

Nos. 08-7412 and 08-7621

IN THE
Supreme Court of the United States

TERRANCE JAMAR GRAHAM,
Petitioner,

—v.—

FLORIDA,
Respondent.

JOE HARRIS SULLIVAN,
Petitioner,

—v.—

FLORIDA,
Respondent.

ON WRITS OF CERTIORARI TO THE DISTRICT COURT OF
APPEAL OF FLORIDA, FIRST DISTRICT, STATE OF FLORIDA

**BRIEF OF COUNCIL OF JUVENILE CORRECTIONAL
ADMINISTRATORS, NATIONAL ASSOCIATION FOR
JUVENILE CORRECTIONAL AGENCIES, NATIONAL
JUVENILE DETENTION ASSOCIATION, NATIONAL
PARTNERSHIP FOR JUVENILE SERVICES, AMERICAN
PROBATION AND PAROLE ASSOCIATION, AND INTER-
NATIONAL COMMUNITY CORRECTIONS ASSOCIATION
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICI*¹

We are Corrections professionals, working within and outside the prison system as corrections officers, probation/parole officers, community corrections workers and prison administrators with juvenile and adult offenders. It is our responsibility to protect society, maintain order within our facilities, and to be responsive to the needs of those committed to our care and supervision.

The **Council of Juvenile Correctional Administrators (CJCA)** represents the youth correctional CEOs in fifty states, Puerto Rico, Washington, D.C. and some major metropolitan counties. Through the collaborative efforts of its members, CJCA has developed an expertise in designing and implementing the most effective practices for the treatment of juveniles within their care.

The **National Association of Juvenile Correction Agencies (NAJCA)** was founded in 1903 and is an affiliate of the American Corrections Association. Its members represent the broad spectrum of researchers, administrators and caretakers working in the juvenile corrections field.

¹ The parties have consented to the filing of this brief and their consent letters have been filed with the clerk. No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

The **National Juvenile Detention Association (NJDA)** is an national organization with over 400 individual members consisting of juvenile detention practitioners and administrators as well as 12 affiliate state juvenile detention associations. Since 1968, the NJDA has existed exclusively to advance the science and processes of juvenile detention services.

The **National Partnership of Juvenile Services** was formed in 2001 and is the operating structure of five distinct organizations including *amici* NAJCA and NJDA, as well as the Juvenile Justice Trainers Association, the Council of Educators for At-Risk and Delinquent Youth and the National Association of Children of Incarcerated Parents.

The **American Probation and Parole Association (APPA)** is an international organization, which represents approximately 35,000 probations and parole practitioners within juvenile and adult corrections, including line staff, supervisors and administrators. The APPA seeks to develop a system of probation and parole services that provides public safety by ensuring humane, effective and individualized sentences for offenders, and support and protection for victims.

The **International Community Corrections Association (ICCA)** represents more than 250 private agencies operating over 1500 residential and other community-based correction programs for children and adults; it also has over 1000 individual members. The ICCA member agencies offer a variety of services to the courts, Departments of Corrections, counties, cities and states throughout the United

States including drug treatment, counseling, supervision, and aftercare.

SUMMARY OF ARGUMENT

While we strongly believe that juveniles must be held accountable for their actions, condemning a juvenile to prison for the rest of his life at a point where his true character and potential cannot be accurately assessed is deeply troubling. In our professional capacities, we have experienced great successes with juveniles who others believed could not succeed. We believe the critical question for this Court is not “whether” but “when” – when is the proper and humane time to decide if a juvenile deserves to spend his life in prison. Empirical data, medical science and practical experience overwhelmingly shows that juvenile offenders are distinct from adult offenders and that these distinctions evince a unique potential for rehabilitation. We submit, therefore, that this determination can be made only in a post-adolescence review of the development and treatment progress of a juvenile offender.

ARGUMENT

LIFE WITHOUT PAROLE SENTENCING FAILS TO RECOGNIZE THAT, UNLIKE MANY ADULT OFFENDERS, JUVENILE OFFENDERS POSSESS UNIQUE POTENTIAL FOR REHABILITATION

1. JUVENILE OFFENDERS ARE A DISTINCT OFFENDER CATEGORY BECAUSE THEY POSSESS BROAD POTENTIAL FOR CHANGE AND REHABILITATION

Corrections professionals have long regarded juvenile offenders as a distinct offender category and recognize a responsibility to address the unique needs of these offenders. The American Corrections Association (“ACA”) – the oldest and largest corrections association in the world² – recognizes that “[c]hildren and youths have distinct personal and developmental needs and must be kept separate from adult offenders.”³ The ACA has found that the developmental needs of juveniles “require highly specialized management and treatment by corrections professionals”, irrespective of whether

² See American Corrections Association, *Professional Certification, Standards and Accreditation*, <http://www.aca.org/> (last visited July 21, 2009). The ACA provides professional development to the corrections workforce and promulgates national standards for the accreditation of corrections systems. *See id.*

³ American Corrections Association, Public Correctional Policy on Juvenile Justice Policy (“ACA Juvenile Justice Policy”), (adopted Aug. 23, 1984, last amended Jan. 24, 2007), *available at* http://www.aca.org/government/policyresolution/view.asp?ID=25&origin=results&QS='PoliciesAndResolutionsYMGHFREType=Policy&reversesearch=false&viewby=50&union=AND&startrec=1&top_parent=360 (last visited July 21, 2009).

juveniles are within the juvenile justice system or have been adjudicated as an adult and sentenced to prison.⁴ To that end, the ACA has adopted a policy mandating separate housing and special programming for youth transferred to the adult criminal system.⁵

Similarly the American Jail Association (“AJA”) – the only national association that exclusively focuses on the issues specific to the operation of local correctional facilities,⁶– resolved that the AJA “be opposed in concept to housing juveniles in any jail unless that facility is specifically designed for juvenile detention and staffed with specially trained personnel.”⁷

⁴ American Corrections Association, Public Correctional Policy on Youthful Offenders Transferred to Adult Criminal Jurisdiction (“ACA Youthful Offender Policy”), (adopted Jan. 20, 1999; amended Jan. 14, 2004), *available at* http://www.aca.org/government/policyresolution/view.asp?ID=51&origin=results&QS='PoliciesAndResolutionsYMGHFREType=Policy&reversesearch=false&viewby=50&union=AND&startrec=1&pg_360=2&top_parent=360 (last visited July 21, 2009).

⁵ *See id.*

⁶ *See* American Jail Association: *About AJA*, <http://www.aja.org/aja/about/index.shtml> (last visited July 21, 2009).

⁷ American Jail Association, Resolution: Juveniles in Jails (adopted May 22, 1990, re-affirmed May 3, 2008), http://www.aja.org/aja/about/resolutions.shtml#JUVENILES_IN_JAILS. In adopting this position, the AJA relied in part on its determination that juveniles housed with adults may be victimized through homosexual rape and other violence, and that “the care and legal requirement of housing juveniles are not a part of an adult jail facility’s responsibilities, and require specially trained staff and specially designed programming which are not readily available in an adult facility.” *Id.*

The Association of State Correctional Administrators (“ASCA”) - has also resolved, with regard to juveniles adjudicated as adults that:

By virtue of their unique needs and legal circumstances, it is appropriate to qualify “juveniles,” or youthful offenders, as a “special needs” population when they are admitted to adult corrections agencies, and to house and treat them accordingly.

....

It is appropriate to provide special programs for these populations based on statutory requirements and individual needs assessments.⁸

The International Community Corrections Association (“ICCA”) also regards children and youth as having “distinct personal and developmental needs that require specialized programs completely apart from adult offenders.”⁹

The American Probation and Parole Association has similarly urged that juvenile justice both be responsive to the needs of a broad range of

⁸ Association of State Correctional Administrators Resolutions, Resolution #2 – Evaluating the Effects of Incarceration in Adult Facilities on Youthful Offenders (adopted Aug. 10, 1997; amended Sept. 22, 2006), <http://www.asca.net/documents/Youthful.pdf>.

⁹ ICCA Public Policy on Juvenile Justice (Jan. 29, 2006), *available at* <http://www.iccaweb.org/public.html> (last visited July 21, 2009).

children and youth – even the most violent offenders – and to protecting society.¹⁰

Across the spectrum, corrections professionals have concluded that juvenile offenders, even within the adult corrections system, are a population with needs and characteristics that cannot be addressed through a traditional penological methodology. This belief is at the core of the juvenile corrections system, and is now underlying the establishment of Young Offender Divisions within adult corrections systems in many states.¹¹

As widely recognized within corrections, proper treatment of juveniles within the corrections system must recognize and address their developmental needs. Medical science confirms both the need for categorical distinctions in the treatment of juvenile vs. adult offenders and the importance of addressing the developmental needs of juvenile offenders within both adult and juvenile corrections. Studies conclusively establish that the brain of an adolescent is not fully developed, particularly in the area of the prefrontal cortex, which is critical to higher order cognitive functioning and impulse

¹⁰ American Probation and Parole Association, Position Statement – Juvenile Justice (enacted Jan. 1996), http://www.appa-net.org/eweb/Dynamicpage.aspx?site=APPA_2&webcode=IB_PositionStatement&wps_key=85432f61-443f-451a-bc59-29a37574f94e.

¹¹ See Patricia Torbet et al, *State Responses to Serious and Violent Juvenile Crime*, OJJDP RESEARCH REPORT (Office of Juvenile Justice and Delinquency Prevention, Wash. D.C.), July 1996, at 25-34 (describing the attempts by some states to address the influx of juvenile offenders into the adult system through the establishment of Youthful Offender Divisions).

control.¹² When a juvenile is confined either to the juvenile or adult corrections system, regardless of sentence, the institution is responsible for addressing those neurobiological-based deficiencies by providing the tools for that juvenile's positive maturation into adulthood. It is therefore incongruous to impose a sentence that fails to acknowledge any such development.

Kids today may be maturing physically earlier than before, but mentally they still require teaching, training, loving, skill-building, and learning through years of maturity. Bodies may be growing faster but no child is born with morals, with judgment, or with remorse; they learn these and other emotions and controls.

James A. Gondles, Jr. Executive Director, American Correctional Association¹³

¹² See Josh Day et al., *Structure and Function of the Adolescent Brain: Findings from Neuroimaging Studies*, 175 ADOLESCENT PSYCHIATRY, Jan. 1, 2005, at 1-34; B.J. Casey et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 BIOLOGICAL PSYCHOL. 241, 243 (2000); Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859, 860-61 (1999); Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Logitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861, 861 (1999).

¹³ James A. Gondles, Jr., Editorial, *Kids are Kids, Not Adults*, CORRECTIONS TODAY (Amer. Corrections Assoc., Alexandria, Va), Feb. 2004, at 6.

- a. The needs and characteristics which so define this population also identify the unique opportunity to repair and transform juvenile offenders

While this Court has recognized, and medical research has confirmed, the categorical immaturity and vulnerability ascribed to juveniles, *see Roper v. Simmons*, 543 U.S. 551, 569 (2005), in the juvenile offender population these developmental deficiencies coalesce with personal and environmental challenges that contribute to delinquent and criminal behavior.¹⁴

Corrections professionals working with the juvenile offender population encounter youth that are commonly simultaneously both victim and offender. A strong correlation between child maltreatment – abuse or neglect – and delinquent and criminal behavior in juveniles is well established.¹⁵ Studies examining the prevalence of child maltreatment among juvenile offenders in various states reported results ranging from 29% to

¹⁴ See J. David Hawkins et al., *A Review of Predictors of Youth Violence*, in *SERIOUS AND VIOLENT JUVENILE OFFENDERS: RISK FACTORS FOR SUCCESSFUL INTERVENTIONS* 119-146 (Loeber & Farrington, eds. 1998) (discussing the influence of family, community and peer factors in violent offending).

¹⁵ See Richard Wiebush, Raelene Freitag, & Christopher Baird, *Preventing Delinquency through Improved Child Protection Services*, *JUVENILE JUSTICE BULLETIN*, (Office of Juvenile Justice & Delinquency Prevention, Wash. D.C.), July 2001, at 1-3 (reviewing research establishing this link); Janet Wiig & Cathy Spatz Widom with John A. Tuell, *Understanding Child Maltreatment & Juvenile Delinquency: From Research to Effective Program, Practice, and Systemic Solutions*, CWLA PRESS, at 1-9 (2003) (same).

66% of offenders with reported or substantiated cases of child maltreatment.¹⁶

Juveniles who committed violent offenses are also more likely to have been victimized outside their home. The Office of Juvenile Justice and Delinquency Prevention reported a “strong link” between violent offending and violent victimization, with victimization defined as being shot or stabbed, threatened with a weapon or “jumped.” Jennifer N. Shaffer & R. Barry Ruback, *Violent Victimization as a Risk Factor for Violent Offending Among Juveniles*, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice & Delinquency Prevention, Wash. D.C.), December 2002, at 3. According to this study, juveniles who were victimized in year 1 were 3 times more likely than nonvictims to offend in year 2 (52% versus 17%).¹⁷ *Id.* at 4. Clinical and epidemiological

¹⁶ Richard Wiebush et al. *supra* n. 15 at 2. In 2004, Florida ranked 1st in the country for substantiated victims of child maltreatment and 1st in the country for the number of African-American maltreated youth in out-of-home placements. John A. Tuell, Child Welfare League of America, *Building Bridges to Better Outcomes for Children: The Link Between Juvenile Justice and Child Welfare*, at 1 (final draft), available at <http://www.cwla.org/programs/juvenilejustice/flwhitepaper.pdf> (last visited July 21, 2009). The number of victims of child maltreatment in Florida that end up in the juvenile justice system is unknown, but a review by Florida’s Office of Program Policy and Government Accountability of 90 case files of girls in juvenile justice residential programs found that 68% experienced physical or sexual abuse or neglect. *Id.* at 7.

¹⁷ The study also reported that:

Within year 1, juveniles who offended were 5.3 times more likely than nonoffenders to be victimized (37% versus 7%), and those who were victimized were 2.4 times more likely than nonvictims to offend (78% versus 32 percent).

studies indicate that at least three in four youth in the juvenile justice system have been exposed to severe victimization.¹⁸ Vulnerability to victimization continues to be a significant issue for juvenile offenders while incarcerated. *See infra* n. 62.

Witnessing acts of violence alone is a substantial risk factor for juvenile violent offending.¹⁹ Children who witness interparental domestic violence fare far worse than children with no exposure to this kind of violence, experiencing a range of emotional, behavioral, social and academic problems.²⁰

According to [State Correctional Institute] Houtzdale's Drug and Alcohol Treatment Specialist Heather Yasolsky,

Within year 2, juveniles who offended were 6 times more likely than nonoffenders to be victimized (42% versus 7%), and those who were victimized were 4 times more likely than nonvictims to offend (66% versus 16%).

Jennifer N. Shaffer & R. Barry Ruback, *supra*, at 2-3.

¹⁸ Julian Ford, et al., National Center for Mental Health and Juvenile Justice, *Trauma Among Youth in the Juvenile Justice System: Critical Issues and New Directions*, June 2007, at 3.

¹⁹ See Stacey Nofziger & Don Kurtz, *Violent Lives: A Lifestyle Model Linking Exposure to Violence to Juvenile Violent Offending*, 42 J. OF RESEARCH IN CRIME AND DELINQUENCY 3, 17-19 (2005) (finding that being a witness to violence increases the risk of offending by 769%).

²⁰ See Katherine Kitzmann et al., *Child Witnesses to Domestic Violence: A Meta-Analytic Review*, 71 J. OF CONSULTING AND CLINICAL PSYCH., 339, 344, 345 (2003) (performing a meta-analysis of 118 studies and finding that 63% of child witnesses to interparental domestic violence were faring poorly as compared to their peers with no exposure).

[Young Adult Offenders']²¹ favorite programs are COPS-type of television shows.

"I find it interesting that they are always so concerned with scenes that involve kids," Yasolsky said. "They were really concerned when one reenactment showed a highly explosive chemical used to make methamphetamines sitting right next to children's toothbrushes."

Yasolsky said YAOs are very protective of kids. She believes that they wish someone had protected them, thus avoiding their incarceration.

Pennsylvania's Young Adult Offenders - Treatment Staff Stories and Experiences, CORRECTIONAL NEWSFRONT (Pa. Dept. of Corrections, Pa.), 2001, Vol. XXVII, at 15.

The negative impact of trauma on the development of adolescents is plainly evident among the juvenile offender population.²² "Traumatized adolescents typically do not lack a sense of self or values, but are often too anxious, angry, or confused to rely upon these psychological resources while struggling with a sense of being in constant danger."²³ Moreover trauma involving victimization by others is more likely than other forms "to lead to impairment in psychosocial functioning and physical

²¹ Juveniles sentenced for committing adult crimes in Pennsylvania are designated Young Adult Offenders.

²² Cf. Julian D. Ford et al., *supra* n. 18, at 1-3 (discussing the negative impact of trauma on development).

²³ *Id.* at 2.

health.”²⁴ Trauma can, therefore, further exacerbate the neurobiological and psychological immaturity of youth and, as a result, impair an adolescent’s already more limited cognitive processing and behavioral regulation.²⁵

When exposed to trauma or mistreatment, a youth may cope by resorting to indifference, defiance, or aggression as self-protective reactions. In these cases, risk-taking, breaking rules, fighting back, and hurting others who are perceived to be powerful or vulnerable may become a way to survive emotionally or literally.²⁶

As a result, perhaps, of the twin effects of trauma and developmental deficiencies, corrections professionals see a significant number of juvenile offenders with mental health issues. As many as 70 percent of juvenile offenders are affected with a mental disorder – depression, anxiety, post-traumatic stress, conduct disorders – and one in five suffer from a mental illness that impairs their ability to function.²⁷ Two-thirds of juvenile offenders with

²⁴ *Id.*

²⁵ See Frank W. Putnam, *The Impact of Trauma on Child Development*, 57 Juv. & Fam. Ct. J., Winter 2006, at 1, 1-7 (discussing the neurological effects of child maltreatment on youth); Henry R. Cellini, *Child Abuse, Neglect and Delinquency: The Neurological Link*, 55 JUV. & FAM. CT. J., Fall 2004, at 1, 1-14 (discussing research showing the “clear connection” between child maltreatment and negative changes in a youth’s neurological development).

²⁶ Julian D. Ford et al, *supra* n. 18, at 3.

²⁷ Sarah Hammond, National Conference of State Legislatures, *Mental Health Needs of Juvenile Offenders*, at 4 (2007); see

any mental health diagnosis most often had a dual diagnosis, typically substance abuse.²⁸

In order to address the developmental needs of these offenders, corrections professions must first confront and repair the effects of trauma and victimization that have impaired normal development and socialization. While exposure to violence and victimization creates a significant risk for juvenile violent offending, the formation of positive social learning and social control factors – i.e. family and school attachments and other environmental factors that can serve to reject the propriety of violent behavior – mediates the risk of engaging in violent behavior.²⁹ As discussed *infra*, corrections professional have the ability to treat and reform these offenders.

Howard N. Snyder & Melissa Sickmund, *Juvenile Offenders and Victims: 2006 National Report*, OJJDP NATIONAL REPORT (Office of Juvenile Justice & Delinquency Prevention, Wash. D.C.), 2006, at 233. (reporting results of a survey designed to detect emotional problems showing that 90% of committed youth presented as having some type of emotional disorder; 71% more than one). 81% of committed youth surveyed indicated some degree of anger management problem; 61% also presented as experiencing anxiety and 59%, depression. Howard N. Snyder & Melissa Sickmund, *supra*, at 233. 27% of these youth reported suicidal feelings or ideation and 21% had attempted suicide at least once in their life. *Id.*

²⁸ Sarah Hammond, *supra* n. 27, at 5.

²⁹ See Angela R. Gover, *The Effects of Child Maltreatment on Violent Offending Among Institutionalized Youth*, 17 VIOLENCE AND VICTIMS 655, 657, 662 (2002) (discussing various studies and reporting that in a study of over 3000 juvenile offenders across the country, the increased likelihood of violent offending created by the effect of child maltreatment was mediated by social learning and social control factors).

My philosophy in working with Young Adult Offenders (YAOs) is that if you keep them feeling safe, they will grow and develop and allow you to lead them. If for any reason that YAO feels that safety is jeopardized, he has a tendency to revert to behavior he knows from the streets and that often includes violence. The inmates who enter the Young Adult Offender Program often come into the facility in what we refer to as “survival mode.” Until we can teach them that there is more to life than just survival, they test us as staff. One day you come to work, and the inmate who has been the biggest problem in the program has a new look about him. He is following the rules and being respectful, for the first time taking responsibility for himself. That is the day you know that you have been able to reach that inmate.

J. Barry Johnson, former Superintendent (2000-2007) SCI Pine Grove – a maximum-security correction facility for Young Adult Offenders in Pennsylvania.³⁰

³⁰ *Pennsylvania's Young Adult Offenders - Message from Superintendent Johnson*, CORRECTIONAL NEWSFRONT (Pa. Dept. of Corrections, Pa.), 2001, Vol. XXVII, at 3.

2. JUVENILE AND ADULT CORRECTIONS CAN REHABILITATE THESE OFFENDERS AND PROTECT THE COMMUNITY.

We know so much more today about “what works” than we knew 30, 20 and even 10 years ago. Evidence- and research-based approaches to reducing juvenile crime and improving recidivism rates are gaining in acceptance and implementation. We are getting better at targeting our prevention resources for high-risk children before they have serious involvement in the system. We are improving our screening and assessment tools to better understand both the strengths and weaknesses of the families and young people we see. We are doing a better job of training our work force to meet the challenges of juvenile crime in the new millennium.

Francisco “Frank” J. Alarcon, Deputy Secretary, Florida Department of Juvenile Justice³¹

Despite the widespread and inaccurate misconception that violent juvenile offenders are – as evidenced by the nature of the offenses they have committed – incapable of being rehabilitated, we see a remarkable amount of success with these offenders. The wealth of research now available on violent behavior in youth has provided corrections

³¹ Francisco “Frank” J. Alarcon, Commentary, *Juvenile Corrections: Why Would Anyone Want to Work in This Business?*, CORRECTIONS TODAY (Amer. Correctional Assoc., Alexandria, Va), Feb. 2004, at 8.

administrators, staff and probations officers with the tools needed to implement effective rehabilitation efforts. In recent years, there has been an increase in the availability and use of evidence-based practices - practices that controlled research shows to have resulted in improved outcomes - in treating juvenile offenders.³² Research indicating that aspects of the brain regulating cognitive and behavioral responses are undeveloped in adolescents³³ has guided corrections professionals toward effective cognitive and behavioral therapies. According to a 2007 survey, 88% of states utilize Cognitive-Behavioral Therapy in their juvenile facilities, 57% use Aggression Replacement Therapy, and many also use a number of other therapies – Functional Family Therapy, Multi-systemic Therapy, and Therapeutic Foster Care among others – designed to address the social and environmental stressors that contribute to delinquent and criminal behavior.³⁴

³² Edward J. Loughran & Kim Godfrey, *CJCA YEARBOOK 2007: A NATIONAL PERSPECTIVE OF JUVENILE CORRECTIONS*, (Council of Juvenile Correctional Administrators) (“CJCA YEARBOOK”) 55 (2008).

³³ See R.K. Lenroot & J.N. Giedd, *Brain Development In Children And Adolescents: Insights From Anatomical Magnetic Resonance Imaging*, 30 *NEUROSCI. & BEHAV. REVS.* 718, 723 (2006) (discussing the neurobiological basis for adolescents’ lesser ability as compared to adults, to self-regulate their behavior); Elizabeth Cauffman & Lawrence Steinberg, *(Im)Maturity of Judgment in Adolescents: Why Adolescents May Be Less Culpable Than Adults*, 18 *BEHAV. SCI. & L.* 741, 756-57 (2000) (discussing cognitive and psychosocial immaturity in adolescents); *see also supra* n. 12.

³⁴ *CJCA YEARBOOK*, *supra* n. 32, at 55-56.

Performance-based Standards (PbS), a system launched by the Office of Juvenile Justice and Delinquency Prevention and directed by the Council for Juvenile Correctional Administrators (“CJCA”), now sets national standards establishing the highest quality practices and treatment services for incarcerated youth and monitors participating facilities by outcome measures that report on the safety, security, order and climate within facilities as well as education, health/mental health, programming and reintegration services. *Welcome to Performance-based Standards*, <http://pbstandards.org/> (2009). For serious and violent juvenile offenders, juvenile and adult corrections embrace a model that balances accountability and security with the delivery of services – developmental, educational, mental health – that address the special needs of this population.³⁵

i. Model programs within juvenile corrections

While some violent offenders are transferred into the adult system, the juvenile system also retains a significant number – either adjudicated delinquent or tried as an adult but serving all or part of their sentence in a juvenile facility. The 2006 Census of Juveniles in Residential Placement revealed that of the approximately 92,000 youth held in juvenile residential facilities, 23% committed violent crime index offenses (criminal homicide,

³⁵ See Council of Juvenile Correctional Administrators, Position Paper on Waiver and Transfer of Youth to Adult Systems, available at <http://cjca.net/photos/content/documents/Waiver.pdf> (last visited July 21, 2009); ACA Youthful Offender Policy, *supra* n. 4.

violent sexual assault, robbery, aggravated assault).³⁶ Melissa Sickmund, T.J. Sladky, and Wei Kang, *Census of Juveniles in Residential Placement Databook (2008) (“CJRP Databook”)*, http://www.ojjdp.ncjrs.gov/ojstatbb/cjrp/asp/state_offense.asp. Further, 10% of all the juveniles in residential placement were placed there for a burglary offense. *Id.* Only 5% of all juveniles in these facilities were held for status offenses (running away, truancy, incorrigibility, underage drinking).³⁷ *Id.*

The experience of juvenile corrections in treating this population has led to improved outcomes³⁸ and models for success. More

³⁶ In 2006, juvenile facilities held 6792 juveniles committed for sexual assault, 6707 committed for robbery, 7289 committed for aggravated assault, and 988 committed for homicide. Melissa Sickmund, T.J. Sladky, and Wei Kang, *Census of Juveniles in Residential Placement Databook (2008) (“CJRP Databook”)*, http://www.ojjdp.ncjrs.gov/ojstatbb/cjrp/asp/state_offense.asp. A 2007 survey by the CJCA including youth in residential and non-residential juvenile corrections services reported a population of more than 225,000 youth, 27% of whom committed violent crime index offenses. *CJCA YEARBOOK 2007, supra*, at 26.

³⁷ The remaining categories of juveniles confined include 15% committed for other property offenses (theft, arson, other), 11% committed for public order offenses (weapons, other), 9% committed for drug offenses, and 11% committed for simple assault or other person offenses. *CJRP Databook, supra* n. 36.

³⁸ Shelley Zavlek, *Planning Community-Based Facilities for Violent Juvenile Offenders as Part of a System of Graduated Sanctions*, *JUVENILE JUSTICE BULLETIN* (Office of Juvenile Justice and Delinquency Prevention, Wash., DC), August 2005, at 6; see Mark W. Lipsey & David B. Wilson, *Effective Intervention for Serious Juvenile Offenders: A Synthesis of Research*, in *SERIOUS AND VIOLENT JUVENILE OFFENDERS: RISK FACTORS FOR SUCCESSFUL INTERVENTIONS* 338 (Loeber &

importantly, positive results are not difficult to replicate. The efficacy of rehabilitation programs do not vary based on the characteristics of the juvenile offenders treated (including the nature of the offenses committed and prior offense history).³⁹ Rather, program characteristics – the way a program is organized, staffed, administered – have been found to be the most important factor impacting program effectiveness; in particular, larger treatment effects were found for more well-established programs.⁴⁰ Treatment type and amount was next in significance – the longer the treatment, the greater the effectiveness.⁴¹ The type of treatment shown most effective was interpersonal skills programs – those that focused on social skills training, anger management, moral education, etc.⁴² Aftercare programs upon release that prepare juveniles for re-entry into the community, are also essential to

Farrington, eds. 1998) (conducting a meta-analysis of 200 studies of interventions with institutionalized and non-institutionalized youth and finding that treatment programs for serious and violent offenders have been shown reduce recidivism by as much as 40%).

³⁹ See Mark W. Lipsey, David B. Wilson, & Lynn Cothorn, *Effective Intervention for Serious Offenders*, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice and Delinquency Prevention, Wash., DC), April 2000, at 3 (finding in a meta-analysis of 83 studies of programs for institutionalized serious violent and nonviolent offenders that offender characteristics had the smallest effect on outcomes).

⁴⁰ *Id.* at 3, 4.

⁴¹ *Id.* at 3.

⁴² *Id.* at 3-4; Office of Juvenile Justice and Delinquency Prevention, *Critical Findings: Serious and Violent Juvenile Offenders*,

http://ojjdp.ncjrs.org/pubs/makingadiffer/critical_1.html (last visited July 21, 2009).

continued progress once juvenile offenders are released.⁴³

1. The Missouri Department of Youth Services

Missouri's system has had extraordinary success reducing recidivism through a system of regional small-scale secure correction centers and an array of community-based non-residential programs and group homes.⁴⁴ In Missouri's Department of Youth Services ("MDYS") for 2008, 13% of the youth were committed for the most serious felonies (A&B felonies) and 41% for other felonies.⁴⁵ Missouri Division of Youth Services: Research & Evaluation, *Annual Report: Fiscal Year 2008 ("MDYS 2008 Annual Report")*, at vi (2009). The Division of Youth Services receives juveniles tried as adults with blended sentences – juvenile and adult sentences imposed with the execution of the adult sentence suspended.⁴⁶ In 2008, 46% of youth admitted to MDYS had a history of prior mental health services, 54% had a history of prior substance abuse involvement, and 23% were identified as having an educational disability. *MDYS 2008 Annual Report*, *supra* at vi.

⁴³ *Serious and Violent Juvenile Offenders*, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice and Delinquency Prevention, Wash. D.C.), May 1998, at 6.

⁴⁴ Zavlek, *supra* n. 38 at 8.

⁴⁵ 37% were committed for misdemeanors and other non-felonies; 10% for juvenile (status) offenses. *MDYS 2008 Annual Report*, *supra*, at vi.

⁴⁶ Missouri Division of Youth Services, *Dual Jurisdiction Program: A Sentencing Option for Youthful Offenders*, at 2, available at <http://www.dss.mo.gov/dys/pdf/djp021705.pdf> (last visited July 21, 2009).

Three-fourths of offenders committed to MDYS are assigned to non-residential community programs and less secure facilities. Zavlek, *supra* n. 38 at 8. This allows the medium to high-security facilities to maintain a smaller population and provide individualized treatment for each youth. Treatment addresses issues including victim empathy, social skills, anger/emotions management, healthy thinking patterns and coping skills, peer influences, substance abuse, and self-esteem; much of the programming centers around group dynamics and processes.⁴⁷ Missouri's approach utilizes constant therapeutic interventions and minimal force.

In a typical juvenile corrections environment, Mr. Decker [Director of MDYS] said, if a youth becomes aggressive "you would have guards drag him into isolation" for three days.

"But," he added, "the problem is that a young person doesn't learn how to avoid that aggressive behavior and it will get worse."

In Missouri Hills [one of the MDYS facilities], isolation rooms were used only about a dozen times last year, Mr. Decker said, and never for more than a few hours. Pepper spray is banned, and youth are taught to de-escalate fights or apply grappling holds, a form of restraint.

⁴⁷ *DYS Frequently Asked Questions: Treatment Services*, <http://www.dss.mo.gov/dys/faq/treatserv.htm> (last visited July 21, 2009).

[One juvenile] explained how her housing unit does a “circle-up,” or ad hoc counseling session, several times a day, whenever there is a conflict, like cursing.

.....

When someone becomes unruly, the other youth are trained to talk him down.⁴⁸

MDYS’s recidivism rate based on the recommitment to MDYS after 24 months of release was 10% for 2008 and had been between 7-9% for the 4 years prior to 2008. *MDYS 2008 Annual Report*, at 18. Moreover, as of 2005, only 7% of youth released from MDYS were in Missouri’s prisons 5 years after their release. Zavlek, *supra* n. 38 at 30. Missouri’s model is also cost-effective – MDYS’s budget in 2000 amounted to about \$94 per youth in Missouri’s population, while the average budget in the eight states surrounding Missouri was approximately \$140 per youth. *Id.*

2. The Texas Youth Commission

The Texas Youth Commission (“TYC”), although undergoing some changes in programming,⁴⁹ has had proven success treating

⁴⁸ Solomon Moore, *Missouri System Treats Juvenile Offenders with Lighter Hand*, N.Y. TIMES, March 27, 2009, available at http://www.nytimes.com/2009/03/27/us/27juvenile.html?pagewanted=1&_r=1 (last visited July 21, 2009).

⁴⁹ TYC is now in the process of implementing a new general treatment program CoNEXTions - that combines cognitive-behavioral based interventions, an aggressive skills and motivation component, an aggressive community integration and a strong academic or workforce development component.

youth convicted of serious violent offenses and sex offenses. TYC in 2008 had 83% of committed youth with an IQ less than 100, 58% had prior out of home placements, 33% had a history of abuse and neglect, 49% had a family history of criminal behavior, 36% was special education eligible and 32% had a serious mental health diagnosis. Texas Youth Commission: Research and Planning Department, *Review of Agency Treatment Effectiveness: Fiscal Year 2008* (“TYC Review 2008”), at 3 (2008). TYC offered Resocialization as its primary treatment intervention, which focused on three major areas: academic and workforce development, behavior modification, and correctional therapy. *Id.* at 7.

The specialized treatment programs were based on the Resocialization model but with emphasis on the specific treatment need.⁵⁰ *Id.* at 7-8.

TYC Review 2008, supra at 16. The Specialized treatment programs are currently being updated to integrate practices from this treatment model. *Id.* at 7-8.

⁵⁰ In the general program, an offender progressed through a system of four “phases” in each area - Orientation, Life Story, Offense Cycle, and Success Plan - that required youth to learn and demonstrate competency in a series of objectives designed to reduce the probability of offending. *Id.* at 7. In the specialized program:

Life Stories included additional focus on the etiology and development of those specific risk areas associated with the specialized need being addressed. Offense cycles were expanded to include understanding of how aggressive, sexual or drug related behavior patterns emerged and were maintained with emphasis on how they could be modified. Success Planning addressed specific risk management issues in the community to address these specialized risks. In addition, those in the specialized programs

The Capital and Serious Violent Offender Treatment Program, operated within the high-security Giddings State School, is an intensive 24-week program, where youth enroll after spending years in general population.⁵¹ Through extended group therapy sessions “[t]he program helps these young people connect feelings associated with their violent behavior and to identify alternative ways to respond when faced with risky situations in the future. Participants in this program are required to reenact their crimes and to play the role of both perpetrator and victim.” Texas Youth Commission, *Specialized Correctional Treatment*, http://www.tyc.state.tx.us/programs/special_treat.html (last visited July 21, 2009). The Sexual Behavior Treatment Program is a structured 12-18 month program operating at three TYC institutions. *TYC Review 2008, supra* at 8. The program builds on the agencies treatment program with individual and group counseling focusing on the youth deviant sexual behavior, includes psychosexual education and, for youth with abuse histories, trauma resolution therapies. Texas Youth Commission, *Specialized Correctional Treatment, supra*.

Both programs have been shown effective in reducing recidivism. Notably, in 2008, the re-arrest rate within 12 months for a violent offense was 3% for those in the sex offender program and 2% for the

received Psycho-educational programming to help them better understand “normal” development and social customs.

TYC Review 2008, supra, at 8.

⁵¹ John Hubner, LAST CHANCE IN TEXAS xxiv(2005); *TYC Review 2008, supra*, at 8.

violent offender program. *TYC Review 2008* at 10-11. The treatment effectiveness of the programs were measured as compared to a control group (offenders with high risk for sexual or violent re-offense who did not participate in this program) and both showed large differences.⁵² *Id.* at 5, 18. The violent offender program participants were 36% less likely to be arrested for any offense and 68% less likely to be arrested for a violent offense within 1 year; the sex offender program participants were 62% less likely to be rearrested for a violent offense within one year and 18% less likely to be incarcerated for any offense within three years. *Id.* at 10, 11.

Other states and jurisdictions have embraced these models. The District of Columbia, Santa Clara County (Ca.), San Francisco City and County (Ca.), New York, Louisiana and New Mexico are now working with the Missouri Youth Services Institute⁵³ to implement changes to their systems.⁵⁴ The District of Columbia has recently announced the

⁵² The sex offender control group had a 5% rate of re-arrest and the violent offender control group had an 8% rate of re-arrest rate for violent offenses. While there was a statistically significant difference for the sex offender group, the difference between the capital offender group and the control group was not significant because of the small sample size. *Id.* at 18.

⁵³ The Missouri Youth Services Institute is a not-for-profit founded by Mark D. Steward, former Director of Missouri Youth Services to assist juvenile systems in their reform efforts. *Missouri Youth Services Institute: Home*, <http://mysiconsulting.org/index.php> (last visited July 21, 2009).

⁵⁴ *See About Missouri Youth Services Institute: Where We Are Working*, <http://mysiconsulting.org/about.php> (last visited July 21, 2009).

opening of a new secure facility for serious juvenile offenders – the “New Beginnings Youth Development Center” – that will adopt a nine-to-twelve month behavior modification program modeled after the Missouri approach for the most serious and chronic young offenders.⁵⁵ The D.C. Department of Youth Rehabilitation Services has reported a 50% decrease in recidivism among their youth in secure custody since 2005 through an increased focus on rehabilitation.⁵⁶ Rhode Island recently announced a proposal to implement the Resocialization System utilized by the TYC.⁵⁷

Though information-sharing and the implementation of research-based practices, the rehabilitation of violent juvenile offenders is not a theoretical possibility, it is a practical reality.

⁵⁵ *DYRS: Secure Program*, <http://dyrs.dc.gov/dyrs/cwp/view,a,3,q,599546.asp> (last visited July 21, 2009). *Department of Youth Rehabilitation Services Opens State of the Art Facility for District Youth*, Press Release, May 30, 2009, <http://newsroom.dc.gov/show.aspx/agency/dyrs/section/2/release/17227>.

⁵⁶ *Department of Youth Rehabilitation Services Opens State of the Art Facility for District Youth*, *supra*.

⁵⁷ *See generally* Rhode Island Dept of Children, Youth and Families, *Proposal to Implement a New Treatment and Resocialization System for Adjudicated Youth in Rhode Island*, http://www.dcyf.state.ri.us/docs/rits_resocial.pdf (last visited July 21, 2009).

3. THE APPROPRIATENESS OF A LIFE SENTENCE
IMPOSED ON A JUVENILE OFFENDER CAN PROPERLY
BE MEASURED ONLY BY A POST-SENTENCING REVIEW
OF HIS OR HER DEVELOPMENT

A lifetime in prison is a punishment reserved for few offenders. 95% of all those incarcerated in state prison will be released.⁵⁸ In 2007, the median sentence length for felons sentenced to incarceration was 72 months for rape, 60 months for robbery, 24 months for aggravated assault, and 24 months for burglary.⁵⁹ Even in the 75 largest counties in the nation, which account for about half of all reported violent crime in this country, the median sentence was not significantly higher.⁶⁰ From 1990 to 2002, in these counties, the median sentence received was 120 months for rape, 60 months for robbery and 48 months for assault.⁶¹

⁵⁸ Timothy Hughes & Doris James Wilson, Bureau of Justice Statistics, Reentry Trends in the United States: Inmate Returning to the Community After Serving Time in Prison, <http://www.ojp.usdoj.gov/bjs/reentry/reentry.htm> (last visited July 21, 2009).

⁵⁹ Bureau of Justice Statistics, State Court Sentencing of Convicted Felons, 2004- Statistical Tables – Table 1.3 Mean and Median Felony Sentence Lengths in State Courts, by Offense and Type of Sentence, 2004, *available at* <http://www.ojp.usdoj.gov/bjs/pub/html/scscf04/tables/scs04103tab.htm> (last visited July 21, 2009). The median calculation includes those sentenced to life or death sentences. *Id.* The mean calculation, which excludes life and death sentences were higher – 123 months for rape, 86 months for robbery, 41 months for aggravated assault, and 40 months for burglary. *Id.*

⁶⁰ See Brian A. Reaves, *Violent Felons in Large Urban Counties*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT (BJS, Wash, D.C.), July 2006, at 1, 8.

⁶¹ *Id.* at 8.

For juveniles, a lifetime in prison has a greater and harsher significance than for adults. Juveniles will grow into adulthood in prison and will serve much longer than adult offenders. Moreover, younger offenders are a vulnerable population in adult facilities, with higher suicide rates and greater risk of physical and sexual assault than adult offenders⁶² – of particular concern for those juveniles placed in general population with adults.⁶³

In addition, the separate juvenile and adult adjudications of violent offenses distorts a criminal court judge's ability to assess the proportionality of the imposition of a life sentence on a youth. In 2005, juvenile courts disposed of an estimated⁶⁴ 81,600 delinquency cases involving violent crime index offenses (murder, non-negligent manslaughter,

⁶² See Martin Forst, Jeffrey Fagan & T. Scott Vivona, *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment Custody Dichotomy*, 40 JUV. & FAM. CT. J., 1989, at 1, 9-10. (finding that young people in adult prisons are at greater risk for sexual and physical assault than both older inmates and comparable youths in juvenile facilities); Michael G. Flaherty, *The National Incidence of Juvenile Suicide in Adult Jails and Juvenile Detention Centers*, 13 SUICIDE AND LIFE THREATENING BEHAVIOR, 85-94 (1983) (finding that the suicide rate for juveniles in jail is eight times that of juveniles in detention centers).

⁶³ In 1995, “[t]wenty-seven [Department of Corrections] house those offenders under age 18 in the general population of adult institutions or in protective custody within those institutions if needed.” *Offenders Under 18 in State Adult Correctional Systems: A National Picture*, SPECIAL ISSUES IN CORRECTIONS, (LIS, Inc., Longmont, Co.), Feb. 1995, at 3, 5-6.

⁶⁴ Estimates are based on data from over 2100 courts with jurisdiction over 80% of the juvenile population. Melissa Sickmund, *Delinquency Cases in Juvenile Court, 2005*, OJJDP FACT SHEET, (Office of Juvenile Justice and Delinquency Prevention, Wash. D.C.), June 2009, at 1.

forcible rape, robbery, and aggravated assault).⁶⁵ Of the estimated 429,500 total person offense cases disposed of by the juvenile court in 2005, only 3,500 were waived to criminal court.⁶⁶ Although cases transferred by judicial waiver do not represent the entire universe of juvenile cases filed in criminal court (statutory exclusion and prosecutor direct file cases), 2005 juvenile arrests data suggests that the vast majority of these violent crime index cases are resolved in juvenile court.⁶⁷ Therefore, juvenile courts adjudicated a substantial number of cases involving similarly situated violent offenders never exposed to a life without parole sentence. One study revealed that violent young offenders in the adult system received sentences five times longer than those retained in the juvenile system with similar offense characteristics.⁶⁸

⁶⁵ According to estimates, juvenile court disposed of 1,400 criminal homicide, 4,400 forcible rape, 26,000 robbery, and 49,900 aggravated assault cases. *Id.* at 2.

⁶⁶ *Id.* at 3.

⁶⁷ In 2005, an estimated 95,300 violent crime index arrests of juveniles were made, which even assuming that all the person offenses waived to criminal court were violent offenses, still suggests that a substantial number of these cases were resolved in juvenile court – 95,300 – 81,600 (cases in juvenile court) + 3500 (judicial waiver) = 17,200 (cases in criminal court).

Howard N. Snyder, *Juvenile Arrests 2005*, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice & Delinquency Prevention, Wash. D.C.), April 2009, at 3. In 2005, an estimated 7% of all juvenile arrests – 149,800 out of 2.14 million total arrests - were referred directly to criminal court. *Id.* at 5.

⁶⁸ Cary Rudman et. al, *Violent Youth in Adult Court: Process and Punishment*, 2 CRIME & DELINQUENCY 75, 88-89 (1986); see also Marcy Rasmussen Podkopacz & Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 J. OF CRIM. L. & CRIMINOLOGY 449, 485-89 (1996) (finding that violent

The imposition of a life without parole sentence on juveniles must take some account of a juvenile offenders' unique capacity for rehabilitation. Decades of social research shows that most youth "age-out" of engaging in reckless and criminal behavior. During the period of adolescence, because of the developmental deficiencies discussed *infra*, recklessness and most criminal behavior is at its peak.⁶⁹ "[M]ost participants in adolescent delinquency desist from involvement by early adulthood, even those most involved during adolescence."⁷⁰

Thus, confidently predicting that a juvenile offender's criminal behavior will persist is almost impossible. Jurists are unable to predict serious criminal behavior in juveniles.⁷¹ The American

young offenders in adult courts received sentences about five times longer than violent juvenile offenders).

⁶⁹ See Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 339 (1992); see Patrick H. Tolan & Deborah Gorman-Smith, *Development of Serious and Violent Offending Careers*, in SERIOUS AND VIOLENT JUVENILE OFFENDERS: RISK FACTORS AND SUCCESSFUL INTERVENTIONS 73 (Rolf Loeber and David Farrington, eds. 1998) (discussing established findings that crime prevalence increases during early adolescence for most crimes, except drug sales, which peaks in early adulthood).

⁷⁰ Tolan & Gorman Smith, *supra* n. 69, at 73.

⁷¹ See Jeffrey Fagan & Martin Guggenheim, *Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment*, 86 J. OF CRIM. L. & CRIMINOLOGY, 415, 437-38, 447 (1996) (reporting results of a study showing that judges rendered inaccurate predictions of future dangerousness of juveniles in more than eight-out-of-ten cases for preventive detention determinations); See generally Norval Morris & Marc Miller, *Predictions of Dangerousness*, 6 CRIME & JUST. 1, 1 (1985) (arguing that, because of limited reliability, "[t]he use of predictions of dangerousness to alter

Psychiatric Association holds the position that “[a]lthough mental health professionals are able to characterize the functional and behavioral features of an individual adolescent, their ability to reliably predict future character formation, dangerousness, or amenability to rehabilitation is inherently limited.” Brief for the American Psychological Ass'n, & Missouri Psychological Ass'n as *Amici Curiae* Supporting Respondent at 19, *Roper v. Simmons*, 543 U.S. 551 (2005).

Prior dire predictions about the trends in juvenile offender behavior and patterns similarly have proved inaccurate. Despite forecasts in the 1990's of the juvenile super-predator, the threat never materialized.⁷² Since then violent juvenile crime has decreased significantly – the juvenile arrest rate for murder is down 77% from its 1993 peak; the rate for forcible rape is 54% less than its 1991 peak and even below the 1980 level; the rate for robbery is 47% less than its 1995 peak; and the arrest rate for aggravated assault has reached its lowest level since 1980, down 41% from its 1994 peak. Charles Puzanchera, *Juvenile Arrests 2007*, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice & Delinquency Prevention, Wash. D.C.), April 2009, at 6.

individual dispositions should be allowed only to the extent that such dispositions would be justified as deserved independent of those predictions”).

⁷² See generally Shay Bilchik, *Challenging the Myths*, 1999 National Report Series, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice and Delinquency Prevention, Wash. D.C.), Feb. 2000 (discussing the lack of statistical support for the “super-predator” theory).

Predictions as to juvenile behavior, both globally and individually, have proven erroneous. To ensure that those juveniles sentenced to a lifetime in prison are deserving of such a sentence requires the ability to assess that juvenile once he has entered adulthood. This does not prevent a child with sufficient culpability who does not respond to treatment from serving a very lengthy sentence.

CONCLUSION

Only a post-adolescence review can assure the suitability of a life sentence. Moreover, an opportunity for post-sentencing review of the progress of juveniles allows corrections and social service professionals working closely with juveniles to provide an educated evaluation of that youth's development and progress toward rehabilitation.

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