IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,	NO. F052637
Plaintiff and Respondent,	Tulare County No. VCF107543
v.	
MARIANO DIAZ, JR.,	
Defendant and Appellant.	

Appeal from the Superior Court of Sacramento
Honorable Darryl B. Ferguson, Judge

BRIEF OF *AMICUS CURIAE* JUVENILE LAW CENTER IN SUPPORT OF DEFENDANT-APPELLANT MARIANO DIAZ

MARSHA L. LEVICK
JESSICA R. FEIERMAN (CA Bar. No.
JENNIFER POKEMPNER
NEHA DESAI
JUVENILE LAW CENTER
The Philadelphia Building
1315 Walnut Street, 4th Floor
Philadelphia, PA 19107

Service on Attorney General required by California Appellate Rule 8.29(c).

INTEREST OF *AMICUS CURIAE*

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

STATEMENT OF CASE

Amicus adopts the statement of the case set forth by Appellant. We write separately to underscore that at the time of the crime, Mariano Diaz was a juvenile with no criminal record. (App Br. 9). He was described as "scared" and as a "young kid" in a confrontation with two much larger men, (App Br. 4), one of whom wanted to fight him (App Br. 3). Witnesses, including the victims, agreed

that the shooter only fired the gun at the urging of an older man on a bicycle, who may have been a gang member. (App Br. 5, 26) Testimony supported the perspective that younger gang members obey older ones even when they don't want to out of fear of retaliation, (App. Br. 9), and that Diaz – if he was the shooter – shot wildly rather than aiming (App Br. 10).

SUMMARY OF ARGUMENT

"[I]ncorrigibility is inconsistent with youth; . . . it is impossible to make a judgment that a . . . youth, no matter how bad, will remain incorrigible for the rest of his life." Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. Ct. App. 1968) (holding unconstitutional a juvenile sentence of life without the possibility of parole).

In Roper v. Simmons, 543 U.S. 551 (2005), the U.S. Supreme Court clarified that one cannot simply sentence a juvenile as one does an adult. The Roper Court held that imposing a death sentence on an individual under 18 at the time of the offense violates the 8th and 14th Amendments of the U.S. Constitution because juveniles do not have the same judgment, understanding, maturity or abilities as adults. This same analysis supports Mariano Diaz's challenge to his sentence of 73 years to life, with no eligibility for parole until he is 88 – a sentence so long that it is the functional equivalent of life without parole [hereinafter "LWOP"].[1]

[1] See Appellant's brief at 20 for a calculation of Diaz' sentence and parole. This argument has no bearing on the constitutionality of life without parole sentences

Diaz' sentence also violates the California Constitution's prohibition against cruel or unusual punishment. Article I, section 17. In assessing a sentence under the Eighth Amendment of the California Constitution, the California Supreme Court has explicitly recognized the importance of age in determining whether a sentence is constitutional. People v. Dillon, 34 Cal. 3d 441 (1983). In Dillon, the California Supreme Court held that an offender's youth, combined with his clean prior record and his panic at the time of the crime, made a life sentence so disproportionate as to be unconstitutional. Id. Diaz' case is no different. Because Diaz's sentence is disproportionate to the offense and fails to comport with fundamental notions of human dignity, it violates both California and federal constitutional law.

Finally, Diaz' sentence violates international law binding on the United States.

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for adults, which are not at issue here. Nor does *amicus* argue that Massachusetts cannot sentence Diaz or other juveniles to a reasonable term of years in prison. Rather, *amicus* argues only that pursuant to Roper v. Simmons, a juvenile sentence must contain the *possibility* of release.

ARGUMENT

A sentence that denies any possibility of release or parole to children, and that wholly disregards individual culpability, violates the United States Constitution, the California Constitution, and international law.

I. DIAZ' SENTENCE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION

In Roper v. Simmons, the United States Supreme Court struck down as violative of the Eighth and Fourteenth Amendments any death sentence for an offender under the age of 18 at the time the underlying crime was committed. Simmons, 543 U.S. 551 (2005). The Court held that such a sentence was disproportionate in light of the "evolving standards of decency that mark the progress of a maturing society." Id. at 551 (quoting Trop v. Dulles, 356 U.S. 86, 100-101 (1958) (plurality opinion)). In discerning these 'evolving standards,' the Court reviewed "objective indicia of consensus" about the practice. See Simmons, 543 U.S. at 564. Ultimately, however, the Court "determine[d], in the exercise of [its] own independent judgment," whether such a penalty is disproportionate. Id. The Simmons Court concluded that there was a national and international consensus against applying the death penalty to juveniles. The Court then held that the finality of the death penalty was unconstitutional as applied to juveniles because juveniles are both less culpable for their actions and more amenable to change. The same analysis applies to Diaz' sentence: because juveniles are

categorically different from adults, sentences imposed on them must be age-appropriate to be constitutional.[2]

A. DIAZ' SENTENCE FAILS TO COMPORT WITH EVOLVING STANDARDS OF DECENCY

Whether a sentence is disproportionate and violates the Eighth Amendment must be evaluated in light of the "evolving standards of decency that mark the progress of a maturing society." Simmons, 543 U.S. at 551 (quoting Trop v. Dulles (1958), 356 U.S. 86, 100-101, 78 S.Ct. 590, 2 L.Ed.2d 630) (plurality opinion)). The Supreme Court has long underscored the importance of responding to current notions of humanity in interpreting the Eighth Amendment. In Weems v. U.S., for example, the Court explained, "The clause of the Constitution, in the opinion of the learned commentators, may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice..." Weems v. U.S., 217 U.S. 349, 367 (1910) (successfully challenging a sentence that included forced labor, shackling at the arm and wrist, and permanent limitations on civil liberties, for non-capital offense under the Eighth Amendment). Thus, punishments that once were common practice and even approved by the Supreme Court may later be declared unconstitutional under the Eighth Amendment. See, e.g., Simmons, 543 U.S. 551

[2] Simmons should not be misconstrued as precedent supporting LWOP for juveniles. Although Christopher Simmons ultimately received an LWOP sentence from the Missouri court system, the Supreme Court considered only the constitutionality of the death sentence, and its holding was limited to the issue of the death penalty alone. Id. at 579.

(overturning prior Supreme Court precedent to hold that the death penalty is unconstitutional as applied to 17 and 18-year old youth): Atkins, 536 U.S. 304 (overturning prior Supreme Court precedent to hold that the death penalty is unconstitutional as applied to the mentally retarded).

The "evolving standards of decency" analysis applies to all Eighth Amendment cases, whether or not the death penalty is at issue. Indeed, the phrase originated in a non-capital expatriation case, Trop v. Dulles, 356 U.S. at 1010, and has been widely used in a broad array of Eighth Amendment contexts. In establishing the standard for the provision of medical care in prison, for example, the Court explained:

> Our more recent cases, however, have held that the Amendment proscribes more than physically barbarous punishments. The Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . .against which we must evaluate penal measures. Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with "the evolving standards of decency that mark the progress of a maturing society"….

Estelle v. Gamble 429 U.S. 97, 102, 97 S.Ct. 285, 50 L.Ed.2d 252 (1976) (internal citations omitted). Similarly, in addressing prisoners' physical safety, the Court has noted that [p]rison conditions may be "restrictive and even harsh," but gratuitously allowing the beating or rape of one prisoner by another serves no "legitimate penological objectiv[e]," any more than it squares with "'evolving standards of decency,' " Farmer v. Brennan (1994), 511 U.S. 825, 833, 114 S.Ct. 1970, 120 L.Ed. 2d 811 (internal citations omitted). That the "evolving standards" analysis applies even to the excessive fines prohibition in the Eighth

Amendment further underscores its broad range of applicability. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc*., 492 U.S. 257, 267 n.4 (1989). "Evolving standards of decency" is therefore the appropriate analysis here.

1. NATIONAL AND INTERNATIONAL CONSENSUS UNDERSCORE THAT DIAZ' PUNISHMENT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

When states, foreign countries or international law prohibit a particular punishment, courts are more likely to hold that the punishment violates the Eighth Amendment.

In determining "objective indicia" of consensus, the court looks first to domestic trends, including the will of state legislatures, state practices, judicial opinions and other indications of state perspectives. The court then turns to international law.

The court analyzes state trends **"**as expressed in particular by the enactments of legislatures that have addressed the question." Simmons, 543 U.S. 564. The best indicator that a legislature "addressed the question" at issue here is state legislation on juvenile LWOP. If a legislature would prohibit juvenile LWOP for Diaz, one can assume that it would also prohibit a sentence that – although written differently – would cause the same result.[3]

[3] Diaz faces his sentence because in California (1) juveniles can be transferred to adult court; (2) the adult system allows for consecutive sentences for his crimes; and (3) the adult system allows consecutive sentences to last a lifetime without the possibility of parole. This confluence of factors, however, is inadvertent: it occurs *without* express consideration from the legislature of the appropriateness of the

Not a single state permits juvenile LWOP to be imposed on a child convicted of attempted murder. A total of four states and the District of Columbia legislatively prohibit juvenile LWOP.[4] Two more states legislatively prohibit LWOP for both juveniles and adults.[5] In four other states, courts struck down sentences roughly equivalent to the one at issue here – either by holding that life without parole is unconstitutional as applied to child offenders,[6] or by

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specific sentence for a juvenile. Thus, juvenile LWOP laws provide a better marker of the acceptability of the sentence.

[4] District of Columbia, Colorado, Kansas, New York, and Oregon. See D.C. Code. § 22-2104 (a) (2007) (no person who was less than 18 years of age at the time of committing a murder can be sentenced to LWOP); C.R.S.A. § 17-22.5-104 (2)(d)(iv)(2008) (juveniles charged as adults eligible for parole after 40 years); Kan. Stat. Ann. §§ 21-4622, 21-4635 (2007) (No sentence of life without parole for capital murder where defendant is less than 18 years old); N.Y. Penal Law § 70.00(5) (McKinney 2007) (LWOP available only for first-degree murder), N.Y. Penal Law 70.05 (McKinney 2007) (limiting indeterminate sentencing for youthful offenders), N.Y. Penal Law 125.27(1)(b) (McKinney 2007) (required element of first-degree murder is that the defendant is over 18 years old); Or. Rev. Stat. §161.620 (prohibiting LWOP for juveniles tried as adults) (2005), State v. Davilla, 972 P.2d 902 (Or. Ct. App. 1998) (interpreting §161.620 to bar juvenile LWOP).

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

[6] Naovarath v. State, 779 P.2d 944, 948-49 (Nev. S.Ct. 1989); Workman v. Kentucky, 429 S.W.2d 374,378 (Ky S. Ct. 1968); Trowbridge v. State, 717 N.E.2d 138, 150 (Ind. 1999).

underscoring that such a serious sentence cannot be applied unless the child plays a key role in the victim's death.[7]

Even in states that permit juvenile LWOP, *none* permit this punishment for attempted murder. Only 11 states expressly permit juvenile LWOP sentences – of these, 10 permit it only for murder (with some limiting it further to first degree murder or murder of a police officer or child), and one permits it in the case of murder or kidnapping resulting in serious bodily injury or death.[8] An additional 32 states have laws allowing for the transfer of some juvenile cases to adult court,

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[7] People v. Miller, 781 N.E.2d 300, 303 (Ill. 2002) (holding life without parole disproportionate for child who was a lookout in a murder).

[8] California Cal. Penal Code § 190.5(b) (West 1999) (LWOP or at the discretion of the court 25 years to life for first degree murder committed by juveniles at (least age) 16 and 17 at the time of the commission of the crime); West F.S.A. §§ 775.082 (2007) (mandatory LWOP for juvenile convicted of murder); Indiana Ind. Code Ann. § 35-50-2-3 (West Supp. 2005) (LWOP sentences are discretionary for 16 and 17 year olds convicted of murder and impermissible for defendants below age 16); Maryland Md. Code Ann. Crim. Law §§ 2-202, 2-304 (Michie 2002) (discretionary LWOP or life for first degree murder if defendant below 18); Massachusetts Mass. Gen. Laws Ann. ch. 265 § 2 (West 2000) (LWOP is mandatory upon murder conviction of juvenile); Missouri Mo. Rev. Stat. § 565.020 (2005) (mandatory LWOP for first degree murder for juveniles); Nebraska Neb. Rev. Stat. § 29-2204(3) (2007) (mandatory life sentences when "required by law" otherwise individuals under 18 at the time they committed a crime may receive discretionary adult or juvenile sentence) (sentence of life without parole imposed for murder, murder of a child, kidnapping resulting in serious injury or death); New Hampshire N.H. Rev. Stat. § 630:1-a (III) (LexisNexis 1996) (mandatory LWOP for any juvenile convicted of murder); New Jersey N.J. Stat. Ann. § 2C:11-3 (West 2005) (specifically limiting LWOP for juveniles to mandatory LWOP for murder of police officer killing a child under age 14 or murder in the course of a sexual assault or criminal sexual contact); North Carolina N.C. Gen. Stat. § 14-17 (2003) (providing for mandatory LWOP sentence for anyone 17 or under who committed a murder in the first degree); Oklahoma Okla. Stat. tit. 21 § 701.9 (West Supp. 2006) (LWOP or life sentence discretionary for juvenile convicted of first degree murder).

and have adult sentencing schemes that include LWOP. These states also reject the imposition of LWOP for attempted murder.[9] Because not a single state permits LWOP for attempted murder, a clear national consensus exists against its use.[10]

This national consensus is further bolstered by the growing movement toward age-appropriate sentencing for juveniles.[11] The American Bar Association, for example, has recently issued a resolution asserting that sentences for youthful offenders should be less punitive than those imposed on adults for the

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[9] See Appendix A. These laws do not represent that the legislature has "addressed the issue" Simmons, as these legislatures never expressly considered the validity of LWOP sentences as imposed on youth.
Moreover, as in Simmons, the majority of states that do allow LWOP use it only infrequently. According to a report prepared by Amnesty International and Human Rights Watch, while New Jersey, Utah and Vermont have laws permitting juvenile LWOP sentences, at the end of 2003 not a single child was serving a juvenile LWOP sentence in those jurisdictions. Of the remaining jurisdictions that allow LWOP for juveniles, 13 had fewer than 10 youth serving sentences of life imprisonment without the possibility of parole. Amnesty International and Human Rights Watch, The Rest of Their Lives: Life Without Parole for Child Offenders in the United States, 34-35 (October 2005) [hereinafter HRW Report]. Indeed, more than half of all juvenile LWOP sentences in the U.S. are a result of practices in just four states that have *mandatory* LWOP for certain crimes. HRW Report 35. In stark contrast, there are only 439 people serving LWOP sentences for crimes they committed as juveniles in the 19 states that make LWOP for juveniles a discretionary sentence– 21 percent of people serving juvenile LWOP sentences overall. HRW Report at 35 (Table 5) and Appendix D: State Population Table. The breakdown by state is as follows: Arizona, 30; California, 180; Georgia, 8; Illinois, 103; Indiana, 2; Maryland, 13; Mississippi, 17; Montana, 1; Nevada, 16; North Dakota, 1; Ohio, 1; Oklahoma, 49; Rhode Island, 2; South Carolina, 26; Tennessee, 4; Utah, 0; Vermont, 0; Wisconsin, 16; Wyoming, 6. The report does not provide data for 3 of the 22 states with discretionary LWOP sentences: Idaho, Kentucky, and West Virginia, which were not included in this total.

[11] In evaluating state law, trends are instructive in addition to tallies. Id. at 565-67 (giving particular weight to the trend toward prohibition evidenced by recently-passed state laws to prohibit the death penalty for juveniles).

same offenses, that sentences should recognize mitigating factors, including those found in *Roper* as well as the seriousness of the offense and the history of the offender, and that "youthful offenders should generally be eligible for parole or other early release." Because all states agree that juvenile LWOP should not be imposed in cases such as this, a national consensus exists that Diaz' sentence is at odds with current notions of decency.

This conclusion finds further confirmation in foreign and international law. The U.S. Supreme Court has held that a court may refer "to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of cruel and unusual punishments." Roper v. Simmons, 543 U.S. 551, 575 (2005). Indeed, courts have "consistently referred to foreign and international law as relevant to [their] assessment of evolving standards of decency." Id. at 604 (O'Connor, dissenting). See Atkins v. Virginia, 536 U.S. 304, 316 (2002) (noting international community's rejection of death penalty for persons with mental retardation); Thompson v. Oklahoma, 487 U.S. 815, 830 (1988) (Stevens, J., concurring) (noting global rejection of the death penalty for youth offenders age sixteen or younger); Trop v. Dulles, 356 U.S. 86, 102 (1958) (finding a "virtual unanimity" within international community that denationalization "is not to be imposed as punishment for crime.")

In fact, the Simmons Court went to great lengths to acknowledge and validate its use of international and foreign law. "It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death

penalty…The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." Id. at 578. Nothing about the case before this court calls for a deviation from the decades-old tradition of relying on international and foreign law to define evolving standards of decency.

The world community is unanimous in its rejection of juvenile LWOP. Sentencing Our Children To Die In Prison, University of San Francisco School of Law (November 2007) [hereinafter USF Report]. Indeed, juvenile LWOP is currently applied in *only* the U.S.[12] There is thus unambiguous international consensus, with only two outliers, on the impropriety of juvenile LWOP.[13]

2. THIS COURT SHOULD APPLY ITS INDEPENDENT JUDGMENT TO FIND THAT DIAZ' SENTENCE VIOLATES THE CONSTITUTION.

After considering objective indicia of consensus, the court "then must determine, in the exercise of our own independent judgment, whether the. . . penalty is a disproportionate punishment for juveniles." Simmons, 543 U.S. at

[12] Until recently, juvenile LWOP was also applied in Israel. However, as of February, 2008 Israel has changed its policy so that children given life sentences are now entitled to parole review. *See* http://www.law.usfca.edu/home/CenterforLawandGlobalJustice/Juvenile%20LWOP.html (last visited March 18, 2008). ("The new confirmation by Israel means that the United States, with 2,381 such cases, is now the only country in the world known to either issue the sentence or to have children serving life without parole.")

[13] In Simmons, the Court underscored the international opposition to the death penalty with reference to the Convention on the Rights of the Child and the ICCPR. 543 U.S. 576. The analysis is identical for life without parole. For further discussion of the role of international authority, see Section IV of this brief.

564. Under Simmons, this Court must recognize that it is beyond the bounds of decency to regard any juvenile as beyond rehabilitation.

A. DIAZ'S SENTENCE VIOLATES THE EIGHTH AMENDMENT OF THE US CONSTITUTION BECAUSE IT IS DISPROPORTIONATE TO THE OFFENSE AND THE CULPABILITY OF THE OFFENDER

For a sentence to be constitutional, it must be proportional. A full proportionality test balances the gravity of the offense and the culpability of the individual against the severity of the sentence. See, e.g., Solem v. Helm, 463 U.S. 277 (1983). In the case of an adult with full culpability and mental functioning, the proportionality balancing test focuses largely on the gravity of the offense and the severity of the sentence. See, e.g., Solem, 463 U.S. 277; Harmelin v. Michigan, 501 U.S. 957, 997-1009.[14] For those who *as a class* have diminished culpability or capacity, however, the balancing test asks whether the severity of the sentence *can ever* be appropriate for a member of the class.

Thus, the Supreme Court has clarified that an offender's youth or mental capacity can make certain penalties unconstitutional regardless of the severity of the offense. In Simmons, the Court explained: "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or

[14] A majority of Justices in Harmelin asserted that a proportionality analysis is central to the Court's Eighth Amendment jurisprudence. Harmelin v. Michigan, 501 U.S. 957(1991) (Kennedy, J., concurring); Id. at 1009-1027, (White, J., dissenting); Id. at 1027 (Marshall, J., dissenting). Harmelin did not overrule prior cases, such as Rummel v. Estelle, 445 U.S. 263 (1980) or Solem v. Helm, 463 U.S. 277 (1983) – both cases in which proportionality analysis played a prominent role in the Court's reasoning and holding.

blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." Simmons, 543 U.S. at 571. The court concluded that a death sentence is categorically unconstitutional as applied to any youth under 18. Simmons, 543 U.S. at 568-78. Regardless of the brutality of the crime, the death penalty may not be imposed.[15]

In Atkins, the Court similarly held the characteristics of mentally retarded offenders made them inherently less blameworthy than non-mentally retarded adult offenders, and thus that the death penalty was categorically unconstitutional as applied to them. Id. at 319. The Court noted that mentally retarded individuals

> have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Id. at 318. As a result, the Court held that the death penalty was grossly disproportionate in violation of the Eighth Amendment. Again, the Court's categorical conclusion underscores that the appropriate balancing test in such cases weighs the culpability of the class against the severity of the punishment. See also Thompson v. Oklahoma 487 U.S. 815, 853 (1988) (O'Connor, J.,

[15] Indeed, it is hard to imagine a more brutal murder than the one at issue in Simmons

concurring) ("Proportionality requires a nexus between the punishment imposed and the defendant's blameorthiness." Citing Edmund v. Florida 458 U.S. 782 (1982)(O'Connor, J., dissenting)).[16] As Appellant noted, Diaz had "all the earmarks of a juvenile offender," including recklessness and susceptibility to outside pressure, App. Br. 26, further underscoring the importance of considering his juvenile status.

1. JUVENILES' LESSER CULPABILITY AND INCREASED AMENABILITY TO TREATMENT RENDERS JUVENILE LWOP UNCONSTITUTIONAL.

A sentence of life without parole is the harshest sentence available to a juvenile. Like the death penalty, mandatory life imprisonment without any possibility of parole disregards the special characteristics of juveniles and their capability to reform. For a juvenile sentenced to LWOP, any opportunity to learn from his mistakes and transform is irrelevant. A mandatory LWOP sentence automatically precludes any possibility for reform, rehabilitation, and eventual contribution to society.

As the Kentucky Supreme Court explained, "[t]he intent of the legislature in providing a penalty of life imprisonment without benefit of parole . . . was to deal with dangerous and incorrigible individuals who would be a constant threat to society. We believe that incorrigibility is inconsistent with youth." Workman v.

[16] No state has been more clear about the centrality of considering the culpability of the offender in applying the proportionality analysis to sentences challenged under the Eighth Amendment as California. See Section II for the proportionality analysis under the State Constitution.

Commonwealth, 429 S.W.2d at 378. The Nevada Supreme Court has similarly recognized the severity of a sentence of LWOP as applied to juveniles. That court observed:

> Before proceeding we pause first to contemplate the meaning of a sentence "without possibility of parole," especially as it bears upon a seventh grader. All but the deadliest and most unsalvageable of prisoners have the right to appear before the board of parole to try and show that they have behaved well in prison confines and that their moral and spiritual betterment merits consideration of some adjustment of their sentences. Denial of this vital opportunity means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the youth], he will remain in prison for the rest of his days.

The court concluded that this was a "severe penalty indeed" to impose upon an adolescent and held that it could not be constitutionally applied to a 13-year-old. Naovarath v. State, 779 P.2d 944 (Nev. 1989).

Indeed, some thinkers, such as John Stuart Mill, have suggested that life in prison is indistinguishable or even worse than death:

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

John Stuart Mill, Parliamentary Debate on Capital Punishment Within Prisons Bill (Apr. 21, 1868), *quoted in* Wayne A. Logan, Proportionality and Punishment: Imposing Life Without Parole on Juveniles, 33 Wake Forest L. Rev. 681, 712 (1998) [hereinafter Logan, Proportionality]. See also Id. at nn.141-47 (discussing

cases and sources suggesting that LWOP may be a fate worse than the death penalty).

The severity of LWOP renders it unconstitutional as applied to youthful offenders. Because offenders younger than 18 are less culpable and more amenable to rehabilitation than those who are older, it is impossible to determine with any reasonable certainty that they are beyond redemption. Simmons, 543 U.S. at 569-75 (differences between juveniles and adults "render suspect any conclusion that a juvenile falls among the worst offenders. . . The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character").

Relying on widely accepted psychological and sociological research,[17] the Simmons Court explained that children under 18 should be treated differently than

[17] The Court cited the following articles and studies in its opinion: Jeffrey Jensen Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Review 339 (1992); Laurence Steinberg & Elizabeth Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003); Erik H. Erikson, Identity: Youth and Crisis (1968). In addition, there are numerous other studies that support the idea that the brain is not fully developed until at least age 25. See Elizabeth Cauffman & Laurence Steinberg, (Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults, 18 Behavioral Sciences and the Law 741-760 (2000); Elizabeth S. Scott and Thomas Grisso, Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform, 88(1) Journal of Criminal Law and Criminology 137, 137-189 (1997); Elizabeth R. Sowell et al., Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships during Postadolescent Brain Maturation, 21(22) The Journal of Neuroscience 8819, 8819-8829 (2001); National Institute of Mental Health, Teenage Brain: A

adults for three key reasons. First, they possess a "lack of maturity and an underdeveloped sense of responsibility" as illustrated by their overrepresentation in almost all categories of reckless behavior. Simmons, 543 U.S. at 569 (internal citations omitted). Second, as a class juveniles are more vulnerable to negative influences and more likely to succumb to outside pressures. "Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." Id. at 569-70.[18] Third, the Court emphasized the transitory nature of adolescence. As the Court explained,

> the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed…The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult."…

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work in progress, A brief overview of research into brain development during adolescence, NIH Publication No. 01-4929 (2001); Kristen Gerencher, Understand your teen's brain to be a better parent. Detroit Free Press, Feb. 2, 2005; Barry C. Feld, Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents, 32 Hofstra L. Rev. 463, 515-522 (2003) (discussing scientific studies on adolescent neurological development).

[18] On this issue, Simmons follows a long line of cases recognizing juveniles' distinctive susceptibility to coercion and pressure. See, e.g., Gault, 387 U.S. 1, 39 (1968) (juveniles need the assistance of counsel to prevent coercion in the courtroom); Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (holding the death penalty unconstitutional for juveniles under age 16 at the time of their crime because "inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult"); Lee v. Weissman, 505 U.S. 577, 592 (1992) (holding school prayer unconstitutional and noting that "[a]s we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.")

Id. at 569-70 (internal citations omitted) (emphasis added). The Simmons Court further explained, that because it is difficult for expert psychologists to differentiate between a crime reflecting immaturity and one reflecting "irreparable corruption," jurors should not be asked to make such distinctions Id. at 573-74. The reasoning applies with equal force here. LWOP sentences represent a determination that the offender's culpability is not mitigated in any meaningful way, and that the offender is irredeemable. Like the death penalty, LWOP unconstitutionally fails to recognize a child's "potential to attain a mature understanding of his own humanity." Id. at 1197. A sentence of life without parole, like a death sentence, is thus unconstitutional. The analysis is even more striking where, as here, the juvenile had a clean criminal record, the crime was one of attempt, and the facts suggest that that the offender was scared and acting on impulse. App. Br. 26.

2. LWOP SENTENCES FOR JUVENILES ARE EXCESSIVE WHEN CONSIDERED IN LIGHT OF THE COMMONLY ACCEPTED PURPOSES OF PUNISHMENT.

A punishment that serves no legitimate penological purpose inflicts needless pain and suffering in violation of the Eighth Amendment. Robinson v. California, 370 U.S. 660, 667 (1962); Thompson, 487 U.S. 815, 838; Trop, 356 U.S. at 86. Through "the thicket of Eighth Amendment jurisprudence," it is clear that "a gross disproportionality principle is applicable to sentences for a term of years." *Lockyer v. Andrade* 538 U.S. 63 (2003)

Juvenile LWOP sentences cannot be justified as fulfilling the purposes of punishment: deterrence, retribution, incapacitation and rehabilitation.[19] As the Court has reasoned unless the imposition of a punishment "measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." Enmund v. Florida, 458 U.S. 782, 798 (1982), citing Coker v. Georgia, 433 U.S. 584, 592 (1977).

First, juvenile LWOP sentences cannot deter other juveniles from committing similar crimes any more reliably than less harsh sentences. In Simmons the Court noted that even the death penalty could not be regarded as an effective deterrent, given that juveniles generally lack the mental ability to weigh the possible consequences of their actions. Simmons, 543 U.S. at 571 (discussing psychological studies). Logic dictates that if the harsher penalty, death, is not an effective deterrent for young people who typically fail to weigh consequences, neither will a sentence of LWOP. See also Naovarath v. State, 779 P.2d 944, 948 (Nev. 1989) (holding that LWOP for 13 year old defendant was unconstitutional and questioning whether the sentence could even serve as a deterrent for other teenagers). Criminological studies support the theory that the threat of adult criminal sanctions has no effect on the levels of serious juvenile crime. Jensen, Eric L., and Linda K. Metsger. 1994. "A Test of the Deterrent Effect of Legislative

[19] The four purposes for punishment typically understood to justify the criminal justice system are: deterrence, retribution, incapacitation, and rehabilitation. See, e.g., Paul Robinson, Criminal Law: Case Studies and Controversies 82-90 (2005).

Waiver on Violent Juvenile Crime." *Crime and Delinquency* 40:96-104, cited in "Bishop, Donna, "Juvenile Offenders in the Adult Criminal System," 27 Crime and Justice 81 (2000); Singer, Simon I., and David McDowall. 1988. "Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law." *Law and Society Review* 22:521-35; cited in "Bishop, Donna, "Juvenile Offenders in the Adult Criminal System," 27 Crime and Justice 81 (2000).

As for retribution, LWOP sentences are similarly improper. As the Simmons Court stated about the death penalty: "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." Simmons, 543 U.S. at 571. Thus, the Simmons Court found it necessary to prevent individual determinations about retribution for youth, to avoid the "unacceptable likelihood. . . that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth." Id. at 572-73. This reasoning applies with equal force here – life without parole, termed by some as a "slow death," is an extraordinarily severe punishment.[20] When inflicted on an individual with diminished culpability, the sentence is unconstitutional. The sentence is *even more* disproportionate for a crime of attempt.

[20] . Elizabeth Cepparulo, Roper v. Simmons: Unveiling Juvenile Purgatory" Is Life Really Better than Death? 16 Temp. Pol. & Civ. Rts. L. Rev. 225, 239 (2006).

Although LWOP sentences incapacitate offenders, such incapacitation would be unreasonable and disproportionate where the offender no longer poses a danger to the community. See United States v. Jackson, 835 F.2d 1195, 1200 (7th Cir. 1987) (Posner, J., concurring) ("A civilized society locks up [criminals] until age makes them harmless but it does not keep them in prison until they die."). In Simmons the Supreme Court recognized that this may be particularly relevant to youth: "Indeed, 'the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.'" Simmons, 543 U.S. at 570 (quoting Johnson v. Texas, 509 U.S. 350, 368 (1993)). Research supports this conclusion. See Laurence Steinberg & Robert G. Schwartz, "Developmental Psychology Goes to Court," *in* Youth on Trial: A Developmental Prospective on Juvenile Justice 23 (Thomas Grisso & Robert G. Schwartz eds., 2000) ("the malleability of adolescence suggests that a youthful offender is capable of altering his life course and developing a moral character as an adult"); John H. Laub & Robert J. Sampson, Shared Beginnings, Divergent Lives: Delinquent Boys to Age 70 (2003) (presenting lives of adjudicated delinquent and showing that their youthful characteristics were not immutable; change to a law-abiding life was possible and depended in many instances upon aspects of their adult lives). As a result, a child sent to prison should have the opportunity to rehabilitate and qualify for release after a reasonable term of years. Other 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. For an offender such as Diaz who acted recklessly and under pressure from older adults, permanent incapacitation is particularly unreasonable.

Last, LWOP sentences do not promote rehabilitation for juveniles; they frustrate it. A mandatory sentence of life imprisonment without the possibility of parole does share one important characteristic of a death sentence – the offender will never regain his freedom. Because such a sentence does not even purport to serve a rehabilitative function, the sentence must rest on a rational determination that the punished "criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator." Furman, 408 U.S. at 307 (Stewart, J., concurring). Understandably, many juveniles sent to prison fall into despair. They lack incentive to try to improve their character or skills for eventual release because there will be no release. Instead, the incentives, if any, are for the young offender – often placed into the same prisons as adult offenders – to adapt to prison life, which can include "improving" at inflicting violence on others as a means of self-defense and as a means of domination and increased standing in the prison "pecking order." See HRW Report at Pt. VI, at 4 (discussing youth offenders in general, and citing Institute on Crime, Justice and Corrections and the National Council on Crime and Delinquency—U.S. Department, Office of Justice

Programs, Bureau of Justice Assistance, Juveniles in Adult Prisons and Jails: A National Assessment at 63 (Oct. 2000).[21] Indeed, many juveniles sentenced to spend the rest of their lives in prison commit suicide, or attempt to commit suicide. Id. at Pt. VI, at 2. See Logan, Proportionality, supra at 712 n.1 (discussing "psychological toll associated with LWOP"). These sentences promote the very antithesis of rehabilitation.

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

B. COURTS HAVE A SPECIAL DUTY TO ENSURE THAT THE EIGHTH AMENDMENT ADEQUATELY PROTECTS YOUTH

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

[21] Available at http://www.ncjrs.org/pdffiles1/bja/182503-1.pdf (last visited Jan. 11, 2008).

Outside of the Eighth Amendment, the Supreme Court has repeatedly acted to ensure that governmental power is constrained from harming juveniles, and that governmental power be wielded to protect juveniles in light of their immature judgment. The Supreme Court has moved to protect juveniles from the consequences of their actions and decisions where those consequences are far less severe than the death penalty or a LWOP sentence. See e.g., Kaupp v. Texas, 538 U.S. 626 (2003) (considering age and experience in voluntariness of confession by 17-year-old); Fare v. Michael C., 442 U.S. 707, 725 (1979) (determining whether juvenile has waived Miranda rights "mandates. . .evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of the Fifth Amendment rights, and the consequences of waiving those rights. . . [courts must] take into account those special concerns that are present when young persons. . . are involved"); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (in examining voluntariness of consent to search under Fourth Amendment, courts must consider, among the totality of circumstances, the youth of the accused). The Court has also clung to the historic distinction between the juvenile and adult criminal justice systems, ruling in McKeiver v. Pennsylvania, 403 U.S. 528 (1971) that preserving the rehabilitative purpose of the juvenile court was of greater importance than according juveniles the full benefit of jury trials as guaranteed to adult defendants under the Sixth Amendment.

The Supreme Court has even allowed states to exercise power over juveniles that would be unconstitutional if exercised over adults, based on the importance of protecting minors and recognizing developmental differences between minors and adults. See e.g., Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 666-68 (2004) (finding compelling government interest in protecting young minors from harmful images on Internet); Board of Educ. v. Earls, 536 U.S. 822, 838 (2002) (upholding random, suspicionless drug testing of students engaged in extracurricular activities, including marching band); Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995) (same, but drug testing was limited to athletes in part because of the danger that drug-abusing athletes could end up as "role models" for other, impressionable high school students); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding that public school officials may censor school-sponsored, student publications); Ginsburg v. New York, 390 U.S. 629, 637 (1968) (holding that states may prevent sale of obscene materials to minors). The Supreme Court even has allowed states to use their *parens patriae* power to *preventively* detain children in order to serve the best interests of the child, to keep them "from the downward spiral of criminal activity. . ." Schall v. Martin, 467 U.S. 253, 265-66 (1984) (upholding New York's power to detain certain at-risk juveniles for up to 17 days).

Children have long been granted special protection by the law in recognition that they are not as capable, or as culpable, as adults. The Eighth Amendment must similarly protect them.

II. DIAZ'S SENTENCE VIOLATES ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION AS IT CONSTITUTES "CRUEL OR UNUSUAL PUNISHMENT."

As Appellant has stated, the California Supreme Court's decision in People v. Dillon, 34 Cal.3d 441 (1983) dictates the conclusion that Diaz's sentence is unconstitutional. In Dillon, the Court explained that

> the state must exercise its power to prescribe penalties within the limits of civilized standards and must treat its members with respect for their intrinsic worth as human beings: "Punishment which is so excessive as to transgress those limits and deny that worth cannot be tolerated." . . . [A] punishment may violate the California constitutional prohibition "if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity."

Id. at 478 (internal citation omitted). To test proportionality, California courts examine "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society." Id. at 479. The court must also consider "'the nature of the offender' in the concrete rather than the abstract." Id.

The Dillon court emphasized individual culpability, noting that "a punishment which is not disproportionate in the abstract [may be] nevertheless constitutionally impermissible if it is disproportionate to the defendant's individual culpability. Id. at 480.

Diaz shares the characteristics that convinced the Dillon Court that a life sentence could not be constitutional in light of the defendant's individual culpability. Like Dillon, Diaz was a 17-year-old boy whose actions can be described as going "from youthful bravado, to uneasiness, to fear for his life, to

panic." Id. at 482. Like Dillon, Diaz had had "no prior trouble with the law," and "was not the prototype of a hardened criminal who poses a grave threat to society." Id. at 488.

In fact, Diaz was *less* culpable than Dillon. While Dillon testified that "[n]obody told me what to do and I had no support…," id. at 483, Diaz, according to testimony, was directly pressured to shoot. App. Br. at 26. While Dillon shot nine times and killed a person, Dillon, 34 Cal. 3d at 487, Diaz killed no one. While Dillon planned repeatedly over the course of months to steal from the marijuana field and to confront the owner with violence as necessary, id. at 451, Diaz's crime was one of recklessness, App. Br. at 26. Yet Diaz's sentence, with an earliest release date at age 88, is actually *longer* than Dillon's sentence of life with parole eligibility between 16 and 20 years. Dillon, 34 Cal. 3d at 487, n. 37. Thus, Dillon dictates the conclusion that Diaz' sentence is unconstitutional.

Indeed, the California Supreme Court has clarified that a sentence is constitutionally suspect if "more serious crimes" are punished "less severely than the offense in question." In re Lynch, 8 Cal. 3d 410, 426 (1973). A finding that a sentence "exceeds the punishments decreed for the offense in a significant number" of jurisdictions having the same or similar constitutional provisions calls the constitutionality of the sentence even further into question. Id. at 427. Given the unanimous rejection of LWOP sentences for juveniles charged with attempted murder, Diaz's claim must be found unconstitutional.

III. INTERNATIONAL LAW PROVIDES BINDING AUTHORITY PROHIBITING JUVENILE LWOP SENTENCES.

Foreign and international law are not only relevant to the Eighth Amendment analysis of evolving standards of decency, they also provide binding authority on the courts of our own country.

A. THE PROHIBITION AGAINST JUVENILE LWOP IS A *JUS COGENS* NORM AND THEREFORE CONSTITUTES BINDING AUTHORITY ON THE U.S.

Once a norm of customary international law rises to the status of a *jus cogens*[22] norm, it becomes *mandatory* authority applicable to all nation-states without exception. While there is no singular, established method for evaluating whether a principle qualifies as a *jus cogens* norm, it is instructive to consider how courts have approached this analysis. In 2002, the Inter-American Commission on Human Rights ("Commission")[23] held that the prohibition on the juvenile death

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

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

[23] The Inter-American Commission on Human Rights (IACHR) is one of two bodies in the inter-American system for the promotion and protection of human

penalty is a *jus cogens* norm, and consequently that the United States was bound by this norm. Applying the Commission's analysis to juvenile LWOP likewise leads to the conclusion that the prohibition against juvenile LWOP is a *jus cogens* norm.

In Domingues v. U.S. the Commission first reasoned that the prohibition on the death penalty was a *jus cogens* norm because of the near-unanimity of the world community in opposition to the punishment:

> [The] U.S. stands alone amongst traditional developed world nations and those of the inter-American system, and has also become increasingly isolated within the entire global community. The overwhelming evidence of global state practice as set out above displays a consistency and generality amongst world states indicating that the world community considers the execution of offenders aged below 18 years at the time of their offence to be inconsistent with prevailing standards of decency.

Domingues v. U.S., Case 12.285, Report No. 62/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 913 (2002). The Commission thus concluded that the U.S. "is bound by a norm of *jus cogens* not to impose capital punishment on individuals who committed their crimes when they had not yet reached 18 years of age." Id. at para. 85. The court's opinion emphasized that such a norm "binds the community of States, including the United States. The norm cannot be validly derogated from, whether by treaty or by the objection of a state, persistent or otherwise." Id.

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rights. The Commission has its headquarters in Washington, D.C. The other human rights body is the Inter-American Court of Human Rights, which is located in San José, Costa Rica. See http://www.cidh.org/what.htm.

The Court further underscored its finding of a *jus cogens* norm by looking to the near-universal ratification of the United Nations Convention on the Rights of the Child (CRC). According to the Court, "the extent of ratification of this instrument alone constitutes compelling evidence of a broad consensus on the part of the international community" against the juvenile death penalty. Domingues at para. 57. The prohibition against juvenile LWOP is part of the same sentence in the CRC that prohibits the juvenile death penalty, and international policy is analogous in terms of opposition to LWOP. Additionally, the fact that no other country in the world besides the U.S. imposes juvenile LWOP is particularly significant and relevant. Thus, the Commission's reasoning in Domingues strongly supports a finding that the prohibition on juvenile LWOP constitutes a *jus cogens* norm.

B. JUVENILE LWOP VIOLATES THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, WHICH IS BINDING ON THE U.S.

In addition to violating the binding authority of a *jus cogens* norm, the U.S. is in direct violation of its treaty obligations in applying LWOP sentences to youth. The U.S. ratified the International Covenant on Civil and Political Rights ("ICCPR") in 1992. Because the ICCPR is a treaty that the U.S. has signed and ratified, it constitutes the "supreme law of the land" based on Article VI, Clause 2 of the U.S. Constitution – the Supremacy Clause. The Committee on Human Rights, which is vested with the authority to oversee the ICCPR, has concluded that juvenile LWOP violates article 24(1) of the treaty, which states that "every

child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor…" See Committee Concluding Observations of the Human Rights Committee on the United States of America, 87th Sess. Held of 27 July 2006 (CCCPR/C/SR.2395), para. 24, cited in USF Report at 15.

In its ratification of the treaty, the U.S. reserved the right to treat juveniles as adults in "*exceptional* circumstances." (emphasis added) See International Covenant on Civil and Political Rights, Declarations and Reservations available at http://www2.ohchr.org/english/bodies/ratification/4.htm. However, the Committee on Human Rights concluded in 2006 that the U.S.'s use of juvenile LWOP violates the ICCPR in spite of the "exceptional circumstances" reservation. USF Report at 15. The Committee found in essence that, "the extraordinary breadth and rapid development" of juvenile LWOP "since the U.S. ratification of the ICCPR contradicts the assertion that the United States has applied this sentence in only exceptional circumstances." USF Report at 15. The Committee thus concluded that the U.S. is not limiting its use of juvenile LWOP to "exceptional circumstances" only, and furthermore that sentencing juveniles to LWOP in any circumstances violates the ICCPR. In persisting in its use of juvenile LWOP, the U.S. is therefore violating binding international law.[24]

[24] Sentencing juveniles to LWOP may violate another treaty as well. Since ratification in 1994, the U.S. has been legally bound to comply with the

C. THE CONVENTION ON THE RIGHTS OF THE CHILD REINFORCES THE INTERNATIONAL AUTHORITY PROHIBITING JUVENILE LWOP

The Convention on the Rights of the Child (CRC) explicitly prohibits juvenile LWOP. The CRC states that "[n]either capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below eighteen years of age." United Nations Convention on the Rights of the Child, Art. 37, Nov. 20, 1989, 1577 U.N.U.S. 3. In early 2007, the implementing authority for the CRC, the Committee on the Rights of the Child, issued a General Comment stating that a "life sentence without the possibility of parole [is] explicitly prohibited in article 37(a) CRC." Committee on the Rights of the Child, "General Comment No. 10: Children's Rights in Juvenile Justice," at para.4(c), UN Doc. No. CRC/C/GC/10 (9 February 2007) (*unedited version*). [25]

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

[25] 192 out of a total of 194 countries have joined the CRC as parties. Not one of the parties to the treaty has registered a reservation to the CRC's prohibition on life imprisonment without release for children. See United Nations Treaty Collection Database, available at http://untreaty.un.org/ (last visited Jan. 3, 2008). The only two countries that have failed to ratify the treaty, U.S. and Somalia, have both signed the treaty.

Although the United States is one of only two countries that did not ratify the treaty, as a signatory to the CRC the U.S. is bound in good faith to "ensure that nothing is done which would defeat the object and purpose of the treaty." See International Justice Project available at http://www.internationaljusticeproject.org. And, indeed, the U.S. has repeatedly declared its commitment to the principles of the document.[26] Two major principles of the CRC are non-discrimination; and the best interests of the child. G.A. Res. 44/25, U.N. Doc. A/44/49 (Nov. 20, 1989), Art. 1. Juvenile LWOP violates the principle of non-discrimination in dramatic, consequential ways. Nationally, African-American children are ten times more likely than white

[26] When Ambassador Madeline Albright, as the U.S. Permanent Representative to the U.N., signed the CRC on behalf of the United States in 1995, she declared: "The convention is a comprehensive statement of international concern about the importance of improving the lives of the most vulnerable among us, our children. Its purpose is to increase awareness with the intention of ending the many abuses committed against children around the world…United States' participation in the Convention reflects the deep and long-standing commitment of the American people." Madeline K. Albright, Remarks as United States Permanent Representative to the United Nations on the Occasion of the Signing of the U.N. Convention on the Rights of the Child, U.S. Press Release (Feb.16, 1995) (transcript available at http://www.hrw.org/reports/2005/us1005/9.htm). The U.S. has reaffirmed this commitment on subsequent occasions. For example, in 1999 Ambassador Betty King, U.S Representative to the U.N. Economic and Social Council stated: "Although the United States has not ratified the Convention on the Rights of the Child, our actions to protect and defend children both at home and abroad clearly demonstrate our commitment to the welfare of children. The international community can remain assured that we, as a nation, stand ready to assist in any way we can to enhance and protect the human rights of children wherever they may be." Betty King, Statement as United States Representative on the Economic and Social Council, to the Plenary of the 54th Session of the General Assembly on the Tenth Anniversary of the Convention on the Rights of the Child, (Nov. 11, 1999) (transcript available at http://www.hrw.org/reports/2005/us1005/9.htm).

children to be sentenced to LWOP. USF Report at i. In California, African-American children are twenty times more likely than white children to be sentenced to LWOP. Id. Juvenile LWOP also violates the principle of best-interests: whereas juvenile sentences are generally grounded in the principle of rehabilitation, LWOP disregards the possibility of an offender rehabilitating and reintegrating into society. Thus, the U.S. is violating its good faith obligation as a signatory to the CRC to adhere to the primary objectives of the treaty.

Although the CRC does not constitute the "supreme law of the land" as does the ICCPR, it represents persuasive authority. In determining whether the juvenile death penalty was lawful, the U.S. Supreme Court found persuasive that the CRC expressly forbids the juvenile death penalty. Simmons, 543 U.S. at 576. It is similarly persuasive here.

D. RESOLUTIONS OF THE UNITED NATIONS FURTHER HIGHLIGHT THE INTERNATIONAL OPPOSITION TO JUVENILE LWOP

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

Dec. 2006), passed by the Third Committee November 22, 2006. In October 2007, a similar resolution was introduced calling for a prohibition of juvenile LWOP sentences. USF Report at 15, citing U.N. General Assembly, Third Committee, para. 34, U.N. Doc. A/C.3/62/L.24 (23 Oct. 2007).

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

CONCLUSION

A sentence of life imprisonment without the possibility of parole for a juvenile tried for attempted murder violates the U.S. constitution, the California constitution and international law. For these reasons, *Amicus*, Juvenile Law Center supports Diaz's appeal.

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Respectfully submitted,

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

APPENDIX A

States where LWOP sentences are imposed inadvertently (through transfer or waiver laws), but not expressly.

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

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

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

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

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

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

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

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

Illinois 730 Ill. Comp. Stat. 5/5-8-1 (West Supp. 2005) (details mandatory minimum sentences for felonies; for first degree murder if death cannot be imposed and one aggravating factor is proven the mandatory sentence is LWOP if no aggravating circumstances the sentence is 20-60 years).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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