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IN THE SUPREME COURT
OF THE STATE OF WISCONSIN

**CLERK OF SUPREME COURT
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

2008AP001139

OMER NINHAM,

Defendant-Appellant-Petitioner.

**On Appeal from the Wisconsin Court of Appeals, District 3
Brown County Circuit Court Case No. 99-CF-523
The Honorable J.D. McKay Presiding**

**NON-PARTY BRIEF OF WISCONSIN COUNCIL ON
CHILDREN AND FAMILIES**

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ARGUMENT

Scientific and psychological studies have increasingly and consistently proven what the Wisconsin Council on Children and Families ("WCCF") has long understood and advocated—juveniles are different and less culpable than adults, and any fair system of justice must recognize this fact. Children and adolescents are not adults in miniature; their youth makes them less able to recognize the consequences of their decisions, yet more capable of extraordinary, positive growth as they develop into adults.

The United States Supreme Court similarly recognizes that our justice system, and in particular, the punishment of juveniles, must reflect that adolescents are less culpable when they commit crimes and must be given the opportunity to grow into adults capable of understanding the meaning and consequences of their actions. As such, the Court has stated juveniles are "less deserving of the most severe punishments." And it has explained the accepted justifications for punishment apply with less force to juveniles.

In Wisconsin, the most severe punishment allowed by law is life imprisonment without the possibility of parole. WCCF urges this Court to apply the United States Supreme Court's rationale that sentencing of juveniles must reflect that they are "less deserving of the most severe punishments," and to hold that in Wisconsin, a juvenile cannot be sentenced to life without parole for a crime committed at age 14.

I. JUVENILES ARE DIFFERENT AND LESS CULPABLE THAN ADULTS.

In two opinions issued in the last six years, the United States Supreme Court has found that the Eighth Amendment has unique application when the punishment of juveniles is involved. *See Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 130 S. Ct. 2011 (2010). In each, the Court relied on social science and neurological studies.

A. The United States Supreme Court Recognized in *Roper* and *Graham* That Juveniles Are Different and Less Culpable Than Adults.

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment.

Embodied within this ban is "the basic precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Roper*, 543 U.S. at 560 (internal quotes and citations omitted). "To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society." *Graham*, 130 S. Ct. at 2021 (internal quotes and citations omitted).

When determining if a punishment is categorically cruel and unusual, this Court must exercise its own independent judgment. *Id.* at 2022, 2026. While community consensus is given great weight, it is not determinative. *Id.* at 2026. Rather, this Court must exercise its own judgment, guided by "controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning and purpose" *Id.* at 2022 (internal quotes and citations omitted). It must also consider "the culpability of the offenders at issue in light of their crimes

and characteristics, along with the severity of the punishment in question." *Id.* at 2026 (citations omitted).

Here, in exercising its own judgment to determine whether it is categorically cruel and unusual to impose Wisconsin's most severe punishment—life without parole—on an adolescent who committed a crime at age 14, this Court must consider an adolescent's culpability in light of the holdings in *Roper* and *Graham*. In those cases, the United States Supreme Court held that juveniles are less culpable than adults and, therefore, "are less deserving of the most severe punishments." *Graham*, 130 S. Ct. at 2026 (citing *Roper*, 543 U.S. at 569). The Court based these holdings, in part, on three differences between juveniles and adults: (1) "juveniles have a 'lack of maturity and an underdeveloped sense of responsibility'"; (2) "they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'"; and (3) "their characters are 'not as well formed.'" *Graham*, 130 S. Ct. at 2026 (quoting *Roper*, 543 U.S. at 569-70).

In holding that juveniles are less culpable than adults, the Court relied on studies and developments in

social science and neuroscience. *Roper*, 543 U.S. at 569; *Graham*, 130 S. Ct. at 2026. The findings of those studies remain true, and social science and neurological studies continue to confirm that juveniles are, indeed, different and less culpable than adults.

B. Social Science Literature and Neurological Studies Support the United States Supreme Court's Holding That Juveniles Are Less Culpable Than Adults.

Juveniles are less culpable than adults because their youth makes them susceptible to reckless, impulsive behavior. But this susceptibility is only temporary, and most adolescents outgrow it.

Juveniles are more likely than adults to engage in impulsive, risky behaviors that are driven by emotion. This is why during adolescence "we witness a dramatic increase in death and disability: soaring rates of serious accidents, suicide, homicide, aggression and violence, use of alcohol and illegal drugs, emotional disorders, and health consequences of risky sexual behavior." Ronald Dahl, M.D., *Beyond Raging Hormones: The Tinderbox in the Teenage*

Brain, Cerebrum: The Dana Forum on Brain Science,
Vol. 5, No.3, p. 7-22 (Summer 2003).

Juveniles engage in more impulsive, risky behavior because they make decisions differently than adults. Generally, juveniles "use a risk-reward calculus that places relatively less weight on risk, in relation to reward, than that used by adults." Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am. Psychol.* 1009, 1012 (Dec. 2003).¹

And when in the presence of peers, juveniles are even more likely to make risky decisions and engage in risky behavior. Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 *Developmental Psychol.* 625, 632 (2005) (study finding that "relative to adults, adolescents are more susceptible to the influence of their peers in risky situations").

¹ The United States Supreme Court has relied on Steinberg's. See, e.g., *Roper*, U.S. 543 at 569.

But a juvenile's susceptibility to impulsive, risky behavior is temporary, as illustrated by arrest rates. Arrest records dating back to 1980 show that arrest rates for 15 to 20-year olds are consistently elevated compared to the rest of the population, but that these rates decline after peaking around the age of 18. U.S. Dept. of Justice, OJJDP Statistical Briefing Book, Age-Specific Arrest Rate Trends (Aug. 1, 2004) *available at* <http://www.ojjdp.gov/ojstatbb/crime/qa05301.asp?qaDate=20040801>; Charles Puzzanchera, U.S. Dept. of Justice, OJJDP, Juvenile Arrests 2008, Juvenile Justice Bulletin at 10 (Dec. 2009) *available at* <http://www.ncjrs.gov/pdffiles1/ojjdp/228479.pdf>.

Indeed, the majority of juveniles who engage in criminal activity will self-correct themselves as they mature. "[S]tudies of criminal careers indicate that the vast majority of adolescents who engage in criminal or delinquent behavior desist from crime as they mature into adulthood." Steinberg & Scott, *supra* at 1015 (citations omitted); see also *The Children's Court Centennial Communication Project, Second Chances: 100 Years of the*

Children's Court: Giving Kids a Chance to Make a Better Choice, available at

<http://www.cjck.org/files/secondchances.pdf> (profiling 25 individuals, including D.C. District Court Judge Reggie Walton and former United States Senator Alan Simpson, who were adjudicated delinquent in juvenile court—some for violent offenses including attempted murder and armed robbery—and then changed the course of their lives).

Advancements in neuroscience have found that physiology may explain the impulsive, reckless behavior of juveniles. Natural changes that occur in a juvenile's brain during adolescence may make this behavior inherent. For example, changes in the brain that occur around the time of puberty are believed to "promote reckless, sensation-seeking behavior in early and middle adolescence."

Laurence Steinberg, *Adolescent Development and Juvenile Justice*, Vol. 5 Annual Rev. Clin. Psychol. 459, 467 (2009).

In contrast, the areas of the brain that govern impulse control and self-regulation mature more gradually over the course of adolescence. *Id.* at 466-467. "This temporal gap between the increase in sensation seeking around puberty

and the later development of mature self-regulatory competence may combine to make adolescence a time of inherently immature judgment." *Id* at 467.

As such, social science and neurological studies support what the Supreme Court recognized in *Roper* and *Graham*, and what WCCF has consistently advocated: juveniles are different and less culpable than adults, and must be treated accordingly in our criminal justice system.

II. BASED ON THE UNITED STATES SUPREME COURT'S ANALYSIS IN *ROPER* AND *GRAHAM*, THIS COURT SHOULD HOLD THAT JUVENILES CANNOT BE SENTENCED TO LIFE WITHOUT PAROLE IN WISCONSIN.

The United States Supreme Court has not specifically addressed whether juveniles may be sentenced to life without parole for homicide. But its analysis in *Roper* and *Graham* supports this Court holding that in Wisconsin, an adolescent may not be sentenced to life without parole for a crime he committed at age 14.

Graham and *Roper* each held that because juveniles are less culpable than adults, they are "less deserving of the most severe punishments." *Graham*, 130 S. Ct. at 2026 (citing *Roper*, 543 U.S. at 569). This is because the

accepted justifications for punishment—retribution, deterrence, incapacitation, and rehabilitation—apply with less force to juveniles. *Roper*, 543 U.S. at 571; *Graham*, 130 S. Ct. at 2028-2030.

In Wisconsin, a sentence of life without parole is the most severe punishment available. Accordingly, Wisconsin should reserve this punishment for the most culpable criminals – a category that the United States Supreme Court has said cannot include juveniles. Further, the accepted justifications for imposing Wisconsin's most severe penalty apply to juveniles with less force.

A. Retribution Violates the Basic Precept of Proportionality When a Sentence of Life Without Parole Is Imposed on a Juvenile in Wisconsin.

Retribution does not support imposing Wisconsin's most severe punishment on adolescents, because the punishment is not proportionate to their culpability. For retribution to justify punishment, the punishment "must be directly related to the personal culpability of the criminal offender." *Graham*, 130 S. Ct. at 2028. This is in accord with the basic precept of proportionality. *See Roper*, 543

U.S. at 560. Since juveniles are less culpable than adults, "the case for retribution is not as strong with a minor as with an adult." *Id.* at 571 (internal quotes and citations omitted).

The United States Supreme Court has held that retribution does not justify imposing the most severe penalty available on persons with diminished culpability. In *Atkins v. Virginia*, the Court held retribution does not justify imposing the death penalty on mentally retarded persons. 536 U.S. 304, 319 (2002) ("If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution."). The Court held the same for juveniles in *Roper*: "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth or immaturity." 543 U.S. at 571. And in *Graham*, the Court held that a juvenile could not be sentenced to the most severe punishment available for a non-homicide crime against an individual—life without

parole. *Graham*, 130 S. Ct. at 2034; *see also Kennedy v. Louisiana*, 128 S. Ct. 2641, 2660 (2008) (holding the death penalty is an impermissible punishment for non-homicide crimes against individuals).

Applying the rationale from these cases, retribution does not justify imposing a sentence of life without parole on an adolescent in Wisconsin, because life without parole is Wisconsin's most severe punishment. Imposing this punishment on adolescents offends the precept of proportionality because juveniles have lessened culpability. This is particularly so when the juvenile was as young as 14 at the time he committed the crime for which he was sentenced.

Moreover, in all Wisconsin cases involving first-degree intentional homicide, the sentencing court has a choice of whether to allow for parole or not. Wis. Stat. § 973.014. If retribution does not justify imposing Wisconsin's most severe penalty on all persons convicted of first-degree intentional homicide, there can be little to no justification for imposing it on persons with lessened

culpability—in this case an adolescent. *See Atkins*, 536 U.S. at 319.

Furthermore, a sentence of life without parole is more severe when imposed on a juvenile and, therefore, also lessens the case for retribution because it makes the punishment all the more disproportionate. The United States Supreme Court has acknowledged life without parole "is an especially harsh punishment for a juvenile." *Graham*, 130 S. Ct. at 2028. On average, a juvenile will "serve more years and a greater percentage of his life in prison than an adult offender." *Id.* "This reality cannot be ignored." *Id.*

Underscoring the increased severity of life without parole for a juvenile are the similarities between it and the death penalty. As with the death penalty, a sentence of life without parole is irrevocable. *Id.* at 2027. It means "the denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." *Id.* at 2027 (citations and internal quotes omitted).

Life without parole is Wisconsin's most severe sentence, and it is especially harsh for a juvenile. That, along with the diminished culpability of a juvenile, means retribution cannot justify imposing the sentence on an adolescent because the punishment is not directly related to the adolescent's culpability.

B. Sentences of Life Without Parole Do Not Deter Juveniles.

Deterrence does not justify imposing a sentence of life without parole on an adolescent because these sentences do not deter adolescents. As stated by the United States Supreme Court, "the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence." *Graham*, 130 S. Ct. at 2028 (quoting *Roper*, 543 U.S. at 571). And because juveniles have a "lack of maturity and an underdeveloped sense of responsibility . . . they are less likely to take a possible punishment into consideration when making decisions." *Id* at 2028-29 (internal quotes and citations omitted). This is especially true when the punishment is rarely imposed, as is the case here. *See id.*

The Court's comments are in accord with social science findings. Social science shows that when making decisions, adolescents place less emphasis on potential risks, and they are more susceptible to peer pressure. *Supra* at 6. Additionally, studies indicate that imposing adult punishments on juveniles does not deter crime. Jeffrey Fagan, *Juvenile Crime and Criminal Justice: Resolving Border Disputes*, 18 *The Future of Children* 81, 102 (Fall 2008) ("The evidence tips against the claim that youthful offenders are sensitive to the age boundaries that make them eligible for punishment in the criminal courts."). As such, deterrence cannot justify imposing a sentence of life without parole on an adolescent.

C. It Is Impossible to Accurately Foretell That a Juvenile Must Be Incapacitated for Life to Protect the Public.

Incapacitation cannot justify imposing a sentence of life without parole on an adolescent, especially one as young as 14, because juveniles are capable of extraordinary, positive growth as they develop into adults. To impose a sentence of life without parole on an adolescent is to say that person will forever be a threat to society.

Graham, 130 S. Ct. at 2029. But "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* (quoting *Roper*, 543 U.S. at 572). Indeed, the *Graham* Court refused to say that courts can accurately "distinguish the few incorrigible juvenile offenders from the many that have the capacity for change." *Id.* at 2032.

Parole boards exist to determine whether offenders should be released because they no longer represent a threat to the public. Common sense, social science and brain science tells us that juveniles have more capacity for change than adults. And sentencing courts cannot foretell in any meaningful way how an adolescent may act decades in the future. Because of this, incapacitation cannot justify sentencing an adolescent to life without parole.

D. Sentences of Life Without Parole Do Nothing to Further the Ideal of Rehabilitation, and Severely Undermine a Juvenile's Capability for Growth.

Finally, rehabilitation does not justify imposing sentences of life without parole on an adolescent because "[t]he penalty forswears altogether the rehabilitative ideal." *Graham*, 130 S. Ct. at 2030. "Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation." *Id.* at 2032. But life without parole means "no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Id.* The result: a juvenile sentenced to life in prison "has little incentive to become a responsible individual." *Id.*

Indeed, life without parole undermines everything science teaches about adolescents and their capability for growth. One of the important developmental tasks of adolescence is "the emergence of a personal identity." Steinberg & Scott, 58 Am. Psychol. at 1014. Entwined within this is an adolescent's potential to "attain a mature understanding of his own humanity." *See Roper*, 543 U.S.

at 574. This cannot happen when an adolescent has no hope for fulfillment in the outside world. Thus, rehabilitation cannot justify sentencing an adolescent to life without parole.

CONCLUSION

Any fair system of justice must recognize that juveniles are different and less culpable than adults. Scientific and psychological studies have consistently shown this to be true. And the United States Supreme Court has also recognized this to be true, holding twice in the last six years that juveniles are less culpable than adults and, therefore, less deserving of the most severe punishments. WCCF urges this Court to apply that same rationale, and to hold that in Wisconsin, adolescents who commit crimes at age 14 cannot be sentenced to life without parole—the most severe punishment that can be imposed on any person in Wisconsin.

Dated this 15th day December, 2010.

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a non-party brief produced with proportional serif font. The length of this brief is 2,959 words.

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RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 15th day of December, 2010, I caused 22 copies of the Non-Party Brief of Wisconsin Council on Children and Families to be mailed by First Class Mail, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

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CERTIFICATE OF SERVICE

I do hereby certify that, on December 15, 2010, three true and correct copies of this petition for review were furnished by First Class Mail to each of the following:

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