

Nos. 08-7412, 08-7621

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**In the Supreme Court of the United States**

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Terrance Jamar Graham,

*Petitioner,*

v.

State of Florida,

*Respondent.*

Joe Harris Sullivan,

*Petitioner,*

v.

State of Florida,

*Respondent.*

**On Writs of Certiorari to  
the First District Court of Appeal of Florida**

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**BRIEF OF DISABILITY RIGHTS  
LEGAL CENTER AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONERS**

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Paula D. Pearlman  
Carly J. Munson  
Disability Rights Legal  
Center  
919 Albany St.  
Los Angeles, CA 90015  
(213) 736-1031

Neil M. Soltman  
*Counsel of Record*  
Mayer Brown LLP  
350 South Grand Ave.  
Los Angeles, CA 90071  
(213) 229-9500

Additional counsel listed inside front cover

---

Donald M. Falk  
Mayer Brown LLP  
Two Palo Alto Square  
3000 El Camino Real  
Palo Alto, CA 94306  
(650) 331-2000

Brian J. Wong  
Mayer Brown LLP  
1909 K Street, N.W.  
Washington, DC 20006  
(202) 263-3000

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**BRIEF OF DISABILITY RIGHTS  
LEGAL CENTER AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONERS <sup>1</sup>**

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**INTEREST OF THE *AMICUS CURIAE***

The Disability Rights Legal Center (DRLC) is a non-profit organization dedicated to promoting the rights of people with disabilities and to heightening public awareness of those rights by providing legal and related services. DRLC accomplishes its mission through many programs, including the Cancer Legal Resource Center (a joint program with Loyola Law School), the Education Advocacy Program, the Education and Outreach Program, and the Civil Rights Litigation Program. Since 1975, DRLC has handled countless disability rights cases under state and federal civil rights laws challenging discriminatory practices by government, business, and educational institutions.

DRLC has a particular interest in juvenile justice issues. DRLC provides legal advocacy to ensure that at-risk youth receive appropriate general and special education services in their community, thereby reducing the likelihood that they will one day become involved in the juvenile and adult justice systems. Because early intervention is far from comprehensive, a large proportion of youth who do become in-

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<sup>1</sup> Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days before the due date of the intention of *amicus* to file this brief. The parties' letters consenting to the filing of this brief are filed with the Clerk's office.

volved in the juvenile delinquency system have undetected learning-related disabilities. DRJC's Juvenile Justice Section accordingly works to ensure that court-involved youth with special education needs receive appropriate education and related services. DRJC supports criminal justice policies that recognize the special needs of juveniles and the factors that uniquely affect their culpability. It therefore opposes the imposition of life-without-parole sentences on juveniles whose offenses were committed before the age of 18.

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

Sending children to prison for life without parole violates the Eighth Amendment because the practice is both cruel and unusual. It is grossly disproportionate to juvenile culpability, especially for non-homicidal crimes like those at issue here. It is exceptionally unusual in modern society. And it is unusually cruel in light of the offender's extreme youth, which more often than not is accompanied by a developmental disability.

A juvenile sentence of life without parole is as final and irrevocable as a juvenile death sentence. It condemns the juvenile to die in prison as surely as a death sentence; under both sentences the juvenile enters prison as a shackled teenager and decades later leaves in a pine box. The sole difference is that in life without parole the State awaits the death, rather than inflicts it. But a sentence of life without parole, just as certainly as a death sentence, forecloses any prospect of personal rehabilitation or societal reentry, and accordingly should be reserved for the very worst of offenders, those whose prior culpability is unquestionable and whose future rehabilita-

tion inconceivable. The same considerations that led this Court to find juvenile executions unconstitutional in *Roper v. Simmons*, 543 U.S. 551 (2005), and *Thompson v. Oklahoma*, 487 U.S. 815 (1988), render the sentence here beyond the scope permitted by the Eighth Amendment.

Although children should be held accountable for their crimes, it does not follow that they should be punished identically to adults. Society has long distinguished among the rights, privileges, and burdens of adults and children. See Br. for Pet. in No. 08-7621, App. A. Children are not miniature adults but rather are fundamentally different. They are more impulsive and less able to assess the risks and consequences of their actions. Moreover, because children are not neurologically complete, they are far less likely to be truly hardened criminals. Thus, children have a greater potential for rehabilitation. The constitutional limits on their punishment should reflect those inherent differences.

This brief explains how juveniles' special susceptibility to emotional, psychological, and learning-related disabilities affects the constitutional limits on their sentencing. Juveniles with serious emotional, psychiatric, and learning-related brain disabilities are significantly overrepresented in the incarcerated population. Juveniles suffering from serious disabilities, moreover, are likely to be particularly disadvantaged at every stage of their dealings with the criminal justice system. When their disabilities are unrecognized, as is often the case, these problems intensify. The cases before this Court are illustrative—both *Graham* (in No. 08-7412) and *Sullivan* (in No. 08-7621) have substantial disabilities, yet there is no evidence that their disabilities re-

ceived any consideration at sentencing. And the disproportionality of a sentence of life without parole is especially pronounced for juveniles with disabilities, given the realities of long-term incarceration in facilities where harsh and austere conditions purposely tax the most hardened adult inmate; those same conditions aggravate existing juvenile deficits.

The high frequency of disabilities in juveniles involved in the criminal justice system further impedes the reliable assessment of juvenile culpability. Consequently, any irrevocable assessment of culpability is necessarily unsound and a lifelong sentence unconstitutionally excessive. The discredited notion that juveniles are merely adults in training and thus should be subject to the same punishment should be laid to rest. As this Court has recognized, juveniles, and especially juveniles with diminished capacities, present different issues of culpability entirely. Because the nature and the assessment of juvenile culpability make final and irrevocable judgments irrational, a sentence to a juvenile of life without parole for a non-homicidal offense exceeds constitutional limits in the same way as a death sentence for a juvenile who commits a homicide.

### **ARGUMENT**

A wealth of psychosocial and neurological research shows that juveniles differ from adults in numerous ways that reduce their moral culpability. These developmental limitations and deficiencies are magnified when disability is a factor. It is therefore unsurprising that juveniles with disabilities are overrepresented (and fare especially poorly) in the criminal justice system. This fact illuminates the fundamentally mistaken assumption about juvenile culpability that underlies juvenile sentences of life

without parole: namely, that it is possible to conclude that a juvenile—in these cases a 17-year-old and a 13-year-old, in another perhaps a 10-year-old—is wholly unredeemable and should, for that reason, be permanently banished from free society.<sup>2</sup> To the contrary, the defining characteristic of juvenile personality is its transience. All juveniles mature, and the control that comes with maturity can check the transgressive influences of disability—influences that are particularly pronounced on the still-forming juvenile psyche. A sentence of life without parole presumes irreparable corruption when in fact juvenile offenders are immature, often have disabilities, act impulsively, and—above all—are still in the process of growing into the adults they eventually will become. For that reason, this Court observed, “it is likely cruel, and certainly unusual, to impose on a child a punishment that takes as its predicate the existence of a fully rational, choosing agent.” *Thompson v. Oklahoma*, 487 U.S. 815, 825 n.23 (1988) (plurality op.). A punishment that imprisons a juvenile until death rests on an equally unsound premise, and therefore is unconstitutionally disproportionate.

As this Court repeatedly has acknowledged, even normal children are less culpable for their actions than adults and therefore less deserving of the most severe criminal punishments. The presence of a disability further reduces the blameworthiness of juvenile offenders. And the very nature of a disability often impairs the evaluation of a juvenile’s moral cul-

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<sup>2</sup> Children as young as 10 or still younger are at risk from the sentencing practice challenged here. Under Florida law, a “child of *any age* who is charged with” a major crime may be “*tried and handled in every respect as an adult.*” Fla. Stat. Ann. § 985.56(1) (emphasis added.)

pability. Thus, the extraordinarily high prevalence of disability—both recognized and undiagnosed—among juvenile offenders is an additional reason that a sentence of life without parole is categorically disproportionate for any juvenile.

**A. Life Without Parole Is An Unconstitutionally Disproportionate Punishment Because Juveniles Are Less Morally Culpable.**

As this Court recognized over a quarter-century ago, “[e]ven the normal 16-year-old customarily lacks the maturity of an adult.” *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982). More recently, in *Roper v. Simmons*, 543 U.S. 551 (2005), the Court identified three broad differences between juveniles and adults that preclude the constitutional application of the death penalty to minors. These differences—each supported by substantial research—render equally unconstitutional the imposition of sentences of life without parole for non-homicidal offenses.

First, juveniles do not have the same capacity as adults for mature reasoning, risk assessment and impulse control; therefore, “impetuous and ill-considered actions and decisions” are “more understandable among the young.” *Roper*, 543 U.S. at 569 (internal quotation marks omitted).<sup>3</sup> Second, “juve-

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<sup>3</sup> See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality op.); Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-making Competence in Adolescents and Adults*, 22 J. Applied Dev. Psych. 257, 264-270 (2001); Reed Larson et al., *Mood Variability and the Psychosocial Adjustment of Adolescents*, 9 J. Youth & Adolescence 469, 488 (1980).



niles are more vulnerable or susceptible to negative influences and outside pressures. \* \* \* This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment.”<sup>4</sup> *Ibid.* Finally, “the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.”<sup>5</sup> *Id.* at 570.

These categorical developmental deficits combine to “render suspect any conclusion that a juvenile falls among the worst,” or most morally culpable of offenders. *Roper*, 543 U.S. at 570. For that reason, the consensus of modern society has rejected imposition of a sentence of life without parole on a juvenile, as the briefs for the petitioners explain. Accordingly, for the reasons more fully explained in those briefs and in the briefs of other *amici* supporting the petition-

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The remarks at sentencing in No. 08-7412, *Graham v. Florida*, reflect a contrary understanding of juveniles’ developmental characteristics. In the court’s view, Graham had “*decided*” that an “escalating pattern of criminal conduct” was “how [he was] going to lead [his] life” and remarked that it was “unfortunate that [he] made that *choice*.” No. 08-7412, J.A. 394 (emphasis added). By contrast, as noted above (at p. 5), this Court rejected the notion that a juvenile sentence may be constitutionally predicated on the notion of “a fully rational, choosing agent.” *Thompson*, 487 U.S. at 825 n.23.

<sup>4</sup> See, e.g., *Lee v. Weisman*, 505 U.S. 577, 593 (1992); *Thompson*, 487 U.S. at 835; Alan E. Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths*, in *Youth on Trial: A Developmental Perspective on Juvenile Justice* 33, 47-48 (Thomas Grisso & Robert G. Schwartz eds., 2000).

<sup>5</sup> See, e.g., Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in *Youth on Trial: A Developmental Perspective on Juvenile Justice* 9, 27 (Thomas Grisso & Robert G. Schwartz eds., 2000).

ers, such sentences are grossly disproportionate and therefore unconstitutional.

**B. The High Prevalence Of Disabilities Among Juvenile Offenders Makes Judicial Assessment Of Their Culpability Insufficiently Reliable To Support Irrevocable Punishment.**

The interplay among youth, disability, and delinquency underscores why juvenile life-without-parole sentences cannot withstand *Roper's* constitutional test. The high prevalence of disabilities among the delinquent youth population means that a large number of juveniles facing life without parole will have a disability.<sup>6</sup> Yet juveniles with disabilities are disadvantaged at every stage of their encounters with the criminal justice system. Indeed, disability often goes unrecognized, making it impossible to adequately consider its effect on the already reduced moral culpability of juveniles. Coupled with the inherent unreliability of judgments about juvenile culpability—which, as *Roper* recognized, stems from the fact that juvenile character is a work in progress—the distorting effect of widespread disability makes it inappropriate to sentence a juvenile to imprisonment until death.

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<sup>6</sup> For example, Graham, the petitioner in No. 08-7412, “most likely suffered a form of crack addiction at birth” (both parents were long-term crack addicts), No. 08-7412, J.A. 448, had long-term depression, *id.* at 446, 448, and suffered from ADHD, for which his mother refused the prescribed treatment. *id.* at 447. Sullivan, the petitioner in No. 08-7621, has a mental disability and, at age 13, read at a first-grade level. See No. 08-7621, J.A. 26 & Pet. Reply 7.

“[T]he signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.” *Roper*, 543 U.S. at 570 (internal quotation marks omitted). A sentence of life without parole irrevocably presumes the contrary, even though experience and science show that the volatile mix of youth and disability responsible for so much delinquent behavior among juveniles will fade in the fullness of time.

*1. Juveniles With Disabilities Are Disproportionately Affected By The Criminal Justice System.*

Incarcerated youth are significantly more likely to have a mental disorder than the general population of teens.<sup>7</sup> “[T]he general consensus” is that between 70 and 100 percent of “incarcerated youth meet [the] formal [diagnostic] criteria for at least one \* \* \* disorder,” with “approximately 20% of youth meeting diagnostic criteria for a serious mental health disorder—defined as serious emotional disturbance resulting in functional impairment.” Candice L. Odgers et al., *Misdiagnosing the Problem: Mental Health Profiles of Incarcerated Juveniles*, 14 *Can. Child Adolescent Psych. Rev.* 26, 27 (2005). By comparison, the prevalence of *any* disorder in the general youth population is approximately 1 in 3,

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<sup>7</sup> See Seena Fazel et al., *Mental Disorders Among Adolescents in Juvenile Detention and Correctional Facilities: A Systematic Review and Meta-regression Analysis of 25 Surveys*, 47 *J. Am. Acad. Child Adolescent Psych.* 1010, 1016 (2008) (youth in prison are between 2 to 20 times more likely to have mental disorders than age-equivalent youth in the general population); Christopher B. Forrest et al., *The Health Profile of Incarcerated Male Youths*, 105 *Pediatrics* 286, 289 (2000).

with only 1 in 10 youth meeting the criteria for a serious one. *Ibid.*

Three recent studies across five States provide compelling evidence of the high rate of mental disabilities among juveniles in the criminal justice system. Nearly 60% of male youths arrested in Cook County, Illinois, and over two-thirds of the females, met the diagnostic criteria for a psychiatric disorder. Linda A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 *Archives Gen. Psych.* 1133, 1137 (2002). Similar figures were reported in a study of over 1,400 youthful offenders from Louisiana, Texas, and Washington. Jennie L. Shufelt & Joseph J. Cocozza, Nat'l Ctr. For Mental Health And Juvenile Justice, *Youth With Mental Health Disorders In The Juvenile Justice System: Results From A Multi-State Prevalence Study 2* (2006) (over 70%). And a study of incarcerated juveniles in Maryland found that more than half met the diagnostic criteria for a psychiatric disorder. Deborah Shelton, *Emotional Disorders in Young Offenders*, 33 *J. of Nursing Scholarship* 259, 262 (2001). Put simply, youth detained in “correctional facilities have levels of psychopathology similar to the levels of mental illness found in psychiatric hospitals.” *Id.* at 259. Moreover, the youngest juvenile offenders—those, like Sullivan, between the ages of 12 and 14—who met the diagnostic criteria for more than one disability had “significantly more serious criminal behavior,” underscoring the synergistic effects of disability and pronounced immaturity. *Id.* at 261.

There is a likewise strong relation between juvenile incarceration and learning-related disabilities, which are relatively common in the imprisoned juvenile population. See Mary M. Quinn et al., *Youth*

*with Disabilities in Juvenile Corrections: A National Survey*, 71 *Exceptional Children* 339, 342 (2005). Learning disabilities predispose youth toward involvement in the criminal justice system.<sup>8</sup>

“[S]tudies typically suggest that approximately 10 percent of general population youth have a special education disability, compared with between 30 and 50 percent of incarcerated youth.” Daniel P. Mears & Laudan Y. Aron, Urban Institute Justice Policy Center, *Addressing The Needs of Youth With Disabilities in the Juvenile Justice System: The Current State of Knowledge* § 5.3 (2003). One national study found that during the 2000-2001 school year, 33.4% of students in juvenile correction institutions received special education services compared to 8.8% of students in the general population. Quinn, *supra*, 71 *Exceptional Children* at 342.<sup>9</sup> Other studies have found disparities of more than five to one. See Tamara Zenz

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<sup>8</sup> The link between academic underachievement and delinquency is firmly established. See, e.g., Norman Brier, *The Relationship Between Learning Disability and Delinquency: A Review and Reappraisal*, 22 *J. Learning Disabilities* 546, 546 (1989); Carolyn G. Grande, *Delinquency: The Learning Disabled Student's Reaction to Academic School Failure?*, 23 *Adolescence* 209, 212 (1988); see generally ABA Juvenile Justice Center, *Special Ed Kids In The Justice System: How To Recognize and Treat Young People with Disabilities that Compromise Their Ability To Comprehend, Learn, and Behave* 2 (Lourdes M. Rosado ed., 2000) (estimating that 18% of those with an intellectual disability, 31% of those with a specific learning disability, and 57% of youth with a behavioral disorder will be arrested within five years of leaving high school).

<sup>9</sup> These figures likely understate the actual prevalence of learning disabilities because they reflect only those individuals already diagnosed with a disability and being provided with services or treatment. *Ibid.*

& George Langelett, *Special Education in Wisconsin's Juvenile Detention System*, 55 J. Corr. Educ. 60, 63 (2004) (61% of juveniles incarcerated in Wisconsin received special education services, compared to 11.77% of the students in the public school system).

2. *Sporadic Recognition Of Juvenile Disability Further Impedes The Reliable Assessment Of Juvenile Culpability.*

Because of their developmental characteristics, the culpability of juveniles never rises to the level that would justify a life-without-parole sentence. But even if an exceedingly “rare case might arise in which a juvenile offender has sufficient psychological maturity, and at the same time demonstrates sufficient depravity” (*Roper*, 543 U.S. at 572), to deserve such a harsh sentence, the confounding facts of youth make the reliable identification of such exceptional offenders impossible. As this Court has recognized, the professional norms of psychiatrists forbid them from diagnosing any patients under 18 with antisocial personality disorder, because even experienced mental health professionals find it difficult to distinguish between “unfortunate yet transient immaturity” and “irreparable corruption” in juveniles. *Id.* at 573. A lay judge or lay jury cannot be expected to do better, and cannot constitutionally be entrusted with that task when the stakes place a child’s life beyond redemption.

The difficulty of accurately diagnosing mental and psychiatric disorders in juveniles further precludes the constitutional imposition of an immutable punishment. Diagnosing mental disabilities in juveniles is difficult even for mental health professionals. See, e.g., Jay A. Sevin et al., *Psychiatric Disorders in Adolescents with Developmental Disabilities: Longi-*

*tudinal Data on Diagnostic Disagreement in 150 Clients*, 34 *Child Psych. & Hum. Dev.* 147, 161 (2003) (over a 10 year period, the individuals studied received an average of 5 different diagnoses and 7 different medications). The broad variability of symptoms is unsurprising, “given that the disorder is superimposed on a developing child that has yet to achieve emotional, cognitive, neuropsychological, and physical maturity.” Margaret A. Bowring & Maria Kovacs, *Difficulties in Diagnosing Manic Disorders Among Children and Adolescents*, 31 *J. Am. Acad. Child. Adolescent Psych.* 611, 612 (1992). In addition, “the high rate of comorbidity across psychiatric diagnoses” in juveniles “poses a particularly difficult problem” for diagnosis. Rani A. Desai et al., *Mental Health Care in Juvenile Detention Facilities: A Review*, 34 *J. Am. Acad. Psych. & Law* 204, 206 (2006); see also Gabrielle A. Carlson, *The Challenge of Diagnosing Depression in Childhood and Adolescence*, 61 *J. Affective Disorders* 3, 3, 5 (2000).<sup>10</sup>

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<sup>10</sup> Juvenile disabilities have high comorbidity, meaning that the majority of youth who met the diagnostic criteria for one mental health disorder also met the criteria for other, distinct, mental health disorders. Shufelt & Coccozza, *supra*, *Youth With Mental Health Disorders* at 3 (79% of juveniles with at least one disorder met the criteria for two or more disorders, and over 60% of juveniles with at least one disorder were diagnosed with three or more). Mental health disorders are also highly correlated with substance abuse disorders. *Ibid.* (among youth with a mental health disorder, 61% met the criteria for a substance use disorder); see also Lisa H. Jaycox et al., *Mental Health and Medical Problems and Service Use Among Adolescent Substance Users*, 42 *J. Am. Acad. Child Adolescent Psych.* 701, 701 (2003) (almost two-thirds of sample in substance abuse program had at least one comorbid mental health disorder).

Undiagnosed disabilities are substantially likely to remain undiagnosed throughout a juvenile's tenure in the criminal justice system. To begin with, in many cases, the educational system—the first line of defense in identifying many juvenile disabilities—has already failed in that task. Su-chin Serene Olin & Kimberly Hoagwood, *The Surgeon General's National Action Agenda on Children's Mental Health*, 4 *Current Psych. Rpts.* 101, 102-103 (2002); cf. 20 U.S.C. § 1412(a)(3) (requiring, pursuant to the Individuals with Disabilities Education Act, that every State “identif[y], locate[], and evaluate[]” all “children with disabilities residing in the State”).<sup>11</sup> Second, minority youth and youth of low socioeconomic status (who are at greater risk of involvement with the justice system) are more likely to have unmet mental health needs. Andres J. Pumariega et al., *Utilization of Mental Health Services in a Tri-Ethnic Sample of Adolescents*, 34 *Cmty. Mental Health J.* 145, 146-147, 155 (1998). Third, “transfer of school records to juvenile court and correctional facilities” is “inconsistent to nominal,” making it easy for juveniles with disabilities to fall through the cracks. Mears & Aron, *supra*, § 5.3; Peter E. Leone et al., *Understanding the Over Representation of Youths with Disabilities in Juvenile Detention*, 3 *D.C.L. Rev.* 389, 397 (1995). Fourth, even though intake screen-

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<sup>11</sup> See also Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 *Whittier J. Child & Fam. Advoc.* 3, 29-33 (2003) (recalling how “Dale,” despite failing kindergarten and first, second, and third grades, was never referred for evaluation until he was 15 and facing an armed assault charge, at which point he was diagnosed with mild mental retardation and a severe emotional disturbance).



ing procedures have improved, “assessment practices in juvenile justice settings remain highly variable and generally have not used evidence-based, scientifically sound instruments.” Gail A. Wasserman et al., U.S. Dep’t of Justice, Office of Justice Programs, *Juvenile Justice Bulletin, Assessing the Mental Health Status of Youth in Juvenile Justice Settings* 1 (2004).

All in all, it is unsurprising that a “[h]igh prevalence of both undiagnosed and untreated physical and mental health problems have been reported” for incarcerated juveniles. Seena Fazel et al., *Mental Disorders Among Adolescents in Juvenile Detention and Correctional Facilities: A Systematic Review and Metaregression Analysis of 25 Surveys*, 47 *J. Am. Acad. Child Adolescent Psych.* 1010, 1010 (2008). The prevalence of undiagnosed disability among juveniles casts additional doubt on the criminal justice system’s ability to reliably assess juvenile culpability. Only a categorical rule precluding the imposition of life-without-parole sentences on juveniles can acceptably contain the risk of permanently and disproportionately punishing juveniles with limited culpability.

### 3. *Juveniles With Disabilities Are Systematically Disadvantaged In Their Dealings With The Criminal Justice System.*

Juveniles face distinctive challenges in the criminal justice system. Among juvenile offenders, “approximately one third of 11- to 13-year olds, and \* \* \* one fifth of 14- to 15-year olds are” so “impaired in capacities relevant to adjudicative competence” that, if they were adults, they “would likely be considered incompetent to stand trial.” Thomas Grisso et al., *Juveniles’ Competence to Stand Trial: A Comparison*

*of Adolescents' and Adults' Capacities as Trial Defendants*, 23 Law & Hum. Behav. 333, 356 (2003). Even juveniles who are technically competent to stand trial, however, are at a disadvantage on account of the diminished decision-making abilities characteristic to youth. See *Roper*, 543 U.S. at 569.

The high prevalence of disabilities among delinquent juveniles makes these problems worse. Setting aside the diminished moral culpability of juveniles as a class, there is a real risk that sentences of life without parole are not limited to only the “worst” juvenile offenders. Juveniles with disabilities are at a significant disadvantage at every stage of the criminal justice system. See *Roper*, 543 U.S. at 569. In holding that the death penalty could not constitutionally be imposed on defendants with mental retardation, this Court noted the increased “possibility of false confessions” by individuals with intellectual disabilities, and observed that those persons:

may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crime.

*Atkins v. Virginia*, 536 U.S. 304, 320-321 (2002). The same problems impair adjudication of the youth offender with disabilities. The effects of youth operate in synergy with the effects of disability, leaving juveniles with disabilities critically vulnerable at every stage of the criminal justice system: interrogation and arrest, trial, and sentencing.

Juveniles generally are more prone than adults to false confessions. See Grisso, *supra*, 23 Law & Hum. Behav. at 357; Steven A. Drizin & Richard A.

Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 1005 (2004). That is because juveniles are both more compliant and more suggestible in the face of pressure by perceived authority figures.<sup>12</sup> The problem of false confessions not only affects the likelihood of inappropriate guilty pleas, but also increases the risk of wrongful convictions at trial, which necessarily results in a disproportionate sentence.<sup>13</sup> Grisso, *supra*, 23 Law & Hum. Behav. at 357. And juveniles with disabilities may be even more susceptible to making false confessions. See James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 446 (1985).

Similarly, when even “normal” juveniles have difficulty comprehending the *Miranda* warnings, see Thomas Grisso, *Juveniles’ Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 Calif. L. Rev. 1134, 1160 (1980), “[a] child with demonstrable language-based disabilities typically cannot under-

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<sup>12</sup> Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 Law & Hum. Behav. 141, 151 (2003); Matthew B. Johnson & Ronald C. Hunt, *The Psycholegal Interface in Juvenile Assessment of Miranda*, 18 Am. J. Forensic Psychol. 17, 24 (2000); Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 Psychol. Pub. Pol’y & L. 3, 16 (1997).

<sup>13</sup> It is therefore unsurprising that adolescents make up a large proportion of the known cases of false confessors. In a survey of 125 defendants found guilty on the basis of a false confession and later exonerated, the authors found that fully *one-third* were juveniles. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 944 (2004).

stand the *Miranda* warnings \* \* \*” at all.<sup>14</sup> See Tulman, *supra*, 3 Whittier J. Child & Fam. Advoc. at 46).<sup>15</sup>

These comparative disadvantages persist into the trial phase. In a series of simulated vignettes based on decisions commonly encountered in the criminal justice system, like “disclosing information during consultation with a defense attorney” or “responding to a plea agreement for reduced consequences in exchange for a guilty plea and testimony against other defendants,” younger juveniles systematically made worse choices than their older counterparts.<sup>16</sup> Grisso, *supra*, 23 Law & Hum. Be-

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<sup>14</sup> At 13, Sullivan read at a first-grade level (No. 08-7621, Pet. Reply 7), whereas “[t]he *Miranda* warning itself has been evaluated to be at a 7th grade level of reading and listening difficulty.” Joan Petersilia, California Policy Research Center Report Series, *Doing Justice? Criminal Offenders with Developmental Disabilities* at 13 (2000).

<sup>15</sup> The underdiagnosis of disability in juvenile defendants can also result in overlooked defenses. For example, a juvenile’s disability “may be relevant to \* \* \* establishing a *Miranda* violation by police.” Tulman, *supra*, 3 Whittier J. Child & Fam. Advoc. at 44.

<sup>16</sup> Juveniles must rely on counsel to safeguard their interests (see *In re Gault*, 387 U.S. 1, 38 n.65 (1967)), a faith that is unfortunately often misplaced. Sullivan’s trial lasted a single day. No. 08-7621, J.A. 4-5. Based largely on testimony from his older co-defendants and a suggestive voice identification by the victim that trial counsel did not effectively challenge—but no visual identification, physical, or DNA evidence (indeed, the DNA material was destroyed by the State in 1993)—Sullivan was convicted of sexual assault. *Id.* at 24, 26; *id.* Pet. Reply 6 & n.9. Trial counsel filed no written pleadings following Sullivan’s conviction, and his remarks at sentencing fill less than a page of transcript. Sullivan’s appointed appellate counsel filed an *Anders* [v. *California*, 386 U.S. 738 (1967)] brief indicating his

hav. at 340, 351-352. Juveniles with disabilities are even less able to participate in and make effective decisions regarding their own defenses. See Tulman, *supra*, 3 Whittier J. Child & Fam. Advoc. at 49-51; Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 Psychol. Pub. Pol’y & L. 3, 13-14 (1997).

Finally, evidence suggests that trial judges perversely have come to treat youth or disability as an *aggravating* factor in determining punishment. Thus, youths convicted of murder are more likely than adults convicted of murder to be sentenced to prison for life without the possibility of parole. See Barry C. Feld, *A Slower Form of Death: Implications of Roper v. Simmons for Juveniles Sentenced to Life Without Parole*, 22 ND J.L. Ethics & Pub Pol’y 9, 52-53 (2008); Human Rights Watch, *When I Die, They’ll Send Me Home: Youth Sentenced to Life without Parole in California* 36 (2008), available at <http://www.hrw.org/reports/2008/us0108/us0108web.pdf> (“Respondents reported that in 56 percent of cases in which there was an adult codefendant, the adult received a lower sentence than the juvenile.”). Individuals with disabilities also tend to receive more severe punishments for the offenses they commit. Judith Cockram, *Justice or Differential Treatment? Sentencing of Offenders with an Intellectual Disability*, 30 J. Intell. & Dev. Disability 3, 9 (2005); Petersilia, *supra*, *Doing Justice?* at 23. That underscores the disproportionality of a life-without-parole sentence for a juvenile who might well be treated better if he were an adult.

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view that there was not a single colorable issue to be raised in the appeal of a 13-year-old child sentenced to die in prison. No. 08-7621, Pet. 6; *id.* Pet. Reply 6-7.

**C. The Presence Of Disability Exacerbates The Unconstitutional Disproportionality Of Juvenile Life-Without-Parole Sentences.**

Imprisoning any child for the rest of his or her life without any possibility of release violates the Eighth Amendment's proportionality standard. Because of their special needs and vulnerabilities, juveniles with disabilities serving life-without-parole terms face atypical and significant hardships on top of those suffered by juveniles generally.

First, the quality of mental health services provided to youth confined in correctional facilities is poor. Desai, *supra*, 34 J. Am. Acad. Psych. & Law at 208-209. Almost 20% of the nation's facilities do not have procedures in place for administration of psychotropic medication. Lindsay M. Hayes, U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Suicide in Confinement: A National Survey* 4 (2009). Over 30% of facilities lacked onsite access to psychiatrists, psychologists, or master's degree-level social workers. *Ibid.* In Virginia, 8-10% of the youth in that system had serious mental health problems requiring immediate attention; of those, only 14% received any mental health services. Jennifer Wood et al., *An Examination of the Relationships Between Violence Exposure, Posttraumatic Stress Symptomatology, and Delinquent Activity: An "Ecopathological" Model of Delinquent Behavior Among Incarcerated Adolescents*, 6 J. Aggression, Maltreatment & Trauma 127, 129 (2002).<sup>17</sup>

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<sup>17</sup> Likewise, less than half of all juveniles who could have benefited from alcohol and drug counseling services actually received them. Paul E. Greenbaum, *Service Use Among Adoles-*

The disparity between the needs of incarcerated juveniles and the available services extends to educational and other programs. Many juveniles serving life-without-parole sentences lack access to services because prisoners who may someday be released are typically given priority.<sup>18</sup> These deficiencies may well violate States' affirmative obligation under the Individuals with Disabilities Education Act to provide all juveniles with disabilities with appropriate special education and support services, whether or not they are incarcerated. See 20 U.S.C. § 1412(a)(1)(A), (a)(11)(C); *Green v. Johnson*, 513 F. Supp. 965, 976 (D. Mass. 1981).

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*cents With Comorbid Mental Health and Substance Use Disorders* 7 (commissioned for the National Institute on Drug Abuse's May 2000 on Assessing the Impact of Childhood Interventions on Subsequent Drug Use), available at <http://www.drugabuse.gov/meetings/childhood/Commissioned/Greenbaum/Greenbaum.pdf>; see *supra* note 10.

<sup>18</sup> See, e.g., Illinois Coalition for the Fair Sentencing of Children, *Categorically Less Culpable: Children Sentenced to Life Without Possibility of Parole in Illinois* 21 (2008), available at [http://www.law.northwestern.edu/cfjc/jlwop/JLWOP\\_Report.pdf](http://www.law.northwestern.edu/cfjc/jlwop/JLWOP_Report.pdf) (“[Educational] programs often were, and are, expressly denied to those serving life without parole sentences. \* \* \* The prison policy gives enrollment preference to those with less time to serve \* \* \*.”); Human Rights Watch, *When I Die, They'll Send Me Home: Youth Sentenced to Life without Parole in California* 56-57 (2008), available at <http://www.hrw.org/reports/2008/us0108/us0108web.pdf> (“[P]rison practice and regulations give persons sentenced to life without parole the lowest priority for accessing programs.”); Human Rights Watch, *Thrown Away* 32-33 (2005), available at <http://www.hrw.org/reports/2005/us0205/us0205.pdf> (“[C]hild offender[s] sentenced to life without parole \* \* \* are not able to access the same variety of classes as individuals who will be released from prison at some point in the future.”).

Moreover, even apart from the failure of the criminal justice system to meet the special needs of juveniles with disabilities, the more routine perils of confinement weigh especially heavily on them. Confinement itself aggravates the conditions of juveniles with disabilities. For example, “[i]ncarceration may precipitate major depression among vulnerable individuals.” Eileen P. Ryan & Richard E. Redding, *A Review of Mood Disorders Among Juvenile Offenders*, 55 *Psych. Servs.* 1397, 1399 (2004). “[I]f all youth are to some degree at risk for suicide, juveniles in confinement may be at greater risk because they have life histories that predispose them to suicide,” such as histories of mental health disorders and substance abuse. Hayes, *supra*, *Juvenile Suicide in Confinement: A National Survey* at 1-2.

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As the Court recognized in a related context, the deficiencies of individuals who have “diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others”—a description that aptly characterizes juvenile defendants generally, and juveniles with disabilities particularly—“do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.” *Atkins*, 536 U.S. at 318. The diminished culpability of juveniles categorically precludes subjecting them to the punishment of life without parole. Even a very serious crime committed by a juvenile is far from reliable evidence of irretrievably depraved character—a circumstance of heightened constitutional significance in light of the



prevalence and documented effects of juvenile disability.

**CONCLUSION**

The judgments of the Florida District Court of Appeal should be reversed.

Respectfully submitted.

Paula D. Pearlman  
Carly J. Munson  
Disability Rights Legal  
Center  
919 Albany St.  
Los Angeles, CA 90015  
(213) 736-1031

Neil M. Soltman  
*Counsel of Record*  
Mayer Brown LLP  
350 South Grand Ave.  
Los Angeles, CA 90071  
(213) 229-9500

Donald M. Falk  
Mayer Brown LLP  
Two Palo Alto Square  
3000 El Camino Real  
Palo Alto, CA 94306  
(650) 331-2000

Brian J. Wong  
Mayer Brown LLP  
1909 K Street, N.W.  
Washington, DC 20006  
(202) 263-3000

*Counsel for Amicus Curiae Disability Rights Legal  
Center*

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