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Nos. 08-7412 and 08-7621

In the
Supreme Court of the United States

TERRANCE JAMAR GRAHAM,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

JOE HARRIS SULLIVAN,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

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

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF THE PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association ("ABA"), as *amicus curiae*, respectfully submits this brief to express its views on the question whether a sentence of life imprisonment without the possibility of parole for a juvenile offender is permissible under the Eighth and Fourteenth Amendments.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its more than 400,000 members span all 50 states and other jurisdictions, and include attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutor and public defender offices, as well as judges, legislators, law professors and law students.[2]

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authorized this brief in whole or in part, and that no such counsel or party, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn

Since its inception, the ABA has taken an active role in advocating for the improvement of the criminal justice system, with special interest in the improvement of the juvenile justice system. The ABA includes many members who are judges, prosecutors, and defense attorneys with significant experience and special expertise in the treatment of juvenile offenders under the law.[3] The Juvenile Justice Committee of the ABA's Criminal Justice Section is composed of lawyers who specialize in juvenile justice issues.

In conjunction with the Institute of Judicial Administration ("IJA"), the ABA spent over nine years developing standards for the administration of juvenile justice, which culminated in the publication in 1980 of the IJA/ABA *Juvenile Justice Standards* (the "Standards") in 20 volumes. These Standards flowed from an exhaustive historical, legal and criminological study of society's response to juvenile crime. The Standards reflect the expertise and knowledge of trained legal practitioners in a number of disciplines and are informed by the experience of related professions that work with juvenile offenders.

In 1997, in response to growing number of state statutes and policies that allowed the

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that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[3] As used in this brief, the term "juvenile" refers to individuals under the age of eighteen and "juvenile offender" refers to individuals who commit crimes or acts of delinquency while under the age of 18.

transfer of juvenile offenders to the adult criminal justice systems, the ABA created its Task Force on Youth in the Criminal Justice System. In 2001, this Task Force published its report, *Youth in the Criminal Justice System: Guidelines for Policymakers and Practitioners* (ABA 2001), in which the Task Force noted that, by 1997, the number of youths in adult prisons had reached 7,400 – double the number in adult prisons in 1985. *Id.* at 1. Further, the net result of these state policies was that, by 2001, at least 200,000 American juveniles were being tried as adults each year. *Id.*

The ABA drew upon this experience in its *amicus curiae* brief in *Roper v. Simmons,* 543 U.S. 551 (2005), in which this Court considered the constitutionality of the death penalty for juvenile offenders. In its brief, the ABA endorsed criminal justice policies, that accounted for factors unique to juveniles that affect their culpability, including the fact that juvenile offenders are less mature, less experienced, less able to exercise good judgment and self-restraint, more susceptible to environmental influence, and limited in their ability to assist in their own defense. Br. of the American Bar Ass'n, No. 03-633, *Roper v. Simmons at 2* http://www.abanet.org/amicus/briefs98-03.html (last visited July 21, 2009). In the view of the ABA:

> The ABA recognizes that some juvenile offenders deserve severe punishment for their crimes. However, when compared to adults, juvenile offenders' reduced capacity – in moral judgment, self restraint and the ability to resist the influence of others – renders them less

> responsible and less morally culpable than adults.

Id. at 3 (citing IJA/ABA *Juvenile Justice Standards Relating to Transfer Between Courts* at 3 (1980)).

Most recently, in February 2008, the ABA unanimously adopted policies addressing sentence mitigation for juvenile offenders.[4] *ABA 2008 Report with Recommendation #105C* at 2 (Policy adopted Feb. 2008) (the "Report").[5] As stated in the Report at 2, "The ABA's overall approach to juvenile justice policies has been and continues to be to strongly protect the rights of youthful offenders within all legal processes while insuring public safety."

As noted in the Report at 6, the ABA has opposed sentences of life without the possibility of parole for juvenile offenders since its adoption in 1991 of a policy endorsing the United Nations Convention on the Rights of the Child. Based on the ABA's long history of work in juvenile justice,

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[4] The ABA's House of Delegates ("HOD"), with more than 500 delegates, is the ABA's policymaking body. Only recommendations adopted by the HOD become ABA policy. Recommendations may be submitted to the HOD by, among others, ABA delegates representing states and territories, state and local bar associations, affiliated organizations, ABA sections and divisions, ABA members and the Attorney General of the United States. *See* ABA General Information, *available at* http://www.abanet.org/leadership/delegates.html (last visited July 21, 2009).

[5] *Available at* http://www.abanet.org/leadership/2008/midyear/updated_reports/hundredfivec.doc. While only the Recommendation is approved by the HOD as ABA policy, the Report accompanying the Recommendation is instructive as to the considerations before the HOD.

the Report concluded that sentences for juvenile offenders must recognize that, no matter how adult-like their offenses, they are not adults. *Id.* at 6. That is, as this Court concluded in *Roper,* juvenile offenders have lesser culpability than adult offenders due to the typical behavioral characteristics inherent in adolescence. *Id.* (citing *Roper,* 543 U.S. at 569-70).

The ABA accordingly adopted as policy three principles: (1) sentences for juveniles should generally be less punitive than those for adults who have committed comparable offenses; (2) sentences for juveniles should recognize the key mitigating considerations particularly relevant to their youthful status, including those identified by the Court in *Roper,* 543 U.S. at 567-70, as well as the seriousness of the offense and the delinquent and criminal history of the juvenile; and (3) juveniles should generally be eligible for parole or other early release consideration at a reasonable point during their sentences and, if denied, should be reconsidered for parole or early release periodically thereafter.

These three principles, the ABA believes, are consistent with the Court's conclusions in *Roper* concerning the lesser culpability of juvenile offenders. The ABA believes that *Roper* and these principles are irreconcilable with a conclusion that a juvenile's life sentence is constitutionally permissible under the Eighth and Fourteenth Amendments when that sentence does not permit the possibility of parole.

SUMMARY OF ARGUMENT

The ABA respectfully submits that sentencing a juvenile offender to life in prison without the possibility of parole ("JLWOP") is not reconcilable with the lesser culpability of juvenile offenders. On that basis, settled doctrine establishes that such a sentence is not permissible under the Eighth and Fourteenth Amendments.

First, JLWOP should be considered a "grossly disproportionate" sentence because the "real time" of the juvenile offender's prison term, barring executive commutation, is the rest of the juvenile's life.

Second, "the evolving standards of decency," *Roper,* 543 U.S. at 561, citing *Trop v. Dulles,* 356 U.S. 86, 100-101 (1958) (plurality opinion), have established that none of the standard justifications for criminal justice sentencing – retribution, deterrence, incapacitation and rehabilitation – are served by JLWOP.

Third, because the parole system provides sufficient safeguards to protect the public from those juvenile offenders who, as adults, are deemed to require continued imprisonment, JLWOP should not be permitted.

Finally, consideration of international authorities demonstrates an overwhelming opposition to JLWOP.

ARGUMENT

The ABA respectfully asserts that JLWOP cannot comport with this Court's conclusions in *Roper* concerning the lesser culpability of juvenile offenders, and therefore, should not be permissible under the Eighth and Fourteenth Amendments.

I. BASED ON THE REAL TIME THE JUVENILE OFFENDER IS LIKELY TO SPEND IN PRISON, JLWOP SHOULD BE CONSIDERED "GROSSLY DISPROPORTIONATE" UNDER THIS COURT'S JURISPRUDENCE.

Based on "the length of the prison term in real time, *i.e.,* the time that the offender is likely to actually spend in prison," *Ewing v. California,* 538 U.S. 11, 37 (2003) (Breyer, J., dissenting), JLWOP should be found to be "grossly disproportionate" under this Court's jurisprudence.

As this Court has stated, "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are grossly disproportionate to the crime." *Ewing*, 538 U.S. at 23 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (internal quotation marks and citation omitted)). As the *Ewing* Court stated, "'The Eighth Amendment . . . contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'" *Id.* at 20 (quoting *Harmelin,* 501 U.S. at 997 (Kennedy, J., concurring in part and concurring in judgment)). The proportionality standard, further, has been applied "to terms of years in a series of

cases beginning with *Rummel v. Estelle,* [445 U.S. 263 (1980)]." *Id.* at 20.

"Real time" in the case of JLWOP is, by definition, the rest of the juvenile's life, barring executive commutation. In *Ewing,* an adult was sentenced to 25 years to life under California's "three strikes" law, under which there was a possibility of parole. In affirming the sentence, Justice O'Connor noted that "federal courts should be reluctant to review legislatively mandated terms of imprisonment, and that successful challenges to the proportionality of particular sentences should be exceedingly rare." *Ewing,* 538 U.S. at 22 (quoting *Hutto v. Davis,* 454 U.S. 370, 374 (1982) (per curiam)). Justice O'Connor then compared *Rummel,* in which the defendant had received life in prison with the possibility of parole, with *Solem v. Helm,* 463 U.S. 277 (1983), in which an adult was sentenced to life in prison without possibility of parole, but with the possibility of executive commutation.

Justice O'Connor stated that *Solem* had set out three factors that may be relevant in determining whether a sentence is so disproportionate that it violates the Eighth Amendment: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 22 (quoting *Solem,* 463 U.S. at 292).

However, as Justice Breyer noted in his dissent, "The one critical difference that explains the difference in outcome [in *Rummel* and *Solem*]

is the length of the likely prison term measured in real time." *Id.* at 39. That is, in *Rummel,* the defendant's sentence included the possibility of parole; in *Solem,* it did not. *See also*, *Ewing,* 538 U.S. at 22 (O'Connor, J.) (stating that the *Solem* Court had specifically noted the contrast between the *Solem* and *Rummel* sentences).

Although most juvenile offenders are not sentenced under recidivist statutes, the rationale for these statutes supports the conclusion that JLWOP should be found to be "grossly disproportionate." As stated in *Ewing*:

> In imposing a three strikes sentence, the State's interest is not merely punishing the offense of conviction, or the "triggering" offense: "[I]t is in addition the interest . . . in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law.

Id. at 29 (quoting *Rummel,* 445 U.S. at 276; *Solem* 463 U.S. at 296) (ellipsis original to *Ewing*).

The ABA asserts that if the difference in outcome in these cases was, in fact, the opportunity for parole for adult offenders "who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law," *Ewing,* 538 U.S. at 29, then juvenile offenders, regardless of the crime for which they are sentenced, should also be given a chance to show as adults in parole proceedings that their failure to conform was based on "youth and immaturity," *Roper,* 543 U.S. at 571.

While "federal courts should be reluctant to review legislatively mandated terms of imprisonment," *Ewing,* 538 U.S. at 22 (quoting *Hutto v. Davis,* 454 U.S. 370 (1982) (per curiam)), the ABA asserts that JLWOP is one category for which the challenge should be successful.

II. "THE EVOLVING STANDARDS OF DECENCY" HAVE ESTABLISHED THAT NONE OF THE STANDARD CRIMINAL JUSTICE SENTENCING THEORIES ARE SERVED BY JLWOP.

In *Roper,* in considering whether the imposition of the death sentence on a juvenile offender violated the Eighth Amendment's prohibition against "cruel and unusual punishments," this Court affirmed the propriety and necessity of referring 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 (1958) (plurality opinion)).

The *Roper* Court concluded that there is "sufficient evidence that today our society views juveniles . . . as 'categorically less culpable than the average criminal.'" *Id.* at 567.[6] Because of the

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[6] As the *Roper* Court stated, there are three general differences between juveniles and adults that demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders: (1) a lack of maturity and underdeveloped sense of responsibility; (2) vulnerability or susceptibility to negative influences and outside pressures, including peer pressure; and (3) the character of a juvenile is not as well formed as that of an adult. [footnote continued]

diminished capacity of juveniles, the Court concluded that "it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults." *Id.* at 571.

In the view of the ABA, the Court's analysis in *Roper* applies with equal force to JLWOP, which is now the most severe penalty that may be imposed on a juvenile.[7] Because the "signature qualities of youth are transient," *Roper,* 543 U.S. at 570, citing *Johnson v. Texas*, 509 U.S. 350, 368

The resulting "diminished culpability of juveniles" is therefore based on the conclusions that (1) their irresponsible conduct is not as morally reprehensible as that of an adult; (2) their vulnerability and lack of control over their immediate surroundings mean they have a greater claim than adults to be forgiven for failing to escape negative influences in their environment; and (3) their struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. As the *Roper* Court concluded:

> From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for the greater possibility exists that a minor's character deficiencies will be reformed. Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient: as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside."

Roper, 543 U.S. at 569-70 (quoting *Johnson v. Texas,* 509 U.S. 350, 368 (1993)).

[7] The ABA suggests that JLWOP also be reviewed as an evolving standard by considering (1) a review of objective indicia of consensus, and (2) the exercise of the Court's own independent judgment. *See Roper,* 543 U.S. at 564.

(1993), none of the standard penological goals – retribution, deterrence, incapacitation or rehabilitation – are served. *See also Harmelin,* 501 U.S. at 1023 (White, J., dissenting) ("To be constitutionally proportionate, punishment must be tailored to a defendant's personal responsibility and moral guilt") (citing *Enmund v. Florida,* 458 U.S. 782, 801 (1982)).[8] *See also Harmelin*, 501 U.S. at 1023 (White, J., dissenting) ("To be

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[8] In considering a juvenile offender's personal responsibility and moral guilt, the ABA asserts that the following should also be considered:

- Juveniles are more susceptible to coercion and more likely to be intimidated into making false confessions than are adults. Samuel Gross, *et al*., *Exonerations in the United States, 1989 through 2003*, 95 J. Crim. L. & Criminology 523, 545 (2004) (concluding that 42% of the juveniles convicted during that period of time had falsely confessed to crimes they did not commit).

- Juveniles are generally less capable than adults of communicating with and giving meaningful assistance to their counsel; their lack of appreciation of long-term consequences impairs their ability to make appropriate decisions regarding plea bargains and other aspects of their legal strategy; and they lack the basic skills to assist them in identifying exculpatory facts and effectively communicating them to their counsel. Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 Crim. Just. 27, 28 (Summer 2000).

- In eleven out of the seventeen years between 1985 and 2001, juveniles convicted of murder in the United States were more likely to receive sentences of life in prison without possibility of parole than were adults. United States. Human Rights Watch & Amnesty Int'l, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*, at 2 (2005) (http://www.amnestyusa.org/countries/usa/clwop/report.pdf) (last visited July 19, 2009). Further, minority juveniles are far more likely to be sentenced to life without possibility of parole than their non-minority counterparts. *Id.*

constitutionally proportionate, punishment must be tailored to a defendant's personal responsibility and moral guilt") (citing *Enmund v. Florida*, 458 U.S. 782, 801 (1982)).

As the *Roper* Court stated, "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571.

As for deterrence, the *Roper* Court stated, "In general we leave to legislatures the assessment of the efficacy of various criminal penalty schemes. . . . Here, however, the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Id.* at 571, citing *Harmelin v. Michigan*, 501 U.S. 957, 998-99 (1991) (Kennedy, J. concurring).[9]

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[9] Although the *Roper* Court noted that, to the extent the juvenile death penalty might have a residual deterrent effect, JLWOP "is itself a severe sanction, in particular for a young person," *id.* at 572, studies indicate that there appears to be no significant difference in deterrence between a juvenile death penalty and JLWOP. See, e*.g.,* MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, ISSUE BRIEF 3: "Less Guilty by Reason of Adolescence," *available at* http://www.adjj.org/downloads/6093issue_brief_3.pdf (last visited July 19, 2009) (concluding that juveniles' "lack of foresight, along with their tendency to pay more attention to immediate gratification than to long-term consequences, are among the factors that may lead them to make bad decisions").

The penological goal of incapacitation, to be sure, may be served when it is determined that a juvenile may be a threat to society. However, because "the signature qualities of youth are transient," *Roper,* 543 U.S. at 570, citing *Johnson v. Texas*, 509 U.S. 350, 368 (1993), this does not support the juvenile's continued incapacitation throughout adulthood and into old age without an opportunity for reevaluation. *See Roper,* 543 U.S. at 573 ("It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption").

Finally, JLWOP is not supported by the penological goal of rehabilitation. The objective of rehabilitation is to return the offender to society. Return is, by definition, not possible under JLWOP. Further, as stated by Justice Marshall in his dissent in *Harmelin,* 501 U.S. at 1028:

> Because [a mandatory sentence of life imprisonment without the possibility of parole] does not even purport to serve a rehabilitative function, the sentence must rest on a rational determination that the punished 'criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator.'

Id. (quoting *Furman v. Georgia,* 408 U.S. 238, 307 (1972) (Stewart, J., concurring)).

"A legitimate punishment must further at least one of these goals." *Ewing,* 538 U.S. at 25; *Harmelin,* 501 U.S at 999 (Kennedy, J., concurring

in part and concurring in judgment). This is because, as stated in *Coker v. Georgia,* 433 U.S. 584, 592 (1977), the Eighth Amendment bars punishment that "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." JLWOP fails on both counts.

III. NEITHER THE PUBLIC SAFETY NOR PENAL OBJECTIVES WOULD BE COMPROMISED BY PERMITTING THE OPPORTUNITY FOR PAROLE.

Because the parole process has safeguards to protect the public, as well as recognized law enforcement and rehabilitative functions, neither the safety of society nor the objectives of the penal system would be compromised by permitting juvenile offenders the opportunity to be considered for parole.

As this Court and commentators have recognized, the parole system includes significant rehabilitative, law enforcement and cost control functions. *E.g. Greenholtz v. Inmates of the Nebraska Penal and Corr. Complex*, 442 U.S. 1, 13 (1979) (the "ultimate purpose of parole . . . is a component of the long-range objective of rehabilitation"); *PA Bd. of Prob. and Parole v. Scott*, 524 U.S. 357, 367 (1998) (explaining that "one of the purposes of parole is to reduce the costs of criminal punishment while maintaining a degree of supervision over the parolee"). *See also,* Bruce Zucker, *A Triumph for Gideon: The Evolution of the Right to Counsel for California's Parolees in Parole*

Revocation Proceedings, 33 W. St. U. L. Rev. 1, 3 (2005-2006) (explaining that parole also protects society through restrictions, reintegration services and by encouraging inmates to "conform their behavior while incarcerated under the threat of delaying or forfeiting early release from custody").

Moreover, the possibility of parole would not require the release of violent offenders considered a risk to the community. Parole involves significant checks to protect the public. Years may pass before an offender becomes eligible for parole consideration.[10] Parole boards consider a variety of factors in making parole recommendations, including the seriousness of the offense, the sentence length, the amount of time served, the offender's age, criminal history and prison behavior; participation in prison-based educational, vocational or rehabilitation programs; counseling reports, psychological evaluations, and the viability of parole plans, including where and how the inmate would live and support himself if released.[11] Generally, a majority of parole board panels must approve parole, and some states have imposed more stringent approval requirements for certain offenders.[12] Most inmates eligible for

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[10] *See, e.g.,* Ky. Rev. Stat. Ann. § 532.030 (2008); Mich. Comp. Laws § 791.234 (2009).

[11] *See, e.g.,* Cal. Penal Code § 3041(a) (2005); Cal. Code Regs, tit. 15 § 2281 (2009); Cal. Code Regs titl. 15 § 2402 (2009); Mich. Comp. Laws § 791.223; Mich. Admin. Code r. 791.7715, 7716 (2009); 37 Tex. Admin. Code § 145.2 (2009); R.I. Gen. Laws § 13-8-14 (2008).

[12] *See, e.g.,* Michigan Dept. of Corrections, The Parole Consideration Process, http://www.michigan.gov/corrections/0,1607,7-119-1435-22909--,00.html (last visited July 17, 2009)

parole consideration are not, in fact, granted parole.[13] Offenders whose requests for parole are rejected must wait a certain period of time, sometimes years, before they can be considered again.[14] Some states authorize the governor to reverse a decision granting parole, or impose delays or additional conditions on the terms of parole as an additional check to ensure that public safety is not compromised.[15]

Offenders granted parole are not released unconditionally. Rather, states impose conditions and restrictions on parolees. States may require the offenders to complete in-prison rehabilitation programs before releasing them on parole.[16] Once

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(explaining that decisions for Michigan prisoners serving life sentences must be made by a majority of all ten members of the Parole Board, rather than a majority of the three member panel considering parole for other offenders).

[13] *See* Office of Justice Programs, Dep't of Justice, Characteristics of State Parole Supervising Agencies (2006), http://www.ojp.usdoj.gov/bjs/pub/pdf/cspsa06.pdf (last visited July 20, 2009) (reporting 54% of adult parole inmates in 15 states were denied request for release on parole).

[14] Massachusetts, for example, provides that if parole is not granted at the initial parole release hearing, a parole review hearing occurs for most inmates annually thereafter, except where parole board members act to cause a review at an earlier time. Offenders sentenced as habitual criminals, committed as sexually dangerous persons or serving life sentences require subsequent hearings 2, 3 and 5 years, respectively, after the initial parole release hearing. 120 CMR 301.01 (2009).

[15] *See, e.g.*, http://www.cdcr.ca/gov/Parole/Life_Parole_Process/Index.html (last visited, July 21, 2009).

[16] *See, e.g.,* 37 Tex. Admin. Code § 145.2 (2009).

released, offenders may be confined to their homes with electronic monitoring and are typically restricted by any number of conditions, including drug counseling, treatment and testing requirements, restrictions on travel and on contact with certain persons, required regular contact with parole officers, payment of fines and restitution, and restrictions on the possession of firearms and other criminal behavior.[17]

Further, parole boards retain the right to revoke parole for the violation of any condition imposed, and many parole revocations result not from the commission of another crime, but from a failure to comply with a procedural requirement.[18] When offenders violate the conditions of their parole, the trier of fact generally will not apply the 'beyond a reasonable doubt' standard applied at the trial level; rather, the standard of proof employed in violation of parole hearings ranges from "clear and convincing evidence" to "probable cause," with most states using the "preponderance of the evidence" standard.[19] Moreover, "[i]n a revocation hearing . . . formal procedures and rules of

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[17] *See* 37 Pa. Code § 63.4 (2009); 37 Pa. Code § 63.5 (2009); 220 Ind. Admin. Code 1.1-3-1 – 1.1-3-10 (2009).

[18] *See generally,* Wendy Heller, Note, *Poverty: The Most Challenging Condition of Prison Release*, 13 Geo. J. on Poverty & Pol'y 219 (Summer 2006).

[19] *See* 22 Alaska Admin. Code 20.485 (2009) (preponderance of the evidence standard sufficient to authorize decision to revoke parole); Wash. Admin. Code § 381-70-160 (2009) (same); Regs. Conn. State Agencies § 54-124a(j)(1)-5(g) (2009) (hearing examiner's finding on parole violation based on probable cause standard sufficient to order detention pending final revocation hearing).

evidence are not employed." *Gagnon v. Scarpelli*, 411 U.S. 778, 789 (1973). Therefore, a state's ability to revoke parole based on even a procedural violation of parole conditions often is far easier, and requires a far lower burden of proof, than an adjudication on the underlying offense.

In contrast, for JLWOP sentences, the juvenile offenders will spend their lives in prison without having the opportunity to even be considered for parole. The ABA is not asserting that all juveniles serving JLWOP sentences will establish, at some point in their sentence, that they are entitled to parole. The ABA is asserting, however, that they should not be denied that opportunity.

It is undeniable that some juvenile offenders commit heinous crimes. However, as the *Roper* Court stated, "An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." 543 U.S. at 573.

For the same reasons, the ABA submits that the courts and juries should not be permitted to impose JLWOP. Rather, the decision as to the appropriateness – or inappropriateness – of parole for juvenile offenders should be made at reasonable points in their sentences, based on the adults they have become.

IV. REVIEW OF INTERNATIONAL AUTHORITIES DEMONSTRATES OVERWHELMING OPPOSITION TO JLWOP.

The *Roper* Court stated that its conclusion that the juvenile death penalty was a disproportionate sentence found "confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty." *Id*. at 575. The Court noted that, while this was not controlling, the Court had referred 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." *Id*. (citing *Trop,* 356 U.S. at 102-03 (plurality opinion)).

Similarly, if the Court chooses to consider the laws of other countries and international authorities concerning JLWOP, the review will demonstrate an overwhelming opposition to JLWOP.

For example, as of 2005, only thirteen countries outside the United States had laws that theoretically permitted such a sentence, and there were perhaps only a dozen individuals serving sentences of JLWOP in three countries outside of the United States. Human Rights Watch & Amnesty Int'l, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*, at 5 (2005) (hereinafter, "Human Rights Watch Report"). The numbers have continued to decline, as some of those countries have changed their laws and practices in the past three years to either

abolish the sentence or permit some review of an imposed sentence. Connie De La Vega and Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 Univ. S.F. L. Rev. 983, 1004-05 (Aug. 11, 2008) ("De La Vega and Leighton"); Illinois Coalition for the Fair Sentencing of Children, *Categorically Less Culpable: Children Sentenced to Life Without Parole in Illinois* (2008).

Further, the Convention on the Rights of the Child ("CRC") prohibits both the juvenile death penalty and JLWOP. Human Rights Watch Report at 98 (2005) (citing CRC, art. 37(a)). The CRC also requires states to consider "the desirability of promoting the child's reintegration and the child's assuming a constructive role in society." *Id.* (citing CRC, art. 40.1). As of 2005, 192 out of 194 countries were parties; the United States and Somalia are the two countries that have not ratified the CRC, although both have signed it. *Id.* at 99.

Moreover, in 1996, the European Court of Human Rights declared JLWOP illegal under Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which forbids "inhuman or degrading treatment or punishment." *Hussain v. United Kingdom*, 22 EHRR 1, ¶ 53 (1996) (citing *The Convention for the Protection of Human Rights and Fundamental Freedoms*[20]). The *Hussain* decision is binding on the forty-seven European nations that have signed and ratified the convention.

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[20] *Available at* http://www.conventions.coe.int.

In April 2004, the Commission on Human Rights adopted a resolution which urged states to abolish JLWOP. *See* Human Rights Watch Report at 107 (2005).

In December 2006, the United Nations General Assembly, by a vote of 185 to one (the United States being the lone opposition vote) passed a resolution calling upon nations to abolish the juvenile death penalty and JLWOP. De La Vega and Leighton at 1012 (citing Rights of the Child, G.A., Res. 61/146, ¶ 31(a), U.N. Doc. A/Res/61/146 (Dec. 19, 2006)).

Finally, just last year, the United Nations Committee on the Elimination of Racial Discrimination, to which the United States is a party, determined that the racially disproportionate impact of JLWOP in the United States warranted recommending abolishing the sentence. U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008); De La Vega and Leighton at 1012.

As this Court concluded in *Roper,* "It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." 543 U.S. at 578.

CONCLUSION

For the reasons stated above, *amicus curiae* the American Bar Association requests that the judgments of the District Court of Appeals of Florida, First District be reversed.

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