

In The
Supreme Court of the United States

—————◆—————
JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

—————◆—————
**On Writ Of Certiorari To The
District Court Of Appeal Of Florida,
First District**

—————◆—————
REPLY BRIEF FOR PETITIONER

—————◆—————
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ARGUMENT**I. FLORIDA'S SUBMISSIONS ON THE MERITS
LACK SUBSTANCE.****A. Far from Being Widely Accepted, the
Practice of Condemning Young Adolescents to Die in Prison Is Almost
Universally Repudiated in This Country.**

Neither respondent nor its *amici* dispute that, in actual practice, the imposition of a life-without-parole sentence on a 13- or 14-year-old child is an aberrant, vanishingly rare occurrence. None of the material facts bearing on this point are in contention. Florida does not dispute that only *two* 13-year-olds are currently serving sentences of life without parole in the United States for non-homicide offenses.¹ Although thousands of young adolescents have been charged with serious crimes nationwide and in Florida, Florida is the *one* State to impose this

¹ In fact, in many States 13-year-old children cannot be prosecuted as adults or subjected to *any* kind of adult sentence. *See, e.g.*, Ala. Code § 12-15-203; Ariz. Rev. Stat. Ann. § 13-501; Ark. Code Ann. § 9-27-318; Cal. Welf. & Inst. Code § 602; Conn. Gen. Stat. Ann. § 46b-127; Iowa Code Ann. § 232.45; Ky. Rev. Stat. Ann. § 635.020; La. Child. Code Ann. art. 857; Mass. Gen. Laws ch. 119, § 74; Minn. Stat. Ann. § 260B.125; N.J. Stat. Ann. § 2A:4A-26; N.M. Stat. Ann. § 32A-2-3, *as amended by* 2009 N.M. Laws 239, § 10 (S.B. 248, approved Apr. 7, 2009, eff. July 1, 2009); N.D. Cent. Code § 12.1-04-01; Ohio Rev. Code Ann. § 2152.10; Tex. Fam. Code § 54.02; Utah Code Ann. § 76-2-301; Va. Code Ann. § 16.1-269.1.

sentence; and even Florida has not actually imposed it on any 13-year-old child for a non-homicide in more than 18 years. Only three additional people in this nation are serving life without parole for a non-homicide offense at age 14 – all also in Florida. Only *six* States have sentenced a 13-year-old to life without parole for any offense, including homicide; only *nine* people nationwide are serving such a sentence for any offense at age 13. Only a minority of States (18) have imposed life-without-parole sentences on children convicted of *any* offense at age 13 or 14. Such a sentence actually has been imposed on just 73 people in this country over the past 30 years or so.

Rather than acknowledge this Court’s precedents which analyze actual state practice and find figures like these indicative of a consensus *against* a particular penalty,² Florida points to the number of jurisdictions where 13-year-olds may be tried as adults; it notes the statutes in these States authorizing life-without-parole sentences for adult offenders; and it adds the numbers up to assert that there is widespread acceptance of the propriety of sentencing 13-year-olds to lifelong incarceration with no hope for release before death. This argument ignores that the freakish rarity of actual imposition of such sentences, *despite their broad availability on the statute books*, is compelling evidence of contemporary,

² *E.g.*, *Roper v. Simmons*, 543 U.S. 551, 567 (2005) (considering “the infrequency of . . . [a penalty’s actual] use even where it remains on the books”).

nationwide repudiation of life-without-parole for young teens.

Florida endorses the analysis in the Brief for Petitioner showing that life-without-parole is theoretically available for 13-year-olds in 27 jurisdictions.³ It misreads and miscalculates, but does not disagree with, the data showing that, of more than a quarter-million potential cases, a total of only 73 young adolescents (nine 13-year-olds plus sixty-four 14-year-olds) have been sentenced to life without parole nationwide for any crime over the past three decades or so.⁴ While Florida and its *amici* acknowledge that, in this nation of more than 300 million souls, 2, 9, or 73 is a “relatively small number,” RB 35, and that

³ It also agrees that, for 14-year-olds, the penalty is theoretically available in 40 jurisdictions. Florida cites sources asserting that a larger number of jurisdictions permit life-without-parole sentences for juveniles, but those sources fail to take account of statutes forbidding such sentences for 13- or 14-year-olds. For the age-specific numbers, Florida accepts the analysis in the petitioner’s brief. RB 27-28, 32-33, 34.

⁴ J.A. 27; Equal Justice Initiative, *Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison* 20 (2007). Florida’s misreading produces a mathematically wrong total of “81 (nine plus 73)” rather than 73. RB 34. And in stating that Sullivan’s brief has “increased the number of juveniles upwards [from two] to nine who committed serious offenses such as rape and homicide at age thirteen,” RB 3, Florida also appears to misunderstand that 2 is the number of 13-year-olds sentenced to life without parole nationwide for non-homicide offenses; 9 is the number of 13-year-olds sentenced to life without parole nationwide for all offenses, including homicide. Obviously, both are infinitesimally small figures; Florida does not refute this.

“imposition of life without parole on juveniles is rare,” Nat’l D.A. Ass’n Br. 18; *see also* La. Br. 1-2, 8 (“Such sentences are rare, of course, and should be.”), Florida ignores the clear implication of these facts. The refusal of state prosecutors, juries, and judges to actually impose the readily-available penalty of life without parole in more than 2, 9, or 73 cases demonstrates not acceptance but virtually universal *rejection* of the penalty.

Florida also fails to acknowledge that its reliance on nonspecific state legislative enactments alone is particularly tenuous because not one of those enactments expressly endorses the sentencing of 13- and 14-year-old children to life without parole.⁵ Respondent and its *amici* do not dispute the fact that no State which has expressly addressed the question of the minimum age of eligibility for a life-without-parole sentence has set the age as low as 13.⁶ Indeed, *amicus* Louisiana expressly *prohibits* life-without-parole sentences for children 14 and younger.

⁵ The only arguable exception is Massachusetts. *See* PB 48.

⁶ In fact, under respondent’s analysis, Florida and 14 other States have “authorized” life without parole for 8- and 9-year-old children, since none of these States sets a minimum age for transfer to adult court. *See* Del. Code Ann. tit. 10, § 1010; Fla. Stat. Ann. § 985.56; Haw. Rev. Stat. Ann. § 571-22(d); Idaho Code Ann. § 20-509(1); Me. Rev. Stat. Ann. tit. 15, § 3101; Md. Code Ann., Cts. & Jud. Proc. § 3-8A-06; Mich. Comp. Laws Ann. § 712A.2d; Neb. Rev. Stat. Ann. § 43-247; 42 Pa. Cons. Stat. Ann. §§ 6302, 6355; R.I. Gen. Laws § 14-1-7.1; S.C. Code § 63-19-1210(6); S.D. Codified Laws § 26-11-4; Tenn. Code Ann. § 37-1-134; Wash. Rev. Code § 13.40.110; W. Va. Code Ann. § 49-5-10(e).

La. Child. Code Ann. art. 857(A)-(B) (minimum age for prosecution as adult is 14, and transferred 14-year-old convicted in adult court must be released before reaching 31 years of age). Florida simply disregards *Thompson's*⁷ teaching that no legislative judgment about the appropriate penalty for a child offender can be inferred from a transfer or waiver statute; and Florida's account of the widespread legislative reaction to the inflated, alarmist juvenile-crime projections of the mid-1990s differs from Joe Sullivan's only in Florida's failure to recognize that the projections proved wildly inaccurate.⁸ In any event, its brief offers no evidence that Florida or any other State specifically considered whether a permanent punishment like lifelong imprisonment without parole is appropriate for 13- and 14-year-olds.

⁷ *Thompson v. Oklahoma*, 487 U.S. 815, 829 n.24 (1988) (plurality opinion).

⁸ See Surgeon General of the United States, *Report: Youth Violence* 5 (2001); and see generally Franklin Zimring, *The Great American Crime Decline* (2007).

B. Florida’s Claim of Justification for Sentencing “The Worst of the Worst” Among Juvenile Offenders to Lifelong Incarceration Fails Because, as *Roper* Teaches, the Immature and Transient Nature of a Young Adolescent’s Personality Precludes a Reliable Judgment That He or She Deserves That Indelible Brand.

Florida does not dispute what *Roper*, the uniform teaching of the medical and scientific community, and hundreds of state and federal laws make clear: Young adolescents’ unique vulnerabilities and deficiencies distinguish them from adults and from older teens in ways that are particularly relevant to sentencing. Indeed, Florida admits that “an offender’s young age could play into the gross disproportionality analysis for prison sentences,” RB 21; that “the states have recognized the differences between juveniles and adults” for sentencing purposes, RB 41; “that juveniles generally lack mature judgment and that their age level matters in many contexts,” RB 42; that “society may assign lesser culpability to juveniles as a class,” RB 42; “that many juvenile acts are not suitable for ‘adult’ treatment,” RB 43; and that, by national consensus, “only the worst juvenile offenders are treated as adults for purposes of charging, adjudication, and sentencing,” RB 38. Thus Florida agrees, as it must, with *Roper*’s determination that children categorically possess unique characteristics – diminished responsibility and culpability; heightened susceptibility to external influences; and unfinished, incomplete personal identity and character – which

must be taken into account in sentencing; and Florida agrees that life-without-parole sentencing must be reserved for a small subset comprised of “only the worst juvenile offenders.” RB 38; *see also* Nat’l D.A. Ass’n Br. 19 (“This rarity simply confirms that prosecutors and courts have used their guided discretion to confine application of this severe sanction to the most severe offenses and hardened juvenile offenders.”).

Where Florida goes wrong – and falls afoul of *Roper* – is that it contends that these “worst of the worst” juvenile offenders – those whose culpability, dangerousness, and irretrievable depravity would justify permanent incarceration – can be accurately identified while they are still children.⁹ And it compounds this error by suggesting that the necessary identification is performed by the determination that a child should be tried in adult court. RB 21-22. *Roper* explains that it is impossible to distinguish accurately the small number of children who will not reform from the vast majority of children who will mature and one day be fit to return to society. The clear consensus of the scientific community¹⁰ – as well

⁹ To justify Joe Sullivan’s sentence to die in prison, Florida argues that “Sullivan’s crime was so serious that an inference can be drawn that [at age 13] he intended to commit these heinous acts with knowledge of their seriousness.” RB 24; *see also* RB 25 (some crimes are “sufficiently horrific” that we “can conclude that a juvenile offender was sufficiently mature to commit those crimes with adult intent”).

¹⁰ Florida’s *amici* attempt to undermine this consensus by suggesting that neurological studies using fMRI scanning
(Continued on following page)

as that of educators, correctional professionals, and faith communities – is that no reliable procedure or instrument exists to enable even mental health experts specifically trained in child development to identify unredeemably incorrigible young adolescents. *See* Am. Psych. Ass’n et al. Br. 21; Aber et al. Br. 31; Juv. Corr. Adm’rs Br. 31-33. To expect that prosecutors or judges can do this reliably is to indulge a fantasy. That is why *Roper* flatly rejected – and warned of the problems inherent in – the notion that the few incorrigible juvenile offenders can be accurately identified.

This Court has recognized that even the in-depth, far-ranging examination of an offender’s background which is constitutionally required in capital cases could not produce a reliable permanent judgment about the incomplete person that a young adolescent represents. *Roper*, 543 U.S. at 572-573. It blinks reality to suggest, as Florida argues at length, that this judgment can be accurately made (or sensibly attempted, for that matter) through the determination – often an informal, unreviewable, unilateral decision by a prosecutor – to try a child in adult court. Even when a juvenile court judge makes this determination, he or

technology to show the general developmental trajectory of different areas of the brain are unreliable because of methodological problems with fMRI studies in general (Ctr. Const. Juris. Br. 7-10). Notably, none of the studies relied on by petitioner or any of his *amici* is implicated in this critique. Still more notably, not a single medical, developmental, or mental-health professional signed on to any of Florida’s *amici*’s briefs.

she considers only whether the resources of the juvenile justice system are adequate to deal with the child in the near future, not whether the child will be forever unfit to reenter society.

The model transfer provision presented by *amicus* Louisiana is a good example. It directs the court to consider whether “rehabilitation of the child will not occur in the juvenile system,” whether there is adequate security available in the juvenile system, and whether there is “sufficient time to rehabilitate the child within the juvenile system.” La. Br. 37. These factors address whether the child can be rehabilitated before age 21,¹¹ not whether he or she will *ever* be rehabilitated.

Similarly, where Florida law instructs the juvenile court to determine whether a child should be transferred to adult court, it directs the juvenile judge to consider the “prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child . . . by the use of procedures, services, and facilities currently available to the [juvenile] court.” Fla. Stat. Ann. § 985.556(4)(c)(8). Those procedures, services, and facilities are co-extensive with the juvenile court’s jurisdiction, which expires when the child reaches age 22. Fla. Stat. Ann.

¹¹ Ohio Rev. Code Ann. § 2152.02(6) (juvenile court has jurisdiction until age 21). It is worth noting that 13-year-olds cannot be tried as adults in Ohio. *Id.* § 2152.10 (minimum age for transfer to adult court is 14).

§ 985.0301(5)(d)-(e). A decision that a child should remain in custody past his or her 18th or 21st birthday cannot rationally substitute for, or support, an inference that he or she will never be safe to release from incarceration – not even decades later. *See Thompson*, 487 U.S. at 829 n.24 (plurality opinion) (that some States had “set a 15-year-old waiver floor for first-degree murder tells us that the States consider 15-year-olds to be old enough to be tried in criminal court for serious crimes (or too old to be dealt with effectively in juvenile court), *but tells us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders*” [emphasis in original]).

Joe Sullivan’s case provides a dramatic example of the fallacy of the claim by Florida and its *amici* that a decision to prosecute a child as an adult can stand in for the judgment that he or she is forever incorrigible and irretrievable. Joe was indicted directly in adult court. J.A. 1. There was no transfer or waiver proceeding to determine whether he should be tried in adult court, much less to determine whether he will ever be fit to return to society.¹² Contrary to Florida’s assertion that the trial judge properly accounted for Joe’s age, background, and potential for rehabilitation, the sentencing judge’s comments show only that he believed that Joe

¹² *See* Fla. Stat. Ann. § 985.56(1) (former § 39.02) (when “indictment is returned . . . the child must be tried and handled in every respect as an adult”).

Sullivan required something more than a short juvenile sentence – not that Joe would be incapable of ever reentering society. Tr. III 268. Assuming *arguendo* that the sentencing court reliably determined – based on a single adjudication prior to Joe’s arrest for this offense and a term of less than nine months in a structured facility – that 13-year-old Joe Sullivan was beyond the capacity of the juvenile system to help, control, or correct, that determination cannot plausibly be understood as a judgment that Joe is “the worst of the worst” among juvenile offenders, who will never be capable of living in free society. Nor, if the determination were so understood or intended, could it be defended for one moment consistently with reason or with *Roper*.

C. Requiring States to Make the Determination About an Offender’s Fitness to Rejoin Society at a Time in the Course of the Individual’s Development When That Determination Can Be Made with Some Accuracy Will Not Unleash a Juvenile Crime Wave or Impose an Impractical Burden on Criminal Justice Systems.

Florida asserts – without any data or empirical evidence to support it – that “enhanced penalties against juveniles, such as Sullivan, . . . have deterred others from such conduct over the past decade.” RB 35. There is no basis in reality for this claim. To appreciate what Florida is arguing, one needs only

make its point explicit: It is that the tidal wave of juvenile crime predicted by the now-discredited alarmism of the mid-90s would have flooded the nation if it had not been held back nationwide by the successful deterrent tactics of a minority of States, like Florida, which collectively have put a total of seventy-three 13- and 14-year-olds in prison for the remainder of their natural lives, never to be considered for parole.¹³

There exists no credible argument, much less evidence, that 13-year-olds are sufficiently aware of criminal sentencing provisions or that they have sufficiently mature judgment or foresight to regulate their behavior in consideration of legislation (almost never used, at that) authorizing life-without-parole sentences.¹⁴ Florida offers no rebuttal to *Roper's* finding that there is an “absence of evidence of deterrent effect,” 543 U.S. at 571; *see also id.* (“[T]he same characteristics that render juveniles less

¹³ For what is actually known on the subject, *see* the authorities in note 8 *supra* and those they cite; *see also* David S. Lee & Justin McCrary, *The Deterrence Effect of Prison: Dynamic Theory and Evidence*, *IRS Working Paper # 550* (2009), <http://www.irs.princeton.edu/faculty/wp.php>.

¹⁴ Interestingly, at least one criminal trial judge who imposed a life-without-parole sentence on a child in Florida did not know that life without parole could be imposed on children. *See, e.g.*, Meg Laughlin, *Sentenced to Life, Unintentionally*, *St. Petersburg Times*, Feb. 27, 2009 (Florida trial judge who sentenced 14-year-old to life without parole for non-homicide told reporter, “I didn’t think when I gave Kenneth Young life that it was life without parole.”).

culpable than adults suggest as well that juveniles will be less susceptible to deterrence.”); *Thompson*, 487 U.S. at 837 (plurality opinion) (“The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.”); nor does Florida attempt to explain how life without parole deters indisputably less mature 13-year-olds when the death penalty does not deter 17-year-olds.¹⁵ And the plain fact is that no 13-year-old has been sentenced to life without parole for a non-homicide offense in the United States for more than 18 years now. Obviously, the elimination of that sentence from the realm of possibility will be inconsequential for crime policy.

Florida’s argument that a constitutional ruling invalidating Joe Sullivan’s life-without-parole sentence would require “the reconstitution of parole boards,” mandate expensive state programs, and ultimately prove “unworkable,” RB 47-49, is another

¹⁵ See Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 Ann. Rev. Clinical Psychol. 47, 66-69 (2009) (summarizing numerous studies finding lack of deterrent effect of harsh juvenile sentencing, including one based on Florida’s direct file provision, and concluding that research indicates that “exposing [adolescents] to especially harsh sanctions does little to deter offending”); Laurence Steinberg, Sandra Graham et al., *Age Differences in Future Orientation and Delay Discounting*, 80 Child Dev. 28, 29 (2009) (noting study finding that “younger adolescents (11- to 13-year-olds) were significantly less likely to recognize the long-term consequences of various decisions than were adolescents 16 and older”).

scarecrow. It overlooks the fact that every affected State, including Florida, currently has a functioning parole board;¹⁶ it confuses Joe Sullivan’s modest plea for review with a demand for an affirmative right to release; and it underestimates the States’ proven ability to comply with this Court’s constitutional rules.¹⁷

A ruling for Joe Sullivan would not invalidate a single state law. It would merely curb the marginal application of a seldom-used sentencing option by requiring jurisdictions which theoretically authorize – but almost never use – life-without-parole sentences for young adolescents to provide some form of review of the adolescent’s later fitness for release in the rare cases where such review is not now afforded. Florida itself would not be required to relinquish custodial control over the handful of juvenile offenders whom it presently imprisons for the whole of their natural

¹⁶ In all States that currently have people sentenced to death in prison for crimes at 13 or 14, there exists a functioning parole board. *See* App. A.

¹⁷ For example, when this Court held in *Gerstein v. Pugh*, 420 U.S. 103 (1975), that States could not constitutionally detain arrested persons for prolonged periods with no pretrial opportunity for a probable cause determination, it “recognize[d] that state systems of criminal procedure vary widely” and refrained from dictating a “single preferred pretrial procedure.” *Id.* at 123. The States responded in various ways, some relying on their existing preliminary-hearing process, others authorizing new forms of adversarial hearings or procedures for magisterial review of post-arrest affidavits, to satisfy *Gerstein*’s requirements.

lives without such review. It could, as many jurisdictions do, subject them to sentences of life imprisonment *with* the possibility of parole.¹⁸ And in the States that, like Florida, have abolished parole for all offenses occurring after a certain date, parole boards still operate to provide periodic review to offenders who were sentenced for parole-eligible offenses before that date.¹⁹ The handful of juveniles affected by a ruling in this case could without much ado be added to that cohort.

II. FLORIDA'S DEPICTION OF JOE SULLIVAN AND HIS CASE IS A DISTORTION.

Because the only case-specific facts relevant to Joe Sullivan's constitutional contention are his age of 13 and the non-homicidal nature of his conviction, the Brief for Petitioner did not describe the distressing circumstances of his life and the disturbing features of his prosecution. Florida's brief has stepped into this vacuum with a misleading portrait which we feel obliged to correct.²⁰ Examination of the record of Joe's

¹⁸ See, e.g., Ala. Code § 15-22-28(e); Colo. Rev. Stat. Ann. § 18-1.3-401(4)(b); Iowa Code Ann. §§ 901A.2(6), 903B.1, *as amended by* 2009 Iowa Legis. Serv. 119 (West) (S.F. 340, approved May 21, 2009); Mich. Comp. Laws Ann. § 791.234(7); Miss. Code Ann. § 47-7-3(1); Mo. Ann. Stat. § 558.019(4); Neb. Rev. Stat. Ann. §§ 29-2204(1)(a)(ii) & 83-1,110(1); 37 Pa. Code § 81.211(2)(ii).

¹⁹ See App. A.

²⁰ Florida draws its facts from proceedings at Joe Sullivan's trial and sentencing which it acknowledges were not a part of
(Continued on following page)

trial reveals facts and proceedings that make his sentence particularly indefensible and highlight the dangers of justice miscarrying when young adolescents can be prematurely, terminally adjudicated fit only to die in prison.

At the time of his arrest in 1989, Joe Sullivan was a 13-year-old boy with intellectual impairments who read at a first-grade level, had experienced repeated physical abuse by his father, and was severely neglected. J.A. 26, 36; Present. 7. His family had disintegrated into what state officials described as “abuse and chaos.” Present. 7. From age ten until his arrest for this offense, Joe had no stable home; he had no less than ten different addresses within this

the record before the courts below in the present case. RB 4 n.1. This Court generally does not consider facts outside the record below because it “must affirm or reverse upon the case as it appears in the record.” *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 488 n.3 (1986). Joe’s state postconviction motion was dismissed without an evidentiary hearing; Florida law therefore required the state appellate court to accept his factual allegations as true to the extent they were not refuted by the record. *Floyd v. State*, 808 So.2d 175, 182 (Fla. 2002). Petitioner’s merits brief relied exclusively on the facts in the state postconviction record, which were and are sufficient for this Court to adjudicate his claims. However, in order to respond to Florida’s allegations about his background, trial, and sentence, he is now obliged to refer also to the trial record, including the presentence reports. These have been proposed for lodging with this Court pursuant to its Rule 32. The presentence investigation report dated December 4, 1989, will be referred to as “Present.” and the predisposition report dated December 11, 1989, will be referred to as “Predisp.”

three-year period. Present. 7. He spent most of his time on the streets, where police stopped him for violations including trespassing, stealing a bike, and property crimes committed with his older brother and other older teens. Predis. 1-3. Twelve resulting misdemeanor-level violations make up the bulk of his juvenile history. Tr. III 285. During this period, Joe was brought to court and adjudicated on a *single* occasion, when he was 12 years old. Predis. 1-3.

Joe's most serious prior offense occurred when, at age 12, he followed his older brother in breaking into a house. They were unexpectedly set upon by a dog, and Joe fatally struck the dog. Predis. 2. This one incident accounted for nearly two-thirds of the criminal history points assessed at Joe's sentencing. Predis. 2; Tr. III 285.²¹

Florida's supporters contend that Joe "had also proven himself unamenable to juvenile rehabilitation, having seriously assaulted one of his juvenile counselors." Nat'l D.A. Ass'n Br. 20-21; *see also* RB 6. This "serious assault" was an unwanted touching that

²¹ Florida and its supporters significantly overstate Joe's juvenile history. The National District Attorney's Association twice asserts, without citation, that Joe had "seventeen prior serious felonies." Br. 20, 21. This is demonstrably false. Twelve of Joe's 17 juvenile adjudications were for misdemeanor violations; four were offenses that would be third-degree felonies (the lowest degree of felony under Florida law [Fla. Stat. Ann. § 775.081]) if committed by an adult. Tr. III 285. Thus, Florida's assertion that Joe had "several serious felonies," RB 6 – much less 17 – is a blatant misstatement of the record facts.

took place when Joe, at age 11, was at a shopping mall with other children and touched his school counselor on the buttocks, causing no injury. Predis. 1.

Joe's record of mostly misdemeanor-level juvenile incidents – nearly all of which are non-violent and which did not merit more than a single court adjudication in a two-year period – does not support the conclusion that “the juvenile system has been utterly incapable of doing anything with Mr. Sullivan,’ even though Sullivan had been ‘given opportunity after opportunity to upright himself and take advantage of the second and third chances he’s been given.’” RB 6 (quoting the sentencing judge). It belies reason to suggest that the juvenile system’s capacity to “do anything with” Joe Sullivan was exhausted by a single adjudication and brief commitment for several months to juvenile detention. Predis. 1-4. The fact is that Joe was given no second, much less a third, chance to “upright himself”: his second-ever adjudicatory court appearance was at 13 years old when he was indicted to stand trial as an adult for the instant offense.²²

Joe's pre-teen behavior demonstrates his heightened susceptibility, as an intellectually impaired child, to engage in inappropriate behavior while following his older brother and other teens. The

²² Joe was adjudicated a second time for the remaining juvenile violations while in custody awaiting trial on this offense. Predis. 2-3.

juvenile probation officer assigned to Joe's current case observed his behavior was attributed to the fact that "he is easily influenced and associates with the wrong crowd." *Predis.* 4. She noted that "[i]t is apparent that Joe is a very immature naive person who is a follower rather than a leader," and that he has the potential to "be a positive and productive individual." *Predis.* 4. His prior history was exactly the type of minor misbehavior in which young adolescent boys participate and then leave behind as they grow up and mature.²³ While it is appropriate and necessary to hold young children accountable for these types of misdeeds, it is wholly inaccurate and a gross exaggeration to suggest that Joe's juvenile behavior makes him a "serial" or "violent recidivist," *Nat'l D.A. Ass'n Br.* 20-21, who will never be fit to reenter society.

The circumstances of the offense for which Joe was sentenced to die in prison underscore his vulnerability to the negative influences of older people. On the morning of May 4, 1989, two older boys, Michael Gulley, 15, and Nathan McCants, 17,²⁴ enlisted Joe to

²³ See PB 19-22; *Aber et al. Br.* 13-25; *Am. Psych. Ass'n et al. Br.* 7-22; *see also Former Juv. Offenders Br.* 11-13 (describing much more serious offenses committed by Senator Alan Simpson as a juvenile, when he and his peers torched a federal building, shot up their community, and killed a cow; Senator Simpson's turning point came after he was arrested for assaulting a police officer).

²⁴ Co-defendants' age and race information is from the Florida Department of Corrections Web site, at <http://www.dc.state.fl.us/InmateReleases>.

accompany them to break into an empty house. J.A. 26, 36. The three boys entered the home of Lena Bruner in the morning while no one was there. J.A. 26, 36. McCants took some money and jewelry. J.A. 26, 36. The three boys then left. J.A. 26, 36. That afternoon, Ms. Bruner was sexually assaulted in her home. J.A. 26, 36. She never saw her attacker. J.A. 26, 36. She could describe him only as “quite a dark colored boy” with “curly type hair.” Tr. I 76. Gulley, McCants, and Sullivan all are African American.

Within minutes of the assault, Gulley and McCants were apprehended nearby, together. Tr. I 124, 142, 166. McCants had the victim’s jewelry on him. Tr. I 124. Facing serious felony charges, Gulley – who had an extensive criminal history involving at least one sexual offense, Tr. IV, State’s Ex. C 38-41²⁵ – accused Joe of the sexual battery. J.A. 26, 36. Joe was not apprehended on the day of the crime, but spoke to police the next day. *See* Tr. II 197, 203. The prosecutor chose to indict 13-year-old Joe Sullivan in adult court for sexual battery and other charges. Tr. III 256-257. The grand jury that convened to determine whether there was probable cause to believe that Joe committed the offense had no authority or occasion to consider whether Joe should be tried in adult court, and there was no transfer or waiver proceeding to

²⁵ Gulley’s deposition also revealed that both he and McCants previously had been sexually active. Tr. IV, State’s Ex. C 8-9.

determine the appropriateness of trying, much less sentencing, Joe as an adult.²⁶

Joe was tried by a six-person jury in a one-day proceeding; opening statements began sometime after 9 a.m., and the jury returned its verdict at 4:55 p.m. Tr. I 30-31; Tr. II 250. Joe's appointed counsel was later suspended from practice in Florida and never reinstated.²⁷

At trial, Joe admitted his participation in the earlier burglary but denied that he committed sexual battery. Tr. II 193-194. The prosecution's evidence purporting to identify Joe as the perpetrator of the sexual assault was far from overwhelming. The prosecution relied primarily on the self-serving stories of McCants and Gulley, including Gulley's claim that Joe confessed the rape to him in a detention facility before trial. Tr. I 167-168. After implicating Joe, both

²⁶ Under Florida law, the grand jury's role is that of an investigative and accusatorial body required to present every offense against the penal laws of the state without regard for the available punishment, *Owens v. State*, 59 So. 2d 254, 256 (Fla. 1952); see also *In re Jury Instructions in Criminal Cases*, 911 So. 2d 766, 786 (Fla. 2005) (grand jury must be instructed, "Your duty is only to ascertain whether there is 'probable cause' a crime has been committed by the person so accused.").

²⁷ See *Fla. Bar v. Plant*, 698 So. 2d 1226 (Fla. 1997) (table) (inactive status); *Fla. Bar v. Plant*, 699 So. 2d 1376 (Fla. 1997) (table) (public reprimand); *Fla. Bar, In re Plant*, 728 So. 2d 205 (Fla. 1998) (table) (reinstatement denied); *Fla. Bar v. Plant*, 848 So. 2d 1156 (Fla. 2003) (table) (suspended); see also Florida Bar Online, <http://www.floridabar.org/> (click "Find a Lawyer" and search last name: Plant; first name: Mack).

Gulley and McCants received very short sentences for their roles in the crime. McCants was sentenced as an adult to four-and-one-half years and served six months.²⁸ Gulley, despite admitting his involvement in some 20 prior burglaries and a prior sex crime, was sentenced as a juvenile. Tr. IV, State's Ex. C 4, 30-41.

The only physical evidence adduced to implicate Joe was a latent partial palm-print that the State's examiner testified matched his. Tr. I 183-184. This was consistent with Joe's admitted presence in the bedroom during the morning prior to the rape. Tr. II 201. The State collected biological evidence but did not present it in court, and then destroyed it before it could be tested by the defense. J.A. 26, 36. The prosecution also presented testimony from a police officer who got a "glimpse" of an African-American youth running from the victim's house, observed Joe Sullivan at the police station being interrogated as the suspect in the sexual assault, and under these highly suggestive circumstances, identified Joe as the fleeing youth.²⁹ Tr. I 118, 120; Tr. IV, State's Ex. B 24.

²⁸ Sentence and release information from <http://www.dc.state.fl.us/InmateReleases> (search first name: Nathan; last name: McCants) (shows sentence of 4.5 years for burglary committed on May 4, 1989, and in custody from April 26, 1990, to October 4, 1990).

²⁹ Florida implies that a neighbor identified Joe. RB 5. The victim's neighbor testified that she saw "two young black males" outside the victim's house, Tr. I 51, but she did not recognize Joe Sullivan as being one of them. Tr. I 56-57.

Finally, the prosecution presented testimony from the victim who, despite being coached through a rehearsal of her testimony outside the presence of the jury,³⁰ could not affirmatively identify Joe Sullivan as the perpetrator, testifying only that Joe's voice "could very easily be" that of the perpetrator. Tr. I 91. The prosecutor during closing argument acknowledged uncertainty about whether Joe actually committed the assault but nonetheless urged the jury to convict him as the assailant or as an accomplice. Tr. II 219-220. Joe was convicted. J.A. 60-61.

³⁰ Witness: It sounds – there's a tone in your voice that's just like that, only you said it very loud to me that time in a belligerent way.

Prosecutor: I don't want to argue about it. Are you able to say that's the voice of the person?

Witness: There's a tone in that voice that makes me know it's that person.

Prosecutor: So you are saying the person who just spoke to you is the person that said that to you that day?

Witness: **It sounds like the voice.**

Prosecutor: All right.

Witness: It's been six months. **It's hard, but it does sound similar.** But it's said in a different way. See, the tone – it was said to me very belligerent in a loud voice.

Tr. I 86-88 (emphasis added).

His appointed lawyer filed no written pleadings and uttered no more than 12 transcript lines at sentencing. Tr. III 267. Despite numerous potentially meritorious grounds for appeal, Joe's appointed appellate counsel notified the court that he could find no issues worth raising and withdrew.³¹ Joe, then 14, was thus denied any meaningful opportunity for review of his conviction. In 2007, present 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 the State had destroyed the relevant biological evidence. J.A. 26, 36.

III. FLORIDA'S OBJECTIONS TO THIS COURT'S JURISDICTION ARE UNFOUNDED.

Florida argues that the Court lacks jurisdiction because the ruling below is based upon an independent and adequate state-law ground. This rehash of the argument made in the State's Brief in Opposition to *certiorari* has gained no added force since we answered it in our reply. *See* Pet. Reply Brief in Support of Cert. 1, 9-11; *see also* Cert. Pet'n 10-18. In short, there exists no obstacle to this Court's jurisdiction because the state procedural ground of decision which Florida seeks to invoke as a bar was dependent upon the Florida postconviction courts' anterior consideration and rejection of the precise

³¹ *See* PB 2.

federal constitutional claim upon which this Court has now granted *certiorari*.

As it did before, Florida relies on the circuit court's statement that Joe Sullivan's Eighth Amendment claim was "procedurally barred." RB 8. The state court reached this conclusion, however, only *after* determining that "Defendant d[id] not have a valid [federal] constitutional claim." J.A. 58. In circumstances like these – where invocation of a state-law bar depends on an antecedent analysis of the federal right claimed – this Court has jurisdiction to review the claim of federal right. *See, e.g., Ohio v. Reiner*, 532 U.S. 17, 20 (2001) (per curiam) (citing the relevant precedents and reaffirming "that 'this Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law'" (citation omitted); *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 388 (1986) ("If the . . . procedural ruling under state law implicates an underlying question of federal law, . . . the state law is not an independent and adequate state ground supporting the judgment."); *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985) (holding that where "the State has made application of the procedural bar depend on an antecedent ruling on federal law . . . the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded").

Here, petitioner contended in the courts below, exactly as he does in this Court, that a proper reading of the Court's decision in *Roper v. Simmons* rendered

his life-without-parole sentence federally unconstitutional and thereby brought his case within an exception to the State's postconviction statute of limitations. The state postconviction court responded to this contention by examining *Roper*, concluding that petitioner had no "valid constitutional claim" because his argument based on *Roper* was "meritless," and accordingly holding that the exception to the statute of limitations was inapplicable. See J.A. 58-59. The state-law procedural-bar ruling depended squarely on a determination that *Roper* "did not establish" the federal constitutional right claimed by petitioner.³² It was thus the very antithesis of an *independent* state-law ground of decision. See *Ake*, 470 U.S. at 75.

That alone is sufficient to establish this Court's jurisdiction. But there is a further reason to conclude that the state postconviction court's ruling was not independent but was driven by its view of federal law. This arises from the standard conventions of Florida's noncapital postconviction practice, under which – notwithstanding Florida Rule of Criminal Procedure 3.850(b)'s two-year time limitation with its enumerated exceptions – a postconviction court

³² Florida conceded this in its BIO: "In his state motion, petitioner asserted that *Roper* established a new constitutional right that juveniles could not be sentenced to life in prison. The state court examined *Roper*, and how courts had interpreted *Roper*, and determined that *Roper* did not establish the constitutional right asserted. Based on this determination, the court then dismissed the post conviction motion because it was procedurally barred." Resp. BIO 9.

retains the power to correct an illegal sentence “at any time.”³³

Florida’s brief minimizes this exception by relegating it to a footnote and citing a 1984 intermediate appellate court decision that appears to sharply limit its scope. RB 12 n.5 (citing *Wahl v. State*, 460 So. 2d 579 (Fla. 2d Dist. Ct. App. 1984)). In reality, however, the exception has been the subject of

³³ Rule 3.850(b) states: “A motion to vacate a sentence that exceeds the limits provided by law may be filed at any time.” Rule 3.800(a) states: “A court may at any time correct an illegal sentence imposed by it . . . when it is affirmatively alleged that the court records demonstrate on their face an entitlement to that relief. . . .” The slightly different language of these two provisions is interpreted in tandem as requiring that “an illegal sentence . . . must be corrected.” *Summers v. State*, 747 So. 2d 987, 989 (Fla. 5th Dist. Ct. App. 1999) (granting relief under Rule 3.850 beyond two-year limitation period where sentence based on erroneous habitual offender classification). Also, to the extent that there is any difference between the two rules in this regard, Florida courts are required, *sua sponte*, to treat a claim filed under the wrong rule as filed under the right one. *See, e.g., Parker v. State*, 987 So. 2d 177, 178 (Fla. 1st Dist. Ct. App. 2008) (per curiam) (reversing summary denial of Rule 3.850 claim as untimely and remanding for trial court to treat claim that written judgment varied from oral pronouncement of sentence as claim of illegal sentence under Rule 3.800(a) and resolve it on merits); *Young v. State*, 619 So. 2d 378, 379 (Fla. 2d Dist. Ct. App. 1993) (per curiam) (remanding because trial court should have considered motion filed under Rule 3.850 as one under Rule 3.800(a) and noting, “While one might question why it took Young eighteen years to discover such a claim, a motion seeking correction of an illegal sentence may be filed at any time.”).

repeated analysis by the Florida Supreme Court³⁴ and has been held to include a wide array of constitutional and statutory sentencing infirmities. The exception has been applied, for example, to reach the merits of claims of double jeopardy, *Apprendi* error, various errors of state law, and Eighth Amendment error, making all of these claims raisable and correctable at any time.³⁵

³⁴ The Florida Supreme Court has addressed the “illegal sentence” exception in a series of decisions stretching back to the mid-1980s. See *Saintelien v. State*, 990 So. 2d 494 (Fla. 2008); *Williams v. State*, 957 So. 2d 600 (Fla. 2007); *Wright v. State*, 911 So. 2d 81 (Fla. 2005); *Bover v. State*, 797 So. 2d 1246 (Fla. 2001); *Carter v. State*, 786 So. 2d 1173 (Fla. 2001); *Maddox v. State*, 760 So. 2d 89 (Fla. 2000); *Dixon v. State*, 730 So. 2d 265 (Fla. 1999); *Hopping v. State*, 708 So. 2d 263 (Fla. 1998); *State v. Mancino*, 714 So. 2d 429 (Fla. 1998); *State v. Callaway*, 658 So. 2d 983 (Fla. 1995); *Davis v. State*, 661 So. 2d 1193 (Fla. 1995); *State v. Whitfield*, 487 So. 2d 1045 (Fla. 1986).

³⁵ See, e.g., *Deering v. State*, 988 So. 2d 1237, 1238 (Fla. 5th Dist. Ct. App. 2008) (per curiam) (rejecting on merits claim that Eighth Amendment rendered life sentence for 1977 robbery an “illegal sentence”), *review denied*, 11 So. 3d 942 (Fla. 2009); *Pfoutz v. State*, 910 So. 2d 946 (Fla. 5th Dist. Ct. App. 2005) (denying on merits claim that sentence was illegal under state analog to Eighth Amendment). Cf. *Hopping*, 708 So. 2d at 265 (“[W]here it can be determined without an evidentiary hearing that a sentence has been unconstitutionally enhanced in violation of the double jeopardy clause, the sentence is illegal and can be reached at any time under rule 3.800.”); *Hughes v. State*, 826 So. 2d 1070, 1072 (Fla. 1st Dist. Ct. App. 2002) (per curiam) (“We note initially that rule 3.800(a) is an appropriate procedural vehicle for raising an *Apprendi* claim, since such a violation would produce a sentence in excess of constitutional and statutory maximums and would be apparent from the face of the record.”).

In sum, the Florida judiciary has preserved for defendants, even decades after sentencing and direct review, procedures for challenging fundamental constitutional and statutory infirmities in their sentences. *See Carter v. State*, 786 So. 2d 1173, 1178 (Fla. 2001) (“We continue to refine our definition of ‘illegal sentence’ in an attempt to strike the proper balance between concerns for finality and concerns for fundamental fairness in sentencing.”). Under Florida law, if the state courts had believed that Joe Sullivan’s sentence violated the federal Constitution as interpreted in *Roper*, they were empowered to grant him relief. Consequently, the postconviction court’s decision to apply a procedural bar doubtless rests squarely on its ruling that Joe Sullivan’s sentence does not violate the federal Constitution.



CONCLUSION

There is no obstacle to this Court's jurisdiction and no substance to Florida's arguments on the merits. The Court should invalidate Joe Sullivan's sentence of life imprisonment without the possibility of parole as a cruel and unusual punishment forbidden by the Eighth Amendment.

Respectfully submitted,

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APPENDIX A*

ALABAMA

Ala. Code §§ 15-22-20 to -40 (defining role and duties of Board of Pardons and Paroles); Alabama Board of Pardons and Paroles, <http://www.pardons.state.al.us/>.

ARIZONA

Ariz. Rev. Stat. Ann. §§ 31-401 to -417 (defining role and duties of Board of Executive Clemency, which include consideration of parole applications); Arizona Board of Executive Clemency, <http://www.azboec.gov/>.

ARKANSAS

Ark. Code Ann. §§ 16-93-201 to -211 (defining role and duties of Parole Board); *id.* § 12-28-104 (establishing paroling authority); Arkansas Parole Board, <http://www.arbop.org/>.

COLORADO

Colo. Rev. Stat. Ann. §§ 17-2-201 to -217 (defining role and duties of Board of Parole); Colorado Department of Corrections, <http://www.doc.state.co.us/> (select “Operations” menu, click on “Parole and Community”).

* All statutes are current per Westlaw as of October 12, 2009. All Web sites were last visited on October 12, 2009.

DELAWARE

Del. Code Ann. tit. 11, §§ 4341 to 4354 (defining role and duties of Board of Parole); Delaware Board of Parole, <http://www.state.de.us/parole/>.

FLORIDA

Fla. Stat. Ann. §§ 947.01 to .27 (defining role and duties of Parole Commission); Florida Parole Commission, <https://fpc.state.fl.us/>.

ILLINOIS

730 Ill. Comp. Stat. Ann. 5/3-3-1 to 5/3-3-13 (defining role and duties of Prisoner Review Board); Illinois Prisoner Review Board, <http://www.state.il.us/prb/>.

IOWA

Iowa Code Ann. §§ 904A.1 to A.6, 906.1 to .19 (defining role and duties of Board of Parole); Iowa Board of Parole, <http://www.bop.state.ia.us/>.

MICHIGAN

Mich. Comp. Laws Ann. §§ 791.231 to .246 (defining role and duties of Parole Board); *id.* § 791.034 (creating Michigan Parole and Commutation Board and transferring to it all powers of former Parole Board) (codifying Executive Reorganization Order No. 2009-3, eff. Apr. 19, 2009); Michigan Department of Corrections, <http://www.michigan.gov/corrections/> (click on “Probation, Parole & CDP”).

MISSISSIPPI

Miss. Code Ann. §§ 47-7-1 to -27 (defining role and duties of Parole Board); Mississippi Parole Board, <http://www.mpb.state.ms.us/>.

MISSOURI

Mo. Ann. Stat. §§ 217.650 to .735 (defining role and duties of Board of Probation and Parole); Missouri Department of Corrections, <http://www.doc.mo.gov/> (click on “Probation & Parole”).

NEBRASKA

Neb. Const. art. IV, § 13; Neb. Rev. Stat. Ann. §§ 83-188 to 83-1,125 (defining role and duties of Board of Parole); Nebraska Board of Parole, <http://www.parole.state.ne.us/>.

NORTH CAROLINA

N.C. Gen. Stat. Ann. §§ 143B-266 to -267 (defining role and duties of Post-Release Supervision and Parole Commission); North Carolina Post-Release Supervision and Parole Commission, <http://www.doc.state.nc.us/parole/>.

PENNSYLVANIA

61 Pa. Cons. Stat. §§ 6101 to 6153 (defining role and duties of Board of Probation and Parole) (as codified by 2009 Pa. Legis. Serv. 2009-33, S.B. 112, approved Aug. 11, 2009, eff. Oct. 13, 2009); Pennsylvania Board of Probation and Parole, <http://www.pbpp.state.pa.us/>.

SOUTH DAKOTA

S.D. Codified Laws §§ 24-13-1 to 24-15A-44 (defining role and duties of Board of Pardons and Paroles); South Dakota Board of Pardons and Paroles, <http://doc.sd.gov/parole/>.

TENNESSEE

Tenn. Code Ann. §§ 40-28-101 to -130 (defining role and duties of Board of Probation and Parole); Tennessee Board of Probation and Parole, <http://www.tn.gov/bopp/>.

WASHINGTON

Wash. Rev. Code Ann. §§ 9.95.001 to .900 (defining role and duties of Indeterminate Sentence Review Board); Washington Indeterminate Sentence Review Board, <http://www.srb.wa.gov/>.

WISCONSIN

Wis. Stat. Ann. §§ 15.145, 304.01 to .071 (defining role and duties of Parole Commission), *as amended by* 2009 Wis. Sess. Laws 28, §§ 34, 2742 to 2772 (A.B. 75, approved June 29, 2009, eff. Oct. 1, 2009) (renaming Parole Commission “Earned Release Review Commission” and altering commission’s duties); Wisconsin Parole Commission, http://www.wi-doc.com/Parole_Commission.htm.
