IN THE SUPREME COURT OF THE UNITED STATES

JOE HARRIS SULLIVAN, Petitioner,

v.

STATE OF FLORIDA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Joe Sullivan is serving a sentence of life imprisonment without the possibility of parole for a non-homicide offense committed when he was thirteen years old. Nationwide, only one other thirteen-year-old child has received a life-without-parole sentence for a non-homicide. The questions presented are:

1. Does imposition of a life-without-parole sentence on a thirteen-year-old for a non-homicide violate the prohibition on cruel and unusual punishments under the Eighth and Fourteenth Amendments, where the freakishly rare imposition of such a sentence reflects a national consensus on the reduced criminal culpability of children?

2. Given the extreme rarity of a life imprisonment without parole sentence imposed on a 13-year-old child for a non-homicide and the unavailability of substantive review in any other federal court, should this Court grant review of a recently evolved Eighth Amendment claim where the state court has refused to do so?

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PETITION FOR WRIT OF CERTIORARI

Joe Sullivan respectfully petitions for a writ of certiorari to review the judgment of the District Court of Appeal of Florida for the First District.

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida for the First District is reported at 987 So. 2d 83 (Table) and is attached as Appendix B. That court's denial of rehearing, rehearing en banc and certification to the Supreme Court of Florida is unreported and is attached as Appendix A. The order and judgment of the Circuit Court of Florida for the First Judicial Circuit is unreported and is attached as Appendix C.

JURISDICTION

The judgment of the District Court of Appeal of Florida was entered June 17, 2008. On August 6, 2008, that court denied a timely motion for rehearing, rehearing en banc, and certification to the Supreme Court of Florida. Because the district court of appeal affirmed without opinion, Florida law did not permit further review. Jackson v. State, 926 So. 2d 1262, 1265 (Fla. 2006). On October 22, 2008, Justice Thomas extended to and including December 4, 2008 the time for filing this petition for writ of certiorari. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case presents a question of great importance concerning the constitutionality of condemning a thirteen-year-old child to die in prison. Petitioner Joe Sullivan is one of only two people in the United States to have been sentenced to die in prison for a non-homicide offense committed at the age of thirteen, and one of only eight thirteen-year-olds to receive that sentence for any crime.[1] In the vast majority of states, no one Joe's age has received a life-without-parole sentence.

A. Rarity of Death-in-Prison Sentences for Thirteen-Year-Olds

Nationwide, Joe Sullivan is one of only two thirteen-year-old children who have received life-without-parole sentences for crimes in which the victims did not die. Both of these sentences were imposed in Florida, making Florida the only state

[1] The factual discussion in this Petition is based on the facts presented to the Florida courts. (E.g., R. 6–8, 27–29, 33–34. "R." refers to the one-volume record on appeal in the District Court of Appeal for Florida, First Circuit, case number 1D07-6433.)

to have sentenced a thirteen-year-old to die in prison for a non-homicide. No thirteen-year-old child has been sentenced to die in prison for a non-homicide in over fifteen years.

Extensive research by undersigned counsel has uncovered only eight cases, in only six states, where a thirteen-year-old has been condemned to die in prison for any crime, including homicide.[2] In the vast majority of states, no child Joe's age has been subjected to life imprisonment without possibility of parole, for any crime.

Joe Sullivan is the *only* thirteen-year-old nationwide to have been sentenced to die in prison for sexual battery or rape. His case, however, represents just a tiny fraction of cases in which young teens have been arrested for sexual battery or rape. In just the ten-year period between 1996 and 2005, 12,340 children fourteen years old or younger were arrested for rape nationwide,[3] but *none* of these children was sentenced to life without parole. (Joe's case predates this ten-year period.)

Even in the limited context of juvenile life-without-parole sentences, imposition of the sentence on a thirteen-year-old is freakishly rare. As of 2005,

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[2] Florida, Illinois, Nebraska, North Carolina, Pennsylvania, and Washington. See Equal Justice Initiative, Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison 20 & n.27 (2007), available at http://eji.org/eji/files/20071017cruelandunusual.pdf [hereinafter Cruel and Unusual]. In compiling this report, undersigned counsel extensively consulted with state departments of corrections, exhaustively reviewed published decisions and news articles available in electronic databases, and consulted with juvenile justice scholars and practitioners. Cf. supra n.1.

[3] This total is based on the Department of Justice Uniform Crime Reports for 1996 to 2005. See generally U.S. Dept. of Justice, Uniform Crime Reports: Crime in the United States, http://www.fbi.gov/ucr/ucr.htm. The underlying data for each year is found in the report for that year, as follows: 2005, table 38; 2004, p. 290; 2003, p. 280; 2002, p. 244; 2001, p. 244; 2000, p. 226; 1999, p. 222; 1998, p. 220; 1997, p. 232; 1996, p. 224.

there were at least 2225 people in the United States serving life-without-parole sentences for crimes committed as juveniles, but less than one half of one percent of these prisoners were thirteen or younger at the time of the offense.[4]

Internationally, the United States is the only country in which a thirteen-year-old is known to be sentenced to life in prison without parole.[5] Outside the United States, only a handful of juveniles of any age are known to have been sentenced to life without parole, and only a few countries even theoretically permit such a sentence.[6]

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[4] Amnesty Int'l & Human Rights Watch, The Rest of Their Lives: Life Without Parole for Child Offenders in the United States 21, 26 (2005), available at http://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf.

[5] Cruel and Unusual, supra n.2, at 13.

[6] See Michelle Leighton & Constance de la Vega, Ctr. for Law & Global Justice, Univ. S.F. Law Sch., Sentencing Our Children to Die in Prison: Global Law and Practice 4, 9–12 (2007), available at http://www.usfca.edu/law/home/CenterforLawandGlobalJustice/LWOP_Final_Nov_30_Web.pdf. The Convention on the Rights of the Child, ratified by every country in the world except the United States and Somalia, forbids a life-without-parole sentence for any child under eighteen. United Nations Convention on the Rights of the Child, Art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448, 1468–70 (entered into force Sept. 2, 1990). In December 2006, a further resolution calling on all states to abolish the sentence passed the United Nations General Assembly by a vote of 185 to 1 with no abstentions. G.A. Res. 61/146, ¶ 31(a), UN Doc. No. A/Res/146 (Dec. 19, 2006).

The foregoing is based on the facts presented to the Florida courts. See supra n.1. Since the conclusion of the state court proceedings, it has become clear that the United States is now the *only* country to impose life-without-parole sentences for offenses committed before the age of eighteen. See Michelle Leighton & Constance de la Vega, Sentencing Our Children to Die in Prison: Global Law and Practice, 42 U.S.F.L. Rev. 983, 985 (2008) ("[T]here is only one country in the world today that continues to sentence child offenders to LWOP terms: the United States.").

B. Joe Sullivan's Background, Offense, and Conviction[7]

At the time of the offense in 1989, Joe Sullivan was a thirteen-year-old child living in a home where he was regularly subjected to physical and sexual abuse. (R. 5, 18.) Joe also is mentally disabled. (R. 5, 18.) On the day of the crime, two older boys convinced Joe to participate in a burglary. (R. 5, 18.) The three boys entered the home of Lena Bruner in the morning while no one was there. (R. 5, 18.) One of the older boys took some money and jewelry. (R. 5, 18.) The three boys then left. (R. 5, 18.) That afternoon, Ms. Bruner was sexually assaulted in her home. (R. 5, 18.) She never saw her attacker. (R. 5, 18.)

One of the older boys, who may have been the true assailant, accused Joe of the sexual battery. (R. 6, 18.) Each of the older boys received short sentences in juvenile detention. (R. 6, 18.) Thirteen-year-old Joe Sullivan was charged and tried in adult court. (R. 58–61.)

Joe's trial before a six-person jury lasted only one day. (R. 6, 19.) No biological evidence was presented. (The biological evidence that could have exonerated Joe was destroyed in 1993. (R. 6, 18–19.)) Instead, the prosecution relied on testimony from Joe's juvenile co-defendants and a highly suggestive voice identification by the victim, who could say only that Joe's voice "sound[ed] like" and the voice of her assailant. (R. 6, 19; Trial Tr. 88, 91.) The trial, involving an

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[7] This section is based on the record and the unrefuted allegations in Joe Sullivan's postconviction motion. (See R. 1–16.) See Floyd v. State, 808 So. 2d 175, 182 (Fla. 1992) (where trial court denies postconviction motion without evidentiary hearing, court is bound to "accept [the] defendant's factual allegations as true to the extent they are not refuted by the record").

African-American defendant and a white victim, featured repeated, irrelevant references to race. (R. 6, 19; e.g., Trial Tr. 76, 97.)

Joe Sullivan was convicted and sentenced to life imprisonment without parole. (R. 6, 19.) His appointed appellate counsel filed an Anders brief and withdrew.[8] The district court of appeal affirmed the conviction without opinion,[9] and the Supreme Court of Florida likewise dismissed review without opinion.[10] Between 1991 and 1997, without the assistance of counsel, Joe attempted to challenge his conviction unsuccessfully. (R. 67–68.) In 2007, undersigned counsel agreed to help Joe and attempted to prove his innocence through a motion for DNA testing; the motion was denied after a hearing because all biological evidence had been destroyed by the State. (R. 4, 70–71.)

C. Procedural History of Judgment on Review in This Petition

After this Court recognized constitutional limits on sentencing based on an evolving national consensus on the reduced criminal culpability of juveniles in Roper v. Simmons, 543 U.S. 551 (2005), undersigned counsel filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. The motion argued that the Eighth and Fourteenth Amendments prohibited imposition of a life-without-parole sentence on a thirteen-year-old child convicted of a non-homicide.

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[8] See Sullivan v. State, No. 1D90-190 (Fla. 1st Dist. Ct. App.) (docket entry for Dec. 4, 1990). By filing an Anders brief, counsel asserted that there were no issues worth raising on appeal. Anders v. California, 386 U.S. 738, 744 (1967).

[9] Sullivan v. State, No. 1D90-190, 580 So. 2d 755 (Table) (Fla. 1st Dist. Ct. App. May 22, 1991).

[10] Sullivan v. State, No. 78050, 583 So. 2d 1037 (Table) (Fla. June 12, 1991).

(R. 1–13, 71.) The trial court dismissed the motion with prejudice in a five-page order.[11] (See App. C.)

Counsel timely appealed the trial court's dismissal, and the district court of appeal summarily affirmed without opinion.[12] (See App. B.) The district court of appeal then denied a timely motion for rehearing and/or certification to the Supreme Court of Florida. (See App. A.) Because the district court of appeal affirmed without opinion, Florida law did not permit review in the Supreme Court of Florida. Jackson v. State, 926 So. 2d 1262, 1265 (Fla. 2006).

D. The State Court Ruling on Review

In its order and judgment dismissing Joe Sullivan's postconviction motion, the trial court held the motion to be untimely based on a conclusion that it did not raise a valid constitutional claim. (App. C at 3–4.) Generally, motions under Florida Rule of Criminal Procedure 3.850 must be brought within two years of a final conviction, but there is an exception where "the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively."[13] The trial court acknowledged the potential applicability of this exception, noting that Roper v. Simmons, 543 U.S. 551 (2005), applied retroactively and that Joe's motion argued that "after . . . Roper it is

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[11] State v. Sullivan, No. 1989 CF 002693 A (Fla. 1st Cir. Ct. Oct. 31, 2007).

[12] Sullivan v. State, No. 1D07-6433, 987 So. 2d 83 (Table), 2008 WL 2415314 (Fla. 1st Dist. Ct. App. June 17, 2008) (per curiam).

[13] Fla. R. Crim. P. 3.850(b)(2).

unconstitutional to sentence a thirteen-year-old child to die in prison." (App. C at 3–4.) However, the court stated that Joe Sullivan "does not have a valid constitutional claim" because Roper was a capital case. (App. C at 4.) Hence, the court held, his Eighth Amendment claim "must be dismissed as procedurally barred." (App. C. at 4.)

The trial court went on to address the merits of Joe's Eighth Amendment claim, stating that "[e]ven if Defendant's motion were properly before the Court, [his] argument is meritless." (App. C. at 4.) To support this conclusion, the court cited cases where the Supreme Court of Florida had declined to extend Roper v. Simmons to defendants *over* the age of eighteen.[14] (App. C. at 4.) The trial court also stated that "the Supreme Court of Florida has made clear that a sentence of life imprisonment without parole is a perfectly acceptable penalty under Roper," citing Ramirez v. State, 909 So. 2d 862 (Fla. 2005). (App. C at 4–5.) Ramirez involved a seventeen-year-old convicted of first-degree murder who was sentenced to life *with* the possibility of parole.[15] In short, the trial court, in deciding that Joe Sullivan

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[14] Kearse v. State, 969 So. 2d 976 (Fla. 2007) (declining to extend Roper to eighteen-year-old); Melton v. State, 949 So. 2d 994, 1020 (Fla. 2006) (declining to find that Roper prevents consideration of juvenile convictions when imposing death penalty on adult defendant); England v. State, 940 So. 2d 389, 406–07 (Fla. 2006) (same); Grossman v. State, 932 So. 2d 192 (Fla. 2006) (table) (affirming without opinion over argument to extend Roper to nineteen-year-old).

[15] See State v. Ramirez, 850 So. 2d 620, 623 (Fla. 2d Dist. Ct. App. 2003) (Fulmer, J., dissenting) (noting age and offense). Mr. Ramirez is sentenced to life with the possibility of parole after 25 years because he committed his offense on March 10, 1995, prior to the October 1, 1995 effective date of the statute authorizing life without parole for capital murder. See 1995 Fla. Laws. ch.95-294, § 4 (eff. Oct. 1, 1995) (now codified at Fla. Stat. § 775.082(1)); see also Florida Inmate Population Information, http://www.dc.state.fl.us/ActiveInmates (confirming date of Ramirez's offense).

could not state an Eighth Amendment claim, did not consider the fact that he was only thirteen at the time of the crime or that his offense was a non-homicide, and relied exclusively on cases involving adult defendants and homicides.

REASONS FOR GRANTING THE WRIT

Joe Sullivan's sentence—life imprisonment without parole for a non-homicide committed at age thirteen—raises a novel and important constitutional issue regarding the culpability of very young teens. The Florida courts summarily rejected the constitutional validity of this Eighth Amendment claim. Federal habeas corpus review is unlikely. Presentation of the claim in a less complex procedural posture in a subsequent case is similarly improbable. Ironically, one of the very characteristics that renders Joe's sentence unconstitutional—that it is freakishly rare—essentially means that if this Court does not exercise jurisdiction now, the merits of the underlying constitutional issue will go unreviewed indefinitely.

Fairness requires that the merits of Joe Sullivan's claim be reviewed because his sentence violates the Eighth Amendment. Even in a system that regularly imposes harsh, adult penalties on older teens, a life-without-parole sentence for a thirteen-year-old is so rare, and consequently capricious and arbitrary, as to be cruel and unusual. The near uniqueness of Joe's sentence accords with this Court's recognition in Roper v. Simmons, 543 U.S. 551 (2005), of a national consensus regarding the reduced criminal culpability of juveniles, and shows that the

consensus is particularly strong in regard to the difference between very young adolescents and older teens.

I. JOE SULLIVAN'S EIGHTH AMENDMENT CLAIM SHOULD BE REVIEWED ON THE MERITS, AND A WRIT OF CERTIORARI FROM THIS COURT PROVIDES THE ONLY MEANINGFUL OPPORTUNITY FOR SUCH REVIEW.

This Court should take jurisdiction because Joe Sullivan has a valid and extraordinarily important constitutional claim that should be heard on the merits. See Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality op.) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."). Absent review by this Court now, the underlying claim will go unreviewed. Such a failure of review would be unwise and unjust because it would leave Joe Sullivan without a means to access this Court's recognition of society's evolved thinking regarding the limited culpability of juveniles in the Eighth Amendment context. Further, this Court's review is not barred by rules of finality or jurisdiction where the state court's dismissal depended on a threshold analysis of the underlying federal constitutional question. Therefore, this Court should grant certiorari.

A. If This Court Does Not Review Joe Sullivan's Claim Now, a Novel and Important Constitutional Question Will Go Unreviewed.

The Florida courts dismissed this important constitutional claim on procedural grounds. As explained below, infra Part I.B–C, that dismissal does not bar this Court's review, because the state court's procedural ruling was intertwined with a threshold issue of federal constitutional law and because the unusual nature

of Joe Sullivan's sentence has become clearer with the passage of time. Nevertheless, this Court might normally be inclined to wait for the issue to arise in another case, in a less complicated procedural posture.

The problem with this approach, however, is that Joe's claim is *truly and extremely* unusual, and becoming more so every year. Only two thirteen-year-olds currently are sentenced to die in prison for non-homicides in the United States, and Joe is one of only eight thirteen-year-olds sentenced to die in prison for any crime. It has been more than fifteen years since such a sentence was imposed for a non-homicide. There may not be another opportunity for this Court to address this issue.[16]

Moreover, federal habeas corpus will not provide an outlet for relief in this case. Given the limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and the nature of this claim, the lower federal courts will not have the authority to resolve the constitutional question presented in this case. See 28 U.S.C. § 2244(d) (one-year statute of limitations on federal habeas corpus claims). Such circumstances previously have prompted four members of this Court to suggest that the Court must look more closely at certiorari petitions from state postconviction proceedings, Lawrence v. Florida, 127 S. Ct. 1079, 1089 n.7 (2007) (Ginsburg, J., dissenting) ("Since AEDPA . . . our consideration of state

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[16] Cf., e.g., Lackey v. Texas, 514 U.S. 1045, 1047 (1995) (Mem. of Stevens, J., respecting denial of certiorari) ("Often, a denial of certiorari on a novel issue will permit the state and federal courts to 'serve as laboratories in which the issue receives further study before it is addressed by this Court.'").

habeas petitions has become more pressing."); this case illustrates the wisdom of that suggestion.

In sum, the Florida courts did not conduct an appropriate analysis of this Eighth Amendment claim, because the trial court incorrectly concluded that Joe Sullivan had not even stated a "constitutional claim." (App. C at 4.) The state courts never mentioned or considered the constitutionally significant distinction between children and older teens. Moreover, due to substantial procedural and substantive restrictions, this claim is unlikely to receive merits review in a federal habeas corpus court. Thus, if this Court, in this posture, declines to take jurisdiction, the merits of an important federal constitutional claim may go unreviewed indefinitely. This Court should take jurisdiction to ensure that Joe's arguments receive a hearing. See Lawrence, 127 S. Ct. at 1089 n.7 (Ginsburg, J., dissenting) ("Even if rare, the importance of our review of state habeas proceedings is evident."); see also Knight v. Florida, 528 U.S. 990, 993–94 (1999) (Breyer, J., dissenting from denial of certiorari) (arguing that Court should take jurisdiction to resolve important and relatively rare Eighth Amendment Lackey claim, despite lack of division on question in lower courts).

B. This Court Should Review Joe Sullivan's Claim on the Merits Now Because the Complete Basis for That Claim Emerged Only Over Time.

Although the Florida courts applied a type of procedural bar to Joe Sullivan's Eighth Amendment claim, this Court can and should take jurisdiction, not only

because of the intertwining of federal constitutional issues in the state court's decision, discussed infra Part I.C, but also because this is one of the rare claims that must be considered even at a time relatively remote from conviction, regardless of default rules for finality, lest it escape review entirely.

i. Joe Sullivan should have access to evolved societal and legal values concerning the culpability of children and juveniles.

Since his conviction, the legal basis for this issue has evolved, most notably due to this Court's recognition, in Roper v. Simmons, 543 U.S. 551 (2005), of a developing scientific and societal consensus concerning the reduced criminal culpability of juveniles. The distinct constitutional analysis and evolved thinking represented by the Roper decision now make clear that Joe's sentence is categorically unconstitutional, and this Court should take jurisdiction to ensure that he can access that evolved thinking.

This Court has recognized that "'[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose,'" Penry v. Lynaugh, 492 U.S. 302, 330 (1989) (quoting Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)), and has thus retroactively applied constitutional "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." Id. (citation and internal quotation marks omitted). Joe's claim clearly falls under this doctrine.

Thus, although Florida generally is entitled to limit access to postconviction relief through valid procedural rules, in this case, even if this Court finds that Florida acted under an independent state rule, jurisdiction should not be declined on that basis. Because the sheer unusualness of this sentence is likely to prevent recognition of its unconstitutionality in another case, see supra Part I.A, this Court should take jurisdiction to ensure that Joe has access to its evolved Eighth Amendment doctrine.

This case involves a categorical challenge to imposition of an extremely serious penalty—the "penultimate sentence," Solem v. Helm, 463 U.S. 277, 303 (1983)—on a thirteen-year-old child for a non-homicide. In such circumstances, this Court has made clear that rules "implemented to further the principles of comity, finality, and federalism" should not be interpreted to completely bar potentially meritorious federal claims from hearing in a federal forum. Panetti v. Quarterman, 127 S. Ct. 2842, 2855 (2007) (construing AEDPA so as not to preclude federal merits consideration of potentially meritorious Ford claims); cf. Nelson v. Campbell, 541 U.S. 637 (2004) (interpreting 42 U.S.C. § 1983 to allow challenge to pre-execution "cut down" procedure in case where habeas corpus challenge would have been procedurally barred as second and successive). Instead, this Court has explained that where "the Constitution itself deprives the State of the power to impose a certain penalty, . . . finality and comity concerns . . . have little force." Penry, 492 U.S. at 330. Accordingly, as in other cases involving claims that imposition of a

certain punishment on a certain class of defendants is categorically prohibited, this Court should interpret the general rules of finality to permit merits review in this case.

ii. The unusual and cruel character of Joe Sullivan's sentence has become clear with the passage of time.

When Joe Sullivan was sentenced, an explosion in harsh juvenile sentencing was just getting underway, and the trend and national consensus appeared to support expanded imposition of harsh, adult sanctions on juveniles. See Roper, 543 U.S. at 566 (noting "particular trend in recent years toward cracking down on juvenile crime") (citing Howard N. Snyder & Melissa Sickmund, Nat'l Ctr. for Juvenile Justice, Juvenile Offenders and Victims: 1999 National Report 89, 133 (1999)[17]). As it turns out, that trend did not extend to sentencing very young teens to life in prison without parole—only two thirteen-year-olds are now serving such sentences for non-homicides, and only eight for any crime. See supra Statement of the Case Part A, pp. 2–4 & nn.1–6. Because this claim turns on an analysis of what other states are doing over time, however, the unusualness of Joe's sentence could

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[17] Available at http://www.ncjrs.gov/html/ojjdp/nationalreport99/toc.html (Chapter 4). This report describes how "[i]n the 1980's, the pendulum began to swing toward law and order," with the increased, mandatory channeling of juvenile offenders into the adult criminal justice system and a concomitant increase in sentences, and how "[t]he 1990's . . . [were] a time of unprecedented change as State legislatures crack[ed] down on juvenile crime." Id. at 88–89; see also id. at 108 ("As many States have shifted the purpose of juvenile court away from rehabilitation and toward punishment, accountability, and public safety, the emerging trend is toward dispositions based more on the offense than the offender."); id. at 89 (stating that "[b]etween 1992 and 1997, all but three States changed laws" to reduce protections and increase punishment for juvenile offenders, including 45 states which "made it easier to transfer juvenile offenders from the juvenile justice system to the criminal justice system" and 31 states which "expanded sentencing options" for juveniles).

not easily be perceived at the time of sentencing. Now, twenty years later, the cruelty and unusualness of the sentence has become clear enough to require constitutional recognition, and Joe should have access to meaningful review. As discussed above in Part I.A, the only court that realistically can review the merits of his claim is this Court.

This Court has exempted Ford claims[18] from the normal, finality-based limits on second and successive federal habeas corpus petitions because "[Ford] claims, as a general matter, are not ripe until after the time has run to file a first federal habeas petition." Panetti, 127 S. Ct. at 2852; see id. at 2855 ("We are hesitant to construe [AEDPA], implemented to further the principles of comity, finality, and federalism, in a manner that would require unripe (and, often, factually unsupported) claims to be raised as a mere formality, to the benefit of no party."); see also Stewart v. Martinez-Villareal, 523 U.S. 637, 644–45 (1998) (interpreting AEDPA provision governing "second or successive" petitions to permit reassertion of Ford claim previously dismissed as unripe and noting: "Respondent brought his claim in a timely fashion, and it has not been ripe for resolution until now.").

Joe's claim should be treated similarly, because the unusualness of his sentence was hard to perceive initially. Just as a prisoner who seeks to make a

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[18] Ford v. Wainwright, 477 U.S. 399, 409–10 (1986) (plurality op.) (holding that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane"); cf. Lackey v. Texas, 514 U.S. 1045 (1995) (Mem. of Stevens, J., respecting denial of certiorari) (raising possibility that inordinate delay before execution could violate Eighth Amendment and invalidate death sentence).

Ford claim cannot know what his mental condition will be when the relevant time frame arrives, cf. Herrera v. Collins, 506 U.S. 390, 406 (1993) ("[T]he issue of sanity is properly considered in proximity to the execution."), Joe could not have known, while his conviction was on direct review, whether the trend of increasingly harsh juvenile punishment would include expanded imposition of life without parole on young teens.

Joe was sentenced to life in prison without parole for a non-homicide in the midst of an historic, national explosion in the treatment of juvenile offenders as adults, and his unusualness claim did not fully emerge until it became possible to discern that—even given this new regime of substantially expanded sanctions against juvenile offenders, including young teens—sentences like Joe's *still* would almost never be imposed. See Roper, 543 U.S. at 566 (noting that trend toward abolition or disuse of juvenile death penalty "carrie[d] special force in light of the general popularity of anticrime legislation, . . . [and] the particular trend in recent years toward cracking down on juvenile crime in other respects"). Moreover, review of Joe's claim is especially important and appropriate due to the impact of Roper v. Simmons and its recognition of societal values concerning the reduced culpability of juveniles. This Court should take jurisdiction to allow merits review of Joe's Eighth Amendment claim.

C. This Court Should Take Jurisdiction Because the State Court's Ruling Is Based On a Threshold Determination of Federal Constitutional Law.

The state courts' decision "rests, as a threshold matter, on a determination of federal law." Ohio v. Reiner, 532 U.S. 17, 20 (2001). The state court held that "Defendant does not have a valid [federal] constitutional claim. Hence, Defendant's claim . . . must be dismissed as procedurally barred." (App. C at 4.[19]) This analysis expressly premises the decision to apply a state-law procedural bar on a threshold analysis of federal constitutional law, and thus the court's decision cannot be said to rest independently on state-law grounds. See Reiner, 532 U.S. at 20 ("[T]his Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law.") (internal quotation marks omitted).

Joe's Eighth Amendment claim was squarely presented to the state trial court, which based its ruling on a threshold analysis of federal law and summarily concluded that Joe did not have a valid constitutional claim. This Court should take jurisdiction to correct the state court's erroneous conclusion and ensure that Joe's important constitutional claim is heard.

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[19] See also supra Statement Part D (describing state trial court's decision).

II. A LIFE-WITHOUT-PAROLE SENTENCE IMPOSED ON A THIRTEEN-YEAR-OLD CHILD FOR A NON-HOMICIDE VIOLATES THE PROHIBITION ON CRUEL AND UNUSUAL PUNISHMENTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

Children thirteen and younger are a distinct group for whom a sentence of life in prison without parole violates the Eighth Amendment of the United States Constitution. Children are distinct from older teens developmentally and for purposes of criminal punishment. In Roper v. Simmons, 543 U.S. 551 (2005), this Court recognized that categorical differences render juveniles less criminally culpable than adults and therefore not subject to the harshest adult sanctions. The same principles and the same science recognized in Roper also demonstrate that thirteen-year-old children are distinct from, and substantially less culpable than, older teens, and thus, as a class, are not sufficiently culpable to justify imposition of the penultimate sentence of life imprisonment without parole. Moreover, national statistics[20] demonstrate that children thirteen or younger are almost never sentenced to die in prison—particularly for non-homicides. The freakishly rare character of Joe Sullivan's sentence renders it so capricious as to be unconstitutionally cruel and unusual.

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[20] See supra Statement Part A ("Rarity of death-in-prison sentences for thirteen-year-olds"), pp. 2–4 & nn.1–6 .

A. The Principles Recognized in Roper v. Simmons Compel the Conclusion That the Constitution Prohibits Sentencing a Thirteen-Year-Old Child to Die in Prison for a Non-Homicide.

The small number of children aged thirteen or younger sentenced to die in prison is particularly significant to evaluating contemporary standards of decency given the new constitutional limits on sentencing children recognized by this Court in Roper v. Simmons, 543 U.S. 551 (2005). In Roper, this Court recognized expanded requirements of the Eighth Amendment with respect to the sentencing of juveniles. Recognizing that three general differences between adolescents and adults "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders," this Court prohibited death sentences for older teenagers. Roper, 543 U.S. at 569. The same analysis compels the conclusion that a life-without-parole sentence for a very young adolescent like Joe is similarly prohibited.

First, this Court found that juveniles tend to suffer from a "'lack of maturity and an underdeveloped sense of responsibility,'" which often result in "'impetuous and ill-considered actions and decisions.'" Id. (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)). Thus, "adolescents are overrepresented . . . in virtually every category of reckless behavior." Id. (internal quotation marks omitted). A thirteen-year-old's lack of responsibility is consonant with recent research indicating that the human brain continues to develop into an individual's early twenties. See infra Part II.B.i (summarizing recent research developments).

Second, young children are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." Roper, 543 U.S. at 569. They have "less control . . . over their environment [and therefore] . . . lack the freedom that adults have to extricate themselves from a crimonogenic setting." Id. (internal quotation marks omitted.) As this Court recognized in Eddings v. Oklahoma, "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." 455 U.S. 104, 115 (1982).

Finally, the character of a child is "not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." Roper, 543 U.S. at 570. As a consequence of these limitations, the Court concluded that 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." Id.

B. The Law Recognizes the Critical Difference Between Thirteen-Year-Old Children and Older Adolescents.

In Roper, this Court recognized the categorical differences in development between juveniles and adults, and that these differences are highly relevant to determinations of culpability and permissible punishment. Such concerns are even more important when addressing the comparative culpability of children thirteen and younger, and this crucial distinction is reflected in all facets of the law.

The Florida Legislature, all other states, Congress, and this Court all have recognized the important distinction between thirteen-year-olds and older teens.

Like every other state, Florida acknowledges that a thirteen-year-old child's decision-making capacity is even less developed than that of older teens by placing additional legal restrictions on very young adolescents. Florida law requires that thirteen-year-olds attend school. Fla. Stat. § 1003.21(1)(a) (2006). Thirteen-year-olds cannot drive. Id. § 322.05(1). Thirteen-year-olds cannot consent to sexual activity. Id. § 800.04. The federal government strictly regulates the hours and conditions under which thirteen-year-olds may be employed. See 29 U.S.C. §§ 203, 212, 213. None of these restrictions apply with the same force to older teens.

Moreover, courts previously have found the differences between very young teens and older juveniles to be of critical significance in sentencing. In 1968, the Kentucky Court of Appeals (that state's highest court at the time) held that imposition of life in prison without parole on two fourteen-year-olds convicted of rape was cruel and unusual punishment. Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968); see also Naovarath v. State, 779 P.2d 944, 948–49 (Nev. 1989) (mitigating life-without-parole sentence for thirteen-year-old convicted of murder to life with possibility of parole under Eighth Amendment and Nevada Constitution). Twenty years later, in Stanford v. Kentucky, this Court distinguished younger adolescents from those sixteen and older, permitting sixteen- and seventeen-year-olds to be subjected to harsher punishments, including death. 492 U.S. 361, 380 (1989). Although the holding of Stanford was overruled by Roper, there is no indication that this Court intended to abandon the constitutionally significant

sentencing distinction between young adolescents and older teenagers. See also Thompson v. Oklahoma, 487 U.S. 815, 834 (1988) (plurality op.) (prohibiting the death penalty for children fifteen and under, in part because "[a]dolescents, *particularly in the early and middle teen years*, are more vulnerable, more impulsive and less self-disciplined than adults" (internal quotation marks omitted) (emphasis added)).

As Justice Scalia noted in dissent in Roper, even at pre-founding common law "there was a rebuttable presumption of incapacity to commit a . . . felony until the age of 14." Roper, 543 U.S. at 609 n.1 (Scalia, J., dissenting) (citing Stanford, 492 U.S. at 368; 4 W. Blackstone, Commentaries *23–*24; and 1 M. Hale, Pleas of the Crown 24–29 (1800)). Today, the law still draws significant distinctions between young adolescents and older teens. Because thirteen-year-olds are a distinct group of juvenile offenders, the lower court mischaracterized the issue in this case when it referred to the claim as an argument that the constitution "should disallow the sentencing of *juvenile* offenders to life in prison without parole." (App. C at 3 (emphasis added).) The Eighth Amendment claim in this case is specific to thirteen-year-olds, who, as young adolescents, are substantially different from older teens in ways that are constitutionally relevant to punishment. This Court should grant certiorari and recognize this constitutionally significant distinction.

C. The Extreme Rarity of Sentencing a Thirteen-Year-Old to Die in Prison Shows that Such a Sentence Is Cruel and Unusual in Violation of the Eighth Amendment.

The practice of sentencing thirteen-year-olds to life imprisonment without parole is so infrequent as to render it arbitrary and "unusual" punishment prohibited by the Eighth Amendment. In interpreting the Eighth Amendment's prohibition against cruel and unusual punishments, courts must refer to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. Roper, 543 U.S. at 560–61 (citing Trop, 356 U.S. at 100–01 (plurality op.)). "Part of the rationale for this index of constitutional value lies in the very language of the construed clause: whether an action is 'unusual' depends, in common usage, upon the frequency of its occurrence or the magnitude of its acceptance." Thompson, 487 U.S. at 823 n.7.

It is well-established that courts should look to the frequency with which a punishment is imposed in determining whether it is unusual for Eighth Amendment purposes. In Furman v. Georgia, this Court struck down Georgia's statute "under which the death penalty was 'infrequently imposed' upon 'a capriciously selected random handful.'" Godfrey v. Georgia, 446 U.S. 420, 438 (1980) (Marshall, J., concurring) (quoting Furman v. Georgia, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring)); see also id. at 440 n.9 (noting that, in Furman, Justices Stewart and White "concurred in the judgment largely on the ground that

the death penalty had been so infrequently imposed that it made no contribution to the goals of punishment."). This Court also relied on the infrequency of the penalty in striking down statutes authorizing imposition of the death penalty for non-homicides or for any crime committed before the age of sixteen. Coker v. Georgia, 433 U.S. 584, 596–97 (1977) (rarity of death sentences for rape of an adult woman relevant to conclusion that death penalty is cruel and unusual punishment for that crime); Kennedy v. Louisiana, 128 S. Ct. 2641, 2658 (2008) (fact that "Louisiana is the only State since 1964 that has sentenced an individual to death for the crime of child rape" relevant to "national consensus against capital punishment for the crime of child rape"); Thompson, 487 U.S. 815, 832–33 (exceeding rarity with which death penalty imposed on offenders under sixteen relevant to conclusion that contemporary standards of decency prohibited their execution).

When Atkins v. Virginia was decided, only a minority of states permitted the execution of the mentally retarded, "and even in those [twenty] States it was rare. On the basis of these indicia, the Court determined that executing mentally retarded offenders 'has become truly unusual, and it is fair to say that a national consensus has developed against it.'" Roper, 543 U.S. at 563 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)). Similarly, in Roper, this Court found "sufficient evidence that today our society views juveniles . . . as 'categorically less culpable than the average criminal'" so as to render the juvenile death penalty unconstitutionally cruel and unusual based in part on the infrequency of its use

even in states where it remained on the books. Id. at 567; see also id. at 564 (noting that even in twenty states without formal prohibition on executing juveniles, "the practice is infrequent").

The facts surrounding Joe Sullivan's sentence are at least as compelling as those which led this Court to conclude that a national consensus had developed against the imposition of the death penalty for non-homicides, or against execution of juvenile offenders or the mentally retarded. As explained above, see supra Statement of the Case Part A, thirteen-year-olds sentenced to die in prison constitute a "capriciously selected random handful," Furman, 408 U.S. at 309–10 (Stewart, J., concurring), of juvenile offenders.[21] Joe's is the *only known death-in-prison sentence imposed on a thirteen-year-old for a sexual offense.* Florida is the *only state* to impose death in prison on a thirteen-year-old for a non-homicide, and

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[21] For convenience, the following is a summary of the information provided in more detail above at Statement of the Case Part A, pp. 2–4 & nn.1–6:

Extensive research by undersigned counsel has uncovered only two cases in the United States, including Joe Sullivan's case, where thirteen-year-olds have been condemned to die in prison for crimes in which the victim did not die. Florida is the *only state* to have sentenced a thirteen-year-old to die in prison for a non-homicide. No thirteen-year-old child has been sentenced to die in prison for a non-homicide in over fifteen years.

Joe also is the only thirteen-year-old nationwide have been sentenced to die in prison for sexual battery or rape, although young teens frequently are arrested for such crimes. Over 12,000 children fourteen or younger arrested for sexual battery or rape between 1996 and 2005, but *none* of these children was sentenced to life without parole (Joe's case predated this period).

Only eight thirteen-year-olds in the United States have been sentenced to life without parole for any crime, including homicide. The cases come from only six states; in the vast majority of states, *no* child Joe's age has been sentenced to life without parole. Even in states where the sentence has been imposed it is rare. In four of the other states, only one child has received that sentence, and in Florida and Pennsylvania, there are only two.

These eight thirteen-year-olds reflect less than one half of one percent of the more than 2000 juveniles sentenced to die in prison in the United States. Internationally, no thirteen-year-old is known to have been sentenced to life without parole, and only a handful of countries permit the sentence for juveniles of any age.

only six states[22] have imposed such a sentence for any crime. The vast majority of states in this country have not sentenced any child as young as Joe to die in prison.

Further, every state that has explicitly considered the minimum age at which children may be sentenced to life without parole has set that minimum well above thirteen.[23] The only court to expressly consider the constitutionality of a life-without-parole sentence imposed on a young teen for rape found the sentence unconstitutional under the Eighth Amendment. See Workman, 429 S.W.2d at 378 (holding that "life imprisonment without benefit of parole for two fourteen-year-old youths under all the circumstances shocks the general conscience of society . . . and is intolerable to fundamental fairness" and that "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").

In sum, all of the domestic evidence made relevant by this Court's prior decisions points to the conclusion that Joe's sentence is so rare, disfavored, and arbitrary as to be cruel and unusual under the Eighth Amendment. Moreover, as in Roper, this evidence "carries special force in light of the general popularity of anticrime legislation, . . . and in light of the particular trend in recent years toward

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[22] See supra n.1.

[23] See D.C. Code § 22-2104 (setting minimum age for life without parole for murder at 18); Kan. Stat. § 21-4622 (same); Cal. Penal Code § 190.5 (setting minimum age for life without parole for murder at 16); Ind. Code § 35-50-2-3 (same); Ky. Rev. Stat § 640.040 (exempting juveniles from harshest sentences including life without parole for murder); Colo. Rev. Stat § 17-22.5-104(2)(d)(IV) (making juveniles convicted as adults eligible for parole); Or. Rev. Stat. § 161.620 (prohibiting life without parole for anyone waived from juvenile court); La. Rev. Stat. § Children's Code Art. 857(B) (prohibiting confinement of 14-year-olds transferred to criminal court beyond age 31).

cracking down on juvenile crime in other respects." 543 U.S. at 566 (citing Snyder & Sickmund, supra n.21, at 89, 133).

In Roper, this Court also reaffirmed its practice of referring to "the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'" 543 U.S. at 575. The Court referred to the Convention on the Rights of the Child's prohibition against imposing the death penalty on juveniles and noted that "[p]arallel prohibitions are contained in other significant international covenants." Id. at 576. As noted above, see supra nn.5–7 and accompanying text, the United States is the only country known to have sentenced a thirteen-year-old to life in prison without parole; it is one of only a few countries that even theoretically permit such a sentence; and the Convention on the Rights of the Child and other, near-unanimous international proclamations prohibit the imposition of the sentence on juveniles of any age.

Florida is the *only state in the country* to have sentenced a thirteen-year-old child to die in prison for an offense in which the victim did not die, and Joe is the only thirteen-year-old in the country to have received such a sentence for sexual battery. This Court has made clear that rape and sexual battery, while extremely serious, differ categorically from intentional murder. See Kennedy, 128 S. Ct. at 2660 (holding that rape and even child rape "may be devastating in their harm, as here, but in terms of moral depravity and of the injury to the person and to the

public, they cannot be compared to murder in their severity and irrevocability"). Moreover, even including homicide cases, life without parole has only been imposed on eight thirteen-year-old children in six states. The rarity with which life imprisonment without parole is imposed on thirteen-year-old children reflects community norms and values that have evolved and now reject death-in-prison sentencing for young children Joe's age. Accordingly, Joe's sentence now violates the Eighth and Fourteenth Amendments to the United States Constitution.

D. Scientific Research Establishes that Young Teens Are Psychosocially and Neurologically Different from Older Teens in Constitutionally Relevant Ways.

This Court's analysis in Roper has the greatest force and application to the youngest offenders, because developmental differences between young teenagers and adults are even more pronounced than the differences between older juveniles and adults. This makes the issue of reduced culpability most compelling in this case. Joe was only thirteen years old when he was sentenced to the harshest sentence possible under Florida law, with no mitigating weight given to his age or the constitutional considerations relevant to juvenile sentencing after Roper.

Psychosocial research confirms that younger teenagers are less developed than older adolescents in areas directly related to criminal culpability:

responsibility, perspective, and impulse control.[24] In considering adolescent decision-making capabilities,

> distinctions must be drawn older and younger adolescents . . . [because] it is clear that important progress in the development of decision-making competence occurs sometime during *late* adolescence, and that these changes have a profound effect on their ability to make consistently mature decisions.[25]

In the context of legal competence, an extensive study of adolescent decision-making concluded that "juveniles aged 15 and younger are significantly more likely than older adolescents and young adults to be impaired in ways that compromise their ability to serve as competent defendants."[26]

In addition to this growing body of psychosocial research, recent developments in the field of adolescent neuroscience reveal that the brains of young adolescents are not as developed as those of adults or older teenagers. Advances in

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[24] See, e.g, Elizabeth Cauffman & Laurence Steinberg(Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable than Adults, 18 Behav. Sci. & L. 741, 756 (2000) (noting that the steepest upswing in psychosocial development occurs at and after age sixteen).

[25] Bonnie L. Halpern-Felsher & Elizabeth Cauffman, Costs and Benefits of a Decision: Decision-making Competence in Adolescents and Adults , 22 J. Applied Developmental Psychol. 257 (2001) (emphasis added).

[26] Thomas Grisso, et al., Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants, 27 L. & Hum. Behav. 333, 356 (2003). See also id. ("Based on criteria established in studies of mentally ill adult offenders, approximately one-third of 11- to 13-year-olds, and approximately one-fifth of 14- to 15-year-olds, are as impaired in capacities relevant to adjudicative competence as are seriously mentally ill adults who would likely be considered incompetent to stand trial by clinicians who perform evaluations for courts. Our results also indicate that the competence-relevant capacities of 16- and 17-year-olds as a group do not differ significantly from those of young adults. These patterns of age differences are robust across groups defined by gender, ethnicity, and socioeconomic status, and they are evident among individuals in the justice system and in the community." (citations omitted)).

functional magnetic resonance imaging (FMRI) technology, beginning in the 1990s, "have opened a new window into the differences between adolescent and adult brains." Brief for Amer. Psychological Ass'n & Mo. Psychological Ass'n as Amici Curiae Supporting Respondent, at 9, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633). Technological advances have led scientists to reject the previously widely-held belief that the brain is fully developed early in childhood.[27]

Of particular note are the differences scientists have exposed between young adolescents and older individuals in the frontal lobes of the brain, which are critical to the brain's executive functioning, including planning and self-regulation.[28] This research shows that young adolescents are less able to make responsible decisions than even older teens, precisely the type of evidence that this Court has found important under the Eighth Amendment. E.g., Roper, 543 U.S. at 570 (2005) ("The susceptibility of juveniles to immature and irresponsible behavior means their

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[27] See, e.g., Paul Raeburn, Too Immature for the Death Penalty?, N.Y. Times, Oct. 17, 2004 (Magazine) at 26; Brain Development and Puberty May Be Key Factors in Learning Disorders, Science Daily, June 22, 2004, http://www.sciencedaily.com/releases/2004/06/040622021222.htm ("Until recently, it was thought that the brain was fully developed relatively early in childhood. Today it is clear that the teenage brain is a formidable work-in-progress undergoing myriad changes.").

[28] See Jay N. Giedd, Structural Magnetic Resonance Imaging of the Adolescent Brain, 1021 Annals N.Y. Acad. Sci. 77, 77–85 (2004) (explaining that white brain matter increases in linear fashion throughout adolescence, facilitating cognitive complexity, while gray brain matter is "prun[ed]" in later teen years, making more efficient that part of the brain responsible for inhibiting impulses and assessing risks). See also Tracy Rightmer, Arrested Development: Juveniles' Immature Brains Make Them Less Culpable Than Adults, 9 Quinnipiac Health L.J. 1, 12 (2005); Laurence Steinberg & Elizabeth S. Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1013 (2003) ("[P]atterns of development in the prefrontal cortex, which is active during the performance of complicated tasks involving long-term planning and judgment and decision making, suggest that these higher order cognitive capacities may be immature well into adolescence.").

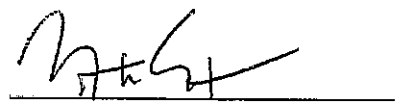
irresponsible conduct is not as morally reprehensible as that of an adult.") (citation and internal quotation marks omitted).

Very young teens are distinct from older teens developmentally and for purposes of criminal punishment. A sentence of life without parole for a non-homicide by a thirteen-year-old child is so rare as to be essentially random in application. Accordingly, and for all the reasons stated above, this Court should take jurisdiction and declare that Joe Sullivan's sentence violates the Constitution.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to the Court of Appeal of Florida for the First District and declare his rights were violated.

Respectfully submitted,



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