Nos. 08-7412 & 08-7621

IN THE

Supreme Court of the United States

TERRANCE JAMAR GRAHAM,
Petitioner,

v.

FLORIDA,
Respondent.

JOE HARRIS SULLIVAN,
Petitioner,

v.

FLORIDA,
Respondent.

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

BRIEF OF THE SENTENCING PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE SENTENCING PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

This brief is submitted on behalf of the Sentencing Project as *amicus curiae* in support of Petitioners.[1]

INTEREST OF *AMICUS CURIAE*

The Sentencing Project is a non-profit organization dedicated to promoting rational and effective public policy on issues of crime and justice. Through research, education, and advocacy, the organization analyzes the effects of sentencing and incarceration policies, and promotes cost-effective and humane responses to crime. The Sentencing Project has filed *amicus curiae* briefs in prior sentencing cases before this Court, including *Kimbrough v. United States*, 552 U.S. 85 (2007) (addressing lack of empirical basis for Guidelines sentences in crack-cocaine cases), *Claiborne v. United States*, 551 U.S. 87 (2007), and *Roper v. Simmons*, 543 U.S. 551 (2005).

The Sentencing Project has also produced a broad range of scholarship on the sentencing of juveniles to life without parole and related topics, such as the transfer of juveniles into the adult criminal system. Members of its staff have been invited to present tes-

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

timony on juvenile life without parole before Congress, state legislatures, and professional audiences, and have testified on legislative reform proposals before the House Judiciary Committee.

INTRODUCTION AND SUMMARY OF ARGUMENT

In Florida and other states, juveniles – sometimes as young as 13 or 14 at the time of their offense – are serving life sentences without the possibility of parole. In some cases, they are serving these sentences for offenses in which no homicide was committed, or in cases in which they acted as an accomplice for an older, more culpable defendant's crime. And in many cases, juveniles are serving life-without-parole sentences that are effectively mandatory, rather than the result of careful and individualized sentencing decisions. State law frequently requires both that these juvenile offenders be tried as adults and that, upon conviction, they be sentenced to life without parole, meaning that no judge or jury ever considered whether the juvenile's age or culpability potentially warranted a lesser sentence.

These sentences violate the Eighth Amendment's prohibition on cruel and unusual punishment. The Eighth Amendment is grounded in the "basic precept of justice that punishment for crime should be graduated and proportioned to the offense." *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (citations and quotation marks omitted). Whether a particular penalty comports with this proportionality requirement depends in large part on the culpability of the offender – a factor that has motivated this Court's rejection of disproportionate penalties in a variety of

circumstances. *See, e.g.*, *Roper*, 543 U.S. at 569-70; *Atkins v. Virginia*, 536 U.S. 304, 319 (2002); *Enmund v. Florida*, 458 U.S. 782, 797-801 (1982).

Nowhere is the question of a defendant's culpability more relevant than in sentences involving juvenile offenders, whom this Court has long recognized are less blameworthy than adults who commit similar crimes. *See*, *e.g.*, *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) ("less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult") (plurality op.). In particular, juveniles lack the same maturity as adults, are more susceptible to negative influences, and possess a greater capacity for reform over time. *Roper*, 543 U.S. at 569-70. This Court has determined that because of these "marked and well understood" differences between juveniles and adults, *id.* at 572-73, the Eighth Amendment prohibits imposition of the death penalty on offenders under the age of 18, *id.* at 578.

That same reasoning applies with equal force to sentences of life without parole for juvenile offenders. Life without parole, "like death, is a sentence different in quality and character from a sentence to a term of years subject to parole," *Hampton v. Kentucky*, 666 S.W.2d 737, 741 (Ky. 1984) – and its imposition runs counter to this Court's conclusion that juveniles cannot be classified "among the worst offenders," *Roper*, 543 U.S. at 570. Indeed, life without parole not only condemns juveniles to a sentence that reflects a determination that they can never be rehabilitated, it removes incentives for good behavior by making it effectively impossible in many cases for

juveniles to access rehabilitative services that are in practice reserved for offenders with lesser sentences.

It is no answer to the Eighth Amendment problem to say that individual judges and juries are in the best position to make case-by-case decisions about which juvenile offenders deserve a life-without-parole sentence. Unlike the sentence this Court considered in *Roper*, life without parole is often imposed on juveniles without any individualized consideration of their diminished culpability. Before *Roper*'s categorical ban on the sentence, the death penalty could only be imposed on a juvenile after a judge or jury considered his culpability. *See Roper*, 543 U.S. at 602-03 (O'Connor, J., dissenting). In the context of life without parole, however, such individualized consideration is frequently unavailable or even impossible. Mandatory transfer and mandatory sentencing laws, whose use has expanded dramatically over the past two decades, create a perfect storm for juvenile offenders: They require that juveniles be tried in the adult system and, upon conviction, mandate a sentence of life without parole. Together, these laws deny many juveniles any opportunity to have their age, home environment, history of abuse, and other factors related to their culpability considered at any stage of the proceedings against them.

For these reasons, the Eighth Amendment prohibits the imposition of life without parole on juvenile offenders. The judgments below should be reversed.

ARGUMENT

I. SENTENCING JUVENILES TO LIFE WITHOUT PAROLE IS CONTRARY TO THIS COURT'S FINDING IN *ROPER* THAT THEY ARE FUNDAMENTALLY DIFFERENT THAN ADULTS

Because of their diminished culpability – recognized by this Court, demonstrated by science, and underscored by sentencing practices – juveniles cannot be classified among the worst offenders. Rather, "juveniles have a greater claim than adults to be forgiven" when they commit crimes. *Roper*, 543 U.S. at 570; *see also Naovarath v. State*, 779 P.2d 944, 948 (Nev. 1989) (juvenile life without parole is excessive "given the undeniably lesser culpability of children for their bad actions"). Sentencing juveniles to life without parole ignores this diminished culpability and, like the death penalty, wholly denies their unique potential for rehabilitation.

A. In Light Of Their Diminished Culpability, Juveniles Should Not Be Subjected To The Severe Sanction Of Life Without Parole

This Court has long recognized that juveniles, because of their young age and diminished culpability, cannot be considered among the worst offenders. *See Thompson*, 487 U.S. at 835 (juveniles' "irresponsible conduct is not as morally reprehensible as that of an adult"); *Eddings v. Oklahoma*, 455 U.S. 104, 116 & n.11 (1982). This diminished culpability flows from three well-established differences between juveniles and adults: Juveniles are less mature and more

likely than adults to act recklessly; they are more susceptible to negative influences and peer pressure; and their character traits are less firmly-fixed than those of adults. *Roper*, 543 U.S. at 569-70.

As scientists have widely documented, these behavioral differences reflect differences between the juvenile and adult brain. Brain imaging research (using Magnetic Resonance Imaging and other techniques) has provided new information about the degree to which juvenile and adult brains differ – and how these differences increase juveniles' aggression and risk-taking behavior while diminishing their judgment and ability to control impulses. *See generally* Brief of American Medical Association et al. as *Amici Curiae* Supporting Respondent, *Roper*, 543 U.S. 551 (No. 03-633) (synthesizing scientific literature). To take only one important example, adolescent brains are more active in areas related to aggression and anger, and are not fully developed in areas that control reasoning, risk taking, and impulse control. *Id.*

Sentencing trends confirm that juveniles serving life without parole are not the most culpable offenders. The present cases illustrate that fact. Here, both petitioners were sentenced to life without parole for non-homicide offenses: Terrance Graham, a first-time offender, received the sentence for a probation violation and underlying charges of armed burglary and attempted armed robbery, Cert. Pet. 2, *Graham v. Florida*; Joe Sullivan was sentenced to

life without parole after being convicted of sexual battery, Cert. Pet. 3, *Sullivan v. Florida*.[2]

Even in those cases in which loss of life occurs, life without parole – the most severe penalty to which juveniles may be subjected – is frequently imposed on juvenile offenders who did not intend to cause harm, even though "[i]t is fundamental that causing harm intentionally must be punished more severely than causing the same harm unintentionally." *Enmund*, 458 U.S. at 798. More than a quarter of juveniles serving life without parole were convicted of felony-murder – a crime in which the juvenile offenders did not intend to commit murder and may have been only minimally involved. *See* Human Rights Watch & Amnesty International, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 27 (2005), *available at* http://www.hrw.reports/2005/us1005/TheRestofTheirLives.pdf. In other cases, juveniles have been sentenced to life without parole for aiding and abetting homicides committed by other persons. *Id.* at 28 (nearly half of juveniles sentenced to life without parole in Michigan were convicted of felony murder or aiding and abetting); *see also* Illinois Coalition for the Fair Sentencing of Children, *Categorically Less Culpable* 11 (2008), *available at*

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[2] Florida – which has sentenced juveniles to life without parole for offenses including burglary, carjacking, and battery – appears uniquely out of step with other states when it comes to imposing the sentence for non-homicide offenses. *See* Paolo G. Annino et al., *Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to Nation* 3 (2009), *available at* http://www.law.fsu.edu/faculty/profiles/annino/Report_JuvenileLifeSentence.pdf.

http://www.law.northwestern.edu/cfjc/jlwop/JLWOP_Report.pdf (discussing Illinois' "accountability statute," which imposes severe sentences on accomplices). Juvenile offenders often have adult co-defendants who played a larger role in the crime yet, in some cases, receive a lesser sentence.

For example, one 16-year old – Patrick McLemore – was sentenced to life without parole in Michigan for aiding and abetting a murder his 20-year old accomplice committed. McLemore was not in the residence where the murder took place when it occurred, yet his co-defendant – who pled guilty – received a shorter sentence. *See* Ashley Nellis and Ryan S. King, The Sentencing Project, *No Exit: The Expanding Use of Life Sentences in America* 33 (2009), *available at* http://www.sentencingproject.org.

Nor has juvenile life without parole been reserved for recidivists. To the contrary, the majority of juveniles sentenced to life without parole – like Terrance Graham – are not chronic offenders. *See* Human Rights Watch, *The Rest of Their Lives*, *supra*, at 28. Indeed, 59 percent of juveniles serving life without parole received the sentence for their first criminal conviction, *id.* – even though society assigns greater culpability to habitual offenders, *see Solem v. Helm*, 463 U.S. 277, 296 (1983).

B. Sentencing Juveniles To Life Without Parole Denies Their Unique Potential For Reform

Life without parole not only ignores juveniles' diminished culpability; it extinguishes any possibility for rehabilitation, even though it is widely-

recognized that juveniles possess a unique capacity for reform. *See Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968) ("it is *impossible* to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life") (emphasis added).

1. Precisely because the adolescent brain is not yet fully developed, juveniles possess character traits that are more transitory than those of adults and, accordingly, are more likely to change as they mature. *See* Gail B. Goodman, Comment, *Arrested Development: An Alternative To Juveniles Serving Life Sentences*, 78 U. Colo. L. Rev. 1059, 1082-83 (2007). This unique potential for reform has been accepted for a century; indeed, rehabilitation was the original cornerstone of the juvenile justice system, established at the turn of the Twentieth Century with a goal of reforming juvenile offenders and enabling their return as productive members of society. *See In re Gault*, 387 U.S. 1, 15-16 (1967); Hillary J. Massey, *Disposing of Children: The Eighth Amendment and Juvenile Life Without Parole After* Roper, 47 B.C. L. Rev. 1083, 1086-87 (2006).

For this reason, just as this Court has long acknowledged that juveniles are less culpable than adults, it has likewise recognized that they possess a greater capacity for reform. *Roper*, 543 U.S. at 570 ("it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed"); *see also Thompson*, 487 U.S. at 837 (acknowledging the "teenager's capacity for growth"). As the Court has explained, "the signature qualities

of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Johnson v. Texas*, 509 U.S. 350, 368 (1993).

This capacity for reform, in turn, counsels against imposing penalties on juveniles that utterly reject even the possibility of rehabilitation over the course of an offender's lifetime. The prospect of rehabilitation was thus an important factor in this Court's holding that juveniles cannot constitutionally be sentenced to death. *See Roper*, 543 U.S. at 573-74 ("When a juvenile offender commits a heinous crime . . . the State cannot extinguish his . . . potential to attain a mature understanding of his own humanity.").

This reasoning applies with equal force to juvenile life without parole. Life without parole – like the death penalty – ignores juvenile offenders' capacity for reform and entirely rejects the possibility of rehabilitation. *See Harmelin v. Michigan*, 501 U.S. 957, 1028 (1991) (Stevens, J., dissenting) ("a mandatory sentence of life imprisonment without the possibility of parole does share one important characteristic of a death sentence: The offender will never regain his freedom . . . such a sentence does not even purport to serve a rehabilitative function").

A "regular part of the rehabilitative process," *Solem v. Helm*, 463 U.S. 277, 300 (1983), parole does not guarantee that juvenile offenders will be released; rather, it provides them with the opportunity to demonstrate their progress and rehabilitation at a parole hearing. *See* Nellis and King, *No Exit*, *supra*, at 30. By depriving juveniles of this basic opportu-

nity, a sentence of life without parole sends them the same stark message as the death penalty does: They are beyond redemption, and any attempt at rehabilitation is futile. *See Naovarath v. State*, 779 P.2d 944, 944 (Nev. 1989) ("Denial of [parole] means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [a juvenile], he will remain in prison for the rest of his days.").

2. This wholesale rejection of rehabilitation has a tangible impact on juveniles serving life sentences without parole. Federal laws, prison policies, and a lack of resources combine to deprive juveniles of educational opportunities and vocational training services available to other inmates. As a result, juveniles who want to reform themselves are often unable to do so.

Post-secondary education, for example, is effectively unavailable to juveniles sentenced to life without parole. A 1994 statute eliminated the availability of Pell Grants for inmates pursuing post-secondary education, *see* 20 U.S.C. § 1070a(b)(7); at present, federal assistance is limited to grants to prisons to help inmates acquire literacy, life, and job skills through post-secondary education, *see* 20 U.S.C. § 1151(f). But this assistance is available only to inmates under 35 years of age who are within seven years of release – a standard that juveniles serving life without parole will, of course, never meet. *Id.* As a result, only those juveniles who can pay for course fees themselves are able to pursue post-secondary education. These fees are often be-

yond the means of prisoners and their families. *See* Human Rights Watch, *The Rest of Their Lives*, *supra*, at 69.

Other rehabilitative services are similarly unavailable to juveniles sentenced to life without parole. Confronted with limited resources, prisons often give enrollment preference for education, vocational, and other services to inmates with shorter sentences. *See* Human Rights Watch, *The Rest of Their Lives*, *supra*, at 70-71 (Pennsylvania and California corrections department representatives explain that inmates sentenced to life without parole have lowest priority and may have difficulty accessing vocational programs). These policies can deny access to basic rehabilitative services – such as GED courses or Alcoholics Anonymous meetings – for inmates sentenced to life without parole as juveniles. *See* Illinois Coalition for the Fair Sentencing of Children, *Categorically Less Culpable*, *supra*, at 21; Human Rights Watch, *When I Die, They'll Send Me Home: Youth Sentenced To Life Without Parole In California* 56-57 (2008), *available at* http://www.hrw.org/reports/2008/us0108/us0108web.pdf.

In still other cases, prison security classifications prevent juveniles from accessing vocational and other rehabilitative services. In California, for example, inmates are assigned security levels based in part on the severity of their sentence; state regulations mandate that inmates sentenced to life without parole receive a high security level that restricts their movement throughout the prison and their access to work programs. *See id.* Unlike other in-

mates, they receive this high security classification regardless of their behavior – limiting the ability of juveniles to access rehabilitation services no matter how well they behave. *Id.*

3. The practical impact of denying rehabilitation is bleak: Juveniles suffer hopelessness and isolation at the time in their lives when education and other developmental opportunities are most critical. Of course, many juveniles sentenced to life without parole strive successfully to better themselves, notwithstanding the barriers to accessing rehabilitative services. *See*, *e.g.*, *id.* at 48-49. In other cases, however, juveniles may react to the isolation and hopelessness of their sentence with disruptive behavior, *see* Human Rights Watch, *The Rest of Their Lives*, *supra*, at 57 – a perverse consequence given their unique potential for reform, and one that could be avoided through precisely those rehabilitative services that juveniles with life sentences cannot access. *See* Office of Justice Programs, Dep't of Justice, *Juveniles in Adult Prisons and Jails: A National Assessment* 63, *available at* http://www.ncjrs.gov/pdffiles1/bja/182503-2.pdf (noting that youthful offenders can be "more difficult to deal with," but that "this population's significant developmental, emotional, and cognitive issues can be addressed by appropriate programming"). To make matters worse, young offenders may also fall prey to the violent behavior of other inmates: Juveniles incarcerated in adult prisons face a serious risk of sexual and physical assault. *See* Nellis and King, *No Exit*, *supra*, at 39.

In short, juvenile life without parole rejects rehabilitation in theory and in practice. Like the death penalty, therefore, the practical effect of a life-without-parole sentence is to extinguish any possibility for juvenile offenders to "attain a mature understanding of [their] own humanity." *See Roper*, 543 U.S. at 576; *see also Hampton*, 666 S.W.2d at 741 (life without parole, "like death, is a sentence different in quality and character" from sentences to a term of years").

II. LIFE WITHOUT PAROLE IS OFTEN IMPOSED ON JUVENILES WITHOUT ANY CONSIDERATION OF THEIR DIMINISHED CULPABILITY

For the reasons set forth above and accepted by this Court in *Roper*, sentencing juveniles to life without parole violates the Eighth Amendment – particularly where, as here, it is imposed for non-homicide offenses. This violation persists no matter what procedure is used to impose the sentence. But there is another compelling reason to prohibit juvenile life without parole that was not present in *Roper*: the sentence, unlike the death penalty, is often imposed on juveniles without any consideration by a judge or jury of their diminished culpability.

Before *Roper* held that the Eighth Amendment categorically prohibits sentencing juveniles to death, a judge or jury was required to consider juvenile offenders' diminished culpability on a case-by-case basis before imposing the death penalty. *See Roper*, 543 U.S. at 602-03 (O'Connor, J., dissenting). Indeed, it was in part because of the availability of this individualized consideration that some members of

this Court rejected the imposition of a categorical bar against the penalty. *See id.* (concerns about juvenile culpability can be addressed "through individualized sentencing in which juries are required to give appropriate mitigating weight to" a juvenile's diminished culpability); *id.* at 620 (Scalia, J., dissenting).

Because predicting a juvenile's future characteristics is so difficult, of course, *Roper* ultimately concluded that no individualized sentencing procedure could cure the juvenile death penalty's Eighth Amendment violation. *See* 543 U.S. at 572-73. And while this reasoning applies with equal force here, juvenile offenders who receive life-without-parole sentences are often deprived of even the individual consideration that this Court ultimately found inadequate in *Roper*. Indeed, unlike death penalty cases – where individualized consideration of a defendant's culpability is constitutionally required – individualized consideration is frequently impossible in cases involving juvenile life without parole.[3] Instead, juvenile offenders are frequently subject to mandatory transfer and mandatory sentencing statutes, whose use has exploded during the past two decades. The combined effect of these laws often dooms juvenile offenders. At the outset, they require many juveniles to be tried as adults. Then, upon conviction in the adult system, they mandate life-

[3] Juveniles' uniquely diminished culpability sets juvenile life without parole apart from terms of years imposed on adult offenders such as the one this Court considered in *Harmelin v. Michigan*, 501 U.S. 957 (1991), where the concerns that this Court raised in *Roper* were not present.

without-parole sentences for certain crimes. Together, these laws deny juveniles any opportunity to have their age and diminished culpability considered by any decision-maker at any stage of the proceedings against them.

1. Juvenile life without parole sentences are precipitated by a transfer from juvenile court to the adult criminal system – an occurrence that has grown in use and become less discretionary over time. *See* Nellis and King, *No Exit*, *supra*, at 29. To transfer juveniles to the adult system, states employ a variety of mechanisms, the use and expansion of which grew dramatically during the 1990s in response to warnings – long since proven unfounded – about an impending crime wave caused by juvenile "superpredators." Between 1985 and 1994 alone, the number of juveniles transferred to adult court nationwide doubled; this doubling, in turn, fueled an increase in the number of juveniles sentenced to life without parole. *Id.*[4]

While waiver into the adult system has always been allowed, it has become far less discretionary in recent years. Since the early-Twentieth Century inception of the juvenile justice system, juvenile judges

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[4] The present cases illustrate how transfer to the adult system necessarily increases a juvenile's risk of receiving a life-without-parole sentence. Terrance Graham was charged as an adult under a statute that vests prosecutors with unreviewable discretion to file charges against juveniles directly in adult court, *see* Pet'r Br. 13, *Graham v. Florida*; Joe Sullivan was charged in adult court under the state's mandatory direct filing law, *see* Pet'r Br. 2, *Sullivan v. Florida*. In neither case would the petitioner have received a life-without-parole sentence had he been convicted in the juvenile system.

have largely retained the discretion to waive jurisdiction and allow prosecution of adolescents in adult court. *See* Massey, *Disposing of Children*, *supra*, at 1087. When exercising this discretion, a judge typically waives jurisdiction only after considering an individual juvenile's circumstances: for example, his home life, susceptibility to peer pressure, and degree of involvement in the crime. Newly-enacted direct filing and mandatory waiver statutes, however, eliminate judicial discretion altogether. Because of the expanded use of these statutes, the number of juveniles who received some sort of judicial transfer hearing prior to being sentenced to life without parole has declined markedly. *See* Human Rights Watch, *The Rest of Their Lives*, *supra*, at 19 (by 2000, only 13 percent of juveniles tried in adult court had received a prior transfer hearing before a juvenile court).

Direct filing, for example, permits prosecutors to file charges against a juvenile directly in adult court. The prosecutor unilaterally determines whether to prosecute a particular juvenile as an adult, with no judicial transfer hearing and typically on the sole basis that probable cause exists to believe the juvenile committed the crime in question. *See* Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 Wake Forest L. Rev. 681, 714-15 (1998). Fourteen states and the District of Columbia have enacted direct filing laws, and the offenses which are subject to direct filing – and the ages to which the statutes apply – vary by state. *See* Richard E. Redding, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Transfer Laws: An Effective Deterrent To Delinquency?* 2

(2008), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf.

In many states, direct filing laws cover a vast group of offenses – not just the most serious ones. In Arkansas, for example, prosecutors may file charges in adult court against 14- and 15-year olds for offenses including kidnapping and first-degree battery, and against juveniles who are 16 and older for any felony at all. *See* Ark. Code Ann. § 9-27-318(c). In Michigan, the state's direct filing law grants criminal courts jurisdiction over juveniles as young as 14 for offenses ranging from carjacking to escape from a juvenile facility, as well as a variety of drug crimes. Mich. Comp. Laws § 600.606. And in Florida, the direct filing statute permits prosecutors to charge 14- and 15-year olds in adult court for offenses including grand theft of a motor vehicle and committing a lewd action in front of a minor; when the juvenile is 16 or older, it permits direct filing for any crime – including, in some circumstances, misdemeanors. Fla. Stat. § 985.557; *see also* Patrick Griffin et al., Office of Juvenile Justice and Delinquency Prevention, *Trying Juveniles As Adults in Criminal Court: An Analysis Of State Transfer Provisions* 8 (1998), *available at* http://www.ncjrs.gov/pdffiles/172836.pdf. In none of these cases does a judge consider the culpability of the individual juvenile offender before he is charged in adult court.

Mandatory waiver laws permit no more discretion for judges than do direct filing statutes. In force in 29 states, *see* Redding, *Juvenile Transfer Laws*, *supra*, at 2, mandatory waiver laws require juvenile judges to relinquish jurisdiction if a juvenile meets

certain criteria: for example, if he is charged with a particular crime. While cases subject to mandatory waiver originate in juvenile court, the juvenile judge has no discretion to consider an offender's age or culpability; his only role is to confirm that the statutory criteria are met and, if so, to send the juvenile to adult court. *See* Griffin, *Trying Juveniles As Adults in Criminal Court*, *supra*, at 4. The statutes can make consideration of a juvenile's culpability difficult in more subtle ways, too. Connecticut's mandatory waiver statute, for example, requires juveniles as young as 14 to be transferred to adult court when charged with certain felonies. The law prohibits the juvenile's attorney from filing any motion, or otherwise making any argument, to oppose the mandatory waiver. *See* Conn. Gen. Stat. § 46b-127(a). And while the statute requires a juvenile judge to find probable cause before mandatory waiver applies to certain felonies, the probable cause hearing occurs without notice, a hearing, or any participation by the juvenile or his attorney. *See id.*; *see also* Griffin, *supra*, at 6.

2. Compounding the effect of mandatory transfer laws are mandatory sentencing statutes, which require judges to impose life without parole in certain circumstances. By design, these statutes wholly remove sentencing discretion from judges, preventing them from considering a juvenile's culpability or potential for reform. Not surprisingly, juveniles receive life without parole with a greater frequency in states with mandatory sentencing laws: The eight states with the highest rates of sentencing juveniles to life without parole all make the sentence mandatory upon conviction for certain crimes. *See* Human

Rights Watch, *The Rest of Their Lives*, *supra*, at 37-38. The five states with the lowest rate of imposing the sentence, by contrast (other than those that do not impose it at all), make it discretionary. *See id.* In these states – where sentencing judges retain the ability to weigh juveniles' culpability and potential for reform on a case-by-case basis – the lower rate of imposing life without parole strongly suggests that judges do not view the sentence as a proportionate one for young offenders.[5]

3. Together, mandatory transfer and mandatory sentencing laws present a perfect storm for juveniles: At the outset, they require that the juvenile, if charged with a certain crime, be tried in adult court. Then, upon conviction in the adult system, they require the judge to sentence the juvenile to life without parole. At no stage of the proceedings is a judge permitted to consider the juvenile's degree of involvement in the crime, mental health status, or history of trauma – factors that would, if considered, counsel heavily in favor of a lesser sentence. *See* Nellis and King, *No Exit*, *supra*, at 19.

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[5] Indeed, some judges have stated in open court that they would not sentence juvenile offenders to life without parole if they retained discretion to impose a lesser sentence. For example, after a juvenile defendant was convicted of first-degree murder by a Cook County jury, Judge Thomas Dwyer informed him that "I sentence you to a term of natural life in the Illinois Department of Corrections . . . That is the sentence that I am mandated by law to impose. If I had my discretion, I would impose another sentence, but that is mandated by law." *See* Illinois Coalition for the Fair Sentencing of Children, *Categorically Less Culpable*, *supra*, at 10.

In practice, the result is unforgiving. In Colorado, for example, prosecutors in 1992 charged 15-year old Jacob Ind as an adult after he murdered his parents, who had subjected him to years of physical and sexual abuse. *See* Gail B. Goodman, Comment, *Arrested Development: An Alternative to Juveniles Serving Live Without Parole in Colorado*, 78 U. Colo. L. Rev. 1059, 1059-60 (2007). Under Colorado's mandatory sentencing statute, the judge was required to sentence Ind to life without parole without regard for his abuse – a fact with which she expressed frustration. *Id.* at 1060; *see also* Sue Lindsay, *Growing Up in Prison*, Rocky Mountain News, Sept. 19, 2005, at 6A (Judge Mary Jane Looney remarked that "[i]t seems to me that kind of change [allowing parole] might be an appropriate change in the statute in many cases that I've seen – certainly this case"). While Colorado has since abolished juvenile life without parole, the change was not retroactive; as a result, Ind is still serving the sentence. *See* Nellis and King, *No Exit*, *supra*, at 23.

In Illinois, a punitive aiding and abetting statute has compounded the effect of the state's mandatory transfer and sentencing laws. Under this "accountability statute," an accomplice – no matter how small his role in a crime – must receive the same punishment as the principal. *See* 720 Ill. Comp. Stat. § 5/5-2. The statute acts in tandem with the state's mandatory waiver law, which enables the automatic transfer to adult court of certain juveniles, as young as 15, who are charged on an accountability theory. *See* 705 Ill. Comp. Stat. § 405/5-130. Both statutes are backed up by a mandatory sentencing law, which requires the imposition of life without parole in a va-

riety of cases. 730 Ill. Comp. Stat. § 5/5-8-1. The result: More than 95 percent of juvenile life without parole cases in Illinois were transferred automatically to adult court, and nearly 80 percent of them received a mandatory life-without-parole sentence. *See* Illinois Coalition for the Fair Sentencing of Children, *Categorically Less Culpable*, *supra*, at 11-12. In none of these cases did a judge or jury consider the juvenile offender's age, culpability, or potential for reform.

And in Washington, at least 28 adolescents are serving life sentences without the possibility of parole. In each of these cases, life without parole was the only sentence available to the court; for 13 of the juveniles, the state's mandatory waiver law prevented a judge from ever considering their age or diminished culpability at a transfer hearing. *See* Washington Coalition For The Just Treatment Of Youth, *A Reexamination Of Youth Involvement In The Adult Criminal Justice System In Washington* 13 (2009), *available at* http://www.columbialegal.org/~lumbia/files/JLWOP_cls.pdf.

Despite this Court's admonition that they are less culpable than adults, therefore, juveniles are frequently sentenced to life without parole – the most severe penalty to which they may be subjected – without any consideration of whether the sentence is proportionate in light of their diminished culpability. For this reason, too, juvenile life without parole is a grossly disproportionate sentence that violates the Eighth Amendment.

CONCLUSION

For the foregoing reasons, the judgments below should be reversed.

Respectfully submitted,

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