

Nos. 10-9646 and 10-9647

In The
Supreme Court of the United States

—◆—
EVAN MILLER,

Petitioner,

v.

ALABAMA,

Respondent.

—◆—
KUNTRELL JACKSON,

Petitioner,

v.

RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION,

Respondent.

—◆—
**On Writs Of Certiorari To The Court Of
Criminal Appeals Of Alabama And The
Supreme Court Of Arkansas**

—◆—
**BRIEF OF AMICI CURIAE
AMNESTY INTERNATIONAL, ET AL.
IN SUPPORT OF PETITIONERS**

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF INTEREST.....	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT	5
I. INTERNATIONAL PRACTICE, OPINION AND TREATY OBLIGATIONS SUPPORT HOLDING LIFE SENTENCES WITHOUT PAROLE FOR JUVENILES UNCONSTITUTIONAL.....	5
A. International Practice and Opinion Inform the Court’s Eighth Amendment Analysis	6
B. International Practice and Opinion Reject Sentences of Life Without Parole For Juvenile Offenders, Regardless of the Offense	15
1. Foreign Law and Practice Do Not Allow Juvenile Life Without Parole Sentences.....	15

2.	International Human Rights Treaties and Institutions Reflect a Global Consensus Against Juvenile Life Without Parole Sentences	21
C.	United States Treaty Obligations Are Relevant to Eighth Amendment Analysis	28
	CONCLUSION	32
	APPENDIX (Descriptions of <i>Amici</i>)	App. 1

TABLE OF AUTHORITIES

Page(s)**Cases**

<i>Atkins v. Virginia</i> 536 U.S. 304 (2002).....	12
<i>Cal. Fed. Savings & Loan Ass'n v. Guerra</i> 479 U.S. 272 (1987).....	App. 6
<i>Coker v. Georgia</i> 433 U.S. 584 (1977).....	4, 11
<i>Enmund v. Florida</i> 458 U.S. 782 (1982).....	11, 12
<i>Graham v. Florida</i> 130 S. Ct. 2011 (2010).....	<i>passim</i>
<i>Grutter v. Bollinger</i> 539 U.S. 306 (2003).....	App. 6, App. 11
<i>Kennedy v. Louisiana</i> 554 U.S. 407 (2008).....	App. 8
<i>Roper v. Simmons</i> 543 U.S. 551 (2005).....	<i>passim</i>
<i>Sosa v. Alvarez-Machain</i> 542 U.S. 692 (2004).....	7, 32
<i>Thompson v. Oklahoma</i> 487 U.S. 815 (1988).....	12

Trop v. Dulles
356 U.S. 86 (1958)..... 10

United States v. Alvarez-Machain
504 U.S. 655 (1992)..... 32

United States v. Rauscher
119 U.S. 407 (1886)..... 32

Constitution

U.S. Constitution
Article VI, cl. 2 28
Eighth Amendment *passim*

Declarations

Declaration of Independence para. 1 (U.S.
1776) 7

Rules

U.S. Supreme Court Rules
Rule 37.2(a) 2

Foreign Statutes and Cases

Argentina

*César Alberto Mendoza, et al. (Perpetual
imprisonment and confinement of
adolescents)* Case No. 12,651, Inter-Am.
Ct. H.R., submitted June 17, 2011 4

Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 7, 2005, “Maldonado, Daniel Enrique / recurso de hecho” Fallos (M- 1022-XXXIX) (Arg.), <i>available at</i> http://www.mpf.jusbaires.gov.ar/wp- content/uploads/csjn-maldonado-daniel- enrique-y-otro-sobre-robo-agravado-07- 12-2005.pdf	20
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----

Bahamas

Bahamian Penal Code § 41	19
-----------------------------------	----

Brunei

Children and Young Person’s Order, Section 45(1), (3), and (5).....	18
------------------------------------------------------------------------	----

England and Wales

Schedule 21, ¶ 1 and § 269(4) of the Criminal Justice Act 2003 c. 44	17
-------------------------------------------------------------------------------	----

Fiji

Fijian Penal Code § 25(1)	18
------------------------------------	----

Sierra Leone

Children and Young Person's Act § 216	19
------------------------------------------------	----

Tonga

(Cases)

Fangupo v. Rex; Fa'ooa v. Rex
[2010] TOCA 17; AC 34 of 2009; AC 36 of
2009 (147 2010) (Tonga)19, 20

(Statutes)

Tongan Penal Code
§ 91(2) 19

Zambia

Penal Code Act of Zambia
§ 25(2) 19

International Cases

*Juridical Condition and Human Rights of the
Child*, Advisory Opinion OC-17/02 (Ser.
A.) No. 17 ¶ 103 Inter-Am. Ct. H. R.
(Aug. 28, 2002) 24

*In re Juveniles Sentenced to Life Without
Parole in the United States of America*,
Petition P-161-06, Inter-Am. C.H.R.
(2006).....App. 4

Michael Domingues v. United States
Case 12.285, Report No. 62/02, doc. 5 rev.
1 ¶ 83 Inter-Am. C.H.R. (2002) 23

<i>North Sea Continental Shelf Cases (F.R.G. v. Den., F.R.G. v. Neth.)</i> , 1969 I.C.J. 3 (Feb. 20).....	22
-----------------------------------------------------------------------------------------------------------	----

Treaties

American Convention on Human Rights Article 19.....	23
American Declaration on the Rights and Duties of Man Article VII	23
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), <i>opened for signature</i> Dec. 10, 1984, 1465 U.N.T.S. 85 (<i>entered into force</i> June 26, 1987) (<i>ratified by the United States</i> , S. Treaty Doc No. 100-20 (Oct. 27, 1990)).....	29
Convention on the Rights of the Child, GA Res. 44/25, annex, 171, U.N. Doc. A/RES/44/25 (Nov. 20, 1989)	22
International Covenant on Civil and Political Rights, <i>opened for signature</i> Dec. 16, 1966, 999 U.N.T.S 171 (<i>entered into force</i> Mar. 23, 1976) (<i>ratified by the United States</i> , S. Treaty Doc. No. 95-20 (April 22, 1992)).....	28, 29

International Convention on the Elimination of All Forms of Racial Discrimination (CERD), <i>opened for signature</i> Dec. 21, 1965, 660 U.N.T.S. 195 (<i>entered into force</i> Jan. 4, 1969) (<i>ratified by the United</i> <i>States</i> , S. Treaty Doc. No. 95-18 (Oct. 21, 1994)).....	29
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----

United Nations Documents

CERD, Concluding Observations on the United States ¶ 21, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008)	31
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)	30
Comm. on Rights of the Child, Children's Rights in Juvenile Justice, General Comment No. 10 ¶ 78, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007).....	23
Concluding Observations of the Human Rights Committee: United States of America ¶ 14, U.N. Doc. CCPR/C/USA/CO/ 3/Rev.1 (Dec. 18, 2006).....	30
H.R.C. Res. 2 ¶ 11, U.N. Doc. A/HRC/10/29 (Mar. 25, 2009).....	26
Human Rights Comm., Comments on the United States of America ¶ 34, U.N. Doc. CCPR/C/USA/CO/3 2395 (Sept. 15, 2006).....	30

Human Rights Comm., General Comments http://www2.ohchr.org/english/bodies/crc/comments.htm	23
Rights of the Child, Comm'n on Human Rights Res. 2005/44 ¶ 27(c), U.N. Doc. E/CN.4/RES/2005/135, (April 19, 2005).....	26
Rights of the Child, G.A. Res. 61/146, ¶ 31(a), 61st Session, U.N. Doc. A/Res/61/146 (Dec. 19, 2006).....	25
Rights of the Child, G.A. Res. 62/141 ¶ 36(a), U.N. Doc. A/RES/62/141 (Dec. 18, 2007).....	25
Rights of the Child, G.A. Res. 63/241 ¶ 43(a), U.N. Doc. A/RES/63/241 (Dec. 24, 2008).....	25
Rights of the Child, G.A. Res. 64/146 ¶ 15, U.N. Doc. A/RES/64/146 (Dec. 18, 2009).....	25
Rights of the Child, G.A. Res. 65/197 ¶ 17, U.N. Doc. A/RES/65/197 (Dec. 21, 2010).....	25
Rights of the Child, G.A. Res. 65/213 ¶ 16, U.N. Doc. A/RES/65/213 (Dec. 21, 2010).....	25
Rights of the Child, H.R.C. Res. 29 ¶ 30(a), U.N. Doc. A/HRC/7/RES/29 (Mar. 28, 2008)	26
Second Periodic Report by Belize to the Committee on the Rights of the Child ¶ 85, U.N. Doc. CRC/C/65/Add.29 (July 13, 2004).....	18

U.N. Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), G.A. Res. 45/112, annex, ¶ 46, U.N. Doc. A/RES/45/112, (Dec. 14, 1990) 27

U.N. Rules for the Protection of Juveniles Deprived of Their Liberty, G.A. Res. 45/113, annex, Rule 2, U.N. Doc. A/RES/45/113 (Dec. 14, 1990)..... 27

U.N. Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), G.A. Res. 40/33, annex, Rule 17(b), U.N. Doc. A/40/33 (Nov. 25, 1985)..... 27

Other Authorities

136 CONG. REC. S17486-01 (daily ed. Oct. 27, 1990) 29

138 CONG. REC. S4781 (daily ed. Apr. 2, 1992) 29

140 CONG. REC. S7634-02 (daily ed. June 24, 1994) 29

Adams, John, *A Defence of the Constitutions of Government of the United States of America*, Preface, (1797), available at http://www.constitution.org/jadams/ja1_00.htm (Da Capo Press Reprint ed., last visited Jan. 10, 2012)..... 8

- Amnesty International, Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* (2005)..... App. 1, App. 7
- Blackmun, Harry A., *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39 (1994)..... 8
- Child Rights International Network, C. de la Vega, et al., Human Rights Advocates, *Statement on Juvenile Sentencing to Human Rights Council*, 10th Sess. (Nov. 3, 2009), available at www.usfca.edu/law/docs/jlwop/graham/ 14
- de la Vega, Connie, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 Cinn. L. Rev. 423, 456-62 (1997)..... 32
- de la Vega, Connie, and Leighton, Michelle, “*Sentencing our Children to Die in Prison: Global Law and Practice*,” 42 U.S.F. L. Rev. 983 (2008)..... *passim*
- Griffin, P., et al., *Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions*, (National Center for Juvenile Justice 1998) www.ncjrs.org/pdffiles/172836.pdf..... 20
- Human Rights Watch, *Thrown Away*..... App. 7

Human Rights Watch, *When I Die They'll
Send Me Home*.....App. 7

Response to *amicus* briefs of Sixteen
Members of Congress, the State of
Florida, and Solidarity Center with
respect to international law before the
U.S. Supreme Court *Graham v. Florida*
(08-7412) and *Sullivan v. Florida* (08-
7621) (Oct. 13, 2009) available at
www.usfca.edu/law/docs/jlwop/graham/ 14

The Sentencing Project, *Juvenile Life
Without Parole: Trends in Sentence Use
Over Time* (May 2010)
[http://www.sentencingproject.org/doc/publ
ications/jj_JLWOPTrends.pdf](http://www.sentencingproject.org/doc/publications/jj_JLWOPTrends.pdf) 21

Staloff, Darren, *Hamilton, Adams, Jefferson:
The Politics of Enlightenment and The
American Founding* 250-251 (2005)..... 8

Van Zyl Smit, Dirk, *Outlawing Irreducible
Life Sentences: Europe on the Brink?*, 23
Fed. Sentencing Rptr., No. 1, 39 (Oct.
2010).....16, 17

**AMICUS BRIEF ON BEHALF OF PETITIONERS
MILLER AND JACKSON**

STATEMENT OF INTEREST¹

Amnesty International, the Amsterdam Bar Association, the Austrian Bar (Österreichischer Rechtsanwaltskammertag, ÖRAK), the Barcelona Bar Association, the Bar Human Rights Committee of England and Wales, the Bar of Montreal, the Center for Constitutional Rights, Columbia Law School Human Rights Institute, the Czech Bar Association, the European Bars Federation/Fédération des Barreaux d'Europe, the General Council of the Bar (GCB) of South Africa, the Hong Kong Bar Association, Human Rights Advocates, Human Rights Watch, the Japan Federation of Bar Associations, the Law Council of Australia, the Law Society of England and Wales, the Law Society of New South Wales, the New Zealand Law Society, the Norfolk Island Bar Association, the Norwegian Bar Association, the Portuguese Bar Association, the Swedish Bar Association, the Union Internationale des Avocats (UIA-International Association of Lawyers), the University of Minnesota Human Rights Center, and the University of San Francisco (USF) Center

¹ Counsel of record received timely notice of the intent to file this brief. Letters from all counsel consenting to its filing have been filed with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

for Law and Global Justice hereby request that this Court consider the present brief pursuant to Supreme Court Rule 37.2(a) in support of Petitioners. The interests of *amici* are described in detail in the Appendix.

Amici urge the Court to consider international law and opinion, as well as foreign practice, when applying the Eighth Amendment's clause prohibiting cruel and unusual punishments. International standards and practice prohibiting sentencing juvenile offenders to life in prison without the possibility of parole provide an important indicator of evolving standards of decency, which illuminate the contours of acceptable conduct under the Eighth Amendment. Treaties the United States is party to are relevant to this analysis. The United States is the only country in the world that does not comply with the norm against imposing life without possibility of parole sentences on offenders who are under the age of 18 at the time of the offense.²

Prohibiting the sentence imposed in these cases would bring the United States into alignment with one of the most widely accepted international human rights norms, and enhance compliance with treaty obligations. Formally recognizing the unconstitutionality of these sentences would uphold

² Life without possibility of parole sentences are sometimes referred to by the acronym "LWOP." Similarly, juvenile life without the possibility of parole sentences are sometimes referred to as "JLWOP."

the Eighth Amendment principles that led this Court to strike down the death penalty for juveniles in *Roper v. Simmons*, 543 U.S. 551 (2005), and juvenile life sentences without parole for non-homicide crimes in *Graham v. Florida*, 130 S. Ct. 2011 (2010).

SUMMARY OF ARGUMENT

International law and opinion have informed the law of the United States since the adoption of the Declaration of Independence. The Founders were greatly influenced by international legal and social thought; and throughout U.S. history, courts have referred to international standards when considering the constitutionality of certain practices. This is particularly true with respect to the Eighth Amendment's "cruel and unusual punishments" clause. The point, as the Court explained in *Graham*, is not that the Eighth Amendment is governed by international law, but rather that as a matter of U.S. constitutional law, the Court must consider contemporary standards of decency, as informed by international (and foreign) law and practice. Thus, *amici* consider international law and practice with respect to sentencing of juvenile offenders to life without parole to be of particular relevance to this Court.

Virtually every other country in the world either has never engaged in or has rejected the sentencing of persons convicted of crimes committed when they were under 18 to life without possibility of parole. The few countries in which juveniles were previously reported to be serving life

sentences without parole have either changed their laws or explained that juvenile offenders can apply for parole.³

Universally accepted standards condemn sentencing juvenile offenders to life without the possibility of parole. All countries except the United States and Somalia are parties to the Convention on the Rights of the Child, which prohibits the sentence. Several treaties that the United States is party to have also been interpreted to prohibit the sentence.

³ There is one case in Argentina that has raised questions about whether someone *might* be serving such a life sentence, but the sentence appears to be based on crimes committed as a juvenile and as an adult, and the sentence is otherwise subject to challenge under the laws of Argentina. (Communications with Argentinean Counsel for Saúl Cristian Roldán Cajal, emails on file with counsel for *amici*). Mr. Cajal's case is included in a petition pending before the Inter-American Court of Human Rights challenging life sentences with parole. *See* Case No. 12,651, *César Alberto Mendoza, et al. (Perpetual imprisonment and confinement of adolescents)*, Inter-Am. Ct. H.R., submitted June 17, 2011.

As this Court has recognized in other cases, a small number of outlier jurisdictions does not detract from the importance of foreign and international opinion and practice. *E.g.*, *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (that only 3 of 60 nations retain death penalty for rape "not irrelevant" to constitutional analysis); *Roper*, 543 U.S. at 578 (non-unanimous but widespread adherence to norm informs contemporary standards of decency).

This Court considered international law when holding that the juvenile death penalty violates the Eighth Amendment, *Roper*, 543 U.S. at 575-79, and again when it struck down life sentences without parole for offenders under 18 convicted of non-homicide crimes. *Graham*, 130 S. Ct. at 2033-34. Many of the international norms considered in *Roper* and *Graham* apply equally to *any* life without parole sentences applied to juvenile offenders, and those norms equally support overturning Mr. Miller and Mr. Jackson's sentences here.

The community of nations rejects sentencing any juvenile offender to die in prison, whatever the offense. Allowing the practice to continue in the United States would be inconsistent with contemporary standards of decency and contrary to the Eighth Amendment. The appropriate remedy is to ensure that persons incarcerated for crimes committed when they were under the age of 18 have a meaningful opportunity to obtain release at the end of a term of years sentence or through parole consideration.

ARGUMENT

I. INTERNATIONAL PRACTICE, OPINION AND TREATY OBLIGATIONS SUPPORT HOLDING LIFE SENTENCES WITHOUT PAROLE FOR JUVENILES UNCONSTITUTIONAL

The United States is the only nation in the world that currently imposes life without parole

sentences on juveniles. *See* Connie de la Vega and Michelle Leighton, *Sentencing our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. Rev. 983 (2008). Most governments never allowed, expressly prohibit, or currently do not impose such sentences on children. *Id.* at 989-90. While a few countries other than the United States have statutory language that arguably permits sentencing juvenile offenders to life without parole, there is no known person to be serving such a sentence anywhere in the world other than the United States. *Id.* at p. 990.

Pursuant to *Graham v. Florida* and this Court's jurisprudence, the laws of other countries and international practice and opinion are relevant to the determination of whether a sentence is cruel and unusual under the United States Constitution. *Graham*, 130 S. Ct. at 2033-34; *see also Roper*, 543 U.S. at 575-79. There is clear international consensus against sentencing a juvenile offender to die in prison, and of equal importance, the United States is party to human rights treaties that have been interpreted to prohibit life sentences for juvenile offenders. The Court should consider both of these factors in determining whether the sentences at issue violate the Eighth Amendment.

A. International Practice and Opinion Inform the Court's Eighth Amendment Analysis

The laws of the United States reflect the influence of laws and opinions of other members of the international community. Indeed, the

Declaration of Independence itself speaks to the significance of other nations:

When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, *a decent respect to the opinions of mankind* requires that they should declare the causes which impel them to the separation.

The Declaration of Independence para. 1 (U.S. 1776) (emphasis added). This Court has recognized that history and noted that:

For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. . . . It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.

Sosa v. Alvarez-Machain, 542 U.S. 692, 729-30 (2004).

In urging courts to afford the requisite “decent respect to the opinions of mankind” Justice Blackmun has explained that:

[T]he early architects of our Nation understood that the customs of nations – the global opinions of mankind – would be binding upon the newly forged union. John Jay, the first Chief Justice of the United States, observed . . . that the United States “had, by taking a place among the nations of the earth, become amenable to the laws of nations.”

Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39, 39 (1994) (citation and footnotes omitted).

Thomas Jefferson, drafter of the Declaration of Independence, had a keen appreciation for international opinion and law. He had a broad understanding of eighteenth century political thought, and was greatly influenced by European Enlightenment philosophers and their understanding of ancient Greek democracy and the Roman Republic. *See* Darren Staloff, *Hamilton, Adams, Jefferson: The Politics of Enlightenment and The American Founding* 250-51 (2005).

John Adams too understood the need to select the best the world had to offer in order to create a better government, and he believed that international opinion should inform the new nation’s laws and institutions. *See* John Adams, *A Defence of the Constitutions of Government of the United States of America*, Preface, (1797), *available at*

http://www.constitution.org/jadams/ja1_00.htm (Da Capo Press Reprint ed., last visited Jan. 10, 2012).

Consistent with the approach of the Founders, this Court has recognized the relevance of international norms to the scope and content of societal norms and Constitutional rights. In *Roper*, this Court struck down juvenile death sentences, considering both the evolution of international law and practice in the global community as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." *Roper*, 543 U.S. at 575-78.

In *Graham v. Florida*, the Court again recognized the value of "the judgment of the world's nations," citing foreign laws and international practice and opinion that prohibit life without parole for juveniles as evidence that "demonstrates that the Court's rationale has respected reasoning to support it." *Graham*, 130 S. Ct. at 2034. The Court in *Graham* further recognized that the U.N. Convention on the Rights of the Child, ratified by every country except Somalia and the United States, explicitly prohibits juvenile LWOP sentences, that countries had taken measures to abolish the practice in order to comply with the Convention on the Rights of the Child, and that the provisions and status of the Convention on the Rights of the Child are evidence of international opinion. *Id.* at 2033-34. The Court found that "the United States now stands alone in a world that has turned its face against" life without parole sentences for juvenile non-homicide offenders. *Id.* at 2034, (quoting *Roper*, 543 U.S. at 577).

In his concurrence, Justice Stevens reaffirmed the Court's reliance on international law for at least a century when interpreting the Eighth Amendment's "evolving standards of decency." *Graham*, 130 S. Ct. at 2036 (Stevens, J., concurring) (quoting *Weems v. United States*, 217 U.S. 349, 373–378 (1910)). The rationale of *Graham* should apply equally to a life sentence without parole for a juvenile offender when the crime committed was a homicide.

In the past 50 years, this Court's jurisprudence on issues of cruel and unusual punishment has reflected "evolving standards of decency" in "civilized" society. The standards are not frozen in time, and the Court has consistently relied upon international law, practices and customs as part of the constitutional analysis. Indeed, the very constitutional provision at issue in this case, the Eighth Amendment's prohibition on "cruel and unusual punishments inflicted," traces its origin directly to the laws of another nation. The phrase "cruel and unusual" is derived from the "Anglo-American tradition of criminal justice" and the principle it represents goes back to the Magna Carta. *Trop v. Dulles*, 356 U.S. 86, 100 (1958). The term was taken directly from the English Declaration of Rights of 1688. *Id.*

In *Trop v. Dulles*, the Court expounded upon the role of the fundamental norms of dignity and civility in interpreting the Eighth Amendment. "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the

Amendment stands to assure that this power be exercised within the limits of civilized standards.” *Id.* at 100. Recognizing that the text of the Eighth Amendment is “not precise” and its meaning “is not static,” the Court has underscored that it is both appropriate and necessary to look abroad to “evolving standards of decency” to determine which punishments are so disproportionate as to be cruel and unusual. *Id.* at 100-01. Thus, the Court noted that the “civilized nations of the world are in virtual unanimity that statelessness [the punishment at issue in *Trop*] is not to be imposed as punishment for crime.” *Id.* at 102.

In *Coker v. Georgia*, the Court again considered “the climate of international opinion concerning the acceptability of a particular punishment.” *Coker*, 433 U.S. at 596 n.10. In support of its conclusion that a death sentence for a rape conviction was cruel and unusual, the Court acknowledged that “[it] is not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.” *Id.*

In *Enmund v. Florida*, the Court invoked *Coker* reiterating that international opinion is an additional consideration which is “not irrelevant.” *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (quoting *Coker*, 433 U.S. at 596 n.10). The Court went on to find the death penalty cruel and unusual punishment for felony murder. *Id.* at 798 The Court, citing foreign law, noted that the “doctrine of felony murder has been abolished in England and India, severely restricted in Canada

and a number of other Commonwealth countries, and is unknown in continental Europe.” *Id.* The decision also reflects foreign practice, stating “[i]t is also relevant that death sentences have not infrequently been commuted to terms of imprisonment on the grounds of the defendant's lack of premeditation and limited participation in the homicidal act.” *Id.*

In *Thompson v. Oklahoma*, the Court recognized the relevance of the views expressed by “respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western community” when concluding that the Eighth and Fourteenth Amendments prohibited the execution of a defendant convicted of committing first degree murder when he was 15 years old. *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988). The Court further referenced its own practice of looking outward in its Eighth Amendment analyses: “[w]e have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual.” *Id.* at 830 n.31. More recently, in *Atkins v. Virginia*, the Court stated: “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.” *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

In *Roper v. Simmons*, the Court relied upon the “evolving standards of decency” reasoning applied in *Trop* and *Thompson* and looked to international law, practice and opinion to

categorically prohibit juveniles from receiving the death penalty. *Roper*, 543 U.S. at 575-78 (“Yet at least from the time of the Court's decision in *Trop*, 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.”). In applying the Eighth Amendment's prohibition on cruel and unusual punishment, the Court gave due deference to international treatment of juvenile offenders. “It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime.” *Id.* at 578.

In *Graham v. Florida*, the Court, quoting *Roper*, explicitly reaffirmed the relevance of international practice and opinion: “[The opinion of the world community, while not controlling our outcome,] provide[s] respected and significant confirmation for our own conclusions.” *Graham*, 130 S. Ct. at 2035 (quoting *Roper*, 543 U.S. at 578). Justice Stevens' concurrence acknowledges that “evolving standards of decency” have played a central role in Eighth Amendment jurisprudence for decades and will continue to do so.

Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and

experience, be found cruel and unusual at a later time; unless we are to abandon the moral commitment embodied in the Eighth Amendment, proportionality review must never become effectively obsolete. While Justice Thomas would apparently not rule out a death sentence for a \$50 theft by a 7-year-old, the Court wisely rejects his static approach to the law. Standards of decency have evolved since 1980. They will never stop doing so.

Graham, 130 S. Ct. at 2036 (Stevens, J. concurring).⁴

⁴ Justice Thomas asserted that some countries' laws permit LWOP sentences *Id.* at 2053 n.12 (Thomas, J., dissenting), but as the very source he relied on explains, courts in those countries have *not* sentenced juvenile offenders to life without parole—for homicide or non-homicide offenses. *See* Child Rights International Network, Connie de la Vega, et. al., Human Rights Advocates, *Statement on Juvenile Sentencing to Human Rights Council*, 10th Sess. (Nov. 3, 2009), available at <http://www.crin.org/resources/infodetail.asp?ID=19806> (“Currently, there is no evidence of any country, besides the United States, with juvenile offenders sentenced to life without the possibility of release.”); *see also* Response to *amicus* briefs of Sixteen Members of Congress, the State of Florida, and Solidarity Center with respect to international law before the U.S. Supreme Court *Graham v. Florida* (08-7412) and *Sullivan v. Florida* (08-7621) (Oct. 13,

The global consensus against the death penalty and life without parole sentences for juveniles informed the United States Supreme Court's decisions to strike down those sentencing practices as cruel and unusual punishments in *Roper* with respect to death penalty and in *Graham* with respect to JLWOP for non-homicide crimes. *Roper*, 543 U. S. at 578; *Graham*, 130 S. Ct. at 2033-2034. Similarly, international consensus regarding juvenile life without parole sentences for homicide offenses should inform the Court's analysis here.

B. International Practice and Opinion Reject Sentences of Life Without Parole For Juvenile Offenders, Regardless of the Offense

Foreign law and practice, and international agreements, including treaties to which the U.S. is a party, reflect a global consensus that life without parole sentences should be prohibited, regardless of the crime, if the offender was under the age of 18 at the time the crime occurred.

1. Foreign Law and Practice Do Not Allow Juvenile Life Without Parole Sentences

As international human rights law has developed and gained broader acceptance, most countries have followed suit, eliminating sentencing practices that contravene human rights

2009), available at www.usfca.edu/law/docs/jlwop/graham/.

principles. But there is nothing new or revolutionary about recognizing the impermissibility of sentencing juvenile offenders to life without parole. Indeed, very few countries have ever imposed life sentences on juvenile offenders. *Sentencing our Children to Die, supra*, at 989-1007. Most governments (unlike the United States) have either never allowed, expressly prohibited, or in practice do not impose such sentences on juvenile offenders. *Sentencing our Children to Die, supra*, at 989-90.

Consistent with international law, practice and opinion, an irreducible sentence of life imprisonment is not imposed on a child in any country in Europe. The majority of European countries do not allow any type of life sentences for juvenile offenders. See Dirk Van Zyl Smit, *Outlawing Irreducible Life Sentences: Europe on the Brink?*, 23 Fed. Sentencing Rptr., No. 1 at 39-48 (Oct. 2010). Generally, throughout Europe, the maximum sentence for juvenile offenders is ten years, though this may increase up to 15 years in cases that involve a very serious crime. *Id.* (citing Frieder Dünkel & Barbara Stańdo-Kawecka, *Juvenile Imprisonment and Placement in Institutions for Deprivation of Liberty--Comparative Aspects*, *Juvenile Justice Systems in Europe—Current Situation and Reform Developments 1772* (2010)).

The range of permissible sentences varies by country: the maximum sentence in Portugal is three years (including for murder); the maximum in Switzerland is four years (including for murder);

it is five in the Czech Republic; 10 in Estonia, Germany and Slovenia; and up to 20 in Greece and Romania. *Id.*⁵ In England and Wales, a person under 21 cannot receive a whole life tariff, the equivalent of an LWOP sentence, because Schedule 21, ¶ 1 and § 269(4) of the Criminal Justice Act 2003 restricts such sentences to persons aged 21 or older.⁶ In the Netherlands and Scotland, there is the (theoretical) possibility of life imprisonment *with* the possibility for parole, restricted to juveniles at least 16 years in age. *Id.* But in none of those countries do the courts impose sentences of life *without* parole on juvenile offenders.

Other than the United States, some of the few countries that previously allowed JLWOP sentences have since ended the practice in accordance with their international human rights law obligations. *Sentencing our Children to Die, supra*, at 996-1004. Tanzania has committed to allow parole for the one under-18 offender potentially serving the sentence and to clarify its laws to prohibit the punishment. *Id.* at 996-99. Israel has clarified that parole consideration is available to juveniles serving the sentence, and South Africa has clarified that such sentences are not permitted. *Id.* at 999-1004. That the few countries that potentially had juvenile offenders serving a life without parole sentence have clarified

⁵ This is applicable only in cases where the sentence for an adult offender would be life imprisonment.

⁶ See Schedule 21, ¶ 1 and § 269(4) of the Criminal Justice Act 2003, c.44.

that they allow for parole hearings in accordance with the international legal norms is further evidence that the sentence is not permitted under any circumstances.

Of the ten countries identified in 2007 as having laws that could permit the sentencing of juvenile offenders to life without parole (other than the United States)—Antigua and Barbuda, Argentina, Australia, Belize, Brunei, Cuba, Dominica, Saint Vincent and the Grenadines, the Solomon Islands, and Sri Lanka—there are no known cases where the sentence has been imposed. *Id.* at 990.⁷ The majority of nations do not apply

⁷ Additional research clarifies that “life sentence” in Belize means 18-20 years without parole. Second Periodic Report by Belize to the Committee on the Rights of the Child ¶ 85, U.N. Doc. CRC/C/65/Add.29 (July 13, 2004). In Brunei, while an offender under 18 may be detained during “His Majesty the Sultan and Yang Di-Pertuan’s pleasure,” the statute also provides that the child or young person (ages 14-18) may be released at any time and the case must be reviewed at least once a year. Children and Young Person’s Order 2006, Section 45(1), (3), and (5).

Five additional countries have been identified as having similar ambiguous statutory language — Zambia, Sierra Leone, Fiji, Tonga and the Bahamas — but there is no evidence that any of these countries in fact imposes JLWOP. Each of these countries is party to the Convention on the Rights of the Child. While the penal codes in these jurisdictions have ambiguous language regarding JLWOP, the wording of the statutes suggests that there remains some mechanisms for review of life sentences or for potential release. Section 25(1) of the Fijian Penal Code specifies that “the court shall sentence such

person to be detained during the Governor-General's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the Governor-General may direct, and whilst so detained shall be deemed to be in legal custody," providing discretion in the sentencing. Tongan Penal Code Section 91(2) notes that "[e]very person who attempts to commit murder shall be liable to imprisonment for life or any less period," and Tongan Courts have looked to human rights instruments regarding the validity of punishments. *See Fangupo v. Rex; Fa'ooa v. Rex* [2010] TOCA 17; AC 34 of 2009; AC 36 of 2009 (147 2010) (Tonga) (overturning sentence of judicial whipping because contrary to Tonga's international legal obligations under the Convention Against Torture). Chapter 97 section 41 of the Penal Code of the Bahamas provides that those under the age of 18 are "to be detained during Her Majesty's pleasure; if so sentenced he shall notwithstanding anything in the other provisions of this Act," suggesting that a later review of the sentence is possible. Additionally, in Sierra Leone, section 216 of the Criminal Procedures Acts specifies that the juvenile should be confined to a chosen place as may be directed by the president and for a stated period of time until a juvenile's reformation and transformation is guaranteed. Although this does not prohibit JLWOP, it does suggest that there is evaluation of juveniles during incarceration and upon rehabilitation the potential for release. Finally, the Penal Code Act of Zambia Section 25(2) notes that "the court shall sentence him to be detained during the President's pleasure; and when so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct." This, in conjunction with subsection (3), which states that "the presiding Judge shall forward to the President a copy of the notes of evidence taken at the trial, with a report in writing signed by him

juvenile life without parole sentences because such sentences violate the principles of child development and protection established through national standards and international human rights law. *Id.* at 989. Courts in other countries often refer to the treaty obligations in cases involving human rights. *See, e.g.* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 7, 2005, “Maldonado, Daniel Enrique / recurso de hecho,” Fallos (M-1022-XXXIX) (Arg.), *available at* <http://www.mpf.jusbaires.gov.ar/wp-content/uploads/csjn-maldonado-daniel-enrique-y-otro-sobre-robo-agravado-07-12-2005.pdf> (overturning life sentence of 14 year old offender for violating the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, and the Convention Against Torture as well as Argentinean laws); *Fangupo v. Rex; Fa'ooa v. Rex, supra*, (Tonga) (citing Convention Against Torture as basis for overturning sentence of judicial whipping).

Even in the United States, the sentence was not used on a large scale until the 1990s when 40 states passed laws making it easier to try juveniles as adults. *See* P. Griffin, et al., *Trying Juveniles as Adults in Criminal Court: An Analysis of State*

containing such recommendation or observations on the case as he may think fit to make” indicates that some discretion remains after the juvenile has been sentenced.

Transfer Provisions Foreword (National Center for Juvenile Justice 1998) www.ncjrs.org/pdffiles/172836.pdf. Before the 1990s, the sentence was imposed relatively infrequently anywhere. The Sentencing Project, *Juvenile Life Without Parole: Trends in Sentence Use Over Time* (May 2010), http://www.sentencingproject.org/doc/publications/jj_JLWOPTrends.pdf. As of 2008, the United States was the only nation where juveniles served life sentences without the possibility of parole.

2. International Human Rights Treaties and Institutions Reflect a Global Consensus Against Juvenile Life Without Parole Sentences

International agreements and resolutions reflect that the community of nations rejects sentencing juveniles to life without parole regardless of the crime committed. *See, e.g., Graham*, 130 S. Ct. at 2033-34. The Convention on the Rights of the Child, the most widely ratified human rights treaty, specifically condemns this practice. As noted in *Graham*, Article 37(a) of the Convention on the Rights of the Child, “prohibits the imposition of ‘life imprisonment without possibility of release . . . for offences committed by persons below eighteen years of age.’” *Graham*, 130 S. Ct. at 2034 (citation omitted).⁸ Article 37(b) of

⁸ Because all countries in the world, aside from the United States and Somalia, are parties to the Convention, the practice of nations in this regard is arguably done pursuant to their legal obligations. In light of the practice and overwhelming authority

the Convention further provides that imprisonment be used only as a measure of last resort for juvenile offenders, and for the shortest appropriate time. U.N. Convention on the Rights of the Child, GA Res. 44/25, annex, 171, U.N. Doc. A/RES/44/25 (Nov. 20, 1989). Neither of those treaty provisions distinguishes between homicide and non-homicide offenses. Because Petitioners Miller and Jackson's sentences allow no possibility of release and are not the shortest appropriate time available, they are inconsistent with the Convention on the Rights of the Child and the international practice and opinion it reflects.

The significance of offender age in criminal sentencing is further highlighted by the fact that Article 37 sets a specific age ("below 18 years of age") in relation to sentences of life without parole, in contrast with other rights which in Article 1 defers to domestic laws for the age of majority. In early 2007, the authoritative Committee on the Rights of the Child, which oversees the Convention, reiterated that article 37 prohibits the death penalty and life without parole for offenders under eighteen years of age at the time of the offense. *See*

prohibiting the sentence, the standard at a minimum may be considered as customary international law. *See North Sea Continental Shelf Cases (F.R.G. v. Den., F.R.G. v. Neth.)*, 1969 I.C.J. 3, 42 ¶ 71 (Feb. 20) (recognizing passage of treaty rule into the "general corpus of international law" as "one of the recognized methods by which new rules of customary international law may be formed").

Comm. Rts. Child, Children's Rights in Juvenile Justice, General Comment No. 10 ¶ 78, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007).⁹

The prohibition on the juvenile death penalty and juvenile sentences of life without parole is also required to ensure the rights to humane treatment, dignity and personal liberty of children that are codified in the *corpus juris* of the Organization of American States. *See* American Declaration of the Rights and Duties of Man, art. VII (establishing the right of “all children . . . to special protection, care and aid”); American Convention on Human Rights, art. 19 (“Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state”); *Michael Domingues v. United States*, Case 12.285, Report No. 62/02, doc. 5 rev. 1 ¶ 83 Inter-Am. C.H.R. (2002) (Art. 19 of the American Convention and Art. VII of the American Declaration reflect “the broadly-

⁹ Specifically, the Committee has recommended that “parties abolish *all* forms of life imprisonment for offences committed by persons under the age of eighteen.” “For *all* sentences imposed upon children the possibility of release should be realistic and regularly considered.” *Id.* ¶ 77 (*emphasis added*). General Comments constitute the authoritative interpretation of the Committee on the Rights of the Child, established by the Convention to administer the treaty. *See* <http://www2.ohchr.org/english/bodies/crc/comments.htm>. The prohibition of juvenile life without parole sentences has also been recognized as an obligation under treaties that the United States is party to. *See*, section C below.

recognized international obligation of states to provide enhanced protection to children”); *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02 (Ser. A.) No. 17 ¶ 103 Inter-Am. Ct. H. R. (Aug. 28, 2002) (“measures that involve deprivation of liberty must be exceptional”).

Beyond the rule’s clarity in treaty law, a near universal consensus has coalesced over the past seventeen years that the sentence must be legally abolished, and the consensus has been repeatedly affirmed in recent years. Myriad United Nations resolutions adopted by consensus or upon vote, with the support of every country represented except the United States, call for abolition of the juvenile death penalty and life sentences without parole. Since 2009, however, *even the United States* has joined the consensus against the use of this sentence in votes on resolutions at the General Assembly.

Every year since 2006, in its annual Rights of the Child resolution, the United Nations General Assembly has called for immediate abrogation of the juvenile LWOP sentence by law and practice in any country still applying the penalty. From 2006-2008, the United States cast the lone dissenting vote. For example, on December 19, 2006, the General Assembly resolved by a vote of 185 to one (the United States) that nations should “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.” Rights of the Child, G.A. Res. 61/146 ¶ 31(a), U.N. Doc. A/Res/61/146

(Dec. 19, 2006). The General Assembly adopted a similar resolution by a vote of 183 countries to one (the United States) in December of 2007, Rights of the Child, G.A. Res. 62/141 ¶ 36(a), U.N. Doc. A/RES/62/141 (Dec. 18, 2007), and again in 2008 (the United States was the only vote against). Rights of the Child, G.A. Res. 63/241 ¶ 43(a), U.N. Doc. A/RES/63/241 (Dec. 24, 2008).

In 2009 and 2010, the General Assembly affirmed the earlier resolutions, including the directive to abolish juvenile life without parole sentences, by a full consensus *without* a dissenting vote from the United States. Rights of the Child, G.A. Res. 64/146 ¶ 15, U.N. Doc. A/RES/64/146 (Dec. 18, 2009), and Rights of the Child, G.A. Res. 65/197 ¶ 17, U.N. Doc. A/RES/65/197 (Dec. 21, 2010). In 2010, the General Assembly adopted a resolution on the administration of justice specifically requesting that countries abolish the death penalty and life imprisonment without the possibility of release for offenders under eighteen years of age. The resolution on the administration of justice passed by consensus, without a dissenting vote from the United States. Human rights in the administration of justice, G.A. Res. 65/213 ¶ 16, U.N. Doc. A/RES/65/213 (Dec. 21, 2010).¹⁰

In its first substantive resolution on the Rights of the Child, the recently created United Nations Human Rights Council included the prohibition of juvenile life without parole

¹⁰ The texts of the 2011 General Assembly resolutions are not yet available online.

sentences, Rights of the Child, H.R.C. Res. 29 ¶ 30(a), U.N. Doc. A/HRC/7/RES/29 (Mar. 28, 2008), along with the prohibition of the death penalty for offenders under the age of 18 at the time of the crime.¹¹ In 2009 the Council again urged “States to ensure that, under their legislation and practice, neither capital punishment nor life imprisonment without the possibility of release is imposed for offences committed by persons under 18 years of age.” Human rights in the administration of justice, in particular of children and juvenile justice, H.R.C. Res. 2 ¶ 11, U.N. Doc. A/HRC/10/29 (Mar. 25, 2009). In 2005, the U.N. Commission on Human Rights (predecessor to the U.N. Human Rights Council) called specifically for governments to prohibit juvenile LWOP sentences along with the juvenile death penalty. Rights of the Child, Comm’n on Human Rights Res. 2005/44 ¶ 27(c), U.N. Doc. E/CN.4/2005/135 (April 19, 2005).¹²

¹¹ The Commission on Human Rights was replaced by the Human Rights Council in 2005. The Human Rights *Committee* remains. Like the Commission, the Council is made up of government delegates.

¹² As in the UN General Assembly, members of the Commission on Human Rights acted as representatives of their governments, which means that a Commission resolution reflected government opinion. The resolution calling for abolition of juvenile life without parole sentences emerged from a series of pronouncements from the Commission, from 1997 through 2004, emphasizing the need for the global community to comply with the principle that depriving juveniles of their liberty should only be a measure of last resort and for the shortest appropriate time, i.e., the opposite of an inflexible sentence that

These resolutions followed many years of other pronouncements calling for limited juvenile incarceration. In 1985, for example, the General Assembly adopted the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, reiterating that confinement shall be imposed only after careful consideration and for the shortest period possible. U.N. Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), G.A. Res. 40/33, annex, Rule 17(b), U.N. Doc. A/RES/40/33 (Nov. 25, 1985). In 1990, the General Assembly passed two other resolutions in support. *See* U.N. Rules for the Protection of Juveniles Deprived of Their Liberty, G.A. Res. 45/113, annex, Rule 2, U.N. Doc. A/RES/45/113 (Dec. 14, 1990) (emphasizing imprisonment as a last resort and for the shortest time possible); U.N. Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), G.A. Res. 45/112, annex, ¶ 46, U.N. Doc. A/RES/45/112 (Dec. 14, 1990).

Because the two sentences at issue here are out of step with international law, practice and opinion, there is compelling support to find that this sentencing practice is cruel and unusual. As the Court found in *Graham*, “the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it.” *Graham*,

requires imprisonment for a juvenile offender's whole life. *Sentencing Our Children to Die, supra*, at 1017-18 & n. 182.

130 S. Ct. at 2034. Further, in the inquiry of whether a punishment is cruel and unusual, “the overwhelming weight of international opinion against’ life without parole for non homicide offenses committed by juveniles ‘provide[s] respected and significant confirmation for our own conclusions.” *Id.* (quoting *Roper*, 543 U.S. at 578). The weight of global law, practice and opinion against life without parole for any under-18 offender, regardless of offense, similarly supports the conclusion that such a sentence is unconstitutional.

C. United States Treaty Obligations Are Relevant to Eighth Amendment Analysis

The United States is a party to several treaties that have been interpreted by their oversight bodies, and recognized by states parties, to prohibit juvenile life without parole sentences. As a treaty party, the United States has assumed international legal obligations that should inform the Court's Eighth Amendment analysis. And under the Constitution, the states of the United States must uphold these treaty obligations. U.S. Const. art. VI, cl. 2.

Treaties relevant to the Court's analysis include: (1) the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S 171 (*entered into force* Mar. 23, 1976) (*ratified by the United States*, S. Treaty Doc. No. 95-20 (April 22, 1992)); (2) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention

Against Torture”), *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (*entered into force* June 26, 1987) (*ratified by the United States*, S. Treaty Doc No. 100-20 (Oct. 27, 1990)); and (3) the International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (*entered into force* Jan. 4, 1969) (*ratified by the United States*, S. Treaty Doc. No. 95-18 (Oct. 21, 1994)). In ratifying these treaties, Congress stated, “the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative **and** judicial jurisdiction over the matters covered therein, **and** otherwise by the state **and** local governments.” 138 CONG. REC. S4781 (daily ed. Apr. 2, 1992) (for the International Covenant on Civil and Political Rights) (bold in original); *see also* 140 CONG. REC. S7634-02 (daily ed. June 24, 1994) (same understanding regarding the Convention on the Elimination of All Forms of Racial Discrimination); 136 CONG. REC. S17486-01 (daily ed. Oct. 27, 1990) (same understanding for the Convention Against Torture).

The prohibition on juvenile life without parole sentences has been recognized as an obligation of the International Covenant on Civil and Political Rights. In relation to articles 7 (cruel and unusual punishment) and 24 (treatment of children), the Human Rights Committee, the body established under the treaty to monitor compliance and provide interpretation, has stated that it “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. (articles 7 and 24).” Human Rights Comm., Comments on the United States of America ¶ 34, U.N. Doc. CCPR/C/USA/CO/3 2395 (Sept. 15, 2006) (hereinafter “Comments on the United States”). Further, the Human Rights Committee determined that a life without parole sentence contravenes Article 24(1), which states that every child shall have “the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State,” and Article 7, which prohibits cruel and unusual punishment. Concluding Observations of the Human Rights Committee: United States of America ¶ 14, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006). Article 14(4) of the Covenant further requires that criminal procedures for juvenile persons should take into account their age and desirability of promoting their rehabilitation. International Covenant on Civil and Political Rights, art. 14(4).

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

Most recently, in 2008, the Committee on the Elimination of Racial Discrimination, the oversight

body for Convention on the Elimination of Racial Discrimination, found the juvenile without parole sentence incompatible with Article 5(a) of the Convention on the Elimination of Racial Discrimination because the sentence is applied disproportionately to youth of color, amounting to pervasive discrimination that the United States has failed to address. CERD, Concluding Observations of CERD on the United States ¶ 21, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008). The Committee referred to the concerns raised by the Human Rights Committee and Committee Against Torture on the United States practice of sentencing juveniles to life without parole and added its own conclusion:

The Committee therefore recommends that the State Party discontinue the use of life sentence without parole against persons under the age of eighteen at the time the offence was committed, and review the situation of persons already serving such sentences.

Id.

In light of the U.S. Constitution and U.S. treaty obligations, this Court should consider the views of the treaty oversight bodies in determining whether a life sentence without parole for any under-18 offender violates the Eighth Amendment

prohibition against cruel and unusual punishments.¹³

CONCLUSION

As in *Roper* and *Graham*, this Court should consider the laws, practices and opinions of other nations and international agreements in interpreting and applying the Eighth Amendment. This Court should find these same principles, which have been applied to universally condemn in international law and practice the sentencing of juveniles to life in prison without parole, instructive in interpreting the Eighth Amendment here. Further, it should consider the provisions of treaties to which the United States is a party. For the reasons stated above, the sentences of Mr. Miller and Mr. Jackson should be overturned.

¹³ In considering the treaties for the purpose of interpreting the Eighth Amendment, the Court need not address the issue of whether the treaty provisions are self-executing or the validity of the non-self-executing declarations the United States submitted in connection with ratifying some of the treaties. For background and legislative history of the declarations, see Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 Cinn. L. Rev. 423, 456-62 (1997). This Court has applied treaty provisions in defensive postures without considering whether they are self-executing. See *United States v. Rauscher*, 119 U.S. 407, 430 (1886); *United States v. Alvarez-Machain*, 504 U.S. 655, 669-70 (1992) (*rev'd on other grounds*, *Sosa*, 542 U.S. at 692).

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Rights Institute
Czech Bar Association
European Bars
Federation/Fédération des
Barreaux d'Europe General
Council of the Bar (GCB) of
South Africa
Hong Kong Bar Association
Human Rights Advocates
Human Rights Watch
Japan Federation of Bar
Associations
Law Council of Australia
Law Society of England and
Wales

Law Society of New South
Wales
New Zealand Law Society
Norfolk Island Bar Association
Norwegian Bar Association
Portuguese Bar Association
Swedish Bar Association
Union Internationale des
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Association of Lawyers)
University of Minnesota Human
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University of San Francisco
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Justice¹⁴

¹⁴ Research assistance was provided by Professor Julian Killingly, Birmingham City University School of Law and Solicitor of the Supreme Court (UK) and his students; Mark George, Queen's Counsel; and Hannah L. Gorman, Solicitor of the Supreme Court (United Kingdom); staff at the Law Society of England and Wales; Fellows and students at the University of San Francisco School of Law; and staff at Sheppard Mullin Richter & Hampton LLP.

APPENDIX

Amnesty International is a worldwide human rights movement of more than 2.2 million members and subscribers. It works independently and impartially to promote respect for human rights. It monitors domestic law and practices in countries throughout the world for compliance with international human rights law and international humanitarian law and standards, and it works to prevent and end grave abuses of human rights and to demand justice for those whose rights have been violated. It has addressed the issue of juvenile life without parole and co-published the report *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* (2005). It has previously appeared as *amicus curiae* in cases before the United States Supreme Court, including *Graham v. Florida*, 130 S. Ct. 2011 (2010).

The Amsterdam Bar Association ('Amsterdamse orde van Advocaten') is the professional body of lawyers, practicing in the district of the Amsterdam Court. The membership is mandatory. The Amsterdam bar organization, representing over 5,000 lawyers, has as a task to further good practice by lawyers and to protect the rights and interests of their members as lawyers, as well as the administration of justice.

The Austrian Bar (Österreichischer Rechtsanwaltskammertag, ÖRAK) is the official representation of lawyers in Austria, a public body determined by law, which is responsible for safeguarding their rights and affairs and their

App. 2

representation at national, European and international level. It is as such particularly responsible for proposing legislative acts and rendering opinions on legislative projects as well as for notifying deficiencies in the administration of justice and administration to the competent body and providing proposals in order to improve the administration of justice and administration.

The Bar Human Rights Committee of England and Wales (BHRC) is the international human rights arm of the Bar of England and Wales. It is an independent body primarily concerned with the protection of the rights of advocates and judges around the world and with defending the rule of law and internationally recognized legal standards relating to the right to a fair trial. The BHRC regularly appears in cases where there are matters of human rights concern, and has experience of legal systems throughout the world. The BHRC has previously appeared as *amicus curiae* in cases before the United States Supreme Court, including *Roper v. Simmons*, 543 U.S. 551 (2005) and *Sullivan v. Florida* and *Graham v. Florida*, 130 S. Ct. 2011 (2010).

The Barcelona Bar Association now has more than 21,000 members; 16,000 are active and 6,000 do not exercise as lawyers but enjoy certain rights as members of the Bar. The Association aims at guaranteeing the professional interests of the law profession but also watching for the accomplishment of the profession's deontological rules, with a distinct vocation for serving the community. The Association exercises

App. 3

deontological control, regulates on matters of fees, fights against professional intrusion, organizes and provides legal aid to those with no financial resources, and to persons held in detention.

The Bar of Montreal, with over 13,000 members, is one of the largest bar associations in the world, as well as being the second largest French-speaking bar association. Its members' expertise covers all aspects of the legal practice, administration and business. Many of its members are recognized nationally and internationally in these fields. With more than 160 years of history, the Bar of Montreal is considered a model for its leadership in the pursuit of excellence in ethics and high standards of competence. The Bar of Montreal's mission is to protect the public. With this in mind, the Bar organizes a number of activities each year which inform members of the public of their legal rights and how they are to be exercised.

The Center for Constitutional Rights (CCR) is a national non-profit legal, educational and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements in the South, CCR is committed to the creative use of law as a positive force for social change.

Columbia Law School's Human Rights Institute (HRI), founded in 1998, serves as a crossroads for practitioners, scholars, and activists,

App. 4

and as a focal point for Columbia Law School's human rights curriculum, programs and research. HRI leverages these academic resources into support for human rights in the United States and throughout the world. As part of its work to promote human rights in the United States, HRI, in conjunction with Columbia Law School's Human Rights Clinic, is co-counsel in *In re Juveniles Sentenced to Life Without Parole in the United States of America*, Petition P-161-06, Inter-Am. C.H.R. (2006), concerning the mandatory sentencing of juveniles in Michigan to life without the possibility of parole. HRI also participated as *amicus* in *Graham v. Florida*, 130 S. Ct. 2011 (2010).

The Czech Bar Association is the biggest legal professional organization in the Czech Republic representing more than 8,500 lawyers. It is a self-governing organization performing public administration in the area of the Legal Profession and, as such, it protects and guarantees the quality of the provision of the legal services by lawyers.

The European Bars Federation/Fédération des Barreaux d'Europe (FBE) was founded in Barcelona on 23rd May 1992, as a successor to the « Conférence des Grands Barreaux d'Europe ». Its official headquarters are in Strasbourg. FBE membership is open to all national and local Bars and Law societies within the Council of Europe. Today, the FBE has 250 member bars, representing approximately 800 000 lawyers. Its principal objects are: to put in place common activity while respecting its members' autonomy and

App. 5

independence; to establish a permanent link between Bars with the organization of periodic meetings; to represent the Advocacy with all the European Institutions; to promote the supremacy of law, the right to a fair trial and human rights, an item in which it is particularly and strongly involved this year; and to promote the harmonization of the profession in Europe equally in forensic activity and profession ethics, and all possible contacts with lawyers of the other Continents.

The General Council of the Bar (GCB) of South Africa is a voluntary association constituted by ten South African bars. The advocates who are members of the General Council of the Bar of South Africa are in private practice and are competitive specialist advocates who are experts in trial, motion court, appellate and opinion advocacy. One of GCB's objects is to promote the administration of justice.

The Hong Kong Bar Association is the professional organization of all practicing Barristers in Hong Kong totaling over 1,100 members. Matters of policy are decided by the Bar Council with the support of its various Special Committees. The Association is principally concerned in considering and taking appropriate action in respect of all matters concerning the legal profession in general and speaking up on issues relating to the administration of justice. The Association is a staunch supporter in upholding human rights and the rule of law.

App. 6

Human Rights Advocates (HRA), a California non-profit corporation was founded in 1978 and has national and international membership. It endeavors to advance the cause of human rights to ensure that the most basic rights are afforded to everyone. HRA has Special Consultative Status in the United Nations and has participated in meetings of its human rights bodies for almost thirty years, where it has addressed the issue of juvenile sentencing. HRA has participated as *amicus curiae* in cases involving individual and group rights where international standards offer assistance in interpreting both state and federal law. Cases it has participated in include: *Graham v. Florida*, 130 S. Ct. 2011 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005); *Grutter v. Bollinger*, 539 U.S. 306 (2003); and *Cal. Fed. Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

Human Rights Watch is a non-profit, independent organization and the largest international human rights organization based in the United States. For over 30 years, Human Rights Watch has investigated and exposed human rights violations and challenged governments to protect the human rights of all persons, including youth and prisoners. To fulfill its mission, Human Rights Watch investigates allegations of human rights violations in the United States and over 80 countries throughout the world by gathering information from governmental and other sources, interviewing victims and witnesses, and issuing detailed reports. Where human rights violations have been found, Human Rights Watch advocates for the enforcement of those rights before

App. 7

government officials and in the court of public opinion. In 2004, Human Rights Watch published *Thrown Away*, on youth offenders sentenced to life without parole in Colorado. In 2005, Human Rights Watch co-published *The Rest of Their Lives*, a national report on the sentencing of youth offenders to life without parole. Subsequently, in 2008, the organization published *When I Die They'll Send Me Home*, on the same topic in California. In 2009, the organization published updated national statistics on youth offenders serving life without parole throughout the United States. The organization has also advocated on the issue before the Committee against Torture, the Human Rights Committee, and the Committee on the Elimination of Racial Discrimination.

The Japan Federation of Bar Associations (JFBA) is an autonomous body comprised of the 52 bar associations in Japan, their individual members, and the legal professional corporations. Founded in 1949, the JFBA self-regulates the legal profession and strives to further the primary role of attorneys in society: the protection of fundamental human rights and the realization of social justice. Aiming for a judicial system that is familiar, open, and accessible to the public, the JFBA has been engaged in the reform of the judicial system.

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council represents its constituent bodies on national issues, and promotes the administration of justice, access to justice and general improvement of the law. Through this

App. 8

representation the Law Council effectively acts on behalf of 56,000 legal practitioners in Australia. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Society of England and Wales is the professional body representing more than 138,000 solicitors in England and Wales. Its concerns include upholding the independence of the legal profession, the rule of law and human rights throughout the world. The Law Society regularly intervenes in cases that relate to its core mandate. It has previously submitted *amicus curiae* in cases before the United States Supreme Court, including *Kennedy v. Louisiana*, 554 U.S. 407 (2008) and *Sullivan v. Florida* and *Graham v. Florida*, 130 S. Ct. 2011 (2010).

The Law Society of New South Wales is the largest professional association of lawyers in Australia. The Law Society acts as the voice of the legal profession, representing the interests of over 21,000 members, encouraging debate and actively driving law reform issues through policy submissions and open dialogue with Governments, parliamentary bodies, the Courts and the Attorney General's Department. Endowed with co-regulatory duties with the Office of the Legal Services Commissioner, it sets and enforces professional standards, licenses solicitors to practice, investigates complaints and administers discipline to ensure that both the community and the

App. 9

profession are properly served by ethical and responsible solicitors.

The New Zealand Law Society is the statutory regulator of the legal profession in New Zealand (currently comprising 11,500 practicing lawyers). The Law Society's regulatory functions include fundamental obligations to uphold the rule of law and the administration of justice, and it actively monitors and promotes the rule of law and human rights. The Law Society has previously made submissions as *amicus curiae* to this Court.

The Norfolk Island Bar Association is the professional body representing lawyers on and from Norfolk Island. It consists of barristers, solicitors and judicial officers. It is a corporate member of the International Bar Association, the Human Rights Institute and the European Association of Lawyers. Its members are active in many countries of the world.

The Norwegian Bar Association is the representative organization for more than 90% of the lawyers in Norway. The Association safeguards the basic principles of the legal profession, such as independence and professional confidentiality. Furthermore, the Association is the most important arena for the lawyers' political engagement in relation to the rule of law.

The Ordem dos Advogados Portugueses (OAP) in English, Portuguese Bar Association, was established by the State, Decree n.º 11 715, of 12 June 1926, over 85 years ago. However, its origins

App. 10

trace even back to the Lisbon Lawyers Association, whose Statutes were approved in 1838. The Ordem dos Advogados is the only public and independent association (nationwide) compulsory representing law graduates who practice law and deliver legal services (advocacia) as a profession, presently counting 27,903 active Lawyers.

The Swedish Bar Association is the sole national organization for advocates in Sweden, a professional body representing more than 5,000 advocates. Its international focus includes upholding the independence of the legal profession, the rule of law and human rights in Europe and throughout the world.

The Union Internationale des Avocats (UIA-International Association of Lawyers) was created in 1927 and is the oldest professional association, with several thousand individual members, as well as more than 200 bar associations, organisations or federations (representing nearly two million lawyers) from over 110 countries. The objectives of the UIA are to promote the basic principles of the legal profession, to contribute to the establishment of an international legal order based on the principles of human rights and justice among nations, through the law and for the cause of peace, and to defend the moral and material interests of members of the legal profession.

The University of Minnesota Human Rights Center (HRC) is dedicated to the advancement of the fundamental rights guaranteed by national and international law. The HRC seeks to ensure that

all persons receive the full panoply of rights accorded to them by national and international law regardless of nationality or immigration status. The HRC maintains one of the largest human rights document collections in the United States (<http://www.umn.edu/humanrts>). In addition, the Co-Director of the University of Minnesota Human Rights Center has served from 1996 – 2003 as a member of the United Nations Sub-Commission on the Promotion and Protection of Human Rights and thus has expertise in regard to the international human rights law applicable to this matter. The HRC has previously submitted amicus curiae briefs; for example, in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

The University of San Francisco (USF) Center for Law and Global Justice is a focal point for USF School of Law's commitment to international justice and legal education with a global perspective. The Center generates student externships around the globe, protects and enforces human rights through litigation and advocacy, manages and participates in international rule of law programs in developing nations, develops partnerships with world-class foreign law schools, provides a forum for student scholarship, and nurtures an environment where student-organized conferences and international speakers explore topics relating to global justice. For over five years the Center has been working on projects addressing the sentencing of juvenile offenders.