

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

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

While *Graham* and *Roper* enriched the constitutional analysis by embedding science in the Court's reasoning, they also built upon the Supreme Court's longstanding recognition that the differences between youth and adults merit distinct and protective treatment under the Constitution. Significantly, in *J.D.B. v. North Carolina,* ___ U.S. ___, 131 S. Ct. 2394 (2011) – a case decided by the Court on June 16, 2011, subsequent to *Ortiz* – the Court reiterated this longstanding recognition that "a child's age is far more than a chronological fact. It is a fact that

generates commonsense conclusions about behavior and perceptions." 131 S. Ct. at 2403 (internal quotations and quotation marks omitted). The Court looked to its long history of distinguishing children from adults, and found that "[t]ime and time again, this Court has drawn these commonsense conclusions for itself." *Id.* For example, in *Haley v. Ohio,* 332 U.S. 596 (1948), the Supreme Court recognized that when it comes to criminal procedure, a teenager cannot be judged by the more exacting standards applied to adults. *Id.* (holding that police improperly obtained the confession of a fifteen-year old defendant in violation of his due process rights). The *Haley* Court emphasized the unique vulnerability of youth during the period of adolescence:

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

Id. at 599. Similarly, in *Gallegos v. Colorado*, involving the admissibility of a juvenile's statement, the Court observed that an adolescent "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. . . . Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had." 370 U.S. 49, 54 (1962). In *J.D.B.*, the Court recognized that these cases, in addition to *Roper* and *Graham*, support the general proposition that children must be treated differently under the Constitution than adults, and therefore that a child's age must be considered in the *Miranda* custody analysis, as long as the age was known, or would have been objectively apparent, to the officer at the time of police questioning. *Id.* at 2406.

The Supreme Court has considered the developmental attributes of youth in defining their rights at other key points in the juvenile and criminal justice systems as well. For example, the Court has acknowledged that a child has a particular need for the "guiding hand of counsel at every step in the proceedings against him." *In re Gault,* 387 U.S.1, 36 (1067). The Court has also sought to promote the well-being of youth by ensuring their ongoing access to rehabilitative, rather than punitive, juvenile justice systems. *See McKeiver v. Pennsylvania,* 403 U.S. 528, 539-40 (1971); *Gault*, 387 U.S. at 15-16.

In civil cases, as well, the Supreme Court has frequently expressed its view that children are different from adults, and has tailored its constitutional analysis accordingly. In upholding greater state restrictions on minors' exercise of reproductive choice, the Court noted that children "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *J.D.B.*, 131 S. Ct. at 2403 (quoting *Bellotti v. Baird*, 443 U.S. 662, 635 (1979). S*ee also Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990); *Ohio v. Akron Center For Reproductive Health*, 497 U.S. 502, 520 (1990). The Court has also held that different obscenity standards apply to children than to adults, *Ginsburg v. New York,* 390 U.S. 629, 637 (1968), and has concluded that the state has a compelling interest in protecting children from images that are "harmful to minors." *Denver Area Educational Telecommunications Consortium, Inc. v. FCC,* 518 U.S. 727, 743 (1996). Similarly, the Court has upheld a state's right to restrict youth employment, observing that "[t]he state's authority over children's activities is broader than over the actions of adults." *Prince v. Massachusetts,* 321 U.S. 158, 168 (1944).

The Court's school prayer cases similarly take account of the unique vulnerabilities of youth, and their particular susceptibility to coercion. *See Lee v. Weissman*, 505 U.S. 577, 593 (1992) (observing that "there are heightened concerns with protecting freedom of conscience

from subtle coercive pressures in the elementary and secondary public schools."). *See also Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 311-12, 317 (2000).

The Court's recent *Graham* and *J.D.B.* decisions track the Court's long history of relying upon the key developmental differences between youth and adults to inform its constitutional analysis.

iii. Developmental and Neuroscience Research Confirms The Transitory Nature Of Adolescence And The Capacity Of Youth For Rehabilitation.

As the *Graham* Court recognized, social science research confirms the unique characteristics of youth – and how a life without parole sentence flies in the face of that research. *Graham,* 130 S. Ct. at 2027.[2] In particular, research reveals that because adolescence is a transitory stage, an irrevocable sentence like life without parole is inherently disproportionate. "Contemporary psychologists universally view adolescence as a period of development distinct from either childhood or adulthood with unique and characteristic features." Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 31 (2008). A central feature of adolescence is its transitory nature. As Scott and Steinberg explain:

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

Id. at 32.

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[2] The Court in *J.D.B.* noted that "[a]lthough citation to social science and cognitive science authorities is unnecessary to establish these commonsense propositions [that children are different than adults], the literature confirms what experiences bears out." 131 S. Ct. at 2403 n.5.

Studies show that youthful criminal behavior can be distinguished from permanent personality traits. Rates of impulsivity are high during adolescence and early adulthood and decline thereafter. *See* Steinberg, Cauffman, Banich & Graham, *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 Dev. Psych. 1764 (2008). As youth grow, so do their self-management skills, long-term planning, judgment and decision-making, regulation of emotion, and evaluation of risk and reward. *See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psych. 1009, 1011 (2003). As a result, "[t]he typical delinquent youth does not grow up to be an adult criminal. . . " *Id.* at 54. As one report explained, "the criminal careers of most violent juvenile offenders span only a single year. Richard A. Mendel, *Less Hype, More Help: Reducing Juvenile Crime, What Works – and What Doesn't* 15 (2000). Thus, not only are youth developmentally capable of change, research also demonstrates that when given a chance, youth with histories of violent crime can and do become productive and law abiding citizens, even without any interventions.

These findings are consistent with recent research in developmental neuroscience. Brain imaging techniques show that areas of the brain associated with impulse control, judgment, and the rational integration of cognitive, social, and emotional information do not fully mature until early adulthood. Scott & Steinberg, *Rethinking Juvenile Justice* 46-68. *See also* Elizabeth Sowell, et al., *In vivo evidence for post-adolescent brain maturation in frontal and striatal regions*, 2 Nat. Neurosci. 859-861 (1999); Nitin Gogtay, et al. *Dynamic Mapping of Human Cortical Development during Childhood through Early Adulthood*, 101 Nat'l Acad. Sci. Proc.

8174-8179 (2004).[3] The *Graham* court similarly that, due to differences between juvenile and adult brain development, juveniles are more likely to change than adults, and their actions "and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." 130 S. Ct. at 2026 (internal citation omitted)

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

For juveniles convicted of felony murder, the constitutional infirmity of a life without parole sentence is even more pronounced. Felony murder is a legal fiction that allows an individual to be convicted of murder even though he lacked the intent to kill. *See* 18 Pa. Cons.

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

Stat. § 2502(b) ("A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony.") *Cf.* 18 Pa. Cons. Stat. § 2502(a) ("A criminal homicide constitutes murder of the *first* degree when it is committed by an *intentional* killing.") (emphasis added). Intent is inferred based on the defendant's participation in the underlying felony because the defendant, "*as held to a standard of a reasonable man*, knew or should have known that death might result from the felony." *Commonwealth v. Legg*, 491 Pa. 78, 82 (1980) (emphasis added). Consistent with Supreme Court jurisprudence, however, a juvenile is developmentally different from the adult "reasonable person" in constitutionally relevant ways. *See J.D.B.,* 131 S. Ct. at 2404 ("even where a 'reasonable person' standard otherwise applies, the common law has reflected the reality that children are not adults"); *Graham*, 130 S. Ct. at 2026, 2028. Whatever legal reasoning may support the adult felony murder rule, it is simply inapplicable to a juvenile. One cannot properly infer malice to commit murder merely from the juvenile's participation in the underlying felony.

Primary justifications for the felony-murder rule include deterrence (because a felony could result in such a sentence, individuals should avoid the underlying felony in the first instance) and retribution (because the individual was engaged in a felony, the defendant is a bad actor and we are less concerned that he or she lacked the intent to kill). *See* Steven A. Drizin and Allison McGowan Keegan, *Abolishing the Use of the Felony-Murder Rule When the Defendant is a Teenager,* 28 Nova L. Rev. 507, 527-28 (2004). These justifications are likewise inapt for juveniles who, "lacking the foresight and judgment of fully competent adults, are prone to make decisions without careful deliberation, and do not fully understand the consequences of their actions." *Id.* at 534.

Indeed, the Supreme Court has consistently emphasized that those who do not intend to kill must be spared the most severe penalties under the law. Thus in *Enmund v. Florida,* 458 U.S. 782 (1982), the Court held that the Eighth Amendment bars imposing the death penalty on an individual convicted of felony murder where there is no finding of an intent to kill. Because the defendant caused harm "unintentionally," he should not suffer the most severe punishment. *Id.* at 798. Instead, the defendant's "criminal culpability must be limited to his [actions], and his punishment must be tailored to his personal responsibility and moral guilt." *Id.* at 801.

In *Graham*, the majority recognized that "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." Thus the Court explicitly included juveniles such as Mr. Knox in its holding as there was no legal finding that Mr. Knox himself killed or intended to kill. *See* Brief for Appellee at 16, 17 (conceding that Mr. Knox was not the shooter and at most had the intent to rob).

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

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

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

i. Deterrence

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

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

Graham, 130 S. Ct. at 2028-29. Because youth would not likely be deterred by the fear of a life without parole sentence, the goal did not justify the sentence. This is especially true in a case like the present one, in which the defendant lacked the intent to kill. As the Supreme Court recognized in *Enmund,* "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation," *Enmund* at 798-99 (internal citations omitted). Similarly, the harsh sentence of life without parole for homicide can only deter an intentional killing. Studies showing that adult sentences fail to deter youth reinforce the Court's view that the goals of deterrence are not furthered by juvenile life without parole sentences. *See* Jeffrey Fagan, *Juvenile Crime and Criminal Justice: Resolving Border Disputes*, 18 Future of Child. 81, 102-103 (2008); David Lee and Justin McCrary, "*Crime, Punishment, and Myopia,*" (Nat'l Bureau of Econ. Research, Working Paper No. W11491, 2005). *See also* Eric L. Jensen & Linda

K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime,* 40 *Crime & Delinq.* 96, 96-104 (1994), cited in Donna Bishop, *Juvenile Offenders in the Adult Criminal System*, 27 *Crime & Just.* 81 (2000); Richard Redding & Elizabeth Fuller, *What Do Juveniles Know About Being Tried as Adults? Implications for Deterrence*, Juvenile & Family Court Journal (Summer 2004) (cited in Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 199 (2008).

ii. Retribution

The *Graham* Court also concluded that retribution does not justify the imposition of life without parole sentences for juveniles. *Graham* echoed *Roper's* assessment that "'retribution is not proportional if the law's most severe penalty is imposed' on the juvenile murderer." *Graham,* 130 S. Ct. at 2028 (citing *Roper*, 543 U.S. at 571), and emphasized that "the case for retribution is not as strong with a minor as with an adult." *Id.* As the *Roper* Court had explained, such a severe retributive punishment was inappropriate in light of juvenile immaturity and capacity to change. *Graham* recognized that these same considerations applied to "imposing the second most severe penalty on the less culpable juvenile." *Id.* As the Supreme Court recognized in *Enmund,* the case for retribution is even weaker in felony murder cases. Imposing the most severe sanction for a crime the defendant "did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts." *Enmund,* 458 U.S. 801 (holding the death penalty unconstitutional in a felony murder case).

This conclusion about juveniles' reduced culpability also finds ample support in behavioral and neurobiological research. As described above, a significant body of research recognizes the malleability and transitory nature of adolescence. *See, e.g.,* Laurence Steinberg &

Robert G. Schwartz, *Developmental Psychology Goes to Court, in Youth on Trial: A Developmental Perspective on Juvenile Justice* 9, 23 (Thomas Grisso and Robert Schwartz eds., 2000) (describing adolescence as a period of "tremendous malleability" and "tremendous plasticity in response to features of the environment"); Scott & Steinberg, *Rethinking Juvenile Justice* 32, 49 (describing adolescence as a transitional stage in which individuals display a reduced capacity for impulse control).

iii. Incapacitation

The *Graham* Court also held that incapacitation could not justify the sentence of juvenile life without parole. Incapacitating a juvenile for life "requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable." *Graham*, 130 U.S. at 2029. Indeed, the research proves the opposite – adolescents' natures are transient and they must be given "a chance to demonstrate growth and maturity." *Id.* *See also* Steinberg & Schwartz, "*Developmental Psychology Goes to Court*," 23 (explaining that the malleability of adolescence suggests that a youthful offender is capable of altering his life course and developing a moral character as an adult); John H. Laub & Robert J. Sampson, *Shared Beginnings, Divergent Lives: Delinquent Boys to Age 70* (2003) (following 500 individuals who had been adjudicated delinquents and showing that their youthful characteristics were not immutable; they were able to change and have law-abiding lives as adults). As a result, a child sent to prison should have the opportunity to rehabilitate and to demonstrate his qualification for release after a reasonable term of years. Parole boards – or other similar entities – can provide a crucial check to ensure that the purposes of punishment are satisfied without unnecessarily incapacitating fully rehabilitated individuals and keeping youth "in prison until they die." *Naovarath*, 779 P.2d at 948.

iv. Rehabilitation

Finally, *Graham* concluded that a life without parole sentence "cannot be justified by the goal of rehabilitation. The penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society." *Id.* at 2030. The Court also underscored that the denial of rehabilitation was not just theoretical: the reality of prison conditions prevented juveniles from growth and development they could otherwise achieve, making the "disproportionality of the sentence all the more evident." *Id.* at 2030. Research further bears out the many ways in which lengthy adult sentences – especially life sentences – work against a youth's rehabilitation. Understandably, many juveniles sent to prison fall into despair. They lack incentive to try to improve their character or skills. Many juveniles sentenced to spend the rest of their lives in prison commit suicide, or attempt to commit suicide. *See* Human Rights Watch, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States* 63-64 (2005), http://www.hrw.org/en/ reports/2005/10/11/rest-their-lives; *See also*, Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 Wake Forest L. Rev. 681, 712, nn.141-47 (1998).

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

b. The Mandatory Nature Of Pennsylvania's Life Without Parole Sentencing Scheme Compounds Its Constitutional Infirmity

18 Pa. Cons. Stat. § 1102(b), mandating life without parole sentences for juveniles convicted of felony murder, poses particular constitutional problems. The statute on its face prohibits courts from considering a child's age, immaturity, reduced mental capacity, reduced

role in the offense, or any other factors related to his or her young age – the precise characteristics that the United States Supreme Court in *Graham* concluded categorically apply to all juvenile offenders under 18, 130 S. Ct. at 2026, and which the Court found conclusive in abolishing the penalty of life without parole in that case. *Id* at 2034.

The *Graham* majority was unequivocal that irrevocable judgments about the character of juvenile offenders are impermissible under the Constitution – at least where they deny juveniles any opportunity to prove their rehabilitation and their eligibility to re-enter society. 130 S. Ct. at 2030. *Graham* and *Roper* are both explicit in finding that juvenile offenders' capacity to change and grow, combined with their reduced blameworthiness and inherent immaturity of judgment, set them apart from adult offenders in fundamental – and constitutionally relevant – ways. Mandatory sentencing schemes by definition preclude individualized determinations. This "one size fits all" feature is directly at odds with *Graham* and *Roper*, barring consideration of age as a factor at all in sentencing while simultaneously proscribing any "realistic opportunity" for release. *Id.* at 2034. *Graham* prohibits a judgment of irredeemability to be made "at the outset." *Id.* at 2029. The Pennsylvania statute requires that just such a judgment be made – not only because the sentence allows for no review, but because it *must* be imposed regardless of the individual circumstances of the case. In his concurrence in *Graham*, Justice Roberts himself cautioned that "[o]ur system depends upon sentencing judges applying their reasoned judgment to each case that comes before them." *Id.* at 2042 (Roberts, C.J., concurring).[4] By mandating a

[4] Similarly, in his dissent in *J.D.B.*, Justice Alito distinguished the *Miranda* analysis at issue in that case with the Court's Eighth Amendment jurisprudence, noting that the Eighth Amendment cases involve "the 'judicial exercise of independent judgment' about the constitutionality of certain judgments," not "on-the-spot judgments" as in the *Miranda* analysis." *J.D.B.*, 131 S. Ct. at 2416-17 (quoting *Graham*, 130 S. Ct. at 2026) (Alito, J., dissenting). Mandatory sentences, however, do not allow for the deliberation and individualization envisioned by the Court.

life without parole sentence, Pennsylvania violates *Graham* at both the front and back end of the sentence – at no time may the individual characteristics and circumstances of the juvenile offender *ever* be considered.

As Justice Frankfurter wrote over fifty years ago in *May v. Anderson*, 345 U.S. 528, 536 (1953), "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." Even today, adult sentencing practices that fail to properly take account of youth are unconstitutional.

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

A national consensus exists against the mandatory imposition of life without parole sentences on juveniles convicted of felony murder. In both *Roper* and *Atkins,* the Supreme Court found national consensus against a practice where thirty states prohibited the practice. Here, the consensus weighs more strongly against the punishment: only five other state statutes mandate the sentence of life without parole for felony murder by a juvenile accomplice who did not intentionally kill.[5]

The direction of change in state laws further illustrates the national consensus against juvenile life without parole. *Roper* and *Atkins* make clear that a legislative trend against imposing such sentences provides further evidence of the national consensus against it. *See, e.g., Roper*, 543 U.S. at 565-67; *Atkins,* 536 U.S. at 315. In *Roper,* for example, five states had

[5] Ark. Code Ann. § 5-10-101; La. Rev. Stat. Ann. §14:30.1 A (2009); La. Rev. Stat. Ann. §14:30.1 B (2009); Mich. Comp. Laws Ann. § 767.39; Mich. Comp. Laws Ann. § 750.316; Miss. Code Ann. § 97-3-19 (2)(e) & (f); Miss. Code Ann. § 97-3-21; N.C. Gen. Stat. § 14-17; N.C. Gen. Stat. § 15-2000(e).

abolished the death penalty in the prior 15 years – four through legislative enactments, and one through a decision from the judiciary. *Roper,* 543 U.S. at 565. Here, the rate of change has been even faster. In the last six years, four states have imposed new limits on life without parole sentences for minors. In 2005, Colorado outlawed juvenile life without parole sentences altogether, Colo. Rev. Stat. § 17-22.5-104(IV) (2009; Texas followed suit in 2009, Tex. Penal Code Ann. § 12.31 (2010); and Montana barred applying mandatory minimum sentences and limits on eligibility for parole against anyone below the age of eighteen. Mont. Code Ann. § 46-18-222 (1) (2010). In 2004, Kansas eliminated the death penalty, but created the new option of life without parole for adult offenders. The legislature explicitly barred the imposition of the penalty on juveniles. Kan. Stat. Ann. § 21-4622 (2009).

A review of sentencing practices further demonstrates the national consensus against these sentences. In *Graham,* the Court concluded that legislative enactments alone did not determine a national consensus. *See Graham*, 130 S. Ct. at 2025-26 ("[T]he statutory eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration.") Instead, the Court looked to the number of individuals serving the sentence. It concluded that because only 109 juvenile offenders were serving life without parole sentences for non-homicide offenses, there was a national consensus against the practice. *Id.* at 2023. The Court further recognized that while the statistics available to the Court were not precise, the information was sufficient to demonstrate that the punishment is rarely imposed. *Id.* at 2024.

While the number of individuals sentenced to life without parole is hard to ascertain, it is clear that the sentence is rarely imposed in any case, let alone felony murder. According to Amnesty International, juvenile life without parole was first imposed in the United States in the

early 1980s, peaked in the late 1990s, and was on the decline as of 2004. Human Rights Watch, Amnesty International, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 31 (2005) (hereinafter "HRW Report"), at 31, fig. 3. The same report observed that the sentence was meted out 152 times in 1996 but just 54 times in 2003. *Id.* This is particularly notable given that the use of life without parole sentences for adults increased significantly during the same time period. Ashley Nellis & Ryan S. King, Sentencing Project, *No Exit: The Expanding Use of Life Sentences in America* (2009).

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

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

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

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

The United States is the only nation in the world that currently imposes life without parole sentences on juveniles for committing *any* crime, whether a homicide or nonhomicide.

Michelle Leighton & Connie de la Vega, *Sentencing our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. Rev. 983 (2008). Most governments either have expressly prohibited, never allowed, or do not impose such sentences on children. *Id.* at 989-90. Of the ten countries other than the United States that have laws that arguably permit sentencing child offenders to life without parole,[6] there are no known cases where the sentence has been imposed on a juvenile. *Id.* at 990. As the *Graham* Court recognized, this international consensus is further reflected in the ratification by every nation except the United States and Somalia of Article 37(a) of the United Nations Convention on the Rights of the Child, which prohibits juvenile life without parole. *Graham*, 130 S. Ct. at 849.

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

Moreover, as noted above, all countries other than the United States that had maintained a juvenile life without parole sentence have ended the practice in accordance with their treaty and international human rights obligations. *Sentencing our Children to Die*, *supra*, at 996-1004. For example, Tanzania committed to allowing parole for the one person potentially serving the

[6] These countries are Antigua and Barbuda, Argentina, Australia, Belize, Brunei, Cuba, Dominica, Saint Vincent and the Grenadines, the Solomon Islands, and Sri Lanka.

sentence and to clarifying its laws to prohibit the practice; Israel clarified that parole petitions may be reviewed by its High Court; and South Africa clarified that such sentences are not permitted. *Sentencing our Children to Die*, *supra*, at 996-1003. This clarification that parole hearings must be allowed in accordance with the international legal norm is further evidence that countries agree that no derogation is permitted.

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

In determining whether the United States Constitution permits the challenged sentence, this Court should consider the mandates of the Supremacy Clause, which provides that "[a]ll Treaties made . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const. art. VI, cl. 2. Further, the United States Supreme Court has noted that customary international law is "part of our law, and must be ascertained and administered by the 31 courts of justice of appropriate jurisdiction." *The Paquete Habana*, 175 U.S. 677, 700 (1900). As Justice Stevens has stated: "[o]ne consequence of our form of government is that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation." *Medellin v. Texas*, 552 U.S. 491, 536 (2008) (Stevens, J. concurring). Accordingly, Pennsylvania has an obligation to ensure that its criminal punishments comply with the United States' international treaty obligations. Thus, this Court must consider treaties to which the United States is a party, including: (1) the International Covenant on Civil and Political Rights ("ICCPR"), 999 U.N.T.S 171, *entered into force*, Mar. 23, 1976, ratified by the United States; (2) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), 1465 U.N.T.S. 85, entered into force, June 26, 1987, ratified by the United States, Oct. 21, 1994; and (3) the Convention on the Elimination of Racial

Discrimination ("CERD"), 660 U.N.T.S. 195, entered into force, Jan. 4, 1969, ratified by the United States, Oct. 21, 1994. In ratifying the ICCPR, Congress stated, "The United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the State and local governments;. . ." Senate Committee on Foreign Relations, ICCPR, S. Exec. Rep. No. 102-23, at 19 (1992).

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

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

Moreover, in 2008, the Committee on the Elimination of Racial Discrimination, the oversight body for the Convention on the Elimination of Racial Discrimination ("CERD"), found the juvenile life without parole sentence incompatible with Article 5(a) of the CERD because the sentence is applied disproportionately to youth of color and the United States has done nothing to reduce what has become pervasive discrimination. Nationwide, Black youth are more than ten times more likely to be serving a sentence of life without parole than white youth. Human Rights Watch, Publications, "Executive Summary: The Rest of Their Lives," May 1, 2008, available at http://www/hrw/en/reports/2008/05/01/executive-summary-rest-their-lives. The Committee on the Elimination of Racial Discrimination referred to both the Human Rights Committee and Committee Against Torture's reports on the United States, noting the concern raised in regard to the sentence, and recommending that the State party discontinue the use of juvenile life without parole sentences. CERD, Concluding Observations of the United States, at para 21, U.N. Doc. CERD/C/USA/CO/6 (Feb. 6, 2008).

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

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

Pennsylvania's youth are neither the most violent nor the most criminal children in the world, yet Pennsylvania has more inmates serving juvenile life without parole sentences than *any other jurisdiction in the nation or the world. See A Shameful Record*, N.Y. Times, Feb. 6, 2008. In addition to violating the United States Constitution, these sentences also violate the Pennsylvania Constitution, whose protections are at least as broad as the federal Constitution. With respect to juvenile sentences, Article I, Section 13 of the Pennsylvania Constitution should be interpreted more broadly than the Eighth Amendment of the U.S. Constitution.[7] In considering whether a protection under the Pennsylvania Constitution is greater than under the United States Constitution, this Court may consider: the text of the Pennsylvania Constitution; the provision's history, including case law; related case law from other states; and policy considerations unique to Pennsylvania. *See Commonwealth v. Edmunds*, 526 Pa. 374, 390, 586 A.2d 887, 895 (1991).[8]

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

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

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

Constitution bars punishments that are both "cruel" and "unusual," the Pennsylvania Constitution is broader and bars punishments that are merely "cruel."

The history of juvenile life without parole sentences in Pennsylvania also supports a holding that the sentence is unconstitutional under the Pennsylvania Constitution. The Pennsylvania Supreme Court has acknowledged that Pennsylvania's prohibition against cruel punishment is not a static concept and courts must draw its meaning from "the evolving standards of decency that mark the progress of a maturing society." *Zettlemoyer*, 500 Pa. at 74 (internal quotations omitted). Though courts may typically look to the legislature to "respond to the consensus of the people of this Commonwealth," *id.* (quoting *Commonwealth v. Story*, 497 Pa. 273, 297 (1981)), the Pennsylvania legislature has never explicitly authorized the practice of sentencing juveniles to life without parole sentences. Instead, juveniles in Pennsylvania are subject to life without parole sentences because of the interaction between Pennsylvania's juvenile transfer law and its homicide sentencing law. Thus, a statutory accident rather than a considered act of the Pennsylvania legislature led to this sentence. As the U.S. Supreme Court noted in *Graham,* such sentencing schemes do not reflect an intent to impose life without parole sentences on juveniles:

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

130 S.Ct. at 2025.

Indeed, Pennsylvania history reveals a longstanding commitment to providing special protections for minors against the full weight of criminal punishment. The Pennsylvania Supreme Court has recognized the special status of adolescents, and has held, for example, that a court determining the voluntariness of a youth's confession must consider the youth's age, experience, comprehension, and the presence or absence of an interested adult. *Commonwealth v. Williams*, 504 Pa. 511, 521 (1984). In *Commonwealth v. Kocher*, 529 Pa. 303, 311 (1992), involving the prosecution of a nine year old for murder, the Pennsylvania Supreme Court referred to the common law presumption that children under the age of 14 are incapable of forming the requisite criminal intent to commit a crime. While this common law presumption was replaced by the Juvenile Act, its existence for decades demonstrates that Pennsylvania's common law was especially protective of minors. The Juvenile Act also recognizes the special status of minors in its aim "to provide for children committing delinquent acts programs of supervision, care and rehabilitation which provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the development of competencies to enable children to become responsible and productive members of the community." 42 Pa. Cons. Stat. § 6301(b)(2). This focus on rehabilitation and competency development underscores Pennsylvania's recognition that children are still changing and deserve special protections under the law.[9]

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

Finally, policy considerations support broadly interpreting the Pennsylvania's prohibition against cruel punishments. As discussed above, the U.S. Supreme Court held that "penological theory is not adequate to justify life without parole for juvenile non-homicide offenders." *Graham*, 130 S. Ct. at 2030. While finding that juvenile life without parole sentences are unconstitutional under the Pennsylvania Constitution would entitle the juveniles to meaningful parole opportunities, it would not "guarantee eventual freedom to a juvenile offender." *Id.* Those juvenile offenders who have "not demonstrated maturity and rehabilitation," *id*, could remain incarcerated, allowing the Commonwealth to simultaneously protect public safety while also recognizing that a young, immature, and not fully developed juvenile offender might rehabilitate over the course of his life.[10]

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

(youth under the age of 18 cannot get married in Pennsylvania without parental consent or, if under 16, judicial authorization).

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

VII. CONCLUSION

Amici respectfully request that this Court hold the sentence of life without parole unconstitutional as applied to juveniles convicted of felony murder. Accordingly, this Court should remand the instant matter for resentencing.

Respectfully submitted,

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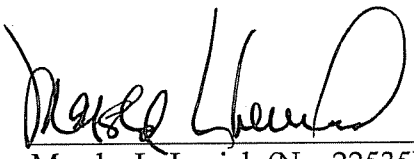
IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	599 WDA 2009
	:	
VS.	:	
	:	
JOVON KNOX	:	

PRAECIPE FOR APPEARANCE

TO THE PROTHONOTARY OF THE SUPERIOR COURT:

Enter my appearance as attorney on behalf of Amicus Curiae counsel in the above captioned matter.



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DATE: July 20, 2011

IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	599 WDA 2009
	:	
VS.	:	
	:	
JOVON KNOX	:	

PROOF OF SERVICE

I, Marsha L. Levick, hereby certify that on July 20, 2011, a true and correct copy of the foregoing PRECIPE FOR APPEARANCE has been served by First Class mail on the following:

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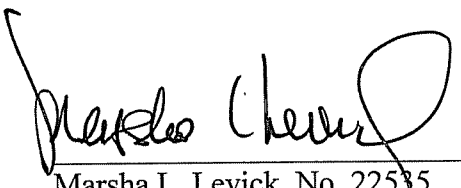

Marsha L. Levick, No. 22535
JUVENILE LAW CENTER
The Philadelphia Building
1315 Walnut Street, 4th Floor
Philadelphia, PA 19107
(215) 625-0551

IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	599 WDA 2009
	:	
VS.	:	
	:	
JOVON KNOX	:	

PROOF OF SERVICE

I, Marsha L. Levick, hereby certify that on July 20, 2011, a true and correct copy of the foregoing BRIEF OF *AMICUS CURIAE* ON BEHALF OF JOVON KNOX has been served by First Class mail on the following:

Thomas N. Farrell, Esq.
Farrell & Kozlowski
100 Ross St., Ground Floor
Pittsburgh, PA 15219

Michael Wayne Streily, Esq.
Allegheny County District Attorney's Office
436 Grant St.
401 Courthouse
Pittsburgh, PA 15219

Francesco Lino Nepa, Esq.
Allegheny County District Attorney's Office
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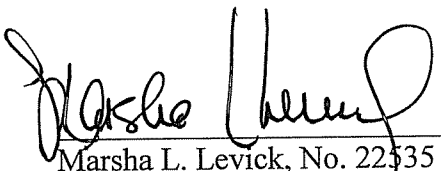

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IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	**599 WDA 2009**
V.	
JOVON KNOX, **Appellant**	

AVERMENT FOR ELECTRONIC COPY OF BRIEF

I, Marsha L. Levick, hereby certify that the material on the CD is an accurate and complete representation of the paper version.

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Philadelphia, PA 19107
(215) 625-0551

IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	: 599 WDA 2009
	:
VS.	:
	:
JOVON KNOX	:

PRAECIPE FOR APPEARANCE

TO THE PROTHONOTARY OF THE SUPERIOR COURT:

Enter my appearance as attorney on behalf of Amicus Curiae counsel in the above captioned matter.

Marsha L. Levick (No. 22535)
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Philadelphia, PA 19107
(215) 625-0551

DATE: July 20, 2011

IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	: 599 WDA 2009
VS.	:
JOVON KNOX	:

PRAECIPE FOR APPEARANCE

TO THE PROTHONOTARY OF THE SUPERIOR COURT:

Enter my appearance as attorney on behalf of Amicus Curiae counsel in the above captioned matter.

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IN THE SUPERIOR COURT OF PENNSYLVANIA
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COMMONWEALTH OF PENNSYLVANIA	:	599 WDA 2009
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PRAECIPE FOR APPEARANCE

TO THE PROTHONOTARY OF THE SUPERIOR COURT:

Enter my appearance as attorney on behalf of Amicus Curiae counsel in the above captioned matter.

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TO THE PROTHONOTARY OF THE SUPERIOR COURT:

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