No. 08-7412

In the Supreme Court of the United States

TERRANCE JAMAR GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writ of Certiorari to the District Court of Appeal, First District of Florida

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BRIEF OF RESPONDENT

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QUESTION PRESENTED

Whether the Eighth Amendment's ban on cruel and unusual punishments prohibits the imprisonment of a juvenile for life without the possibility of parole as punishment for the juvenile's commission of a non-homicide.

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A. History and Background of Florida's Response to Violent Juvenile Crime.

Florida, the fourth most populous state with nearly 19 million residents, faces unique challenges to curbing violent crimes, including those committed by juveniles. By the 1990s, violent juvenile crime rates had reached unprecedented high levels throughout the nation.[1] Florida's problem was particularly dire, compromising the safety of residents, visitors, and international tourists, and threatening the state's bedrock tourism industry.[2]

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[1] This included increases in so-called "youth gangs," that arose during that time, generally involving three or more members aged 12 to 24 engaged in elevated levels of violent crime. *See* National Youth Gang Center, Center for Intergovernmental Research, Youth Gang FAQ, http://www.iir.com/nygc/faq.htm (last visited Sept. 11, 2009); *see also National Gang Threat Assessment,* Nat'l Gang Intelligence Center 40 (Jan. 2009) ("typical gang-related crimes" include armed robbery, assault, home invasions, and weapons trafficking), *available at* http://www.usdoj.gov/ndic/pubs32/-32146/32146p.pdf (last visited Sept. 11, 2009).

[2] *See, e.g.,* Curt Anderson, *Police Round Up Youths in Slaying of British Tourist*, AP, Sept. 16, 1993; *Behind the Mask of Florida; Ranked as One of Top Three Most Dangerous Places to Visit*, Hamilton Spectator (Canada), Dec. 13, 1994, at A3; Mike Clary, *Florida Tries to Rescue Sunny Image as Violence Gets Worse,* L.A. Times, Sept. 29, 1993, at A1; *Germans Wary of Visiting Florida*, St. Petersburg Times, May 18, 1994, at 1E; Edwin McDowell, *After Tourists' Deaths, Florida Works to Recover*, N.Y. Times, Nov. 26, 1993, at D11; Jim Mulvaney, *From* (Continued…)

During these years, many Americans considered the criminal system too easy on violent juvenile offenders and demanded reform.[3]

Florida, like over forty other states,[4] purposefully[5] confronted its juvenile violent crime

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Youngster to Gangster: How Florida Boy Shot a Tourist, L.A. Times, Jan. 16, 1994, at A1.

[3] *See Juvenile Justice: A Century of Change*, U.S. Dep't of Just., Off. of Juv. Just. & Delinquency Prevention 5 (Dec. 1999), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/178995.pdf (last visited Sept. 3, 2009) (Juvenile Justice History); *Combating Violence & Delinquency: The National Juvenile Justice Action Plan Report*, U.S. Dep't of Just., Off. of Juv. Just. & Delinquency Prevention 19 (March 1996), *available at* http://www.ncjrs.gov/pdffiles/jjplanfr.pdf (last visited Sept. 3, 2009) (DOJ Action Plan); *Public on Justice System: Fair, but Still Too Soft*, Gallup, Feb. 3, 2004, *available at* http://www.gallup.com/poll/10474/Public-Justice-System-Fair-Still-Too-Soft.aspx (last visited Sept. 3, 2009) (83% of Americans in 1992 believed the system too lenient on crime).

[4] *See* Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 Crime & Just. 81, 84 (2000); DOJ Action Plan, *supra* note 3, at 22.

[5] *See* William Booth, *Florida Wants to be on Cutting Edge of Get-Tough Crime Remedies*, Wash. Post, Feb. 17, 1994, at A3; Jerry Fallstrom, *Young Killers Fuel Rise in Violent Crime; Florida's Crime Figures for 1993 Bolster Arguments in Tallahassee for a Get-Tough Approach to Teen Criminals*, Orlando Sentinel, Mar. 17, 1994, at A1; Linda Kleindienst & Diane Hirth, *House Gets Tough with Juveniles*, Sun Sentinel (Ft. Lauderdale, Fla.), Nov. 4, 1993, at 1A (reporting a 119-0 vote on a special session bill that required juveniles to be tried as adults in some cases).

problem. Indeed, it took unprecedented steps. The Florida legislature, which typically meets annually in a single 60-day session, was convened in *two* special sessions in 1993 to address rising crime problems, one specifically addressing juvenile crime.[6] *See* 1993 Fla. Laws, Ch. 93-403 (appropriating additional funds for correctional facilities and juvenile justice reform); 1993 Fla. Laws, Ch. 93-416 (creating legislation to prevent juveniles from accessing firearms). Florida's governor, who convened the legislature, did so because it "is widely recognized that juvenile crime has become the greatest single crime problem in America today." *See* 1994 Fla. Laws xviii (statement of Governor Lawton Chiles). The legislature comprehensively reviewed juvenile crime issues in its regular session in 1994, producing the Juvenile Justice Act, which facilitated the transfer of juvenile offenders to adult criminal courts and gave judges discretion to impose either juvenile or adult sanctions in some cases. *See* 1994 Fla. Laws, Ch. 94-209 (noting juvenile crime problem "has ramifications far beyond the juvenile justice system and affects the health and integrity of the state's business, community, education, and family institutions."). The Act's primary goal was to protect society by emphasizing "control, discipline, punishment, and treatment" of juvenile offenders. Fla. Stat. § 39.002(1)(c) (1995). The Act broadened the ability to prosecute older juvenile offenders, and those who commit serious violent crimes, as adults. Fla. Stat. § 39.0587(1)(e) (1995).

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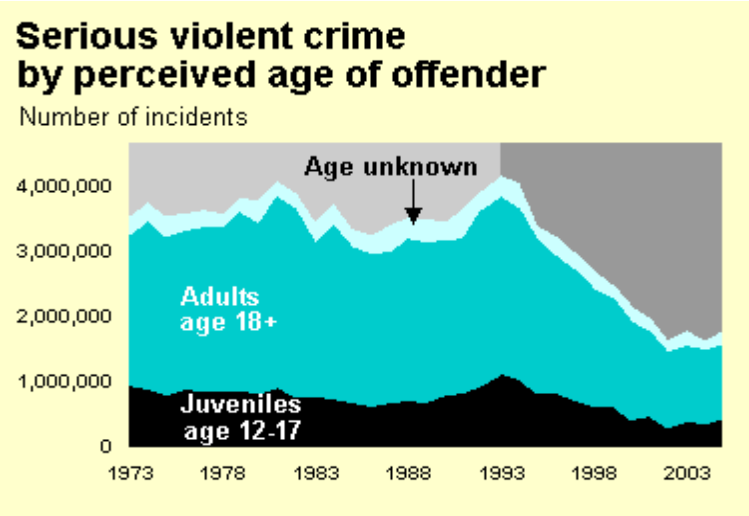
[6] *See Florida's Governor Calls Session on Crime*, N.Y. Times, Oct. 12, 1993, at A18.

Florida's criminal sentencing laws and punishment policies from 1980 to 2000 reflected an ongoing, focused effort to deter serious crimes. Many changes in sentencing practices, gaintime policies, and early prison release occurred during this time. *See* William H. Burgess, *Florida Sentencing* 235-423 (2008-09). Additionally, the legislature funded a massive and accelerated prison construction program, resulting in more correctional institutions opening in the 1990s than in any other decade before or since. *See* Dep't of Corrs., *Facilities*, 2007-08 Annual Report, *available at* http://www.dc.state.fl.us/pub/annual/0708/facil.html (last visited Sept. 11, 2009). Indeterminate sentencing with parole was replaced with a determinate, "truth-in-sentencing" policy that required all offenders to serve at least 85% of their sentences. Historical Summary of Sentencing & Punishment in Fla., Dep't of Corrs., http://www.dc.state.fl.us/pub/history/ (last visited Sept. 2, 2009). Violent career criminal laws were enacted along with other statutes substantially increasing mandatory punishments and enhancing sentences for repeat offenders and prison release reoffenders. *Id.* Sentences were also enhanced for those who possess or use firearms during violent or drug trafficking crimes under a 10-20-Life program. *Id.*

These deliberative and focused strategies worked; violent crime rates plummeted from their 1990s highs, both nationwide and in Florida:



As the chart shows, serious violent offenses committed by juveniles aged 12-17 declined 61% from 1993 to 2005 nationwide.[7] In Florida, violent crime rates per 100,000 persons decreased from 1200.3 in 1992 to 670.3 in 2008.[8] Juvenile crime has also

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[7] U.S. Dep't of Justice, Bur. of Justice Statistics, http:// www.ojp.usdoj.gov/bjs/glance/offage.htm (last visited Sept. 3, 2009).

[8] *See Violent Crime Rate at a Glance (1989-08)*, Fla. Dep't Law Enforcement, http://www.fdle.state.fl.us/Content/FSAC/Crime-Trends/Violent-Crime.aspx (last visited Sept. 3, 2009). Florida and other states continue to consider juvenile sentencing policy, including the potential for parole, a major issue. Ashley Nellis & Ryan S. King, *No Exit, The Expanding Use of Life Sentences in America*, The Sentencing Project 41 (July 2009); *see also* H.R. 2289, 111th Cong. (1st Sess. 2009) (federal bill to give meaningful parole to juvenile offenders).

dramatically decreased; the rate of juvenile crime in Florida fell 30% from 1994 to 2004.[9]

B. Graham's First Violent Offenses: Armed Burglary with Assault or Battery and Attempted Armed Robbery.

In 2003, Terrance Graham, then about six months short of his seventeenth birthday, plotted to rob a Jacksonville barbeque restaurant. [JA 15] After scoping out the restaurant, he and an accomplice donned masks and entered the restaurant at closing time through a rear door that a third accomplice (who worked at the restaurant) left unlocked. [JA 14-15, 438] The restaurant's manager was bludgeoned over the head with a steel bar as the intruders sought money. [JA 6-7, 14-16, 35, 205, 437-38] The victim, in his letter to the sentencing judge, noted that the blows barely missed causing permanent injury or death. [JA 205]

Investigators arrested Graham (and his accomplices), at which time Graham's father told the investigators about burglary tools and a mask that he had found and that he thought Graham might be committing crimes. [JA 437-39]

Graham was charged as an adult with (I) armed burglary with an assault or battery in violation of Florida Statutes sections 810.02(2)(a)

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[9] Nat'l Juvenile Defender Center, *Florida: An Assessment of Access to Counsel & Quality of Representation in Delinquency Proceedings* 13 (Fall 2006).

and 810.02(2)(b), a first-degree felony punishable by up to life in prison; and (II) attempted armed robbery in violation of Florida Statutes sections 812.13(2)(b) and 777.04(1), a second-degree felony punishable by up to fifteen years in prison. [JA 6-7, 9, 407] Graham pled guilty to both offenses and stipulated to the factual basis for the plea. [JA 17-27] The original trial judge, Judge Peter Dearing, withheld adjudication and gave Graham three years probation with the condition that he serve 12 months in a county detention facility (with 101 days credit) and 100 hours of community service. [JA 17-27, 42-48] During the plea colloquy, the trial judge informed Graham, and Graham acknowledged, that he was agreeing to adult sentencing and giving up his right to have the court consider the imposition of juvenile sanctions. [JA 22-23] Accordingly, the court certified Graham as an adult for future violations of Florida law. [JA 28]

C. Graham's "Second Chance" on Probation: Escalating Violent Criminal Conduct a Month Shy of His Eighteenth Birthday.

Shortly after his release from county jail in June 2004, Graham almost immediately resumed an even more violent criminal life. A month shy of his eighteenth birthday, Graham led older accomplices in planning and then committing an armed robbery at the home of Carlos Rodriguez Lopez, a recent war refugee from Colombia who worked as a construction laborer and lived with his wife and stepson. [JA 53-55, 57-58, 111-16, 314-15, 407]

On December 2, 2004, at about 7:00 p.m., Rodriguez answered a knock at the front door and was confronted by three armed males – Graham, Kirkland Lawrence, and Meigo Bailey. [JA 113, 317] Graham pushed through the door, shoved a pistol in Rodriguez's stomach, and gave orders to the others. [JA 113-14, 318, 321-27] The men forced Rodriguez to the floor; Graham held a gun to Rodriguez's head and yelled at him for money. [JA 114, 319, 350] The group stayed in the home for about a half hour and "destroyed everything." [JA 115, 317] Rodriguez feared for his life, certain that Graham would shoot him. [JA 115, 320] Rodriguez's friend, who was also at the home, was brought out from the bathroom and put on the floor. [JA 114] The intruders stole the friend's gold crucifix and chain (which police later recovered from Lawrence's pockets). [JA 115, 182-83] Ultimately, Graham and the men put the two victims in the closet, stacked furniture against the door, and left. [JA 115, 319]

After leaving Rodriguez's home, accomplice Bailey was shot during an alleged second robbery incident. [JA 160] Graham drove the group in his father's car to the hospital, where he dropped off Bailey and Lawrence, and then sped away. [JA 177, 247, 264, 267, 272, 365-66]

Graham exited the hospital parking lot with no regard for traffic and almost crashed into two other cars, one of which was driven by a sheriff's detective. [JA 247] The detective activated his emergency equipment and pursued Graham, attempting to pull him over. Graham fled, leading the detective on an extended high-speed car chase.

After ignoring stop signs and speeding upwards of 90 miles per hour through residential streets, Graham lost control of the car and crashed into a telephone pole. [JA 247-50] Graham exited the car and fled on foot, but eventually was apprehended. *Id.* Crime scene detectives found three guns inside the car: a .38 revolver and two semiautomatics, a .380 and a .45. [JA 171-73]

Detectives from the Hispanic robberies task force, created in response to a series of home invasion robberies against Hispanic victims in the Jacksonville area, were brought in to investigate Graham. [JA 145, 158, 312] On the night of the robbery, Detective Cesar Parrales met with the victim, Rodriguez, who immediately identified Graham, Lawrence, and Bailey as the perpetrators. [JA 117-24, 148-50] Later, Detective Parrales questioned accomplice Bailey who admitted his involvement in the robbery with Graham and Lawrence. [JA 152]

Detective Brian Kee, also a member of the Hispanic robberies task force, interviewed Graham. [JA 158] After being read his rights, Graham told Detective Kee his version of the night's events. He claimed that while driving his father's car he happened upon Bailey, who had been shot, and Lawrence, and gave them a ride to the hospital. [JA 159-60] Graham contended that he had led police on a high-speed chase after dropping Bailey off because he did not want to violate his 10 p.m. probation curfew. [JA 160] After detectives told Graham that Rodriguez (the victim) had identified him as a perpetrator, they asked Graham, "Aside from the two

robberies tonight how many more were you involved in?" *Id.* Graham answered, "Two or three before tonight." *Id.* The officers arrested Graham on new felony charges of home-invasion robbery and fleeing and eluding.

D. Graham's Violation of Probation and Sentencing Hearings.

In late 2005, the trial judge, Judge Lance Day, began a series of violation of probation (VOP) and sentencing hearings that extended over a six-month period. [JA 67-397] The State filed an affidavit charging Graham with violating conditions of his probation; three violations arose from the Rodriguez robbery and related events:

- Possessing, carrying, or owning any weapon or firearm (Condition (3));
- Committing the offenses of Home Invasion Robbery, Fleeing/Attempting to Elude a Law Enforcement Officer, Aggravated Chase (Condition (4)); and
- Associating with persons engaged in criminal activity (Condition (5)).

[JA 53-55] Graham admitted that he had fled and eluded police, but nothing more. [JA 78, 80-88] In doing so, he repeatedly acknowledged to the trial judge that he understood and accepted that his admission exposed him to a minimum sentence of 66.75 months of incarceration up to a life sentence, which could be based on any additional evidence the

State was prepared to present to the trial judge about the home invasion charge. [JA 78-83; 99-102][10]

The State then presented the testimony of Graham's probation officer [JA 92-108]; Mr. Rodriguez, the victim of the home invasion robbery who identified Graham and the gun Graham used [JA 110-144]; task force officer Detective Parrales, who had interviewed witnesses identifying Graham; task force officer Detective Kee, who interviewed Graham about the home invasion robbery and testified that Graham said he'd been involved with "two or three [robberies] before tonight" [JA 144-164]; the crime scene detective who identified the three handguns in Graham's car [JA 164-175]; and the officer who found the gold necklace and cash on accomplice Lawrence. [JA 176-181] Based on the State's presentation of evidence and Graham's partial admission, the trial court concluded that all three conditions of probation had been violated due to the home invasion robbery. [JA 198-200]

Next, sentencing proceedings were held in a series of three evidentiary hearings over a three-month period when Graham was nineteen. [JA 212-234, 236-282, 307-397] In mitigation, Graham testified, as did a number of his family members. [JA 212-13] Graham asked for leniency because of the family difficulties his incarceration caused. [JA 263,

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[10] The trial judge corrected the record to reflect that Graham faced exposure of 66.75 months to life on the primary count, armed burglary with assault or battery, and of 66.75 months to fifteen years on the secondary count, attempted armed robbery. [JA 99-102]

275, 374] He claimed that he had "manned up" to his violation because he admitted to fleeing and eluding the police for fear of missing his curfew. [JA 263-64] Graham continued to deny any involvement with the Rodriguez home invasion, knowledge of the firearms recovered from his car, or his admission to police of his involvement in other home invasion robberies. [JA 276] After Graham's initial testimony, the court reserved judgment on sentencing for two months so it could hear more testimony. [JA 281]

When sentencing resumed in May 2006, the court heard again from the victim Rodriguez and Graham, and from Graham's accomplice Lawrence for the first time. [JA 308] Rodriguez re-identified Graham as the leader who had pointed a gun at Rodriguez's stomach and head and demanded money. [JA 314-20] Accomplice Lawrence testified to Graham's role in the Rodriguez robbery and as the driver that night, and identified pictures of the three guns retrieved from Graham's car and used by the group to rob Rodriguez's home. [JA 348, 357-58, 365] He further identified the particular gun that Graham used that night. *Id.*

Graham, however, continued to maintain that he had no involvement in the robbery. [JA 377, 381-86] Graham testified, for instance, that Rodriguez mistakenly identified him, that Lawrence wrongly inculpated him, that his flight from police at the hospital only arose from his concern for making curfew, that police wrongly recounted his admission of participation in a robbery, and that he had no idea from where the guns recovered from his car had come. *Id.*

Ultimately, the trial court concluded:

> THE COURT: Mr. Graham, as I look back on your case, yours is really candidly a sad situation. You had, as far as I can tell, you have quite a family structure. You had a lot of people who wanted to try and help you get your life turned around including the court system, and you had a judge who took the step to try and give you direction through his probation order to give you a chance to get back onto track. And at the time you seemed through your letters that that is exactly what you wanted to do. And I don't know why it is that you threw your life away. I don't know why.
>
> But you did, and that is what is so sad about this today is that you have actually been given a chance to get through this, the original charge [*sic*], which were very serious charges to begin with. The burglary with assault charge is an extremely serious charge. The attempted robbery with a weapon was a very serious charge. … And you get an opportunity and you throw it away. How old are you now?
>
> THE DEFENDANT: Nineteen.
>
> THE COURT: And how old were you when this started?
>
> THE DEFENDANT: Seventeen.
>
> THE COURT: And in less than two years – actually, a lot less than that, in a very short period of time you were back before the Court on a violation of probation,

and then here you are two years later standing before me, literally the – facing a life sentence as to – up to life as to count 1 and up to 15 years as to count 2.

And I don't understand why you would be given such a great opportunity to do something with your life and why you would throw it away. The only thing that I can rationalize is that you decided that this is how you were going to lead your life and that there is nothing that we can do for you. And as the state pointed out, that this is an escalating pattern of criminal conduct on your part and that we can't help you any further. We can't do anything to deter you. This is the way you are going to lead your life, and I don't know why you are going to. You've made that decision. I have no idea. But, evidently, that is what you decided to do.

So then it becomes a focus, if I can't do anything to help you, if I can't do anything to get you back on the right path, then I have to start focusing on the community and trying to protect the community from your actions. And unfortunately, that is where we are today is I don't see where I can do anything to help you any further. You've evidently decided this is the direction you're going to take in life, and it's unfortunate that you made that choice.

I have reviewed the statute. I don't see where any further juvenile sanctions would be appropriate. I don't see where any youthful offender sanctions would be

> appropriate. Given your escalating pattern of criminal conduct, it is apparent to the Court that you have decided that this is the way you are going to live your life and that the only thing I can do now is to try to protect the community from your actions.

[JA 393-94]

The trial judge adjudicated Graham guilty as to count I, armed burglary with an assault or battery, and sentenced him to life in prison with credit for 12 months and 496 days already served. [JA 395-96] As to count II, the trial court adjudicated Graham guilty of attempted armed robbery and sentenced Graham to 15 years in prison with 12 months and 496 days credit for time served, to run concurrently with count I. *Id.* The trial court also revoked and terminated Graham's probation. *Id.*

E. Graham's State Appeal.

Graham appealed his sentence in June 2006. Florida's First District Court of Appeal upheld the trial court in an April 10, 2008, opinion that extensively analyzed Graham's claim that his sentence violates the prohibitions on cruel and unusual punishment. [Pet. App. 1-22] The district court determined that Graham's life sentence is not facially invalid under this Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005), because, as this Court has recognized, "death is different" and sentencing a juvenile to life imprisonment is not always cruel and unusual. [Pet. App. 6-12] Graham's *per se* claim based on international norms was

rejected in accordance with this Court's decision in *Roper* that reliance on international norms is "not controlling" and that, "[w]hile the weight given the international community is persuasive," the sentencing regimes of state legislatures will generally be upheld if they are otherwise constitutional. [Pet. App. 12-15]

The First District also rejected Graham's *as applied* challenge that his life sentence was grossly disproportionate to his offense, recognizing that the "record facts ... establish that, after being placed on probation – an extremely lenient sentence for the commission of a life felony – appellant committed at least two armed robberies and confessed to the commission of an additional three." [Pet. App. 15-19] Graham's age was considered: "These offenses were not committed by a pre-teen, but a seventeen-year-old …." [Pet. App. 17] The seriousness of the offense was also noted: "Additionally, these robberies involved the use of a weapon, and appellant himself held a gun to a man's head during the incident for which [his probation] was violated." *Id.* The First District also highlighted that Graham, who wrote a letter expressing his remorse and promising to refrain from criminal activity when he "was given an unheard of probationary sentence for a life felony, … rejected his second chance and chose to continue committing crimes at an escalating pace." [Pet. App. 18] Accordingly, "the tested theory of rehabilitation" and Graham's "inability to rehabilitate" justified the life sentence Graham received. [Pet. App. 18-19]

Finally, the First District rejected Graham's claim that his sentence violated the International

Covenant on Civil and Political Rights (ICCPR), concluding that, even if Graham had standing to raise such a claim, the treaty is not self-executing and no judicially enforceable right directly arises out of the ICCPR. [Pet. App. 19-22] Accordingly, the First District affirmed Graham's conviction and sentence. [Pet. App. 22]

Graham sought review in the Florida Supreme Court, which declined jurisdiction on August 22, 2008. [Pet. App. 107]

SUMMARY OF THE ARGUMENT

The Eighth Amendment contains no textual or jurisprudential basis for a categorical ban on life sentences without parole for juveniles who commit violent crimes simply because of the fortuity that their victims did not die. Particularly heinous acts that stop short of causing death or a series of escalating violent acts justify long-term sentences for juveniles, including life without parole.

Indeed, this Court's Eighth Amendment non-capital cases establish that a life without parole sentence is not grossly disproportionate to violent crimes against vulnerable victims, such as the armed burglary with assault or battery that Graham committed. Because a life without parole sentence is constitutional for the mere possession of 672 grams of cocaine (*Harmelin*), and a life sentence is constitutional for the commission of three non-violent theft-related offenses (*Rummel*), it is constitutional for Graham's violent armed burglary. Because his sentence is objectively not grossly disproportionate, it does not violate the Eighth Amendment and the judicial inquiry ends.

Notably, Graham's acts were sufficiently violent that the State of Florida, pursuant to its juvenile transfer laws, deemed him worthy of adult court adjudication and adult sanctions, a decision that Graham has not challenged; indeed, he acknowledged and agreed to disposition in the adult system. A primary purpose of juvenile transfer laws is to apply the processes and sanctions of the adult system to those juveniles, such as Graham, who

engage in adult-like crimes. Given that Graham does not challenge his adjudication as an adult via the transfer system, his attempt to inject age at the sentencing phase is unwarranted and, if allowed, would undermine transfer systems nationwide.

Though unnecessary to consider, Graham's intra- and interjurisdictional analyses lack comparative or explanatory power. Florida data show that Graham's sentence is not an unusual one, even taking his age into account. Half of the 301 juvenile offenders serving life sentences in Florida are doing so for at least one non-homicide offense, a figure nearly double that in the study on which Graham primarily rests his argument. Graham also relies on comparisons with highly selective "average" sentences in Florida, which include far less violent or serious conduct, thereby skewing the results in his favor. These type of comparisons are a misleading "apple to oranges" exercise that provide little basis for meaningful judicial review.

Graham's comparisons to offenders in other states are similarly flawed. Three-fourths of the states permit life sentences without parole for juveniles convicted of non-homicides, reflecting a broad consensus on the question presented. It cannot be said that Florida's treatment of juvenile offenders who commit violent crimes that do not happen to kill their victims exceeds constitutional norms. Moreover, the absence of reliable data and studies in the record below make this a particularly troublesome case upon which to establish a new constitutional rule. The lack of a national trend against the sentence imposed here further reflects

that Graham has not met his burden to demonstrate an Eighth Amendment violation. Given the national consensus that life without parole is a permissible sanction for juveniles, the international data on juvenile life sentences should be accorded no weight.

That *Roper* removed the death penalty from the constitutional calculus for minors does not, ipso facto, make harsh penalties, even life sentences, categorically unconstitutional, particularly for potentially lethal violent offenses. Extending the rationale of *Roper*, developed in the limited context of the death penalty, to the exceptionally broad and virtually unlimited context of prison incarceration is compelled neither by legal logic nor by societal norms.

That juveniles as a class generally are less developed mentally than adults is neither a novel idea nor a dispositive factor in this analysis. Our society has accounted for juvenile status in virtually every aspect of our laws and traditions. Indeed, an entire field of study is devoted to juvenile justice and delinquency, and all states, including Florida, devote massive resources and extensive programs to juveniles who are at risk for criminal behavior or have committed crimes. State legislatures, judges, juries, and attorneys take an offender's age into account in many ways.

Thus, the argument that imposition of a lengthy sentence should be categorically prohibited because it fails to take into account a juvenile's lesser culpability ignores these many obvious ways in which youth plays a role in our criminal justice

system and sentencing laws. Florida's legislature, as well as that of every other state, has closely and repeatedly reviewed juvenile justice and sentencing matters over the past twenty years, when crime rates soared and societal concerns justifiably mounted. Principles of sovereignty that accord states broad deference in structuring their criminal and juvenile justice systems must be given great weight. States must have ongoing flexibility to decide what mix of incapacitation, deterrence, and rehabilitation their criminal justice systems will pursue.

Finally, a constitutional rule that categorically excludes life sentences without parole for violent and potentially lethal offenses is unworkable and raises far more "line-drawing" questions than it answers. Does a "non-homicide" offense include violent crimes with dangerous weapons that cause serious injury but not death? Does "life" mean only those sentences that actually impose "life" for a single offense, or does it include consecutive sentences for two or more offenses that effectively amount to (or exceed) the actuarial life expectancy of the offender? Do states have to reinstitute costly and oftentimes problematic parole systems to assist life-sentenced juveniles in reforming themselves? How effective must parole be? The possibilities are boundless, and none of them have been addressed by Graham or his amici.

For all the reasons above, the decision of the Florida appellate court was correct and should be affirmed.

ARGUMENT

Outside the context of the death penalty, this Court has never adopted categorical bans on punishment and it has never considered the characteristics of the offender, such as age, in its Eighth Amendment analysis. Yet Graham seeks to override both of these established and important firewalls protecting the states' power to structure and implement their criminal justice systems as they deem warranted. These systems already account for age, along with offense severity, in the processes by which a juvenile offender is adjudicated and punished for criminal conduct. The linchpin of Graham's argument is the wholesale extension of *Roper* and its categorical ban, which was developed in the unique and highly limited context of the death penalty, to the exceptionally broad and virtually unlimited context of prison incarceration. This extension, which seeks a categorical ban on life sentences for juveniles in the adult system who commit violent felonies merely because no death occurs, is compelled neither by this Court's Eighth Amendment jurisprudence nor by *Roper*.

Section I demonstrates that life without parole is not grossly disproportionate for the type of violent felonies involving lethal weapons that underlie Graham's sentence, even when accounting for an offender's age. Section II explains why *Roper* should not be extended outside the death penalty context, why doing so would undermine the administration of state criminal justice systems that already account for juvenile status, and why Graham's proposed analysis is unworkable.

I. This Court's Eighth Amendment Jurisprudence Supports a Life Sentence Without Parole for Violent Juvenile Offenses, Even When a Victim of the Offense Does Not Die.

A. Under general Eighth Amendment principles that apply to incarceration cases, Graham's sentence is not grossly disproportionate to his offense.

Over the past thirty years, this Court has decided six cases addressing whether a prison sentence for a term of years contravened the Eighth Amendment's prohibition against cruel and unusual punishment. In these cases, the Court applied a "narrow proportionality" principle, noting that successful challenges based on excessiveness of incarceration will be "exceedingly rare" and only when "extreme" circumstances exist. *See, e.g., Lockyer v. Andrade*, 538 U.S. 63, 73 (2003). This Court's threshold consideration involves simply a comparison of the crime committed and the sentence imposed to determine whether an inference of gross disproportionality exists. *Harmelin v. Michigan*, 501 U.S. 957, 1005 (Kennedy, J., concurring).

These principles are reflected in the fact that this Court upheld five of the six sentences, two of which were *mandatory life sentences* for *non-violent crimes* such as theft or drug possession:

- *mandatory life sentence* (with the possibility of parole) for three theft-related felonies (under a recidivist statute) which, in the aggregate, totaled less than $230, *Rummel v. Estelle*, 445 U.S. 263 (1980);
- *forty-year sentence* for possession and distribution of less than nine ounces of marijuana, *Hutto v. Davis*, 454 U.S. 370 (1982);
- *mandatory life sentence* (without the possibility of parole) for possession of 672 grams of cocaine, *Harmelin*;
- *25-year to life sentence* pursuant to California's mandatory Three Strikes law where the triggering offense was felony grand theft of three golf clubs amounting to approximately $1200, *Ewing v. California*, 538 U.S. 11 (2003); and
- *two consecutive 25-year to life sentences* under California's mandatory Three Strikes law for two counts of petty theft of videocassettes valued at approximately $150, *Lockyer*.

The only instance in which this Court found a sentence unconstitutional was a *mandatory life sentence without parole* for a seventh felony, the first six being non-violent felonies and the last being a $100 bad check charge. *Solem v. Helm*, 463 U.S. 277 (1983).

Given this Court's precedents, Graham's life sentence for committing a violent crime is not grossly disproportionate. If a life sentence without parole is constitutional for the possession of 672 grams of

cocaine or for the commission of three non-violent theft-related offenses, then the same sentence for Graham's violent armed burglary with a potentially lethal battery on the victim is constitutional and not grossly disproportionate.

This conclusion is buttressed by the fact that Graham's sentence was discretionary and imposed after he received a second chance on probation during which time he committed more serious violent crimes involving the use of firearms a month before turning eighteen. His sentence was imposed in an individualized sentencing process after a number of hearings at which the trial judge was able to assess Graham's maturity and demeanor; the judge expressly considered Graham's age when imposing the sentence.

A brief overview of the analyses in these cases demonstrates that Graham's individualized sentence for a violent felony is well within constitutional parameters. First, in *Rummel*, this Court observed that the Eighth Amendment proscribed a term of incarceration "grossly disproportionate to the severity of the crime," 445 U.S. at 271, and recognized the inappropriateness of discerning any guiding principles regarding proportionality from its death penalty jurisprudence. Accordingly, this Court perceived no constitutional infirmity regarding either the recidivist statute or the life sentence imposed for a non-violent theft-related felony, recognizing that questions related to sentencing policy are best reserved for the legislature. *Id.* at 285; *see also Hutto*, 454 U.S. at 374.

In *Solem*, which involved a mandatory sentence of life without parole for a $100 bad check following a series of non-violent felonies, this Court recognized that broad deference should be accorded to both legislatures and trial courts regarding the propriety of mandatory punishments for certain crimes. 443 U.S. at 290. To moor its gross disproportionality analysis to an objective framework, the Court explained that this analysis included consideration of: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 292. These factors dictated *Solem's* holding: the defendant's mandatory sentence of life without parole was "significantly disproportionate to his crime" of a $100 bad check and non-violent felony history, and therefore was proscribed by the Eighth Amendment. *Id.* at 303.

In contrast to *Solem*, this Court in *Harmelin* held that a mandatory sentence of life without the possibility of parole for possession of 672 grams of cocaine did not violate the Eighth Amendment. 501 U.S. 957. The reasoning underlying this conclusion derived from separate plurality opinions. Justice Scalia (joined by Chief Justice Rehnquist) asserted that the three objective factors articulated in *Solem* were inapposite; and, *inter alia*, that the Eighth Amendment only proscribed modes of punishment. *Id.* at 965, 976. Justice Kennedy's concurring opinion (joined by Justices O'Connor and Souter) similarly found that Harmelin's mandatory life sentence did not violate the Cruel and Unusual Punishments

Clause; the opinion noted that: "The Eighth Amendment does not require strict proportionality between crime and sentence." *Id.* at 1001 (Kennedy, J., concurring).

Justice Kennedy also recognized that the three objective factors identified in *Solem* as being germane to this narrow proportionality review should not be applied mechanistically. *Id.* at 1005 (Kennedy, J., concurring). In fact, comparative analysis of sentencing practices within, and outside of, a particular jurisdiction might often prove unnecessary. Instead, reviewing courts only need engage in "intrajurisdictional and interjurisdictional analyses … in the *rare case* in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Id.* (Kennedy, J., concurring) (emphasis added). Because Harmelin had not made a threshold showing that his sentence was grossly disproportionate to his crime, comparative analysis of his sentence was unnecessary, and his mandatory life prison term was not violative of the Eighth Amendment.

Following *Harmelin*, this Court did not have occasion to consider the constitutionality of a noncapital sentence until *Ewing* and *Lockyer*, both involving California's Three Strikes law, which subjected a defendant with two or more prior serious or violent felonies to a mandatory sentence of 25 years to life upon conviction of a third felony. In *Ewing*, a plurality (Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy) again recognized that the Eighth Amendment encompasses

a "narrow proportionality principle" within the sphere of noncapital cases; the opinion set forth the view that Justice Kennedy's concurring opinion in *Harmelin* was instructive regarding the contours of this narrow proportionality analysis. *Ewing*, 538 U.S. at 20, 23-25. Therefore, because Ewing could not show that his sentence was grossly disproportionate to his crime, this Court upheld his mandatory 25-year to life sentence. *Id.* at 30-31.[11]

In *Lockyer*, the Court conceded that its precedents regarding gross disproportionality had been somewhat imprecise: "we have not established a clear or consistent path for courts to follow." 538 U.S. at 72. Nevertheless, the sentence imposed (50 years to life) was not so extraordinary as to be considered grossly disproportionate to the offense (recidivist petty theft), and Eighth Amendment relief was therefore unwarranted. *Id.* at 77.

This Court's noncapital narrow proportionality jurisprudence demonstrates that for a prison sentence to contravene the Eighth Amendment, aberrant circumstances must exist involving a shockingly lengthy sentence imposed for relatively minor misconduct. *Rummel*, 445 U.S. at 274 n.11 (acknowledging that a life sentence for overtime parking would necessarily touch upon proportionality principles).

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[11] Justices Scalia and Thomas concurred in the judgment, asserting that the Eighth Amendment does not contain a proportionality principle. *See id.* at 31 (Scalia, J., concurring); *id.* at 32 (Thomas, J., concurring).

Yet Graham committed serious violent offenses, and has no claim that his actions were relatively "passive." *See, e.g., Solem*, 463 U.S. at 296 (observing that the petitioner's criminal history was "passive" in nature and did not involve "violence nor threat of violence to any person."). He portrays his sentence as arising from a single isolated incident, an armed burglary with an assault or battery. That characterization is inaccurate. Graham committed two serious violent offenses to which he pled guilty and agreed to be treated as an adult; he was given a second chance by having adjudication withheld, serving one year in county jail, and being placed on probation. But soon after his release, a few weeks shy of his eighteenth birthday, he engaged in an escalating pattern of violent crimes involving firearms and vulnerable Hispanic victims. The trial judge, who closely questioned and observed Graham during the individualized sentencing hearings, concluded that Graham had no real interest in rehabilitation and posed a serious and ongoing threat of violence to the community. Graham's conduct established not lesser, but far greater culpability.

Because Graham finds little support in the gross disproportionality precedents, he argues that his sentence is grossly disproportionate because it is the harshest sentence now available for juveniles. [Br. 55] He posits that because the death penalty may only be imposed on adults for homicide, so too should life without parole be limited to juveniles who commit homicides; in either case, only the most

serious penalty can be imposed for only the most serious crime.[12] Neither the Eighth Amendment nor proportionality principles compel this result. States are free to penalize serious violent and even non-violent acts that do not result in death with sentences identical to those imposed for homicides. *See Harmelin*, 501 U.S. at 1004 (holding that the state could conclude rationally that possession of a large amount of cocaine is "as serious and violent as the crime of felony murder without specific intent to kill, 'a *crime for which no sentence of imprisonment would be disproportionate.*'" (citation omitted) (emphasis added)). The threshold question is simply the narrow issue of whether a life sentence for the type of violent felony at issue is grossly disproportionate, which it is not in Graham's case.

Graham's assertion that age should be an additional factor that broadens this Court's narrow

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[12] Graham contends his sentence would be appreciably shorter under the Federal Sentencing Guidelines. [Br. 55 n.14] As this Court has recognized, different sovereigns will, necessarily, have distinct punitive objectives that may manifest themselves in harsher sentencing outcomes. *Rummel*, 445 U.S. at 282 ("Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State."). Florida's potentially harsher consequences for armed burglary, when compared to national norms allowing life sentences without parole for non-homicides, does not establish a constitutional violation. *See Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring) ("[T]he circumstance that a State has the most severe punishment for a particular crime does not by itself render the punishment grossly disproportionate.").

proportionality review finds no support in precedent.[13] Graham also overlooks that, like all other states, age and juvenile status are woven into Florida's juvenile and criminal justice systems. These systems establish a reasonable approach to determine under what circumstances a juvenile is eligible for transfer to the adult system by considering an offender's age and criminal history as well as the severity of the particular offense.[14] Like most states, only the most serious juvenile offenders, who have demonstrated criminal maturity beyond their years either by committing extremely serious offenses or by repeating their criminal conduct, are eligible for adult sanctions in Florida. As discussed in section II, given the deference this Court has accorded legislatures, this legislative judgment is appropriate. Age has been taken into account repeatedly in this case, in a manner that ensures that Graham's sentence is constitutional.

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[13] Graham argues that the personal traits of an offender have been used to assess the gross disproportionality of non-capital offenses, citing to those cases involving recidivist offenders. Those cases, however, involved conduct, not personal traits of the offenders; conduct which the states adjudged (and this Court confirmed) could increase the offender's sentence. *Lockyer*, 538 U.S. at 67; *Ewing*, 538 U.S. at 30; *Rummel*, 445 U.S. at 264.

[14] *See infra* pages 54-55 (discussing Florida's juvenile transfer system).

B. Graham's comparative analysis is seriously flawed.

Because Graham has not demonstrated gross disproportionality, the constitutional analysis should be at an end. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring) ("intrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."). Graham's intra- and interjurisdictional comparisons need not be addressed, but deserve comment due to their serious flaws.

First, life sentences without parole may be imposed for a variety of crimes in Florida, namely all life felonies and certain first-degree felonies.[15] While

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[15] *See* Fla. Stat. §§ 499.0051(10) (knowing sale of contraband prescription drugs resulting in death); 775.0823, 782.04, & 782.051(1) (degrees of murder & attempted murder); 775.0823(8), 787.01, & 787.02 (kidnapping and false imprisonment); 775.084(4)(a) (habitual felony offender convicted of life or first-degree felony); 775.085(1) (committing first-degree felony while evidencing prejudice); 775.0861 (committing first degree felony involving physical force or violence on religious property or during victim's participation in religious service); 775.087 (various offenses for possessing or discharging a firearm or destructive device); 775.0875(2) (taking an officer's firearm during first-degree felony); 775.31(1)(e) (facilitating terrorism); 790.16(1) (discharging machine gun in public with intent to do harm); 790.161 (destructive device causing death); 790.166(2) (using or making available weapon of mass destruction); 790.23(4) (if repeat offender, carrying a weapon while committing gang-related crime); 794.011 & 794.023 (various sexual battery); 810.02(2) (Continued…)

Graham is arguably correct that more serious crimes are included in this list [Br. 61] (e.g., sexual battery), he makes no mention of the arguably less serious crimes also included (e.g., tampering with a witness in first degree felony case or investigation). The inclusion of violent offenses such as armed burglary with assault or battery in this breadth of crimes for which a life sentence may be imposed is not arbitrary.

In reliance on a recently released study based on Florida Department of Corrections (DOC) data, Graham erroneously asserts that 77 out of 301 offenders serving life sentences for juvenile crimes in Florida were sentenced for non-homicide crimes. [Br. 59-60] Paolo G. Annino et al., *Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to Nation* 2 (July 14, 2009) [hereinafter Annino Study]. Even if this statistic is accurate, which it is not, it establishes that Graham's sentence is not

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(burglary with assault or battery, armed burglary, variety of burglaries causing damage to building); 812.13(2)(a) (armed robbery); 812.133(2)(a) (armed carjacking); 812.135(2)(a) (armed home invasion); 817.487 (first-degree felony committed in conjunction with tampering with caller identification system in order to deceive call recipient); 817.568(10) (first-degree felony offense committed while unlawfully using personal identification information while misrepresenting self as law enforcement officer); 843.167(3)(e) (interception of police communication to aid escape from first-degree felony); 874.04(2)(c) (criminal street gang activity); 874.10 (leading a gang); 876.38 (intentional interference with defense or prosecution of war); 893.135 (various offenses for trafficking, importing, or manufacturing illegal drugs); 914.22 (tampering with a witness in a first-degree felony case/investigation).

unusual because 77 is a substantial number, representing 25% of the juveniles serving life sentences in Florida. The Annino Study incorrectly excludes a substantial number of juveniles (approximately 73) who are serving life sentences without parole for non-homicides simply because these juveniles – *in addition to these non-homicide offenses* – are also serving separate sentences for other crimes in which death or intent to kill occurred. [Br. 3 n.1][16] Each was sentenced to life without parole for a non-homicide offense; the fact that they are also serving sentences on other charges does not alter this fact. As such, a more accurate portrayal is that about half, 150 of 301, of the juvenile offenders serving life sentences in Florida for a non-homicide offense.[17] Given this data, juvenile life sentences for non-homicides are hardly a rare event in Florida and cannot be characterized as unusual.

Moreover, by using broadly defined "average" sentence data from DOC's website in comparisons elsewhere in his brief [Br. 56-59], Graham entirely misses the subtleties of Florida's criminal statutes and draws seriously misleading comparisons. The

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[16] For example, Florida inmate H15865 received a life sentence for the same primary burglary offense as Graham. *See* Fla. Offender Search, http://www.dc.state.fl.us/ActiveInmates/-search.asp. This offender is dropped from the Annino Study, however, because he has a separate life sentence for a second degree murder conviction.

[17] These figures were determined from the same list of inmates DOC provided to the authors of the Annino study upon which Graham relies. Bureau of Research & Data Analysis, Fla. Dep't of Corrections, data received June 10, 2009.

various crime categories against which his comparisons are made are not at all comparable to Graham's situation. For instance, one of the average statistics that Graham relies on is from a DOC report that combined *all* juvenile burglary offenses without regard to degree of severity or statutory limitations on maximum sentences. [Br. 59] This average included offenders, utterly unlike Graham, whose convictions were for second- and third-degree burglaries that carry maximum prison sentences of only fifteen and five years, respectively, thereby skewing the statistic and making Graham's sentence appear much harsher. *See* Fla. Stat. § 775.082(3)(c) & (d). In addition, Graham's use of the "armed burglary" average for all offenders includes armed burglaries where (a) an assault or battery did not occur, and (b) an offender merely had a weapon versus actually using it, thereby including less serious offenses, again skewing this statistic in his favor. In short, Graham's comparisons to these "averages" border on the meaningless.[18]

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[18] *See generally* Robert P. Abelson, *Statistics as Principled Argument* 2-7 (1995) (noting that statistical comparisons, particularly those involving "isolated, stand alone" statistics, are prone to flaws and faulty comparisons, such that great care and attention must be used in establishing comparison standards for control groups to "substantially reduce the occurrence of misleading statistical interpretations.") (further noting that "casual, one-shot tabulations of statistical observations will almost certainly be difficult to interpret" and that "it is rhetorically weak to make claims based on them, and such claims deserve to be regarded with great skepticism."); *see also* Joel Best, *Stat-Spotting: A Field Guide to Identifying Dubious Data* (2008) (identifying selective comparisons and averages as fertile areas for statistical and data problems); Jane E. Miller, *The Chicago Guide to Writing About Numbers* (Continued…)

Even parsing the Question Presented to only "armed burglary" as Graham has restated it, shows that 42 juveniles are serving life sentences for burglary offenses. A preliminary view of DOC data from its public offender information shows that since 1998, 506 offenders (adult and juvenile) have been sentenced to life for first-degree burglary offenses. Bureau of Research & Data Analysis, Fla. Dep't of Corrections, data received Aug. 14, 2009. Because other juvenile and adult offenders receive life sentences for non-homicide crimes and burglaries like Graham's in significant numbers, his sentence cannot be considered intrajurisdictionally disproportionate or unusual.

Turning to an interjurisdictional comparison, Florida's approach to juveniles is not out of line nationally. A substantial majority of states permit the imposition of life without parole on a juvenile for non-homicide offenses.[19] By most accounts, more than 80% of states permit the imposition of life

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58-71, 174-75 (2004) (noting the importance of defining meaningful units of comparison, making accurate and consistent comparisons, and analyzing the distribution of data before relying on and making representations based on averages or other measures of central tendency).

[19] A chart with the various state laws is omitted to avoid unnecessary repetition with the State of Louisiana's chart in its amicus brief and due to general agreement, with some exceptions, to Graham's chart reflecting states that permit life without parole for juveniles convicted of a non-homicide charge. *See infra* n.21.

without parole on a juvenile.[20] Of those, Graham's own data shows that 36 states plus the federal government and District of Columbia permit life sentences for some crime other than one resulting in the death of a victim.[21] With three quarters of states

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[20] Forty-two is often cited as the number of states permitting juveniles to serve life without parole, and the figure is often credited to the data in the report *The Rest of Their Lives: Life without Parole for Child Offenders in the United States*, Human Rights Watch & Amnesty Int'l 18 (2005). *See, e.g.*, Stephanie Chen, *Teens Locked Up for Life Without a Second Chance*, http://www.cnn.com/2009/CRIME/04/08/teens.life.sentence/index.html (last visited Sept. 8, 2009). Other studies have found this figure to be 43 states. *See* Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law & Practice*, 42 U.S.F. L. Rev. 983, 1031-1044 (2008) [hereinafter *Global Law & Practice*]. Some media reports place the figure at 44 states. *See, e.g., Juvenile Life Without Parole*, http://www.pbs.org/wnet/religionandethics/episodes/january-30-2009/juvenile-life-without-parole/2081/ (last visited Sept. 8, 2009). The details and distinctions of states' criminal codes and sentencing law, as well as personal interpretations of those statutes by the studies' authors, might explain the reason for the variety of figures. For instance, the 43-state figure excludes Montana, because of the amendment to Montana Code section 76-18-222(1) (2007), which sets forth that *mandatory* minimum sentences and restrictions on parole eligibility do not apply when the offender is under 18. *Global Law & Practice*, at 1037. Another study may have instead included Montana because trial judges there still have discretion to impose such sentences. Notwithstanding these discrepancies, the number of states permitting life without parole for juveniles is consistently reported to be at least 40 of the 50 states (as well as the federal government), or more than 80%, a figure that decisively counters any notion that a consensus against the sentence has developed.

[21] Arizona and Oregon should also be included. Ariz. Rev. Stat. § 13-1423(B); Or. Rev. Stat. §§ 137.707(1), 137.719(1). This (Continued…)

permitting the imposition of life sentences on juveniles for non-homicides, Graham cannot show a national trend exists that prohibits his sentence.[22]

One study (by a group opposed to Florida's sentencing provisions) reports that nationally the number of offenders serving life sentences in the last

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addition brings the total of jurisdictions in which life without parole for non-homicides may be imposed on a juvenile up to 38 states, the federal government, and the District of Columbia. Graham's exclusion of Mississippi is puzzling. [Br. 63 n.18] That state provides that violent non-homicides may be punished by life sentences, Miss. Code § 47-7-3(1)(g), but provides for the possibility of early release when an offender turns 65. Presumably Graham considers potential parole at age 65 sufficient to meet constitutional objections, which raises the workability of a categorical rule based on the availability of various types of parole systems. *See* section II.D *infra.*

[22] A New York Times study reports a national trend in favor of life sentences, including those without parole, as well as a substantial percentage for non-homicides, based on adult and juvenile data combined. *See* Adam Liptak, *To More Inmates, Life Term Means Dying Behind Bars*, N.Y. Times, Oct. 5, 2005, at 1-1. Its survey "found that about 132,000 of the nation's prisoners, or almost 1 in 10, are serving life sentences. The number of lifers has almost doubled in the last decade, far outpacing the overall growth in the prison population. Of those lifers sentenced between 1988 and 2001, about a third are serving time for sentences other than murder, including burglary and drug crimes. Growth has been especially sharp among lifers with the words "without parole" appended to their sentences. In 1993, the Times survey found, about 20 percent of all lifers had no chance of parole. Last year, the number rose to 28 percent.") (finding more than 25,000 offenders serving life sentences for non-homicide crimes like rape, kidnapping, armed robbery, assault, extortion, burglary, and arson).

25 years has more than quadrupled, with large states such as Pennsylvania, California, and Michigan accounting for the most juveniles serving life without parole sentences. *See* Ashley Nellis & Ryan S. King, *No Exit, The Expanding Use of Life Sentences in America*, The Sentencing Project 6, 17 (July 2009). Florida ranks sixth among states in raw numbers and is below the national average (ranked 30th) with respect to juvenile life without parole sentences as a percentage of its entire life-sentenced population. *Id.* at 17-18. It is therefore not unusual for a juvenile in the United States to receive a life sentence, even for a non-homicide crime.[23] According to one study upon which Graham relies, 7.2% of youth offenders nationwide are serving a life without parole sentence for crimes other than some type of homicide, such as kidnapping, property crimes, sex crimes, and other violent crimes. *See The Rest of Their Lives: Life without Parole for Child Offenders*

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[23] *See, e.g., Calderon v. Schribner*, 2009 WL 89279 (E.D. Cal. Jan. 12, 2009) (upholding life without parole for a 17-year-old convicted of kidnapping for ransom with great bodily injury); *State v. Warren*, 887 N.E.2d 1145 (Ohio 2008) (upholding life without parole for 15-year-old convicted of kidnapping and rape); *State v. Standard,* 569 S.E.2d 325 (S.C. 2002) (upholding life without parole for burglary and larceny committed by 15-year-old); *State v. Green,* 502 S.E.2d 819 (N.C. 1998) (holding life sentence for 13-year-old for burglary and rape not grossly disproportionate to the crime); *see also State v. Ira*, 43 P.3d 359 (N.M. 2002) (aggregate adult sentence of 91 and one-half years for sexual battery offenses committed by a 15 year-old not grossly disproportionate); *Hawkins v. Hargett*, 200 F.3d 1279 (10th Cir. 1999) (sentencing of 13 year-old to 100-year term (consecutive sentences) for non-homicide crimes not grossly disproportionate).

in the United States, Human Rights Watch & Amnesty Int'l 27 (2005).

Graham's attempt to redefine the Question Presented to only armed burglary creates the illusion of an "unusual" sentence by dramatically narrowing the class. All non-homicides are not equal, nor are all burglaries equal. Because the states have no uniform definitions for "armed burglary with an assault or battery" or "armed burglary" (or, for that matter, parole, probation, or life sentence), this alteration of the issue presented raises problems. More importantly, like his erroneous intrajurisdictional comparisons, Graham again downplays the aggravated nature of his offense and how it might be charged in other states, making it erroneously appear less violent and his sentence harsher.

Notably, the lack of peer review or independent verification of the various studies and reports self-generated and relied upon by those opposed to life sentences is a significant flaw in Graham's intrajurisdictional analysis. It is highly likely that the interjurisdictional data suffers from similar problems. *See* Annino Study at 8 n.16 (explaining that national figure of juveniles serving life sentences for non-homicides could be larger because the study excludes offenders also serving homicide sentences). Additionally, the Annino Study concedes that data was not received from six states that are among the 38 that permit life sentences for juveniles convicted of non-homicides. *Id.* at App. II (data unavailable for Delaware, Nevada, Oklahoma, Utah, Virginia, and Wisconsin).

These flaws highlight a final point pertinent to Eighth Amendment analysis. This Court should take great care in relying on reports and statistics submitted in this litigation. None of it has been meaningfully and objectively reviewed or subjected to critique or cross-examination in a judicial proceeding to provide a check on its accuracy and reliability. Unlike death penalty data, which relates to a single identifiable punishment about which an enormous body of literature developed over the decades, the criminal sentencing laws (both adult and juvenile) and their effects involve multivariate analyses of vastly complex and, to a large extent, unquantifiable variables that make meaningful comparisons within or outside a state particularly hazardous, if not impossible in some situations.

Indeed, the self-generated and self-referential nature of the studies upon which Graham relies make them better suited for political advocacy in the state legislatures, who "are better qualified to weigh and evaluate the results" of those studies "in terms of their own local conditions and with a flexibility of approach that is not available to the courts." *Roper*, 543 U.S. at 618 (Scalia, J., dissenting) (citation and internal quotation marks omitted). Self-referential and largely incomplete or misleading reports and analyses of the parties and amici in this case must be viewed with great caution. Given the nascent and untested nature of these studies and reports, it is suggested that the establishment of a constitutional rule should not precede the development of reliable literature; rather, to the extent it is considered at all, the literature's development must precede judicial action.

Incomplete studies and statistics do not suffice to meet Graham's burden to establish that his sentence is unconstitutional. Even if the Court concludes that Graham's sentence raises an inference of gross disproportionality, Graham nonetheless has not met his burden of showing that his sentence is an outlier in Florida or nationwide that justifies the conclusion that it is cruel and unusual punishment.

C. International comparisons are unnecessary.

Finally, consideration of international law is unwarranted because no national consensus exists disfavoring the sentence of life without parole in these circumstances. International support serves only as confirmation for the Court's determination about the evolving standards of decency in our own country. *See Roper*, 543 U.S. at 578 ("The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (noting international opinion supported the states' legislative consensus); *Trop v. Dulles*, 356 U.S. 86, 102 (1958).

In cases where no legislative trend toward abolition existed among the states, the Court has not explored international law trends. *See, e.g., Ewing v. California*, 538 U.S. 11 (2003); *Johnson v. Texas*, 509 U.S. 350 (1993); *Stanford v. Kentucky*, 492 U.S. 361 (1989); *see also Roper*, 543 U.S. at 604 (O'Connor, J.,

dissenting) ("Because I do not believe that a genuine *national* consensus against the juvenile death penalty has yet developed … I can assign no such *confirmatory* role to the international consensus described by the Court."). Therefore, because Graham has failed to show a national trend disfavoring the sentence he received, international law has no role in this Court's analysis.

Even if this Court looks to international law, no international obligation prohibits sentencing juveniles to life. The International Covenant on Civil and Political Rights (ICCPR) states generally that minors must be provided "measures of protection as are required by [their] status as [minors]." ICCPR, art. 24, Dec. 19, 1966, 999 U.N.T.S. 171. Though the United States has ratified the ICCPR, with reservations, at no point does the document speak specifically to the topic of juvenile life without parole. *See also Graham v. State*, 982 So. 2d 43, 54 (Fla. Dist. Ct. App. 2008) (noting that because the ICCPR is not self-executing, it cannot limit the Florida legislature's power to sentence offenders under this Court's jurisprudence). The United States has not ratified the United Nations Convention on the Rights of the Child and is therefore not bound by its provisions. No other source cited by Graham imposes any maximum sentencing limitation on this nation or Florida.

Finally, any data or aggregate information regarding international practices must be considered carefully. Just as each state's sentencing structure is different, even more variety exists in the criminal justice and sentencing systems around the world.

Notably, the data fails to explain fully the reasons why nations may have chosen to structure their juvenile sentencing laws differently. For all that is known, a multitude of parochial concerns, totally unrelated to issues of cruel and unusual punishment, may account for the actual reasons why other nations do not impose life sentences on juveniles. Lastly, the data showing which nations impose life without parole on juveniles rely, almost exclusively, on those nations' self reports. *See Global Law and Practice*, *supra* n.20, at 997, 999-1000. Such unverified data should not be the basis for a rule binding on this nation's domestic sentencing laws.

II. *Roper* Does Not Alter This Court's Non-Capital Precedents, Particularly Given That Age is Woven into State Criminal Justice Systems, the Deference to State Sovereignty in Sentencing Matters, and the Unworkability of a Categorical Rule.

A. *Roper*'s elimination of the death penalty for juveniles does not also eliminate harsh prison sentences for juveniles.

Contrary to the weight of this Court's jurisprudence, Graham argues that this case is fully resolved by *Roper v. Simmons*, 543 U.S. 551 (2005). But *Roper*'s holding has negligible applicability to Graham given this Court's repeated admonition that its capital jurisprudence is of little help in other

contexts.[24] The inescapable conclusion from this jurisprudence is that death is different, and for good reason. As the ultimate sanction, final and extreme, the death sentence is simply "in a class by itself." *Furman v. Georgia*, 408 U.S. 238, 289 (1972) (Brennan, J., concurring). Indeed, "[n]o other existing punishment is comparable to death in terms of physical and mental suffering." *Id.* at 287.

Throughout his brief, Graham asserts that *Roper*'s analysis should be extended and applied to juvenile sentences, ignoring this Court's limiting principle that death differs in kind from *any* sentence of imprisonment, no matter the length. *Rummel*, 445 U.S. at 272. This limited view of *Roper* is reflected in the decisions of virtually every court

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[24] *See Rummel v. Estelle*, 445 U.S. 263, 272 (1980) ("Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of punishment meted out to Rummel."); *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) ("We have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further); *see also Ford v. Wainwright*, 477 U.S. 399, 411 (1986) ("In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heighted standard of reliability. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (internal citations omitted)); *Caldwell v. Mississippi,* 472 U.S. 320, 329 (1985) ("[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." (internal citation and quotation marks omitted)).

nationwide that has been asked to extend its reasoning.[25] Graham's claim that "no principled reason" exists "to limit consideration of the juvenile status of an offender to only death penalty cases" [Br. 33], has been soundly and uniformly rejected across the country.

Moreover, Graham's characterization of life without parole as nothing more than a delayed or disguised death sentence ignores the obvious distinctions between prison terms and death. While inmates lose many rights, they retain a range of freedoms including their rights to exercise religion, to receive due process and equal protection under the law, and of access to courts. *Furman*, 408 U.S. at 290 (Brennan, J., concurring).[26] They generally are still

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[25] *See, e.g., United States v. Feemster*, 483 F.3d 583, 587 (8th Cir. 2007) (refusing to extend reasoning of *Roper* to prevent use of juvenile crimes committed as enhancements on current sentence), *vacated on other grounds*, 128 S. Ct. 880 (2008), *aff'd on rehearing en banc*, 572 F.3d 455 (8th Cir. 2009); *Calderon v. Schribner*, 2009 WL 89279 (E.D. Cal. 2009) (finding LWOP sentence permissible for 17-year-old for a violent felony not resulting in death); *State v. Ninham*, 767 N.W.2d 326 (Wisc. Ct. App. 2009) (LWOP for 14 year old does not violate *Roper*); *Cobos v. Dennison*, 825 N.Y.S.2d 332, 332 (N.Y. App. Div. 2006) (refusing to extend *Roper*'s reasoning to parole hearings). Only one court has extended *Roper*'s reasoning and logic to find a sentence of imprisonment unconstitutional. *In re Nunez*, 93 Cal. Rptr. 3d 242, 263 (Cal. Ct. App. 2009).

[26] Justice Brennan explained:

> Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. The contrast with the plight of a

(Continued…)

permitted to communicate with others, maintain and create personal relationships, and visit with their family and friends.[27] Recently this Court noted that "[i]n most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense." *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2665 (2008). Perhaps most significantly, when a life sentence is imposed, the possibility of executive commutation always exists; once an inmate is executed, executive

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> person punished by imprisonment is evident. An individual in prison does not lose "the right to have rights." A prisoner retains, for example, the constitutional rights to the free exercise of religion, to be free of cruel and unusual punishments, and to treatment as a "person" for purposes of due process of law and the equal protection of the laws. A prisoner remains a member of the human family. Moreover, he retains the right of access to the courts. His punishment is not irrevocable. … An executed person has indeed "lost the right to have rights." As one 19th century proponent of punishing criminals by death declared, "When a man is hung, there is an end of our relations with him. His execution is a way of saying, 'You are not fit for this world, take your chance elsewhere.'"

Furman, 408 U.S. at 290 (Brennan, J., concurring) (citations omitted).

[27] Additionally, a slew of educational and health programs and services are available for Florida inmates. Dep't of Corrs. Institutional Programs: A Positive Impact on Inmate Lives, http://www.dc.state.fl.us/orginfo/programs/ (last visited Sept. 2, 2009).

commutation is no remedy at all. *See Furman*, 408 U.S. at 306 (Stewart, J., concurring) ("The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability.").

For these reasons, the Court limits application of the death sentence, not just by creating procedural requirements for the sentencing process, but by prohibiting it for entire categories of persons and crimes. *Kennedy*; *Roper*; *Atkins v. Virginia*, 536 U.S. 304 (2002). Therefore, the Court insists that death sentences be saved only for "the worst of crimes." *Kennedy*, 128 S. Ct. at 2665. By contrast, life sentences have never been reserved by this Court for only the worst crimes or offenders. *See Harmelin*, 501 U.S. at 995 (life without parole constitutional for cocaine possession offense).

Graham asserts that in the wake of *Roper*, courts should no longer be permitted to make individualized determinations regarding the appropriate length of incarceration in instances where juveniles commit grievous and violent felonies, because their victims do not happen to die. [Br. 48-50] Graham's belief is premised on *Roper's* recognition that experts in the field of psychology often have difficulty discerning "between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[28] But

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[28] *Roper,* 543 U.S. at 573 (citing Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity,* (Continued…)

this Court in *Roper* explicitly limited its reasoning to death sentences, stating that "[w]hen a juvenile offender commits a heinous crime, *the State can exact forfeiture of some of the most basic liberties*, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity." 543 U.S. at 573-74 (emphasis added). This Court impliedly recognized that an offender's understanding of his humanity may mature in prison, when it affirmed the resentencing of the juvenile offender to life without parole. *Id*. at 560.

Moreover, Graham's focus on *Roper* and the possibility of juvenile rehabilitation ignores his own failed experience. The trial court initially considered Graham's age and promise of reform and spared him the sentence an adult might have received for his violent offense. But Graham squandered his second chance by committing exceptionally violent crimes upon release. As the Florida appellate court noted: "There is record evidence to support [Graham]'s inability to rehabilitate – evidence that is usually not available upon an original sentencing proceeding." *See Graham*, 982 So. 2d at 53. Thus, Graham's sentence reflects the uncontroversial legislative and trial court judgment that juveniles who are violent recidivists deserve more severe criminal sentencing for their crimes.

Furthermore, under Graham's reasoning, it is unclear how states are permitted to deal with serious

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Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014-16 (2003)).

juvenile offenders. If a court is deemed incapable of making assessments about whether a juvenile deserves a life sentence, it raises questions about whether a juvenile may be sentenced to any lengthy term of incarceration. This interpretation would undermine judicial discretion in sentencing juveniles who are adjudicated as adults (remembering that Graham consented to such treatment on parole), a result that could not be intended by *Roper*, which upheld such a sentence.

B. Age, as a characteristic of the offender, is already woven deeply into the fabric of state criminal justice systems.

As previously noted, Florida does, in fact, make many provisions for the juvenile in its criminal justice system.[29] The flaw in Graham's argument is that he overlooks the fact that Florida's criminal code, indeed that of every state, takes into account

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[29] Notably, Graham was charged and treated as an adult, a status to which he repeatedly consented on the record. [JA 22, 35] He explicitly does not contest the process by which he has been charged and adjudicated as an adult. [Br. 14] Yet he now claims that the adult sentence he received is unconstitutionally harsh and presumably adjusted downward to an appropriate juvenile sentence. In effect, he seeks a new constitutional doctrine that categorically prohibits states from treating juveniles as adults for sentencing purposes, even those who consented to being treated as an adult. The Eighth Amendment does not require this result. *See State v. Pittman*, 647 S.E.2d 144, 163 (S.C. 2007) (rejecting similar argument because "the argument does not address the Eighth Amendment's concern, which is punishment; not forum of trial.").

the fact that juveniles are less mature in numerous ways. Florida has a well-developed juvenile justice system.[30] Florida's system reserves adult criminal court only for a small percentage of juveniles committing crimes;[31] namely, those who demonstrate that they are ill-suited for progressive juvenile programs because they committed the most serious of criminal offenses, are older teens, or demonstrated that they are unable or unwilling to benefit from the juvenile system by continuing to commit crimes.

At common law, 16- and 17-year-olds were subject to criminal sanctions. Children under seven were considered incapable of possessing criminal intent; beyond that age, they could be arrested, tried, and punished like adult offenders, including capital sentences, subject to a rebuttable presumption that minors 14 and under lacked the capacity to commit a felony. *See In re Gault,* 387 U.S. 1, 14-16 (1967); *see also Stanford v. Kentucky*, 492 U.S. 361, 368 (1989)

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[30] Florida's Department of Juvenile Justice was created as an independent agency in 1994 with the mission "[t]o increase public safety by reducing juvenile delinquency through effective prevention, intervention and treatment services that strengthen families and turn around the lives of troubled youth." Fla. Dep't of Juvenile Justice, http://www.djj.state.fl.us/ (last visited Sept. 11, 2009). Its operating budget has more than doubled since its inception in 1994. Nat'l Juvenile Defender Center, *Florida: An Assessment of Access to Counsel & Quality of Representation in Delinquency Proceedings* 14 (Fall 2006).

[31] In 2007-08, 144,705 delinquency referrals were made. Fla. Dep't of Juvenile Justice Office of Research & Data, data received Sept. 2, 2009. Of those cases, 3,611 (2.5%) were transferred to adult court, approximately 2100 (1.5%) of which were older juveniles who committed felonies. *Id.*

(citing 4 W. Blackstone, Commentaries 23-24; 1 M. Hale, Pleas of the Crown 24-29 (1800)). A shift occurred in the late 1800s when the "idea of crime and punishment' was abandoned and children were "to be 'treated' and 'rehabilitated,'" resulting in the juvenile court movement.[32] *Gault*, 387 U.S. at 15-16.

In the 1980s and 1990s, the pendulum swung back after juvenile and violent crime rates skyrocketed nationwide. The juvenile system was deemed a failure, and a "greatly enhanced response" was deemed necessary: "[T]he system has been unable to successfully fulfill its role in securing community safety … [and] has created an immediate need to target certain serious, violent, and chronic juvenile offenders for prosecution in the criminal justice system."[33] States responded by amending laws to increase the number of juveniles transferred to, convicted in, and sentenced as adults in criminal courts.[34] All states now have mechanisms to handle juveniles in criminal court.[35]

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[32] *See* Juvenile Justice History, *supra* note 3, at 2.

[33] DOJ Action Plan, *supra* note 3, at 6, 19; *see also* Juvenile Justice History, *supra* note 3, at 4.

[34] *See generally* Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 Crime & Just. 81, 84 (2000); *State v. Green*, 502 S.E.2d 819, 829-30 (N.C. 1998) (describing one state's 249% increase in under-aged 15 violent crime rates and its legislature's decision to reduce, the age at which a juvenile could be transferred to adult court to 13).

[35] Delinquency Cases Waived to Criminal Court, 2005, U.S. Dep't of Just., Off. of Juv. Just. & Delinquency Prevention 1 (June 2009), *available at* http://www.ncjrs.gov/pdffiles1/ (Continued…)

The creation of a system imposing harsher sentences on juveniles due to the commission of more serious juvenile crime is entirely consistent with the Court's evolving Eighth Amendment analyses. As explained by the North Carolina Supreme Court:

> "Evolving standards of decency" are not fixed in time and place, nor are they always focused solely on the rights of criminals. At this time, protection of law-abiding citizens from their predators, regardless of the predators' ages, is on the ascendancy in our state and nation. Similarly, it is the general consensus that serious youthful offenders must be dealt with more severely than has recently been the case in the juvenile system. These tides of thought may ebb in the future, but for now, they predominate in the arena of ideas.

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ojjdp/224539.pdf. Florida's reforms in particular were highlighted in a 1996 federal action plan dealing with juvenile crime:

> Florida has led the way in an unusual blending of traditional features of the juvenile and criminal justice systems through a three-tiered approach that gives prosecutors expanded discretionary power in making jurisdictional decisions as the age of defendants and the severity of offenses increase. In criminal court, the judge has a variety of sentencing options, including sentencing the offender as an adult or as a juvenile.

DOJ Action Plan, *supra* note 3, at 27.

State v. Green, 502 S.E.2d 819, 831 (N.C. 1998) (holding that mandatory life imprisonment for a first-degree sexual offense by a thirteen-year-old is within bounds of society's current and evolving standards of decency).

In structuring its juvenile transfer provisions, the Florida legislature created a system that takes into account matters such as the offender's age, the seriousness of the offense, and the likelihood of future rehabilitation. Florida imposes no minimum age for prosecuting a juvenile in adult court in only the narrowest of circumstances.[36] When less serious offenses are involved, prosecutors are *required* to directly file criminal charges in adult court *only for older offenders*; namely, 16- and 17-year-olds when they are charged with either repeat serious felonies or enumerated offenses committed with a firearm. Fla. Stat. §§ 985.227(2)(a), (b) & (d) (2003).[37] Discretionary direct filing is available in the case of all 16- and 17-year-olds not charged with a misdemeanor (of those charged with misdemeanors, direct filing is available for certain recidivists). Fla. Stat. § 985.227(1) (2003). Contrary to Graham's

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[36] Those circumstances are when the offender: (1) demands a transfer (and only then after a hearing before the court), Fla. Stat. § 985.226(1) (2003); (2) is indicted by a grand jury (which may only occur if the crime is punishable by life imprisonment or death), § 985.225(1); or (3) has committed an offense involving the substantial bodily harm or death of a non-participant during the course of a motor vehicle theft, § 985.227(2)(c).

[37] And even then the prosecutor may avoid mandatory direct file by showing good cause. *Id.*

assertions [Br. 4], only certain 14- and 15-year-olds charged with enumerated serious felonies are subject to direct filing. *Id.* Juveniles over 14 charged with less serious offenses are transferrable subject to the court's determination, and in the least egregious cases, only after the court holds a hearing. Fla. Stat. § 985.226 (2003). When hearings are required, the court must consider specific criteria, including the seriousness of the offense, the offender's history, the sophistication and maturity of the offender, and the likelihood of the offender's rehabilitation. *Id.*

In light of these categories and considerations, the Florida Supreme Court concluded, in reviewing a challenge to a similar version of the statute, that "far from being arbitrary, the transfer scheme is entirely reasonable." *State v. Cain*, 381 So. 2d 1361, 1364 (Fla. 1980). The court explained: "as the circumstances supporting transfer become less compelling, the procedures required become more formal." *Id.* Changes to juvenile justice approaches markedly impacted sentencing in Florida. Ninety-four percent of Florida's 301 juvenile offenders currently serving life without parole were sentenced for crimes committed in the 1990s or later. Bureau of Research & Data Analysis, Fla. Dep't of Corrections, data received June 10, 2009.

In conjunction with the changes to the juvenile justice system, Florida enacted changes in sentencing throughout Florida's criminal justice system to attempt to stem the tide of violent crime. These changes culminated in the late 1990s, when Florida implemented the Criminal Punishment Code, which increased the level of judicial discretion

involved in sentencing. Fla. Stat. § 921.002 (2008). Under the Code, judges are authorized to impose any sentence above the minimum required by the offender's sentence scoresheet and up to the statutory maximum. Fla. Stat. §§ 921.002(f) & (g) (2008). Florida's trial judges are thus entrusted with wide discretion, permitting them the opportunity to take into account factors about the offender as discrete as age to those of a less quantifiable nature, such as the violence involved in the particular offense, the risk of recidivism, and the offender's remorse. This discretion explains why only certain juveniles are sentenced to maximum life terms.

Contrary to Graham's statements, Florida's criminal justice system therefore does take a juvenile's age into account and balances it against the other facts of the offense. The legislature took age into account in creating a juvenile justice system with several avenues for prosecution, giving judges sentencing discretion. On this point, Graham's argument that this Court would only be condemning a single trial judge's action by holding juvenile life sentences without parole unconstitutional is flatly incorrect. [Br. 50-53] Such a holding would condemn the legislature's balanced system, plus the decisions of the approximately 150 judges who have imposed this sentence in Florida as well as an unknown number nationwide.

C. The structure of state sentencing laws must be flexible and allow states to pursue methods that best address serious crime problems.

Graham's approach, where a state's sentencing laws are subordinated to claims that juveniles as a class are incapable of deterrence, outgrow their criminal activities, and should be rehabilitated rather than punished, presents a slippery path that undermines a state's "sovereign responsibilities to promulgate and enforce its criminal law." *Rummel*, 445 U.S. at 303 (Powell, J., dissenting). Accepting Graham's premise, that life without parole is unconstitutional as applied to juveniles committing serious violent offenses (that fortuitously do not result in a death), would undo the policy choices of state legislatures and unnecessarily hamper the thousands of discretionary sentencing decisions of trial judges nationwide.

This Court has long recognized that "[r]eviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals." *Solem*, 463 U.S. at 290; *see also Rummel*, 445 U.S. at 274 (reasoning that "the length of the sentence actually imposed is purely a matter of legislative prerogative").

This deference extends to a legislature's decisions about the goals of its criminal justice system. This Court has made clear that the

Constitution "does not mandate adoption of any one penological theory." *Ewing*, 538 U.S. at 25 (quoting *Harmelin*, 501 U.S. at 999); *see also id.* at 28 ("It is enough that the State of California has a reasonable basis for believing that dramatically enhanced sentences for habitual felons 'advance[s] the goals of [its] criminal justice system in any substantial way.'" (quoting *Solem,* 463 U.S. at 297)). Punishment, deterrence, incapacitation, and avoiding recidivism are legitimate policy choices states routinely make with regard to serious and dangerous felons.[38] *See Rummel*, 445 U.S. at 276-79 (discussing the states' valid interests in dealing with recidivists through harsher criminal penalties, and the differing and complex state schemes to deal with recidivists). The logic of Graham and his amici, if accepted, would lead to constitutionally-preferred rehabilitative systems where punishment, deterrence, and preventing recidivism are constitutionally-disfavored goals on the mistaken premise that juveniles as a whole, including mature 16- and 17-year olds, simply cannot control their actions and cannot be deterred from committing violent crimes. The merit and potential cost of various rehabilitation programs is a

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[38] Graham mistakenly argues that life sentences without parole serve no legitimate penological purpose. [Br. 43-47] At a minimum, the goal of deterrence is effectively met by life without parole sentences, as this Court has recognized. *Roper*, 543 U.S. at 571. Because Graham is no longer able to commit violent acts on vulnerable victims in civil society, the goals of protecting the public and preventing Graham from further recidivism are met. Finally, the goal of punishment is met via a sentence that is not grossly disproportionate to Graham's violent offense.

policy decision for state legislatures, not a dictate of the Constitution.

This Court has expressed its unwillingness to micro-manage the states' differing sentencing schemes and the discretionary decisions of prosecutors and judges. *See Rummel*, 445 U.S. at 281-82 (pointing out that "[a]bsent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State."); *see also Solem*, 463 U.S. at 309. Just last term, this Court again re-emphasized the "twin considerations – historical practice and respect for state sovereignty" – that counsel against the federal courts' interference in the states' administration of their respective criminal justice systems. *Oregon v. Ice*, 129 S. Ct. 711, 717 (2009). Laws enacted by state legislatures are presumed valid against constitutional attack, as states act as "laboratories for devising solutions to difficult legal problems," and such problems and solutions can differ between individual states. *Id.* at 718-19. The fact that one state has the most severe punishment for certain crimes does not mean it is in violation of the Eighth Amendment. *See Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring); *see also id.* at 990 ("The Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions."). For this reason, a narrow proportionality review of prison sentences defers to

state legislatures except in the most egregious situations. *See, e.g., Solem*, 463 U.S. at 291 n.17.

D. The categorical rule suggested by Graham in the Question Presented is unworkable.

A categorical constitutional rule that precludes life sentences without parole for all non-homicide offenses for all juveniles under a certain age raises far more questions than it answers – and is simply unworkable. The Question Presented raises a number of definitional questions that highlight this point. For example, a "non-homicide" offense could include a wide swath of crimes ranging from petty offenses against property (e.g., vandalism) to violent crimes with dangerous weapons against people (e.g., armed robbery or a brutal rape that leaves a victim maimed and close to death). Categorically excluding the latter violent offenses, simply because the victims did not die, makes little sense. The categorization of felony murder and other similar offenses could be deemed either non-homicides or homicides creating confusion on how they are to be treated. The permutations are endless, weighing heavily against the imposition of the categorical imperative on the terms and definitions Graham seeks in this case.

Under Graham's theory, any term-of-years sentence would also be problematic. If the Eighth Amendment recognizes, as Graham argues, that all juveniles are less culpable and presumed capable of reform, what constitutionally distinguishes a life sentence from a lengthy term of years, or any term of

years? Why, in view of this supposed presumption, is a life sentence unacceptable but not a sentence of 30 or 40 or 50 years? Even assuming some distinction exists, the term "life" is itself problematic. Does "life" mean only those sentences that actually impose an indeterminate term of life for a single offense, or does it also include consecutive sentences for two or more offenses that in effect amount to (or far exceed) the actuarial life expectancy of the offender? *See, e.g.*, *Hawkins v. Hargett*, 200 F.3d 1279, 1284-85 (10th Cir. 1999) (finding 13-year-old's consecutive sentences for burglary, robbery, and forcible sodomy, which resulted in a 100-year term of imprisonment, did not violate the Eighth Amendment), *cert. denied*, 531 U.S. 830 (2000). For example, two consecutive 30-year sentences for a juvenile offender could in effect be a life sentence. As applied to a term of years, Graham's theory invites appellate review of every sentence imposed on a juvenile on grounds that admit of no principled distinctions. To do so creates additional questions that require additional answers, encroaching more and more on the sovereignty of the states to control and manage their own criminal justice systems based on their own differing goals and needs.

Indeed, a categorical rule would essentially hold that some juveniles have an Eighth Amendment right to demonstrate their reform or rehabilitation. This raises the question of at what point in a lengthy sentence must parole be available to be constitutionally meaningful, whether a parole system must actually result in parole for life

sentenced inmates,[39] and whether the availability of executive commutation plays a role.[40] In this regard, Florida long ago dismantled its parole system in light of adverse reports regarding the operation of the parole commission.[41] Congress phased out parole in the federal system with the Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1837. Must the federal government and those states that have abolished parole commissions now recreate them for juvenile offenders despite their legislative judgments? Are they obligated to develop programs that will assist juvenile offenders in the exercise of this right to demonstrate reform, and how much does the Eighth Amendment require them to spend? And does the existence of any sort of "parole" system meet Graham's demand, or are there yet-to-be-identified Eighth Amendment principles that will govern parole board actions?

This Court should decline Graham's invitation to fashion a new constitutional right. The Eighth Amendment requires only that the severity of an offender's sentence not be grossly disproportionate to

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[39] For instance, California's parole board reportedly recommended approval for 48 of 4,800 of requests for parole by lifers, but the governor vetoed all but one. *See* Liptak, *supra* n.22.

[40] Florida's constitution provides that the Governor with the approval of two cabinet members may grant full or conditional pardons and commute punishment. Fla. Const. art. IV, § 8.

[41] *See, e.g., Roberson v. Fla. Parole & Probation Comm'n*, 444 So. 2d 917, 920 (Fla. 1983).

the gravity of his crimes. Though Graham's punishment is harsh, it is imposed on numerous juvenile and adult offenders in Florida and is not unlike many other sentences permitted in a majority of states. Consequently, his sentence is not disproportionate under the Eighth Amendment.

CONCLUSION

For all of the above reasons, this Court should affirm the First District Court of Appeal, State of Florida.

Respectfully submitted,

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