JUVENILE JUSTICE ACCOUNTABILITY AND IMPROVEMENT ACT OF 2007

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

ON

H.R. 4300

SEPTEMBER 11, 2008

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SEPTEMBER 11, 2008

JUVENILE JUSTICE ACCOUNTABILITY AND IMPROVEMENT ACT OF 2007

THURSDAY, SEPTEMBER 11, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:14 p.m., in room 2237, Rayburn House Office Building, the Honorable Robert C. "Bobby" Scott (Chairman of the Subcommittee) presiding.

Present: Representatives Scott, Conyers, Waters, Johnson, Gohmert and Coble.

Staff Present: Bobby Vassar, Subcommittee Chief Counsel; Ameer Gopalani, Majority Counsel; Jesselyn McCurdy, Majority Counsel; Mario Dispenza, Fellow, BATFE Detailee; Veronica Eligan, Majority Professional Staff Member; Caroline Lynch, Minority Counsel; Kimani Little, Minority Counsel; and Kelsey Whitlock, Minority Staff Assistant.

Mr. SCOTT. The Subcommittee will now come to order.

I am pleased to welcome you today to the hearing before the Subcommittee on Crime, Terrorism, and Homeland Security on H.R. 4300, the "Juvenile Justice Accountability and Improvement Act of 2007."

The United States is the only country on Earth that sentences its children to die in prison. The only country. We now have over 2,400 persons in prison serving sentences for life without parole for crimes they committed as adults. We are adamant that children are not mature enough to vote, to join the military, to smoke or drink, to enter into contracts, or to serve on juries; however, when it comes to being responsible for crimes, children can be and are sentenced to the harshest adult sentences short of death, life without parole. Sixteen percent of those serving juvenile life without parole sentences were between the ages of 13 and 16 at the time of the offense; 73 of them were only 13 or 14 years old at the time of the offense. The majority of these teenagers, it was their first conviction ever. Some of them were not the one that pulled the trigger; instead, they aided or abetted someone else, often older, who was the principal actor. Ironically, it is estimated that in 56 percent of the cases with adult codefendants, the adult actually received a lower sentence than the youth.

Many of these youth offenders share tragic stories of years of childhood abuse and neglect before their offense. Bryan Stevenson,

with the Equal Justice Initiative, will tell you about Ashley, who was abandoned by her mother at a crack house when she was in diapers, assaulted by her father so badly that she ended up in a hospital, and sexually assaulted at the age of 11 by her stepfather. At 14, she tried to escape the violence with an older boyfriend who shot and killed her grandfather and aunt. Because of Alabama's mandatory sentencing law, she is now serving a sentence of life without parole.

Other stories are equally tragic. Despite these horrific stories, there is hope that these youth offenders can rise above their pasts and their crimes and live productive lives.

Teenagers act differently from adults because they are different. Through well-established scientific studies, we know that the frontal lobes of their brains, which are critical to controlling impulsive behavior and making good choices, are not fully developed. This will change as they become adults.

Now, it was recognized by the Supreme Court in *Roper v. Simmons* the character of teenagers is not well formed, so they are not only vulnerable to maladjusted impulse behaviors, but are receptive to education, treatment, and rehabilitation. At the time of sentencing, it is too early to predict that there is no hope for a juvenile, and we should not at that stage throw away the key forever.

Life without parole sentences also disproportionately impact racial and ethnic minorities. A study in California revealed that African American youth arrested for murder are almost six times more likely to receive a life without parole sentence than White youth arrested for murder.

H.R. 4300 is a straightforward bill. It does not mandate the release of any juvenile. It merely requires States to provide all juveniles with a meaningful opportunity for parole at least once in the first 15 years of incarceration, and once every 3 years thereafter. If the States choose not to, they risk losing some of their Federal funding.

The bill also requires the Federal judicial system to similarly provide a meaningful opportunity for parole for juveniles. There are 35 individuals serving life without parole sentences that they received in the Federal system for crimes committed when they were juveniles.

Finally, H.R. 4300 provides grant money to improve the quality of legal representation provided to juveniles charged with or convicted of life without parole sentences.

I hope that my colleagues will support the bill, and now would be pleased to recognize the Ranking Member of the Subcommittee Judge Gohmert.

[The bill, H.R. 4300 follows:]

I

110TH CONGRESS
1ST SESSION

H. R. 4300

To establish a meaningful opportunity for parole for each child offender sentenced to life in prison, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 6, 2007

Mr. SCOTT of Virginia (for himself and Mr. CONYERS) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To establish a meaningful opportunity for parole for each child offender sentenced to life in prison, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Juvenile Justice Accountability and Improvement Act of 2007".

SEC. 2. FINDINGS.

Congress finds the following:

(1) Historically, courts in the United States have recognized the undeniable differences between adult and youth offenders.

(2) In fact, while writing for the majority in Roper v. Simmons (125 S. Ct. 1183), a recent Supreme Court decision abolishing use of the death penalty for juveniles, Justice Kennedy declared such differences to be "marked and well understood."

(3) Notwithstanding such edicts, many youth are being sentenced in a manner that has typically been reserved for adults. These sentences include a term of imprisonment of life without the possibility of parole.

(4) The decision to sentence youthful offenders to life without parole is an issue of growing national concern.

(5) While only about a dozen youth are serving such sentences in the rest of the world, research indicates that there are at least 2,225 youth offenders serving life without parole in the United States.

(6) The estimated rate at which the sentence is imposed on children nationwide remains at least three times higher today than it was fifteen years ago.

(7) The majority of youth sentenced to life without parole are first-time offenders.

(8) Sixteen percent of these individuals were fifteen or younger when they committed their crimes.

(9) Denying such individuals the possibility of a meaningful opportunity for parole is both cruel and unwise. It sends a message to our youth that they are beyond rehabilitation. It also demonstrates a complete lack of confidence in the ability of our penal institutions to accomplish one of their main goals and responsibilities.

SEC. 3. ESTABLISHING A MEANINGFUL OPPORTUNITY FOR PAROLE FOR CHILD OFFENDERS.

(a) IN GENERAL.—For each fiscal year after the expiration of the period specified in subsection (d)(1), each State shall have in effect laws and policies under which each child offender who is under a life sentence receives, not less than once during the first 15 years of incarceration, and not less than once every 3 years of incarceration thereafter, a meaningful opportunity for parole. Not later than one year after the date of the enactment of this Act, the Attorney General shall issue guidelines and regulations to interpret and implement this section. This provision shall in no way be construed to limit the access of child offenders to other programs and appeals which they were rightly due prior to the passage of this Act.

(b) DEFINITION.—In this section, the term ''child offender who is under a life sentence'' means an individual who—

(1) is convicted of an offense committed before the individual attained the age of 18; and

(2) is sentenced to a term of natural life, or the functional equivalent in years, for that offense.

(c) APPLICABILITY.—This section applies to an individual who is sentenced on or after the date of the enactment of this Act as well as to an individual who had already been sentenced as of the date of the enactment of this Act.

(d) COMPLIANCE AND CONSEQUENCES.—

(1) COMPLIANCE DATE.—Each State shall have not more than 3 years from the date of enactment of this Act to be in compliance with this section, except that the Attorney General may grant a 2-year extension to a State that is making a good faith effort to comply with this section.

(2) CONSEQUENCE OF NONCOMPLIANCE.—For any fiscal year after the expiration of the period specified in paragraph (1), a State that fails to be in compliance with this section shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to that State under subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3750 et seq.), whether characterized as the Edward

Byrne Memorial State and Local Law Enforcement Assistance Programs, the Local Government Law Enforcement Block Grants program, the Edward Byrne Memorial Justice Assistance Grant Program, or otherwise.

(3) REALLOCATION.—Amounts not allocated under a program referred to in paragraph (2) to a State for failure to be in compliance with this section shall be reallocated under that program to States that have not failed to be in compliance with this section.

SEC. 4. ESTABLISHING A PARALLEL SYSTEM FOR CHILD OFFENDERS SERVING LIFE SENTENCES AT THE FEDERAL LEVEL.

In addition to any other method of early release that may apply, the Attorney General shall establish and implement a system of early release for each child offender who is under a life sentence (as defined in section 3) in a Federal facility. The system shall conform as nearly as practicable to the laws and policies required of a State under section 3.

SEC. 5. GRANT PROGRAM TO IMPROVE LEGAL REPRESENTATION OF CHILDREN FACING LIFE IN PRISON.

(a) IN GENERAL.—The Attorney General shall award grants to States for the purpose of improving the quality of legal representation provided to child defendants charged with an offense which could potentially subject them to the sentence of life in prison.

(b) DEFINED TERM.—In this section, the term ''legal representation'' means legal counsel and investigative, expert, and other services necessary for competent representation.

(c) USE OF FUNDS.—Grants awarded under subsection (a) shall be used to establish, implement, or improve a system for providing competent legal representation to—

(1) individuals charged with committing, before the individual attained the age of 18, an offense subject to life imprisonment; and

(2) individuals convicted of, and sentenced to life for, committing such an offense who seek appellate or collateral relief, including review in the Supreme Court of the United States.

(d) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this section such sums as may be necessary.

○

Mr. GOHMERT. Thank you, Chairman Scott. And I would ask unanimous consent to submit an opening statement in writing. I need to do some more work on it. If that might be allowed——

Mr. SCOTT. Without objection.

Mr. GOHMERT [continuing]. Within 5 days.

But I would like to say in my capacity as a former judge, you know, I have wrestled with these issues of sentencing in a very personal way. And though I know that sometimes we here in Washington think that we have far greater knowledge and wisdom than anyone in any of the State governments, whereas when you reflect on it, perhaps the fact that they are working in the State and local government rather than being here may be evidence that they are more wise.

But it is an ongoing struggle. Do we usurp the State authority and substitute our judgment for those States? I don't think the Constitution provides for that. When it comes to juvenile justice, having seen families destroyed, lives destroyed, and I mean literally, people killed because someone was not tough enough with a juvenile who had already demonstrated that they were a dangerous threat to others around them, I know it is—I hesitate to interject the judgment of Washington for somebody on the scene locally.

And I realize that there is some wisdom in saying the parole board should have more often reviews, and I appreciate that, but my thing is I am struggling with the bill not because things in it may not be a good idea, but it is the Federal Government telling the State government what they can or can't do in their own constitutionally reserved cases.

So I look forward to the testimony here, hearing from you, and yield back the balance of my time.

Mr. SCOTT. Thank you.

Without objection, all Members may include opening statements in the record at this point.

We have a distinguished panel of witnesses with us today to discuss the legislation. Our first witness will be Bryan Stevenson, who is the executive director of the Equal Justice Initiative in Montgomery, Alabama, and a professor of law at New York University School of Law. His efforts to confront bias against the poor and people of color in the criminal justice system have earned him dozens of national awards. In 2007, his organization published a report, "Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison."* The report is powerful and reveals the tragedy that has resulted from the political rhetoric of adult time for adult crime. Mr. Stevenson is a graduate of Harvard Law School and Harvard School of Government.

Our second witness is Dr. Richard Dudley, who is a practicing psychiatrist whose practice involves both the evaluation and treatment of African American men and forensic practice. He has taught at the New York University School of Law and the City of New York Medical School at City College. During 2005 and 2006, he

*The 2007 report, "Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison," has been made a permanent part of this record and is archived at the Committee on the Judiciary. The report may also be viewed on the Internet at the following address: *http://www.eji.org/eji/files/20071017cruelandunusual.pdf.*

served as a Commissioner on the Commission of Safety and Abuse in America's Prisons. He has a medical degree from Temple University School of Medicine and completed his psychiatric residency at Northwestern University Institute of Psychiatry in Chicago.

Next witness is Raphael Johnson from Michigan. At the age of 17, he shot and killed someone, was convicted of murder, and sentenced to 10 to 25 years in prison. He served 12 years, and has been out now for 4 years. He went to college and received a B.A. Summa cum laude from the University of Detroit Mercy, is now married with two children. He has his own company where he does motivational speaking and conflict resolution; works for Goodwill Industries of the Greater Detroit Area as a community reintegration coordinator, where he helps ex-offenders successfully reenter society. He is also working on a master's degree.

Our final witness will be Elizabeth Calvin, who works in the Children's Rights Division of Human Rights Watch. She is the author of the Human Rights Watch report, When I Die, They'll Send Me Home: Youth Sentenced to Life Without Parole in California. She has also written a national practice guide for attorneys representing children, an assessment of the quality of attorneys representing youth, and a guide for reducing unnecessary detention of children. She is a founding director of a legal services program to address education and mental health and homelessness among juvenile offenders in Washington State. She has a B.A. in political science and a J.D. from the University of Washington School of Law and taught law school at Loyola School of Law.

Now, each witness's written statement will be made part of the record in its entirety, and I would ask each of our witnesses to summarize his or her testimony in 5 minutes or less. To help stay within that time, there is a lighting device in front of you which will start off green, switch to yellow when 1 minute is left, and red when 5 minutes are up.

Do I understand that Dave Marsden from the Virginia House of Delegates is here? Dave? Good to see you, sir. Thank you.

Mr. MARSDEN. Good to see you.

Mr. SCOTT. Good to have you with us.

Bryan Stevenson.

TESTIMONY OF BRYAN A. STEVENSON, EXECUTIVE DIRECTOR, EQUAL JUSTICE INITIATIVE, MONTGOMERY, AL

Mr. STEVENSON. I want to express my deep gratitude for you taking time to take on this very serious issue. As Chairman Scott indicated, there are 2,500 children in the United States who have been sentenced to life in prison without parole. There are hundreds more, thousands more, that have been sentenced to sentences of life imprisonment. And I do believe that this is a very critical issue that would benefit from this legislation which has been proposed.

Let me first say that one of the big problems that I see as an attorney who represents this population a great deal is the profound absence of hope that seems to have demoralized whole communities. I go into poor sections across this country and poor neighborhoods and rural neighborhoods, and the thing that is most tragic to me is I meet 13- and 14-year-old children who tell me that they don't believe they are going to live past the age of 18, and that

despair shapes the way they see the world. It is the way they organize themselves. They don't talk to me about staying in school. They don't talk to me about this. They talk about "getting mine while I can." And that hopelessness is something that is very, very tragic. And I think it is reinforced by the criminal justice system that takes kids and throws them away.

And I believe that a sentence of death in prison imposed on someone as young as 13 or 14 is very, very hopeless. The tragedy is when I work with these young people even in the incarceration system, they become more hopeful at 21 and 22 behind bars than they were at 13 and 14 on the street. And it says something to me about the power of intervention. We do have kids that are at risk that do things that require punishment, but we can work with them.

The tragedy of the law right now is that we condemn children as young as 13 to die in prison, and I would like to suggest to the judge in particular that the consequence of these sentences or how we got there was not the consequence of thoughtful decision-making by State legislatures. In the early 1990's we began lowering the minimum age for trying children as adults with no consideration for how that would intersect with sentencing at the high end. A lot of States were concerned about giving more leeway to criminal justice policymakers on sentencing at the low end, thinking that the juvenile system was inadequate, but unfortunately, when we brought these kids into the adult system, they collided with another phenomena of the 1990's, which was mandatory sentencing. And as a result of mandatory sentencing, about 70 percent of the cohort of 13- and 14-year-olds were sentenced to die in prison in proceedings where the judge could not consider their age, could not consider their status, could not consider the fact that they were first offenders or that an older codefendant got a less sentence. And I think that speaks to the need of reform.

And one of the, I think, real serious problems that I hope this legislation can also help us address is the real problem of providing the kinds of assistance that these kids need. I represented a young man by the name of Ian Manuel, who was 13 years of age, in Florida, and he was charged with an aggravated robbery. And his lawyer actually urged him to plead guilty, which he did. And when he went before the judge, the judge sentenced him to life imprisonment without parole. Of course, you would never plead guilty for a life imprisonment without parole sentence, but because he was young, and because he was poor, that sentence still stands. He has had no opportunity to challenge. Even the victim in that case has joined the effort to try to get release for Mr. Manuel, but life without parole doesn't facilitate that. And I see these cases playing out time and time again.

Kids this age are very vulnerable to all of the problems of the criminal justice system, wrongful convictions included. I represent another 13-year-old by the name of Joe Sullivan, who was convicted of a sexual assault with two other young men who are absolutely convinced that Joe at age 13 did not commit a rape. But the DNA evidence that could exonerate him now, this was in the early 1990's, has been lost. And, of course, we don't have the opportunity to challenge that sentence. And so parole would be an opportunity

for us to get sentencers and policymakers to deal with this case. But life without parole means you never are heard from again, and it is the silence surrounding this universe of young kids that I think makes reform so critically needed.

One of the big challenges in providing assistance to this young group of people is the way in which they become very victimized in the adult prison system. As we all know, you are substantially more likely to be the victims of sexual assault, trauma, et cetera. Yesterday I got a call from one of our young clients in Alabama who was raped. We now assessed in our population of 13- and 14-year-olds that 70 percent have been victimized by sex crimes.

A young client in Pennsylvania, Trina Garnett, 14 years old, Westchester, Pennsylvania, was trying to see a boy next door and was using matches to light her way to the bedroom. The house caught on fire. Two children were killed. She was charged with arson, murder; convicted of murder; sentenced to life imprisonment without parole at 14. She goes to the State penitentiary, where she is raped by a male guard. The State never prosecuted the guard. She is now 44 years of age, multiple sclerosis, a lot of disabilities. Correctional staff will tell you she is the first person who they would recommend for release, but life without parole doesn't facilitate any review of that case, and as a result of that, we do believe this legislation is critically needed.

There are so many instances where young kids are abused, neglected, victimized, traumatized in the streets and in the community, and their first attention only comes when they are accused of committing a crime. We think that we have to have sentencing for children that takes into account all of those factors and that allows us to create a sentencing regime that is responsive.

One final example. I am representing a young man by the name of Antonio Nunez, who grew up in south central L.A., was shot several times at 13. His family tried to move out of the area, but because he had a sibling who was on probation, they were required to come back to south central L.A. He joins a gang, at 14 was brought in to attempt to commit a kidnapping. He was chased by the police, shots are fired, no one is injured, but because of California's sentencing law, he goes to trial with his older codefendant, convicted of aggravated kidnapping, sentenced to life imprisonment without parole for a crime where there are no injuries. No injuries.

The eighth amendment says that cruel and unusual punishment is prohibited. We believe that sentencing children 13, 14, 15, 16, and 17 to these kinds of nonreviewable, nonparolable sentences is cruel and unusual punishment.

We do need leadership from Congress. Sentencing reform at the State level is very, very difficult. We live in an era where so many politicians preach fear and anger, and it creates an environment where good sentencing reform is difficult. We do need leadership. And I believe this bill represents the kind of thing, the kind of intervention that could make a huge difference in how States recover from this problem of a growing population of very young children who have been sentenced to die in prison. I really appreciate the Committee's leadership on this issue, and I look forward to answering any questions that the Committee might have.

Mr. SCOTT. Thank you. Thank you, Mr. Stevenson.

[The prepared statement of Mr. Stevenson follows:]

PREPARED STATEMENT OF BRYAN A. STEVENSON

STATEMENT BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES

THE SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY

September 11, 2008

Sentencing Young Children to Die in Prison

BRYAN A. STEVENSON

Equal Justice Initiative, Executive Director

H.R. 4300, The Juvenile Justice Accountability and Improvement Act

MR. CHAIRMAN AND COMMITTEE MEMBERS:

In the United States, dozens of 13- and 14-year-old children have been sentenced to life imprisonment with no possibility of parole after being prosecuted as adults. While the United States Supreme Court recently declared in *Roper v. Simmons* that death by execution is unconstitutional for juveniles, young children continue to be sentenced to imprisonment until death with very little scrutiny or review. A study by the Equal Justice Initiative (EJI) has documented 73 cases where children 13 and 14 years of age have been condemned to death in prison.[1] Almost all of these kids currently lack legal representation and in most of these cases the propriety and constitutionality of their extreme sentences have never been reviewed.

Most of the sentences imposed on these children were mandatory: the court could not give any consideration to the child's age or life history. Some of the children were charged with crimes that do not involve homicide or even injury; many were convicted for offenses where older teenagers or adults were involved and primarily responsible for the crime; nearly two-thirds are children of color.

Young Children Are Different From Adults

[1] Equal Justice Initiative, *Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison* (2008), available at http://eji.org/eji/files/20071017cruelandunusual.pdf.

Unlike older teenagers, 14-year-olds in most states cannot get married without permission or obtain a driver's license. The law mandates that they must attend school and limits the hours they can work in after-school jobs.The law treats young adolescents differently because they *are* different. Using state-of-the-art imaging technology, scientists have revealed that adolescents' brains are anatomically undeveloped in parts of the cerebrum associated with impulse control, regulation of emotions, risk assessment, and moral reasoning. Accordingly, the neurological development most critical to making good judgments, moral and ethical decision-making, and controlling impulsive behavior is incomplete during adolescence.[2]As a result, young teens experience widely fluctuating emotions and vulnerability to stress and peer pressure without the adult ability to resist impulses and risk-taking behavior or the adult capacity to control their emotions.[3] At the same time, because a child's character is not yet fully formed, he will change and reform as he grows up.[4]

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[2] Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 Ann. N.Y. Acad. Sci. 77-85 (2004); Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 Proceedings Nat'l Acad. Sci. 8174 (2004); Elizabeth R. Sowell et al., *Mapping Cortical Change Across the Human Life Span*, 6 Nature Neuroscience 309 (2003).

[3] L.P. Spear, The Adolescent Brain and Age-Related Behavioral Manifestations, 24 Neuroscience & Biobehav. Revs. 417, 421 (2000); Elizabeth Cauffman & Laurence Steinberg, (Im)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults, 18 Behav. Sci. & L. 741,742 (2000); Lita Furby & Ruth Beyth-Marom, Risk Taking in Adolescence: A Decision-Making Perspective, 12 Developmental Rev. 1, 9-11 (1992).

[4] *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (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.").

While the differences between children and adults are "marked and well understood,"[5] children as young as 13 have found themselves in the adult criminal justice system and subject to its most severe penalties. Because of their low social status in relation to adult interrogators, beliefs about the need to obey authority, greater dependence on adults, and vulnerability to intimidation, juveniles are uniquely susceptible to coercive psychological interrogation techniques designed for adults, leading to false confessions6 and undermining the reliability of the fact-finding process.[6] Together with their diminished understanding of rights, confusion about trial processes, limited language skills, and inadequate decision-making abilities, young children are at great risk in the adult criminal justice system.

Condemned Children Share Childhoods of Neglect and Abuse

Most of the children who have been sentenced to die in prison for crimes at 13 or 14 come from violent and dysfunctional backgrounds. They have been physically and sexually abused, neglected, and abandoned; their parents are prostitutes, drug addicts, alcoholics, and crack dealers; they grew up in lethally violent, extremely poor areas where health and safety were luxuries their families could not afford.

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[5] *Id.* at 572-73.
[6] Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 1005 (2004).

"[Y]outh is more than a chronological fact . . . It is a time and condition of life when a person may be most susceptible to influence and to psychological damage."[7] During 2005, approximately 899,000 children in the 50 states, the District of Columbia, and Puerto Rico were determined to be victims of abuse or neglect. More than 60% of victims suffered neglect, 15% suffered physical abuse, 10% suffered sexual abuse, and 7% were victims of emotional maltreatment. An estimated 1460 children died due to child abuse or neglect in 2005 – a rate of 1.96 deaths per 100,000 children. More than 40% of child fatalities were attributed to neglect, while physical abuse also was a major contributor to child deaths. Nearly 80% of perpetrators of child maltreatment were parents, and another 6.8% were other relatives of the child victim.[8]

Children sentenced to die in prison have in common the disturbing failure of police, family courts, child protection agencies, foster systems, and health care providers to treat and protect them. Their crimes occur in the midst of crisis, often resulting from desperate, misguided attempts to protect themselves.

The experiences of EJI's clients exemplify the extremely deprived and difficult backgrounds of children sentenced to die in prison. Many of these children have been victimized by physical violence and sexual abuse inflicted on them by their parents and other family members. Several of these children endured

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[7] *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982).
[8] U.S. Department of Health and Human Services, Administration on Children, Youth and Families, Child Maltreatment 2005 (Washington, DC: U.S. Government Printing Office, 2007), *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm05/index.htm.

years of sexual abuse and rape: one was repeatedly sexually assaulted beginning when he was just four years old; another boy was raped by a family member.

Ashley Jones was repeatedly threatened at gunpoint by her parents, sexually assaulted by her stepfather, forced into crack houses by an addicted mother, physically abused by family members, and abducted by a gang shortly before her crime.

Severe neglect is also common among children in this group. Joseph Jones grew up in Newark public housing, where his crack-addicted parents left him to cook, clean, and take care of his six younger siblings. At 13, Joseph's parents took him to North Carolina and abandoned him with relatives.

Quantel Lotts saw his uncle gunned down in his front yard in a poor St. Louis neighborhood, where his mother used and sold crack cocaine out of their house. Quantel was removed from his mother's custody at age eight; he smelled of urine, his teeth were rotting, and his legs, arms, and head bore scars from being punched and beaten with curtain rods and broom handles.

Fatal violence is all too common in the impoverished areas where many of these kids spent their childhoods. Antonio Nuñez lived with his family in a brutally violent South Central Los Angeles neighborhood. When he was 13, he was shot while riding a bicycle just down the street from his house. His 14-year-old brother responded to Antonio's cries for help and was shot in the head and killed. Antonio would have died but for emergency surgery to repair his intestines.

These adolescents suffer from drug and alcohol dependence that typically began in the womb and can be traced back through their family trees. Omer Ninham is the child of alcoholic parents and, by age ten, was drinking alcohol daily – even in the classroom, where his teachers looked the other way. Omer got his first toothbrush at age 14, when he was removed from his parents and sent to a youth home.

Tragically, these children received no effective or long-term services, even where their cries for help were early, frequent, and unmistakable. Evan Miller suffered physical and emotional abuse so severe that he tried to kill himself when he was just seven years old. By age eight, he had attempted suicide several times.

Research has shown that juveniles subjected to trauma, abuse, and neglect suffer from cognitive underdevelopment, lack of maturity, decreased ability to restrain impulses, and susceptibility to outside influences greater even than those suffered by normal teenagers.[9]

Normal adolescents cannot be expected to transcend their own psychological or biological capacities in order to operate with the level of maturity, judgment, risk aversion, or impulse control of an adult. A 14-year-old who has suffered brain trauma, a dysfunctional family life, violence, or abuse cannot be presumed to function even at standard levels for adolescents.

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[9]Nancy Kaser-Boyd, Ph.D., *Post-Traumatic Stress Disorders in Children and Adults: The Legal Relevance*, 20 W. St. U. L. Rev. 319 (1993).

Children overwhelmed by dysfunction and without resources to flee or seek help are not provided treatment or safe haven. Instead, in the adult criminal justice system, they are subjected to mandatory sentencing that ignores the child's circumstances and those of the offense in imposing the harshest available sentence.

Numbers and Demographics of Young Children Sentenced to Death in Prison

EJI conducted a nationwide investigation to determine how many people in the United States are serving sentences of life imprisonment with no possibility of parole for crimes committed when they were 13 or 14 years old. By reviewing court decisions, searching media reports, and collecting information from state departments of corrections and from prisoners directly, we have identified **73** people who are serving sentences to die in prison for crimes they committed at age 13 or 14. These 73 children sentenced to death in prison are serving their sentences in just **19** states: Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Illinois, Iowa, Michigan, Mississippi, Missouri, Nebraska, North Carolina, Pennsylvania, South Dakota, Tennessee, Washington, and Wisconsin.

Pennsylvania is the worst state in the country when it comes to sentencing 13- and 14-year-old children to die in prison. Of the 73 children sentenced to die in prison nationwide, **18** were sentenced by Pennsylvania. Florida is second, with 15 young children sentenced to die in prison. In six states – Florida, Illinois, Nebraska, North Carolina, Pennsylvania, and Washington – 13-year-old children have been condemned to death in prison.

Sentencing Children to Death in Prison Violates the U.S. Constitution and International Law

Nearly 2500 juveniles (age 17 or younger) in the United States have been sentenced to life imprisonment without parole. These cases raise important legal, penological, and moral issues. EJI believes that such a harsh sentence for the youngest offenders is cruel and unusual in violation of the Eighth Amendment to the United States Constitution. These children should be re-sentenced to parole-eligible sentences as soon as possible.

The Eighth Amendment to the United States Constitution prohibits "cruel and unusual punishments." To determine which punishments are cruel and unusual, courts look to "the evolving standards of decency that mark the progress of a maturing society."[10] The analysis includes measuring the blameworthiness of children against the harshness of the penalty and looking at how frequently the penalty is imposed.[11]

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[10] *Roper*, 543 U.S. at 561 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958) (plurality opinion)).

[11] In *Furman v. Georgia*, 408 U.S. 238 (1972), the Court struck down Georgia's statute "under which the death penalty was 'infrequently imposed' upon 'a capriciously selected random handful.'" *Godfrey v. Georgia*, 446 U.S. 420, 438 (1980) (Marshall, J., concurring) (citing *Furman*, 408 U.S. at 309-10 (Stewart, J., 34 concurring)); *see also id.* at 439 n.9 (noting that, in *Furman*, Justices Stewart and White "concurred in the judgment largely on the ground that the death penalty had been so infrequently imposed that it made no contribution to the goals of punishment."). In *Coker v. Georgia*, 433 U.S. 584, 596-97 (1977), the Court looked to the rarity of death sentences for rape of an adult woman in concluding that the death penalty is an unconstitutionally cruel and unusual punishment for that crime. Likewise, in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), a plurality of the Court determined that contemporary standards of decency did not permit the execution of offenders under the age of 16 at the time of the crime, noting that the death penalty was imposed on offenders under 16 with exceeding rarity. *Id.* at 832-33. When *Atkins v. Virginia*, 536 U.S. 304 (2002), was decided, only a minority of states permitted the

A sentence of imprisonment until death is a different and harsher punishment when inflicted on a young child.[12] In striking down a life without parole sentence imposed on a 13-year-old, the Nevada Supreme Court characterized it as a "denial of hope" and said that "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 defendant], he will remain in prison for the rest of his days."[13]

The United States Supreme Court has held:

> **When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.[14]**

A sentence to die in prison – whether by execution or other means – extinguishes that potential and offends the Constitution.

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execution of persons with mental retardation, "and even in those States it was rare. On the basis of these indicia the Court determined that executing mentally retarded offenders 'has become truly unusual, and it is fair to say that a national consensus has developed against it.'" *Roper*, 543 U.S. at 563 (citations omitted); *see also id.* at 564 ("*Atkins* emphasized that even in the 20 States without formal prohibition, the practice of executing the mentally retarded was infrequent. Since *Penry*, only five States
had executed offenders known to have an IQ under 70.").

[12] *Hampton v. Kentucky*, 666 S.W.2d 737, 741 (Ky. 1984) ("life without parole for a juvenile, like death, is a sentence different in quality and character from a sentence to a term of years subject to parole.").

[13] *Naovarath v. Nevada*, 779 P.2d 944, 948-49 (Nev. 1989).

[14] *Roper*, 543 U.S. at 573-574.

Sentences of life imprisonment with no parole also violate international law. The United States is the only country in the world where a 13-year-old is known to be sentenced to life in prison without the possibility of parole. The Convention on the Rights of the Child, ratified by every country except the United States and Somalia, forbids this practice and at least 132 countries have rejected the sentence altogether.[15]

The International Covenant on Civil and Political Rights, to which the United States became a party in 1992, prohibits life without parole sentencing for juveniles.[16] The official implementation body for the Convention Against Torture, Cruel, Inhuman or Degrading Treatment or Punishment recently commented that life imprisonment for children "could constitute cruel, inhuman or degrading treatment or punishment" in violation of the Convention.[17] Further, the United Nations General Assembly passed by a 185-1 vote (the United States voted against) a resolution calling upon all nations to "abolish by law, as soon as possible, the death penalty and life imprisonment without possibility for release for those under the age of 18 years at the time of the commission of the offence."[18]

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[15] Connie de la Vega & Michelle Leighton, *Special Report on Human Rights Violations in Sentencing Children to Die in Prison: State Practice of Imposing Life Without Possibility of Parole* 5 (2007).
[16] Human Rights Committee, *Concluding Observations of the Human Rights Committee on the United States of America*, ¶ 34, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006) (determining that life without parole sentencing for children does not comply with articles 7 or 24(1) of the ICCPR).
[17] Committee Against Torture, Conclusions and Recommendations of the Committee Against Torture: United States of America, ¶ 34, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006).
[18] G.A. Res. 61/146, ¶ 31(a), U.N. Doc. A/Res/61/146 (Jan. 23, 2007).

Conclusion

Many young children in America are imperiled by abuse, neglect, domestic and community violence, and poverty. Without effective intervention and help, these children suffer, struggle, and fall into despair and hopelessness. Some young teens cannot manage the emotional, social, and psychological challenges of adolescence and eventually engage in destructive and violent behavior. Sadly, many states have ignored the crisis and dysfunction that creates child delinquency and instead have subjected kids to further victimization and abuse in the adult criminal justice system.

The imposition of life imprisonment without parole sentences on the 13- and 14-year-olds documented in EJI's report reveals the misguided consequences of thoughtlessly surrendering children to the adult criminal justice system. Condemning young children to die in prison is cruel and incompatible with fundamental standards of decency that require protection for children. These sentences undermine the efforts of parents, teachers, lawyers, activists, legislators, policymakers, judges, child advocates, clergy, students, and ordinary citizens to ensure the well-being of young children in our society and they feed the despair and violence that traumatizes too many of our communities and young people. The denial of all hope to a child whose brain - much less his character or personality - is not yet developed cannot be reconciled with society's commitment to help, guide, and nurture our children.

Life imprisonment without parole for young children should be abolished. The Juvenile Justice Accountability and Improvement Act is critically needed to address this issue. States that impose death in prison sentences on young children should immediately eliminate the practice and provide opportunities for parole to people who are currently sentenced to imprisonment until death for crimes committed as children. Recent legal developments, international law, and medical insights on child development provide powerful support for ending life without parole sentences for young children. There is an urgent need to change current criminal justice policy and institute reforms that protect young children from death in prison sentences. The plight of the condemned children in this report is not disconnected from the fate of all children, who frequently need correction, guidance, and direction, but always need hope.

Mr. SCOTT. Dr. Dudley.

TESTIMONY OF RICHARD G. DUDLEY, JR., M.D., NEW YORK, NY

Dr. DUDLEY. Thank you, Mr. Scott, Members of the Committee, for having me here today.

In the time allotted, I can only briefly summarize what behavioral science has to offer to your deliberations. Since behavioral science evidence as presented in Roper is considered relevant to the matter before you today, I have attached a copy of the brief submitted by the American Psychological Association and the Missouri Psychological Association that was entered in Roper to my written statement. I believe that that brief outlines the relevant behavioral science findings that support such different treatment of juvenile offenders in more detail and provides references for further exploration of the findings that are presented and discussed in that brief.

In essence, child and adolescent growth and development is best understood as multiple parallel, but interacting vectors. These vectors include physical and biological growth; cognitive development, or the development of the ability to think; psychological development; social development; and moral development. It is important to note that while in some ways each of these vectors can be examined separately, each of these areas of growth and development does impact on the other, and that delays or impairments in one area can also result in delays or impairments in another. In addition to that, of course, stressful life events, biologically and nonbiologically mediated mental illness, et cetera, can also impact on each of these areas of growth and development.

So bearing in mind the importance of this interaction between different areas of growth and development and other factors that can impact on them, clearly the two areas of adolescent development that are most central to the matter before you today are cognitive development and psychological development.

We have long known that cognitive capacities increase during childhood and adolescence. For quite some time, we believed that this has to do with the continuing development of the brain, and now recent research made possible by the advances of technology has begun to provide a more clear picture of the differences between adolescent and adult brains.

As Mr. Scott noted, we find that the brain is not fully developed until after adolescence, actually in the young adult years, and that the last area to be fully developed is the frontal lobes, which is the brain center for higher functions, which we call the executive functions, of the brain. Such executive functions include those brain functions involved in making rational decisions that are in one's long-term best interests, being able to identify and consider reasonable options based on available information, weighing the pros and cons of each action. Executive brain functions are also involved in the planning and implementation of goal-directed or intended behaviors. Since impaired frontal lobe functioning has also been associated with impulsivity and difficulties in attention, concentration, self-monitoring, an increase in these capacities has also become associated with the maturation of the frontal lobes. So in short, children and adolescents do not yet have the physical brain capacity

for the type of decision-making we expect of adults and have legally held adults responsible for.

The path to psychological maturity is at least partly influenced by these same biological brain development issues. More specifically, as the brain's frontal lobes grow and the capacity for executive functions develop, the psychological capacity required for considering alternative courses of action also develops. So there is an increased capacity to restrain impulses, to inform the decisions that we make using a growing body of knowledge and information, to consider the impact of our decisions that they will have on others, and to consider the short- and long-term consequences of these decisions and actions.

Psychological work of adolescents also includes the consolidation of one's identity; therefore, adolescents are prone to experiment with different aspects of their identity. And if this consolidation of identity is complicated, that experimentation might become actual risk-taking behavior. And while that risk-taking behavior may cause the adolescent to get involved with the criminal justice system, more often than not these behaviors are transient expressions of the adolescent's efforts to establish an identity instead of evidence of a more fixed, enduring behavioral disturbance.

These far less than adult capacities of juveniles should clearly be taken into consideration when sentencing juvenile offenders. Most importantly, it should be recognized that adolescents do not have the capacity for decisionmaking and the forming of an intent that adults have. It should also be recognized that the transitory nature of adolescence is such that the adolescent who stands before the court on one day may become a very different and much more highly functioning young adult.

In addition, there is the related finding that these far less than adult capacities of juveniles compromises the ability of juveniles to adequately participate in all other aspects of the adult criminal process, including, for example, making important decisions about giving reliable statements, waiving rights, entering pleas, and accepting deals.

Thank you for this opportunity to present to you, and I believe that the information gleaned from the behavioral sciences provides clear support for protecting juveniles through the bill that you are considering today.

Mr. SCOTT. Thank you, Dr. Dudley.

[The prepared statement of Dr. Dudley follows:]

PREPARED STATEMENT OF RICHARD G. DUDLEY, JR.

What we have learned from the behavioral sciences about child and adolescent growth and development clearly differentiates children and adolescents from adults. However, exactly how this knowledge should influence the administration of justice to children and adolescents is argued on an almost daily basis. It is argued in jurisdictions across the country in individual cases involving children or adolescents that we never really hear about; then there are the high profile cases involving children or adolescents, some of which have helped to evolve the law in this regard; and of course, this same debate often impacts on the work of legislators and government administrators.

As you know, the most recent high profile case where the relevance of these issues were argued was 'Roper v. Simmons' (125 S. Ct. 1183), where the United States Supreme Court decided that the differences between adult and youth offenders were so marked and well understood that the court abolished the death penalty for juve-

niles. The behavioral science evidence presented in 'Roper' is also relevant to the matter before you today—the sentencing of juvenile offenders to life without parole.

In the time allotted for me today, I can only briefly summarize what the behavioral sciences have to offer to your deliberations. Therefore, I have attached a copy of the Amici Curiae brief from the American Psychological Association and the Missouri Psychological Association that was entered in 'Roper' to my written statement. I believe that that brief expertly outlines the relevant behavioral science findings that support such different treatment of juvenile offenders in more detail, and provides references for further exploration of the findings that are presented and discussed therein.

In essence, child and adolescent growth and development is best understood as multiple, parallel, but yet interacting vectors. These vectors include physical/biological growth, cognitive development or the development of the ability to think, psychological development, social development, and moral development. It is important to note however that while in some ways, each of these vectors can be examined separately, each of these areas of growth and development can and does impact on the others, in that delays or impairments in one area can also result in delays or impairments in other areas.

Bearing in mind the importance of appreciating the impact of one aspect of development on another, clearly, the two areas of adolescent development that are most central to the matter before you today are cognitive development and psychological development.

COGNITIVE DEVELOPMENT:

We have long known that cognitive capacities increase during childhood and adolescence; for quite some time it has been believed that this gradual progression towards an adult capacity for cognition parallels the growth and development of the brain during the childhood and adolescent years; but now, recent research, made possible by advances in technology, has begun to provide a more clear picture of the differences between the adolescent and adult brain. Of particular relevance to this discussion is the finding that the brain is not fully developed until after adolescence/until the young adult years, and that the last area to fully develop is the frontal lobes, which is the brain center for higher functions of the brain, which we call the executive functions of the brain. Such executive functions include those brain functions involved in making rational decisions that are in one's long-term best interests, such as being able to identify and consider reasonable options based on available information and weighing the pros and cons of each option. Executive brain functions are also involved in the planning and implementation of goal-directed or 'intended' behaviors. Since impaired frontal lobe functioning has also been associated with impulsivity and difficulties in attention, concentration and self-monitoring, an increase in these capacities has also become associated with the maturation of the frontal lobes.

Simply put, what all of this means is that children and adolescents do not yet have the physical brain capacity for the type of decision-making we expect of adults and have legally held adults responsible for. It is also important to note that even once this biological brain capacity grows in, just like with any other mental function it takes some time and practice before the developing young adult can consistently and effectively employ this new brain capacity.

PSYCHOLOGICAL DEVELOPMENT:

The path to psychological maturity is at least in part clearly influenced by the above described biological growth and development of the brain. More specifically, as the brain's frontal lobes grow and the capacity for executive functions develops, the psychological capacity required for considering alternative courses of action also develops. For example, there is an increased capacity to restrain impulses long enough to think through alternatives and make decisions; there is an increased capacity to inform those decisions using a growing body of knowledge and information; there is an increased capacity to consider the impact that one's decisions will have on others; and there is an increased capacity to consider the short and long-term consequences of one's decisions and actions.

The psychological work of adolescence also includes the consolidation of one's own identity, apart from simply being the child of one's parents. Therefore adolescents are prone to experiment with different aspects of their identity, and if consolidation of an identity is complicated, that experimentation might become actual risk-taking behavior. Although such risky behaviors might cause some adolescents to get into trouble with the law, more often than not, such behaviors are transient expressions

of the adolescent's effort to establish an identity instead of evidence of a more fixed/enduring behavioral disturbance.

ASSESSMENT OF ADOLESCENTS:

Given all that is going on during the adolescent stage of growth and development—all of the above noted and the other aspects of development that I have not described here—and given that it is clear that the personalities of adolescents are not yet fixed/will continue to develop and evolve as they continue to mature, it is extremely difficult if not virtually impossible to consistently make long-term predictions about the future behavior of any given adolescent. In fact, many of us who evaluate adolescents involved in juvenile proceedings have found that between the time that the adolescent committed the offense and the time that he/she was evaluated and then appeared in court, the adolescent had already changed/continued to develop in significant ways.

IMPLICATIONS FOR JUVENILE JUSTICE ACCOUNTABILITY:

These far less than adult capacities of juveniles should clearly be taken into consideration when sentencing juvenile offenders. Most importantly, it should be recognized that adolescents do not have the capacity for decision-making and the forming of an intent that adults have. It should also be recognized that the transitory nature of adolescence is such that the adolescent who stands before the court on one day may become a very different young adult. In addition, there is the related finding that these far less than adult capacities of juveniles compromises the ability of juveniles to adequately participate in all aspects of the adult criminal process including, for example, making important decisions about giving reliable statements, waiving rights, entering pleas and accepting deals.

I am here today because it is my opinion that when what we know about child and adolescent growth and development is taken into consideration, sentencing juveniles to life without parole is clearly inappropriate.

Thank you.

ATTACHMENT

For Opinion See 125 S.Ct. 1183, 124 S.Ct. 2198, 124 S.Ct. 1171

U.S.,2004.

Supreme Court of the United States.
Donald P. ROPER, Superintendent, Potosi Correctional Center, Petitioner,
v.
Christopher SIMMONS.
No. 03-633.
July 19, 2004.

On Writ Of Certiorari To The Supreme Court Of Missouri

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*1 INTEREST OF *AMICI CURIAE*[FN1]

FN1. Letters from the parties consenting to the filing of this brief have been filed with

the Clerk of this Court, pursuant to Sup. Ct. R. 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

The American Psychological Association (APA) is a voluntary nonprofit scientific and professional organization with more than 155,000 members and affiliates. Since 1892, the APA has been the principal association of psychologists in the United States. Its membership includes the vast majority of psychologists holding doctoral degrees from accredited universities in the United States.[FN2]

FN2. *Amici* acknowledge the assistance of Thomas Grisso, Ph.D., Laurence Steinberg, Ph.D., Robert Kinscherff, J.D., Ph.D., Kirk Heilbrun, Ph.D., Randy Otto, Ph.D., Elizabeth S. Scott, J.D., Laura Schopp, Ph.D., Elizabeth Cauffman, Ph.D., and Joel Dvoskin, Ph.D. in the preparation of this brief.

Research cited in this brief includes data from studies conducted using the scientific method. Such research typically is subject to critical review by outside experts, usually during the peer review process preceding publication in a scholarly journal.

An integral part of the APA's mission is to increase and disseminate knowledge regarding human behavior and to foster the application of psychological learning to important human concerns. In 2001, the APA recognized that there are unique problems with assessment of juveniles who, under existing law, may be subject to the death penalty and called for a halt to such executions until it could be established that such deficiencies had been addressed. The body of research that has developed, including significant research findings in the last three years, indicates that these deficiencies have not been and cannot be corrected.

*2 The Missouri Psychological Association is the only statewide professional organization for Missouri psychologists. Begun in 1954, it has a membership of approximately 420. It is the professional voice for the advancement of psychology at the state Capitol, and serves Missouri's citizens through professional practice, scientific consultation, and public service.

SUMMARY OF ARGUMENT

A. At ages 16 and 17, adolescents, as a group, are not yet mature in ways that affect their decision-making. Behavioral studies show that late adolescents are less likely to consider alternative courses of action, understand the perspective of others, and restrain impulses. Delinquent, even criminal, behavior is characteristic of many adolescents, often peaking around age 18. Heightened risk-taking is also common. During the same period, the brain has not reached adult maturity, particularly in the frontal lobes, which control executive functions of the brain related to decision-making.

Adolescent risk-taking often represents a tentative expression of adolescent identity and not an enduring mark of behavior arising from a fully formed personality. Most delinquent adolescents do not engage in violent illegal conduct through adulthood.

The unformed nature of adolescent character makes execution of 16- and 17-year-olds fall short of the purposes this Court has articulated for capital punishment. Developmentally immature decision-making, paralleled by immature neurological development, diminishes an adolescent's blameworthiness. With regard to deterrence, adolescents often lack an adult ability to control impulses and anticipate the consequences of their actions. Studies call into question the effect on juvenile recidivism of harsher criminal sanctions.

B. The mitigating effect of adolescence cannot be reliably assessed in individualized capital sentencing. Adolescents are "moving targets" for assessment of character and future dangerousness, two

important considerations in the penalty phase of capital trials. As one example, psychologists have been unable to identify chronic psychopathy, also known as sociopathy, among adolescents. Assessments of such severe antisocial behaviors during adolescence have yet to be shown to remain stable as individuals grow into adulthood. Consequently, attempts to predict at capital sentencing an adolescent offender's character formation and dangerousness in adulthood are inherently prone to error and create an obvious risk of wrongful execution.

The transitory nature of adolescence also means that an adolescent defendant is much more likely to change in relevant respects between the time of the offense and the time of assessment by courts and experts. At sentencing, an offender may behave and look more like an adult than he or she did at the time the crime was committed. Impressions of the maturity and responsibility of adolescent offenders may also be impermissibly influenced by unconscious racism.

C. Immaturity of judgment, which is generally characteristic of adolescent development, will affect a defendant's participation in earlier stages of the criminal process. A recent study found adolescents overrepresented among defendants who had falsely confessed to crimes. Other research that examined psychosocial influences on legal decisions found that developmental immaturity may adversely affect an adolescent's decisions, attitudes, and behavior in the role of defendant. Individualized capital sentencing cannot correct for the heightened risk of error produced by less mature adolescent decision-making at earlier stages of the criminal process.

*4 ARGUMENT

Behavioral Studies And Recent Neuropsychological Research Demonstrate That Execution Of Those Under 18 Years Old When Their Offenses Were Committed Would Not Further The Constitutional Purposes Of The Death Penalty And Would Not Meet Eighth Amendment Standards

A. Adolescents, As A Group, Think And Behave Differently From Adults In Ways That Undermine The Court's Constitutional Rationale For Capital Punishment In Cases Of Adolescent Offenders

Adolescence is the bridge between childhood and adulthood. It commonly is defined as beginning at age 10 or 11 and continuing until age 18 or 19. *See, e.g.*, Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 Am. Psychologist 469, 476 (2000). Adolescence is a unique stage of human development, bearing its own distinctive psychosocial and physiological traits that shape judgment and behavior. Those developmental differences adversely affect the reliability of determinations about the character and long-term behavior of adolescents, including 16- and 17-year-olds, particularly with regard to the imposition of the death penalty. *See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014-1015 (2003).

Sixteen and 17-year-olds, the vast majority of whom live at home with their families and attend secondary school, occupy a special status between childhood and young adulthood. Many social norms endorse this special status through restrictions on decision-making in, for example, voting, contracting, and jury service. In this *5 regard, the law presumes what science demonstrates, that 16- and 17-year-olds are not yet mature in ways that affect their decision-making capabilities.

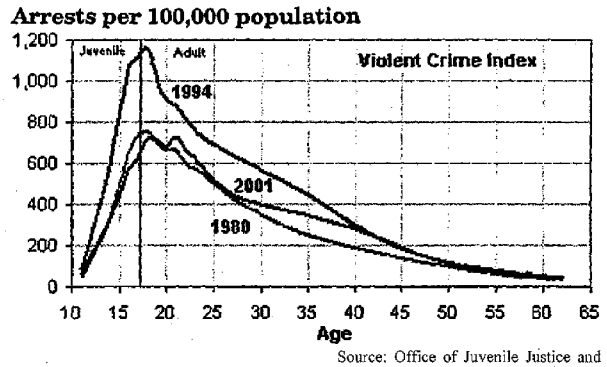
1. Adolescence is a period in which character is forming and often involves heightened risk-taking and even criminal conduct which are moderated or eliminated by the individual in adulthood

Adolescents, as a group, are overrepresented statistically in virtually every category of reckless behavior, although recklessness does not necessarily characterize all adolescents, and recklessness varies in degree. *See* Jeffrey Arnett, *Reckless Behavior in*

Adolescence: A Developmental Perspective, 12 Developmental Rev. 339, 339 (1992). Late adolescence is a developmental period during which individuals are particularly prone to risky behavior. From early to late adolescence, death rates increase by more than 200% - the single largest increase between any two age groups. *See* Charles E. Irwin, Jr., *Adolescence and Risk Taking: How Are They Related?, in Adolescent Risk Taking* 7, 7 (Nancy J. Bell & Robert W. Bell eds., 1993). *See also* Centers for Disease Control and Prevention, *Deaths: Leading Causes for 2001*, Nat'l Vital Stat. Rep. No. 52-9, Nov. 7, 2003, at 13 (showing 2001 death rates for early and late adolescents as 19.2 and 66.9, respectively, signaling a 248% increase).

When "crime rates are plotted against age, the rates for both prevalence and incidence of offending appear highest during adolescence." Terrie E. Moffitt, *Natural Histories of Delinquency, in Cross-National Longitudinal Research on Human Development and Criminal Behavior* 3, 4 (Elmar G.M. Weitekamp & Hans-Jurgen Kerner eds., 1994). A steep increase "in antisocial behavior between ages 7 and 17" is mirrored by a steep decrease "in antisocial behavior between ages 17 and 30." *Id.* at 7. With slight variations, the general correlation between age and crime holds between "males and females, for most types of ^6 crimes, during recent historical periods, and in numerous Western nations." *Id.* at 4. One cross-cultural comparison found that the age distribution of delinquency for a ten-year period was indistinguishable between Argentina, England and Wales, and the United States. Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 Am. J. Soc. 552, 555 (1983). The same authors concluded that "[o]ne of the few facts agreed on in criminology is the age distribution of crime." *Id.* at 552.

The same trends hold in the United States where, sampling the last two decades, the rates of offending for serious crimes build steeply to 18, before starting to drop off, as demonstrated by the following chart.



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Note: The Violent Crime Index includes the offenses of murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault.

Source: Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, *Statistical Briefing Book, at* http://ojjdp.ncjrs.org/ojstatbb/crime/qa05301.asp?qaDate=20030531 (last visited July 9, 2004).

On average, adolescents are risk takers to a far greater degree than adults. Behavioral studies indicate that adolescents often undervalue the true consequences *7 of their actions. Instead, adolescents, as a group, often value impulsivity, fun-seeking, and peer approval more than adults do. *See* Laurence Steinberg, *Adolescence* 88 (6th ed. 2002). Indeed, numerous rigorous self-report studies have documented that it is statistically normative for adolescents to engage in some form of illegal activity. *See* Moffitt, *supra*, at 29. But levels of planning and thinking about the future increase as adolescents grow older. *See* Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 Developmental Rev. 1, 29 (1991). In sum, the same person who engages in risky or even criminal behavior as an adolescent may moderate or desist from these behaviors as an adult. Indeed, most do.

2. Adolescent decision-makers on average are less future-oriented and less likely to consider properly the consequences of their actions

In comparison with adults, studies show that adolescents are less likely to consider alternative courses of action, understand the perspective of others, or restrain impulses. In a study of more than 1,000 adolescents and adults, researchers investigated the relationships among the factors of age, maturity, and antisocial decision-making. Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity and Judgment in Adolescence: Why Adolescents May be Less Culpable Than Adults*, 18 Behav. Sci. & L. 741 (2000). Adolescents, on average, were "less responsible, more myopic, and less temperate than the average adult." *Id.* at 757. In this study, the most dramatic change in behavior occurred sometime between 16 and 19 years of age, especially with respect to "perspective" (*i.e.*, the consideration of different viewpoints and broader contexts of decisions), and "temperance" (*i.e.*, the ability to limit impulsivity and evaluate situations before acting). *Id.* at 756. And it was not until age 19 that this development of responsible decision-making plateaued. *Ibid.* These findings indicate "that once *8 the developmental changes of adolescence are complete, maturity of judgment may stabilize." *Ibid.*

In another analysis of decision-making competence, adolescents performed more poorly than adults. Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 J. Applied Developmental Psychol. 257, 268 (2001). Although even greater differences prevailed between younger adolescents and adults, the researchers concluded "it is clear that important progress in the development of decision-making competence occurs sometime during late adolescence." *Id.* at 271. The researchers explained that "these changes have a profound effect on their ability to make consistently mature decisions." *Ibid.* Adults, for example, were better able to weigh the options available to resolve an issue. *Id.* at 268; *see also* Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 Developmental Rev. 1, 1 (1992) (highlighting how adolescents seek different outcomes than adults from decision-making).

Adolescent behavior is also affected by its social context. Peer behaviors are a very important aspect of delinquent involvement. *See* Dana L. Haynie, *Friendship Networks and Delinquency: The Relative Nature of Peer Delinquency*, 18 J. Quantitative Criminology 99, 123 (2002). Research shows that the likelihood of being influenced by peers declines after individuals reach adulthood. Peggy C. Giordano et al., *Changes in Friendship Relations Over the Life Course: Implications for Desistance from Crime*, 41 Criminology 293, 319 (2003) (longitudinal study). Increased strength of a friendship network can increase the influence of peers on behavior. *See* Dana L. Haynie, *Delinquent Peers Revisited: Does Network Structure Matter?*, 106 Am. J. Sociology 1013, 1048 (2001). Delinquent behavior, peer associations, and delinquent beliefs together influence each other. *See* Terence P. Thornberry et al., *Delinquent Peers, Beliefs,*

Delinquent Behavior: A Longitudinal Test of Interactional Theory, 32 Criminology 47, 74-75 (1994).

3. Neuropsychological research demonstrates that the adolescent brain has not reached adult maturity

Why do adolescents show differences from adults with respect to risk-taking, planning, inhibiting impulses, and generating alternatives? Recent research suggests a biological dimension to adolescent behavioral immaturity: the human brain does not settle into its mature, adult form until after the adolescent years have passed and a person has entered young adulthood.

Advances in magnetic resonance imaging (MRI) technology have opened a new window into the differences between adolescent and adult brains. MRI technology produces exquisitely accurate pictures of the inner body and brain. Beginning in the 1990s, "functional" MRIs have allowed mapping not only of brain anatomy but observation of brain functioning while an individual performs tasks involving speech, perception, reasoning, and decision-making. *See, e.g.*, Kenneth K. Kwong et al., *Dynamic Magnetic Resonance Imaging of Human Brain Activity During Primary Sensory Stimulation*, 89 Proc. Nat'l Acad. Sci. 5675 (1992) (early use of functional MRI to image the brain). Longitudinal MRI studies have allowed researchers to track individual brains as they develop through adolescence by observing them at periodic intervals. *See, e.g.*, Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 Nature Neuroscience 861, 861 (1999) (study of 145 children and adolescents scanned up to five times over approximately 10 years).

Of particular interest with regard to decision-making and criminal culpability is the development of the frontal lobes of the brain. The frontal lobes, especially the pre-frontal cortex, play a critical role in the executive or "CEO" functions of the brain which are considered the higher *10 functions of the brain. *See* Elkhonon Goldberg, *The Executive Brain: Frontal Lobes and the Civilized Mind* 23 (2001). They are involved when an individual plans and implements goal-directed behaviors by selecting, coordinating, and applying the cognitive skills necessary to accomplish the goal. *See id.* at 24. Disruption of functions associated with the frontal lobes may lead to impairments of foresight, strategic thinking, and risk management. *See* M. Marsel Mesulam, *Behavioral Neuroanatomy, in Principles of Behavioral and Cognitive Neurology* 1, 47-48 (M. Marsel Mesulam ed., 2d ed. 2000). Frontal lobe impairment has been associated with greater impulsivity, difficulties in concentration, attention, and self-monitoring, and impairments in decision-making. *Id.* at 42-45. One "hallmark of frontal lobe dysfunction is difficulty in making decisions that are in the long-term best interests of the individual." *See* Antonio R. Damasio & Steven W. Anderson, *The Frontal Lobes, in Clinical Neuropsychology* 404, 434 (Kenneth M. Heilman & Edward Valenstein eds., 4th ed. 2003).

Neurodevelopmental MRI studies indicate this executive area of the brain is one of the last parts of the brain to reach maturity. *See* Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 Proc. Nat'l Acad. Sci. 8174, 8177 (2004). In early adolescence, the proliferation of gray matter - consisting of neuron cell bodies and dendrites - peaks. *See* Giedd et al., *supra*, at 861-862. During adolescence, the size of the frontal lobes is not largely altered, but their composition, consisting of gray and white brain matter, undergoes dynamic change while cognitive functioning improves. One important change is that gray matter thins. *See* Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. Neurosci. 8819, 8821 (2001) (studying 7-11, 12-16, and 23-30 age groups). A contributing factor to the thinning of gray matter is thought to be "pruning" which strengthens the *11 connections between the remaining neurons. *See* Peter R. Huttenlocher, *Neural Plasticity: The Effects of Environment on the De-*

velopment of the Cerebral Cortex 41, 46-47, 52-58, 67 (2002).

MRI research reveals that in the same regions where gray matter thins, white matter significantly increases during adolescence, likely through a process called "myelination" in which a substance called myelin is wrapped around brain cell axons. Myelination improves the connectivity of neural tracts by insulating the axon thereby greatly speeding up the communication between cells, allowing the brain to process information more efficiently and reliably. *See* Goldberg, *supra*, at 144. In a study of minors ages 5 through 17, white matter within the prefrontal area of the frontal lobes steadily increased with age, likely reflecting the advances of myelination. Allan L. Reiss et al., *Brain Development, Gender and IQ in Children: A Volumetric Imaging Study*, 119 Brain 1763, 1767-1768 (1996). A longitudinal MRI study at the National Institute of Mental Health documented an increase in white matter continuing through the teenage years to at least age 22. Giedd et al., *supra*, at 861-862.[FN3]

> FN3. *See also* Reiss, *supra*, at 1770 (finding expansion of white matter particularly prominent in prefrontal region of brain, an area implicated in higher order regulation of cognitive functions); Elizabeth R. Sowell et al., *Localizing Age-Related Change in Brain Structure Between Childhood and Adolescence Using Statistical Parametric Mapping*, 9 NeuroImage 587, 593 (1999) (associating change from gray to white matter in dorsal cortices of the frontal and parietal lobes with myelination in these regions of the brain); Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 Nature Neuroscience 859, 860 (1999) (remarking that reduction of frontal lobe gray matter in adolescence probably reflects increased myelination that may improve cognitive processing in adulthood).

A recent longitudinal MRI study captured common patterns of development by rescanning the same children and adolescents ages 4 to 21 every two years over the course of a ten-year period. Nitin Gogtay et al., *supra* *12 Researchers found that the maturation of the brain cortex, or outer layer, followed "regionally relevant milestones in cognitive and functional development," *id.* at 8177, with "[p]arts of the brain associated with more basic functions matur [ing] early." *Ibid.* Again, the study confirmed that "[l]ater to mature were areas involved in executive function, attention, and motor coordination (frontal lobes)." *Ibid.*

These findings from recent MRI research converge with earlier post-mortem studies and other research exploring the maturation process of the human brain. Close correlations had previously been noted between myelination and acquisition of brain functions. *See* Paul I. Yakovlev & Andre-Roch Lecours, *The Myelogenetic Cycles of Regional Maturation of the Brain, in Regional Development of the Brain in Early Life* 3, 63-64 (Alexandre Minkowski ed., 1967). Late maturation of the frontal lobes is also consistent with electroencephalogram (EEG) research showing that the frontal executive region matures from ages 17 to 21 - after maturation appears to cease in other brain regions. William J. Hudspeth & Karl H. Pribram, *Psychophysiological Indices of Cerebral Maturation*, 21 Int'l J. Psychophysiology 19, 26-27 (1990); *see also* R.W. Thatcher et al., *Human Cerebral Hemispheres Develop at Different Rates and Ages*, 236 Science 1110, 1113 (1987) (EEG study revealed that, between age 15 and adulthood, fiber networks focused primarily in the frontal lobes grew, allowing for greater functional associations among the regions of the brain).

Emerging from the neuropsychological research is a striking view of the brain and its gradual maturation, in far greater detail than seen before. Although the precise underlying mechanisms continue to be explored, what is certain is that, in late adolescence, important aspects of brain maturation remain in-

complete, particularly those involving the brain's executive functions.

***13** 4. Given that 16- and 17-year-olds as a group are less mature developmentally than adults, imposing capital punishment on such adolescents does not serve the judicially recognized purposes of the sanction

This Court has recognized that the constitutional legitimacy of the death penalty depends on its ability to serve "as retribution and deterrence of capital crimes." *Atkins v. Virginia,* 536 U.S. 304, 319 (2002) (internal quotation marks omitted). "Unless the imposition of the death penalty *** measurably contributes to one or both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment." *Ibid.* (internal quotation marks omitted).

"With respect to retribution *** the severity of the appropriate punishment necessarily depends on the culpability," *i.e.*, the blameworthiness, of the offender. *Ibid*; *see also Stanford v. Kentucky,* 492 U.S. 361, 382 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (Eighth Amendment requires a proportional "nexus between the punishment imposed and the defendant's blameworthiness") (internal quotation marks omitted).

The Court already has recognized that personal culpability is lessened in the case of persons with mental retardation due to "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." *Atkins,* 536 U.S. at 318. When such a category of offenders exhibits significantly diminished culpability for its acts, capital punishment is prohibited because the highest degree of societal retribution is not justified. *Id.* at 319; *see also* Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth,* 81 Tex. L. Rev. 799, 822-839 (2003) (proposing to exclude adolescents categorically from execution due to their developmental immaturity).

***14** Similarly, the emerging nature of adolescent character makes the execution of 16- and 17-year-olds fall short of the purposes this Court has articulated for capital punishment. That emerging character, demonstrated by developmentally immature decision-making when compared with adults, and paralleled by a still developing brain, diminishes adolescent blameworthiness and does not merit the retribution of execution because even "the culpability of the average [adult] murderer is insufficient to justify the most extreme sanction." *Atkins,* 536 U.S. at 319.

With regard to deterrence, capital punishment will have a questionable effect on adolescents as a group because they are more impulsive and less able to anticipate the consequences of their actions. Indeed, although identifying comparable groups of juveniles who have been tried as adults versus those who have been tried as juveniles has proven difficult, research has failed to establish that the threat of adult criminal punishment through waiver or transfer into the adult criminal justice system has had any deterrent effect on adolescent misconduct. *See* Simon I. Singer & David McDowall, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law,* 22 L. & Soc'y Rev. 521, 529-532 (1988) (measuring New York arrest rates before and after change to require prosecution of some adolescents in criminal court); Eric L. Jensen & Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime,* 40 Crime & Delinq. 96, 100-102 (1994) (evaluating deterrent effect of Idaho statute mandating criminal processing as adults of adolescents charged with serious offenses).[FN4]

> FN4. Studies comparing recidivism rates between comparable groups of adolescents processed by either the criminal or juvenile justice systems showed no significant specific deterrent effect from exposure to the adult criminal justice system. *See* Jeffrey Fagan, *Separating the Men From the Boys:*

The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders, in Sourcebook on Serious, Violent & Chronic Juvenile Offenders 238, 249-250, 253-254 (James C. Howell et al. eds., 1995) (indicating recidivism rates were not generally lower for adolescents in the criminal justice system as opposed to those treated by the juvenile justice system, in a cross-jurisdictional study); Lawrence Winner et al., *The Transfer of Juveniles to Criminal Court: Reexamining Recidivism Over the Long Term*, 43 Crime & Delinq. 548, 551-562 (1997) (comparing recidivism rates of comparable adolescent offenders in Florida).

*15 As in the case of offenders with mental retardation, "it is the same cognitive and behavioral impairments that make these defendants less morally culpable *** that also make it less likely that they will process the information of the possibility of execution as a penalty and, as a result, control their conduct based on that information." *Atkins*, 536 U.S. at 320. Thus, under *Atkins*, because research indicates that imposing capital punishment on adolescents does not "measurably contribute" to the goals of retribution or deterrence, it is "an unconstitutional punishment" in such cases. *Id.* at 319.

B. Individualized Capital Sentencing Proceedings Do Not Account For The Mitigating Effect Of Adolescence In A Sufficiently Reliable Manner To Meet The Court's Eighth Amendment Standards

Reliability has long been a touchstone of this Court's Eighth Amendment jurisprudence governing capital sentencing proceedings because of the severity and finality of the sanction. The Court has made clear that reliability takes on a heightened significance in the determination of whether a defendant should be sentenced to death because once the sanction is carried out, it is irreversible and cannot be rescinded, even if error is later revealed. "Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment *16 in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). Of course, the reliability of the determination depends in substantial part on the reliability of the information that is presented to the decisionmaker. "[A]ccurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision." *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (joint opinion).

Critical to the State of Missouri's position in this case is the assumption that individualized sentencing can reliably identify those adolescent defendants who do not merit execution. Individualized capital sentencing does allow the presentation of mitigating evidence, including that related to youth, which, of course, may be relevant in certain cases of young adults as well. But the changes in behavior, attitudes, perspective, risk-taking and personality that are the hallmarks of adolescence preclude reliably predicting a juvenile defendant's character in adulthood or the likelihood that he or she will continue to be dangerous in adulthood. In simpler terms, assessing an adolescent is like attempting to hit a moving target because of the developmental transitions characteristic of adolescence.

1. The unsettled nature of adolescent personality confounds attempts to make sufficiently reliable determinations about the character and future behavior of adolescent defendants to support execution

a. Under this Court's Eighth Amendment jurisprudence, capital sentencing juries must be allowed to consider evidence of the "character and record of the individual offender." *Woodson*, 428 U.S. at 304 (plurality opinion); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (requiring that "a defendant's character or record" not be precluded from consideration as mitigating evidence). Various state statutory schemes specifically allow evidence of a defendant's character at capital sentencing. *See,*

e.g., *17Fla. Stat. ch. 921.141(1) ("evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant"); Cal. Penal Code § 190.3 ("evidence may be presented *** as to *** the defendant's character").

This Court has held that capital sentencing juries also are constitutionally permitted to consider the future dangerousness of a defendant. *See Jurek v. Texas*, 428 U.S. 262, 274-275 (1976) (plurality opinion).[FN5] Moreover, capital sentencing juries are sometimes required by statute to consider the future dangerousness of the defendant. Among States with the death penalty for juveniles, three include the defendant's future dangerousness as a factor that jurors must consider at sentencing in a capital case.[FN6] In a fourth State allowing the death penalty for juveniles, a finding of future dangerousness is required for imposition of the death penalty.[FN7] These four States, taken together, have executed 82 percent of the juveniles executed since 1976. *18 Death Penalty Information Center, Juveniles Executed in the United States in the Modern Era (Since January 1, 1973) (listing 22 juvenile executions), *at* http://www.deathpenaltyinfo.org/article.php?scid=27&did=203 (last visited July 9, 2004). Evidence of future dangerousness also is presented in some jurisdictions as a nonstatutory sentencing factor.[FN8]

FN5. *See also Simmons v. South Carolina*, 512 U.S. 154, 163 (1994) (plurality opinion) (noting that prosecutors "frequently emphasize a defendant's future dangerousness in their evidence and argument at the sentencing phase"); *id.* at 178 (O'Connor, J., concurring in the judgment) (where State puts a capital defendant's future dangerousness at issue, due process entitles defendant to inform jury of parole ineligibility); *California v. Ramos*, 463 U.S. 992, 1003 (1983) (State constitutionally permitted to instruct capital sentencing jury to consider Governor's power to commute a life sentence without possibility of parole to a lesser sentencing allowing parole because it "focuses the jury on the defendant's probable future dangerousness").

FN6. Idaho Code § 19-2515(9)(h) (considering whether defendant "has exhibited a propensity to commit murder which will probably constitute a continuing threat to society"); Okla. Stat. tit. 21, § 701.12(7) (considering whether there is a "probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"); Va. Code Ann. § 19.2-264.2(1) (same).

FN7. Tex. Crim. Proc. Code Ann. § 37.071(2)(b)(1) (precluding imposition of death sentence unless jury finds that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society").

FN8. *Cf. United States v. Spivey*, 958 F. Supp. 1523, 1534 (D.N.M. 1997) (allowing consideration of the nonstatutory aggravating factor of future dangerousness); *United States v. Nguyen*, 928 F. Supp. 1525, 1542 (D. Kan. 1996) (allowing a nonstatutory aggravating factor asking whether "[t]he defendant represents a continuing danger to the lives and safety of others in the future").

Empirical data suggest that juries tend to consider future dangerousness even when the issue is not raised by the prosecutor in the penalty phase of a capital case. John H. Blume et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 Cornell L. Rev. 397, 405-408 (2001) (presenting data from the Capital Jury Project); *see also* Lawrence T. White, *Juror Decision Making in the Capital Penalty Trial*, 11 L. & Hum. Behav. 113, 124 (1987) (finding factors related to dangerousness are second only to factors related to the nature

of the crime in study of reasons why jurors voted for a death sentence).

A capital sentencing jury's determination of future dangerousness is a highly aggravating sentencing factor and may be outcome determinative. A study in Texas showed that capital defendants who did not receive the death penalty were usually those whom juries decided did not pose a future danger to society. *See* James W. Marquart et al., *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 L. & Soc'y Rev. 449, 463 (1989) (finding 85% of juries between 1974 and 1988 refusing to impose death penalty failed to find future dangerousness of defendant); *see also* William J. Bowers et al., *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction, in* *19 *America's Experience with Capital Punishment* 413, 430-431 (James R. Acker et al. eds., 2d ed. 2003) (finding in 14-State study that "defendant's likely future dangerousness [was] an especially prominent theme" in jury deliberations); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1, 4-6 (1993) (finding in South Carolina study that future dangerousness ranked second only to crime itself in attention given in jury's penalty phase deliberations, overshadowing evidence presented in mitigation).

b. These two common sentencing factors of character and future dangerousness, however, present special problems of reliability in capital sentencing proceedings for 16- and 17-year-old defendants. Although mental health professionals[FN9] are able to characterize the functional and behavioral features of an individual adolescent, their ability to reliably predict future character formation, dangerousness, or amenability to rehabilitation is inherently limited. This is true even for adolescents with histories of delinquent behavior because misconduct diminishes at a high rate between adolescence and adulthood. Thus, mental health professionals' ability to reliably distinguish between the relatively few adolescents who will continue as career criminals and the vast majority of adolescents who will, as adults, "repudiate their reckless experimentation" is limited. *See* Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, supra*, at 1016.

> FN9. "Mental health professionals" is used here to include psychologists, psychiatrists and others who assess adolescents, particularly within the context of capital sentencing.

The manual that governs the professional evaluation of psychiatric disorders wisely bars diagnosis of antisocial personality disorder in individuals under the age of 18. American Psychiatric Association, *Diagnostic and Statistical* *20 *Manual of Mental Disorders* 702, 706 (4th ed. text rev. 2000) (DSM). For adolescent personality disorders in general, the DSM cautions that they cannot be diagnosed except in the "relatively unusual instances in which the individual's particular maladaptive personality traits appear to be pervasive, persistent, and unlikely to be limited to a particular developmental stage," *id.* at 687, or to "an episode of an Axis I disorder," *e.g.*, depression. *Ibid.* The DSM's limitation on assessing antisocial personality disorder is even more severe, categorically prohibiting its diagnosis "in individuals under age 18 years." *Ibid.*

Consequently, attempts to predict at capital sentencing an adolescent offender's character formation and dangerousness in adulthood are inherently prone to error and create an obvious risk of wrongful execution. The same evidence which could be used to argue that a death sentence is warranted in a case of an adult defendant may, in an adolescent, very well reflect transitory behavior that would not support such an argument.

This problem arises, in particular, in the labeling of some adolescent offenders as psychopaths. Psychopathy, sometimes referred to as sociopathy, is an

adult personality feature defined chiefly by a combination of antisocial behavior, callousness, and emotional detachment. *See* Robert D. Hare, *Psychopathy: A Clinical Construct Whose Time Has Come*, 23 Crim. Just. & Behav. 21, 25 (1996). Psychopaths have been described as "[l]acking in conscience and in feelings for others, [and] ... coldbloodedly tak[ing] what they want and do [ing] what they please, violating social norms and expectations without the slightest sense of guilt or regret." *Id.* at 26.

Unlike disorders such as depression, psychopathy is presumed to be deep seated, stable over time, and resistant, if not absolutely impervious, to change. Some experts have gone so far as to conclude that "at this time there is *no empirical* evidence to suggest that psychopathy is treatable." Carl B. Gacono et al., *Treating Conduct Disorder, Antisocial, and Psychopathic Personalities, in Treating Adult and* ***21** *Juvenile Offenders with Special Needs* 99, 113 (Jose B. Ashford et al. eds., 1997) (emphasis in original). As a group, psychopaths "are responsible for a markedly disproportionate amount of the serious crime, violence, and social distress in every society." Hare, *supra*, at 26. One analysis concluded that psychopathic offenders were approximately four times as likely to commit a future violent crime as were non-psychopathic offenders. James F. Hemphill et al., *Psychopathy and Recidivism: A Review*, 3 Legal & Criminological Psycholog. 139, 160 (1998).

Evidence of psychopathy can strongly encourage the imposition of the death penalty in a particular case. Indeed, some of the cases which have shaped the Court's death sentencing jurisprudence have centered on evidence of psychopathic tendencies. *See, e.g., Estelle v. Smith*, 451 U.S. 454, 459-460 (1981) (State's evidence that defendant was "a very severe sociopath"); *Satterwhite v. Texas*, 486 U.S. 249, 259-260 (1988) (State's evidence that defendant would be a continuing threat to society and was "as severe a sociopath as you can be"); *Barefoot v. Estelle*, 463 U.S. 880, 918-919 (1983) (Blackmun, J., dissenting) (State's evidence that defendant was a "criminal sociopath" whom no treatment could change). In a recent study measuring the effect on laypersons of hypothetical traits, participants were considerably more likely to support a death sentence when an adolescent offender was described as psychopathic. John F. Edens et al., *Psychopathic Traits Predict Attitudes Toward a Juvenile Capital Murderer*, 21 Behav. Sci. & L. 807, 822 (2003).

The antisocial phenomena that are emblematic of psychopathy in adults are difficult to assess with adolescents. The researcher whose groundbreaking description of the psychopathic personality became the basis for modern diagnostic techniques warned that "the child or the adolescent will for a while behave in a way that would seem scarcely possible to anyone but the true psychopath and later change, becoming a normal and useful member of society." Hervey Cleckley, *The Mask of Sanity* 270 (5th ed. ***22** 1976); *see also* John F. Edens et al., *Assessment of "Juvenile Psychopathy" and its Association with Violence: A Critical Review*, 19 Behav. Sci. & L. 53, 77 (2001) ("Because most adolescents manifest some 'traits' and behaviors during this period that may be phenotypically similar to symptoms of psychopathy, adolescence may be the most difficult stage of life in which to detect this personality pattern.").

Using standard psychological appraisals, various behaviors and traits that are associated with normal development in adolescents are, in adults, indicative of psychopathy. These include proneness to boredom, impulsivity, irresponsibility, failure to accept responsibility for one's actions, and unstable interpersonal relationships. *See* Robert D. Hare, *Hare Psychopathy Checklist Revised* (2d ed. 2003) (PCL-R).[FN10] More recently, this checklist has been modified for adolescents, Adelle E. Forth et al., *Hare Psychopathy Checklist: Youth Version* (2003) (PCL-YV), but the revision maintains the basic structure of the adult version, modifying application of some adult factors, such as the adult "short-term marital relationships" factor. Adelle E.

Forth & Heather C. Burke, *Psychopathy in Adolescence: Assessment, Violence, and Developmental Precursors, in Psychopathy: Theory, Research and Implications for Society* 205, 207 (David J. Cooke et al. eds., 1995).

> FN10. The complete Hare Psychopathy Checklist Revised comprises two factors. The "Interpersonal/Affective" factor includes glibness/superficial charm; grandiose sense of self-worth; pathological lying; conning/manipulative; lack of remorse or guilt; shallow affect; callous/lack of empathy; failure to accept responsibility for actions. The "Social Deviance" factor includes need for stimulation/proneness to boredom/parasitic lifestyle; poor behavioral controls; early behavior problems; lack of realistic long-term goals; impulsivity; irresponsibility; juvenile delinquency; revocation of conditional release and criminal versatility. Other items are promiscuous sexual behavior and many short-term marital relationships. Robert D. Hare, *Hare PCL-R Technical Manual* 85 (2d ed. 2003).

***23** Although the PCL-YV and other measures of psychopathy may aid in making short-term predictions of violent behavior in adolescence, "they provide little support for the argument that psychopathy during adolescence is a robust predictor of *future* violence, particularly violence that occurs beyond late adolescence." Edens et al., *Assessment of "Juvenile Psychopathy" and Its Association with Violence: A Critical Review, supra*, at 73 (emphasis in original). Despite findings of stability over a few months of psychopathic traits among adolescents, "[c]learly, there are no data to determine the actual risk for adult diagnosis in children who score high on psychopathic traits." Paul J. Frick et al., *The 4 Year Stability of Psychopathic Traits in Non-Referred Youth*, 21 Behav. Sci. & L. 713, 732 (2003). In gauging whether two different tests of psychopathy tracked each other or merely tracked indicia of normal immaturity in adolescents, one study concluded that "[t]hese measures of psychopathy, a distinctive constellation of enduring personality traits, were less strongly associated with one another than with measures of immaturity, a broad set of incapacities associated with normative phases of development [in adolescents]." Jennifer L. Skeem & Elizabeth Cauffman, *Views of the Downward Extension: Comparing the Youth Version of the Psychopathy Checklist with the Youth Psychopathic Traits Inventory*, 21 Behav. Sci. & L. 737, 764 (2003); *see also* Daniel Seagrave & Thomas Grisso, *Adolescent Development and the Measurement of Juvenile Psychopathy*, 26 L. & Hum. Behav. 219, 229 (2002) (expressing concern over "false positive" rate in identifying psychopathic traits in adolescents).

c. The sentencing process is ill-suited to discern the difference between transitory adolescent behavior and enduring adult character traits. These distinctions are critical for determining a capital defendant's character and future dangerousness. The observable behavior of different adolescents can be identical in adolescents who will persist as criminal offenders through adulthood and those who will not. *See* Edens et al., *Assessment of "Juvenile Psychopathy" and Its Association with Violence: A Critical Review, supra*, ***24** at 59 (measures of psychopathy may tap "relatively *normative* and *temporary* characteristics of adolescence rather than deviant and stable personality features") (emphasis in original); *cf.* Thomas Grisso, *Double Jeopardy: Adolescent Offenders with Mental Disorders* 64-65 (2004) (discontinuity of disorders in adolescence creates "moving targets" for identification of mental disorders); Edward P. Mulvey & Elizabeth Cauffman, *The Inherent Limits of Predicting School Violence*, 56 Am. Psychologist 797, 799 (2001) ("Assessing adolescents, therefore, presents the formidable challenge of trying to capture a rapidly changing process with few trustworthy markers.").

The likelihood of error in ascertaining putatively enduring features of an adolescent's behavior is

high. The fundamental problem is found in the inability to distinguish in a reliable way between the few adolescent offenders who may not be amenable to rehabilitation and the many who will spontaneously desist or who will respond to sanction or intervention. The absence of proof that assessments of adolescent behavior will remain stable into adulthood invites unreliable capital sentencing based on faulty appraisals of character and future conduct.

2. The lapse of time between a crime and sentencing tends to complicate assessment of the adolescent capital defendant

Even if a sufficiently reliable means existed to assess the true character and future dangerousness of an adolescent defendant, the maturation of an adolescent that occurs between the date of a crime and the time of a capital sentencing assessment further complicates efforts to capture accurately an adolescent's capacities and maturity at the time of an offense. The lapse of time is likely to involve much more significant psychological changes in adolescents than in adults.

An evaluation performed for the purpose of capital sentencing will consider an adolescent who has, necessarily, ***25** aged since the date of the offense. Having advanced further through puberty, the defendant may have more the appearance of a man than the boy who committed the offense. In one juvenile case, jurors imposed a death sentence, at least in part, based on the defendant's seemingly more adult physical appearance. Michael E. Antonio et al., *Capital Jurors as the Litmus Test of Community Conscience for the Juvenile Death Penalty*, 87 Judicature 275, 282 (2004) (discussing data from the Capital Jury Project). The defendant was nearing 21 years of age by the time of trial, was physically imposing, unusually tall, and characterized by one juror as a "tall, pretty muscular black guy." *Ibid.* Interestingly, several jurors described him "as utterly emotionless, despite other jurors' reports of his tears at the mention of his murdered brother" and his mother's testimony. *Ibid.*

Neurodevelopmental maturation may have altered the adolescent's impulsivity, difficulty in weighing options, vulnerabilities to situational factors or other features of relative developmental immaturity that existed at the time of the offense. Exposure to the adult corrections system while awaiting trial and sentencing can also affect adolescents, their behavior and their presentation. In a study of the impact of incarceration on adolescents, offenders reported that, at best, experience in adult facilities was a test of will and endurance and, at worst, a painful and denigrating experience that served as reason to become "more angry, embittered, cynical and defeated." Donna Bishop & Charles Frazier, *Consequences of Transfer, in The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court* 227, 259 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

A more adult appearance at sentencing is harder to reconcile with whatever mitigating evidence of immaturity may be introduced. The professional opinion rendered by experts for the purpose of capital sentencing and the impression left with the sentencer during trial will reflect an older, more mature person, even though the offending ***26** behaviors at issue were adolescent. Thus, in many cases, the judge and jury will encounter a person who is different in highly relevant respects from the individual who committed the crime. The passage of months or perhaps years between the offense and sentencing may punish a defendant because he appears, thinks, and behaves in a more mature fashion than he did when he committed the offense, eliminating the opportunity to judge the defendant's developmental state at the time of the crime. *Cf.* Richard L. Wiener et al., *Guided Jury Discretion in Capital Murder Cases: The Role of Declarative and Procedural Knowledge*, Psych. Pub. Pol'y & L. (forthcoming 2004) (ms. at 74-82) (studying the inadequacies of jury instructions to explain needed concepts in the penalty phase of first-degree murder trials).

3. Unconscious racism may falsely attribute greater

culpability to African American adolescent offenders

The assessment of the maturity and responsibility of individual adolescent offenders also can be impermissibly influenced by unconscious bias. Recent research has revealed that a stereotyped belief that African American adolescents possess more adult-like criminal intent may taint judgments about the culpability of adolescent offenders. Police officers and probation officers reported more negative trait ratings, greater perceived culpability, less child-like qualities and recommended harsher punishment for adolescents after the officers were provided a set of subliminal cues related to African Americans. Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, L. & Hum. Behav. (forthcoming 2004) (ms. at 18-19, 25-26). Police and probation officers induced to think about African Americans were less likely to judge the hypothetical juvenile offenders as immature, and more likely to think of them as adult-like in their behavior. *Ibid.*

*27 Previous research found that probation officers are more likely to attribute the criminality of African American adolescents to negative personal defects such as a lack of remorse, while they are more likely to attribute criminal behavior of white adolescents to negative environmental causes such as a dysfunctional family. George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 Am. Soc. Rev. 554, 559, 561-564 (1998) (summarizing regression analysis of 233 probation officer reports controlling for variables such as age, sex, offense, and prior record).[FN11]

FN11. Since 1976, 55% of those executed in the United States who were under 18 at the time of their offense were African American or Latino. Death Penalty Information Center, Juveniles Executed in the United States in the Modern Era (Since January 1, 1973) (listing 22 juvenile executions since 1976), *at* http://www.deathpenaltyinfo.org/article.php?scid=27&did=203 (last visited July 9, 2004). In contrast, 40% of the adult offenders sentenced to death since 1976 were African American or Latino. Death Penalty Information Center, Execution Database (listing 895 adult executions since 1976), *at* http://www.deathpenaltyinfo.org/executions.php (last visited July 9, 2004).

C. Individualized Capital Sentencing Cannot Correct For The Heightened Risk Of Error Produced By Immature Adolescent Decision-making At Earlier Stages Of The Criminal Process

Judgments made by adolescents, who on average are less mature than adults, will also affect a defendant's participation at the stages of the criminal process before sentencing. Adolescent immaturity undermines a defendant's ability to make meaningful and fully informed decisions to manage his or her own defense. Decisions by a defendant throughout the investigatory and trial process may influence whether the death penalty will be sought or imposed. As is true for defendants with mental retardation, the possibility ***28** of false confessions, difficulties in giving meaningful assistance to counsel, and poor performance as witnesses all increase the likelihood that adolescents will be convicted, and then executed, in error. *See Atkins*, 536 U.S. at 320-321.

A recent analysis found that adolescents were overrepresented among those who falsely confessed in response to interrogation. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. Rev. 891, 944 (2004). Among a total of 113 false confessors, 16% were between the ages of 16 and 17, representing the highest concentration among any averaged two-year age group. *Id.* at 945, table 3.[FN12] Among all cases studied, false confessions were concentrated in the most serious offenses, the overwhelming majority occurring in murder cases (81%), fol-

lowed by cases of rape (9%) and arson (3%). *Id.* at 946. One case was that of the Central Park jogger victim in which four 14- to 16-year-old defendants were convicted of rape or other crimes on the basis of their confessions, but later were exonerated by DNA evidence linking the crime to a notorious serial rapist. *Id.* at 894-900.

> FN12. Twelve other defendants in the study were not counted in these results because their ages were unknown. *Id.* at 945, n. 350. Together, the 125 defendants in the study constituted "the largest collection of interrogation-induced false confession cases ever assembled and analyzed in the research literature." *Id.* at 924. All cases involved confessions that were "indisputably false." *Id.* at 925.

False evidence presented by authorities to an individual in an effort to elicit a confession can lead an individual to confess to an act he or she did not commit. The same individual may then internalize the confession and confabulate details consistent with the false confession. *See* Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 Psycholog. Sci. 125, 127 (1996) (69% of test participants signed confessions admitting to errors *29 they did not commit in assigned clerical tasks). Research indicates that adolescents are more susceptible to these kinds of suggestion of guilt than are adults. In a study comparing 15- and 16-year-olds to young adults ages 18 to 26, the adolescents were more likely to take responsibility for a mock crime when presented with false evidence of their guilt. Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 L. & Hum. Behav. 141, 151 (2003).

The reliability of convictions and sentences can also be directly affected by adolescent defendants' understanding of their legal rights. In a recent study of more than 1,300 adolescents and young adults, researchers found adolescent immaturity of judgment reflected in adolescent decision-making concerning criminal proceedings. Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & Hum. Behav. 333 (2003). The research examined psychosocial influences on legal decisions that criminal defendants are often required to make, involving whether to confess to the police or remain silent, whether or to what extent to communicate with counsel, and whether to accept a prosecutor's plea offer. *Id.* at 336. After participants completed a standardized measure of abilities relevant to competency to stand trial, *i.e.*, participating in and understanding the trial process, researchers went on to assess the relationship between immaturity and the choices made in the course of a criminal adjudication. *Ibid.* Adolescents, including older adolescents who scored at adult levels on measures of capacity relevant to legal competence to stand trial, nonetheless tended more often than adults to make choices that reflected the influences of psychosocial immaturity. *Id.* at 336-337, 343.

Although older adolescents were more likely than younger adolescents to recognize potential risks and understand how unpleasant consequences would be if they occurred, their perception of the likelihood that the adverse *30 consequences would actually occur was not significantly different than that of younger adolescents. *Id.* at 354. Consequently, the researchers concluded that "psychosocial immaturity may affect a young person's decisions, attitudes, and behavior in the role of defendant in ways that do not directly implicate competence to stand trial, but that may be quite important to how they make choices, interact with police, relate to their attorneys, and respond to the trial context." *Id.* at 361. That means that adolescents "may make different legal decisions than they themselves would make in their adult years." *Id.* at 335.

CONCLUSION

For the reasons set forth above and in respondent's brief, the judgment of the Missouri Supreme Court

should be affirmed.

U.S.,2004.
Roper v. Simmons
2004 WL 1636447 (U.S.)

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Mr. SCOTT. Mr. Johnson.

TESTIMONY OF RAPHAEL B. JOHNSON,
JUVENILE OFFENDER REFORMED, DETROIT, MI

Mr. JOHNSON. Mr. Chairman, Members of the Committee, thank you for inviting me to testify before you today. I give honor to God for giving me my life and for showing me the mercy that I have been shown. My name is Raphael Bernard Johnson, and I am before you as someone who as a teenager committed a horrible and senseless crime. An innocent person lost his life because of me, and that is something that I regret more than I can ever say, and it is something that I will remember for the rest of my life.

I am a man who spent my young adulthood in prison. By the grace of God, I did not receive a life without parole sentence, and because of that I was released from prison and have dedicated my life to making amends. I would like to tell you my story in hopes that it illustrates just how important it is for young people to get second chances.

I grew up in a Detroit neighborhood known for violence, guns, and drug dealing. My father went to prison when I was a baby. Although I had a loving mother who worked hard for our family, I now know that I direly needed a role model, and I searched for it in desperate places. As a child and youth, I looked to the streets. I thought that being a gangster would make me a man.

My first arrest was at 12. At 14, I was sent to a boys' home for 4 years. There things did begin to look up for me. I was given a scholarship to attend a private high school, and I excelled. I was on the honor roll. I was captain of the football team. I even made it to homecoming king. I had a lot going on for me, yet still I was an adolescent who could not think clearly before he acted, and could not control his anger, and could not walk away from conflict.

When I was 17 years old, at a party where I got into a scuffle and was thrown to the ground, in rage and fear I ran and got a gun, and I shot someone. It was the most cowardly act imaginable. What was in my head at that time? I didn't think about my future. I didn't even comprehend that I was ending someone else's future. Later I learned that his name was Mr. Johnny Havard. I was tried as an adult and sentenced to 10 to 25 years in prison. Had the outcome been slightly different, my sentence would have been life without parole.

Like a lot of youths sentenced to adult prisons, change did not come immediately. Change took time. My thoughts began to go to the horrible realities of the losses I caused to the victim's family. I even wrote letters trying to express my apologies. Each letter would be returned with an "address expired" stamp fixed to it.

I realized that I could best serve Mr. Havard's memory by changing myself. One thing I had going for me was hope. Because I had the chance of parole, a chance that thousands of young offenders serving life without parole do not have, I had hope. From day one, I saw the light at the end of the tunnel. I had something to work towards. And the dream of helping others and having a family and making a difference all seemed like a possibility.

I took advantage of all available programming and became a certified carpenter, certified plumber, electrician, even a paralegal. I

read over 1,300 books. I thought about my faith and relationship with God. I was able do this in part because I had a strong support of family, friends, clergy, and even my father, who had transformed himself from a gangster into a State correctional officer for the State of Michigan. I focused on what I could do to right my wrong, to somehow atone for the innocent life I had taken.

Twelve years after the senseless and unwarranted murder of Mr. Johnny Havard, I was released from prison. I have been out now for 4 years. I went to college, and last year I received my B.A. Summa cum laude from the University of Detroit Mercy. I married my childhood sweetheart Shannon, and she has given me two beautiful children. I started my own company, where I do motivational speaking and conflict resolution all around this country. I work with Goodwill Industries in Detroit, helping ex-offenders as a community reintegration coordinator. I am a published author. I expect to complete my master's degree in December of 2008. My master's project will result in a new book about successfully reintegrating offenders into society.

I submit to you that everyone makes mistakes, errors in judgments and decisions that they wish they can take back at a later time. Perhaps this is especially true for young people. What I want to convey to you all is that for any juvenile offender who commits a crime as horrible and senseless as mine, there should still be some hope.

I think about my actions that night every single day. I think about Mr. Havard's mother, who once declared in a courtroom that she could never forgive me. Now, many years later, I have a deeper understanding of her pain, because when I look at my 2-year-old son and my little baby and imagine if a teenager took their lives, I think that I have a clearer sense of her hurt and her pain. However, I also can empathize with the errors of a misguided teenager who acts without thinking into the future and takes the life of another person.

I humbly ask you all to vote for H.R. 4300, and do so in recognition that no adolescent is beyond hope of redemption. And every young person should have the chance to prove that they can change and be afforded the opportunity to make the difference. Thank you for listening.

Mr. SCOTT. Thank you, Mr. Johnson.

[The prepared statement of Mr. Johnson follows:]

PREPARED STATEMENT OF RAPHAEL B. JOHNSON

STATEMENT OF RAPHAEL B. JOHNSON
IN SUPPORT OF
The Juvenile Justice Accountability and Improvement Act of 2007, H.R. 4300
House Judiciary Committee
Subcommittee on Crime, Terrorism, and Homeland Security
September 11, 2008

Mr. Chairman and members of the Committee, thank you for holding this hearing and for inviting me to testify here today. I give honor to God for my life and the mercy I have been shown. My name is Raphael Bernard Johnson. I am before you as someone who, as a teenager, committed a horrible, senseless crime. An innocent person lost his life because of me – something I regret more than I could ever say, and something I will have to live with for the rest of my life. I am a man who spent my young adulthood in prison. By the grace of God I did not receive a life without parole sentence, and because of that I was released from prison, and have dedicated my life to making amends. I would like to tell you my story in hopes that it illustrates how important it is for young people to get second chances.

I grew up in a Detroit neighborhood known for gun violence and drug dealing. My father went to prison when I was twenty-two months old. My mother was alone as the head of our house. She worked long hours in order to compensate for the fact that she had no one to rely on. I now know that I direly needed a role model, and I searched in desperate places to find one. As a child and youth, I looked to the streets and to tough men. I wanted to somehow be like to them, and to be accepted. I wanted to be tough. I wanted to be a gangster. I thought these things would make me a man. I know now just how distorted that perception was.

My first arrest came when I stole my grandmother's gun. I was twelve years old. I took it to school to build a tough-man persona. At fourteen, I was sent to a boys home for four years.

There, things began to look up for me. I was given a full scholarship to attend the University of Detroit High School. I excelled in high school. I was on the honor roll. I was the captain of the football team. I was even homecoming king. I had a lot going for me, and still, I was an adolescent who could not think clearly before he acted, could not control his anger or walk away from conflict.

When I was 17 years old, I did the most horrible thing that anyone could ever do to another human being. The night it happened, I went with friends from school to a party. We were thrown out of the party for horseplay. Once we were outside, we had a physical altercation, and I was thrown to the ground. In front of my friends, I was embarrassed, frightened, and angry. Without thinking, I acted out of rage and fear. One of my friends had a gun in his car. I ran to get it, returned and fired it three times. The bullets I shot killed someone who was not even involved in the scuffle I had just had. It was the most cowardly act imaginable.

What was in my head at the time? I didn't think about my future. I didn't comprehend that I was ending someone else's life and future. Later I learned his name was Mr. Johnny Havard. I think years passed before I was mature enough to really understand what I had done.

I was tried as an adult and found guilty. I was very fortunate that I did not get life without parole. The circumstances of the case and the fact that my supporters got me good attorneys meant that I narrowly escaped a charge that would have resulted in life without parole. I was sentenced to 10-25 years in prison.

Like a lot of youth offenders who are sentenced to adult prison, the early years of my incarceration were not perfect by far. I was still misguided, with an unclear understanding of manhood. I violated the prison rules three times: for a fight, assault, and threatening behavior. These infractions resulted in my spending nearly six years in solitary confinement where I was

locked down for 23 hours a day, without fresh air and little natural light. Something happened when I was about 25 years old, and I began to change. I got tired. My exhaustion with this meaningless life propelled me to do everything in my power to change who I was and who I was becoming.

As the years went by, I grew up inside that cell. Over time, I began to come to terms with myself and to look at what I had done. I began to detest my crime and I came to understand Mr. Havard and his family as human beings. I began to think of what I had put them through and I wrote letters trying to express my apologies and beg for forgiveness. Each letter would be returned with an "address expired" stamp affixed to it.

Because I had the chance of parole, a chance that thousands of other young offenders do not have, I had hope. From day one I saw light at the end of the tunnel. I had something to work towards, and the dream of helping others, having a family, making a difference in the world seemed like a possibility. I immersed myself in education and vocation. I read over 1,300 books and wrote three of my own. I took advantage of all available programming and became a certified carpenter, plumber, electrician and paralegal. I thought about my faith and relationship with God. In doing so, I learned self-discipline. I began to search my soul. Through this self-introspection I was able to question my thinking of the past, develop a value system and have a deeper understanding of my actions. I realized I was lying to myself about what really happened the night of my crime, and I was living a life where I blamed others for situations I got into. In short, I matured. I grew up. I did the things that a young adult should do, leaving behind adolescence.

I was able to do this in part because I had a strong desire to make up for the harm I had done. In addition, I had the support of family and friends who sent letters, money, and clothes

and visited me. There were community ties which included business owners, clergy, elected officials and educators. I was also fortunate because through all of this, I had people who believed in me and supported me. Father Don Vettese, a Jesuit priest, stayed in touch through letters, giving me hope. He continues to assist me today. My father, who had transformed himself from a gangster to a correctional officer (for nearly 25 years now) also inspired me. I focused on what I could do to right my wrong – to somehow atone for the innocent life I had taken. I began to concentrate on who I was going to be upon release rather than what I was going to do when released.

Twelve years after the senseless and unwarranted murder of Mr. Johnny Havard, I was released from prison. I have been out four years. I went to college and last year I received my B.A. summa cum laude from the University of Detroit Mercy. I married my childhood sweetheart, Schannon, and she has given me two beautiful children. I started my own company where I do motivational speaking and conflict resolution all around the country. I work with Goodwill Industries of Greater Detroit as a Community Reintegration Coordinator where I help ex-offenders successfully re-enter society. I am a published author and have appeared in the media, and I am a community activist. I am currently working on a Master's degree and expect to be finished by December 2008. For my Master's project, I will produce a new book and curriculum to help ex-offenders successfully re-enter society.

I humbly submit to you that everyone makes mistakes, errors in judgment, and decisions that we wish we could undo at a later time – especially young people. In many, many ways, I am not the same person I was at age 17. I did things then that I could never do now. I have chosen a different path. What I want to convey to you is that for any juvenile offender who commits a crime as horrible and senseless as mine, there is still hope. A teenager is not fully formed yet.

I think about my actions that night every single day. I think about Mr. Havard's mother who once declared in the courtroom that she could never forgive me. Now, many years later, I have another, deeper understanding of her pain. I look at my two year old son and my baby daughter and when I imagine them being murdered by a teenager, I think I have a clearer sense of her hurt and anger. However, I also can empathize with the errors of a misguided teenager who acts without thinking and takes the life of another person.

I humbly ask you to vote for H.R. 4300 and do so in recognition that no adolescent is beyond hope of redemption, and every young person should have the chance to prove that they can change and be afforded the opportunity to make the difference. Thank you.

Mr. SCOTT. Ms. Calvin.

TESTIMONY OF ELIZABETH M. CALVIN, ESQUIRE, CHILDREN'S RIGHTS ADVOCATE, CHILDREN'S RIGHTS DIVISION, HUMAN RIGHTS WATCH, LOS ANGELES, CA

Ms. CALVIN. Mr. Chairman and Members of the Committee, thank you for inviting me to testify today. I am here to support legislation that would provide a meaningful opportunity of parole for youth who have been sentenced to life in prison.

The sentence of life without the possibility of parole is a sentence to die in prison. There is no time off for good behavior. There is no chance to prove that you have become a different person. Next to the death penalty, there is no harsher condemnation.

The Federal Government and 39 States sentence youth under the age of 18 to life in prison without the possibility of parole. In some States, those children are as young as 13 years old. The United States stands alone in the use of this sentence. No other country uses this sentence with children. Here we have over 2,500 individuals who are serving life without parole with no chance for release for crimes that they committed when they were under the age of 18. In the rest of the world there are zero.

H.R. 4300 would ensure that young offenders are held accountable for their actions, that they face severe penalties. But what this bill does is recognize that young people are different than adults. They are different in their ability to change.

This bill provides incentives for people to work toward rehabilitation while in prison. It is not a get out of jail free card. It is a chance to earn one's freedom through rehabilitation. A parole hearing will decide whether a person should be released and whether they have been rehabilitated or not. It will also provide opportunity for the victim or victim's family members to be heard.

Human Rights Watch has investigated the use of life without parole in the United States since 2004. Based on our research, we support the passage of H.R. 4300 for three primary reasons. The use of this sentence for juveniles is frequently disproportionate, it is racially discriminate, and it is in violation of international law.

One example of the disproportionate use of this sentence is the case of Sara K. Sara was raised by her mother, who was addicted to drugs and abusive. At age 11, Sara met G.G., a 31-year-old man. Soon after, he sexually assaulted her, and he began grooming her to become a prostitute. At age 13, Sara started working as a prostitute for G.G. He continued sexually assaulting her and using her as a prostitute for almost 3 years. Just after she turned 16, she took a gun and shot and killed G.G. And she is serving life without parole.

Life without parole was created for the worst criminals, but our research in the United States has found that this sentence is routinely used with young people who have never before been in trouble with the law. We estimate that nationally 59 percent of youth who get this sentence are first-time offenders, without even a shoplifting on a criminal record.

Additionally, our research has found that these young people often acted under the influence, or in some cases the specific direction, of adults. For example, in California we found that an esti-

mated 70 percent of cases in which a teen acted with a codefendant, at least one codefendant was an adult. More disturbing than that is the fact that, in these cases, 56 percent of the time the adult got a lower sentence than the juvenile.

Also troubling is the fact that often youth are sentenced to life without parole when they were not the primary actor in the crime. They were not the trigger person. They were not the person who physically committed the crime. For example, nearly half the youth sentenced to life without parole surveyed in Michigan were sentenced for aiding and abetting or for an unplanned murder that happened in the course of a felony.

We also have serious concerns that racial discrimination and disparities plague the sentencing of youth to life without parole throughout the United States. On average, across this country Black youth are serving life without parole at a per capita rate that is 10 times that of White youth. Many States have racial disparities that are far greater than that.

Finally, we support H.R. 4300 because international law prohibits life without parole for people who commit their crimes under the age of 18. Oversight and enforcement bodies for two treaties to which the U.S. is a party have found the practice of sentencing juvenile offenders to life without parole to be a clear violation of U.S. treaty obligations.

H.R. 4300 would provide meaningful opportunity for parole to youth offenders, and we urge your support. Thank you.

Mr. SCOTT. Thank you very much.

[The prepared statement of Ms. Calvin follows:]

PREPARED STATEMENT OF ELIZABETH M. CALVIN

HUMAN RIGHTS WATCH

Testimony of Elizabeth Calvin
Children's Rights Advocate, Human Rights Watch

H.R. 4300, the "Juvenile Justice Accountability and Improvement Act of 2007"
House Judiciary Committee
Subcommittee on Crime, Terrorism, and Homeland Security
September 11, 2008

Mr. Chairman and members of the Committee, thank you for holding this hearing and for inviting me to testify on the important topic of the sentencing of youth who were below the age of 18 at the time of their offenses to life without the possibility of parole. I am here to testify in support of legislation that would end this practice in the United States and provide meaningful access to parole hearings or other review for youth offenders serving this sentence.

The decision to sentence a juvenile to life without the possibility of parole is a decision to sentence that young person to die in prison. There is no time off for good behavior, no opportunity to prove that you have become a different person, responded with remorse and chosen paths of rehabilitation. Next to the death penalty, there is no harsher condemnation, no clearer judgment by our criminal courts that this is a life to be thrown away. The federal government and 39 states sentence under-18 offenders to life without the possibility of parole.

In the US we believe that people under the age of 21 lack the judgment needed to drink alcohol responsibly; that those below 18 are too immature to understand the implications of signing a contract; and that someone younger than 16 cannot assess the risks and consequences inherent in driving a car. Yet, in this country we have also decided that children as young as 13 are mature enough to be sentenced to die in prison.

The United States stands alone in its imposition of this sentence on children. In the US there are currently more than 2,484 people who were convicted of crimes committed as children and sentenced to life without parole. There is not a single individual serving this sentence in the rest of the world.

The Juvenile Justice Accountability and Improvement Act of 2007 would allow states and the federal government to ensure that young offenders receive serious punishments to hold them accountable for actions that have caused enormous suffering to victims and their families. H.R. 4300 would, however, also provide youth—who are different from adults in their capacity to change—with an incentive to work towards rehabilitation in prison. Access to a parole hearing or another form of meaningful review is not a "get out of jail free" card. It is a chance to earn one's release from prison through rehabilitation. Parole hearings would assess a youth offender's rehabilitation, and they would also provide a necessary opportunity for victims and their families to be heard.

Through in-depth statistical and legal research, in-person interviews with youth, judges, prosecutors and defense attorneys, lawmakers and victims, Human Rights Watch has investigated the use of life without parole for youth throughout the United States since 2004. We have found that not only is the US now the sole country imposing this sentence on children, but the sentence is also imposed unfairly and disproportionately upon racial and ethnic minorities. Based on our research, we support the passage of H.R. 4300 for three main reasons. The use of this sentence for juveniles is frequently disproportionate, racially discriminatory, and a violation of international law.

One example of the disproportionate use of the sentence is the case of Sara K. Sara was raised by her mother who was addicted to drugs and abusive. She was 16 years old at the time of her crime. At age 11 Sara met "G.G.," a 31-year-old man. Soon after, he sexually assaulted Sara and began grooming her to become a prostitute. At age 13, Sara began working as a prostitute for G.G. He continued sexually assaulting Sara and using her as a prostitute for almost three years. Shortly after turning 16, Sara shot and killed G.G. She was sentenced to life in prison without parole.

It is not just the facts of individual cases that show the disproportionate use of this sentence. There are more systemic problems. The sentence of life without parole was created for the worst criminal offenders. But we have found that life without parole is not reserved for juveniles who commit the worst crimes or who show signs of being irredeemable criminals. For example, this sentence is routinely used with young people who have never before been in trouble with the law. Human Rights Watch found that nationally an estimated 59 percent of youth sentenced to life without parole are first-time offenders. They had no prior juvenile or criminal record whatsoever—not even a shoplifting conviction.[1]

Additionally, our research found that these young people often acted under the influence or at times specific direction of adults when they committed their crimes. For example, in California, in an estimated 70 percent of cases in which a teen was acting with codefendants, at least one codefendant was an adult.[2] Even more disturbing, however, is that in an estimated 56 percent of cases with adult codefendants, the adult received a lower sentence than the youth who is now serving life without parole.[3]

Also troubling is the fact that often youth sentenced to life without parole were not the primary actors in the crime: they did not pull the trigger; they did not physically commit the crime. Nearly half of youth sentenced to life without parole surveyed in Michigan were sentenced for aiding and abetting or an unplanned murder in the course of a felony.[4] Thirty-three percent of youth sentenced to life without parole whose cases we investigated in Colorado had convictions based on the felony murder rule.[5] In 45 percent of California cases surveyed, youth sentenced to life without parole had not actually committed a murder and were convicted for their role

[1] Human Rights Watch and Amnesty International, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*, October 2005, http://hrw.org/reports/2005/us1005/, pp. 27-28.

[2] Human Rights Watch, *When I Die, They'll Send Me Home: Youth Sentenced to Life without Parole in California*, January 2008, http://www.hrw.org/reports/2008/us0108/, p. 35.

[3] Ibid, p. 36.

[4] American Civil Liberties Union of Michigan, "Second Chances, Juveniles Serving Life without Parole in Michigan's Prisons," 2004, http://www.aclumich.org/pubs/juvenilelifers.pdf (accessed September 2, 2008), p. 4.

[5] Human Rights Watch, *Thrown Away: Children Sentenced to Life without Parole in Colorado*, February 2005, http://hrw.org/reports/2005/us0205/, pp.18-19.

in aiding and abetting or participating in a felony.[6] These are all cases in which someone else was the primary actor. A significant number of these cases involved an attempted crime gone awry—a tragically botched robbery attempt, for example—rather than premeditated murder.

We also have serious concerns that racial discrimination and disparities plague the sentencing of youth to life without parole throughout the United States. On average across the country, black youth are serving life without parole at a per capita rate that is 10 times that of white youth. Many states have racial disparities that are far greater. Among the 26 states with five or more youth offenders serving life without parole for which we have race data, the highest black-to-white ratios are in Connecticut, Pennsylvania, and California, where black youth are between 18 and 48 times more likely to be serving a sentence of life without parole than white youth.[7]

Poor legal assistance afforded to many teen defendants appears to further compromise just outcomes. Some of those Human Rights Watch interviewed or surveyed described a level of legal representation that falls well below professional norms. In California, one of the most salient errors reported to Human Rights Watch is attorneys' failure to adequately represent youth offenders at the sentencing hearing. In 46 percent of cases, respondents reported that their attorney failed to argue for a lower sentence.

We support H.R. 4300 because it is sound public policy. Lawmakers do not face a choice between being "soft on crime" and supporting life without parole for teen offenders. Lawmakers can protect community safety, save on incarceration costs, and save youth from a lifetime in prison.

Proponents of life without parole believe the sentence is necessary in order to ensure retribution—that society metes out the worst punishment for the worst offenses. However, while teens can commit the same acts as adults, by virtue of their

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[6] Human Rights Watch, *When I Die, They'll Send Me Home: Youth Sentenced to Life without Parole in California,* January 2008, http://www.hrw.org/reports/2008/us0108/, p. 21.

[7] Human Rights Watch, *Executive Summary, The Rest of Their Lives: Life without Parole for Youth Offenders in the United States in 2008*, May 2008, http://www.hrw.org/backgrounder/2008/us1005/us1005execsum.pdf, pp.5-7.

immaturity they are not as blameworthy or culpable. Recent developments in neuroscience have found that teens do not have adults' developed abilities to think, to weigh consequences, to make sound decisions, to control their impulses, and to resist group pressures; their brains are anatomically different, still evolving into the brains of adults. These findings suggest that sentencing laws should be revised to ensure that youth offenders are not sentenced as if they were adults.

Supporters of the life without parole sentence also claim that teens who pause to consider the consequences before committing crimes will be deterred if they face harsh sentences such as life in prison without parole. But young people are less likely than adults to pause before acting, and when they do, research has failed to show that the threat of adult punishment deters them from crime. Deterrence is also unlikely given research showing that adolescents cannot really grasp the true significance of the sentence.

Some proponents claim that incapacitation justifies the use of life without parole sentences. No one can deny that life without parole makes some contribution to public safety to the extent that locking up youth offenders prevents them from committing additional crimes. It is undeniable, however, that many youth offenders can be rehabilitated and become productive members of society. The need to incapacitate a particular offender ends once he or she has been rehabilitated. There is no basis for believing that all or even most of the teens who receive life without parole sentences would otherwise have engaged in a life of crime. Our research indicates that many teens received life without parole for their first offense. There is little in their histories to warrant the assumption that they would not mature and be rehabilitated if they were spared a lifetime in prison.

Finally, we support H.R. 4300 because the US practice of sentencing youth to life without parole violates international law. International law prohibits life without parole sentences for those who commit their crimes before the age of 18, a prohibition that is universally applied outside of the United States. Oversight and enforcement bodies for two treaties to which the United States is a party (the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination) have found the practice of

sentencing juvenile offenders to life without parole to be a clear violation of US treaty obligations.

There is movement to change these laws occurring across the country. Legislative efforts are pending in California, Florida, Illinois, and Michigan and there are grassroots movements in Iowa, Louisiana, Massachusetts, Nebraska, and Washington. Most recently, Colorado outlawed life without parole for children in 2006.

H.R. 4300 would eliminate life without parole for juvenile offenders in the United States and bring our country into compliance with international law and standards of justice. It would recognize that youth are different from adults and provide incentives for rehabilitation that reflect their unique ability to change. Human Rights Watch urges you to support this bill.

Mr. SCOTT. I want to thank all of our witnesses for their testimony. We will now ask you questions under the 5-minute rule. And I wanted to follow up with Ms. Calvin.

When this bill was introduced, I understood that there were 12 out of 2,225 people serving life without parole sentences around the world, 12 were outside the United States. Are you disagreeing with that or giving updated information?

Ms. CALVIN. Yes, sir, this is updated information. As of February 2008, every other country in the world has—who had been using this sentence for juveniles has changed their laws and applied it retroactively. So there are now, to our knowledge, no other juvenile offenders serving life without parole outside of the United States.

Mr. SCOTT. And can you state the two treaties that you cited that we are in violation of?

Ms. CALVIN. It would be the International Covenant on Civil and Political Rights and the International Covenant to Eliminate Racial Discrimination.

Mr. SCOTT. Thank you.

Dr. Dudley, is there any deterrent effect that life without parole would have over a juvenile rather than life with parole?

Dr. DUDLEY. Well, going back to what I was explaining about the capacity for juveniles to make decisions and to think through decisions and to consider the issues involved therein, it would be equally as difficult for them to consider the bad possible consequence or outcome as it is for them to consider any other possible outcome of their behavior. So it is really the difficulty they have in identifying those options, considering those difficulties, holding them in their head, weighing the pros and cons. It is the process that they have difficulty with. So that piece of information really doesn't help juveniles like it may help adults.

Mr. SCOTT. So the idea that we would change a penalty from life with parole to life without parole would not reduce crime?

Dr. DUDLEY. That is correct.

Mr. SCOTT. Thank you.

Mr. Stevenson, are there complexities in dealing with juveniles that we would want to help attorneys get through that may not apply to adult court?

Mr. STEVENSON. Yes, Chairman Scott. That is one of the reasons why I am so pleased that the legislation attempts to do something about the counsel problem we have surrounding young kids. Most adult defenders, historically, have had no experience dealing with young kids, especially kids as young as 13 and 14, but any juvenile. There are special needs. This is a client population that has very unformed understanding. They have not been acculturated to the criminal justice system. Their decisionmaking is really unformed. Most of my clients had no idea what life imprisonment without parole meant at the point of their sentencing. We have got several cases where they didn't even understand what that means, and they kept asking, well, when do I get out? When do I get out?

So lawyers working with this population have special needs. Particularly because there is such a high percentage of abuse and trauma in this cohort, you have got to be prepared to deal with people who are very, very fragile, very, very damaged. And a lot

of defenders don't have that preparation. And so the counsel problem is a huge one.

I should just note that, for example, in our cohort of 13- and 14-year-olds, most of these kids never had an appeal filed where the issue of their age was raised. In fact, we have got these 2,500 kids doing life without parole, over 2,000 of them do not have access to legal representation. And because they have been in prison now for more than a year or 3 years or 5 years, their ability to get access to counsel is very, very difficult. So the counsel problem is extremely important to recognize.

Mr. SCOTT. Is false confession a unique problem with juveniles?

Mr. STEVENSON. Absolutely. There is a lot of research. Richard Leo and some others have documented the problem of juvenile confession and statement. You know, without a parent, without a strong guardian to help kids manage criminal justice system decisionmaking, which they are entitled to, you are at great risk. And, of course, unfortunately, with this population they don't have strong parents. They don't have strong guardians that come. In fact, Joe Sullivan, the 13-year-old I mentioned to you, his father picked him up when he found out that he was going to be charged, took him to the police station, pushed him out of the car and then left. And so when he interacted with the police department, he had no parent or guardian there. And that is very common in this universe of kids that are dealing with these very extreme sentences.

Mr. SCOTT. Thank you.

And, Mr. Johnson, did you have any experience in prison—I understand that you had to shorten your statement briefly and had a comment on the confinement in prison.

Mr. JOHNSON. Yes. I particularly—I had only three misconducts in prison. As I mentioned before in my statement, being sentenced as a young person going into adult system is—change don't come easy. And so I did acquire some misconducts. One of the misconducts I acquired was a fighting misconduct, an assault, and a threatening behavior. Out of 12 years, that in normal cases would be considered good, but in my case I would end up doing 6 years in solitary confinement because of those misconducts.

Mr. SCOTT. Thank you.

Mr. Gohmert.

Mr. GOHMERT. Thank you, Chairman, and thank you all for your testimony.

Dr. Dudley, is it possible to identify antisocial personalities, or what used to be sociopaths, as juveniles?

Dr. DUDLEY. Well, technically you can't diagnose a personality disorder until the postjuvenile time period. So we are talking about 19-year-olds——

Mr. GOHMERT. I was just wondering if there has been any studies showing that you could make indications as to those who would follow that path.

Dr. DUDLEY. No, you can't really do that. Even for children who have conduct disorders, it is difficult to determine kind of which way they are going to go until their personality is much more fixed, and that just simply doesn't occur that young.

Mr. GOHMERT. I would just submit that even though I am not an M.D., and am certainly not a psychologist, and hear Mr. Johnson's

case, the scenario, that doesn't sound like anybody that is going to end up being a sociopath. I mean, he has so many positive things in his life going, but rage, anger, hate, that is not one of the positives. But it seems like the indications are when people act out of rage, anger, hate, that is a whole lot different from somebody that could control their conduct, but just would as soon do wrong.

In Texas while I was a judge, I don't think they have it now, we didn't have life without parole for juveniles or for adults, so I am not as acquainted with that. But I am curious, Mr. Stevenson. You mentioned in your statement there are some that can be sentenced to life without parole as a juvenile without injury. Can you give me an example of what crime could produce no injury and still get life without parole?

Mr. STEVENSON. Yes. The case I mentioned is the case of Antonio Nunez in California. California has a set of laws that——

Mr. GOHMERT. What is the crime?

Mr. STEVENSON. Aggravated kidnapping. It was an older man who was at a party, he saw this young kid, put them in the car——

Mr. GOHMERT. No, I understand once you tell me what the crime could be. Then I could see all kinds of scenarios there.

Mr. STEVENSON. Yeah.

Mr. GOHMERT. And that is unusual to have a sentence to that extent without an injury. And I understand the frustration sometimes in dealing with State laws.

But, Mr. Johnson, if I could ask, you made a number of references that indicate religion has assisted you greatly in getting to this point where, you know, you seem like the kind of guy you would love to sit around and visit with or go have a meal or something. What is your religion that has helped you so?

Mr. JOHNSON. Well, right now I am a Muslim. I was raised as a Jehovah's Witness. I went to a Catholic school. I went to a Baptist school. So I got a variety of religions inside of me. But right now I do—I am a member of the church, I am a member of the mosque, I am a member of Sacred Heart Church in Detroit. I am a Muslim.

Mr. GOHMERT. Okay.

Mr. JOHNSON. But I accept the beliefs of everyone, as long as it is only one God.

Mr. GOHMERT. Okay. Well, I was just curious.

Mr. JOHNSON. Yes, sir.

Mr. GOHMERT. People have got to have hope.

With regard to the Federal intervention here again, that is where my concern is. If there needs to be reform, it seems like it should be a concerted effort, including maybe some of us here, without extortion, this needs to be reformed.

Another concern I have, I know in Texas there was tremendous pressure, as well as other States that have the death penalty for adults, that, gee, you ought to go to life without parole. And the thing that crops up in my mind is if we come back and basically—and I know it is not considered blackmail or extortion, but basically we are saying you want the money you come to rely on and is so critical to your programs and helping those that you have been helping, then you have got to change this law.

I am wondering, well, if States like Texas went to the life without parole instead of the death penalty, doesn't this open the door to the Federal Government coming in and saying, now that you have done away with the death penalty, you got life without parole, now we are going to force you to even undo that? It is just once you start this Federal intervention into State laws, then even though I have great concerns about the same issues you are concerned about, there does seem to be some real injustice in some of these cases, but like in Mr. Johnson's case, if I am the judge, and I have got discretion, I hear the positive things in his life, and I go this is not somebody we need to lock up because he is going to continuously be a threat to society. This young man has some real potential, because he has already begun to show it.

I see my time has expired. I have expressed to you some of my concerns about Federal intervention, though I also—you have touched a nerve with some of your concerns about the need for some State reform. And I appreciate your testimony.

Mr. SCOTT. Thank you. The gentleman's time has expired.

The Chairman of the Committee, the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you. I would like, Mr. Chairman, to have my opening statement included in the record.

Mr. SCOTT. Without objection.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

Thank you, Mr. Chairman and I thank Chairman Scott for his leadership on H.R. 4300 in cosponsoring the legislation and for holding this important hearing.

Imposing punishment incommensurate to an offense is an injustice that no society should embrace. Yet for some reason, we in the United States continue to sentence juveniles to life without parole, while every other nation has dispensed with it. They recognize as I hope we will recognize that sentencing juvenile offenders to life with no hope of parole is quite simply such an injustice and it is so because of three overall reasons.

First, punishment should be in proportion to a offender's culpability. This is acknowledged in our common law history far before our republic was founded and today, science has proved that youngsters simply do not have the brain development that enables them to appreciate the consequences of their decisions the way adults can.

Life without parole has historically been reserved for those offenders who commit murder or other violent crimes either with malice aforethought or depraved indifference for their actions. But, juveniles do not have such mental capacities as adults have. Consequently, juveniles cannot be culpable to deserve life with no hope of parole because they cannot have the requisite intent to commit a crime befitting that punishment.

Second, punishment should have a deterrent effect. This is to protect society by discouraging would-be criminals in a general deterrence and by incarcerating those who show no propensity for change in specific deterrence. But again, science and statistics show us that life without parole for youthful offenders has no general deterrence effect because as I have said, youngsters typically do not appreciate the gravity of circumstances.

Moreover, statistics show us that juveniles are the segment of the population that most readily responds to intervention, counseling and training. In fact, the vast majority of youthful offenders mature and commit very few offenses by the time they reach their mid 20s even without being imprisoned. And if an offender does not mature to the point of diminished recidivism, a parole hearing could determine that fact and deny parole. So, the incarcerating someone well past his or her 20's with no hope of parole serves no necessary specific deterrent effect.

Third, any criminal justice system practice should be administered equally upon all members of society. But, of course this is not the case with sentencing as African Americans make up a disproportionate number of the prison population in this country. And this disproportion is particularly high in juvenile incarceration. In fact in some states, African-Americans are up to 48 times more likely to be sentenced to life without the possibility of parole than white offenders. Now, I am anxious to find out through our witnesses exactly why this is the case but, in my opinion, this simply cannot be and even-handed administration of practice.

In sum, we have a criminal sentencing practice that sends youngsters to die in prison before they have the capacity to fully grasp the gravity of their offenses while they still have a chance to turn their lives around. The sentence is unnecessary because the likelihood of recidivism diminishes over time even without the incarceration anyway and the sentence is imposed on African-Americans at a rate far exceeding white defendants.

I am very much looking forward to discussing these issues today because I am at a loss to understand how we can call this justice. We need H.R. 4300. A meaningful chance at parole would at least give youthful offenders hope and an incentive to engage in programs to turn their lives around, particularly because they are at the age where they are most likely to do so. We have seen enough young talent go to waste in prison.

Again, I thank Chairman Bobby Scott for holding this important hearing and I yield back.

Mr. CONYERS. And begin with a focus on our legislation to change this incredibly inhumane practice, but to suggest that there are many, many other parts of the criminal justice system that do not meet the fairness test, is not constructed to rehabilitate whatsoever, and is also contrary to the stated goals of the reason we have a criminal justice system in the first place.

And so I wanted to point out that on September 26th, Friday of this month, the Congressional Black Caucus's 38th annual 5-day event includes a day in which the whole justice system is up for review. Chairman Bobby Scott and myself, Maxine Waters, many Members in the Congress, and Judge Louie Gohmert is being invited this year, although he may have been there before, but we want to continue examining the larger considerations. It is at the Washington Convention Center. In addition, we will have the Citizens United for the Rehabilitation of Errants, CURE, where Charlie and Pauline Sullivan have been working with us for, I think, more than 15 years, to put it mildly. And we will also have Marc Mauer and The Sentencing Project. And we would like to extend our invitation to all of you as witnesses. And there are many others.

We have had more hearings of significance on the criminal justice system under Chairman Scott than any time in the course of my career here, which dates back to an unusually long and unspecified period of time. I will not go into the compromise at the Wormley Hotel in a Presidential dispute that occurred quite a way back. But the point is that what we are challenged to do is to go beyond documenting and talking about this among ourselves.

The one thing I want to recommend that I discussed with the gentlewoman from Los Angeles, Maxine Waters, is the creation of a database that incorporates all of these transgressions of justice so that they are not episodically related at a hearing there, and at the CBC, and at two or three, four dozen of the other hearings; that there is a bank where people of critical judgment can examine how extensive the miscarriages of justice are that occur in the American process.

In addition, we have what is to me a resurgence of police violence in this country that is going on. When I have Sheila Jackson Lee, Maxine Waters, Eddie Bernice Johnson that come to mind immediately who are saying we have got police problems going off the roof, they are out of control; we have a sentencing structure that has been—we have been attacking it for literally two decades now; all of these things suggest one thing to me, and I would like to just get your responses to anything that I may have said, but what it says to me is we need a new way to approach the resolution of the problems of which we are all familiar.

It means that we are talking unsatisfactorily to those people—and I know these things have historical cycles where there is let's have mandatory minimums. We are now coming into a new period where most people, including the Supreme Court, are looking with obvious skepticism on their value. There are other people that are coming around, we may be going through a cycle, but the legislative process consists of more than just hearing the wrong thing and creating the right thing to go along with it, because that can go on indefinitely.

Fifty years from now there will be another Subcommittee Chairman. I will probably likely be the Chairman of the Judiciary Committee still. But that is a bionic consideration that we need not go into here now. But we can do this; we could go on for a century of hearing, of criticizing, documenting, introducing remedial legislation, and this keeps going on.

We build walls, libraries become full of all this, but there has got to be in the legislative process—if there is to be success, there has got to be an analysis of what it takes to lead to success. And obviously, the first thing involved in that is being able to talk to those forces and parties and individuals in law, in the legislative process that can change things. And so I would like to, if I can get the additional time, Mr. Chairman, just starting with Elizabeth Calvin, Esquire, just go down the row here to see if any of these notions cause any reflection on the part of any of our distinguished witnesses.

Ms. CALVIN. Yes. Mr. Chairman, I could not agree with you more about the importance of having solid data about what is going on in our country, in particular in how children and young people are being treated in the juvenile and criminal justice systems. I can tell you from my experience of gathering data in California, it took me 9 months to get the Department of Corrections to give me data that is public record. And part of that was—well, I think there were a number of reasons. But it was a struggle. And I think we in many cases do not have enough information.

I would like to, Mr. Chairman, if I could—pardon me, I should have asked this earlier, I have submitted two Human Rights Watch reports that detail the data that we have been able to find nationally as well as in California. I would like to submit those as a part of the record. One is "The Rest of Their Lives: Youth Serving Life Without Parole in the United States," and the other is the one focused on California, "When I Die, They'll Send Me Home."

Mr. SCOTT. Without objection.*

Mr. JOHNSON. Yes, Chairman, as you were speaking, I began to reflect on the things that I experienced in prison, what I can do in relation to all of this or what I can add on to that.

What I believe, in collecting the data, you know, there is no system set up throughout the entire United States whereby we can see what they are actually doing in prison. And as Judge Gohmert hinted to, it makes those who are part of the fact-finding hearing process, it makes it difficult for them to ascertain who can be let go or who can be given a second chance. And I think that if a program is set up inside the system all around this country that can ascertain and keep data and information about who is going to college, who is helping out with other prisoners, who is involved in correspondence courses, who is involved in vocational training, who is involved in extracurricular activities outside of the normal prison, I think that would alleviate a lot of hardships and headaches when it comes to the decision-making process of who we can let go and who we can't. Thank you.

Dr. DUDLEY. I certainly agree with the issue of the importance of collecting data, but I think one of the things that we also need to focus on is the collecting of data that hasn't been collected or that would be extremely difficult to collect.

One of the things that I didn't talk about in an attempt to be brief was just the assessment of adolescents, and this would have been more in response to your question, Judge Gohmert, that, you know, one of the characteristics of adolescents is that they have so much difficulty managing their feelings. And you know, they act up; they defend against them in really just kind of outrageous ways because they can't handle some of the hurt and some of the things that they have. And that is why they give us all such headaches, you know, whether they are in trouble or not. And so some real assessment about what even the anger that appears to be there actually means. Is that just a way of I am so hurt that, you know, I can't tell you that? And what I am giving you is all of this kind of apparent anger?

I mean, I have lost count over the years of the number of adolescents who appear angry and bitter and closed and unopen, but when you actually can manage to get past that in the evaluation process, how they break down and cry, and what appeared to be this anger and hostility really is something very different than that.

And so data about how we fail really in even assessing these adolescents when they present in court is just not even available. But I suspect that we would find out, and anybody who works with adolescents will tell you this, that we are notoriously poor at really being able to tell you where an adolescent is at that time and that they are going to change so much. And so the notion of taking another look when they are a little older, because they can look so crazy at 13, and then a couple years later look so different, is what makes this legislation make so much sense.

*The Human Rights Watch reports submitted by Ms. Calvin have been made a permanent part of this record and are archived at the Committee on the Judiciary.

Mr. STEVENSON. Yes, Chairman Conyers, I also agree wholeheartedly that this problem reflects a broader set of problems that we see in the criminal justice system that I absolutely agree needs to be addressed. I am delighted to hear about the CBC gathering, because I think that is very important. You know, I think some of the transformation, I think, can come through some of these sorts of responses.

The four things that I see that kind of permeate the criminal justice system and that are certainly present here have to do with counsel. We can make the criminal justice system function better if we approach this problem of poor people not getting the legal help they need in a very different way. We have a criminal justice system in this country that is incredibly wealth-sensitive. Our system treats you better if you are rich and guilty than if you are poor and innocent. Culpability is not what shapes the outcome, it is wealth. And I think we have to understand that when we think about reform.

Second is race. There is real consciousness about race in the criminal justice system. Young men of color, Muslim men, African American men are presumed guilty. And so the lawyer has to overcome a presumption of guilt, which is not the way our system is set up, and as a result of that, lawyers fail to meet that burden. And we see that represented in the prison system. In this cohort of 13- and 14-year-olds, all of the 13-year-olds are Black. All of the kids who have been sentenced to die in prison at 13 and 14 for nonhomicides are kids of color. All of them. And it reflects the way in which we can demonize and devalue and use race as a lens for that.

One of my real strong recommendations is that we have got to find a way to make confronting race bias a priority. You know, I do death penalty cases, and my great frustration is we see gross evidence of racial bias all the time. I have got a case going to the eleventh circuit next month where a prosecutor in Selma, Alabama, a majority Black county, used all of his peremptory strikes, the discretionary strikes to pick a jury, to exclude 23 of the 23 Black people qualified for jury service. When he was asked to give a reason, he said, the first six people I struck were because they, quote, look of low intelligence, end quote. Nothing in the record to support that. And the State courts have affirmed that conviction and sentence, the Federal court has affirmed that conviction and sentence. And we are going to the eleventh circuit next month, and I am fearful that this man on death row could have that sentence affirmed because of proceduralism. We have now insulated claims of race bias from substantive review through the Antiterrorism Effective Death Penalty Act and other procedures. So I think that is an important concern.

And then finally, the last two things, I think, to be transformative, we have got to restore a culture both in the criminal justice system and out that recognizes what we should all know and understand, and that is that each person is more than the worst thing they have ever done. Your worst act is not all you are. And if we have that consciousness, I think we can make sentencing more fair.

And then finally, I think we have to have this transformative idea that we grew up with, a lot of us, which is that you don't judge the civility of a society, you don't judge the character of a society by how you treat the rich and the affluent and the powerful and the privileged; you judge the character and civility of the society by how you treat the hated, the imprisoned, the poor, the disenfranchised and the marginalized.

I think if we have those principles in mind, we can do some of the transformative work that I agree desperately is needed.

Mr. SCOTT. Thank you. The gentleman's time has expired.

The gentlelady from California Ms. Waters.

Ms. WATERS. Thank you very much, Mr. Chairman.

I would like to first thank you for your work and your courage, and to simply say what most of the people in this room already know. There are not many elected officials who are willing to take on these issues and be identified as someone who is fighting to provide justice for people who have committed serious crimes. The body politic has developed over the years in such a way that you are thought to be soft on crime, and it is used against you in campaigns. And so most of our elected officials don't have the courage to even stand up when it is quite obvious that there is something terribly wrong in the criminal justice system that is sentencing children to life in prison and other kinds of biases that are seen in the criminal justice system.

So our Chairman really is—Mr. Scott, the Chairman of the Subcommittee, is to be congratulated. But, of course, he has taken on the work of John Conyers, who has been doing this work for years. When I first met John Conyers 100 years ago, he was out there alone practically in this country doing this kind of work.

So I am very, very pleased to join with them and all of our efforts in trying to deal with the criminal justice system, whether it is talking about children who are sentenced to life without parole, or mandatory minimum sentences as relates to crack cocaine, all of these things we work on. And we are usually battling against a mind-set in the body politic that is not prepared to just do the right thing. It is very, very difficult work.

I thank you all for being here today.

And, Mr. Johnson, I thank you for telling your story and sharing that information with all of us. Despite the fact that most of the people that you see up here are committed and dedicated to trying to deal with these problems, we don't often have an opportunity to let people really know what is going on as we try and accomplish these things.

Now let me just say this: This bill is extremely important. And when you describe what is happening in the criminal justice system and you talk about young children who are raped and abused and developed and trained to be prostitutes, it is unimaginable that judges and juries would not take all of that into consideration. But I know it happens day in and day out.

I have worked, you know, in the feminist community and with women for a number of years. And as you know, you began to see a number of cases where women committed murder against men who were acting this way and treating them this way, abusing

them. And we had cases where there had been years of abuse; and women finally—some of them acted out.

And, you know, the women's community kind of got together and supported many of these women who were convicted. And I think there have been some cases where their sentences have been modified or overturned, et cetera.

We have not had a lot of advocates for children who get sentenced to these long terms or life without parole. This effort that you see here is a kind of a renewed or maybe first-time real effort to take a look at this.

I know that there are some Members who have voted from time to time when these issues were before us, but you would be surprised that some of our Members who consider themselves progressive, who represent communities where this is most likely to happen because they represent poor people and people of color, have voted the opposite direction. And there is one person whose name I won't mention who is no longer here that just infuriated me because of what happened on the Senate side with this issue several years ago.

But having said all of that, yes, data, information, all of that is important. But the kind of change that we need in the criminal justice system demands that there is more diversity in the system. When you look at the criminal justice system, when you look at the prosecuting attorneys, when you look at people who have the ability to make decisions such as you are describing about what is going on in Alabama, what you will find is that there is no diversity on these—you know in many of these counties and these judges, et cetera; and we have got to work harder at that. And, of course, we have got to continue to try and elect people to office who will have the courage to do the right thing.

I know I haven't asked you one question and the reason I haven't asked you any questions is because I know all the answers. I have been here long enough to know what is wrong with this system. I have been here long enough to have heard these cases. And so don't think that because I didn't ask you I am not interested. I just have to tell you and admit, I know.

So thank you very much for being here.

Mr. SCOTT. Thank you very much. And I appreciate the gentleman's comments.

The gentleman from Georgia, Mr. Johnson.

Mr. JOHNSON OF GEORGIA. Thank you, Mr. Chairman.

Mr. Johnson——

Mr. SCOTT. I am sorry. I didn't notice Mr. Coble was here. Excuse me.

The gentleman from North Carolina.

Mr. COBLE. Mr. Chairman, I was at an Intellectual Property Subcommittee hearing, and I apologize for my belated arrival. I have no questions for the moment.

Mr. SCOTT. Thank you.

Mr. Johnson.

Mr. JOHNSON OF GEORGIA. Thank you.

Mr. Johnson, you say you spent 12 years in prison?

Mr. JOHNSON. Yes, sir.

Mr. JOHNSON OF GEORGIA. And how old were you when you first went in?

Mr. JOHNSON. Seventeen, sir.

Mr. JOHNSON OF GEORGIA. Seventeen. And how would you describe what rehabilitation programs were available to you in the early phases of your incarceration?

Mr. JOHNSON. That is unique that you asked it in that way because that is when it was available, in the early years of my incarceration.

When I first went into prison as a teenager, there was vocational training. There was carpentry, there was plumbing, there was electrical engineering, there was opportunity to be a paralegal, certified through a school of law out in Dallas.

That changed in 1995 where those programs were alleviated to prisoners who were serving time inside of closed custody prisons or maximum security prisons. And those opportunities were only afforded to those who were given life sentences and sentenced to low or medium or camp status facilities.

So the majority of my rehabilitation, if you will, came about from the initial stages of my incarceration where those programs were available; and I just had the spirit to continue them on.

I think when you talk about rehabilitation, Mr. Johnson, I think that is—in this instance, in 2000, I think that is an individual choice. It is an individual determination. And to get back to your question, I don't think that the system now—I don't know whether it is finance or whatever it may be—is designed for that.

And if I may add, if you have an individual that does take advantage of whatever, whether it is a correspondence course or whether it is reaching out to a victim's family, becoming a part of a victim's group or whatever, it should be applaudable because it is almost nonexistent today in the system.

Mr. JOHNSON OF GEORGIA. Can you tell me whether or not there were any persons below the age of 17 who were incarcerated with adults while you were——

Mr. JOHNSON. Certainly.

Yes, sir. I was sentenced and sent to what is called Michigan Reformatory. It has since shut down, and then it has reopened in the last couple of years.

But the Michigan Reformatory is a particular prison where individuals 16 to 21 years old were housed. There were a couple thousand of us there at one time. You had 16, me, 17, 18, you had individuals 19. So all over the system now that has changed where you can go just about anywhere. And I believe that is the same way nationwide where there is young adult offenders, 16 years old or 17, that is currently housed in the same cell blocks, the same facility or institution, as those who are adults.

Mr. JOHNSON OF GEORGIA. Any comment on that, Ms. Calvin or Mr. Stevenson?

Ms. CALVIN. Well, I would add on both points, first, it is consistent with the investigation that we have done across the country that in many cases people, young people, who are serving life without parole do have less access to rehabilitative programming than other prisoners. And as one young man in California told me, those programs are for people who are going to get out. So if there are

limited programs, people are essentially moved to the bottom of the list if they have a life without parole sentence.

With regards to juveniles being held with adults, I think that is something that is different from State to State. And I can tell you in California, that is something that has changed, and to our knowledge, people are 18 before they are put into adult prisons in California. I know that there are other States that this is not true for.

I would point out, however, that even 18-year-olds face a lot of violence and threats when they enter in prison. As one person told me, he still did not have facial hair, and was essentially learning to shave in prison and was small in stature at age 18. And even though that comports with the Federal law on mixing people under the age of 18 with adults, that still is a very serious matter for those States that are putting away 18-year-olds.

Mr. STEVENSON. Representative Johnson, I will just add that in 15 of the 19 States where we have done work representing 13- and 14-year-old kids sentenced to life imprisonment without parole, there was incarceration of very young offenders with adults. And part of it has to do with the sentence.

Life without parole is the harshest sentence you can get. In 12 States it is the maximum sentence. And they have classification systems; the Departments of Correction around the country have moved to a classification system, which I applaud, where they try to segregate prisoners based on the level of offense. And they dictate that by sentence, so if you have a sentence of life without parole, you are going to be thrown in with the worst offenders in the system. And unfortunately, most of these States—again, because they haven't thought this stuff through—have not created exceptions for very young offenders.

So a lot of my clients were in the State penitentiary, the worst State penitentiary at 15, 16, 17 years of age, which is why we have found such a high level of sexual assault, rape, abuse, et cetera, because you are just very vulnerable at that age in these kinds of institutions.

Mr. JOHNSON OF GEORGIA. Mr. Stevenson, you reported that all of the incarcerated juveniles below the age of 14 in this country are persons of color?

Mr. STEVENSON. That is correct. We have identified eight young people who have been sentenced to life imprisonment without parole. All of them are African American.

We have identified nine young people—and this is in the cohort of 13 and 14-year-olds. We have identified nine young people who have been sentenced to life without parole for nonhomicide offenses—robbery, the kidnapping cases I mentioned. All of those children are kids of color.

Mr. JOHNSON OF GEORGIA. This is more than just disproportionate sentencing. It is almost exclusive sentencing for young African Americans and Hispanics.

Mr. STEVENSON. Yes. That is certainly true.

Mr. JOHNSON OF GEORGIA. Thank you. I yield back.

Mr. SCOTT. Thank you.

The gentleman from Texas is recognized.

Mr. GOHMERT. Just in response, there has been so much talk about racial bias. And you know, the comment that racial bias, Mr. Stevenson, is, there is racial bias in our justice system.

I would acknowledge there is some that—let me tell you, the first job I had as a lawyer was as a prosecutor in a small town, three small counties. And the main racial bias that we fought at that time was the lack of prosecution of African Americans who attacked African Americans. It was, "Well, they just do that kind of thing," was the comment. And I was proud to work for a DA that said, everybody is entitled to be protected by the justice system. And we turned that around. And so I have seen that.

But at the same time, when I hear a blanket allegation that the justice system—and we hear anecdotal indications and then even sometimes spouting statistics. If an African American victim comes in and says, it was an African American that hit me, I see no need to go looking for White people as the perpetrators of the crime.

So to see more about the issue of race, it would seem you would need to find out, you know, what race actually did the crime; that the problem may not be necessarily with the justice system, but what is causing so much more crime in one racial community or among one race more than with another.

And so, anecdotally, I feel compelled to tell you, in my courtroom I tried three capital murder cases. Two were White and one was an African American defendant. Two got the death penalty. One didn't. The two White men got the death penalty, and it was appropriate. And it was—well, and then as far—I was subpoenaed one time because there was a blanket attack. People were encouraged at some seminar: Go after your county because the judge doesn't pick the grand jurors, but they do pick the grand jury foreman. Then you can show that they are racially biased. I could have cared less what race my foremen were. I wanted the best, most organized person.

They decided they didn't need me after they found out I had actually appointed more African Americans to foreman because just out of the panel that was selected by the commissioners, I knew those people and I knew they were the best organizers. And I repeatedly had prosecutors who made sure I got the right foremen on that grand jury.

One other thing: I was court appointed to represent one death penalty appeal. I didn't want it. I went over and begged the judge, "I don't do criminal law as a rule. Please." And he said, "You will do a good job. I know you will be fair. So now you have got it."

The defendant was African American and had been sentenced to death. I could have cared less what race he was. He got tremendous representation. I poured my whole heart and soul into it because he didn't get a fair trial. And the justice system did the appropriate thing; the case was reversed.

So when I hear, you know, these blanket allegations, you know, the system is just biased, I feel like I have got to provide a defense because it isn't across the board. There are very, very fair aspects within the justice system itself. And I hope we can root out where the causes for racial bias are and work on those.

And, frankly, I believe sometimes it is born out of the legislation here, because I am—one of the most frustrating things that

brought me to Washington, I was seeing far too many people who were from families where someone had been lured into a life of dependency on the Federal Government because they were told, why don't you go have a baby out of wedlock and you will start getting a check.

And they found out that wasn't enough money to live on. They went and had another child and another child, and there was no hope for these people. And so they turned either to crime or welfare fraud, ended up in my court. They were lured into that way of life.

Instead, we should have been providing incentives to finish your education. We will help you with child care so you can reach that God-given potential. We didn't provide them hope; we provided them a rut they couldn't get out of. So those are the kinds of things I want to guard against.

And, Mr. Johnson, when I hear that your father was an encouragement to you, that is what I wish we could provide more incentives for more fathers to do instead of providing more incentives like a marriage penalty.

There is still that. You want to be married, you are going to pay a financial penalty. So I hope we can work together to help provide more reasons for hope and less reasons for injustice.

But I thank you for the second round.

Mr. SCOTT. Thank you.

Just to follow up on that, Ms. Calvin, were you involved in the California study?

Ms. CALVIN. Yes, sir.

Mr. SCOTT. And did that reveal that African American youth arrested for murder were almost six times more likely to receive a life sentence without parole than White youth arrested for murder?

Ms. CALVIN. Yes, that is true. Could I explain a little bit about it? It is pretty remarkable data.

We first looked at the ratio, the per capita ratio. And as I mentioned earlier, we found nationally it is 10 times more likely. In Connecticut, a Black youth is 48 times more likely to get the sentence than a White youth. In Pennsylvania, they are 21 times more likely.

We looked specifically, because I think some people may argue, well, don't more Black people commit more crimes? But when we look specifically at youth who are charged with murder and we compare Black youth who have been charged with murder with White youth who have been charged with murder, there is still a huge difference.

And so, for an example, Black youth in California are nearly six times more likely to get life without parole, those who have been charged with murder, than the White youth charged with murder. And I don't think there is an explanation other than discrimination.

I would like to say one thing, because I think you raise a very serious point. Across this country there are dedicated public defenders and other attorneys who are working long into the night to help people. But there are many, many, many cases in which young people are being told to plead guilty to a life without parole case or something else that is very serious.

In California, we have data on more than half the cases, and it is our estimate that in 45 percent of the cases the attorney for the child at the sentencing hearing did not argue for a lower sentence. So—the person who is in the courtroom there for that individual did not argue for a lower sentence, so there is something very, very broken.

Mr. GOHMERT. In those cases, was there an appeal by a different attorney?

Ms. CALVIN. Yes.

Mr. GOHMERT. Because normally we would try to make sure there was a different attorney that handled appeals so you could point out those kinds of things. That is almost per se malpractice.

Ms. CALVIN. Yeah. In my understanding of California law, they typically do have a different attorney for the appeal because they need to be able to look at——

Mr. GOHMERT. It would be per se malpractice if you didn't argue for a lower sentence. I just can't imagine that not being an issue.

Ms. CALVIN. It is horrific. I think someone who has been an attorney understands just how deeply wrong that is, yes.

Mr. SCOTT. Thank you.

Did you have a final comment?

Mr. STEVENSON. Yes. Just to follow up on that. I mean, I think you are right, Judge, that that would be required. Unfortunately, without again an engagement in the particular problems that these cases present, we have seen a lot of these appeals, and the issues you would expect to be raised don't get raised. And, of course, there is no right to counsel then for collateral review. So most of this universe of 2,500 kids have never had their cases on these kinds of issues reviewed substantively.

I also want to commend you because I think that you are right in recognizing the complexity of race. A lot of it is—when I talk about bias, I am also talking about underprosecution of cases involving minority victims in some jurisdictions. Some folks have done some things about it. You have identified your work.

When we think about these issues, we recognize that we are not always talking about conscious, insidious, intentional racial bias. We are talking about systems that operate in a way that disadvantaged youth of color and people of color and folks just having got to it.

You talk about jury selection. That is one of the issues we do a lot of. In virtually all of the counties where I practiced there are huge disparities between the percentage of people of color in the county and the percentage of people of color on the jury pool. And that means that you see this lack of diversity that Congresswoman Waters was talking about.

So I do think that all of that is part of the picture that we have to address. I don't mean to suggest that it is all willful, intentional and malicious. But it is consequential, and I think we are seeing some of those consequences with these data and with these sentences. And I do believe it really does require some attention and effort by this Congress and by others who recognize the importance of a just system that does not demonize on the basis of race.

Mr. SCOTT. Thank you.

Dr. Dudley, did you have a final comment?

Dr. DUDLEY. I think the thing to add to that is that this issue that we have been discussing here, toward the end, is not really correctable by, you know, mental health evaluations and assessments of adolescents. And in that case, race really does matter because we want to have an ethno-culturally competent evaluation on top of all these other difficulties related to assessing adolescents that I have alluded to before.

Unless you have someone who is competent to handle evaluations of these kids of color, they won't be able to engage them, they won't be able to kind of open them up and find out what is, in fact, really going on. And they could be misperceived as having difficulties they don't really have or not being able to be responsive to interventions that might be available to them or helpful to them.

Mr. SCOTT. Thank you very much.

I want to thank our witnesses for their testimony today. Members may have additional written questions for our witnesses, which we will forward to you and ask you for answers as promptly as possible so that the answers may be part of the record. Without objection, the hearing record will remain open for 1 week for the submission of additional materials.

Without objection, the Subcommittee stands adjourned.

[Whereupon, at 3:41 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE LOUIE GOHMERT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND RANKING MEMBER, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Thank you, Chairman Scott.

Today, the Crime Subcommittee is holding a legislative hearing on H.R. 4300, the Juvenile Justice Accountability and Improvement Act. This bill requires states to give parole reviews to juvenile offenders who are sentenced to life with parole—a sentence that is generally reserved for offenders who have committed murder.

H.R. 4300 requires states to provide parole reviews to these dangerous offenders at least once during their first 15 years of incarceration and at least once every three years thereafter. If a state does not comply with this federal directive, the bill mandates that the state lose 10% of its Byrne JAG funding.

This bill seeks to regulate a prerogative—sentencing of convicted criminals—that is exclusively a state issue. Unless their laws violate a constitutional right, states have exclusive control over the prosecution and sentencing of defendants within their jurisdiction.

In the 1990's, the overwhelming majority of state legislatures appropriately adopted sweeping changes to their juvenile criminal codes to properly address what the juvenile justice system had overlooked: that protection of public safety is of paramount concern whether the offender is juvenile or an adult.

These state legislatures revised their codes to allow juveniles charged with serious violent crimes to be tried as adults to ensure that a juvenile offender was not sentenced less seriously for their criminal behavior solely because of their age and perceived immaturity.

Presently, 39 states allow for juveniles to be tried as adults and sentenced to imprisonment for life without parole if they are convicted of violent crimes such as murder. In some states, a sentence of life without parole is mandatory if a juvenile is convicted of certain crimes; in other states, the sentencing judge has discretion as to the sentence.

When prosecutors determine whether it is appropriate to charge a juvenile defendant as an adult, they consider a number of factors. Included in those factors are the nature and circumstances of the offense, the impact of the offense on the victim, and the juvenile offender's criminal history.

As a result of this deliberative process, very few juveniles are charged as adults. According to the National District Attorneys' Association, most jurisdictions in America prosecute only one to two percent of juvenile criminal offenders as adults, and in some jurisdictions this percentage is even lower.

Groups advocating the passage of H.R. 4300 argue that because the United States is the only country where juveniles can be sentenced for life without parole, we should change sentencing structure.

However, the simple fact of the matter is that most state legislatures—and the constituents that they represent—have determined that tough sentencing is required to (1) punish offenders that have committed murder and other violent crimes and (2) to deter others from committing similar crimes in the future.

I am concerned that H.R. 4300 is an unfunded mandate that would impose costly financial obligations on a number of states. Eleven states and the District of Columbia have determinate sentencing systems that do not allow parole. In order to implement the requirement of H.R. 4300, these states would presumably have to create, fund, and maintain a parole board to conduct hearing for juvenile LWOP offenders.

Further, a federal mandate that a state provide parole reviews for one class of offenders that is not available to other offenders could create equal protection issues within that state.

H.R. 4300 also violates the principles of federalism that are the foundation of our legal system. It is inappropriate at best and unconstitutional at worst for Congress to seek to regulate the manner in which states determine appropriate sentences for state crimes committed and prosecuted within their jurisdiction.

A lot of legislation in Congress uses the "carrot and stick approach" to encourage states to adopt policies favored by Members. However, H.R. 4300 takes the "stick only" approach. The bill unreasonably threatens to withhold Byrne JAG grants from the states unless they comply with its mandates. This threat forces the states to make the impossible decision of substituting Congress's judgment regarding sentencing for its own or risk losing important funds that help state and local law enforcement officials accomplish their mission.

For these reasons, it is unlikely that I can support this bill.

I yield back the balance of my time.

September 11, 2008

The Honorable Robert C. Scott
Chair, Subcommittee on Crime, Terrorism, and Homeland Security
Judiciary Committee
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Louie Gohmert
Ranking Member, Subcommittee on Crime, Terrorism, and Homeland Security
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Re: ACLU Supports H.R. 4300, the Juvenile Justice Accountability and Improvement Act of 2007

Dear Chairman Scott and Ranking Member Gohmert,

On behalf of the American Civil Liberties Union (ACLU), a non-partisan organization with hundreds of thousands of activists and members and 53 affiliates nationwide, we applaud the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security for holding a hearing on H.R. 4300, the Juvenile Justice Accountability and Improvement Act of 2007. This important legislation would help to end the practice of sentencing children to life in prison without the possibility of parole and would provide grants to states to improve the quality of legal representation for youths charged with offenses that could lead to life sentences.

This legislation is both welcome and overdue. The practice of sentencing children who have yet to reach the age of 18, even those convicted of the most serious of crimes, to life imprisonment with no possibility of parole is both a violation of our Constitution, as well as a stain on our country's human rights record and international standing. Indeed, since 2006, three different international human rights treaty bodies that have examined the U.S. government's compliance with its treaty obligations have expressed grave concerns with the practice of sentencing children to life without the possibility of parole[1]. Passage of the Juvenile Justice Accountability an

[1] Committee against Torture (May 2006), UN Human Rights Committee (July 2006) and Committee on the Elimination of Racial Discrimination (March 2008)

Improvement Act would bring the U.S. into compliance with its international treaty obligations, as well as our guiding constitutional principles.

At least 2,381 people in the U.S. are currently incarcerated for life without the possibility of parole for crimes they committed as children[2]. The staggeringly high number of people serving life without parole sentences for crimes committed before age 18 was noted with deep concern by the Committee against Torture, which monitors compliance with the Convention against Torture, in May of 2006. In July 2006, the UN Human Rights Committee, which oversees compliance with the International Covenant on Civil and Political Rights, expressed its alarm at this practice and recommended that the U.S. discontinue its use.

In March 2008, the Committee on the Elimination of Racial Discrimination recommended that the U.S. end the practice of sentencing children to life without parole based on the disproportionate impact it has had on racial, ethnic and national minorities. According to a report by the University of San Francisco School of Law's Center for Law and Global Justice, children of color in the U.S. are ten times more likely to receive sentences of life without parole than white child offenders. In some states, including California, the rate is a shocking 20 to 1. Nationwide, "the estimated rate at which black youths receive life without parole sentences (6.6 per 10,000) is ten times greater than the rate for white youths (0.6 per 10,000)"[3]. In the state of Michigan, the majority (221) of juveniles serving life sentences are minority youths, 211 of whom are African American[4].

In an attempt to address this violation of fundamental human rights, the ACLU and its Michigan affiliate filed a petition with the Inter-American Commission on Human Rights in 2006 on behalf of 32 juveniles who were tried and convicted as adults and given mandatory life sentences for crimes committed when they were under the age of 18 without consideration of their age[5]. The petition urged the commission to rule that sentencing children to mandatory life without the possibility of parole violates the Declaration of the Rights of Man and other universal human rights principles. The petition remains pending before the commission.

Ending the practice of sentencing children to life without parole is the next step our country must take following the Supreme Court's landmark 2005 ruling in the case of *Roper v. Simmons*[6], in which the court ruled the imposition of a capital sentence for crimes committed before the age of 18 unconstitutional[7]. Justice Kennedy, in the majority opinion, recognized the critical distinction

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[2] ACLU of Michigan, *Second Chances: Juveniles Serving Life Without Parole in Michigan Prisons* 3 (2004) available at http://www.aclumich.org/pubs/juvenilelifers.pdf. See also University of San Francisco School of Law, Center for Global Law and Practice, *Sentencing Our Children to Die in Prison: Global Law and Practice*, (Nov. 2007), available at http://www.usfca.edu/law/home/CenterforLawandGlobalJustice/LWOP_Final_Nov_30_Web.pdf.

[3] Human Rights Watch and Amnesty International, *The Rest of Their Lives: Life Without Parole for Child Offenders* 2 (2005), available at http://hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf.

[4] ACLU of Michigan, *Second Chances*, supra note 243, at 6.

[5] ACLU and ACLU of Michigan Petition to the IACHR Alleging Violations of the Human Rights of Juveniles Sentenced to Life Without Parole in the United States (2006), available at http://www.aclu.org/images/asset_upload_file326_24232.pdf.

[6] 543 U.S. 551 (2005).

[7] Id.

in culpability and potential for rehabilitation that the law must recognize when comparing offenses committed by adults with those committed by children[8]. But reform still stands as one of the core goals of a successful correctional system – and Justice Kennedy's opinion serves as encouragement to hold out hope as a society that children are not beyond rehabilitation.

This legislation will help restore discretion to judges and juries during sentencing and to parole boards by encouraging states not to bar consideration of a defendant's status as a child. Many states mandate life without parole sentences for certain offenses, thereby depriving judges and juries of considering the defendant's age. By withholding funds to states that refuse to provide a parole option to child offenders, this legislation encourages modification of these most stringent punitive frameworks.

In providing additional support for child legal defense, this legislation also helps to diminish the potential for critical deficiencies in the quality of legal representation for children facing potential life sentences. This element of the legislation is especially important considering the racially disparate impact shown to be associated with juvenile life sentences.

The ACLU commends the Committee for holding a hearing to explore these issues. Confronting the sentencing of children to life without possibility of parole is a pressing human rights and constitutional challenge facing our criminal justice system. The ACLU encourages members to sign-on as co-sponsors to H.R. 4300 and to move the legislation forward.

Thank you for taking our views into consideration.

Sincerely,

Caroline Fredrickson
Director, Washington Legislative Office

Michael W. Macleod-Ball
Chief Legislative and Policy Counsel

cc: House Judiciary Subcommittee on Crime, Terrorism and Homeland Security

[8] Id. at 572-573.

ACLU AMERICAN CIVIL LIBERTIES UNION
WASHINGTON LEGISLATIVE OFFICE
NEWS

ACLU Calls on Congress to End the Sentencing of Children to Life Imprisonment without Parole

Legislation brings U.S. into compliance with its international treaty obligations

FOR IMMEDIATE RELEASE: Thursday, September 11, 2008
Contact: Linda Paris, 202-675-2312, media@dcaclu.org

Washington, DC – Today, the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security is scheduled to hold a hearing on a bill that would help end the practice of sentencing children to life in prison without the possibility of parole and provide grants to states to improve the quality of legal representation for youth charged with an offense that could lead to a life sentence. In a letter to Representatives Robert C. Scott (D-VA), chair of the House Judiciary Subcommittee, and Louie Gohmert (R-TX), ranking member, the ACLU calls on Congress to move forward with H.R. 4300, the Juvenile Justice Accountability and Improvement Act of 2007.

"Confronting the sentencing of children to life without the possibility of parole is one of the most pressing human rights challenges facing our criminal justice system," said Caroline Fredrickson, director of the ACLU Washington Legislative Office. "This practice is a violation of our Constitution and a stain on our country's human rights record in the international community."

Fredrickson continued, "We have treaty obligations and we have constitutional obligations to stop sentencing children to life imprisonment without the possibility of parole. In the past two years, three international human rights bodies have expressed grave concerns with this U.S. sentencing practice. The Juvenile Justice Accountability and Improvement Act of 2007 would bring the U.S. into compliance with its international treaty obligations and our guiding constitutional principles. We strongly encourage members of Congress to support this legislation."

The national ACLU and the ACLU of Michigan filed a petition with the Inter-American Commission on Human Rights in 2006 on behalf of 32 juveniles who were tried and convicted as adults. These juveniles received mandatory life sentences for crimes committed when they were under the age of 18 without any consideration to their status as children. The petition urged the commission to rule that sentencing children to mandatory life without the possibility of parole violates the Declaration of the Rights of Man and other universal human rights principles. The petition remains pending before the commission.

Kary L. Moss, executive director of the ACLU of Michigan, noted that Michigan ranks among the top states in the U.S. for putting away the most children under eighteen for life imprisonment with no possibility of parole. According to the ACLU of Michigan report, Second Chances, Michigan has at least 306 inmates serving life sentences for crimes committed before their 18th birthdays. No parole board will review their cases. Moss said, "Life without parole sentences ignore the very real differences between children and adults, abandoning the concepts of redemption and second chances upon which this country was built."

For the petition, go to http://www.aclu.org/images/asset_upload_file326_24232.pdf

For the ACLU of Michigan report, go to www.aclumich.org

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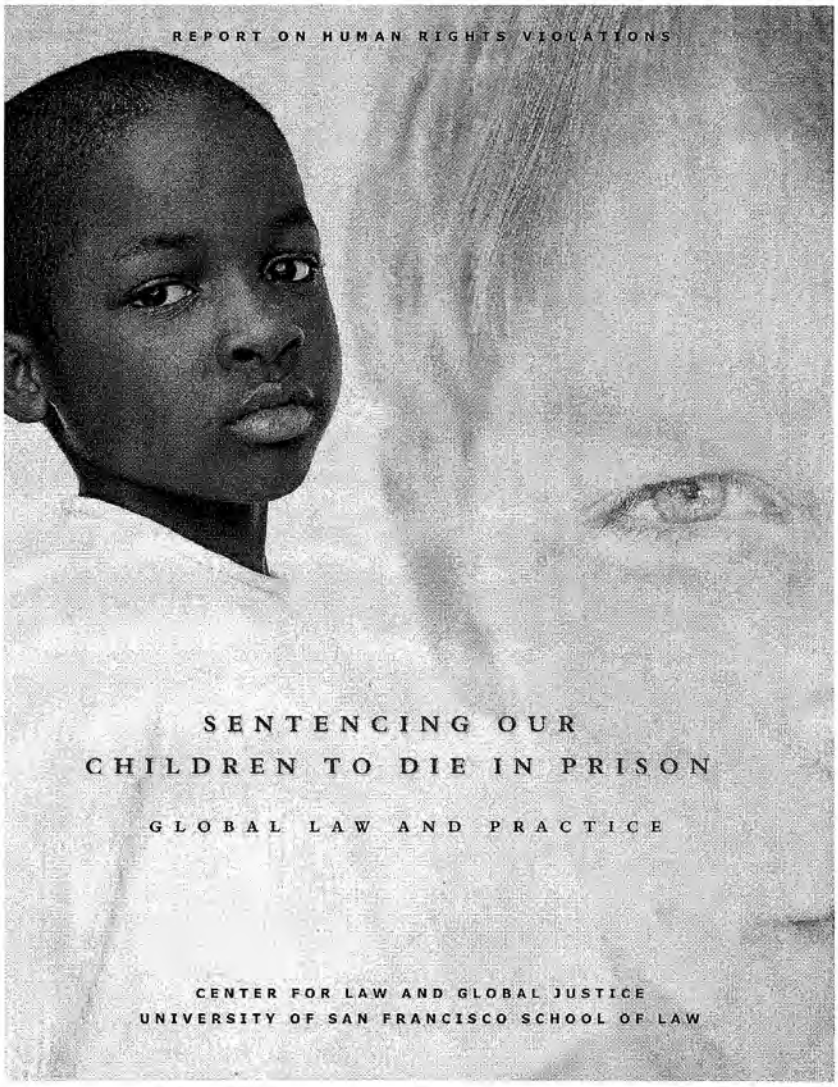
REPORT ON HUMAN RIGHTS VIOLATIONS
SENTENCING OUR
CHILDREN TO DIE IN PRISON
GLOBAL LAW AND PRACTICE
CENTER FOR LAW AND GLOBAL JUSTICE
UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW

Sentencing our Children to Die in Prison

Global Law and Practice

Principal Authors
Michelle Leighton
Professor Connie de la Vega

The Center for Law and Global Justice and
The Frank C. Newman International Human Rights Law Clinic
University of San Francisco School of Law, in association with
Human Rights Advocates

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The Center for Law and Global Justice, University of San Francisco School of Law, works university-wide in a multi-disciplinary environment, recognizing that promoting the rule of law with justice requires cooperation among all disciplines (www.usfca.edu/law/home/CenterforLawandGlobalJustice/index.html). The work of the USF Center for Law and Global Justice and Frank C. Newman International Human Rights Law Clinic is made possible at the United Nations through the close collaboration of Human Rights Advocates ("HRA") and its Board of Directors. HRA is non-profit organization dedicated to promoting and protecting international human rights. It participates actively in the work of various United Nations human rights bodies, using its status as an accredited Non-Governmental Organization and can be found at www.humanrightsadvocates.org.

Special Acknowledgement to the JEHT Foundation

The Project itself and its accomplishments in advocating for the abolition of juvenile life without parole sentences around the world would not have been possible but for the generous support of the JEHT Foundation, New York, N.Y. The Foundation's assistance to the USF Center for Law and Global Justice enhanced the Center's ability and capacity to work directly with NGOs in the U.S., at the U.N. and in the field, as well as with governments and international organizations.

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FREQUENTLY ASKED QUESTIONS

WHAT IS A LIFE WITHOUT POSSIBILITY OF PAROLE OR RELEASE (LWOP) SENTENCE?

The person incarcerated will not be given any opportunity for parole review and thus is condemned to die in prison. This is the harshest sentence that can be given to anyone short of execution.

WHY IS A LIFE WITHOUT POSSIBILITY OF PAROLE OR RELEASE (LWOP) SENTENCE NOT APPROPRIATE FOR CHILDREN?

The harsh sentences dispensed in adult courts do not take into account the lessened culpability of juvenile offenders, their ineptness at navigating the criminal justice system, or their potential for rehabilitation and reintegration into society. Psychologically and neurologically children cannot be expected to have achieved the same level of mental development as an adult, even when they become teenagers. They lack the adult capacity to use reasoned judgment, to prevent inappropriate or harmful action generated as a result of high emotion and fear, or to understand the long-term consequences of rash actions.

HOW MANY COUNTRIES HAVE PERSONS SERVING LWOP FOR CRIMES COMMITTED BEFORE THE AGE OF 18?

Two, the United States and Israel. The United States has 99.9% of all cases of juvenile offenders serving LWOP, with 2,381 such cases. Of those cases, 149 have been sentenced since 2005.

DO CHILDREN OF COLOR SUFFER DISCRIMINATION IN RECEIVING THE LWOP SENTENCE?

Yes. In the United States, African American children are ten times more likely than white children to be given a life without parole sentence. In some states, including California, the rate is 20 to 1.

HAVE ALL OTHER COUNTRIES ELIMINATED THE POSSIBILITY OF SENTENCING CHILDREN TO LWOP TERMS BY LAW?

No. There are nine other countries besides the United States and Israel of concern: Australia could have two child offenders serving the life without parole sentence depending on the outcome of a High Court decision expected in 2008. Eight countries have not officially declared it against law but there are no known cases that exist: Antigua and Barbuda, Belize, Brunei, Cuba (a reform bill is pending), Dominica, Saint Vincent and the Grenadines, the Solomon Islands, and Sri Lanka (legislation is pending). On a positive note, South Africa and Tanzania, which had been reported to have 5 children serving LWOP between them, have now officially indicated they will provide parole for all juvenile offenders.

DO LWOP SENTENCES FOR CHILDREN VIOLATE INTERNATIONAL HUMAN RIGHTS LAWS?

Yes. The sentence violates customary international law binding all nations and is expressly prohibited under any circumstance by Article 37 of the U.N. Convention on the Rights of the Child, ratified by all countries of the world except the U.S. and Somalia. Trying children as adults and imposing a life without parole sentence is also a violation of Article 24 of the International Covenant on Civil and Political Rights and could be considered cruel, unusual or degrading treatment under the Convention Against Torture.

EXECUTIVE SUMMARY

This report focuses on the sentencing of child offenders—those convicted of crimes committed when younger than 18 years of age—to a term of life imprisonment without the possibility of release or parole ("LWOP"). The sentence condemns a child to die in prison. It is the harshest sentence an individual can receive short of death and violates international human rights standards of juvenile justice.

Imposing LWOP on a child contradicts our modern understanding that children have enormous potential for growth and maturity as they move from youth to adulthood, and undergo dramatic personality changes as they mature from adolescence to middle-age. Experts have documented that psychologically and neurologically children cannot be expected to have achieved the same level of mental development as an adult, even when they become teenagers. They lack the same capacity as an adult to use reasoned judgment, to prevent inappropriate or harmful action generated as a result of high emotion and fear, or to understand the long-term consequences of rash actions.

For many children, LWOP is an effective death sentence, carried out by the state slowly over a long period of time. The young age of those serving time in the United States, for example, makes them more susceptible to severe physical abuse by older inmates, including sexual assault. This can produce additional trauma for children who are likely to have suffered physical abuse before entering prison. Children also endure emotional hardship, hopelessness and neglect while serving time. In the U.S., some child offenders believe execution to be more humane than living with the knowledge that their death will come only after many decades of confinement to a small, concrete and steel cell. With no hope of release, they feel no motivation to improve their development toward maturity. This is reinforced by prison officials who tend to give up on the juveniles sentenced to die in prison, providing them with no real education or life skills (resources better spent on those who have a chance of release). In this context, the sentence is indeed cruel and unusual.

On a global level, the consensus not to impose LWOP sentences on children is virtually universal. Based on the authors' research, there are only two countries in the world today that continue to sentence child offenders to LWOP terms: the United States and Israel. The U.S. has at least 2,381 children serving life without parole or possibility of release sentences while Israel is known to have 7.

The last documented case in Israel occurred in 2004 but there is concern that Israel may apply the sentence again to child offenders convicted of political or security crimes. Yet, from 2005-2007 alone, U.S. courts sentenced an additional 149 children to LWOP terms. Australia is also a country of concern because a law passed in New South Wales may have the effect of applying life without parole sentences to at least two juveniles whose cases are pending before the country's highest court.

This year, Tanzania and South Africa, countries reported to have had child offenders serving LWOP sentences, have now officially stated that they will allow parole for juveniles in all cases. This is a laudable departure from earlier positions and one that the authors and other human rights groups look forward to monitoring.

More than ever before, the community of nations today resolutely condemns the practice as against modern society's shared responsibility toward child protection and, more concretely, as a human rights violation prohibited by treaties and customary international law. The U.S. and Israel have ratified a number of international treaties which they are violating by allowing LWOP sentences for juvenile offenders.

The authors have prepared this report in part to expose this human rights abuse to the global public, other governments and the United Nations and, in part, to share this information more clearly with the American public and officials. This is of particular concern today for Americans because, as was the case with the juvenile death penalty, there is no evidence that the severity of this sentence provides any deterrent effect on youth and the sentence rules out the possibility of rehabilitation and redemption for our children. Given the extraordinary number of child offenders serving

this sentence in the U.S. as compared to the rest of the world, Americans may well ask why so many U.S. states continue to violate international human rights law, as practiced by virtually every other country in the world where children also sometimes commit terrible crimes. Why does the U.S. continue to impose a sentence that is not humane, appropriate or a deterrent to crime and which fails America's children and adults?

Surveys demonstrate that Americans believe in the redemption and rehabilitation of children and do not believe that incarcerating youth in adult facilities teaches them a lesson or deters crime. The country's juvenile justice laws and policies should better reflect this understanding. In fact, the U.S. as a nation could follow the lead of Germany, New Zealand or the U.S. states of Georgia, Florida and Louisiana, where alternative sentencing structures are succeeding in rehabilitation and reduction of recidivism. These would more soundly address the public's concerns over punishment and safety, while enhancing the opportunity for juveniles to become mature and productive contributors to society.

The Report commends the efforts of governments, international organizations and NGOs for their efforts in the past few years to more urgently bring non-complying governments into compliance with international law and juvenile justice standards. The authors conclude by recommending that:

- Countries continue to denounce the practice of sentencing juveniles to life without possibility of release as against international law, to condemn the practice among the remaining governments which allow such sentencing, and to call upon those where the law may be ambiguous to institute legal reforms confirming the prohibition of such sentencing; and further to remove barriers to the enforcement of international standards and expand their juvenile justice models to focus more extensively on rehabilitation programs, including education, counseling, employment and job training and social or community service programs and to evaluate these models to ensure protection of the rights of juveniles.

- United States abolish juvenile LWOP sentence under federal law and undertake efforts to bring the U.S. states into compliance with U.S. international obligations to prohibit this sentencing, including to rectify the sentences of those juvenile offenders now serving LWOP; evaluate the disproportionate sentencing of minorities in the country and work more expeditiously to eradicate the widespread discrimination in the country's juvenile justice system, including to consider more equitable and just rehabilitation models as described in this Report; and monitor and publish data on child offenders serving LWOP sentences in each state. The United States should also ratify the U.N. Convention on the Rights of the Child.

- Israel abolish LWOP sentences for juveniles under all circumstances, including for political and security related crimes and that it rectify and/or clarify the sentences of the seven juveniles in question who may be serving an LWOP sentence to come into compliance with their obligations under the U.N. Convention on the Rights of the Child and customary international law.

- Tanzania follow through expeditiously in clarifying by law that any child currently serving or who may be given a life sentence for any crime will be subject to parole review and to further bring its juvenile justice system into compliance with its obligations under the U.N. Convention on the Rights of the Child and customary international law.

- South Africa pass without haste the Child Justice Bill to clarify abolition of juvenile LWOP sentencing under all circumstances.

- Australia clarify the legal prohibition of LWOP sentences for juveniles and ensure that its provinces bring their laws into compliance with its obligations under the U.N. Convention on the Rights of the Child, International Covenant on Civil and Political Rights and other international laws related to juvenile justice.

I. INTRODUCTION & OVERVIEW

This report focuses on the sentencing of child offenders to a term of life imprisonment without the possibility of release or parole ("LWOP"). These are children convicted of crimes committed when younger than 18 years of age, as defined by the international standards contained in the U.N. Convention on the Rights of the Child.[1] The sentence condemns a child to die in prison.

The sentence of life in prison without the possibility of release is the harshest of sentences an adult can receive short of death. Imposing it on a child contradicts our modern understanding that children have enormous potential for growth and maturity as they move from youth to adulthood, and the widely held belief in the possibility of a child's rehabilitation and redemption.

"This growth potential counters the instinct to sentence youthful offenders to long terms of incarceration in order to ensure public safety. Whatever the appropriateness of parole eligibility for 40-year-old career criminals serving several life sentences, quite different issues are raised for 14-year-olds, certainly as compared to 40-year-olds, [who] are almost certain to undergo dramatic personality changes as they mature from adolescence to middle age."[2]

BASED ON THE AUTHORS' RESEARCH, THERE ARE ONLY TWO COUNTRIES IN THE WORLD TODAY THAT CONTINUE TO SENTENCE CHILD OFFENDERS TO LWOP TERMS: THE UNITED STATES AND ISRAEL. THE U.S. HAS AT LEAST 2,381 CHILDREN SERVING LIFE WITHOUT PAROLE OR POSSIBILITY OF RELEASE SENTENCES WHILE ISRAEL IS KNOWN TO HAVE 7.

Experts have documented that children cannot be expected to have achieved the same level of psychological and neurological development as an adult, even when they become teenagers.[3] They lack the same capacity as an adult to use reasoned judgment, to prevent inappropriate or harmful action generated as a result of high emotion and fear, or to understand the long-term consequences of rash actions.[4]

For many children, LWOP is an effective death sentence, carried out by the state over a long period of time. They may be threatened with physical abuse during their incarceration; the young age of those serving time in prison in the United States, for example, makes them more susceptible than adults to severe physical abuse by older inmates.

"Many adolescents suffer horrific abuse for years when sentenced to die in prison. Young inmates are at particular risk of rape in prison. Children sentenced to adult prisons typically are victimized because they have no 'prison experience, friends, companions or social support.' Children are five times more likely to be sexually assaulted in adult prisons than in juvenile facilities."[5]

This can produce additional trauma for children who are likely to have suffered physical abuse before entering prison. One recent study of 73 children serving LWOP sentences in the U.S. for crimes committed at age 13 and 14 concluded: "They have been physically and sexually abused, neglected, and abandoned; their parents are prostitutes, drug addicts, alcoholics, and crack dealers; they grew up in lethally violent, extremely poor areas where health and safety were luxuries their families could not afford."[6]

Children endure emotional hardship, hopelessness and neglect while serving time. In the U.S, some child offenders believe execution to be more humane than living with the knowledge that their death will come only after many decades of confinement to a small, concrete and steel cell. With no hope of release, they feel no motivation to improve their development toward maturity. This is reinforced by prison officials who tend to give up on the

juveniles sentenced to die in prison, providing them no real education or life skills (resources better spent on those who have a chance of release).[7]

In this context, the sentence is indeed cruel. These issues have become so well-understood at the international level that a state's execution of this sentence raises the possibility that it not only violates juvenile justice standards but international norms prohibited by the United Nations Convention Against Torture.[8]

Globally, the consensus against imposing LWOP sentences on children is virtually universal. Based on the authors' research, there are only two countries in the world today that continue to sentence child offenders to LWOP terms: the United States and Israel.[9]

The United States has at least 2,381 children serving life without parole or possibility of release sentences while Israel is known to have seven.[10] The last documented case in Israel occurred in 2004 but there is concern that Israel may apply the sentence again to child offenders convicted of political or security crimes.[11] In the United States from 2005 to 2007, courts sentenced 149 children to serve LWOP terms. For both the United States and Israel there are no official reforms underway, nor any expression that they will seek to amend their laws in the future to prohibit juvenile LWOP sentences or any indication they plan to cease their continued violation of international human rights law.

Moreover, Australia is of serious concern. A law passed in New South Wales may have the effect of applying life without parole sentences to at least two juveniles whose cases are pending before the country's highest court.[12]

On a positive front, Tanzania and South Africa, countries reported to have had child offenders serving LWOP sentences, have now officially stated that they will allow parole for juveniles in all cases, as discussed in Section II below. This is a laudable departure from earlier positions and one that the authors and other human rights groups look forward to monitoring.

The community of nations now condemns the practice by any state as against modern society's shared responsibility for child protection and, more concretely, as a human rights violation prohibited by treaties and expressed in customary international law. The authors have prepared this report in part to expose this human rights abuse to the global public, other governments and the United Nations, and to share this information more clearly with the American public and officials. This is of particular concern today for Americans because there is no evidence that the severity of this sentence provides any deterrent effect on youth, just as was found to be the case with the juvenile death penalty. The U.S. Supreme Court has found, "...the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence."[13] Americans may well ask why so many U.S. states continue to violate international human rights law, as practiced by virtually every other country in the world where children also sometimes commit terrible crimes. Why does the U.S. continue to impose a sentence that is not humane, appropriate or a deterrent to crime and which fails America's children and adults?

Surveys demonstrate that Americans believe in the redemption and rehabilitation of children and do not believe that incarcerating youth in adult facilities teaches them a lesson or deters crime.[14] The country's juvenile justice laws and policies should better reflect this understanding.

Section II presents a discussion of the global condemnation of this practice which has lead to international law

standards, the actual practices of sentencing children to LWOP in the United States and Israel, the countries which have abrogated the law recently and those countries where the law may remain ambiguous. The discussion of current practice in the United States demonstrates that it is the world's single largest practitioner of this sentencing and that racial discrimination has become prevalent in these and other juvenile sentences across the country.

The analysis presented in this Section is based on available information from research, review of country reports to the United Nations, meetings with officials and official statements, and reports of non-governmental organizations and other experts in the field.

Section III analyzes international human rights standards and the violation of international law by countries imposing sentences of life imprisonment without possibility of release for child offenders. Section IV identifies several juvenile justice and rehabilitation models of other countries and U.S. states that can serve as an alternative to harsh and inappropriate sentencing for children.

Section V presents the conclusions and recommendations of the authors to governments and policy-makers in remedying these violations, and for improving the opportunities for juvenile rehabilitation.

II. Country Practice in Imposing LWOP Sentences

Very few countries have historically used life sentences for juvenile offenders. Indeed, a single country is responsible for more than 99.9% of all child offenders serving this sentence: the United States. Most governments have either never allowed, expressly prohibit or will not practice such sentencing on child offenders because it violates the principles of child development and protection established through national standards and international human rights law.

There are now at least 135 countries that have expressly rejected the sentence via their domestic legal commitments[15] and 185 of which have done so in the U.N. General Assembly.[16]

Of the remaining countries outside the United States, ten may have laws that could permit the sentencing of child offenders to life without possibility of release, though except for Israel there are no known cases where this has occurred. Australia, one of the countries with a law that might permit the LWOP sentence for child offenders, is of special concern because there may soon be two child offenders serving the sentence depending on how Australia's High Court decides their appeals (see discussion below). The ten countries are Antigua and Barbuda, Australia, Belize, Brunei, Cuba, Dominica, Israel, Saint Vincent and the Grenadines, the Solomon Islands, Sri Lanka. [17]

The United States has at least 2,381 children who were convicted of crimes committed before the age of 18 who are now serving the LWOP sentence in U.S. prisons (including 149 sentenced since 2005). Israel has seven such cases.[18] Tanzania had been reported to have one child serving the sentence but it has provided evidence in writing to the authors that a life sentence for juveniles must include the possibility of parole now, including for the one child reported. It will also introduce legal reforms to clarify the prohibition, in conformity with the U.N. Convention on the Rights of the Child (as discussed in Section II of this Report).

Consequently, there are now only two countries in the world that can fairly be said to practice sentencing juveniles to die in prison: the United States and Israel. For both of these countries, officials would not assure that either reforms were underway to abolish the practice or that the practice for future cases had effectively ceased. In essence, the two countries are likely to continue to sentence child offenders to die in prison, though Israel's use of the sentence appears quite rare. The Israeli government confirmed recently to the authors that it knows of no additional child offenders serving LWOP in the country since those reported in 2004 but the authors are concerned Israel could apply the sentence again.

A. United States: Most Egregious Violator of the Prohibition Against LWOP Sentences for Children

Compared to the number of countries sentencing child offenders to life without possibility of release, the United States, with more than 2,381 juveniles serving life sentences, disproportionately delivers this sentence to child offenders.[19]

Forty-four states and the federal government allow life sentences without the possibility of parole to be imposed on juvenile offenders. Among these states, 13 allow sentencing a child of any age to LWOP and one sets the bar at 8 years or older. There are 18 states which could apply the sentence to a child as young as 10 years and 20 states that could do this at age 12. Thirteen states set the minimum age at 14 years. These figures are startling considering that as of 2004, 59% of children in the United States who were convicted and sentenced to LWOP received the sentence for their first ever criminal conviction, 16% were between the ages of 13 and 15 when they committed their crimes, and 26% were sentenced under a felony murder charge, where they did not pull the trigger or carry the weapon.[20] Following is an updated summary of state practice and law.

SUMMARY OF STATE LAW IN THE UNITED STATES

44 states allow life without parole sentences for juveniles. 11 states and the District of Columbia either do not allow or do not appear to practice LWOP sentences for juveniles. 39 states appear to apply it in practice.

STATES PROHIBITING LWOP:

Alaska
Colorado
Kansas
Kentucky*
New Mexico
Oregon
District of Columbia

STATES WITH NO CHILDREN KNOWN TO BE SERVING LWOP:

Maine
New Jersey
New York
Utah
Vermont

STATES ALLOWING LWOP: AGE LIMITS

Age 16 and above
Indiana
Age 15 and above
Louisiana
Washington
Age 14 and above
Alabama
Arizona
Arkansas
California
Connecticut
Iowa
Massachusetts
Minnesota
New Jersey
North Dakota
Ohio
Utah
Virginia
Age 13 and above
Georgia
Hawaii
Illinois
Mississippi
New Hampshire
North Carolina
Oklahoma
Wyoming
Age 12 and above
Missouri
Montana
Age 10 and above
South Dakota
Texas
Vermont
Wisconsin
Age 8 and above
Nevada

STATES THAT COULD APPLY LWOP AT ANY AGE

Delaware
Florida
Idaho
Maine
Maryland
Michigan
Nebraska
New York
Pennsylvania
Rhode Island
South Carolina
Tennessee
West Virginia

See Appendix to this Report[3]

Kentucky's law is now uncertain as the only cases of juvenile LWOP are being challenged in the courts as unconstitutional.

As noted above, the sentence was rarely imposed until the 1990s, when most states passed initiatives increasing the severity of juvenile punishments.[23] Such initiatives also created prosecutorial and statutory procedures to waive juveniles into the adult criminal system, where they can be prosecuted and sentenced as adults.[24]

The rate of judicial waiver (allowing children to be tried as adults) increased 68% from 1988 to 1992.[25] Since 2000, 43 U.S. states implemented legislation facilitating the transfer of juveniles to adult court.[26] Twenty-eight or more states limited or completely eliminated juvenile court hearings for certain crimes and at least 14 states gave prosecutors individual discretion to try children as adults, bypassing the traditional safeguard of judicial review.[27]

In violation of international law, some children are still being incarcerated in adult prisons, despite undisputed research documenting that children are then subject to greater physical violence and rape, commit or attempt to commit suicide at greater rates and suffer lifelong emotional trauma.[28] The National Council on Crime and Delinquency found that "one in 10 juveniles incarcerated on any given day in the U.S. will be sent to an adult jail" to serve their time.[29] The number of children serving time in adult jails increased 208% between 1990 and 2004.[30] By transferring juveniles to the adult court system, many states neglect to honor the status of these minors as juveniles, a violation of the U.S. obligations under Article 24 of the International Covenant on Civil and Political Rights.[31]

Although crime rates have been steadily declining since 1994,[32] it is estimated that the rate at which states sentence minors to life without parole remains at least three times higher than it was 15 yeas ago,[33] suggesting a tendency for states to punish these youths with increasing severity. For example, in 1990, there were 2,234 youths convicted of murder in the United States, 2.9% of whom were sentenced to life without the possibility of parole.[34] Ten years later, in 2000, the number of youth murderers had dropped to 1,006, but 9.1% still received the LWOP sentence.[35]

Disproportionate Sentencing of Children of Color to LWOP

Also alarming is the disproportionate number of children of color sentenced to life without possibility of release in the United States. Although significant racial disparities exist in the overall juvenile justice system, African American children are reportedly serving life without possibility of release sentences at a rate that is 10 times higher than white children.[45]

For example, in California, which has the greatest system-wide racial disparity in this regard, 190 of the 227 persons serving the sentence for crimes committed before the age of 18 are of minority background and African American children in California are 20 times more likely to receive a life without parole sentence than white children. Hispanic children are five times more likely.[46] Racial disparities track in jurisdictions across the United States. Other examples are:

Alabama

Children of color are: 36% of the child population,[47] 73% of children serving LWOP sentences (49% are African American);[48] and 100% of children serving LWOP for non-homicide offenses.[49]

Colorado

African-Americans are 4.4% of the child population and 26% of those serving LWOP sentences.[50]

Michigan

Children of color are 27% of the population[51] and 71% of children serving LWOP sentences.[52]

Under age 17, African American children in Michigan are 19% of the population but 65% of children serving LWOP sentences. On a county-by-county basis, the disparities are even more significant.

For children of color in Wayne County, they are 94% of the children given LWOP sentences though accounting for half of the child population; in Oakland County, they are 73% of children serving LWOP sentences but 11% of the child population; and in Kent County, they are 50% of children serving LWOP sentences but 13% of the child population.[43]

MISSISSIPPI

African American children are 45% of the population[44] and 75% of children serving LWOP sentences (compared to 20% of white children).[45]

Racial disparity permeates the U.S. juvenile justice system. Though African Americans comprise 16% of the child population in the United States, they comprise 38% of those confined in state correctional facilities.[46] In analyzing the "relative rate index," (a standardized index that compares rates of racial and ethnic groups compared to whites),[47] the latest data identifies minority overrepresentation in detention for nearly every state in the country. For example, in South Dakota, the relative rate index for African American children compared to whites in detention is 47:1; in North Dakota it is 21:1; Wisconsin 18:1; New Jersey 15:1; Wyoming 12:1; Nebraska 11:1; and New Hampshire 10:1.[48]

Children of color are also held in custody and prosecuted "as adults" in criminal courts and given adult sentences more often than white children.[49] African American children are nine times more likely to be brought into custody than white children, even though they make up just 16% of the total U.S. child population (compared to 78% white children).[50]

Children of color are also much more likely than white youth to do their time in adult prison. As Figure 1 (right) shows, 26 out of every 100,000 African American children were sentenced to and are serving time in adult prison while for white children the rate is only 2.2 per 100,000. On a state-by-state basis, these disparities are magnified, as discussed above.

The U.S. government is aware of this disparity, as are most Americans. A recent survey indicated that this is a fact well-understood by most Americans, 60% of whom believe that non-white youth are more likely to be prosecuted in adult court.[51] This is clearly not "equal treatment before the tribunals... administering justice" as required by Article 5(a) of the U.N. Convention on the Elimination of Racial Discrimination to which the United States is a party.[52]

Finally, of serious concern is that there is a "cumulative" disadvantage to minorities entering the justice system via arrest through the period of incarceration so that racial disparity actually increases as the youth is arrested, processed, adjudicated, sentenced and incarcerated as shown in Figure 2, (right).[53]

Within the juvenile system, the trends for juvenile placements out of the home demonstrate that youth of color suffer discrimination. From 1997 to 2003, the total placements decreased from approximately 92,000 to 97,000 yet the percentage of whites given out of home placement decreased in the same period from approximately 52% to 39%.[54]

While institutions in the country have documented racial disparities in growing numbers over the past decade, the U.S. government has done little to address the most serious discriminatory practices leading to this disparity. Even after passing the 2002 Juvenile Justice and Delinquency Act, a law designed to address discrimination of children, the government has not ensured that effective action is taken by states to address the offending discrimination in their jurisdictions. Moreover, data on racial disparity among juveniles receiving life without parole is neither collected nor analyzed by the federal government or by states in any systematic manner, and thus the government does not inform the public of this disparity. Without such a systematic effort, the United States cannot effectively ensure the eradication of discrimination as required by the U.N. Convention on the Elimination of Racial Discrimination ("CERD").

Figure 1 Youth in Adult Prison: Rates of New Commitments to Prison by Offense

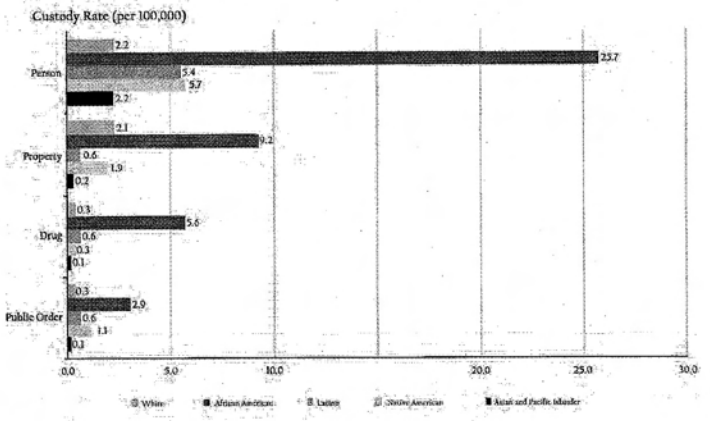
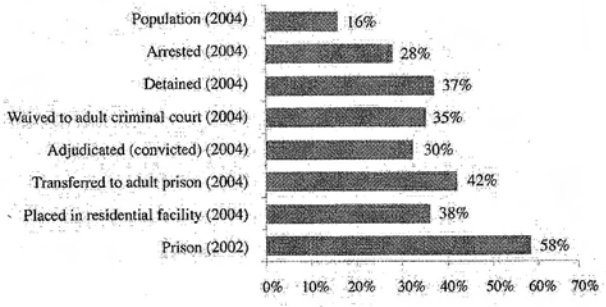


Figure 2 African American Youth Disproportionately Represented through every Stage in the Juvenile Justice Process



Both Figure 1 and Figure 2 were produced by the National Council on Crime and Delinquency, "And Justice for Some" (2007). Figure 1 rates are based on numbers per 100,000 youth of that race in the population.

B. Israel

Israel has anywhere between one and seven child offenders serving life without possibility of parole sentences.[55] It is still unclear how many of the seven youths given life sentences are ineligible for parole. In its report to the Committee on the Rights of the Child in February 2002 the government identified four child offenders serving life sentences but did not indicate whether parole was available, stating:

"The Supreme Court has held, in a majority decision, that the court has the discretion to review each case on its merits; should it reach the conclusion that the appropriate punishment is life imprisonment, and should it consider that this punishment is just and necessary, it may sentence a minor to life imprisonment (Miscellaneous Criminal Applications 330/90 John Doe v. State of Israel, P.D. 45(3) 648). One Supreme Court justice, basing herself, inter alia, on the Convention, expressed the view that life imprisonment should only be imposed on a minor in exceptional cases; however, her opinion was deemed as "needing further study" by the justices who sat with her (Miscellaneous Criminal Applications 3112/94 Abu Hassan v. State of Israel (11.2.99 not yet published)). In practice, life imprisonment is imposed on minors very rarely; to date, it has been imposed on three 17-year-olds who stabbed a bus passenger to death as part of the "initiation rite" of a terrorist organization; and on a youth age 17 and 10 months who strangled his employer to death after she commented on his work and delayed payment of his salary for two days".[56]

Human Rights Watch identified three other juveniles sentenced to life terms in 2004.[57]

Israeli law provides for review of life sentences at a minimum after 30 years, unless the youth offenders are sentenced by military courts under the 1945 Emergency Regulations for political or security crimes where the commutation is not applicable, in which case a juvenile would serve an LWOP sentence.[58] The seven juveniles that could be serving LWOP sentences, discussed above, would have presumably been sentenced for political or security crimes. No reform in the Emergency Regulations Act or sentencing procedure is underway to prohibit this sentence.

In a 2005 report, Human Rights Watch was not able to verify whether or how many of the seven youths would not be provided parole consideration because they were sentenced for political or security crimes.[59] In the authors' meetings and correspondence with Israeli officials during 2007, officials confirmed that there is no change in the general number of life and/or LWOP cases as noted in this Report.[60] Since 2004 there have been no additional cases reported. However the authors continue to seek accurate information about each of the previous cases identified.

C. Countries that Recently Changed their Practice to Prohibit LWOP Sentences for Juveniles

The authors had reported that Tanzania and South Africa had juvenile offenders serving LWOP sentences, and that Burkina Faso and Kenya, while having no children serving LWOP sentences, had laws that appeared to allow for the punishment.[61] In the past year, all of these countries have clarified their practice and/or law to prohibit LWOP sentences for juveniles, as discussed below.

1. Tanzania

In Tanzania, the government asserts that no child under the age of 18 is sentenced to life without possibility of release.[62] Several children recently sentenced to life terms have now been given parole.[63] Tanzania has confirmed that one child offender who was 17 at the time of the crime is serving a life sentence in the country. There was concern that the Act under which he was sentenced does not provide for parole. In meetings with the authors and written follow-up, the government has confirmed that all children, including this case, are to be eligible for parole. It committed to make the

necessary changes in law to expressly prohibit such sentencing in the future, to allow for parole review of the one child offender identified above, and otherwise to come into full compliance with the Convention on the Rights of the Child. In a statement to the Center for Law and Global Justice from the Permanent Mission of the United Republic of Tanzania to the United Nations, on behalf of the Permanent Representative, officials stated:

"The juvenile justice system in Tanzania has always been in favour of a child. No life sentence has ever been imposed on children prior to 1998....

Currently there is a process to review the juvenile justice system in line with the CRC. A cabinet paper has already been prepared by the Ministry of Justice and Constitutional Affairs on a comprehensive legislation on children, the same is expected to be submitted to cabinet secretariat soon.

At the same time a bill on miscellaneous amendments is expected to be tabled by Parliament before the end of 2007...that give the High Court reversionary and discretionary powers, in this regard the court can in suo motu call a file of any case concerning a child offender and redress the harsh punishment that has been imposed on a child. It should be noted in addition to the court the social welfare officers can also move the court to make a review. Thus based on the above information on the current practice and the progress on the juvenile justice system in Tanzania, I can confidently say that the sentence of the one child serving life imprisonment will be reviewed and his sentence has the possibility of parole...It is our expectation that this information is [sic] sufficient to inform you that there are mechanisms that allow a review of sentence of any child who is sentenced to life, and that life imprisonment for the juvenile offenders does not mean it is without parole."[64]

In Tanzania, the child welfare department and a parole review board monitor children in custody and "upon being satisfied that the child has been rehabilitated will then start a process for releasing the child."[65] The life sentence where a child offender may not receive this review is an unusual case because the sentence has only become possible under a law enacted in 1998 to punish cases of sexual abuse, particularly of young children.[66]

The one law which poses an issue for sentencing of juveniles as adults is the Sexual Offenses Special Provisions Act ("SOSPA"), 7/1998 No. 4/98, a Parliamentary Act adopted in 1998 after the country began experiencing record levels of rape, incest and sodomy of young children, some as young as 5 years old. The law sought to reduce violence against children by increasing education and punishment for such crimes.[67] The age of the child is not considered in prosecuting cases under the Act and children are prosecuted as adults. The law imposes stricter sentences for second- or third-time offenders, and offenders can be sentenced to between 30 years and life. In the case of rape of a child under the age of 10, the Act mandates the automatic sentence of life imprisonment.[68] Moreover, under any other criminal convictions the President of the country confirms personally every sentence given to a child offender in Tanzania but under SOSPA the court issues the sentence without review by the President.

As noted above, the Tanzanian Minister of Justice is introducing a reform bill in Parliament to bring sentencing under this Act into compliance with the Convention on the Rights of the Child ("CRC"), prohibiting cruel and unusual punishments for children, including life without parole sentences for child offenders. The Act will provide the courts with discretion in determining all sentences under the Act with respect to juveniles, in compliance with the CRC.[69] An interim act was recently passed that allows for the offender or his family to petition the court for immediate review. In its review, the court is to ensure compliance with the Convention on the Rights of Child prohibition on life without possibility of release sentences.[70] The authors will monitor these developments in the coming months.

2. South Africa

South Africa no longer allows sentences of life without possibility of release for child offenders and has no children serving this sentence. South Africa reported to the CRC in 1999 that it had four child offenders serving life without possibility of release sentences.[71] The government's second report to the CRC does not discuss or further clarify this figure.[72] However, the head of the President's Office on Rights of the Child has confirmed to the authors in its consultation with the Department of Corrections that there are no juvenile offenders serving an LWOP sentence in South African prisons, e.g. no persons who committed crimes before age 18, and that all sentenced persons qualify now to apply for parole after a determinate period.[73] Thus, child offenders cannot be sentenced to an LWOP term.

SOUTH AFRICA NO LONGER ALLOWS SENTENCES OF LIFE WITHOUT POSSIBILITY OF RELEASE FOR CHILD OFFENDERS AND HAS NO CHILDREN SERVING THIS SENTENCE.

South Africa has also been considering a Child Justice Bill since 2002 that would expressly clarify the illegality of life imprisonment for child offenders.[74] In 2004, the South Africa Supreme Court of Appeals issued a critical decision, *Brandt v S.*, which gave judges sentencing discretion with regard to juveniles. The decision emphasized the importance of children's rights and reaffirmed CRC 37(b) principles which required juvenile imprisonment to be a last resort and for the shortest time possible.[75]

Although the Brandt decision marks greater strides toward the expansion of children's rights, it appears that there is still concern by some legal groups that the South African government has made minimal efforts to ensure that its incarcerated youth receive special protections over its older prison populations. The Criminal Procedure Act 51 of 1977 at section 73(6)(b)(iv) specifies that a person serving life imprisonment may not be placed on parole until he or she has served at least 25 years, or has reached 65 years if at that time he has served 15 years. There is no parallel clause benefiting young offenders, and it appears that the Act aids only people who were 50 years or older at the time of the commission of the offence. The Reform bill under consideration may address these deficiencies and be clarified in the government's report to the Committee on the Rights of the Child.

More recently, in January of this year, the government announced that in an attempt to curb prison over-crowding, it would release 300 adults serving life sentences, some of which were former death row inmates. The opposition Inkatha Freedom Party, among other critics, stated that "it is petty criminals, especially juveniles, who should be considered for release, not people who are in prison serving life sentences for serious crimes."[76]

3. Burkina Faso and Kenya

Both Burkina Faso and Kenya had been listed in earlier reports as countries where there was a possibility that a child offender could receive an LWOP sentence. However, in March 2007 during the U.N. Human Rights Council session and subsequently both countries clarified that they do not allow for such sentences and provided written explanation to the authors.[77] Both countries assert that they now apply international standards prohibiting this sentencing, particularly as now recognized by the Committee on the Rights of the Child (oversight body for the CRC) in its General Comment on Juvenile Justice, published in February 2007.[78]

In Burkina Faso, there is no law providing for child offenders younger than 16 to be given life sentences. After age 16, the laws could possibly be read to try the child as an adult for certain crimes, making the child potentially eligible for a life sentence. However, this has never been pronounced by a judge in the country and officials have

stated this cannot be done now in contravention of Burkina Faso's treaty obligations under the CRC, which apply directly in domestic law.[79]

Kenya has specifically clarified its compliance with the Convention on the Rights of the Child in a report submitted to the CRC in 2006.[80] It ratified a bill which outlaws LWOP sentences for all children under age 18.[81]

D. Countries that Could Conceivably Allow LWOP Sentences for Juveniles but where No Practice Exists

The other countries with life without possibility of release sentences available for child offenders reportedly do not have any child offenders serving this sentence. For the other countries listed here the laws provide for a life sentence to be imposed on child offenders but it is not clear whether a life sentence means there is no possibility of parole.[82] Besides the U.S. and Israel there remain nine countries where it is unclear but reportedly possible for a child offender to serve an LWOP sentence are: Antigua and Barbuda, Australia, Belize, Brunei, Cuba,[83] Dominica, Saint Vincent and the Grenadines, the Solomon Islands, and Sri Lanka (which has new legislation pending that would bring it in line with the CRC prohibition on LWOP). The authors observe that Australia could soon become the exception depending on the outcome of a case now before Australia's High Court, discussed below.

Australia

According to Australia's report to the CRC in 2005, state, territory and federal laws are now standardized in the age of criminal responsibility, which is 10 years of age. However, there is a rebuttable presumption that "children aged between 10 and 14 are incapable, or will not be held accountable, for committing a crime, either because of the absence of criminal intent, or because they did not know that they should not have done certain acts or omissions."[84] There are no child offenders convicted under federal law serving LWOP sentences. Australian officials have indicated that there are currently about 26 federal prisoners with life sentences and only two of those do not have a non-parole period set, but neither of these persons were sentenced when they were juveniles.[85]
State practice in Australia is more difficult to evaluate in this regard. In Queensland, children aged 17 in conflict with the law may be tried as adults in particular cases though the authors are not aware of any children serving the adult LWOP sentence.[86] This was noted of concern to the Committee on the Rights of the Child in evaluating Australia's compliance with its treaty obligations.[87]

In New South Wales, two juveniles who were sentenced to life imprisonment are challenging a law enacted after their sentencing which would give legal weight to a judge's recommendation that they not be given parole. The cases, *Elliot v. the Queen*[88] and *Blessington v. the Queen*[89] are being heard now by Australia's High Court.[90] No other juvenile LWOP cases are known. Thus, the decision of the Court to reduce or clarify the sentence will be critical to determining whether Australia will allow juvenile LWOP sentences for child offenders and carry out these sentences. If the High Court allows the LWOP sentences, Australia would be in violation of its treaty obligations under the Convention on the Rights of the Child ("CRC").[91]

The Committee on the Rights of the Child was concerned by Australia's juvenile justice system in 2005 and with the ability of the courts to implement the treaty provisions in the face of contrary domestic law. The Committed indicated that it "remains concerned that, while the Convention may be considered and taken into account in order to assist courts to resolve uncertainties or ambiguities in the law, it cannot be used by the judiciary to override inconsistent provisions of domestic law," and recommended Australia "strengthen its efforts to bring its domestic laws and practice into conformity with the principles and pro-

visions of the Convention, and to ensure that effective remedies will be always available in case of violation of the rights of the child."[92]

It is therefore surprising that an Australian province would be moving in the opposite direction and consider allowing an LWOP sentence for juveniles, as may be the case with the New South Wales Crimes (Sentencing Procedure) Act of 1999 at issue in the High Court cases of *Elliott* and *Blessington*.

Moreover, if the High Court were to allow the retroactive application of the harsher sentence of "no parole" as mandatory on the juvenile offenders, it would be in violation of its treaty obligations under Article 15(1) of the International Covenant on Civil and Political Rights, which prohibits the retroactive application of a harsher penalty that comes into law after the commission of a crime.[93] It is hoped that the Australian High Court will consider these international legal prescriptions in its determination of the *Elliott* and *Blessington* cases now before it.

III. International Law Prohibits Life without Possibility of Release or Parole for Juveniles

International law has recognized that the special characteristics of children preclude them from being treated the same as adults in the criminal justice system.

To sentence a child in such a severe manner contravenes society's notion of fairness and the shared legal responsibility to protect and promote child development. Trying children in adult courts so that they can receive "adult" punishment squarely contradicts the most basic premise behind the establishment of juvenile justice systems: ensuring the well-being of youth offenders. The harsh sentences dispensed in adult courts do not take into account the lessened culpability of juvenile offenders, their ineptness at navigating the criminal justice system, or their potential for rehabilitation and reintegration into society.

Moreover, indeterminate sentences lack the element of proportionality which many believe is essential in a humane punishment.[94] Indeed, the LWOP sentence penalizes child offenders more than adults because the child, by virtue of his or her young age, will likely serve a longer sentence than an adult given LWOP for the same crime.

The common law heritage of the United States and of some of the states that allow LWOP in their laws[95] evolved a century ago to impose a separate punishment structure on children and to prohibit LWOP sentences.[96] The Children Act of 1908 in England required the special treatment of children from adults and "leniency in view of the age of the offender at the time of the offense."[97] The practice to impose LWOP sentences on children has been a more recent phenomenon at the end of the last century, largely in the 1990s, by a small minority of countries seeking harsher sentences against juvenile offenders.[98]

A. Treaties Prohibit LWOP Sentences Because of the Special Characteristics of Children

The Convention on the Rights of the Child ("CRC"), a treaty ratified by every country in the world except the United States and Somalia, codifies an international customary norm of human rights that forbids the sentencing of child offenders to life in prison without possibility of release.[99] In early 2007, the Committee on the Rights of the Child, the implementation authority for the Convention on the Rights of the Child, clarified this prohibition in a General Comment: "The death penalty and a life sentence without the possibility of parole are explicitly prohibited in article 37(a) CRC [of the treaty]."[100]

The General Comment's additional paragraph 27 titled "No life imprisonment without parole" further recommends that parties abolish all forms of life imprisonment for offences committed by persons under the age of 18. Providing greater clarity to this norm is the Committee's interpretation of treaty obligations around procedure for trial of juveniles, requiring states to treat juveniles strictly under the rules of juvenile justice.[101] This would effectively prohibit courts from trying juveniles as adults—the primary mechanism in U.S. courts and elsewhere for applying the LWOP sentence.

Other recent developments in international law have highlighted the urgent need for countries to reconsider their juvenile sentencing policies and prohibit by law LWOP sentences for child offenders. The prohibition is recognized as an obligation of the International Covenant on Civil and Political Rights (hereinafter "ICCPR").[102] Article 7 prohibits cruel, unusual and degrading treatment or punishment. Life terms without the possibility of parole ("LWOP") are cruel, as discussed above, when applied to children. Juvenile LWOP sentences also violate Article, 10(3) which pro-

vides, "[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status." In sentencing, governments are to "[i]n the case of juvenile persons...take account of their age and the deserability of promoting their rehabilitation" as prescribed by Article 14(4) of the treaty. This is reinforced by 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."

B. The United States is in Direct Violation of its Treaty Obligations

The United States ratified the International Covenant on Civil and Political Rights ("ICCPR") in 1992.[103] The Committee on Human Rights, the oversight authority for the treaty, determined in 2006 that the United States is not in compliance with the treaty by allowing LWOP sentences for juveniles. It made this determination even considering that the United States had taken a reservation to the treaty to allow the trying of juveniles in adult court in "exceptional circumstances." The extraordinary breadth and rapid development in the United States of sentencing child offenders to LWOP since the U.S. ratification of the ICCPR contradicts the assertion that the United States has applied this sentence only in exceptional circumstances—the total children tried as adults and sentenced to LWOP now exceeds 2,381, many of whom were first-time offenders (see Section II for discussion).

In 2006, in evaluating U.S. compliance with the treaty, the Committee on Human Rights found the United States to be out of compliance with its treaty obligations, concluding that its practice to sentence child offenders to life without parole violates article 24(1): "Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor..."

The Committee expressed its grave concern "that the treatment of children as adults is not applied in exceptional circumstances only...[t]he Committee is of the view that sentencing children to life sentence without parole is of itself not in compliance with article 24(1) of the Covenant."[104]

The Committee Against Torture, the official oversight body for the Convention Against Torture, Cruel, Inhuman or Degrading Treatment or Punishment to which the United States is a legal party, further commented in 2006 as it evaluated U.S. compliance that the life imprisonment of children "could constitute cruel, inhuman or degrading treatment or punishment,"[105] in violation of the treaty.

Moreover, the United States has done nothing to reduce the pervasive discrimination evident in many U.S. states' application of the LWOP sentence to children of color. As discussed in Section II, the rate of African American youth compared to white youth per 100,000 youths incarcerated in adult prisons is 26 to 2; youth of color in some jurisdictions receive more than 90% of the LWOP sentences given and national rates for African Americans are 10 times that of white youth.[106]

Most recently, the United Nations General Assembly ("G.A.") acted on the issue. By a vote of 185 to 1 (with the United States being the only country voting against it) the G.A. passed a resolution December 19, 2006, codified in Resolution A/61/146, calling upon states to "abolish by law, as soon as possible, the death penalty and life imprisonment without possibility of release for those under the age of 18 years at the time of the commission of the offence."[107] A similar resolution has been introduced in October of 2007 at the General Assembly calling again for abolition of LWOP sentences for juveniles.[108]

International law as evidenced through international treaties and other agreements is the supreme "law of the land" in the United States and these principles should be applied in the context of juvenile sentencing. The Supremacy Clause is the common name given to Article VI, Clause 2 of the U.S. Constitution which states:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[109]

The U.S. Supreme Court in *Roper v. Simmons*, abolishing the practice of juvenile executions, considered not only the evolution of international law but the evolution of practice in the community of nations. "The Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments."[110]

In considering Constitutional values related to the most severe punishment of juveniles, death, the Court observed:

"It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.[citations omitted]. As we understand it, this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others.[citations omitted]. If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation–that a juvenile offender merits the death penalty. When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity."[111]

> THE EXTRAORDINARY BREADTH AND RAPID DEVELOPMENT IN THE UNITED STATES OF SENTENCING CHILD OFFENDERS TO LWOP SINCE THE U.S. RATIFICATION OF ICCPR CONTRADICTS THE ASSERTION THAT THE UNITED STATES HAS APPLIED THIS SENTENCE ONLY IN EXCEPTIONAL CIRCUMSTANCES.

It has been demonstrated that juveniles awaiting death in prison under the LWOP sentence also have no opportunity to attain a mature understanding of his or her own humanity.

C. The Prohibition of Juvenile LWOP is Customary International Law and a *Jus Cogens* Norm

The prohibition against sentencing child offenders to life without the possibility of release is part of customary international law and the virtually universal condemnation of this practice can now be said to have reached the level of a *jus cogens* norm. Once a rule of customary international law is established, that rule becomes binding on all states, including those that have not formally ratified it themselves.

For a norm to be considered customary international law there must be widespread, constant and uniform state practice compelled by legal obligation that is sufficiently long to establish the norm, notwithstanding that there may be a few uncertainties or contradictions in practice during this time.[112] The International Court of Justice ("ICJ") has said that "a very widespread and representative participa-

tion in [a] convention might suffice of itself" to evidence the attainment of customary international law, provided it included participation from "States whose interests were specially affected."[113] Israel falls into this category having ratified the convention and having voted in favor of the resolution condemning this practice (A/61/146).

When customary law is said to be a jus cogens norm, no persistent objection by a state will suffice to prevent the norm's applicability to all states: according to Article 53 of the Vienna Convention on the Law of Treaties it is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[114] This definition is accepted by most legal scholars in and outside of the United States.[115] Moreover, U.S. law recognizes that customary international law is part of domestic U.S. law and binds the government of the United States.[116]

The International Law Commission has included this principle among those in its Draft Articles on State Responsibility.[117] It commented that "the obligations arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of states and their peoples and the most basic human values."[118]

The current President of the International Court of Justice, Honorable Rosalyn Higgins, has stated that what is critical in determining the nature of the norm as a jus cogens norm is both the practice and opinio juris of the vast majority of states.[119] What is important is to look at the legal expectations of the international community of nations and their practice in conformity with those expectations. As such, General Assembly resolutions can provide evidence of such expectations.[120]

The prohibition of life without parole or possibility of release fulfills these requisites for three reasons: (1) There is widespread and consistent practice by states not to impose a sentence of life without parole or possibility of release for child offenders as a measure that is fundamental to the basic human value of protecting the life of a child; (2) the imposition of such sentences is relatively new and now practiced by only two states—all of the other states which had taken up the practice have joined the global community in abolishing the sentence; and (3) there is virtually universal acceptance that the norm is legally binding, as codified by the Convention on the Rights of the Child and elsewhere, and requires states to abolish this practice, as evidenced by the most recent United Nations General Assembly resolution 61/146 (discussed above).

First, there are only two countries that are known to still practice the sentencing of juveniles to LWOP and/or have children serving, the United States and Israel. In Israel, not only are there no more than 7 child offenders reportedly serving LWOP, but the sentence appears not to have been given to a juvenile since 2004, suggesting that the "practice" is rare. Australia's High Court will determine whether it joins this group in two cases now before it, as discussed in Section II of this Report. Second, the sentence has not been consistently and historically applied to child offenders. Even in the United States, the sentence was not used on a large scale until the 1990's when crime reached record levels.[121] It was only between 1992 and 1995, that 40 states and the District of Columbia all passed laws increasing the options for sending juveniles to adult courts.[122] Before this time, the sentence had been rarely imposed.[123]

Third, there is near universal acceptance that the norm is legally binding, as codified by the CRC article 37, which prohibits life without possibility of release sentences for juveniles. All but two countries are party to the Convention (the United States and Somalia) and all but two countries (the United States and Israel) have ended the practice of using this sentence, and in accordance with their treaty obligations.

The Human Rights Committee found that this sentence violates the ICCPR, in evaluating the U.S. report to the Committee, as the treaty ensures that every child has the right to such measures necessary to protect his/her status as a minor.[124] Trying and sentencing children as adults violates that minor's status. Applying a serious adult sentence to a child also implicates article 7 of the ICCRP relating to cruel, inhuman and degrading treatment, as was also suggested by the Committee Against Torture, discussed above.

In addition to the legal prohibition recognized in the context of treaty law, states have reinforced their obligation to uphold this norm in a myriad of international resolutions and declarations over the past two decades. The General Assembly resolution 61/146 of December 2006 calling for the immediate abrogation of the LWOP sentence for juveniles in any country applying the penalty is one that grew from many other international legal pronouncements.

Prior to this, the General Assembly had adopted other statements on the subject which serve as evidence of states' expectations that all members of the international community of states should respect this norm. In 1985, the General Assembly adopted the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (known as the Beijing Rules), reiterating that the primary aim of juvenile justice is to ensure the well-being of the juvenile and that confinement shall be imposed only after careful consideration and for the shortest period possible.[125] The Commentary to this rule indicates that punitive approaches are not appropriate for juveniles and that the well-being and the future of the offender always outweigh retributive sanctions.[126]

Similarly, in 1990 the General Assembly passed two resolutions extending protections for incarcerated juveniles: the U.N. Rules for the Protection of Juveniles Deprived of Their Liberty[127] and the U.N. Guidelines for the Prevention of Juvenile Delinquency (known as the "Riyadh Guidelines").[128] Both consider the negative effects of long term incarceration on juveniles. The Riyadh Guidelines state that, "no child or young person should be subjected to harsh or degrading correction or punishment,"[129] and the U.N. Rules for the Protection of Juveniles Deprived of Their Liberty emphasizes imprisonment as a last resort and for the shortest time possible.[130]

Every year for the past decade, the Commission on Human Rights has emphasized the need for states to comply with the principle that depriving juveniles of their liberty should only be a measure of last resort and for the shortest appropriate period of time.[131] Its resolutions have consistently called for this compliance and in 2005 it further called specifically for the abolition abolition of the juvenile LWOP sentences.[132]

The recently passed GA Resolution 61/146, the 2006 Conclusions and Recommendations of the Human Rights Committee on the U.S. practice, the similar observations of the Committee Against Torture, and the 2007 Committee of the Rights of the Child's General Comment evidence a near universal consensus that has coalesced over the past 15 years, with accelerated pace in condemnations during the last several years. Indeed, because only two countries now would apply this sentence and because 99.9% of the cases come from only one country, the United States, the prohibition against the sentence can now be said to have reached the level of a jus cogens norm, a practice no longer tolerated by the international community of nations as a legal penalty for children.

In sum, the United States and Israel are violating international law by allowing their courts to impose this penalty on children.

IV. Juvenile Justice and Rehabilitation Models

The ICCPR and the CRC provide that deprivation of liberty for child offenders be a "measure of last resort." As previously explained, the Beijing Rules and the Riyadh Guidelines consider long-term incarceration of juvenile offenders antithetical to the purpose and meaning of juvenile justice.[133] The following examples of alternative sentencing structures focusing on rehabilitation and reduction of recidivism represent only a few options available to states in improving their juvenile justice practices.

A. The German Model of Alternative Sentencing and Juvenile Rehabilitation

The German model of juvenile rehabilitation, or restorative justice, is an example of a juvenile justice system focused on rehabilitation. In the 1970's, Germany withdrew traditional sentencing for juveniles. The conventional model gave way to alternative measures in the 1970's enumerated in the Juvenile Justice Act: suspensions, probation, community service, and a system of day-fines. Between 1982 and 1990, incarceration of juveniles in Germany decreased more than 50%.[134]

In 1990, the Juvenile Justice Act (JJA) was amended to include additional alternatives to incarceration. In the case of juvenile offenders (14-17 years), the German criminal justice system predominately aims to educate the juvenile and provides for special sanctions. Initially, education and disciplinary measures are implemented. Only if unsuccessful is youth imprisonment with the possibility of suspension and probation used.[135]

The current JJA emphasizes release and discharge of child offenders when the severity of the crime is balanced with "social and/or educational interventions that have taken place."[136] Included in Germany's innovative system of juvenile justice and rehabilitation is the equal value given to efforts of reparation to the victim, participation in victim-offender reconciliation (mediation), and education programs.[137] Furthermore, the German model does not restrict rehabilitation and justice by the nature of offence. Additionally, felony offences ("Verbrechen") can be reduced or "diverted" under certain circumstances, "e. g. a robbery, if the offender has repaired the damage or made another form of apology (restitution/reparation) to the victim."[138]

Prison sentences for child offenders are a sanction of last resort ("ultima ratio") in line with international norms including the CRC and Beijing Rules.[139] For child offenders between 14 and 17 years of age, the minimum length of youth imprisonment is six months; the maximum is five years.[140] In cases of very serious crimes for which adults could be punished with more than 10 years of imprisonment, the maximum length of youth imprisonment is ten years.[141] Additionally, there is no possibility of death sentences or life without possibility of release sentences for child offenders. The low level of juvenile recidivism is a testament to the success of this innovative system.

B. The New Zealand Family Group Conference Model of Juvenile Rehabilitation

New Zealand began utilizing the approach of restorative justice as an alternative for juveniles in the criminal system in 1989 with the passage of the Children, Young Persons, and Their Families Act.[142] The Act provides for a Family Group Conference as a first step for dealing with a juvenile offender. These Conferences have now become the lynch-pin of the New Zealand youth justice system, both as pre-charge mechanisms to determine whether prosecution can be avoided, and also as post-charge mechanisms to determine how to address cases admitted or proved in the Youth Court.[143]

The purpose of the Family Group Conference is to establish a safe environment in which the young person who has committed the offense, family members and others invited by the family, the victim or a representative, a support person for the victim, the police, and a mediator or manager of the process may come together to discuss the various issues. Sometimes a social worker and/or a lawyer are also present.[144]

The main goal of a Conference is to formulate a plan about how best to deal with the offending youth. It consists of three integral components. First, the participants seek to ascertain whether or not the young person admits to the offense (this is a necessary component for the process to go forward). Next, information is shared among all the parties at the Conference about the nature of the offense, the effects of the offense on the victims, the reasons for the offense, any prior offending by the young person, and other information relevant to the dialogue. Third, the participants decide on an outcome or recommendation.[145] The Act requires the police to comply with the recommendations/agreements adopted and findings made by the Family Group Conference.[146]

The New Zealand model for family group conferencing is largely inspired by traditional Maori justice practices.[147] Modern day family group conferencing incorporates traditional Maori beliefs that responsibility is collective rather than individual and redress is due not just to the victim but also to the victim's family.[148] "Understanding why an individual had offended was also linked to this notion of collective responsibility. The reasons were felt to lie not in the individual but in a lack of balance in the offender's social and family environment."[149] This understanding focuses on the need to address the causes of this imbalance in a collective manner.[150] The emphasis is placed on restoring the harmony between the offender, the victim, and the victim's family.[151]

There are now 8,000 Family Group Conferences held every year in New Zealand and 83% of youth offenders are diverted from the criminal justice system as a result.[152] Imprisonment and the use of youth justice residences have dropped significantly with the use of Family Group Conferences.[153] This alternative to juvenile sentencing provides an excellent model for other states to follow in seeking to lower the level of juvenile incarceration and recidivism rates.

C. The Georgia Justice Project Holistic Approach to Juvenile Rehabilitation

In the U.S., the Georgia Justice Project (GJP) also has an innovative approach to breaking the cycle of crime and poverty among children in Atlanta, Georgia. A privately funded nonprofit organization, GJP minimizes rates of recidivism amongst juveniles by incorporating counseling, treatment, employment and education programs with its legal services. Its rate of recidivism is 18.8%, as compared to the national U.S. average of 50 to 60%.[154]

Working with underprivileged minorities in the Dekalb and Fulton counties of Georgia, GJP works with its juvenile clients to form a relationship that extends beyond legal representation. Recognizing that juvenile offenses typically indicate deeper problems such as lack of familial support, insufficient access or motivation for education, poverty, and lack of access to employment opportunities, GJP works on the criminal defense of the child offender as well as the breadth of other problems which strengthen the likelihood of recidivism.[155] Along with an attorney, each child offender is paired with a licensed social worker. As a team, the attorney, social worker and juvenile work together on the case. Win or lose, the juvenile's 'team' accompanies the juvenile through the entire process. If the judicial proceedings result in incarceration, GJP maintains close contact with the juvenile both during and after incar-

ceration. In this context, GJP provides incentives and support as the child offender rebuilds his/her life. This support is often a critical lynchpin in breaking the cycle of crime and poverty.

D. The Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative

The Juvenile Detention Alternatives Initiative program ("JDAI"), existing in 75 sites in 19 states has focused its attention on eight "core strategies" to minimize juvenile delinquency and rehabilitate youth. Notable strategies include encouraging collaboration between juvenile justice agencies and community organizations, new or enhanced alternatives to detention (such as electronic monitoring), case processing reforms to reduce length of stay in custody, and reducing racial disparities. While children who pose a danger to the community are still detained, the program's focus is to stop deviant behavior before children fall into a life of crime.

In Santa Cruz, California, the 10-year-old JDAI program is considered a model. It offers health and drug-abuse counseling, resume writing an computer classes, as well as meditation classes and an adult mentor for advice and guidance.

Following the JDAI program, Santa Cruz has seen the number of children in detention per day decrease from 50 to 16 on average, saving the state millions of dollars per year. Other counties have followed suit with great success. New Mexico's Bernalillo County JDAI site reduced their average daily detention population by 58% between 1999 and 2004, and New Jersey's Essex County lowered its average daily population by 43% in just two years. In addition, Ada County, Idaho; Pierce County, Washington; and Ventura County, California have all lowered detention populations by at least one-third since implementing the program.[156]

E. The Bridge City Center for Youth, Louisiana

After finding that the Bridge City Correctional Facility had serious problems of abuse and youth violence, the U.S. Department of Justice recommended immediate reform.[157] However, it was not until the death of a child inmate and resulting public protest that the facility began in earnest to restructure, and to comply with the newly enacted Juvenile Justice Reform Act.[158] The facility was shut and reorganized with the help of the Annie E. Casey Foundation and the MacArthur Foundation, reopening in 2005. The reforms abolished the prior boot-camp style youth facility, in which juvenile inmates were treated as "little adults," and established a home-like environment focusing on therapeutic care and rehabilitation.

Today, the center houses approximately 70 young men, ranging from 13 to 20 years old in individual dormitories for about 8 to 12 persons.[159] The dormitories, which replaced the concrete cells, are carpeted and contain colorful quilts, pillows, curtains and couches to create a home-like atmosphere. Each dormitory conducts a series of daily "circles" where the young men gather to discuss concerns or complaints with the other youths in order to come to nonviolent, group-approved solutions to problems.[160] The youths also have daily access to education, mental health, social services and substance abuse treatment.[161]

The success of the Bridge City Center for Youth is being replicated throughout the state at other juvenile facilities.[162] Though relatively new, the program was commended by the Annie E. Casey Foundation and the Juvenile Justice Project as a model state juvenile facility. These and other juvenile justice reforms in Louisiana contributed to a reduction from 1427 to only 611 individuals in the juvenile justice system between 2004 and 2006.[163]

V. Conclusions and Recommendations

The life without parole or possibility of release ("LWOP") sentence condemns a child to die in prison. It is cruel and ineffective as a punishment; it has no deterrent value and contradicts our modern understanding that children have enormous potential for growth and maturity in passing from youth to adulthood. It further prevents society from reconsidering a child's sentence ever and denies the wide expert knowledge that children are susceptible to rehabilitation and redemption.

The international community has outlawed this sentencing practice as a violation of state obligations to protect the status of a child and to seek recourse in criminal punishment toward more rehabilitative models of justice. The LWOP sentence for juveniles is a direct violation of the Convention on the Rights of the Child, Convention Against Torture, and the International Covenant on Civil and Political Rights, as well as customary international law. Countries that would impose this sentence are in violation of their international legal obligations. Today, that amounts to Israel and the United States.

In regard to the remaining countries of concern, the authors commend Tanzania and South Africa for their recent official agreement and clarification in removing the possibility of this sentence. However, the follow-through in legal reforms promised should immediately be undertaken if they are to ensure compliance with obligations under the CRC and international law.

In addition, nine other countries will need to clarify the ambiguities in their own laws to confirm the prohibition of the LWOP sentence for juveniles: Antigua and Barbuda, Australia, Belize, Brunei, Cuba, Dominica, Saint Vincent and the Grenadines, the Solomon Islands and Sri Lanka. In particular, Australia needs to clarify its law most urgently to prevent at least one province from moving in the opposite direction of allowing LWOP sentences for juveniles.

The authors commend the efforts of governments, international organizations and NGOs for their efforts in the past few years to more urgently bring non-complying governments into compliance with international law and standards of juvenile justice.

The authors conclude by recommending the following:

- Countries continue to denounce the practice of sentencing juveniles to life without possibility of release as against international law, to condemn the practice among the remaining governments allowing such sentencing, and to call upon those where the law may be ambiguous to institute legal reforms confirming the prohibition of such sentencing; to remove barriers to the enforcement of international standards and expand their juvenile justice models to focus more extensively on rehabilitation programs, including education, counseling, employment and job training and social or community service programs and to evaluate these models to ensure protection of the rights of juveniles.

- United States abolish this sentence under federal law and undertake efforts to bring all U.S. states into compliance with U.S. international obligations to prohibit this sentencing, including to rectify the sentences of those juvenile offenders now serving LWOP; evaluate the disproportionate sentencing of minorities in the country and work more expeditiously to eradicate the widespread discrimination in the country's juvenile justice system, including to consider more equitable and just rehabilitation models as described in this Report; and monitor and publish data on child offenders serving LWOP sentences in each state.

- Israel abolish LWOP sentences for juveniles under all circumstances, including for political and security related crimes and that it rectify and/or clarify the sentences of the seven juveniles in question who may be serving a LWOP sentence to come into compliance with their obligations under the Convention on the Rights of the Child and international law.

- Tanzania follow through expeditiously in clarifying by law that any child currently serving or who may be given a life sentence for any crime will be subject to parole review and to further bring its juvenile justice system into compliance with its obligations under the Convention on the Rights of the Child and international law.

- South Africa pass without haste the Child Justice Bill to clarify abolition of juvenile LWOP sentencing under any circumstances.

- Australia clarify the legal prohibition of LWOP sentences for juveniles and ensure that its provinces bring their laws into compliance with obligations under the Convention on the Rights of the Child, International Covenant on Civil and Political Rights and other international laws.

TO: The Honorable Members of the House Sub-Committee on Crime, Terrorism and Homeland Security

RE: HR 4300, the Juvenile Justice Accountability and Improvement Act of 2007

Dear Honorable Members of the Sub-Committee,

I encourage each of you to closely review and support this Bill which requires states to enact laws and adopt policies to grant child offenders who are under a life sentence a meaningful opportunity for parole at least once during their first 15 years of incarceration and at least once every three years thereafter. This law defines a "child offender who is under a life sentence" as an individual who is convicted of a criminal offense before attaining the age of 18 and sentenced to a term of natural life or its functional equivalent in years.

Honorable Members, in the United States children are prohibited from buying cigarettes, consuming alcohol, seeing certain movies unless in the presence of an adult, cannot serve on juries, cannot vote, cannot marry without parental consent, are not allowed to leave home and live alone, leave school, cannot make certain decisions relating to their medical treatment or education, cannot sign contracts, purchase firearms or be drafted in to military service.

They can, however, be sentenced to life in prison and its' equivalent in years without the possibility of parole, a sentence reserved for those people in our society for whom there is considered to be no redemption. Do you agree that children are beyond redemption? Juvenile life without parole sentences ignore the very real scientific facts and social differences between children and adults, abandoning the concepts of redemption and second chances upon which this country was built. Psychoanalytical studies have shown that children lack the capacity to both understand and control their actions, which reduces culpability. The human brain does not reach its full capacity in the frontal cortex, the area of reasoning, until age 25.

The U. S. disproportionately sentences child offenders to LWOP. With an estimated 2,225 child offenders serving the sentence, and 42 of the 50 states and the federal government permitting the sentence, the U.S. is home to over 99% of youth serving the sentence in the world. 10 states set no minimum age

and 12 states set a minimum of 10-13 years of age and 16% who receive this sentence are indeed of this young age. Of great concern are the tremendous racial disparities among the populations receiving the sentence. Finally, it is your responsibility as our leadership to be acutely aware of the unthinkable fact that adult prisons are especially harsh on juveniles. The suicide rate for juveniles in adult facilities is 8 times that of juveniles in detention facilities.

I honor Representatives Scott and Conyers for their courage in proposing H.R. 4300. I encourage you, Honorable Members of the Sub-Committee, to begin to do the hard work in discerning where justice truly lies concerning the youth of America. Please help HR 4300 on its way to the full House.

Sincerely,

Marilyn F. Head
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