No. 08-7621

In the Supreme Court of the United States

JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writ of Certiorari to the District Court of Appeal, First District of Florida

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

Joe Sullivan is serving a sentence of life imprisonment without the possibility of parole for a non-homicide offense committed when he was thirteen years old. Nationwide, only one other thirteen-year-old child has received a life-without-parole sentence for a non-homicide. The questions presented are:

1. Does imposition of a life-without-parole sentence on a thirteen-year-old for a non-homicide violate the prohibition on cruel and unusual punishments under the Eighth and Fourteenth Amendments, where the freakishly rare imposition of such a sentence reflects a national consensus on the reduced criminal culpability of children?

2. Given the rarity of a life imprisonment without parole sentence imposed on a 13-year-old child for a non-homicide and the unavailability of substantive review in any other federal court, should this Court grant review of a recently evolved Eighth Amendment claim where the state court has refused to do so?

3. May this Court review Sullivan's Eighth Amendment claim when the state court dismissed his post-conviction motion on an independent and adequate state law ground? (Restated)

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 14.1, respondent states that all parties to the proceedings in the court whose judgment is sought to be reviewed are listed in the caption.

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The June 17, 2008 decision of the First District Court of Appeal of Florida is reported at 987 So. 2d 83 (table). [JA 73] The First District's August 6, 2008 denial of rehearing, rehearing en banc, and certification to the Florida Supreme Court, is unreported. [JA 74] The order and judgment of the Circuit Court of Florida for the First Judicial Circuit is unreported. [JA 54-72]

JURISDICTION

Under Florida law, the Florida Supreme Court is without jurisdiction to review the First District's decision because it was a per curiam affirmance without written opinion. *See Jackson v. State*, 926 So. 2d 1262, 1265 (Fla. 2006). This Court granted the petition for writ of certiorari on May 4, 2009. Whether this Court has jurisdiction under 28 U.S.C. § 1257(a) is addressed in Section I of the argument, *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be permitted, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law."

Florida Rule of Criminal Procedure 3.850(b) provides:

> **(b) Time Limitations.** A motion to vacate a sentence that exceeds the limits provided by law may be filed at any time. No other motion shall be filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final in a noncapital case or more than 1 year after the judgment and sentence become final in a capital case in which a death sentence has been imposed unless it alleges that
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> (1) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or
>
> (2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively, or
>
> (3) the defendant retained counsel to timely file a 3.850 motion and counsel, through neglect, failed to file the motion.

INTRODUCTION

This Court granted review on two questions, one that Sullivan has revised and one that he has ignored entirely. Regarding the latter, Sullivan has ignored the fundamental question of whether jurisdiction exists. Given that an adequate state law basis exists for the trial court's ruling below, and given that Sullivan could have made the same Eighth Amendment claim now raised in his direct appeal in 1990 under the reasoning of *Thompson v. Oklahoma*, 487 U.S. 815 (1988), his claim is procedurally barred and jurisdiction is lacking.

Regarding the former, the initial question presented, upon which review was granted, was based on Sullivan's statement that only two juvenile offenders are serving life sentences for non-homicide crimes committed at age thirteen, and that his "freakishly rare" sentence reflects a "national consensus" against life without parole for such offenders. Now, in his merits brief, Sullivan has revised not only the Question Presented to impliedly include homicides, but also increased the number of juveniles upwards to nine who committed serious offenses such as rape and homicides at age thirteen, and added in 64 more for those age fourteen, reflecting the total of 73 set forth in the only question that Sullivan now addresses.

That the data continue to evolve is understandable. Beyond the many difficulties with obtaining reliable data on juvenile sentences nationwide, even more serious problems exist with interpreting and attempting to make meaningful comparisons with available data. The fact that all reports upon which Sullivan relies have not been

subject to independent verification or review and were self-generated by those opposed to life sentences for juveniles, raises significant questions of accuracy and reliability that cannot be fully explored, let alone resolved, in this forum.

All these shortcomings aside, Sullivan entirely fails to address this Court's narrow proportionality analysis as it applies to his life sentence for sexual battery. He makes no attempt to show his sentence is grossly disproportionate under this Court's non-capital Eighth Amendment precedents. Rather, his sole argument is that *Roper* applies and necessarily dictates that his life sentence be deemed unconstitutional. For the reasons discussed below, Sullivan's sentence is neither grossly disproportionate to his crime nor unconstitutional under the Eighth Amendment's narrow proportionality principle.

STATEMENT OF THE CASE

Joe Sullivan, who had a lengthy juvenile record, was convicted by a jury in 1989 of brutally raping and robbing a 72-year-old woman in her home in Escambia County, Florida. The jury found him guilty of five counts: two counts of sexual battery, two counts of burglary of a dwelling, and one count of grand theft. [Tr. II 250-51][1] Because a grand jury had

[1] Citations to the trial transcript in Sullivan's direct appeal will appear as [Tr.* _], where "*" is the volume number and "__" is the page number. The transcript was part of the state court record in the 1990 appeal, but does not appear in the record in this case. Respondent is therefore proposing that it be lodged with this Court under Rule 32, Rules of the Supreme Court of the United States.

indicted Graham on the sexual battery counts,[2] he was tried and sentenced as an adult. [Tr. I 5-8; Tr. III 270-73]

On May 4, 1989, Sullivan and two other youths broke into the elderly victim's home to steal her valuables, taking jewelry and coins during the first burglary while she was away. [Tr. I 137-139] Later that same day, Sullivan and an accomplice returned when the victim was home. [Tr. I 165-166] While his accomplice distracted her, Sullivan entered through another door, threw a black slip over her head and threatened to kill her. [Tr. I 76-77] Sullivan then took her to her bedroom, where he removed her clothes and brutally beat and raped her both vaginally and orally. [Tr. I 77-82] The elderly woman sustained bruising, a laceration to the vulva, and a vaginal tear that required surgery as a result of the rape. [Tr. I 81-82, 107, 109]

At trial, the victim identified Sullivan from a voice exemplar. [Tr. I 88, 91] In addition, a neighbor testified that she saw Sullivan and his accomplice on the porch and tried to call the victim before calling the police. [Tr. I 51-56] The first police officer on the scene, Officer Dusty Cutler, also testified that she saw Sullivan run from the victim's home at the time of the rape. [Tr. I 117, 119] Sullivan's accomplice further testified that Sullivan had told him that he had beaten and raped the elderly woman. [Tr. I 167-68, 170] The police investigation discovered Sullivan's

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[2] Florida law provided, and continues to provide, that a juvenile who is indicted by a grand jury for a crime punishable by a life sentence is treated as an adult. *See* Fla. Stat. § 39.02(5)(c)1 (1989); *see* Fla. Stat. § 985.56 (2009).

palm print on a plaque found on the victim's bed. [Tr. I 184-85]

Based on the evidence, the jury convicted Sullivan. [Tr. II 250-51] His sentencing hearing was held on December 12, 1989. [Tr. III 266-78] The state highlighted Sullivan's extensive record, including prior offenses of burglary where Sullivan had killed a dog and a prior assault on one of his counselors. [Tr. III 269-270, 271] The presentence reports indicated that Sullivan had committed seventeen criminal offenses in the two years prior to the rape, including several serious felonies. [Tr. III 268-270] He had failed to adjust to juvenile detention and had assaulted other juveniles while in a commitment facility. As a result, he scored 846 points under Florida's sentencing guidelines, well over the 583 points needed to impose a life sentence. [Tr. III 269 (state attorney noting that "It's not even close.")]

The trial judge concluded that an adult sentence was appropriate and sentenced Sullivan to life in prison on the sexual battery counts and thirty-year sentences on the burglaries. [Tr. III 270-273] The judge concluded that "[t]he juvenile system has been utterly incapable of doing anything with Mr. Sullivan," even though Sullivan had been "given opportunity after opportunity to upright himself and take advantage of the second and third chances he's been given." [Tr. III 268] The burglary sentences were later reduced by the judge to fifteen years on December 14, 1989. [Tr. III 276-77]

Sullivan appealed his conviction, but his counsel filed a brief under *Anders v. California*, 386 U.S. 738 (1967). The First District Court of Appeal affirmed the conviction, and the Florida Supreme

Court dismissed review. *See Sullivan v. State*, 580 So. 2d 755 (table) (Fla. Dist. Ct. App. 1991); *Sullivan v. State*, 583 So. 2d 1037 (table) (Fla. 1991). In 1992, Sullivan filed a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850(b), which was denied in 1996. [JA 23-24] He did not appeal the denial of his first post-conviction motion. Despite being convicted in 1989, at no time did Sullivan pursue relief under this Court's decision in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), in which a plurality of this Court held the death penalty unconstitutional as applied to juvenile offenders under the age of sixteen.

Fifteen years later, in July 2007, Sullivan filed another post-conviction motion under Rule 3.850(b). This time he argued that this Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005), created a new constitutional right that entitled him to file an otherwise untimely post-conviction motion. The trial court held that Sullivan did not qualify for an exception to Florida's rules regarding timely motions and successive post-conviction motions because *Roper* did not create a new constitutional right that applied to his case. [JA 58-59] The trial court noted that the Florida Supreme Court had held that a life sentence without parole is "perfectly acceptable" under *Roper*, finding that decision applied only to death penalty cases. [JA 58-59] The court therefore dismissed Sullivan's post-conviction motion as untimely. [JA 59]

Sullivan appealed this denial to the First District Court of Appeal of Florida, which affirmed without opinion. *See Sullivan v. State*, 987 So. 2d 83

(Fla. Dist. Ct. App. 2008) (table).[3] Because the Florida Supreme Court lacks jurisdiction under Florida law to review per curiam affirmed decisions of the lower courts of appeal, *see Jackson v. State*, 926 So. 2d 1262, 1265 (Fla. 2006), Sullivan filed a petition for writ of certiorari, which this Court granted on May 4, 2009.

SUMMARY OF ARGUMENT

This Court should not review the merits of Sullivan's claims because they are procedurally barred under state law. Because the trial court ruled that Sullivan's second post-conviction motion was time barred based on an adequate and independent state law ground, review of his Eighth Amendment claims is foreclosed in this Court.

Florida Rule of Criminal Procedure 3.850(b), with limited exceptions, imposes a two-year limitation for the filing of post-conviction motions in noncapital cases. The trial court's decision that this rule procedurally barred Sullivan's second post-conviction motion, and that no exception applied, was an adequate state law ground that precludes review of Sullivan's federal claims. Moreover, Sullivan's second post-conviction motion, asserting *Roper* as the basis for habeas relief, was untimely because he could have made the same claim as part of an initial motion within the procedural time limits set by Florida law, pursuant to this Court's reasoning in *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

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[3] The Florida First District Court of Appeal three-judge panel in this case consisted of Judges Wolf, Lewis, and Thomas. Judge Wolf authored the opinion released two months earlier in *Graham v. State*, 982 So. 2d 43 (Fla. Dist. Ct. App. 2008).

Even if Sullivan's Eighth Amendment claims were not procedurally barred, that Amendment contains no textual or jurisprudential basis for a categorical ban on life sentences without parole for juveniles of a certain age who commit heinous, violent crimes against vulnerable victims, as Sullivan did. He completely ignores this Court's narrow proportionality jurisprudence as it applies to prison term sentences. This Court has repeatedly held that a sentence of a term of years violates the Eighth Amendment only in "exceedingly rare" cases in which an inference of "gross disproportionality" can be drawn. No inference of gross disproportionality exists for a life sentence arising from the brutal crime of sexual battery, particularly given this Court's characterization of rape as an especially heinous crime, second only to murder. Moreover, this Court has never factored in age in the gross disproportionality analysis, and should not do so in considering particularly violent adult crimes such as rape.

Because no inference of gross disproportionality is raised by Sullivan's sentence, the Court need not conduct a comparison of sentences for similar crimes within Florida or between Florida and other states. Even if it did, however, Florida has imposed life sentences on juveniles for crimes of greater and lesser seriousness than Sullivan's brutal rape, and 42 states permit the imposition of life without parole on a juvenile, with 38 states allowing for such a sentence for non-homicides. Admittedly, the number of juveniles who received these sentences is fewer as the age of the offender declines; but that fact does not undermine the societal consensus that juveniles of even Sullivan's age may be treated as adults in the criminal justice system. Indeed, other courts have affirmed life sentences for juveniles for the especially

heinous crime of sexual battery. No national trend exists moving away from harsh sentences for serious crimes such as rape; in fact, a nationwide trend of getting tougher on crime has occurred over the last two decades since Sullivan was sentenced. Given this national trend, no basis exists for this Court to make comparisons with international law. Even when national comparisons are made, Sullivan cannot show that the sentence for the violent crimes he committed was grossly disproportional.

Sullivan's sole reliance on *Roper* is misplaced. He bases his entire legal argument on the premise that life without parole for a juvenile is equivalent to the death penalty, and therefore the reasoning of *Roper* must apply to his case. These arguments ignore this Court's repeated acknowledgement, including in *Roper* itself, that "death is different." The Court's death penalty jurisprudence setting categorical rules for the imposition of the ultimate penalty does not apply to prison sentences. Virtually every court that has been urged to extend *Roper*'s reasoning to non-capital sentences has refused to do so because death is the only penalty for which it is appropriate to draw categorical exclusions for certain persons or crimes.

Moreover, Sullivan cites a vast array of medical and social science research showing that young juveniles are developmentally different, a fact that state legislatures have known for decades. In determining prison terms, state sentencing laws include age as a factor in deciding the appropriate length of sentence, and all states have juvenile justice systems and programs that attempt to rehabilitate juveniles. For some juveniles and some especially heinous adult-like crimes, however, states have overwhelmingly decided that adult prosecution and adult sentences are appropriate. Here, Sullivan was

indicted by a grand jury and transferred to Florida's adult system, a determination he has not challenged. He now seeks to displace state criminal justice systems by categorically excluding adult sentences resulting from state transfer systems. To do so would eviscerate the core purpose of these systems, which is to mete out adult punishment for adult-like crimes.

The states have sovereign responsibility over their own criminal justice systems, and their legislatures decide the appropriate mix of punishment, deterrence, incapacitation, and rehabilitation in determining appropriate prison sentences. This Court has consistently recognized that only in exceedingly rare cases should the exceptional deference owed to states be overridden. Sullivan's is not such an exceedingly rare case. Instead, his was an intentional, violent crime committed against a vulnerable 72-year-old woman by a juvenile with a prior history of violence and criminal behavior. No basis for a categorical rule prohibiting life sentences for juveniles exists under these circumstances, and Sullivan's reliance on this Court's death penalty jurisprudence is unavailing.

In effect, Sullivan is making the unwarranted suggestion that this Court should order the reconstruction of state criminal systems by requiring the re-institution of the right to parole in some states and the federal government, as well as the prohibition of life without parole sentences for juveniles of a certain age. This Court should instead defer to the majority of states' determination that for some particularly violent crimes, juveniles can be subject to adult prosecution and sentencing, which can include life-without-parole sentences for violent rapes. Sullivan's categorical Eighth Amendment argument to the contrary is unworkable and should be rejected.

ARGUMENT

I. The Trial Court's Ruling – that Sullivan's Post-conviction Motion was Procedurally Barred – is Based on an Independent and Adequate State Law Ground That Forecloses Review in This Court.[4]

Florida Rule of Criminal Procedure 3.850(b), with three exceptions, imposes a two-year limitation for the filing of post-conviction motions in noncapital cases. The trial court ruled that Sullivan's claim could be considered only under the second exception – whether the law had established a new, fundamental, retroactive constitutional right. [JA 57-58][5] The court held that the decision in *Roper v. Simmons*, 543 U.S. 551 (2005), "established only one new constitutional right, the right for a juvenile not to be given the death penalty." [JA 58] Because *Roper* did not establish that a juvenile could not be sentenced to life without

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[4] This Court granted certiorari on both of the questions presented, the second of which goes to the timeliness of Sullivan's state court post-conviction motion. The second question is not listed in Sullivan's merits brief or addressed therein. Ordinarily, such a failure is construed as abandonment of the question. *See Posters "N" Things, Ltd. v. United States*, 511 U.S. 513, 527 (1994); *United States v. Int'l Bus. Machs.*, 517 U.S. 843, 855 n.3 (1996). The State will address the question because Sullivan's post-conviction motion was procedurally barred under state law, and that bar is fatal to this Court's review.

[5] The rule also provides that "[a] motion to vacate a sentence that exceeds the limits provided by law may be filed at any time." This language "refers to a sentence which is above the legislative maximum for the prescribed crime." *Wahl v. State*, 460 So. 2d 579 (Fla. Dist. Ct. App. 1984).

parole, the trial court concluded that Sullivan's claim was procedurally barred under Rule 3.850(b). [JA 58][6]

As will be shown, the trial court properly dismissed Sullivan's post-conviction motion on an independent and adequate state law ground, and this Court is therefore without jurisdiction to review his federal claim.

A. The trial court's ruling rests on a state law ground that is independent of the federal question and adequate to support the judgment.

This Court's decisions have established that a procedural default will bar consideration of a federal claim on either direct or habeas review if the state court holds that its judgment rests on a state procedural bar. The state law ground must be "independent" of the merits of the federal claim and an "adequate" basis for the court's decision. *Harris v. Reed*, 489 U.S. 255, 260-263 (1989); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). "In the context of direct review of a state court judgment, the independent and adequate state ground is jurisdictional." *Coleman*, 501 U.S. at 729. The bar does not hold in federal habeas proceedings if the petitioner can show cause for the default and prejudice resulting therefrom. *See Teague v. Lane*, 489 U.S. 288, 298 (1999); *Coleman*, 501 U.S. at 750 (1991). Sullivan has not sought federal habeas review.

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[6] As pointed out in the State's brief in opposition, state and federal courts have overwhelmingly held that *Roper* does not extend to juveniles serving long prison sentences or life without parole. [Brief in Opp. 11-13 & n.5]

As noted in *Harris*, "the state court must have actually relied on the procedural bar as an independent basis for its disposition of the case." 489 U.S. at 261-262 (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985)). Here, the trial court's ruling, affirmed without opinion by the First District Court of Appeal, indisputably finds Rule 3.850(b) is a procedural bar. Under this Court's case law, the judgment at issue rests on an independent and adequate state law ground, and therefore this Court lacks jurisdiction to review it.

Harris cites two cases that provide guidance as to what is an "independent" and "adequate" basis for a state procedural default ruling. *See Harris*, 489 U.S. at 261 n.6. The first case cited, *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988), reasoned that a state procedural ground is not adequate unless the rule is "strictly or regularly followed." *Johnson* relied on previous decisions holding that where state procedural rules are not applied evenhandedly to similar claims, they do not constitute an adequate state ground barring Supreme Court review. *See, e.g.*, *Hathorn v. Lovorn*, 457 U.S. 255, 262-265 (1982); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964). Nothing in Sullivan's petition or merits brief suggests that the trial court's denial of relief was inconsistent with the plain language and limitations of Rule 3.850(b), or that Florida courts do not strictly and evenhandedly observe those limitations.

The second case *Harris* cites, *Ake v. Oklahoma*, 470 U.S. 68 (1985), addressed the independence prong of the test. In that case, the Oklahoma appellate court held that a criminal defendant had waived his request for psychiatric assistance at trial by not repeating that request in his motion for a new trial. This Court

found that the Oklahoma waiver rule did not, as a matter of Oklahoma law, apply to fundamental error, and that a violation of a constitutional right was fundamental error under Oklahoma law. Oklahoma could not hold the defendant's claim for psychiatric assistance procedurally barred without ruling, explicitly or implicitly, on the defendant's constitutional right to psychiatric assistance. *See id.* at 74-75. Because resolution of the state procedural question was dependent on determination of this right, the Oklahoma court's decision was not independent of federal law. *Id.* For the same reason, any reliance on *Ohio v. Reiner*, 537 U.S. 17 (2001), is also misplaced. In deciding whether a witness was wrongly granted immunity under state law, the Ohio Supreme Court construed the Fifth Amendment to decide the issue.

Here, in contrast, Rule 3.850(b) does not allow a Florida court hearing a post-conviction motion to decide a claim of an as-yet-unrecognized constitutional right or to decide whether the reasoning of this Court in a particular case should be *extended* to different facts and circumstances to create a new right. The trial court here read *Roper* and drew the simple and obvious conclusion that the right it created applied only to death-sentenced juveniles. Indeed, *Roper* permitted a life without parole sentence for a juvenile. The trial court's decision is thus independent of the merits of Sullivan's federal claim that he has a constitutional right not to be sentenced to life without parole. The trial court did not decide whether such a right exists under the Eighth Amendment and was not permitted to do so by Rule 3.850(b). Sullivan has not contended that the trial court's adherence to Rule 3.850(b) violates a

constitutional right, and therefore *Ake* provides no basis for this Court's review.

B. State courts should not be compelled to adjudicate claims of new constitutional rights in post-conviction proceedings.

Florida, like every other state, has the strongest interest in bringing litigation, including criminal appeals, to a close at some reasonable point. Rule 3.850(b), with certain carefully defined exceptions, promotes Florida's interest in finality. Sullivan does not contend that the rule does not serve a legitimate state interest and in fact has avoided any meaningful discussion of whether the judgment below rests on an independent and adequate state law ground. Nevertheless, the point is jurisdictional, it bids fair to rewrite the rules for post-conviction relief, and it must be addressed.

Any argument asserting the trial court's ruling is not independent of the merits of Sullivan's constitutional claim is in fact an argument that no ruling under the second exception to Rule 3.850(b) can ever be independent when it declines to *extend* case law to recognize a new right. No matter how sympathetically Sullivan's petition and merits brief may be read, they clearly ask that the reasoning of *Roper* be extended to juveniles sentenced to life without parole. Indeed, if *Roper* had determined that the Eighth Amendment prohibits sentencing juveniles to life without parole, there would be no need for Sullivan to revisit state, federal, and international law, or to present all the sociological and psychological studies set forth in support of his argument. What Sullivan's logic implicitly means is

that any decision of this Court whose reasoning might arguably be extended to different facts and circumstances must fall outside Rule 3.850(b). Such an exception swallows the rule. Florida courts (and all others following a rule or post-conviction procedure similar to Rule 3.850(b)) could no longer confine themselves to applying new rights that operate retroactively, but would be compelled to adjudicate new claims based on the extrapolation of those rights.

The invalidation of Rule 3.850(b) in this manner is unwarranted and certainly "antithetical to the doctrinal consistency" that should characterize "sensitive issues of federal-state relations." *See Michigan v. Long*, 463 U.S. 1032, 1039 (1983). To require state courts in post-conviction proceedings to consider federal claims based on the extrapolation of new rulings would set the stage for unending litigation. Appeals of those rulings would inevitably make their way to this Court, greatly increasing its burdens. *See Ake*, 470 U.S. at 75. Moreover, such an attenuation of the independent and adequate state law ground would also remove an obstacle to habeas review in federal district courts, thereby increasing their burdens. *See Coleman*, 501 U.S. at 729-730 (the independent and adequate state ground doctrine "applies to bar federal habeas when a state court decline[s] to address a prisoner's federal claims because the prisoner ha[s] failed to meet a state procedural requirement."). State and federal courts will find themselves adjudicating thousands of cases that heretofore have been procedurally barred.

Sullivan may argue in reply that the Court only infrequently recognizes new, retroactive constitutional rights. That argument is debatable, but it also misses the point. Under Sullivan's view, the

meaning and reach of every such decision will be open to exploration in post-conviction proceedings in every state and federal court. That the argument for relief may be weak or farfetched will hardly deter those challenging a conviction or sentence. It is the opportunity to litigate, not the merit of the argument, that will engender thousands of new cases.

C. This case presents no basis for upsetting long-established state post-conviction procedures because Sullivan's federal constitutional claim could have been asserted at trial and on direct appeal.

No exception to Rule 3.850(b) should be made for Sullivan's claim for the additional reason that it could have been raised at trial and on direct appeal. A plurality of this Court, considering state sentencing laws and the developmental differences between adolescents and adults, held in 1988 that execution of juveniles under sixteen years of age violated the Eighth Amendment's prohibition on cruel and unusual punishment. *Thompson v. Oklahoma*, 487 U.S. 815 (1988). Justice O'Connor concurred in the judgment because she did not believe that Oklahoma, in providing for juveniles to be tried as adults, had actually considered whether the death penalty should be imposed on those younger than 16 years of age.

Considering the reasoning of the plurality and Justice O'Connor, Sullivan could have made the same argument he makes now in 1989 or in a *timely* post-conviction motion. This Court's 2005 decision in *Roper* adds nothing that supports Sullivan's claim in a way

that *Thompson* does not.[7] In fact, *Roper* does nothing more than extend the rationale of *Thompson* to include sixteen and seventeen-year-old offenders. Because he failed to timely assert this argument, Sullivan's present claim should be barred.[8]

Finally, Sullivan has argued that the Court should hear his case because it is unlikely that another case involving a thirteen-year-old sentenced to life without parole for a crime that is not a homicide will ever come before this Court. This plea is without merit. First, it constitutes no exception to the *jurisdictional* bar of a judgment based on independent and adequate state law grounds. Second, neither *Thompson* nor *Roper* involved a thirteen-year-old adolescent, but their holdings nevertheless applied to that age group.

This Court may confront a case in which it will decide, as it did in *Roper*, whether the Eighth Amendment prohibits life sentences for adolescents as a group. It may do so in the pending case of *Graham*

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[7] The following year, in *Stanford v. Kentucky*, 492 U.S. 361 (1989), the Court upheld capital punishment for two offenders aged 16 and 17. *Stanford* did nothing to diminish the ruling in *Thompson*.

[8] Sullivan offers no reason why the Court should excuse his 16-year delay. It is not the Court's practice to overlook such extreme tardiness. In *Coleman*, for example, the petitioner filed his notice of appeal from a state court habeas decision three days late. The Virginia Supreme Court then dismissed his appeal. 501 U.S. at 727-728. Coleman thereafter sought review of his constitutional claims in a habeas action in federal court. *Id.* This Court held his federal constitutional claims were procedurally barred. Although Sullivan notes that his appellate counsel filed an *Anders* brief, he has never asserted in a post-conviction motion that his counsel was ineffective for not raising *Thompson v. Oklahoma*.

v. State, Case No. 08-7412, or upon review of one of the many other cases refusing to extend *Roper* to a life-sentenced juvenile. Sullivan will have the benefit of a decision, if it creates a new and retroactive constitutional right applicable to his circumstances. Meanwhile, as the Court has said, clemency is "the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Herrera v. Collins*, 506 U.S. 390, 412 (1993).

II. Sullivan Entirely Ignores This Court's Eighth Amendment Proportionality Jurisprudence, Which Supports a Life Sentence Without Parole for the Violent Crime of Sexual Battery.

Even if Sullivan's constitutional claim is not time barred, it should be rejected. Inexplicably, Sullivan entirely ignores narrow principles of proportionality review that apply to prison sentences, mentioning only two of the Court's six cases in a single perfunctory footnote on page 41 of his brief. [Br. 41 n.53][9]

In doing so, Sullivan disregards thirty years of non-capital precedents addressing whether a prison sentence for a term of years contravenes the prohibition against cruel and unusual punishment. In these cases, the Court applied a "narrow proportionality" principle, noting that successful challenges based on excessiveness of incarceration

[9] Indeed, Sullivan's footnote inaccurately describes the *Harmelin* case as one involving an "aggravated non-homicide offense" when the mandatory life sentence without parole upheld in that case was for possession of 672 grams of cocaine. *See Harmelin*, 501 U.S. at 996.

will be "exceedingly rare." *See, e.g., Lockyer v. Andrade*, 538 U.S. 63, 73 (2003). The threshold determination involves a comparison of the crime committed and the sentence imposed, and no more, to determine whether an inference of "gross disproportionality" exists. *Harmelin v. Michigan*, 501 U.S 957, 1005 (Kennedy, J., concurring). This "gross disproportionality principle reserves a constitutional violation for only the extraordinary case." *Lockyer*, 538 U.S. at 76. Only in the extraordinarily rare case where an inference of gross disproportionality is shown does the Court proceed to the next step and consider comparisons of intra- and interjurisdictional data. *See Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring).

This Court has never considered age in the threshold determination as to whether an inference of gross disproportionality exists. In fact, the analysis focuses on the nature of the offense and the severity of the sentence given, not on the individual characteristics of the offender. Admittedly, at a certain point an offender's young age could play into the gross disproportionality analysis for prison sentences in ways it does not for adult offenders. As the next two sections explain, however, this Court's established analysis, as applied to Sullivan's crimes and sentence, raises no inference of gross disproportionality.

As such, jurisdictional comparisons are unnecessary in this case; but even if they are undertaken, they demonstrate that state legislatures have already woven age deep into the fabric of their criminal justice systems by creating separate juvenile justice systems and taking age into account in decisions as to whether to charge and sentence a

juvenile offender as an adult. There is nothing demonstrating that a majority of states have prohibited life sentences for crimes such as Sullivan's at his age level. The interjurisdictional comparisons do not support the establishment of either a categorical line or an individualized finding that Sullivan's sentence is unconstitutional.

A. Under this Court's precedents, no inference of gross disproportionality exists for the violent crime of sexual battery.

As a threshold matter, Sullivan's life sentence is not grossly disproportionate to the violent and brutal sexual batteries he committed against the 72-year-old victim, particularly when compared to the cases in which this Court has upheld similar sentences for lesser, non-violent property crimes. In five of its six cases involving proportionality review of prison terms, this Court affirmed lengthy, oftentimes mandatory sentences, many of them for life terms:

(a) a mandatory life sentence (with the possibility of parole) for three theft-related felonies (under a recidivist statute) which, in the aggregate, totaled less than $230, *Rummel v. Estelle*, 445 U.S. 263 (1980);
(b) a 40-year sentence for possession and distribution of less than nine ounces of marijuana, *Hutto v. Davis*, 454 U.S. 370 (1982);
(c) a mandatory life sentence (without the possibility of parole) for possession of 672 grams of cocaine, *Harmelin v. Michigan*, 501 U.S. 957 (1991);

(d) a 25-year-to-life sentence pursuant to California's mandatory Three Strikes law where the triggering offense was felony grand theft of three golf clubs amounting to approximately $1200, *Ewing v. California*, 538 U.S. 11 (2003); and

(e) two consecutive 25-year-to-life sentences under California's mandatory Three Strikes law for two counts of petty theft of videocassettes valued at approximately $150, *Lockyer v. Andrade*, 538 U.S. 63 (2003).

The only instance where this Court struck down a prison sentence as unconstitutional was a *mandatory life sentence without parole* for a seventh non-violent felony, the last being a $100 bad check charge. *See Solem v. Helm*, 463 U.S. 277 (1983). In *Solem*, as in all cases involving an application of the narrow "gross disproportionality" standard, the Court has found no constitutional violation if, at the threshold, the seriousness of the offense when compared with the sentence given does not raise an inference of gross disproportionality. An offense's gravity, including the measure of the harm caused to the victim and the violent nature of the crime, are considered. *See id.* at 292. Heretofore, the Court has considered nothing more.

Sullivan's brutal rape of an elderly woman in her own home qualifies as one of the most serious and violent crimes in our society, and is everywhere acknowledged to be one that inflicts serious physical and emotional harm to the victim. *See Kennedy v. Louisiana*, 128 S. Ct. 2641, 2658 (2008) ("Rape has a permanent psychological, emotional, and sometimes physical impact on the child"); *Coker v. Georgia*, 433

U.S. 584, 597-598 (1977) ("[Rape] is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim . . . Short of homicide, it is the 'ultimate violation of self."); *see also Pinson v. Morris*, 830 F.2d 896, 897 (8th Cir. 1987) ("The state is well within its rights, as far as the federal Constitution is concerned, in regarding the crimes of rape and forcible sodomy as deserving of special and severe condemnation.").

Sullivan's life sentence for the two violent sexual battery counts is not a grossly disproportionate sentence under this Court's precedents. If a mandatory life sentence without parole for the mere passive possession of 672 grams of cocaine is constitutional, *Harmelin*, and a mandatory life sentence with the possibility of parole for three theft-related felonies is constitutional, *Rummel*, then it logically follows that a similar sentence for a violent sexual battery is not grossly disproportionate. Sullivan's violent sexual battery is far more serious than the non-violent, passive crimes in *Harmelin* and *Rummel*, for which life sentences have been upheld. Indeed, comparing Sullivan's crime and sentence to those in *Hutto, Ewing*, and *Andrade* leads to one unyielding conclusion: no inference of gross disproportionality exists.

Although the Court has not considered age (or any other individual characteristic) in the gross disproportionality analysis, in this case it raises no inference of a constitutional violation. Here, Sullivan's crime was so serious that an inference can be drawn that he intended to commit these heinous acts with knowledge of their seriousness. *See, e.g., Roper*, 543 U.S. at 600 (O'Connor, J., dissenting) (arguing that

while some juveniles may not be sufficiently culpable to warrant the death penalty, "an especially depraved juvenile offender may nevertheless be just as culpable as many adult offenders considered bad enough to deserve the death penalty."). Some crimes, such as murder and rape, can be sufficiently horrific that a state's criminal justice system, as formulated by its legislature and implemented by its trial courts, can conclude that a juvenile offender was sufficiently mature to commit those crimes with adult intent. *See id.* at 601. As such, Sullivan – even if he attempted to do so – does not survive the initial threshold, ending the constitutional analysis at this point.

B. Neither comparative jurisdictional analysis nor Sullivan's "objective indicia" support a constitutional violation.

Because Sullivan's sentence is not grossly disproportionate, it is unnecessary to consider intra- and interjurisdictional analyses, which "are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence available leads to an inference of gross disproportionality." *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring). Sullivan, however, argues that considering his age at the time of the crimes, the imposition of a life sentence is a "freakishly rare" occurrence in most states.

Sullivan does not explicitly engage in the type of jurisdictional analysis this Court has traditionally considered in its non-capital cases. Instead, citing only the Court's death penalty precedents, he claims that "objective indicia" show a national consensus exists against *ever* imposing a life sentence without parole

upon young juveniles regardless of their offense. [Br. 42-57] Neither a proper jurisdictional analysis nor Sullivan's "objective factors" support a constitutional violation. Moreover, even if this Court were to deem it necessary to proceed to the second step of the "gross disproportionality" analysis and conduct an interjurisdictional analysis of the states, it would find that all states consider age as a crucial factor throughout their criminal justice systems, from separate juveniles systems to decisions regarding adult charges and sentences. Such an analysis provides no justification for the age-based categorical Eighth Amendment rule Sullivan is seeking.

First, turning to intrajurisdictional analysis, life sentences without parole may be imposed in Florida for all life and many first-degree felonies, which involve a wide variety of crimes.[10] Juveniles may be tried as adults for these crimes, and if convicted, can be subject to the same sentences as adults. *See, e.g.,* Fla. Stat. §§ 985.556-557 & 985.56, 985.565(4) (2009); §§ 39.02 & 39.04 (1989). These categories of felonies are comparable to Sullivan's sexual battery, a number being less violent than a sexual battery. As such, life sentences may be imposed on juveniles who commit crimes of both greater and lesser violence in Florida.

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[10] First-degree felonies that are subject to life sentences are provided by statute. *See, e.g.,* Fla. Stat. § 787.01 (kidnapping a child under 13); Fla. Stat. § 812.13 (robbery committed while carrying a firearm); Fla. Stat. § 812.133 (carjacking while carrying a firearm); Fla. Stat. § 817.568(10) (certain criminal use of personal identification information while misrepresenting self as law enforcement officer); Fla. Stat. § 893.135 (first degree felony trafficking of illegal drugs).

As to actual sentencing data, the Florida Department of Corrections reports that the number of persons serving life sentences for sexual battery in Florida is 478. Moreover, out of 301 juvenile offenders currently serving life sentences in Florida, more than half were sentenced for a non-homicide offense – including dozens for offenses less violent than Sullivan's.[11] Thirty-nine juveniles were given life sentences for sexual battery.[12] Thus, life sentences are both theoretically available and actually imposed in Florida, and are not isolated or rare events. Sullivan's claim that this type of sentence is rare in Florida cannot be sustained.

Turning to interjurisdictional comparisons, Florida's sentencing laws and rates are not out of line with national data, especially given its comparatively higher population (nearly 19 million) and juvenile crime problem.[13] A supermajority of states – 42 – permits the imposition of life without parole on a

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[11] Data from Bureau of Research & Data Analysis, Fla. Dep't of Corrections, June 10, 2009. Approximately 150 juveniles are serving life sentences in Florida for non-homicides, including offenses such as burglary, robbery and carjacking.

[12] *See id.*

[13] *See, e.g.,* Curt Anderson, *Police Round Up Youths in Slaying of British Tourist*, AP, Sept. 16, 1993; Mike Clary, *Florida Tries to Rescue Sunny Image as Violence Gets Worse,* L.A. Times, Sept. 29, 1993, at A1; Jim Mulvaney, *From Youngster to Gangster: How Florida Boy Shot a Tourist*, L.A. Times, Jan. 16, 1994, at A1; *Germans Wary of Visiting Florida*, St. Petersburg Times, May 18, 1994, at 1E; *Behind the mask of Florida; Ranked as one of top three most dangerous places to visit*, Hamilton Spectator (Canada), Dec. 13, 1994, at A3.

juvenile.[14] Of those, 38 states permit that sentence for crimes other than those resulting in the death of a victim.[15] Notably, Sullivan's concession that at least 40 states allow life without parole for fourteen-year-olds, 27 of which allow it for thirteen-year-olds, is telling. [Br. 49] Sullivan characterizes this potential as "broad theoretical availability," thus conceding that the "sentence available" for the crime he committed at age thirteen would be life without parole in 27 of the 50 states. This data reflects consensus rather than condemnation, more so given no contrary trend exists.

Courts nationwide have sentenced violent offenders to life for similar sexual battery crimes.[16] In

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[14] *See, e.g.,* Stephanie Chen, *Teens Locked Up for Life Without a Second Chance,* http://www.cnn.com/2009/CRIME/04/08/teens.life.sentence/index.html (last visited Sept. 3, 2009).

[15] The Petitioner in *Graham v. Florida* accepts these figures, and they are acknowledged by Sullivan as well. *See* Brief for Petitioner at App'x C, *Graham v. Florida*, No. 08-7412 (Jul. 16, 2009); Br. at 49-50.

[16] *See, e.g., Smith v. State*, 691 S.W.2d 154 (Ark. 1985) (affirming life sentence for rape by 16-year-old offender); *Miller v. State*, 846 A.2d 238 (Del. 2004) (affirming life sentence for unlawful sexual intercourse in the first degree); *Henry v. State*, 342 S.E.2d 499 (Ga. App. 1986) (affirming life sentence for rape of 78-year-old woman); *State v. Cross*, 978 P.2d 227 (Idaho 1999) (affirming life sentence for sexual battery); *State v. Foley*, 456 So. 2d 979, 983 (La. 1984) (affirming 15-year-old's life sentence for rape because "[a]ggravated rape deserves a harsh penalty; it is one of the most violent felonies a person can commit."); *Phipps v. State*, 385 A.2d 90 (Md. Ct. Spec. App. 1978) (affirming life sentence for rape); *People v. Lemons*, 562 N.W.2d 447 (Mich. 1997) (holding that life sentence for first degree sexual offense was proportional and not excessive due to "perversity" of the acts); *State v. Green*, 502 S.E.2d 819 (N.C. 1998) (holding that life sentence for 13-year-old convicted of rape was not cruel and unusual (Continued …)

addition, a 2005 New York Times study found that more than 25,000 offenders are serving life for non-homicide crimes like rape, kidnapping, armed robbery, assault, extortion, burglary, and arson (16% of lifers were convicted of drug trafficking).[17] Even with such a large number of life-sentenced inmates for non-homicide crimes, however, there is no available data on the number of juveniles nationwide serving a life sentence for the crime of rape.

Life without parole is within the mainstream of state sentencing practices for his crime. No clear national trend indicates that states are moving away from life without parole sentences for juveniles.[18] Indeed, one study (by a group opposed to juvenile life without parole) reports that nationally the number of juvenile offenders serving life sentences in the last 25 years has more than quadrupled, with large states such as Pennsylvania, California, and Michigan accounting for the most juveniles serving life without parole sentences.[19] In this study, Florida ranks sixth

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punishment); *State v. Smiley*, 689 N.W.2d 427, 429 (S.D. 2004) (affirming two concurrent life sentences for rape of a 7-year-old against Eighth Amendment challenge); *State v. Woodall*, 385 S.E.2d 253, 363 (W. Va. 1989) (affirming two life without parole sentences for rape because "any sentence short of [death], including life without parole, for serious crimes against the person, passes constitutional muster.").

[17] *See* Adam Liptak*, To More Inmates, Life Term Means Dying Behind Bars*, N.Y. Times, Oct. 5, 2005 at 1-1.

[18] *See, e.g.,* Ashley Nellis & Ryan S. King, *No Exit, The Expanding Use of Life Sentences in America*, The Sentencing Project (July 2009) (hereinafter "No Exit").

[19] *See id.* at 6, 17.

among states in raw numbers and is below the national average (ranked 29th) with respect to juvenile life without parole sentences as a percentage of its entire life-sentenced population.[20] According to another study, 7.2% of youth offenders nationwide are serving life without parole for crimes other than homicide, such as kidnapping, property crimes, sex crimes (like Sullivan's sexual battery), and other violent crimes.[21]

Finally, Sullivan's analysis of "objective indicia" involves three points that are subject to sharp critique. First, Sullivan claims that juvenile life without parole is simply an "unconsidered consequence" of nationwide legislative trends and

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[20] *See id.*

[21] *See The Rest of Their Lives: Life without Parole for Child Offenders in the United States*, Human Rights Watch & Amnesty Int'l 27 (2005); *see also Calderon v. Schribner*, 2009 WL 89279, *4–6 (E.D. Cal. Jan. 12, 2009) (upholding life without parole for a 17-year-old convicted of kidnapping for ransom); *State v. Warren*, 887 N.E.2d 1145 (Ohio 2008) (upholding life without parole for 15-year-old convicted for kidnapping and rape); *State v. Standard,* 569 S.E.2d 325 (S.C. 2002) (upholding life without parole for burglary committed by 15-year-old); *State v. Green,* 502 S.E.2d 819 (N.C. 1998) (holding life sentence for 13-year-old for burglary and rape not grossly disproportionate to the crime); *see also Jackson v. State*, Case No. 10-07-00089-CR, 2008 Tex. App. LEXIS 698, *15–20 (Tex. App. Jan. 30, 2008) (upholding life sentence, perhaps with possibility of parole, for juvenile offender convicted of aggravated robbery); *State v. Ira*, 43 P.3d 359 (N.M. 2002) (aggregate adult sentence of 91 and one-half years' for sexual battery offenses committed by a 15 year-old not grossly disproportionate); *Hawkins v. Hargett*, 200 F.3d 1279 (10th Cir. 1999) (sentencing of 13 year-old to 100-year term (consecutive sentences) for non-homicide crimes not considered grossly disproportionate).

changes that resulted in most states (a) eliminating parole and increasing the length and certainty of actual sentences imposed; and (b) allowing juveniles who committed certain crimes to be prosecuted and sentenced as adults in criminal courts. [Br. 44-47] According to Sullivan, these broad changes – that specifically addressed the types of crimes he committed – are nothing more than an "adventitious" result of "two distinct movements" that, through inadvertence or happenstance, swept juvenile offenders into adult courts and adult sentences.

This claim, however, runs counter to the fundamental notion of what legislatures do, which is to act incrementally and purposefully with awareness of the laws they have previously enacted. *See, e.g., Albernaz v. U.S.*, 450 U.S. 333, 341-342 (1981) (courts assume legislature knows of it prior enactments and that "silence" on a topic creates no presumption to the contrary). Legislatures nationwide clearly intended to make violent and serious crimes subject to greater sanctions for adults and juveniles alike. Florida is no exception. The state consciously and directly confronted its juvenile crime problem by allowing some juveniles to be prosecuted in adult court, subjecting them to adult sentences.[22] It is wholly

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[22] *See, e.g.,* Fla. Stat. §§ 775.082(8)(d), 921.002(1)(g), 985.227 (1)-(2), & 985.233(1)(b) (2003); *see also* Linda Kleindienst & Diane Hirth, *House Gets Tough with Juveniles*, Sun Sentinel (Ft. Lauderdale, Fla.), Nov. 4, 1993, at A1 (reporting a 119-0 vote on a special session bill that required juveniles to be tried as adults in some cases); Jerry Fallstrom, *Young Killers Fuel Rise in Violent Crime; Florida's Crime Figures for 1993 Bolster Arguments in Tallahassee for a Get-Tough Approach to Teen Criminals*, Orlando Sentinel, Mar. 17, 1994, at A1; William Booth, *Florida Wants to be on Cutting Edge of Get-Tough Crime Remedies*, Wash. Post, Feb. 17, 1994, at A3; David Osbourne, (Continued …)

implausible that the legislature simply had no idea, and would be surprised to know, that its sentencing laws subject juveniles to increased incarceration, including life sentences. Indeed, Sullivan's own life sentence underscores the point that life sentences for juveniles have been available over the past twenty years, even for non-homicides; had the Florida legislature believed this result was simply an "adventitious" and unintended consequence, the laws would have been changed. They have not; indeed, proposed changes to do so have failed.[23]

Second, Sullivan points out that a few states (eight by his calculation) have set a minimum age for the imposition of life without parole (varying from sixteen to eighteen, mostly for murder), and that only one state, Massachusetts, allows this punishment for murders by juvenile offenders fourteen or older. [Br. 47-49] Sullivan claims the absence of any statute "expressly" authorizing life sentences against thirteen year-olds reflects a national consensus against such punishment.

As noted, however, Sullivan concedes that at least 40 states allow life without parole for fourteen-year-olds, 27 of which allow it for thirteen-year-olds.[24]

Florida turns the screws on offenders, The Independent (U.K.), Apr. 3, 1994; Jill Jorden Spitz, *The Party's Over for Young Offenders, But Critics are Wary*, Orlando Sentinel, Jan. 8, 1995, at A1.

[23] *See, e.g., No Exit, supra* note 18, at 41; *see also* H.R. 2289, 111th Cong. (1st Sess. 2009) (federal bill to give meaningful parole to juvenile offenders).

[24] Sullivan further notes that "[s]ome death-penalty States explicitly abolished the death penalty for juveniles by provisions (Continued …)

In fact, 42 states[25] make life without parole available against juveniles.[26] In addition, Sullivan does not indicate which states make parole generally available for these crimes and which have modified or eliminated parole (states with parole systems are less likely to allow life sentences without parole). In short, Sullivan's argument is unpersuasive on this point.

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that arguably authorize life without parole," listing Illinois, Maryland, Nevada, New Jersey, North Carolina, Ohio and Virginia. [Br. 48 n.61]

[25] The 42-state figure is often credited to the data in the report *The Rest of Their Lives*, *supra* note 21. *See, e.g.*, Chen, *supra* note 14. Other studies have found this figure to be 43 states. *See* Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law & Practice*, 42 U.S.F. L. Rev. 983, 1031-1044 (2008) [hereinafter *Global Law & Practice*]. Still other reports place the figure at 44 states. *See Juvenile Life Without Parole*, http://www.pbs.org/wnet/religionandethics/episodes/january-30-2009/juvenile-life-without-parole/2081/ (last visited Sept. 8, 2009). The details and distinctions of states' criminal codes and sentencing law, as well as personal interpretations of those statutes by the studies' authors, might explain the reason for the variety of figures. For instance, the 43-state figure excludes Montana, because of the amendment to Montana Code section 76-18-222(1) (2007), which set forth that *mandatory* minimum sentences and restrictions on parole eligibility do not apply when the offender is under 18. *Global Law & Practice*, at 1037. Another study may have instead included Montana in a count of juvenile life without parole states because trial judges there still appear to have the discretion to impose such sentences. In any event, the number of states permitting life without parole for juveniles is at least 40 (as well as the federal government), or more than 80% of states, a figure undoubtedly counter to any notion that a consensus against the sentence has developed.

[26] *See, e.g.,* Chen, *supra* note 14 (last visited Sept. 3, 2009) (citing sources as Human Rights Watch, Equal Justice Initiative, National Conference of State Legislatures, and U.S. Dept. of Justice).

Third, Sullivan claims that the actual imposition of a life sentence without parole on a thirteen- or fourteen-year-old (a "young teenager") is an "aberrant, vanishingly rare occurrence" that warrants categorical elimination nationwide. [Br. 49-57] Sullivan concedes, however, that at least 40 states make this sentence broadly available against fourteen year-olds, 27 states allowing it specifically against thirteen year-olds. [Br. 49-50] He further notes that his counsel's self-generated report (the "EJI Report")[27] establishes that nine juveniles are under life sentences for crimes committed at age thirteen nationwide and 73 are similarly incarcerated for crimes committed at age fourteen. [Br. 50-51][28] He highlights the magnitude of the juvenile crime problem nationwide by pointing out government data reflecting that 290,188 juveniles fourteen and older were arrested from 1978 to 2007 for serious crimes such as homicides, rapes and robberies for which a life sentence could have been imposed. [Br. 51] He argues that because only 81 (nine plus 73) juveniles of age thirteen or fourteen are incarcerated for life, this

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[27] Sullivan places almost total reliance on this report, entitled *Cruel and Unusual: Sentencing 13- and 14-Year Old Children to Die in Prison*, for his numerical claims. The EJI Report, which was prepared by the organization pursing this and other related anti-incarceration litigation, has not been subject to peer review, verification of its methodology or empirical validity, or other ordinary means used in litigation to assess reliability and trustworthiness.

[28] In a footnote, Sullivan points out that the EJI Report shows only a handful of juvenile offenders are serving life without parole sentences for non-homicide offenses committed at ages thirteen or fourteen. [Br. 51 n.64] His argument, however, focuses on a categorical ban on the use of life without parole for juveniles for any offense.

practice must be condemned nationally, given the extraordinarily large pool of juvenile arrests.

In doing so, Sullivan acknowledges a serious national juvenile crime problem (one that caused the increased sentencing and juvenile reforms with which he disagrees), but fails to make a valid comparison. While he claims that life sentences are aberrations and vanishingly rare, Sullivan offers no evidence of how often such crimes occur and are prosecuted under facts similar to Sullivan's violent rape. It is likely that the commission of rape by thirteen and fourteen year-olds is less prevalent than similar crimes by fifteen, sixteen and seventeen year-olds; for all the data show, the small number of actual sentences reflects the rarity of the offense itself by similar offenders. Indeed, the relatively small number may be due, at least in part, to enhanced penalties against juveniles, such as Sullivan, that have deterred others from such conduct over the past decade. Moreover, it stands to reason that offenders of a younger age would not be given life sentences as often, either because they do not commit serious crimes as often as adults, or because, unlike Sullivan, they have no prior record that would prompt their transfer into the adult system. Sullivan's superficial analysis takes account of none of these variables, or the many others that are relevant to complexities of the criminal justice system.

Sullivan also attempts to make "parallel" comparisons of the number of juvenile life without parole sentences nationwide with the approximate number of juvenile death sentences at issue in *Roper* and the number of such sentences at issue in *Atkins v. Virginia*, 536 U.S. 304 (2002). This comparison is tenuous, if not meaningless. The 72 or so juvenile death sentences at the time of *Roper* reflected

sentences for all juveniles under the age of eighteen; the 71 or so death sentences at the time of *Atkins* reflected all such sentences for all ages with mental impairments nationwide. If the point of the analogy is to establish a benchmark for a categorical ban on juveniles under the age of eighteen as a class as in *Roper*, the closest comparison would show that thousands of juveniles are subject to life sentences without parole.[29]

In passing, Sullivan again cites the EJI Report, noting that 70% of the thirteen and fourteen year-olds serving life sentences without parole are racial minorities, asserting that these sentences arose during a time when fears of increased juvenile crime were unnecessarily heightened. [Br. 54] He claims that such fears were bogus, and that the "rate" of sentencing for young juveniles has "declined dramatically." [Br. 54] Juvenile crime, of course, was a genuine and serious problem that prompted many states, including Florida, to enact stiffer laws against juveniles, which can easily explain, at least in part, why the rate of life sentencing has declined since the laws' enactment. As to race, the fact that the EJI Report shows a 70%-30% split for minorities and non-minorities needs greater explanation because it is unclear whether these data are over- or under-representative of the populations from which they were drawn.

Without a demonstrable interjurisdictional analysis disfavoring life sentences for juveniles of Sullivan's age for serious crimes such as sexual

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[29] *See, e.g.,* Chen, *supra* note 14 (last visited Sept. 3, 2009); *The Rest of Their Lives*, *supra* note 21.

battery, Sullivan's reliance on international law is unwarranted. International comparisons can serve only as a confirmation of the Court's independent determination of the standards of decency in our own country. *See Roper*, 543 U.S. at 578 ("The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."); *Atkins*, 536 U.S. at 316 n.20 (2002) (noting international opinion supported the states' legislative consensus barring the execution of mentally retarded offenders); *Trop v. Dulles*, 356 U.S. 86, 102 (1958).

In sum, this Court's non-capital proportionality precedents – as applied to Sullivan's serious, violent crime of rape – establish no inference of gross disproportionality. Accordingly, there is no need for intra- or interjurisdictional comparisons. Even if such an inference could be drawn, however, national comparisons demonstrate that there is no consensus against life sentences for juveniles, particularly for heinous crimes such as sexual battery. As discussed in the next section, this Court's death penalty jurisprudence provides no support for Sullivan's proposed categorical rule for age in relation to prison sentences, particularly when buttressed against the states' overwhelming consideration of age in their criminal justice systems.

III. *Roper* Does Not Alter Proportionality Principles as Applied to Juvenile Incarceration or Compel a Categorical Rule Against Life Sentences Without Parole.

The premise of Sullivan's entire argument is that life without parole for a juvenile of a certain

young age is equivalent to the death penalty. While *Roper* excluded juveniles as a class from the death penalty, it affirmed the Missouri Supreme Court's decision to re-sentence Simmons to life in prison without parole. *Roper*, 543 U.S. at 560, 578. As discussed below, *Roper* has limited application, if any, to juveniles prosecuted and sentenced as adults. In addition, age is already woven into the criminal justice systems of all 50 states, where only the worst juvenile offenders are treated as adults for purposes of charging, adjudication, and sentencing.

A. Death is different: *Roper* does not eliminate lengthy sentences, including life sentences, for violent offenses.

Sullivan wrongly equates the death penalty with life imprisonment, claiming they are essentially the same because each imposes a "terminal, unchangeable, once-and-for-all judgment" that the offender is "forever unfit to be a part of civil society." [Br. 5] This analogy is highly inaccurate.

Death is terminal. The death penalty extinguishes a human life; a life sentence preserves a person's natural life. An offender serving a life sentence continues to have many opportunities, some contingent on behavior, to enjoy the benefits of civil society. These include visitations and communications with friends and family, the possibility of marriage, educational programs, the expression of opinion, the exercise of religion, and other similar activities. *See, e.g., Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring). Indeed, *Roper*, in preserving the offender's "potential to attain a mature understanding of his own humanity," necessarily

considered that potential would be realized, if at all, in the context of life-long incarceration. *Roper*, 543 U.S. at 574; *see also Kennedy*, 128 S. Ct. at 2665 (reasoning that "[i]n most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense.")[30]

Virtually every court that has been asked to extend the reasoning of *Roper* to cases other than those involving the death penalty has refused to do so.[31] They are correct because death is the only

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[30] *See also Rummel v. Estelle*, 445 U.S. 263, 272 (1980) ("Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of punishment meted out to Rummel."); *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) ("We have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further"); *see also Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (internal citations omitted) ("In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heighted standard of reliability. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable penalties; that death is different."); *Caldwell v. Mississippi,* 472 U.S. 320, 329 (1985) ("The qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.").

[31] *See, e.g., United States v. Feemster*, 483 F.3d 583, 587 (8th Cir. 2007) (refusing to extend reasoning of *Roper* to prevent use of juvenile crimes committed as enhancements on current sentence); *Calderon v. Schribner*, 2009 WL 89279 (E.D. Cal. 2009) (finding LWOP sentence permissible for 17-year-old for a violent felony not resulting in death); *State v. Ninham*, 767 (Continued …)

penalty this Court has seen fit to limit for entire categories of persons and crimes. *See Roper, supra*; *see also Atkins*, 536 U.S. at 304; *Kennedy*, 128 S. Ct. at 2650, 2665. In contrast, life sentences have never been reserved by this Court for only the worst crimes or offenders. *See Harmelin*, 501 U.S. at 995 (life without parole constitutional for cocaine trafficking offense).

Sullivan seeks to equate his "death in prison" circumstance to *Roper* by arguing that courts should no longer be permitted to make individualized sentencing determinations for juveniles under a certain age, even when they commit heinous non-homicides. Instead, analogizing to *Atkins, Kennedy,* and *Roper*, Sullivan contends that a categorical rule is warranted for juveniles that precludes life without the possibility of parole. In *Roper*, however, the Court explicitly limited its holding to the death penalty, pointedly noting that "[w]hen 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." *Roper*, 543 U.S. at 573-74 (emphasis added). As noted, the juvenile offender in *Roper* had been re-sentenced to life without parole.

N.W.2d 326 (Wisc. Ct. App. 2009) (LWOP for 14 year old does not violate *Roper*); *Cobos v. Dennison*, 825 N.Y.S.2d 332, 332 (N.Y. App. Div. 2006) (refusing to extend *Roper*'s reasoning to parole hearings); Opp. To Cert. at 13-14. Only one court has extended *Roper*'s reasoning and logic to find a sentence of imprisonment unconstitutional. *In re Nunez*, 93 Cal. Rptr. 242, 263 (Cal. Ct. App. 2009).

In short, this Court has never concluded that judges and juries are unable to render life sentences because they cannot properly account for a juvenile's age, background, and potential, as the trial judge clearly did with Sullivan.[32] Indeed, no doubt exists that age is already a deeply engrained part of the states' criminal justice systems, particularly the determination of whether juveniles should be tried and sentenced as adults for certain crimes.

B. Age, as a characteristic of the offender, is already woven deeply into the fabric of state criminal justice systems.

The medical and social science research on juvenile development upon which Sullivan heavily relies for his constitutional argument does little to advance his position. In fact, the states have recognized the differences between juveniles and adults by treating the two differently within their criminal justice systems, unless a decision is made that under the circumstances, a juvenile should be

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[32] At several points during Sullivan's sentencing on December 12, 1989, the judge specifically referred to Sullivan's extensive criminal history, considering the possibility of rehabilitation while weighing the strong interest in protecting the community from Sullivan's escalating violence. The judge found that "[t]he juvenile system has been utterly incapable of doing anything with Mr. Sullivan" even though Sullivan "was given opportunity after opportunity to upright himself and take advantage of the second and third chances he's been given." [Tr. III 268] The judge therefore concluded that "the protection of the community requires adult disposition" due to Sullivan's violent record, and that assignment to the juvenile justice system would not adequately protect the public or assist in rehabilitating Sullivan. [Tr. III 270-71]

treated as an adult. As noted, Sullivan does not challenge these decisions, nor does he challenge the longstanding systems all 50 states already have in place to account for youth in the administration of criminal justice.

It has been well known for ages that juveniles generally lack mature judgment and that their age level matters in many contexts. In fact, Sullivan points to "hundreds" of state and federal laws that, in various contexts, recognize the special nature of juveniles and afford them differential treatment. [Br. 30-35 & Appendix] Yet Sullivan omits from this extensive list the wide swath of laws nationwide and in Florida that give special consideration to juveniles in the criminal justice system.

All states have laws establishing juvenile justice systems and programs to contend with the vast majority of youthful offenders. These systems deal with juvenile crime problems[33] ranging from the minor types of youthful indiscretions that occur with regularity to the less frequent, but horrific premeditated acts of violence. That society may assign lesser culpability to juveniles as a class does not

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[33] *See, e.g., Juvenile Justice: A Century of Change*, U.S. Dep't of Just., Off. of Juv. Just. and Delinquency Prevention 2 (Dec. 1999), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/178995.pdf. (Juvenile Justice History); *Combating Violence & Delinquency: The National Juvenile Justice Action Plan Report*, U.S. Dep't of Just., Off. of Juv. Just. & Delinquency Prevention, 6, 19 (March 1996), *available at* http://www.ncjrs.gov/pdffiles/jjplanfr.pdf (DOJ Action Plan); *Delinquency Cases Waived to Criminal Court*, 2005, U.S. Dep't of Just., Off. of Juv. Just. & Delinquency Prevention 1 (June 2009), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/224539.pdf.

compel the conclusion that states may not punish as adults those who intentionally cause serious harm and violence to others.

Indeed, Sullivan's argument reduces to the unacceptable proposition that because juveniles *as a class* lack full maturity and judgment, none – even those who plan and commit the most heinous acts – can be constitutionally punished with lengthy sentences. But states have overwhelmingly decided that those juveniles who engage in certain types of "adult" crimes that involve the planning and premeditation of acts of violence may be treated differently. To do so does not ignore that many juvenile acts are not suitable for "adult" treatment; indeed, the data overwhelmingly show that society generally treats most juveniles as a class with great lenience when compared to adults.[34]

Sullivan does not contend that he was not properly indicted as an adult; rather, he only challenges the end result, an adult sentence that he claims cannot be applied to *any* juveniles of a certain age adjudicated as adults. His reasoning is circular. A major reason for the laws allowing the filing of "adult" charges against juveniles is to provide for potentially stiffer "adult" sanctions to deter and punish, a feature of state direct file systems that would be undermined radically if age categorically bars harsher punishments. This Court should not create a categorical Eighth Amendment rule that upsets the balance states have struck between adjudicating juveniles in their juvenile justice systems and

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[34] *See* Juvenile Justice History, *supra* note 33, at 2.

adjudicating some juveniles of exceptionally serious crimes as adult in the adult systems.

C. *Roper* does not displace state sentencing laws, which must be flexible to allow for the mix of punishment, deterrence, avoidance of recidivism, and rehabilitation that best address serious crime problems.

Sullivan argues that juveniles cannot make responsible decisions, are susceptible to risky behavior and peer influence, will outgrow criminal behavior,[35] and need rehabilitation and parole, not punishment. That is undoubtedly true for some, but Sullivan's offense was no youthful indiscretion and it did not arise from a momentary lapse of judgment or peer pressure. His arguments, going to the appropriate mix of incapacitation, deterrence, and rehabilitation, should be directed to the legislative branch. Precisely because these questions provoke "deeply conflicting interests[] and intractable disagreements," this Court has nearly always left them to the state legislatures and trial judges:

> [The] fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is properly within the province of legislatures, not courts … The function of the legislature is primary, its exercises fortified by

[35] Sullivan's assertion that "[a]lmost all [juveniles] will outgrow criminal behavior" [Br. 5-6], is insupportable; notably, he cites no data whatsoever showing that *violent* juveniles have a lower rate of recidivism than violent adults.

> presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their wisdom and propriety.

Id. at 998-999 (Kennedy, J., concurring) (internal quotation marks and citations omitted).

The states have "sovereign responsibilities to promulgate and enforce [their] criminal law[s]," *Rummel*, 445 U.S. at 303 (Powell, J., dissenting). State legislatures therefore decide what objectives punishment should serve. Florida, for example, long ago dismantled its parole system, following reports of abuses of discretion. *Roberson v. Fla. Parole & Probation Comm'n*, 444 So. 2d 917, 920 (Fla. 1983). Congress abolished the federal parole system in the Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1837. This Court has held that the Constitution "does not mandate adoption of any one penological theory." *Ewing*, 538 U.S. at 25 (quoting *Harmelin*, 501 U.S. at 999). Incapacitation and deterrence are therefore legitimate state policy choices which this Court has seen no need to supervise under the Eighth Amendment. *See Rummel*, 445 U.S. at 281-82.

In short, federal and state individual criminal justice systems have "accorded different weights" to the goals of retribution, deterrence, incapacitation, and rehabilitation, and are entitled to do so without running afoul of the Constitution. *See Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring). It is, accordingly, inappropriate to compare interstate sentences for similar crimes. *See id.* at 999-1000 (reasoning that "differing attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of prison

terms for particular crimes."). The fact that a state has the most severe punishment for certain crimes does not render its sentencing violative of the Eighth Amendment. *See id.* at 1000. It is for this reason that a narrow proportionality review of sentences defers to states except in the most egregious situations. *See, e.g., Solem*, 463 U.S. at 291 n.17.

Sullivan cites a host of studies and articles discussing the development of juveniles at various ages. But these only put in contemporary academic language what has long been recognized and accounted for in every state – that in varying ways juveniles offenders are different. The fact remains, however, that "[l]egislatures are better qualified to weigh and evaluate" such studies "in terms of their own local conditions and with a flexibility of approach that not available to the courts." *Roper*, 543 U.S. at 618 (Scalia, J., dissenting); *see also Thompson*, 487 U.S. at 854 (O'Connor, J., concurring) (reasoning that "qualitative characteristics" among juveniles "vary widely among different individuals of the same age," and therefore the Court should not substitute its "inherently subjective judgment about the best age at which to draw a line" for the judgments of state legislatures). For this reason, this Court has properly refused to rest its Eighth Amendment doctrine on "public opinion polls, the views of interest groups, and the positions adopted by various professional associations," rejecting these "uncertain foundations" in favor of the concrete sentencing laws and applications of those laws within individual states. *See Stanford v. Kentucky*, 492 U.S. 361, 377 (1989) (plurality opinion). State legislatures and sentencing judges have always decided when an adult punishment is appropriate depending on the nature of the crime, and Sullivan presents no sound reason for

overturning decades of this Court's jurisprudence in favor of a new, uncharted categorical rule.

D. The categorical rule suggested by Sullivan is ill-defined and unworkable.

Sullivan claims that a categorical line – at some undefined point between fourteen to eighteen years of age – can be "readily" drawn. [Br. 57-61] His inability to be more precise only underscores the lack of reliable guideposts for such a decision. He again relies on *Roper* for the proposition that like the death penalty for juveniles under 18, the same constitutional exclusion is necessary for life-without-parole sentences for "young adolescents." [Br. 57]

As discussed, however, *Roper* and *Thompson* reflect the Court's reasoning that "death is different." Accordingly, the "lesser culpability" of juvenile offenders justified categorical exclusion from that ultimate penalty under the Eighth Amendment. This Court has never set in stone a categorical divide for lesser sentences, or suggested it could do so; instead, states are left to decide the appropriate term of years based on the nature of the offenses they define. Any Eighth Amendment problems with individual sentences are determined on a case-by-case basis. In "exceedingly rare" cases an offender may be able to show "gross disproportionality." *See Lockyer*, 538 U.S. at 73, 76; *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring).

Moreover, the common law did not categorically preclude the prosecution of a felony against 13- and 14-year-olds. Minors under seven were considered incapable of possessing criminal intent; beyond that

age, they could be arrested, tried, and punished like adult offenders, including capital sentences, subject to a rebuttable presumption that those 14 and under lacked the capacity to commit a felony. *See In re Gault,* 387 U.S. 1, 14-16 (1967); *see also Stanford v. Kentucky*, 492 U.S. 361, 368 (1989) (citing 4 W. Blackstone, Commentaries 23-24; 1 M. Hale, Pleas of the Crown 24-29 (1800)). Sullivan does not contest his transfer to and adjudication in adult court under Florida's transfer laws. Instead, he seeks a categorical rule that would make the common law presumption irrebuttable as applied to life without parole sentences, a result he cannot fully explain in his attempt at line-drawing.

For all its reliance on sociological and psychological studies, Sullivan's argument hinges on the proposition that even the most violent juveniles are exempt from life sentences without parole because a theoretical possibility exists they may reform as their judgment matures during incarceration and, at some point, be ready for release back into society.[36] Sullivan offers no guidance as to how this amorphous proposition can operate as a constitutional standard as applied to parole. If the possibility of reform, rather than gross disproportionality, is the constitutional standard for juvenile offenders, why should it apply only to a life sentence rather than a sentence of 20, 30 or 40 years? If gross disproportionality is no longer the measure, how is a court to determine, within the infinite range of sentencing possibilities, what is

[36] This theoretical reform is why executive clemency is available under Florida's constitution, which provides that the Governor with the approval of two cabinet members may grant full or conditional pardons and commute punishment. Fla. Const. art. IV, § 8.

excessive and what is not? Logically, Sullivan's proposed standard would apply to any crime committed by a juvenile, including a homicide, and to any sentence. It would thus call into question almost any sentence for a term of years.

Sullivan fails to address the ramifications of his argument on Eighth Amendment principles. For now, and at least for juvenile offenders sentenced to life, he apparently seeks a mandate for the reconstitution of parole boards that many states and the federal government abolished in the 1980s. *See, e.g.*, Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1837. Those boards' decisions were often perceived as arbitrary and standardless. *See United States v. Weaver*, 920 F.2d 1570, 1575 (11th Cir. 1991); *United States v. Mejia-Orosco*, 867 F.2d 216, 218 (5th Cir. 1989); *Roberson v. Fla. Parole & Probation Comm'n*, 444 So. 2d 917 (Fla. 1983). Nonetheless, Sullivan's constitutional logic leads to the conclusion that all juveniles sentenced as adults, no matter the crime, should have the constitutional right to parole board review. And presumably, juveniles would have the further right (at untold state expense) to programs that assist them in exercising their right to reform. This Court should not countenance such interference with state (and federal) legislative judgments.

CONCLUSION

The Court should find that certiorari was improvidently granted; alternatively, the Court should hold that Sullivan's sentence does not violate the Eighth Amendment.

Respectfully submitted,

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