No. 10-1200

IN THE

SUPREME COURT OF ARKANSAS

LEMUEL SESSION WHITESIDE,

APPELLANT,

v.

THE STATE OF ARKANSAS,

APPELLEE.

ON APPEAL FROM THE SIXTH JUDICIAL DISTRICT CIRCUIT COURT

FOURTH DIVISION,

HON. JOHN LANGSTON, JUDGE PRESIDING

BRIEF OF JUVENILE LAW CENTER AS *AMICUS CURIAE* ON BEHALF OF APPELLANT

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ARGUMENT

I. 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

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

The constitutional infirmity of a life without parole sentences here is heightened by the mandatory nature of the Arkansas felony murder sentencing scheme, which not only fails to address the reduced culpability of adolescents, but actually precludes the judge from taking age into account. *Graham* rejected such categorical judgments about juveniles. While this Court has held that life without parole is constitutional in capital murder cases, *Jackson v. Norris,* 2011 Ark. 49

(Feb. 9, 2011) that case did not explicitly consider the question of whether life without parole sentences apply to defendants who, like Whiteside, do not "intend to kill," nor did it address its legality under binding international law.

A. A Sentence Of Life Without Parole For a Juvenile Under the Age of Eighteen Who Did Not Kill or Intend to Kill Constitutes "Cruel and Unusual Punishment" In Violation of the Eighth Amendment.

In *Graham v. Florida*, the United States Supreme Court held that the sentence of life without parole was unconstitutional under the Eighth Amendment's ban on "cruel and unusual punishment" as applied to a juvenile convicted of violating his probation by committing an armed home invasion robbery, possessing a firearm and associating with persons engaged in criminal activity. The Court's analysis rested heavily on the principle that such a severe and irrevocable punishment was not appropriate for a juvenile offender who did not "kill or intend to kill." *Graham v. Florida,* 130 S.Ct. 2011, 2027 (2010). The Court emphasized that both case law and brain science recognize that children are different from adults – they are less culpable for their actions and at the same time have a greater capacity to change and mature. The *Graham* opinion built upon the Supreme Court's long history of recognizing that the differences between youth and adults compel a distinct, and often more protective, Constitutional treatment for youth. The unique characteristics of youth were also central to the *Graham*

Court's conclusion that sentences of life without parole served no legitimate penological ends in the case before it. *Id.* at 2033. In light of adolescents' capacity to change, the Court emphasized that juveniles who do not intend to kill must have a meaningful opportunity to have their sentences reviewed. The Court found additional support for its conclusion in the national and international consensus opposing such sentences.

1. The Developmental Differences Between Juveniles and Adults Compel the Conclusion that Juvenile Life Without Parole Sentences are Cruel and Unusual Punishment for Defendants who do not Kill or Intend to Kill.

a. 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. *Id*. at 2026 (quoting *Roper*, 543 U.S. at 569-70). Accordingly, the *Graham* Court concluded that "[a] juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.'" *Id*. (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988). As both *Roper* and *Graham* recognized, even for brutal and cold-blooded crimes – in fact *especially* for such crimes – a categorical rule must recognize juveniles' reduced culpability. This is because "[a]n unacceptable

likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity" should require a less severe sentence. *Id.* at 2032, *citing Roper*, 543 U.S. at 573.

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

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

Id. at 2026-27. The Court's holding rested largely on the incongruity of imposing a final and irrevocable penalty on an adolescent, who had capacity to change and grow. The Court explained that "[t]hose who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." However, the Eighth Amendment forbids States from "making the judgment at the outset that those offenders never will be fit to reenter society." Thus, "[w]hat the State must do . . . is give defendants like Graham

some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 2030. The Court further underscored the point, noting that the "juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential." *Id.* at 2032. A categorical rule "avoids the perverse consequence in which the lack of maturity that led to an offender's crime is reinforced by the prison term." *Id.* at 2033.

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

b. The United States Supreme Court Has Long Recognized that Adolescents Deserve Distinct Treatment Under the Constitution.

While *Graham* and *Roper* enriched the constitutional analysis by embedding science in the Court's reasoning, they also built upon the Supreme Court's longstanding recognition that the differences between youth and adults merit distinct and protective treatment under the Constitution. Indeed, the Court has

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

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

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

The Supreme Court has similarly recognized the unique attributes of youth at other key points of their involvement in the juvenile and criminal justice

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

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

broader than over the actions of adults." *Prince v. Massachusetts,* 321 U.S. 158, 168 (1944).

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

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

c. Social Science Research Confirms the Transitory Nature of Adolescence and the Capacity of Youth for Rehabilitation.

As the *Graham* Court recognized, social science research confirms the unique characteristics of youth – and the problems associated with imposing life without parole on an adolescent still in the process of maturing. *Graham,* 130 S.Ct. at 2027. A large body of work by psychologists further supports this conclusion. In particular, research reveals that because adolescence is a transitory stage, an irrevocable sentence is inherently disproportionate. "Contemporary psychologists universally view adolescence as a period of development distinct

from either childhood or adulthood with unique and characteristic features." Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 31 (2008). A central feature of adolescence is its transitory nature. As Scott and Steinberg explain:

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

Id. at 32.

Studies show that youthful criminal behavior can be distinguished from permanent personality traits. Rates of impulsivity are high during adolescence and early adulthood and decline thereafter. *See* Steinberg, Cauffman, Banich & Graham, *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 Dev. Psych. 1764 (2008). As youth grow, so do their self-management skills, long-term planning, judgment and decision-making, regulation of emotion, and evaluation of risk and reward. *See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psych. 1009, 1011 (2003). As a result, "[t]he typical delinquent youth does not grow up to be an adult criminal. . . " *Id.* at 54. As one report explained, "the criminal careers of most violent juvenile

offenders span only a single year. Richard A. Mendel, *Less Hype, More Help: Reducing Juvenile Crime, What Works – and What Doesn't* 15 (2000). Thus, not only are youth developmentally capable of change, research also demonstrates that when given a chance, youth with histories of violent crime can and do become productive and law abiding citizens, even without any interventions. These findings are consistent with recent research in developmental neuroscience. Brain imaging techniques show that areas of the brain associated with impulse control, judgment, and the rational integration of cognitive, social, and emotional information do not fully mature until early adulthood. Scott & Steinberg, *Rethinking Juvenile Justice* 46-68. *See also* Elizabeth Sowell, et al., *In vivo evidence for post-adolescent brain maturation in frontal and striatal regions*, 2 Nat. Neurosci. 859-861 (1999); Nitin Gogtay, et al. *Dynamic Mapping of Human Cortical Development during Childhood through Early Adulthood*, 101 Nat'l Acad. Sci. Proc. 8174-8179 (2004) .[1]

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[1] 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

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* recognized and held, the reduced culpability of adolescents as well as their distinctive constitutional status makes the sentence of juvenile life without parole unconstitutional.

For juveniles convicted of felony-murder, the constitutional problems with life without parole sentences are even more pronounced. Felony murder is a legal fiction that allows convictions for murder even though the defendant lacked the intent to kill. It requires only the intent to commit or be an accomplice to the underlying felony. *See, e.g.,* Ark. Code Ann. § 5-10-101. Primary justifications

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fully developed until a child reaches his or her mid-twenties.

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

While this Court has held that life without parole sentences are constitutional for juveniles who commit capital murder, *Jackson v. Norris,* 2011 Ark. 49 (Feb. 9, 2011), that decision does not dispose of the instant case before the Court today because it did not explicitly consider the question of juveniles who do not intend to kill. In *Graham*, the majority explicitly recognized that "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." Thus the Court explicitly included juveniles such as Whiteside in its holding. 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. Lemuel Whiteside is certainly culpable for his criminal conduct. However, by participating in a felony as a juvenile without the intent to kill, he is not as culpable as an adult murderer.

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

The *Graham* Court underscored the uniquely severe nature of a life without parole sentence. According to the Court, although the death penalty is a unique sentence deserving of special protections under the law, the sentence of life without parole does "share some characteristics with death sentences that are shared by no other sentences" because it is "irrevocable" and "deprives the convict of the most basic liberties without giving hope of restoration."…. *Graham,* 130 S.Ct. at 2027. Thus, the sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in

prison for the rest of his days." *Id., citing Naovarath* v. *State*, 105 Nev. 525, 526, 779 P. 2d 944 (1989).

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

a. *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 2028-2029. Because youth would not likely be deterred by the fear of a life without parole sentence, the goal did not justify the sentence. This is even more apt in a case like the present one, in which the defendant had no intent to kill. As the Supreme Court recognized in *Enmund,* "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation," *Enmund* at 798-99 (internal citations omitted). Similarly, the harsh

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

b. *Retribution*

The *Graham* Court also concluded that retribution does not justify the imposition of life without parole sentences for juveniles. The *Graham* Court echoed *Roper's* assessment that "'retribution is not proportional if the law's most severe penalty is imposed' on the juvenile murderer." *Graham,* 130 S.Ct. at 2028 (citing *Roper*, 543 U.S. at 571), and emphasized that "the case for retribution is not

as strong with a minor as with an adult." *Id.* As the *Roper* Court had explained, such a severe retributive punishment was inappropriate in light of juvenile immaturity and capacity to change. The *Graham* Court recognized that these same considerations applied to "imposing the second most severe penalty on the less culpable juvenile." *Id.* As the Supreme Court recognized in *Enmund,* the case for retribution is even weaker in felony murder cases. Imposing the most severe sanction for a crime the defendant "did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts." *Enmund,* 458 U.S. 801 (holding the death penalty unconstitutional in a felony murder case).

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

c. *Incapacitation*

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

rehabilitated individuals and keeping youth "in prison until they die." *Naovarath*, 779 P.2d at 948.

d. *Rehabilitation*

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

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

3. The Mandatory Nature of Arkansas' Life Without Parole Sentencing Scheme Makes It Unconstitutional

A sentencing scheme like Ark. Code Ann. § 5-10-101 mandating juvenile life without parole sentences for designated felonies poses particular Constitutional problems. The statute renders courts impotent to give a more just sentence by precluding courts from considering a child's age, immaturity, reduced mental capacity, reduced role in the offense, or any other factors related to his or her young age – the precise characteristics that the United States Supreme Court in *Graham* concluded categorically apply to all juvenile offenders under 18, 130 S.Ct. at 2026, and which the Court found conclusive in abolishing the penalty of life without parole in that case. *Id*. at 2034.

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

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

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

4. <u>The National Consensus Against Mandatory LWOP Sentences for Juveniles Convicted on Felony Murder Charges Further Underscores that they are Unconstitutional</u>

A national consensus exists against the mandatory imposition of life without parole sentences on juveniles convicted of felony murder. In both *Roper* and *Atkins,* the Supreme Court found national consensus against a practice because 30

states prohibited it. Here, the consensus weighs much more strongly against the punishment: only five other states –mandate the sentence of life without parole for felony murder by an accomplice who did not intentionally kill.[2]

The direction of change in state laws further underscores the national consensus against juvenile life without parole. *Roper* and *Atkins* make clear that a legislative trend against imposing such sentences provides further evidence of the national consensus against it. *See, e.g., Roper v. Simmons*, 543 U.S. at 565-67; *Atkins v. Virginia,* 536 U.S. 304, 315 (2002). In *Roper,* for example, five states had abolished the death penalty in the prior 15 years – four through legislative enactments, and one through a decision from the judiciary. *Roper,* 543 U.S. at 565. Here, the rate of change is even faster. In the last six years, four states have imposed new limits on LWOP against minors. In 2005, Colorado outlawed LWOP against minors 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

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[2] La. Rev. Stat. Ann. §14:30.1 A (2009); La. Rev. Stat. Ann. §14:30.1 B (2009); N.J. Stat. Ann. §2C:11-3 (a) and (b)(1) (2007); 18 Pa. Cons. Stat. Ann. § 1102 (b) (2008); S.D. Codified Laws §22-16-4 (2005); S.D. Codified Laws §22-6-1 (2005); Fla. Stat. § 782.04(3) (2010); § 775.0861 (2010); Fla. Stat. § 775.087 (2005); Fla. Stat. § 775.0875 (1998).

anyone below eighteen. Mont. Code Ann. § 46-18-222 (1) (2010). In 2004, Kansas eliminated the death penalty, but created the new option of life without parole for adult offenders. The legislature explicitly precluded the imposition of the penalty on juveniles. K.S.A. 21-4622 (2009).

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

While the number of individuals sentenced to life without parole is hard to ascertain, it is clear that the sentence is rarely imposed in any case, let alone felony murder. Just 54 juveniles nationwide received life without parole sentences in 2003 – including those convicted of homicide or non-homicide offenses. Human

Rights Watch, Amnesty International, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 31 (2005) (hereinafter "HRW Report").

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

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

II. 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.

A. 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,[3] 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

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

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 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.

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

United States, noting the concern raised in regard to the sentence, and recommending that the State party discontinue the use of juvenile life without parole sentences. CERD, Concluding Observations of the United States, at para 21, U.N. Doc. CERD/C/USA/CO/6 (Feb. 6, 2008).

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

CONCLUSION

Amici respectfully request that this Court hold the sentence of life without parole unconstitutional as applied to juvenile defendants who did not kill or intend to kill.