IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

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79 MAP 2009

COMMONWEALTH OF PENNSYLVANIA,
Appellee
v.
QU'EED BATTS,
Appellant

BRIEF OF *AMICUS CURIAE* ON BEHALF OF QU'EED BATTS

Appeal from the order of the Superior Court (No. 766 EDA 2008) dated April 7, 2009, affirming the judgment of sentence of Court of Common Pleas of Northampton County (No. 1215-2006) dated October 22, 2007

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I. INTEREST OF THE AMICUS CURIAE

Founded in 1975, Juvenile Law Center is the oldest multi-issue public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Recognizing the critical developmental differences between youth and adults, Juvenile Law Center works to ensure that the child welfare, juvenile justice, and other public systems provide vulnerable children with the protection and services they need to become healthy and productive adults.

The Defender Association of Philadelphia is a private, non-profit corporation that represents a substantial percentage of the criminal defendants in Philadelphia County at trial and on appeal. The Association attempts to ensure a high standard of representation and to prevent abridgment of the constitutional and other legal rights of the citizens of Philadelphia and Pennsylvania.

Juvenile Law Center and the Defender Association of Philadelphia have previously participated as *amicus curiae* in numerous cases before this Court, as well as before other courts.

Professors Sara Jacobson, Brian Foley, Michelle Leighton and Constance de la Vega each have unique specialties that have been brought to bear as amicus counsel. Professor Jacobson is currently at Temple University, Beasley School of Law, but prior to that she was the Deputy Chief of the Juvenile Division at the Defender Association of Philadelphia. Professor Foley specializes in criminal law issues and has written extensively on those topics as well as juvenile life without parole issues. Professors

Leighton and de la Vega are international law specialists. Their research has been cited and relied upon by the United States Supreme Court.

II. STATEMENT OF THE CASE

Amicus curiae counsel file this brief on behalf of Appellant Qu'eed Batts. Our participation is limited to the constitutionality of sentencing a juvenile to life without parole.

III. SUMMARY OF ARGUMENT

Amici submit that a mandatory sentence of life without the possibility of parole for a fourteen-year old youth convicted of first degree homicide violates both the United States and Pennsylvania Constitutions. In *Graham v. Florida*, the United States Supreme Court held the sentence of life without parole unconstitutional as applied to a juvenile convicted of violating his probation by committing a home invasion robbery, possessing a firearm, and associating with persons engaged in criminal activity. The holding was grounded in developmental and scientific research that demonstrates that juveniles possess a greater capacity for rehabilitation, change and growth than adults. Considering this research in light of the four accepted rationales for the imposition of criminal sanctions – incapacitation, deterrence, retribution and rehabilitation – the *Graham* Court held that a life without parole sentence served no legitimate penological purpose when applied to juveniles under the age of eighteen. The *Graham* Court also held that such a sentence was contrary to evolving standards of decency under the Eight Amendment's cruel and unusual punishments clause, noting that a majority of states prohibited the practice and that, even among those that permitted it, the sentence was rarely imposed.

Graham applies to the sentence challenged here. A life without parole sentence for a juvenile lacks empirical justification in light of the distinctive developmental characteristics of juvenile offenders, and therefore serves none of the traditional justifications for punishment. Striking this punishment is also consistent with longstanding specialized treatment of juveniles under the Constitution.

Moreover, Pennsylvania's sentencing structure is starkly out of touch with national trends; only three other states nationwide mandate a sentence of life without

parole for youth fourteen years old or younger convicted of homicide. Indeed, the constitutional problems with life without parole sentences are heightened in Pennsylvania by the mandatory nature of the life imprisonment without parole sentencing scheme. The sentencing scheme not only fails to address the reduced culpability of adolescents, it actually precludes the judge from taking age into account. *Graham* rejected such categorical judgments about juveniles.

The international consensus against imposition of life without parole sentences upon juveniles further underscores that the sentence is unconstitutional. International law prohibits the imposition of life without parole sentences on juveniles. Finally, the Pennsylvania Constitution, which is broader than the United States Constitution, barring sentences that are "cruel," rather than only those that are "cruel and unsual," also bars such sentences.

IV. ARGUMENT

I. THE IMPOSITION OF A LIFE WITHOUT PAROLE SENTENCE ON A JUVENILE IS BARRED BY THE PENNSYLVANIA AND UNITED STATES CONSTITUTIONS AND BY INTERNATIONAL LAW

On October 22, 2007, Qu'eed Batts was sentenced to Life without the Possibility of Parole, pursuant to the mandatory sentence for First Degree Murder, for a crime he committed when he was fourteen years old. Pursuant to *Graham v. Florida*, ___U.S.___, 130 S. Ct. 2011, 176 L.Ed.2d 825 (2010), this sentence is unconstitutional.

A. A Sentence Of Life Without Parole For a Juvenile Under the Age of Eighteen Violates The Eighth Amendment To The United States Constitution As It Constitutes "Cruel and Unusual Punishment."

The United States Constitution bars "cruel and unusual punishment." U.S. Const. amend. VIII. This provision is applicable to the states through the due process clause of the Fourteenth Amendment. U.S. Const. amend. XIV. A sentence of life imprisonment without the possibility of parole ("LWOP") for a juvenile under the age of eighteen is cruel and unusual.

In *Graham v. Florida*, the United States Supreme Court held the sentence of life without parole unconstitutional as applied to a juvenile convicted of violating his probation by committing a home invasion robbery, possessing a firearm, and associating with persons engaged in criminal activity. The Court's analysis rested heavily on the principle that such a severe and irrevocable punishment was not appropriate for a juvenile offender. *Graham v. Florida*, 130 S.Ct. 2011, 2027 (2010). The Court emphasized that both case law and science recognize that children are different from adults – they are less culpable for their actions and at the same time have a greater capacity to change and mature. The *Graham* opinion built upon the Supreme Court's long history of recognizing

that the differences between youth and adults compel a different, and often more protective, treatment for youth under the Constitution. The unique characteristics of youth were also central to the *Graham* Court's conclusion that sentences of life without parole served no legitimate penological ends in the juvenile case before it. Finally, the Court found further support for its holding in international law, recognizing that the United States is likely the only nation to impose the sentence on juveniles. *Id.* at 2033.[1]

In light of adolescents' capacity to change, the Court emphasized that juveniles must have a meaningful opportunity to have their sentences reviewed. Because Qu'eed Batts' sentence does not allow for any review at any time, it is unconstitutional.

1. In Light of the Developmental Differences Between Juveniles and Adults, LWOP Sentences are Cruel and Unusual Punishment for Juvenile Offenders

    a. The *Graham* Decision Clarifies that Juvenile Life Without Parole Sentences are Unconstitutional Because Juveniles Must Be Treated Differently than Adults.

In determining the constitutionality of a punishment, courts must look to the "evolving standards of decency that mark the progress of a maturing society," recognizing the "essential principle" that "the State must respect the human attributes even of those who have committed serious crimes." *Graham*, 130 S. Ct. at 2021. In doing so, ultimately, the court must exercise its independent judgment, considering the culpability of the offenders and the severity of the punishment. *Graham*, 130 S. Ct. at 2026 (citing *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2658 (2008).

[1] If Israel imposes life without parole sentences on juveniles, then the United States is one of two nations to do so, rather than the only nation. The Court was inconclusive about whether Israel ever imposed such sentences. It recognized that a recent study "concluded that Israel's 'laws allow for parole review of juvenile offenders serving life terms,' but expressed reservations about how that parole review is implemented." *Graham,* 130 S. Ct. at 2033.

The *Graham* Court emphasized that the unique characteristics of juveniles required a distinct and protective treatment under the Constitution. The Court explained that the Eighth Amendment requires an assessment of whether a sentence is proportional. The Court clarified that the appropriate analysis "implements the proportionality standard by certain categorical restrictions." *Id.* at 2021. That is, the Court considered the appropriateness of the sentence as applied to an "entire class of offenders," rather than considering the individual culpability of the offender before it. This analysis put the question of juvenile culpability at the center of the Court's reasoning. The Court emphasized that this categorical approach was necessary to ensure that a juvenile would not receive a sentence that classified him or her as "irredeemably depraved." *Id.* at 2031.

The *Graham* opinion built upon the Supreme Court's earlier analysis in *Roper v. Simmons*, 543 U.S. 551 (2005), which had held the death penalty unconstitutional as applied to juveniles. The *Graham* Court echoed the reasoning in *Roper* that three essential characteristics distinguish youth from adults for culpability purposes:

> As compared to adults, juveniles have a "lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed." *Id.*, at 569–70. These salient characteristics mean that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 573. Accordingly, "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 569.

Id. at 2026 (quoting *Roper*, 543 U.S. at 569-70). Accordingly, the *Graham* Court concluded that "[a] juvenile is not absolved of responsibility for his actions, but his

transgression 'is not as morally reprehensible as that of an adult.'" *Id.* (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)).[2]

Central to the *Graham* Court's determination about juvenile culpability was its understanding that the personalities of adolescents are still developing and capable of change and thus that an irrevocable penalty, one that afforded no opportunity for review, was developmentally inappropriate. The Court further explained that

> Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. *Roper*, 543 U. S., at 570. It remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Ibid.*

Id. at 2026-27. The Court's holding rested largely on the incongruity of imposing a final and irrevocable penalty on an adolescent, who had capacity to change and grow. The Court explained that "[t]hose who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." However, the Eighth Amendment forbids States from "making the judgment at the outset that those offenders never will be fit to reenter society." Thus, "[w]hat the State must do . . . is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 2030.[3] The Court further underscored the point, noting that the "juvenile should not be deprived of the opportunity

[2] As *Graham* recognized, even for brutal and cold-blooded crimes – in fact *especially* for such crimes – a categorical rule must recognize juveniles' reduced culpability. "The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." This is because "[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." *Id.* at 2032, *citing Roper*, 543 U.S. at 573.

[3] While *Graham* arose in the context of a non-homicide case, the analysis of juveniles' capacity to change is equally applicable to all juvenile cases.

to achieve maturity of judgment and self-recognition of human worth and potential." *Id.* at 2032. A categorical rule would protect this goal as it "avoids the perverse consequence in which the lack of maturity that led to an offender's crime is reinforced by the prison term." *Id.* at 2033.

The *Graham* Court relied upon an emerging body of research confirming the distinct emotional, psychological and neurological status of youth. The Court clarified that, since *Roper,* "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." Thus, the Court underscored that because juveniles are more likely to be reformed than adults, the "status of the offender" is central to the question of whether a punishment is constitutional. *Id*. at 2027.

b. <u>The United States Supreme Court Has Long Recognized that Adolescents Deserve Distinct Treatment Under the Constitution.</u>

While *Graham* and *Roper* enriched the constitutional analysis by embedding science in the Court's reasoning, they also built upon the Supreme Court's long history of recognizing that the differences between youth and adults merit distinct and often more protective treatment under the Constitution. For example, in *Haley v. Ohio,* the Supreme Court recognized that when it comes to criminal procedure, a teenager cannot be judged by the more exacting standards applied to adults. 332 U.S. 596, 599-601 (1948) (holding that police improperly obtained the confession of a fifteen-year old defendant in violation of his due process rights). Because minors are generally less mature and more vulnerable to coercive interrogation tactics than adults, they deserve heightened protections under

the Constitution. *Id.* The *Haley* Court emphasized the unique vulnerability of youth during the period of adolescence:

> Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces.

Id. at 599. Similarly, in *Gallegos v. Colorado*, involving the admissibility of a juvenile's statement, the Court observed that an adolescent "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. . . .Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had." 370 U.S. 49, 54 (1962). *See also In re Gault*, 387 U.S. 1, 48, 55 (1967) (observing that confessions may be particularly problematic when taken from "children from an early age through adolescence" and that without procedural protections, a confession may be "the product of ignorance of rights or of adolescent fantasy, fright or despair"). Indeed the Court has been explicit that constitutional standards cannot be applied in a vacuum, but instead must take into account the reality of adolescent development. *See e.g., Haley*, 332 U.S. at 601 ("Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them.").

The Supreme Court has similarly recognized the unique attributes of youth at other key points of their involvement in the juvenile and criminal justice systems. For example, the Court has acknowledged that a child has a particular need for the "guiding hand of counsel at every step in the proceedings against him." *Gault*, 387 U.S. at 36 (extending key constitutional rights including the right to counsel to minors subject to delinquency proceedings in juvenile court). The Court has also sought to promote the

well-being of youth by ensuring their ongoing access to rehabilitative, rather than punitive, juvenile justice systems. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 539-40 (1971); *Gault*, 387 U.S. at 15-16. *See also* Barry C. Feld, *Bad Kids: Race and the Transformation of the Juvenile Court* 92 (1999) (noting that the malleability of youth is central to the rehabilitative model of the juvenile court).

The Supreme Court's special treatment of youth is not limited to adolescents' encounters with the juvenile and criminal justice systems. In civil cases, as well, the Court has frequently expressed its view that children are different from adults, and tailored its constitutional analysis accordingly. Reasoning that "during the formative years of childhood and adolescence, minors often lack . . . experience, perspective, and judgment," the Court has upheld greater state restrictions on minors' exercise of reproductive choice. *Bellotti v. Baird*, 443 U.S. 662, 635 (1979). S*ee also Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990) ("The State has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely."). As a result, the Supreme Court has held that a state may choose to require that minors consult with their parents before obtaining an abortion, subject to a constitutionally required bypass procedure, and may take other "reasonable step[s] in regulating its health professions to ensure that, in most cases, a young woman will receive guidance and understanding from a parent." *Ohio v. Akron Center For Reproductive Health*, 497 U.S. 502, 520 (1990). *See also Hodgson*, 497 U.S. at 483 (Kennedy, J., concurring in part) ("Age is a rough but fair approximation of maturity and judgment, and a State has an interest in seeing that a child, when confronted with serious decisions such as whether or not to abort a

pregnancy, has the assistance of her parents in making the choice."); *id* at 458 (O'Connor, J., concurring in part) (holding that the liberty interest of a minor deciding to bear child can be limited by parental notice requirement, given that immature minors often lack the ability to make fully informed decisions); *Bellotti*, 443 U.S. at 640 (holding that because immature minors often lack capacity to make fully informed choices, the state may reasonably determine that parental consent is desirable).

In its First Amendment jurisprudence, the Supreme Court has held that different obscenity standards apply to children than to adults, *Ginsburg v. New York,* 390 U.S. 629, 637 (1968), and that the state has a compelling interest in protecting children from images that are "harmful to minors." *Denver Area Educational Telecommunications Consortium, Inc. v. FCC,* 518 U.S. 727, 743 (1996). *See also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that public school authorities may censor school-sponsored publications). Similarly, the Court has upheld a state's right to restrict when a minor can work, guided by the premise that "[t]he state's authority over children's activities is broader than over the actions of adults." *Prince v. Massachusetts,* 321 U.S. 158, 168 (1944).

The developmental status of youth has also played a role in the Supreme Court's school prayer cases. In holding that prayers delivered by clergy at public high school graduation ceremonies violate the Establishment Clause of the First Amendment, the Court observed that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressures in the elementary and secondary public schools." *Lee v. Weissman*, 505 U.S. 577, 593 (1992). In explaining those coercive pressures, the *Weisman* Court contrasted mature adults and children, noting that the latter

are "often susceptible to pressure from their peers towards conformity . . . in matters of social convention." *Id*. Similarly, in *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000), the Court held that prayers authorized by a vote of the student body and delivered by a student prior to the start of public high school football games violated the Establishment Clause. The opinion stressed "the immense social pressure" on students, *id*. at 311, observing that "the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one." *Id*. at 312.

The *Graham* decision builds upon the Supreme Court's long history of constitutional rulings that both recognize and respond to the key developmental differences between adolescents and adults.

c. Social Science Research Confirms the Transitory Nature of Adolescence and the Capacity of Youth for Rehabilitation.

As the *Graham* Court recognized, social science research has demonstrated that adolescents share unique developmental characteristics that set them apart from adult offenders, and which illustrate the inappropriateness of an irrevocable sentence such as life without parole. *Graham*, 130 S.Ct. at 2027. In particular, research reveals that because adolescence is a transitory stage, an irrevocable sentence is inherently disproportionate. "Contemporary psychologists universally view adolescence as a period of development distinct from either childhood or adulthood with unique and characteristic features." Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 31 (2008). A central feature of adolescence is its transitory nature. As Scott and Steinberg explain:

> The period is *transitional* because it is marked by rapid and dramatic change within the individual in the realms of biology, cognition, emotion, and

> interpersonal relationships. . . . Even the word "adolescence" has origins that connote its transitional nature: it derives from the Latin verb *adolescere,* to grow into adulthood.

Id. at 32.

Studies show that youthful criminal behavior can be distinguished from permanent personality traits. Rates of impulsivity are high during adolescence and early adulthood and decline thereafter. *See* Steinberg, Cauffman, Banich & Graham, *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 Dev. Psych. 1764 (2008). As youth grow, so do their self-management skills, long-term planning, judgment and decision-making, regulation of emotion, and evaluation of risk and reward. *See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psych. 1009, 1011 (2003). As a result, "[t]he typical delinquent youth does not grow up to be an adult criminal. . . " *Id.* at 54. As one report explained,

> More than 30 percent of boys examined in one study committed one or more acts of serious violence by age 18. Few of these youth were ever arrested for violent offenses, but more than three-fourths nonetheless terminated their violence by age 21. Other research has found that the criminal careers of most violent juvenile offenders span only a single year. Understanding this self-correcting dynamic is crucial in any attempt to combat juvenile crime. Most juvenile offenders – even those who commit serious acts of violence – are not destined for lives of crime.

Richard A. Mendel, *Less Hype, More Help: Reducing Juvenile Crime, What Works – and What Doesn't* 15 (2000). Thus, not only are youth developmentally capable of change, research also demonstrates that when given a chance, even youth with histories of violent crime can and do become productive and law abiding citizens, even without any interventions. These findings (unsurprising to any parent) are primarily grounded in

behavioral research, but also are consistent with recent findings in developmental neuroscience. Brain imaging techniques show that areas of the brain associated with impulse control, judgment, and the rational integration of cognitive, social, and emotional information do not fully mature until early adulthood. Scott & Steinberg, *Rethinking Juvenile Justice* 46-68.[4]

While the process of physiological and psychological growth alone will lead to rehabilitation for most adolescents, research over the last fifteen years on interventions for juvenile offenders has also yielded rich data on the effectiveness of programs that reduce recidivism and save money, underscoring that rehabilitation is a realistic goal for the overwhelming majority of juvenile offenders, including violent and repeat offenders. Indeed, there is compelling evidence that many juvenile offenders, even those charged with serious and violent offenses, can and do achieve rehabilitation and change their lives to become productive citizens. *See Second Chances: 100 Years of the Children's Court: Giving Kids a Chance To Make a Better Choice* (Justice Policy Inst. & Children & Family Law Ctr., n.d.), http://www.cjcj.org/files/secondchances.pdf (last visited Jun. 12,

[4] *See also* Elizabeth Sowell, et al., *In vivo evidence for post-adolescent brain maturation in frontal and striatal regions*, 2 Nat. Neurosci. 859-861 (1999); Nitin Gogtay, et al. *Dynamic Mapping of Human Cortical Development during Childhood through Early Adulthood*, 101 Nat'l Acad. Sci. Proc. 8174-8179 (2004), http://www.loni.ucla.edu/~thompson/DEVEL/PNASDevel04.pdf. While it is beyond the scope of this brief to explore the adolescent psychology research comprehensively, it is worth noting that one of the clearest visual representations of these differences can be found at http://www.nytimes.com/interactive/2008/09/15/health/20080915-brain-development.html?scp=1&sq=interactive%20compare%20brain%20development%20in%20various%20areas%20&st=cse, an interactive web-based link allowing visitors to compare brain development in various areas (such as judgment) at different ages. The research demonstrates that while the seventeen year old brain is fairly developed, it is not until age twenty-one that a youth experiences "tremendous gains in emotional maturity, impulse control and decision-making [that will] continue to occur into early adulthood." *Id.* Thus, while there are distinctions between the development levels of older adolescents' brains and those of younger teens, this biological process is not typically complete until a child reaches his or her mid-twenties.

2009) (profiling 25 individuals, including D.C. District Court Judge Reggie Walton and former United States Senator Alan Simpson, who were adjudicated delinquent in juvenile court – many for violent offenses including attempted murder and armed robbery – and then changed the course of their lives). As *Graham* recognized and held, the reduced culpability of adolescents as well as their distinctive status under the Constitution makes the sentence of juvenile life without parole unconstitutional.

2. Because Juvenile Life Without the Possibility of Parole Serves No Legitimate Penological Interest, It is Unconstitutional

The *Graham* Court underscored the uniquely severe nature of a life without parole sentence. According to the Court, although the death penalty is a unique sentence deserving of special protections under the law, the sentence of life without parole does

> share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence. *Solem*, 463 U. S., at 300–301.

Graham, 130 S.Ct. at 2027. Because a life without parole sentence is irrevocable, it "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." *Id*, (citing *Naovarath* v. *State*, 105 Nev. 525, 526, 779 P. 2d 944 (1989)).

The Court then concluded that no penological justification – neither deterrence, retribution, incapacitation, nor rehabilitation – warrants a sentence of life without parole as applied to juveniles, and that the sentence was therefore unconstitutional. According

to the Court, a sentence "lacking any legitimate penological justification is by its nature disproportionate to the offense." *Id*.

a. *Deterrence*

Relying on the analysis set forth in *Roper,* the *Graham* Court concluded that the goal of deterrence did not justify the imposition of life without parole sentences on juveniles.

> *Roper* noted that "the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence." *Ibid*. Because juveniles' "lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions," *Johnson* v. *Texas*, 509 U. S. 350, 367 (1993), they are less likely to take a possible punishment into consideration when making decisions. This is particularly so when that punishment is rarely imposed.

Graham, 130 S.Ct. at 2028-29. Because youth would not likely be deterred by the fear of a life without parole sentence, the goal of deterrence did not justify the sentence. Criminological studies showing that adult sentences fail to deter youth further illustrate that the goals of deterrence are not well-served by juvenile life without parole sentences. If the threat of adult sentences fails to deter youth, the possible imposition of the relatively rare and extreme adult sentence of life without parole is unlikely to do so either. *See* Jeffrey Fagan, *Juvenile Crime and Criminal Justice: Resolving Border Disputes*, 18 Future of Child. 81, 102-03 (2008); David Lee and Justin McCrary, *Crime, Punishment, and Myopia* (Nat'l Bureau of Econ. Research, Working Paper No. W11491, 2005).[5] *See also* Eric L. Jensen & Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 *Crime & Delinq.* 96, 96-104 (1994), cited in Donna Bishop, *Juvenile Offenders in the Adult Criminal System*, 27 *Crime &*

[5] *See also* http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/41/92/20.pdf.

Just. 81 (2000); Richard Redding & Elizabeth Fuller, *What Do Juveniles Know About Being Tried as Adults? Implications for Deterrence*, Juvenile & Family Court Journal (Summer 2004) (cited in Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 199 (2008)).

b. *Retribution*

The *Graham* Court also clarified that retribution does not justify the imposition of life without parole sentences for juveniles. The *Graham* Court echoed *Roper's* assessment that "'retribution is not proportional if the law's most severe penalty is imposed' on the juvenile murderer." *Graham*, 130 S.Ct. at 2028 (citing *Roper*, 543 U.S. at 571). It continued, noting that

> "The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison* , 481 U. S. at 149. And as *Roper* observed, "[w]hether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult." 543 U. S., at 571.

Id. As the *Roper* Court had explained, such a severe retributive punishment was inappropriate in light of juvenile immaturity and capacity to change. The *Graham* Court recognized that these same considerations required prohibiting "imposing the second most severe penalty on the less culpable juvenile." *Id.*

This conclusion about juveniles' reduced culpability also finds ample support in behavioral and neurobiological research. As described above, a significant body of research recognizes the malleability and transitory nature of adolescence. *See, e.g.*, Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in *Youth on Trial: A Developmental Perspective on Juvenile Justice* 9, 23 (Thomas Grisso and Robert Schwartz eds., 2000) (describing adolescence as a period of "tremendous

malleability" and "tremendous plasticity in response to features of the environment."); Scott & Steinberg, *Rethinking Juvenile Justice* 32, 49 (describing adolescence as a transitional stage in which individuals display a reduced capacity for impulse control).

c. *Incapacitation*

The *Graham* Court also held that incapacitation could not justify the sentence of juvenile life without parole. To justify incapacitation for life "requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable." *Graham*, 130 U.S. at 2029. Indeed, at core, the developmental analysis of juveniles proves the opposite – their natures are transient and they must be given "a chance to demonstrate growth and maturity." *Id*. Sociological and psychological research supports this conclusion as well. *See* Steinberg & Schwartz, *Developmental Psychology Goes to Court*, 23 (explaining that the malleability of adolescence suggests that a youthful offender is capable of altering his life course and developing a moral character as an adult); John H. Laub & Robert J. Sampson, *Shared Beginnings, Divergent Lives: Delinquent Boys to Age 70* (2003) (documenting the criminal histories of 500 individuals who had been adjudicated delinquent and showing that their youthful characteristics were not immutable; they were able to change and lead law-abiding lives as adults). As a result, a child sent to prison should have the opportunity to rehabilitate and qualify for release after a reasonable term of years. Mechanisms such as parole boards can provide a crucial check to ensure that the purposes of punishment are satisfied without unnecessarily incapacitating fully rehabilitated individuals and keeping youth "in prison until they die." *Naovarath*, 779 P.2d at 948.

d. *Rehabilitation*

Finally, *Graham* concluded that a life without parole sentence "cannot be justified by the goal of rehabilitation. The penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society." *Id*. at 2030. The Court also underscored that the denial of rehabilitation was not just theoretical: the reality of prison conditions prevented juveniles from growth and development they could otherwise achieve:

> Defendants serving life without parole sentences are often denied access to vocational training and other rehabilitative services that are available to other inmates. *See* Brief for Sentencing Project as *Amicus Curiae* 11–13. For juvenile offenders, who are most in need of and receptive to rehabilitation, *see* Brief for J. Lawrence Aber et al. as *Amici Curiae* 28–31 (hereinafter Aber Brief), the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident.

Id. at 2030. Research further bears out the many ways in which lengthy adult sentences – especially life sentences – work against a youth's rehabilitation. Understandably, many juveniles sent to prison fall into despair. They lack incentive to try to improve their character or skills for eventual release because there will be no release. Indeed, many juveniles sentenced to spend the rest of their lives in prison commit suicide, or attempt to commit suicide. *See* Human Rights Watch, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States* 63-64 (2005), http://www.hrw.org/en/reports/2005/10/11/rest-their-lives; *See also*, Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 Wake Forest L. Rev. 681, 712, nn.141-47 (1998) (discussing the "psychological toll" associated with LWOP, including citations to cases and sources suggesting that LWOP may be a fate worse than

the death penalty). Thus, life without parole sentences are antithetical to the goal of rehabilitation

Because a sentence of life without parole serves no legitimate penological purpose, it is unconstitutional.

3. The Mandatory Nature of Pennsylvania's Life Without Parole Sentencing Scheme Makes It Unconstitutional

A mandatory sentencing scheme prescribing a life sentence without the possibility of parole for first degree murder, such as the statute at issue in this case, 18 Pa. Const. Stat. § 1102 (2008), violates the United States Constitution when applied to a juvenile.[6] The statute strips courts of the ability to give a more just sentence by foreclosing any consideration of a child's age, immaturity, reduced mental capacity, reduced role in the offense, or any other factors related to his or her young age – the precise characteristics that the United States Supreme Court in *Graham* concluded categorically apply to all juvenile offenders under 18, 130 S.Ct. at 2026, and which the Court found conclusive in abolishing the penalty of life without parole in that case. *Id*. at 2034.

The *Graham* majority was unequivocal in its insistence that irrevocable judgments about the character of juvenile offenders are impermissible under the Constitution – at least where they deny juveniles any opportunity to prove their rehabilitation and their eligibility to re-enter society. 130 S.Ct. at 2030. As described above, both *Graham* and *Roper* are explicit in their conclusion that juvenile offenders' capacity to change and grow, combined with their reduced blameworthiness and inherent immaturity of judgment, set them apart from adult offenders in fundamental – and constitutionally relevant – ways. Mandatory sentencing schemes by definition allow for

[6] Indeed, even if a court were to hold that discretionary life sentences were constitutional, mandatory life without parole sentences imposed on juveniles would still violate the Constitution.

no individualized determinations. It is precisely this "one size fits all" feature that is so directly at odds with the Court's holding in these cases, prohibiting consideration of age as a factor at all in sentencing while simultaneously proscribing any "realistic opportunity" for release. *Id.* at 2034. *Graham* prohibits a judgment of irredeemability to be made "at the outset." *Id.* at 2029. The Pennsylvania statute requires that just such a judgment be made – not only because the sentence allows for no review, but because it *must* be imposed regardless of the individual circumstances of the case.

The highest court in Illinois concluded that a similar mandatory life without parole sentence against a child convicted of multiple murders violated Illinois' constitution. Three converging statutes – mandatory transfer to adult court; a prohibition of consideration of degree of participation where more than one actor committed the crime; and the mandatory sentence – prevented the court from considering the minor's age at sentencing. *Illinois v. Miller*, 202 Ill.2d 328, 340-41 (Ill. 2002). The opinion emphasized that the court's inability under the statutory scheme to consider the defendant's age at any point weighed heavily in the holding that the scheme was unconstitutional. *Id.* at 341. It further explained:

> Our decision is consistent with the longstanding distinction made in this state between adult and juvenile offenders. . . . [T]raditionally, as a society we have recognized that young defendants have greater rehabilitative potential. "There is in the law of nature, as well as in the law that governs society, a marked distinction between persons of mature age and those who are minors. The habits and characters of the latter are, presumably, to a large extent as yet unformed and unsettled."

Id. at 341-42 (*citing People ex rel. Bradley,* 148 Ill. At 423, 36 N.E. 76 (1894). Through legislation, Montana also recently banned mandatory minimum sentences or the

restriction of parole eligibility for defendants below 18. Mont. Code Ann. § 46-18-222 (1) (2007).

As Justice Frankfurter wrote over fifty years ago in *May v. Anderson*, 345 U.S. 528, 536 (1953), "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." Such reasoning remains apt today. Adult sentencing practices that take no account of youth – indeed permit no consideration of youth – are unconstitutional.

4. The National Consensus Against Mandatory LWOP Sentences for Juveniles Further Underscores that they are Unconstitutional

A national consensus exists against the mandatory imposition of life without parole sentences on juveniles. In both *Roper* and *Atkins*, the Supreme Court found national consensus against a sentencing practice because only twenty states allowed for it, while thirty prohibited it. Here, the consensus weighs much more strongly against the punishment. Just ten states – Delaware, Florida, Iowa, Louisiana, Massachusetts, Minnesota, North Carolina, Pennsylvania South Dakota, and Texas – mandate the sentence of life without parole for older juveniles convicted of first degree murder[7] and only four states – Delaware, Massachusetts, North Carolina, and Pennsylvania – mandate

[7] As noted below, there are seven states in which juvenile life without parole sentences are *always* prohibited and an additional twenty-nine states in which the sentence is either discretionary or prohibited for first degree murder. In five of the remaining fifteen states – Hawaii, Michigan, Missouri, Nebraska, and New Hampshire –the court or the prosecutor has discretion of trying the youth in juvenile or adult court. *See* Appendix B. Therefore, only ten states leave the court or prosecutor without discretion to consider the individual culpability of a juvenile convicted of first degree murder before imposing a life without parole sentence. *See* Appendix C.

the sentence for a fourteen-year-old such as appellant convicted of first degree murder.[8] On the other hand, six states have instituted a total prohibition on life without parole against any minor[9] and one state bars life without parole altogether.[10] In an additional twenty-nine states[11] a life without parole sentence is either unavailable or discretionary for juveniles convicted of first degree murder (absent aggravating circumstances not present here). Pennsylvania is therefore in the minority of states that mandatorily impose juvenile life without parole sentences for first degree murder, and therefore allow no discretion for a judge to adapt the sentence based upon the age, maturity, development, or culpability of an individual juvenile convicted of first degree murder.

The direction of change in state laws further underscores the national consensus against juvenile life without parole. *Roper* and *Atkins* make clear that a legislative trend against imposing such sentences provides further evidence of the national consensus against it. *See, e.g., Roper v. Simmons*, 543 U.S. at 565-67[12] (considering as important

[8] Though ten states mandate the imposition of a life without parole sentence for older juveniles convicted of first degree murder, six of these states either prohibit life without parole sentences for younger juveniles, including fourteen-year-olds such as appellant, or give the court or prosecutor discretion whether to try younger juveniles in adult or juvenile court. These states are: Florida, Iowa, Louisiana, Minnesota, South Dakota, and Texas. *See* Appendix D. Therefore, there are only four remaining states, including Pennsylvania, in which any fourteen-year-old convicted of first degree murder must be sentenced to life without parole.

[9] Colorado, Kansas, Kentucky, Montana, Oregon, and the District of Columbia. *See* Colo. Rev. Stat. § 17-22.5-104 (d)(IV) (2009); Colo. Rev. Stat. § 18-1.3-401(4)(b)(I)(2009); Kan. Stat. Ann. § 21-4622 (2000); Ky. Rev. Stat. Ann. §640.040 (LexisNexis 2010); *Shepherd v. Commonwealth*, 251 S.W.3d 309, 320-21 (Ky. 2008); Mont. Code Ann. § 46-18-222(1) (2010); Ore. Rev. Stat. § 161.620 (2010); D.C. Code. § 22-2104(a) (2010).

[10] *See* Alaska Stat. §12.55.125(a), (h), (j)(LexisNexis 2010).

[11] These states are: Alabama, Arizona, Arkansas, California, Connecticut, Georgia, Idaho, Illinois, Indiana, Maine, Maryland, Mississippi, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *See* Appendix A.

[12] In *Roper* the Supreme Court examined state law and practice and determined that 30 states prohibited the death penalty for minors and that the juvenile death penalty was imposed only infrequently in the remaining 20 states. *Id*. at 564-65. The Supreme Court paid special

the "direction of change" in state statutes); *Atkins v. Virginia*, 536 U.S. 304, 315 (2002) (same). In *Roper,* for example, five states had abolished the death penalty in the prior 15 years – four through legislative enactments, and one through a decision from the judiciary. *Roper,* 543 U.S. at 565. Here, the rate of change is even faster. In the last six years, four states have imposed new limits on LWOP against minors. In 2005, Colorado outlawed LWOP against minors altogether, Colo. Rev. Stat. § 17-22.5-104(IV) (2009); Texas followed suit in 2009, Tex. Penal Code Ann. § 12.31 (2010) (barring LWOP sentences for juveniles under seventeen); and Montana barred applying mandatory minimum sentences and limits on eligibility for parole against anyone below eighteen. Mont. Code Ann. § 46-18-222 (1) (2010). In 2004, Kansas eliminated the death penalty, but created the new option of life without parole for adult offenders. The legislature explicitly precluded the imposition of the penalty on juveniles. K.S.A. 21-4622 (2009). The significant increase in state laws limiting the imposition of life without parole upon juveniles demonstrates the national consensus against the sentence.

A review of sentencing practices further demonstrates the national consensus against imposing life without parole sentences on juveniles. The *Graham* Court's conclusion that there was a national consensus against juvenile life without parole rested not on an analysis of state statutes, but on actual sentencing practices. The Court noted, "the evidence of consensus is not undermined by the fact that many jurisdictions do not prohibit life without parole" for juvenile offenders. *Graham*, 130 S.Ct. at 2025. Rather, in the vast majority of these states, the legal availability of the sentence reflects a statutory accident. In such states, the legislature enacted two sets of laws: one allowing

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attention to recent laws and trends and concluded that there was a national consensus against imposing death sentences on minors. *Id.* at 565-67.

juveniles to be tried as adults, and one allowing adults to be given life without parole sentences. These states, however, did not expressly consider the question of the appropriateness of life without parole sentences for juveniles. Thus, "the statutory eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration." *Id*. at 2026. The more pertinent question was how often such sentences were imposed.

In *Graham*, the Court recognized that because only 109 juvenile offenders were serving life without parole sentences for non-homicide offenses, there was a national consensus against the practice. *Id*. at 2023. The Court further recognized that while the statistics available to the Court were not precise, the information was sufficient to demonstrate that the punishment is rarely imposed. *Id*. at 2024. It explained that

> It becomes all the more clear how rare these sentences are, even within the jurisdictions that do sometimes impose them, when one considers that a juvenile sentenced to life *without* parole is likely to live in prison for decades. Thus, these statistics likely reflect nearly all juvenile nonhomicide offenders who have received a life without parole sentence stretching back many years.

Id. (emphasis added). While the information about the imposition of life without parole sentences on juveniles generally is similarly imprecise, it is clear that the sentence is rarely imposed even in homicide cases. As an example, just 54 juveniles nationwide received this sentence in 2003 – including those convicted of homicide or non-homicide offenses. Human Rights Watch, Amnesty International, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 31 (2005) (hereinafter "HRW Report"). The distribution of life without parole sentences among the states further demonstrates the national consensus. As of 2004, *well over half* of the people known to be serving LWOP for crimes they committed as juveniles were imprisoned in just *four*

states: Florida, Louisiana, Michigan, and Pennsylvania, with Pennsylvania having the highest number in the nation. HRW Report, Table 5 at 35 and Appendix D: State Population Data Table.

There is also a discernible trend against imposing life without parole sentences. According to an Amnesty International study, juvenile life without parole began to be used in the United States in the early 1980s, peaked in the late 1990s, and was on the decline as of 2004. HRW Report 31, fig. 3. The same report observed that the sentence was meted out 152 times in 1996 but just 54 times in 2003. *Id*. This decrease is particularly notable given that the use of life without parole sentences for adults increased significantly during the same time period. Ashley Nellis & Ryan S. King, Sentencing Project, *No Exit: The Expanding Use of Life Sentences in America* (2009) http://sentencingproject.org/doc/publications/publications/inc_noexitseptember2009.pdf.

The limited number of states permitting mandatory life without parole sentences for juveniles, and particularly fourteen-year-olds, convicted of first degree murder, the rarity with which such sentences are imposed in practice, and the trend against their use all demonstrate the national consensus against the sentence.

II. INTERNATIONAL LAW, THE PRACTICE OF OTHER NATIONS, AND TREATY OBLIGATIONS ESTABLISH A GLOBAL CONSENSUS AGAINST LWOP SENTENCES FOR JUVENILES THAT RENDER SUCH SENTENCES UNCONSTITUTIONAL.

Pursuant to *Graham*, international law and practice are relevant to this Court's determination of whether a sentence is cruel and unusual under the United States Constitution. Not only is there a clear international consensus against juvenile life without parole, but equally importantly, the United States is party to treaties that have been interpreted to prohibit life without parole sentences for juvenile offenders. Under

the United States Constitution, judges of the states are bound by treaty provisions. The Court should consider both issues in determining whether the sentence is unconstitutional in this case.

A. International Law and Practice are Relevant to a Determination of Whether a Sentence is Cruel and Unusual under the United States Constitution

International law and the practice of other nations are relevant to courts' interpretation of whether a life without parole sentence imposed on a juvenile is cruel and unusual. The *Graham* Court noted, "The Court has looked beyond our Nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual. . . . Today we continue that longstanding practice in noting the global consensus against the sentencing practice in question." 130 S.Ct. at 849.

The United States is the only nation in the world that currently imposes life without parole sentences on juveniles for committing *any* crime, whether a homicide or nonhomicide. Michelle Leighton & Connie de la Vega, *Sentencing our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. Rev. 983 (2008). Most governments either have expressly prohibited, never allowed, or do not impose such sentences on children. *Id.* at 989-90. Of the ten countries other than the United States that have laws that arguably permit sentencing child offenders to life without parole,[13] there are no known cases where the sentence has been imposed on a juvenile. *Id.* at 990.

In considering global law and practice, the Court in *Graham* highlighted the international prohibition of sentencing juveniles to life without parole under any circumstance:

[13] These countries are Antigua and Barbuda, Argentina, Australia, Belize, Brunei, Cuba, Dominica, Saint Vincent and the Grenadines, the Solomon Islands, and Sri Lanka.

> We also note, as petitioner and his *amici* emphasize, that Article 37(a) of the United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990), ratified by every nation except the United States and Somalia, prohibits the imposition of 'life imprisonment without possibility of release. . . for offences committed by persons below eighteen years of age.' Brief for Petitioner 66; Brief for Amnesty International et al. as *Amici Curiae* 15-17."

Graham, 130 S.Ct. at 849.

A near-universal consensus has coalesced over the past fifteen years that the juvenile LWOP sentence must be legally abolished. Many United Nations resolutions have passed by consensus or, upon vote, by every country represented *except* the United States. *Sentencing our Children to Die*, *supra* at 1016-18. Every year since 2006, the United Nations General Assembly has adopted in its Rights of the Child resolution a call for the immediate abrogation of the juvenile LWOP sentence by law and practice in any country applying the penalty.

The United Nations Human Rights Council included the prohibition against both the death penalty and life without parole for offenders under 18 in its first substantive resolution on the Rights of the Child. Rights of the Child, A/HRC/7/RES/29, para. 30 (a) (2008). In 2009, the Council again urged "States to ensure that, under their legislation and practice, neither capital punishment nor life imprisonment without the possibility of release is imposed for offences committed by persons under 18 years of age." A/HRC/10/2.11, para. 11 (adopted March 25, 2009).

Moreover, as noted above, all countries other than the United States that had maintained a juvenile LWOP sentence have ended the practice in accordance with their treaty and international human rights obligations. *Sentencing our Children to Die*, *supra*,

at 996-1004.[14] That these countries clarified that they allow for parole hearings in accordance with the international legal norm is further evidence that countries agree that no derogation is permitted.

B. The Imposition of a Mandatory LWOP Sentence on a Juvenile Offender Violates United States Treaty Obligations and Customary International Law

In determining whether the United States Constitution permits the challenged sentence, this Court should consider the mandates of the Supremacy Clause, which provides that "[a]ll Treaties made . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const. art. VI, cl. 2. Further, the United States Supreme Court has noted that customary international law is "part of our law, and must be ascertained and administered by the 31 courts of justice of appropriate jurisdiction." *The Paquete Habana*, 175 U.S. 677, 700 (1900). As Justice Stevens has stated: "[o]ne consequence of our form of government is that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation." *Medellin v. Texas*, 552 U.S. 491, 536 (2008) (Stevens, J. concurring). In a follow-up opinion on the denial of habeas corpus relief, Justice Stevens again emphasized the point: "I wrote separately to make clear my view that Texas retained the authority and, indeed, the duty as a matter of international law to remedy the potentially significant breach of the United States' treaty obligations . . ." *Medellin v. Texas*, 129 S.Ct. 360, 362, (2008) (Stevens, J., dissenting).

[14] For example, Tanzania committed to allowing parole for the one person potentially serving the sentence and to clarifying its laws to prohibit the practice; Israel clarified that parole petitions may be reviewed by its High Court; and South Africa clarified that such sentences are not permitted. *Sentencing our Children to Die*, *supra*, at 996-1003.

Accordingly, Pennsylvania has an obligation to ensure that its criminal punishments comply with the United States' international treaty obligations. Thus, this Court must consider treaties to which the United States is a party, including: (1) the International Covenant on Civil and Political Rights ("ICCPR"), 999 U.N.T.S 171, *entered into force*, Mar. 23, 1976, ratified by the United States; (2) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), 1465 U.N.T.S. 85, entered into force, June 26, 1987, ratified by the United States, Oct. 21, 1994; and (3) the Convention on the Elimination of Racial Discrimination ("CERD"), 660 U.N.T.S. 195, entered into force, Jan. 4, 1969, ratified by the United States, Oct. 21, 1994. In ratifying the ICCPR, Congress stated, "The United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the State and local governments;. . ." Senate Committee on Foreign Relations, ICCPR, S. Exec. Rep. No. 102-23, at 19 (1992).

Under Pennsylvania law, the life without parole sentence imposed in this case was mandatory due to the nature of the Appellant's offenses. International treaty law to which the United States is a party requires that the *age of the juvenile* and his *status as a minor* be considered in sentencing, but a mandatory life without parole sentencing scheme prevents such consideration. In 2006, the Human Rights Committee, oversight authority for the ICCPR, determined that allowing the sentence contravenes Article 24(1), which states that every child shall have "the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State", and Article 7, which prohibits cruel and unusual punishment. Concluding Observations of the

Human Rights Committee: The United States of America, U.N. Doc. CCPR/C/USA/CO/3/Rev.1, para. 34, (Dec. 18, 2006).

The Committee Against Torture, the official oversight body for the Convention Against Torture, in evaluating the United States' compliance with that treaty, found that life imprisonment of children "could constitute cruel, inhuman or degrading treatment or punishment" in violation of the treaty. Committee Against Torture, Conclusions and Recommendations of the Committee Against Torture: United States of America, at para. 34, U.N. Doc. CAT/USA/CO/2 (July 25, 2006).

Moreover, in 2008, the Committee on the Elimination of Racial Discrimination, the oversight body for the Convention on the Elimination of Racial Discrimination ("CERD"), found the juvenile LWOP sentence incompatible with Article 5(a) of the CERD because the sentence is applied disproportionately to youth of color and the United States has done nothing to reduce what has become pervasive discrimination. In Pennsylvania, Black youth are more than twenty times more likely to be serving a sentence of life without parole than white youth. Human Rights Watch, Publications, "Executive Summary: The Rest of Their Lives," May 1, 2008, available at http://www/hrw/en/reports/2008/05/01/executive-summary-rest-their-lives. The Committee on the Elimination of Racial Discrimination referred to both the Human Rights Committee and Committee Against Torture's reports on the United States, noting the concern raised in regard to the sentence, and stated:

> In light of the disproportionate imposition of life imprisonment without parole on young offenders, - including children - belonging to racial, ethnic and national minorities, the Committee considers that the persistence of such sentencing is incompatible with article 5 (a) of the Convention. The Committee therefore recommends that the State party discontinue the use of life sentence without

> parole against persons under the age of eighteen at the time the offence was committed, and review the situation of persons already serving such sentences.

CERD, Concluding Observations of the United States, at para 21, U.N. Doc. CERD/C/USA/CO/6 (Feb. 6, 2008).

In light of these treaty obligations, this Court should consider the views of the bodies authorized to monitor treaty compliance in determining whether the sentence of life without parole for a juvenile violates international treaties. As the Supreme Court did in *Graham*, this Court should treat the laws and practices of other nations and international agreements as relevant to the Court's interpretation of both the Eighth Amendment and the Pennsylvania Constitution. As the Court noted in *Graham*, in the inquiry of whether a punishment is cruel and unusual, "'the overwhelming weight of international opinion against' life without parole for nonhomicide offenses committed by juveniles 'provide[s] respected and significant confirmation for our own conclusions.'" 130 S.Ct. at 850 (citing *Roper, supra* at 578). The weight of global law and practice against life without parole for *any* offense similarly supports the conclusion that these sentences are unconstitutional.

III. A SENTENCE OF LIFE WITHOUT PAROLE FOR A JUVENILE VIOLATES ARTICLE I, SECTION 13 OF THE PENNSYLVANIA CONSTITUTION WHICH PROHIBITS CRUEL PUNISHMENT.

Pennsylvania's youth are neither the most violent nor the most criminal children in the world, yet Pennsylvania has more inmates serving juvenile LWOP than *any other jurisdiction in the nation or the world*. *See A Shameful Record*, N.Y. Times, Feb. 6, 2008. In addition to violating the United States Constitution, these sentences also violate the Pennsylvania Constitution, whose protections are at least as broad as the federal Constitution.

With respect to juvenile sentences, Article I, Section 13 of the Pennsylvania Constitution should be interpreted more broadly than the Eighth Amendment of the U.S. Constitution.[15] In considering whether a protection under the Pennsylvania Constitution is greater than under the United States Constitution, this Court may consider: the text of the Pennsylvania Constitution; the provision's history, including case law; related case law from other states; and policy considerations unique to Pennsylvania. *See Commonwealth v. Edmunds*, 526 Pa. 374, 390, 586 A.2d 887, 895 (1991).

The Pennsylvania Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." Pa. Const. art. I, § 5. The text of the Pennsylvania Constitution is broader than the United States Constitution; where the U.S. Constitution bars punishments that are both "cruel" and "unusual," the Pennsylvania Constitution is bars punishments that are merely "cruel."

The history of juvenile life without parole sentences in Pennsylvania also supports a holding that the sentence is unconstitutional under the Pennsylvania Constitution. The Pennsylvania Supreme Court has acknowledged that Pennsylvania's prohibition against cruel punishment is not a static concept and courts must draw its meaning from "the evolving standards of decency that mark the progress of a maturing society." *Zettlemoyer*, 500 Pa. at 74 (internal quotations omitted). Though courts may typically

[15] Although Pennsylvania courts have, in the context of the death penalty, held that Pennsylvania's ban on cruel punishments is coextensive with the Eighth Amendment, *see Commonwealth v. Zettlemoyer*, 500 Pa. 16, 72-74, 454 A.2d 937, 967 (1982), the courts have not examined the issue in the context of life without parole sentences imposed on juvenile offenders, nor have those cases considered the jurisprudence of *Roper* and *Graham*, which both establish that there is a constitutional difference between defendants below age 18 and above age 18 regarding punishment (as discussed above). Significantly, *Zettlemoyer* was also decided before *Commonwealth v. Edmunds*, 526 Pa. 374 (1991), which established the method to determine whether the Pennsylvania Constitution is broader than the federal Constitution.

look to the legislature to "respond to the consensus of the people of this Commonwealth," *id*. (quoting *Commonwealth v. Story*, 497 Pa. 273, 297 (1981)), the Pennsylvania legislature has never explicitly authorized the practice of sentencing juveniles to life without parole sentences. Instead, juveniles in Pennsylvania are subject to life without parole sentences because of the interaction between Pennsylvania's juvenile transfer law and its homicide sentencing law. Thus, a statutory accident rather than a considered act of the Pennsylvania legislature led to this sentence. As the U.S. Supreme Court noted in *Graham*, such sentencing schemes do not reflect an intent to impose life without parole sentences on juveniles:

> Many States have chosen to move away from juvenile court systems and to allow juveniles to be transferred to, or charged directly in, adult court under certain circumstances. Once in adult court, a juvenile offender may receive the same sentence as would be given to an adult offender, including a life without parole sentence. *But the fact that transfer and direct charging laws make life without parole possible for some juvenile nonhomicide offenders does not justify a judgment that many States intended to subject such offenders to life without parole sentences*.

130 S. Ct. at 2025.

Indeed, Pennsylvania history reveals a longstanding commitment to providing special protections for minors against the full weight of criminal punishment. The Pennsylvania Supreme Court has recognized the special status of adolescents, and has held, for example, that a court determining the voluntariness of a youth's confession must consider the youth's age, experience, comprehension, and the presence or absence of an interested adult. *Commonwealth v. Williams*, 504 Pa. 511, 521 (1984). In *Commonwealth v. Kocher*, 529 Pa. 303, 311 (1992), involving the prosecution of a nine year old for murder, the Pennsylvania Supreme Court referred to the common law presumption that children under the age of 14 are incapable of forming the requisite

criminal intent to commit a crime. While this common law presumption was replaced by the Juvenile Act, its existence for decades demonstrates that Pennsylvania's common law was especially protective of minors. The Juvenile Act also recognizes the special status of minors in its aim "to provide for children committing delinquent acts programs of supervision, care and rehabilitation which provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the development of competencies to enable children to become responsible and productive members of the community." 42 Pa. Cons. Stat. § 6301(b)(2). This focus on rehabilitation and competency development underscores Pennsylvania's recognition that children are still changing and deserve special protections under the law.[16]

Finally, policy considerations support broadly interpreting the Pennsylvania's prohibition against cruel punishments. As discussed above, the U.S. Supreme Court held that "penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders." *Graham*, 130 S. Ct. at 2030. While finding that juvenile life without parole sentences are unconstitutional under the Pennsylvania Constitution would entitle the juveniles to meaningful parole opportunities, it would not "guarantee eventual freedom to a juvenile offender." *Id*. Those juvenile offenders who have "not demonstrated maturity and rehabilitation," *id*., could remain incarcerated, allowing the

[16] Additionally, Pennsylvania statutory law consistently recognizes that children lack the same judgment, maturity and responsibility as adults. *See, e.g.*, 23 Pa. Cons. Stat. § 5101 (the ability to sue and be sued or form binding contracts attaches at age 18); 18 Pa. Cons. Stat. Ann. §§ 6308, 6305 (a person cannot legally purchase alcohol until age 21 and cannot legally purchase tobacco products until age 18); 10 Pa. Stat. § 305(c)(1) (no person under the age of 18 in Pennsylvania may play bingo unless accompanied by an adult); 18 Pa. Cons. Stat. § 6311 (a person under age 18 cannot get a tattoo or body piercing without parental consent); 72 Pa. Stat. § 3761-309(a) (a person under age 18 cannot buy a lottery ticket); 4 Pa. Stat. § 325.228 (no one under age 18 may make a wager at a racetrack); 23 Pa. Cons. Stat. § 1304(a) (youth under the age of 18 cannot get married in Pennsylvania without parental consent or, if under 16, judicial authorization).

Commonwealth to simultaneously protect public safety while also recognizing that a young, immature, and not fully developed juvenile offender might rehabilitate over the course of his life.[17]

In light of the text of the Pennsylvania Constitution, the Commonwealth's historic recognition of the special status of juveniles, recent knowledge about adolescent development, and Pennsylvania's policies, juvenile life without parole sentences are unconstitutionally "cruel" under the Pennsylvania Constitution.

[17] At least two other states have interpreted their constitutions as barring LWOP against children in particular cases. *Workman v. Kentucky*, 429 S.W.2d 374, 377 (Ky. 1968) (holding that LWOP against children for rape violates United States and Kentucky constitutions, stating: "It seems inconsistent that one be denied the fruits of the tree of law, yet subjected to all its thorns."); *Naovarath v. Nevada*, 105 Nev. 525, 527, 779 P.2d 944, 946 (Nev. 1989) (holding that LWOP against 13-year old violated Nevada and United States Constitutions, and noting that the sentence announced that the boy must be "permanently unregenerate and an unreclaimable danger to society who must be caged until he dies").

V. CONCLUSION

This Honorable Court should hold Qu'eed Batts' life without parole sentence unconstitutional and remand the instant matter for resentencing

Respectfully submitted,

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APPENDIX A

First Degree Murder Life Without Parole Sentences Unavailable or Discretionary

Alabama: Absent aggravated circumstances, murder is a Class A felony punishable by life or ten to ninety-nine years. Ala. Code §§ 13A-6-2(c), 13A-5-6(a)(1) (2010).

Arizona: First degree murder punishable by life without parole or life. Ariz. Rev. Stat. Ann. § 13-752 (2010).

Arkansas: First degree murder is a Class Y felony punishable by ten to forty years, or life. Ark. Code Ann. §§ 5-4-102, 5-4-401 (2010).

California: For juveniles convicted of first degree murder, the penalty is life without parole or twenty-five years to life. Cal. Penal Code § 190.5(b) (2010).

Connecticut: Sentence for murder is twenty-five years to life. Conn. Gen. Stat. § 53a-35a (2010). Life without parole is only mandated for capital murder, which is defined as murder of law enforcement, murder for hire, murder by someone previously convicted of murder, murder by someone already sentenced to life imprisonment, murder in the course of a sexual assault, murder of two or more people at the same time, or murder of someone under sixteen).

Georgia: Sentence for murder is life, life without parole or death, and the court has discretion whether to impose life or life without parole. Ga. Code Ann. §§ 16-5-1, 17-10-3.1, 17-10-31.1 (2010).

Idaho: Sentence for first degree murder is death, LWOP, or life with a minimum 10 years served before parole eligibility. Idaho Code § 18-4004 (2010).

Illinois: Sentence for first degree murder is twenty to sixty years, sixty to 100 years, or life. 730 Ill. Comp. Stat.5/5-4.5-20 (2010).

Indiana: Sentence for murder is a fixed term of between forty-five and sixty-five years, with the advisory sentence being fifty-five years. Ind. Code Ann. § 35-50-2-3 (2010). A person 16-18 who would otherwise be subjected to the death penalty due to aggravated circumstances associated with a murder *may* be sentenced to LWOP. Ind. Code Ann. § 35-50-2-3.

Maine: Sentence for murder is life without parole or a term of twenty-five years or more. Me. Rev. Stat. tit. 17-A, § 1251 (2010).

Maryland: Sentence for first degree murder is death, life without parole, or life. Md. Code Ann., Crim. Law § 2-202 (2010).

Mississippi: Sentence for capital murder is death, LWOP, or life with possibility of parole. Sentence for murder is life. Miss. Code Ann. § 97-3-21 (2010).

Nevada: Sentences for first degree murder include death, life without parole, life with parole, or fifty years. Nev. Rev. Stat. Ann. § 200.030 (2010).

New Jersey: Mandatory life without parole sentences for juveniles are limited to murder of a police officer, killing of a child under fourteen, or murder in the course of a sexual assault or criminal sexual contact. N.J. Stat. Ann. § 2C:11-3(b)(5).

New Mexico: Murder in the first degree is a capital felony, but life without parole is only mandatory if certain aggravating circumstances are found. N.M. Stat. Ann. §§ 31-20A-2, 30-2-1 (2010). Person sentenced as a serious youthful offender may receive less than the mandatory minimum sentence. N.M. Stat. Ann. §§ 31-18-13, § 31-18-15.2.

New York: One element of first degree murder is that the defendant is older than eighteen. N.Y. Penal Law § 125.27(1)(b) (2010)**.**

North Dakota: Murder is a Class AA felony for which life without parole or life with the possibility of parole may be imposed. N.D. Cent. Code, §§ 12.1-16-01, 12.1-32-01 (2010).

Ohio: Sentence for aggravated murder is life without parole or life with the possibility of parole. Ohio Rev. Code Ann. § 2929.03(E) (2010).

Oklahoma: Sentence for first degree murder is death, life without parole, or life. 21 Okl. St. § 701.9 (2010).

Rhode Island: Sentence for first degree murder is life with parole or life without parole. R.I. Gen. Laws § 12-19.2-4 (2010).

South Carolina: Sentence for murder is death, life without parole, life, or at least thirty years. S.C. Code Ann. § 16-3-20 (2009).

Tennessee: Sentence for first degree murder is death, life without parole, or life. Tenn. Code Ann. §§ 39-13-202, 39-13-204 (2010).

Utah: Aggravated murder is a first degree felony (where death penalty is not sought) punishable by life without parole or twenty-five years to life. Utah Code Ann. §§ 76-5-202, 76-3-207.7 (2010).

Vermont: Sentence for first degree murder is thirty-five years to life or life without parole. Vt. Stat. Ann. tit. 13, § 2303(a) (2010).

Virginia: First degree murder is a Class 2 felony punishable by life without parole or at least twenty years. Va. Code Ann. §§ 18.2-10, 18.2-32 (2010).

Washington: Sentence for aggravated first degree murder is life without parole, but sentence for first degree murder is life. Wash. Rev. Code Ann. §§ 9A.32.040, 10.95.030 (2010).

West Virginia: Sentence for first degree murder is life with eligibility for parole. W. Va. Code §§ 61-2-2, 62-12-13 (2010).

Wisconsin: First degree intentional homicide is a Class A felony punishable by life imprisonment, but with possibility of parole. Wis. Stat. §§ 939.50, 940.01, 973.014 (2010).

Wyoming: First degree murder punishable by death, life without parole, or life. Wyo. Stat. § 6-2-101 (2010).

APPENDIX B

Discretion to Try Youth (Any Age) in Juvenile or Adult Court

Hawaii: Waiver to adult court is discretionary. Haw. Rev. Stat. § 571-22 (2010).

Michigan: In cases of murder, juvenile court has jurisdiction "if the prosecuting attorney files a petition in the court instead of authorizing a complaint and warrant," Mich. Comp. Laws § 712A.2 (2010); juvenile court has discretion to waive jurisdiction. Mich. Comp. Laws § 712A.4.

Missouri: Waiver to adult court is discretionary. Mo. Ann. Stat. § 211.071 (2010).

Nebraska: Juvenile court and adult court have concurrent jurisdiction over felonies. Neb. Rev. Stat. § 43-247 (2010). District attorney must consider certain factors in determining whether to file in juvenile or adult court if the youth is under 16. Neb. Rev. Stat. § 43-276.

New Hampshire: Courts have discretion to transfer cases to adult court; there is only a presumption of transfer for murder after the youth is fifteen. N.H. Rev. Stat. Ann.169-B:24 (2010).

APPENDIX C

First Degree Murder Life Without Parole Sentences Mandatory for Older Juveniles

Delaware: Mandatory life without parole for first degree murder. Del. Code. Ann. tit. 11, § 4209 (2010). Youth charged with murder shall be tried as an adult. Del. Code. Ann. tit. 10, § 1010.

Florida: First degree murder is a capital felony with a mandatory life without parole sentence. Fla. Stat. §§ 775.082, 782.04 (2010).

Iowa: First degree murder is a Class A felony with a mandatory life without parole sentence. Iowa Code §§ 902.1, 707.2 (2010).

Louisiana: Sentence for first degree murder is mandatory life without parole. La. Rev. Stat. Ann. § 14:30 (2010).

Massachusetts: Sentence for first degree murder is mandatory life without parole. Mass. Gen. Laws Ann. ch. 265, § 2. Juveniles fourteen to seventeen charged with murder must be tried as adults. Mass. Gen. Laws Ann. ch.119, § 74.

Minnesota: Sentence for first degree murder is mandatory life without parole. Minn. Stat. §§ 609.106, 609.185 (2010).

North Carolina: Sentence for first degree murder is mandatory life without parole. N.C. Gen. Stat. § 14-17 (2010). Mandatory transfer to adult court for Class A felonies. N.C. Gen. Stat. § 7B-2200.

Pennsylvania: Sentence for first degree murder is mandatory life without parole. 18 Pa. Cons. Stat. § 1102 (2010). Murder not part of juvenile court jurisdiction. 42 Pa. Cons. Stat. § 6302.

South Dakota: First degree murder is a Class A felony punishable by life or death. S.D. Codified Laws §§ 22-16-4, § 22-16-12, 22-6-1 (2010). Inmates sentenced to life not eligible for parole. S.D. Codified Laws § 24-15-4.

Texas: Mandatory life without parole for capital murder. Tex. Penal Code § 19.03, 12.31 (2010).

APPENDIX D

Exceptions for Mandatory Adult Court Jurisdiction for Younger Juveniles

Florida: Charges against sixteen year olds and seventeen year olds accused of murder must be filed in adult court. Fla. Stat. § 985.557.

Iowa: Juvenile court does not have jurisdiction over forcible felony, including murder, if *sixteen* or older. Iowa Code §§ 232.8(1)(c), 702.11 (2010).

Louisiana: Juvenile *fifteen* or older charged with first degree murder must be tried as an adult. La. Child Code Ann. art. 305 (2010).

Minnesota: Typically court has discretion to waive juveniles to adult court, but juvenile court does not have jurisdiction over children *sixteen* and older alleged to have committed first degree murder. Minn. Stat. §§ 260B.125, 260B.007.

South Dakota: Mandatory transfer to adult court for youth sixteen and older, otherwise transfer is discretionary. S.D. Codified Laws §§ 26-11-3.1, 26-11-4.

Texas: No life without parole sentences to juvenile under age seventeen. Tex. Fam. Code § 51.02 (2010).