Nos. 08-7412 and 08-7621

IN THE

Supreme Court of the United States

TERRANCE JAMAR GRAHAM,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

JOE HARRIS SULLIVAN,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

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

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. When the only federal premise for a state procedural default rule is the clearly correct determination that no existing precedent dictates the rule defendant asserts, does the judgment rest on a state ground independent of the different federal question of whether such a rule should be created?

2. If so, does this Court have jurisdiction to consider the merits of whether the new rule should be created?

3. Does the Eighth Amendment forbid the imposition of a life-without-parole sentence upon any defendant for any crime, other than homicide, committed before his 18th birthday, regardless of the circumstances of the offense or the length or severity of his criminal record?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Petitioners in these cases seek to place a constitutional constraint on the states forbidding a life-without-parole sentence for anyone prior to his 18th birthday, regardless of the offense (possibly excepting homicide) and regardless of the person's criminal history. In a few extreme cases, society and the victims of crime need the assurance that perpetrators will never be released through routine parole proceedings but only, if ever, through executive clemency, which in most states is a decision made by an official directly responsible to the people. The rule petitioners seek is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

A. Graham v. Florida.

On December 6, 2004, 31 days short of Terrance Graham's 18th birthday, see J. A. (Graham) 50; Brief for Petitioner Graham 11, armed robbers forced their way into the home of Carlos Rodriguez in Jacksonville, Florida, locked him in a closet at gunpoint, and robbed a friend who was present in the apartment. J. A. 111-115. Mr. Rodriguez positively identified Graham as the first one in the door, the one who pointed a gun at his stomach, and the one who appeared to be the leader of the group. J. A. 318. There is also substantial circumstantial evidence that Graham was a party to another home invasion robbery later the same night. J. A. 58.

These crimes were not Graham's first. At the age of 16, he pleaded guilty to the robbery of a restaurant, during which "his codefendant assaulted the restaurant

owner with a pipe." J. A. 407. He received a lenient sentence for this crime of only "three years' probation with the condition that he serve twelve months in a pre-trial detention facility." J. A. 407. He was out of jail less than six months before committing the robberies for which he was caught, but upon his arrest he admitted to the police that "he was involved in 'two or three before tonight.' " J. A. 407.

"Following the probation hearing, the trial court found appellant guilty of the alleged violations and sentenced him to life imprisonment without the possibility of parole." J. A. 408. The trial judge noted that many people had tried to help him turn his life around after the first robbery, and he had chosen to throw it away. *Ibid*. The Court of Appeal rejected the claims that a life sentence for juveniles was *per se* unconstitutional and that his sentence was grossly disproportionate to his crime. J. A. 431. The Florida Supreme Court denied review. J. A. 433.

B. Sullivan v. Florida.

In 1989, Joe Sullivan, then age 13, burglarized the home of an elderly woman along with two accomplices. See Brief in Opposition (BIO) 3. Later that day, Sullivan and one of the accomplices returned to the home. While the accomplice distracted the woman at the front door, Sullivan began to enter through another door. *Ibid*. He forced his way in as she resisted the entry. He covered her head, removed her clothes, beat her, raped her vaginally and orally, and threatened to kill her. The identification of Sullivan, rather than the accomplice, as the perpetrator was made by the victim's recognition of his voice, both a neighbor and a police officer who saw him running from the house, and his palm print in the bedroom. BIO 4-5. Sullivan had been found guilty of 17 crimes in the prior two years, includ-

ing several felonies, one of which was a burglary. BIO 5. During a previous juvenile detention, he had assaulted other clients. BIO 5-6.

Sullivan was convicted of two counts of sexual battery and two counts of burglary. He was sentenced to life in prison on the sexual battery counts. J. A. (Sullivan) 21. The conviction and sentence were affirmed on direct appeal. J. A. 22. A motion for postconviction relief was denied. J. A. 23. A writ of habeas corpus was denied. J. A. 24-25. On July 24, 2007, Sullivan commenced the present proceeding, a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. J. A. 21.

Rule 3.850 has a time limit of two years after the judgment became final with an exception, among others, for newly established, retroactive constitutional rights. Rule 3.850(b)(2); Brief for Respondent (No. 08-7621) 2. Sullivan argued to the trial court that, "*Roper v. Simmons* dictates sentencing relief for thirteen-year-olds sentenced to die in prison." J. A. 37 (capitalization altered). The trial court found, "*Roper* has established no such constitutional right. Rather, *Roper* established only one new constitutional right, the right for a juvenile not to be given the death penalty." J. A. 58. "Hence, Defendant's claim does not fit into any exception to the time limits in rule 3.850 and must be dismissed as procedurally barred." *Ibid*. The trial court also found in the alternative that Sullivan's "argument is meritless." *Ibid*. The Florida Court of Appeal summarily affirmed. J. A. 73. "In this posture of the case, Florida law precluded review by the state Supreme Court." Brief for Petitioner 4.

SUMMARY OF ARGUMENT

In *Sullivan*, the state court decision rests on a state ground that is independent of the question petitioner asks this Court to decide. The only federal premise of the state court's decision is the clearly correct statement that *Roper* v. *Simmons* did not establish a new right regarding noncapital sentences. Under *Fox Film Corp.* v. *Muller*, a clearly correct federal premise to a court ruling on state law is insufficient to give this court jurisdiction to review a different federal question not necessary to the judgment.

The developmental psychology research cited in the brief of the mental health *amici* does not support the rule petitioners seek. On the contrary, that research supports the conclusion that teenagers are not a homogenous mass, and courts can and should distinguish the differences among them. Some teens engage in significant illegal behavior only in adolescence and are likely to desist in young adulthood. Others are life-course-persistent offenders who are likely to victimize others into middle age if we let them. The latter group is distinguished by the length of antisocial behavior and by the commission of crimes of violence, the same factors courts typically use in determining sentences.

ARGUMENT

I. The judgment in *Sullivan* rests on an adequate state ground independent of the federal question presented to this Court.

In *Sullivan*, No. 08-7621, the case comes to this Court on a writ of certiorari to a state court under 28 U. S. C. § 1257. The state court petition under Florida Rule of Criminal Procedure 3.850 (2009) ("Rule 3.850") was petitioner's third collateral attack on the judgment, see J. A. 22-24, and it was commenced 16 years after the judgment became final on direct appeal. See J. A. 21-22. The Florida rule, like its federal counterpart, has both a time limitation and a successive petition limitation. See Rule 3.850(b), (f); cf. 28 U. S. C. §§ 2255(f), (h).[2] The Circuit Court held,

> "Consequently, at this time, the Court may address Defendant's claims only if they fall into the enumerated exceptions to the two-year time limitation and could not have been raised in Defendant's original 3.850 motion. Defendant's claim under *Roper* could not have been raised in his original 3.850 motion because his motion was filed many years before the United States Supreme Court ruled on *Roper*, thereby escaping dismissal based on successiveness. However, the Court finds that the claim raised in the instant motion, based on *Roper*, does not fit into the limited category of claims allowed to be brought after the expiration of the two-year filing period." J. A. 56-57.

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2. The predecessor of Rule 3.850 was substantially a copy of 28 U. S. C. § 2255. See *Gideon* v. *Wainwright*, 153 So. 2d 299, 300 (Fla. 1963) (on remand). The state and federal rules have since diverged somewhat.

If this holding is an adequate and independent state ground, then review in this Court under § 1257 is jurisdictionally barred. See *Sochor* v. *Florida*, 504 U. S. 527, 535, n. * (1992). At the certiorari stage, petitioner attempted to brush off this issue with the conclusory assertion that the state court judgment rested on a "threshold evaluation of the underlying federal constitutional claim." Reply to Pet. for Cert. 9. Remarkably, petitioner does not address the issue at all in his brief on the merits. Obviously, the Court's decision to grant the writ of certiorari cannot be construed to have resolved this question, if for no other reason because a decision to grant that writ does not require a majority of the Court.

The problem requires a closer examination. Many states, like the federal government, have struggled to place reasonable limits on collateral review to bring some finality to criminal cases, while still holding open the possibility of relief for cases of genuine miscarriages of justice.[3] This process has produced rules with intricate exceptions. A federal procedural default doctrine that punished states for making exceptions, brushing aside their judgments in cases not qualifying for the exceptions, would be perverse and would encourage the adoption of draconian rules. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Beard* v. *Kindler*, No. 08-992, p. 28. A state *could* shut off its collateral review process to all delayed claims without regard to retroactive new rules subsequently created by this Court. However, such a rule would, at best, throw cases into federal court that could have been resolved in state court. Conceivably, such a rule might cut off relief altogether under 28 U. S. C.

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3. This point will be addressed further in our brief in *Wood* v. *Allen*, No. 08-9156, to be filed shortly after this brief.

§ 2254(d), if the original state-court decision was a reasonable application of the then-existing Supreme Court precedent, or under 28 U. S. C. § 2244(b)(1), if the claim had been presented in a prior federal petition. Encouraging states to adopt such severe rules would be bad policy.

States should be permitted to make an exception to their timeliness and successive petition rules for *direct* application of retroactive new rules created by this Court without opening their judgments to renewed attack in federal court based on every attempt to *extend* this Court's recent precedents. The distinction between what *Roper* v. *Simmons*, 543 U. S. 551 (2005), dictates and whether its rule should be extended into new territory is important to a correct analysis of the jurisdictional problem in this case.

There is no dispute that *Roper* created a new rule, and that it "has been held to apply retroactively," see Rule 3.850(b)(2), to cases on collateral review in Florida state courts. See *Bonifay* v. *State*, 909 So. 2d 861, 861 (Fla. 2005). There should be no genuine dispute that *Roper* by its terms does not dictate extension of its rule to noncapital cases. See 543 U. S., at 568 (special considerations for capital punishment); *id*., at 572 (explicit premise that life without parole remains available). To the extent that Sullivan argued to the state courts that it does, see J. A. 37, it would be an understatement to call that argument frivolous.

Caspari v. *Bohlen*, 510 U. S. 383 (1994), illustrates the point. Bohlen sought to extend a rule developed for capital cases in *Bullington* v. *Missouri*, 451 U. S. 430 (1981), to noncapital cases. Without dissent on this point, the Court held that the capital-case holding of *Bullington* did not dictate its extension to noncapital cases, noting "the unique circumstances of a capital

sentencing proceeding." *Caspari, supra,* at 392.[4] "Even were [this Court] to agree with [Sullivan's] assertion that [its] decision[] in [*Roper*] inform[s], or even control[s] or govern[s], the analysis of his claim, it does not follow that [it] compel[s] the rule that [Sullivan] seeks." *Saffle* v. *Parks*, 494 U. S. 484, 491 (1990). Sullivan is seeking to create a new rule beyond *Roper*, not just the application of *Roper* to his case.

To the extent that the state court ruling is based on the determination that no existing precedent states the rule Sullivan seeks, that ruling is based on a federal-law premise, but it is a premise that is correct beyond genuine question. *Ake* v. *Oklahoma*, 470 U. S. 68, 75 (1985), contains broad language stating, "when a resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded." In applying this precedent, one must recall the

> "maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens* v. *Virginia*, 6 Wheat. (19 U. S.) 264, 399 (1821).

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4. The Court held that because the proposed rule would be new under *Teague* v. *Lane*, 489 U. S. 288 (1989), and the *Teague* issue had not been waived, the Court "had no occasion" to consider the merits. *Id*., at 397. Justice Stevens, the lone dissenter, concluded the State had waived the *Teague* issue, *ibid*., there was therefore no need to decide the *Teague* issue, *ibid*., and he would rule for Bohlen on the merits. *Id*., at 398. He did not express any disagreement with the conclusion that Bohlen's proposed rule would be new for the purpose of *Teague*.

The state rule at issue in *Ake* had an exception for all federal constitutional error, so the federal premise of the state-law ruling was precisely the merits of the question presented to this Court on certiorari. See 470 U. S., at 74-75. The question of whether a state-law ruling with a federal premise different from the merits precludes jurisdiction was not before the Court in *Ake*, and to the extent "some expressions are used which go far beyond" the question that was presented, they should not be considered controlling. *Cohens*, *supra*, at 400.

Fox Film Corp. v. *Muller*, 296 U. S. 207 (1935), involved a state-court ruling with a clearly correct federal premise. That case involved a contract with an arbitration clause that violated federal antitrust law. The state court decided that the clause was not severable from the remainder of the contract. The federal premise was clearly correct, based on a precedent of this Court striking down an identical clause, and severability was not a federal question. See *id.*, at 210. The Court therefore had no jurisdiction to decide another, disputed federal question that was not necessary to the judgment. See *id.*, at 211. *Ake* did not purport to overrule *Fox Film*, and the latter remains good law.

One difference between *Fox Film* and the present case is that in *Fox Film* the federal premise of the state-law ruling was expressly conceded, see *id.*, at 210, while in the present case the petitioner did make a frivolous argument contrary to that premise. See *supra*, at 8. That distinction should not make a difference. A party should neither be penalized for conceding a point where the law is clear nor rewarded for making an insubstantial argument to the contrary.

The jurisdictional question in this case therefore depends on whether the state court, in order to deny Sullivan's petition, needed to decide only that *Roper*

does not by itself dictate the rule that he seeks or whether it also needed to decide that *Roper* should not be extended to include the rule he seeks. The answer to that question depends on Florida law.

In *Tyler* v. *Cain*, 533 U. S. 656 (2001), this Court considered a similar provision of the federal successive petition statute, making an exception for a "claim [that] relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable . . . ." 28 U. S. C. § 2244(b)(2)(A); *Tyler*, *supra*, at 659. The District Court was required to dismiss the claim because this Court had not yet made the precedent in question retroactive, and that was sufficient to decide the case in that court. See *Tyler*, *supra*, at 667. This Court also decided that it could not make the decision retroactive on review of the District Court's decision. *Id*., at 667-668.

Florida Rule 3.850(b)(2), unlike the statute in *Tyler*, does not expressly say by whom the new rule has been "established . . . and has been held to apply retroactively," but the Florida Supreme Court has filled in the gap. Only rules created by this Court or the Florida Supreme Court can be retroactive on collateral review. See *Witt* v. *State*, 387 So. 2d 922, 930-931 (Fla. 1980); *Chandler* v. *Crosby*, 916 So. 2d 728, 729 (Fla. 2005) (*per curiam*).

To decide that the (b)(2) exception was inapplicable, the Circuit Court in this case needed only to decide that the right Sullivan sought had not yet been established by this Court or the Florida Supreme Court. The Circuit Court had no authority to extend *Roper* and make the extension retroactive. Nor did the Court of Appeal, so it was correct to summarily affirm. "Florida law precluded review by the state Supreme Court." Brief for Petitioner 4. The Court of Appeal is therefore

"the highest court of [the] State in which a decision could be had," 28 U. S. C. § 1257(a), and this Court's writ of certiorari runs to that court. If this Court cannot reverse a lower federal court that correctly dismissed a petition as procedurally barred based on existing law, as it held in *Tyler*, then surely it cannot reverse a state court in similar circumstances.

The judgments of the Circuit Court and the Court of Appeal in this case are independent of the federal question of whether *Roper* should be extended to noncapital, nonhomicide cases, the question presented in this Court. Those judgments depend only on the clearly correct determination that *Roper* itself does not establish such a rule.

The judgments below do not depend on any genuinely disputable federal question. Jurisdiction under 28 U. S. C. § 1257 is lacking.

II. The finality of an executed death sentence makes *Roper* v. *Simmons* fundamentally different from the present case.

Petitioners and supporting *amici* rely heavily on *Roper* v. *Simmons*, 543 U. S. 551 (2005), but there is a critically important difference between that case and this one. Once a death sentence is executed, neither an executive commutation nor a legislative repeal will have any effect. In contrast, a person sentenced to life without parole at the age of 17 will have decades to demonstrate that the predictions about him were wrong by leading an exemplary life in prison. Many Governors of Florida will come and go during Graham's life expectancy. If he behaves himself as a model prisoner, it is not unrealistic to expect one of them will grant clemency. *Harmelin* v. *Michigan*, 501 U. S. 957, 996 (1991) (opinion of the Court), noted that even a life-

without-parole sentence does not negate all possibility of release and distinguished capital punishment on that basis. To the extent that *Solem* v. *Helm*, 463 U. S. 277, 297 (1983), is inconsistent with this passage and implies that life without parole is in a special category comparable to capital punishment, *Solem* should be considered overruled.

For decades, we have heard the incessant drumbeat that death is different. See, *e.g.*, *Furman* v. *Georgia*, 408 U. S. 238, 306 (1972) (opinion of Stewart, J.). Suddenly and magically, it seems, death is no longer different. A sentence of life without parole is now described as a sentence "to die in prison." See, *e.g.*, Brief for Petitioner Sullivan 55. Is there no longer a difference of importance between the two sentences? If so, the entire "annually improvised Eighth Amendment, 'death is different' jurisprudence," *Morgan* v. *Illinois*, 504 U. S. 719, 751 (1992) (Scalia, J., dissenting), is based on a false premise. The decades of litigation and millions of dollars spent disputing whether states have complied with it are pointless. If death is not different after all, the entire structure from *Furman* onward should be overruled.

But of course death is different. If the State of Missouri had executed Simmons, there would have been no opportunity for him to demonstrate rehabilitation and seek clemency. Graham and Sullivan face no such cutoff. Sullivan has already been in prison for nearly two decades. If he has been a model prisoner, he can apply for clemency now. If further advances in psychology ten years hence show us clearly who can be safely released, Graham and Sullivan will probably still be alive to receive the benefit if they qualify.

Roper, 543 U. S., at 574, noted that its categorical rule was subject to the "objection always raised against categorical rules." Indeed it was, and the objection is a

strong one. The objection is particularly strong when a litigant proposes to find a categorical rule in the Constitution that does not appear in the text and has not been found there in the two centuries since its enactment. For this Court to impose a categorical restriction and thereby remove the policy question from the people is a drastic step, to be reserved for drastic circumstances. In *Roper*, a bare majority of the Court decided to take that step despite a clear precedent to the contrary. See *id*., at 556. It is debatable whether the Court should have gone that far, but it should go no further. *Roper* itself should be the end of this road.

III. The developmental psychology studies proffered by the mental health *amici* do not support a rigid constitutional cutoff at the 18th birthday.

An *amicus* brief has been filed in support of Petitioners by four mental health organizations: The American Psychological Association, the American Psychiatric Association, the National Association of Social Workers, and Mental Health America. For brevity, we will refer to this as the APA Brief. The brief would make a powerful case if it were submitted on the question of whether *all* or *most* adolescents should be tried in adult court and subjected to adult penalties. That question, however, is not before this Court, and it probably never will be. The question is whether to draw a sharp line at the 18th birthday and declare permanently, as a matter of constitutional law, that *no one* less than 18 may *ever* be sentenced to life without

parole, at least for nonhomicides.[5] The science submitted in the APA Brief provides no support for that proposition.

The fallacy that lies throughout the APA Brief is its persistent lumping together of all adolescents into one group and all delinquent behavior, along with risky and impulsive behavior, into one construct. Not only is this not supported by the research the APA Brief cites, it is contradicted by that research.

The APA Brief obscures an important difference by smearing together different kinds of behavior. At pages 7-9, the brief puts emphasis on the greater propensity of teenagers to engage in risky behavior and notes that "risky behavior frequently includes criminal activity . . . ." *Id*., at 7. The fact that two categories of behavior overlap does not mean they are the same. Skydiving is *risky*; drinking one beer at age 20 is *illegal*; forcible rape is *evil*. These categories are different in kind, and a greater propensity for one does not equal reduced culpability for another, even if some behaviors fall into more than one category.

After defining "adolescence" for the purpose of their brief as ending at 17, see APA Brief at 6, n. 3, *amici* claim, "Both violent crimes and less serious offenses 'peak sharply' in late adolescence—around age 17—and 'drop precipitously in young adulthood.' " APA Brief 8 (footnotes omitted). The inner quotes are from Moffitt, Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy, 100 Psychol. Rev. 674, 675 (1993) (cited below as "Moffitt (1993)"), and refer to overall crime rates, *not* violent

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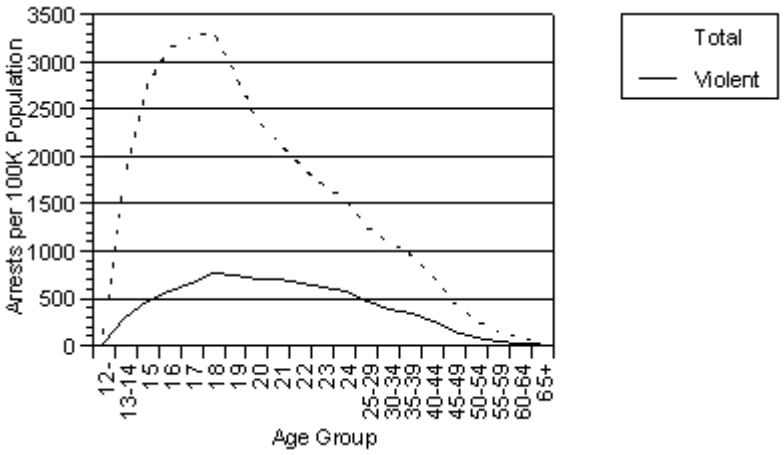
5. If petitioners prevail in these cases, the ink will not be dry on the opinion before the same forces are back claiming the same rule must apply to homicides.

crime rates. The rates for violent crime neither peak at 17, nor "drop precipitously in young adulthood."

Figure 1 shows arrest rates for crimes in the FBI's total and violent crime indices by age for 2001. See U. S. Dept. of Justice, Federal Bureau of Investigation, Age-Specific Arrest Rates and Race-Specific Arrest Rates for Selected Offenses 1993-2001, pp. 4, 6 (2003). The violent peak is at 18-19, the rates for those two ages being nearly equal. The decline in young adulthood is gradual. At age 22, the rate is about the same as at 17, and at age 24 it is about the same as at 16.

Figure 1. Total and Violent Crime Rates By Age, 2001

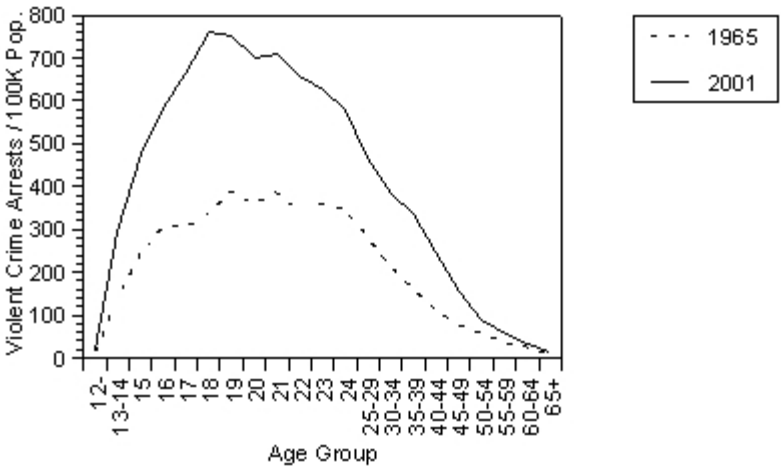


The age profiles of violent crime change across time and across cultures. Figure 2 shows the violent index crime arrest rates by age for 1965 and 2001.[6] Not only

6. The solid line in Figure 2 is the same as the solid line in Figure 1, although plotted on a different scale. The dashed line, for 1965, is computed from data in U. S. Dept. of Justice, Federal

was violent crime lower in 1965, but the age profile peaked later and remained nearly flat through the early 20s.

Figure 2. Violent Crime Rates By Age, 1965 and 2001



What accounts for the sharp increase in *total* offending in the teen years, with a sharp decline in adulthood, and the considerably less spiked rate of *violent* offenses in the same years? One widely credited explanation is that the teen years in Western cultures see a large increase "in the number of people who are willing to offend . . . ." Moffitt (1993) 675-676. The teen peak is caused by a large portion of the population that begins offending in the teen years and soon desists, but underneath the peak is another group that has been aggressive and antisocial from childhood and is likely to continue offending throughout the life course. See *id*.,

Bureau of Investigation, Age-Specific Arrest Rates and Race-Specific Arrest Rates for Selected Offenses 1965-1985, pp. 3-33 (1986).

at 677-678. That underlying group commits a disproportionate share of the violent crimes.

Multiple longitudinal studies have confirmed the pattern. See Moffitt, A Review of Research on the Taxonomy of Life-Course-Persistent Versus Adolescence-Limited Antisocial Behavior 277, 292-293, in Taking Stock: The Status of Criminological Theory (F. Cullen, J. Wright & K. Blevins eds. 2006). Moffitt's findings come from a longitudinal study in Dunedin, New Zealand. The group that began delinquent behavior in adolescence generally committed nonviolent offenses, while the group that began serious, aggressive misbehavior in childhood was more likely to commit violent offenses. *Ibid*. Another longitudinal study in Canada similarly found that violence in adolescence was typically part of a long-term pattern of behavior. See Brame, Nagin, & Tremblay, Developmental Trajectories of Physical Aggression from School Entry to Late Adolescence, 42 J. Child. Psychiatry 503, 510 (2001).

Cross-cultural comparisons are also revealing. In preindustrial societies where teenagers are treated as adults, the increase in delinquent behavior among young males is either extremely mild or completely absent. See R. Epstein, The Case Against Adolescence: Rediscovering the Adult in Every Teen 81 (2007). It is when societies become Westernized that adolescent delinquency rises. See *id*., at 81-85. This variation confirms that the high rates of crime among adolescents is not inherent or biological, but rather a product of culture or the interactions of biology and culture.

The APA Brief, at 22-27, also claims physical immaturity of the teen brain as a reason for risk-taking and

poor judgment.[7] However, individuals mature at different rates, and if the immature brain hypothesis were true, one would expect that among individuals of the same age, brain maturity would be negatively correlated with dangerous behavior. A recent study finds just the opposite. See Berns, Moore, & Capra, Adolescent Engagement in Dangerous Behaviors Is Associated with Increased White Matter Maturity of Frontal Cortex, 4 PLoS ONE 9, http://www.plosone.org/article/info:doi/10.1371/journal.pone.0006773.

These "results are consistent with the maturity gap theory." *Id*., at 9. The rise of dangerous and delinquent behavior in the teen years is not because of immature brains but the result of society treating physically mature young people as if they were children, denying them adult responsibility and status. See Epstein, The Myth of the Teen Brain, Scientific American Mind 63 (April/May 2007). Treating teenagers like children is the problem, not the answer, for most teens. According to Moffitt, the maturity gap is a major reason for the short-lived delinquency of the larger, less serious group of teen offenders, and they grow out of it. See Moffitt (1993) 687, 690. A smaller group does not.

The argument of the APA Brief varies from the science that it cites in its assertion that adolescents must be treated as one indistinguishable mass. "Research has documented that the vast majority of youthful offenders will desist from criminal behavior in adulthood. And the malleability of adolescence means that there is no reliable way to identify the minority who will not." APA Brief 4. Yet the APA Brief relies heavily on the work of Terrie Moffitt, see *id*., at 8, 20,

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7. As discussed *supra*, at 15, an additional problem with this argument is equating risky behavior and poor judgment with deliberate acts of harm to others.

and the central theme of Moffitt's work is that adolescents are *not* a homogenous mass. Rather, "delinquency conceals 2 distinct categories of individuals, each with a unique natural history and etiology." Moffitt (1993) 674.

According to Moffitt's theory, there are multiple subgroups with different patterns of offending. The two with the highest rates of offending during adolescence are termed the adolescence-limited (AL) group and the life-course-persistent (LCP) group. The AL group, in this theory, is likely to desist from offending in young adulthood, while the LCP group is not. See Moffitt, *et al.*, Childhood-Onset Versus Adolescent-Onset Antisocial Conduct Problems in Males: Natural History from Ages 3 to 18 Years, 8 Dev. & Psychopathology 399, 400 (1996) (cited below as "Moffitt (1996)"). Follow-up research required a modification of the theory. The AL group continued property offenses into adulthood but had a significantly lower rate of violent offenses. See Moffitt, Caspi, Harrington, & Milne, Males on the Life-Course-Persistent and Adolescence-Limited Antisocial Pathways: Follow-up at Age 26 Years, 14 Dev. & Psychopathology 179, 187 (2002).

Contending that adolescents who will desist are indistinguishable from those who will not, the APA Brief cites several sources that only tangentially support that proposition, see APA Brief at 21, while ignoring the body of work they relied on the page before. See *id.*, at 20. The first source the APA Brief cites is Mulvey and Cauffman, The Inherent Limits of Predicting School Violence, 56 Am. Psychologist 797 (2001). As the title of their article implies, Mulvey and Cauffman address the problem of predicting which high schools students will commit acts of violence such as the Columbine massacre. See *id.*, at 797. Predicting

which adolescents among those who have already committed an act of great violence will do so again as adults is not their concern. The paragraph cited by the APA Brief, see *id*., at 798-799, notes the changing nature of youth in passing to support the point that instruments designed for adults may be inappropriate. The passage provides little or no support for the proposition that identification of likely recidivists among known violent adolescent offenders is inherently impossible.

Thomas Grisso, Double Jeopardy: Adolescent Offenders with Mental Disorders 64-65 (2004), discusses identification of mental disorders. In particular, this passage discusses whether mental states of mood or anger observed by a clinician are stable enough to form the basis of a diagnosis. However, diagnosis according to the DSM and evaluation of criminal culpability are different matters. See American Psychiatric Assoc., Diagnostic and Statistical Manual of Mental Disorders, Cautionary Statement, p. xxvii (4th ed. 1994). Other research indicates that mental states such as anger are indeed poor predictors of future violence, but the variety of crimes a juvenile commits and the age at which he begins are much better predictors. See Vitacco, Caldwell, Van Rybroek, and Gabel, Psychopathy and Behavioral Correlates of Victim Injury in Serious Juvenile Offenders, 33 Aggressive Behavior 537, 541 (2007).

Edens, Skeem, Cruise, and Cauffman, Assessment of "Juvenile Psychopathy" and Its Association with Violence: A Critical Review, 19 Behav. Sci. Law 53 (2001), is a technical article discussing the validity for use with juveniles of various instruments for assessing psychopathy. The page cited by the APA Brief, see *id*., at 59, discusses the age-inappropriateness of some of the items on one instrument, the PCL-R, that is the

"gold standard" for use with adults. See *id.*, at 54. For example, one need not be a psychologist to know that "grandiose sense of self-worth," see *id.*, at 59, is a characteristic many teenagers have and most grow out of. The fact that this characteristic is associated with psychopathy in adults does not mean that it is similarly associated in adolescents.

The Edens article supports the proposition that existing measures of psychopathy are not sufficiently validated for courts to use in sentencing minors. See *id.*, at 74. It does not support the proposition that there is no subgroup of adolescents too dangerous to ever release from prison or that such a subgroup is inherently indistinguishable from the mass, no matter what tools we may develop in the future.

The body of research on "life-course persistent" offenders points in the other direction. According to Moffitt and her colleagues, the AL and LCP groups *are* distinguishable, and they are distinguishable in ways known to the criminal/juvenile justice system.

It is true that the AL and LCP groups are not distinguished by broad measures of antisocial behavior taken in midadolescence. See Moffitt (1996) 409. It is also true that in Moffitt's study the two groups did not differ on number of convictions in adolescence or age of first arrest or conviction. See *id.*, at 413-414. However, the theory predicted "they should differ on convictions for violence," *id.*, at 412, and indeed they did, with a highly significant $p<.01$.[8] See *id.*, at 414. The LCP group was three times as likely to be convicted of a

8. The p statistic represents the probability that an observed result could have happened by chance. The lower the p, the more conclusively the random chance possibility is negated. A result with p less than .05 is regarded as "statistically significant."

violent offense before age 18 as the AL group, and six times as likely as the average of the total sample. See *id*., at 413, Table 2. This increased level of violence persists into adulthood. See Moffitt (2006) 293. This research is consistent with common sense. The first step toward identifying the incorrigibles is simply to separate the rapists and armed robbers from the shoplifters and joyriders. The second step is to separate the repeaters from those who have committed only one serious offense.

Roper v. *Simmons*, 543 U. S. 551, 570 (2005), noted that "it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." It may be less supportable to draw that conclusion from a single crime as the only evidence, but that does not mean that no one under 18 is "irretrievably depraved." "Interventions with life-course-persistent persons have met with dismal results . . . . The well-documented resistance of antisocial personality disorder to treatments of all kinds seems to suggest that the life-course-persistent style is fixed sometime before age 18 . . . ." Moffitt (1993) 684 (citations omitted).

Incorrigibles do exist. Whether the present state of knowledge permits identification of persistent offenders with the degree of certainty required for a psychiatric diagnosis is beside the point. This Court is being asked to lay down a constitutional mandate that can only be overturned by the drastic measure of amending the federal Constitution. The limitations of knowledge of the moment provide a reason to refrain from such a step, not a reason to take that step. The potential consequences of error here are not to be taken lightly.

The kidnapping of 11-year-old Jaycee Lee Dugard and her 18-year imprisonment provide a cautionary tale of how parole decisions can go horribly wrong, with

devastating consequences for innocent people. See Lane, How Jaycee Lee Dugard's Tormentor Got Out, http://voices.washingtonpost.com/postpartisan/2009/09/how_jaycee_lee_duggards_tormen.html. Phillip Garrido was sentenced to 50 years for a prior kidnapping in which he committed repeated sexual assaults on the victim for hours. Yet he was back on the street in only 11 years, and the unimaginable ordeal for Jaycee was the result.

The question of where to strike the balance between the risk of release for innocent people and the need to offer a second chance to offenders is not an easy one. There is no clearly correct answer.

Blackstone noted that ancient Saxon law had fairly rigid age categories.

> "But by the law, as it now stands, and has stood at least ever since the time of Edward the third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen; and in these cases our maxim is that '*malitia supplet aetatem*.' "[9] 4 W. Blackstone, Commentaries 23 (1st ed. 1769).

Sullivan's extensive criminal record compiled by the age of 13 demonstrates the continuing truth of Blackstone's observation. Does the science to date require a rejection of this wisdom and reversion to the pre-Edward III approach of rigid categories based solely on chronological age? No, it does not, and the APA *amici* come close to admitting as much. See APA Brief 6, n. 3.

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9. Malice supplies age.

No one disputes that minors generally should be treated differently from adults. However, the extent to which we should use minimum-age cutoffs versus individual assessment is one of policy. This policy question is one of the many that the Constitution leaves to the people of the several States, not one of the few it has removed from them. See U. S. Const., Amdt. 10. This Court need not endorse Florida's sentencing policy. See *Harmelin* v. *Michigan*, 501 U. S. 957, 1007 (1991) (Kennedy, J., concurring in part and concurring in the judgment). It need only recognize where the authority to make the decision lies. Proposals for change should be addressed to the legislature.

CONCLUSION

In *Graham*, the judgment of the Florida District Court of Appeal should be affirmed. In *Sullivan*, the writ of certiorari should be dismissed for lack of jurisdiction.

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Respectfully submitted,

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