IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,127

RODERICK JUSTIN FERRELL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR LAKE COUNTY, FLORIDA

AMICUS CURIAE BRIEF OF THE RUTHERFORD INSTITUTE ON BEHALF OF APPELLANT

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SUMMARY OF ARGUMENT

The imposition of the death penalty on juvenile offenders is violative of the Eighth Amendment to the United States Constitution. Execution of minor defendants, who are more vulnerable to negative familial and societal influences and less culpable for their conduct, is "cruel and unusual," a view reflected by the fact that juvenile executions are rare in the United States and rarer still in Florida. An emerging consensus of opinion among legal scholars, child experts and educators opposes the imposition of the death penalty on underage children. The opinion of the international community has long held against the practice, condemning it as in derogation of fundamental human rights.

Amicus also contends that the execution of juvenile offenders is cruel punishment prohibited by Article I, Section 17 of the Florida Constitution, insofar as it serves no legitimate penological purpose and does not comport with Florida's public policy in favor of juvenile treatment and rehabilitation. It also constitutes "unusual punishment" under the State Constitution, as no juvenile has been executed in the State since 1954.

ARGUMENT I

A DEATH SENTENCE FOR A JUVENILE OFFENDER IS DISPROPORTIONATE AND THEREFORE VIOLATES THE EIGHTH AMENDMENT OF THE U.S. CONSTITUTION

The death penalty is so different from other punishments "in its absolute renunciation of all that is embodied in our concept of humanity." *Furman v. Georgia*,

408 U.S. 238, 306 (1972) (Stewart, J., concurring). The death penalty must be reserved, therefore, for only the most aggravated and least mitigated of most serious crimes. *DeAngelo v. State*, 616 So.2d 440 (Fla. 1993); *Penn v. State*, 574 So.2d 1079 (Fla. 1991); *Songer v. State*, 527 So.2d 809, 811 (Fla. 1988); *State v. Dixon*, 283 So.2d 1, 7 (Fla. 1973). Further, the Eighth and Fourteenth Amendments require that courts impose capital punishment fairly and with reasonable consistency, or not at all. *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). A sixteen-year-old offender does not qualify for the death penalty under these principles.

Obviously, a juvenile's age is of great significance when one considers whether or not he deserves to die for the instant offenses. The appellant was sixteen years old at the time of the offense. In *Eddings*, 455 U.S. 104, the United States Supreme Court held that the chronological age of a minor is itself a relevant mitigating factor of great weight. Subsequently, in *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988), the Court expressly endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. Because adolescents are more vulnerable, more impulsive, and less self-disciplined than adults, they cannot be held to the same level of culpability. *Thompson*, 487 U.S. at 834.

Juveniles also are less culpable than adults because they have not yet had the opportunity to outgrow the effects of a bad childhood over which they had little control:

"[Y]outh crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." *Id.*

The Supreme Court has also recognized that maturity and moral responsibility may vary from minor to minor. "[J]ust as the chronological age of a minor itself is a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing." *Eddings*, 455 U.S. at 115-17. "In the realm of capital punishment . . . "individualized consideration [is] a constitutional requirement," . . . and one of the individualized mitigating factors that sentencers must be permitted to considered is the defendant's age . . ." *Stanford*, 492 U.S. at 375 (internal citations and footnote omitted).

The imposition of the death penalty on adolescents is a rare occurrence. The imposition of the death penalty on juveniles in Florida has been even rarer. The State of Florida has executed only twelve juvenile offenders, the last two being in 1954. *See generally*, V. Streib, *American Death Penalty for Juveniles: An International Embarrassment*, 2 Geo. J. Fighting Poverty 219 (Summer 1998) (hereinafter "*American Death Penalty*").

In *Thompson v. Oklahoma*, the Supreme Court held that execution of offenders age fifteen and younger at the time of their crimes is "cruel and unusual" under the Eighth

Amendment." *Id.* at 220. Therefore, a state without a minimum age provision in its death penalty statute cannot go below age sixteen without violating *Thompson*, and in fact no state with a minimum age provision in its death penalty statute uses an age of less than sixteen. *Id*.

In *Stanford v. Kentucky*, a plurality of the Supreme Court held that the Eighth Amendment did not prohibit the death penalty for a defendant who committed his crime at age sixteen or seventeen. *Id.* However, the *Stanford* decision was neither static nor absolute.[1] Four of the Justices believed that executing a sixteen year old defendant was permissible under the Eighth Amendment, four believed that it was not. The four dissenters in *Stanford* would have held that eighteen should be the minimum constitutional age line. *Id.* at 405. Justice O'Connor, the fifth vote affirming the judgment, articulated the now-controlling proviso. She ruled that execution of sixteen and seventeen year old perpetrators was permissible under the Eighth Amendment only

[1] Not only was the *Stanford* decision a close call, but it could easily have gone the other way had Justice Powell stayed on the Court for an additional two years. Based on Justice Powell's dissent in the *Burger* decision two years earlier, one can plausibly conclude that Justice Powell would have joined the dissenters' position in *Stanford*. Had Justice Powell retired in 1989 instead of 1987, the Court might have decided with a 5-1-3 holding that the minimum constitutionally-acceptable age for the death penalty is age eighteen, not sixteen. *See Another Kind of Innocence*, *supra*, at 7. Of course, this speculation is has no practical impact on the law as it now stands, but it serves to illustrate just how narrowly juvenile executions survived Supreme Court scrutiny in 1989.

so long as society generally agreed that such practice was acceptable. *Id*. at 381. Should a consensus emerge prohibiting such executions, then the Eighth Amendment would not longer permit them. "The day may come when there is such general legislative rejection of the execution of 16- or 17-year old capital murderers that a clear national consensus can be said to have developed." *Id.* at 381-382.

A national consensus *is* emerging to oppose the death penalty for those offenders who committed their crimes when they were juveniles. For example, up until February of this year, the last offender executed for a crime committed at sixteen, Leonard M. Shockley, was executed on April 10, 1959, in Maryland. *Id.* at 4. Further, Texas has executed the most juvenile offenders, accounting for seven (64%) of these eleven juvenile executions. *Id.* at 14. Apart from Texas, the United States has had only minimal involvement in the death penalty for juvenile offenders. *Id.*

Other statistics illustrate this emerging national consensus against the juvenile death penalty. From January 1, 1973, through May 20, 1998, courts have imposed a total of 173 death sentences upon juvenile offenders. *American Death Penalty*, *supra,* at 221. Since 1973, only 2.7% of the total of almost 6,300 death sentences imposed for offenders of all ages were juveniles. *Id.* Over two-thirds of these juvenile death sentences have been imposed on seventeen-year-old offenders, the other third on offenders ages sixteen and fifteen, and none on offenders age fourteen or younger at the time of their crimes.

Another Kind of Innocence, *supra*, at 15.

Furthermore, only sixty-nine (40%) of those juvenile death sentences remain currently in force. *Id.* Eleven (6%) have resulted in execution, and ninety-two (53%) have been reversed. *Id.* Thus, for the 103 juvenile death sentences finally resolved (excluding the sixty-nine death row inmates remaining under juvenile death sentences but still litigating them), the reversal rate is 89%. *Id.*

Twenty-two individual states have imposed these 173 juvenile death sentences, comprising well over half of the death penalty jurisdictions during this time. *American Death Penalty*, *supra*, at 221. The total number of persons under death sentences has increased by 181% in the past fifteen years, reflecting a steady rise from 1,209 in 1983 to about 3,400 on June 1, 1998. *Another Kind of Innocence*, *supra*, at 19. In contrast, the number of juvenile offenders under death sentences has risen much less quickly. *Id.* Thirty-three juvenile offenders were under death sentences at the close of 1983, compared to sixty-nine juvenile offenders today (a 109% increase), but this number has fluctuated between these two extremes during this decade. *Id.* "This comparatively constant death row population for juvenile offenders results from the fact that the number of new death sentences each year is roughly equal to the combination of death sentence reversals plus executions for juvenile offenders." *Id.*

Historical evidence further demonstrates the emerging national consensus against

the juvenile death penalty. For example, the United States has executed about 19,161 persons since colonial days, with only about 353 (1.8%) being for crimes as juvenile. *American Death Penalty*, *supra*, at 222. Moreover, juvenile cases have accounted for eleven of the approximately 460 executions during the current era of the American death penalty, from 1973 to the present. *Id.* "These findings indicate no increased willingness in the modern America to impose the juvenile death penalty." *Id.*

The national consensus opposing the death penalty for offenders who committed their crimes while they were juveniles is also illustrated by the American Bar Association's (ABA) request for a moratorium on the death penalty, including the juvenile death penalty. *Another Kind of Innocence, supra*, at 2. *See also* Resolution of the ABA House of Delegates, Feb. 3, 1997; *ABA opposes capital punishment for persons under 18*, 69 A.B.A.J. 1925 (1983). The ABA's most recent Resolution (hereinafter "Moratorium") does not completely oppose the death penalty. It does, however, take the position that courts should not impose the death penalty until the process is administered fairly and impartially. *Another Kind of Innocence*, *supra*, at 3.

A national consensus also against such executions exists among professionals who work with persons under the age of eighteen.[2] Professional educators, scholars, juvenile

[2] In *Thompson v. Oklahoma*, 487 U.S. 815 (1988), the United States Supreme

law practitioners, child welfare workers, children advocates,[3] juvenile court judges,[4] lawyers,[5] religious organizations,[6] and medical, psychological, and psychiatric experts,[7]

Court held that the execution of a person who was fifteen years old or younger at the time of an offense violated the Eighth Amendment.

In *Wilkins v. Missouri*, 492 U.S. 361 (1989), and *Stanford v. Kentucky*, 492 U.S. 361 (1989), which were consolidated for review, the United States Supreme Court held that it did not violate the Eighth Amendment to execute a person who was, respectively, seventeen years old or sixteen years old at the time of the commission of an offense.

Many *Amici* filed briefs in the latter two cases and urged the Court to set the federal Constitutional minimum age for execution at eighteen. The four dissenters in *Wilkins* found these *Amici* briefs to be helpful and authoritative with regard to the national standard of decency. *See Stanford*, 492 U.S. at 388-89 (Brennan, J., joined by Marshall, J., Blackmun, J., and Stevens, J., dissenting).

[3] In *Wilkins v. Missouri*, 492 U.S. 361, the following such organizations filed an *Amicus* Brief on behalf of the Petitioner: National Parent and Teachers Association; Child Welfare League of America; National Council on Crime and Delinquency; Children's Defense Fund; National Association of Social Workers; National Black Child Development Institute; National Network of Runaway and Youth Services; National Youth Advocate Program; and the American Youth Work Center.

[4] *See* National Council of Juvenile and Family Court Judges, *Juvenile and Family Court Newsletter*, Vol. 19, No. 1, p. 4 (Oct. 1988).

[5] *See* American Bar Association, *Summary of Actions of the House of Delegates* 17 (1983 Annual Meeting). This report is the first time in its history that the ABA has taken a formal position on any aspect of capital punishment.

[6] In *Wilkins,* 492 U.S. 361*,* the following such organizations filed an *Amicus* Brief on behalf of the Petitioner: American Baptist Churches, American Friends Service Committee, American Jewish Committee, American Jewish Congress, Christian Church (Disciples of Christ), Mennonite Central Committee, General Conference Mennonite Church, National Council of Churches, General Assembly of the Presbyterian Church,

nationwide and in Florida oppose the execution of persons under the age of eighteen.[8]

The United States is clearly witnessing an ever-increasing movement by the American public towards the disapproval of the juvenile death penalty. The ABA Moratorium asks us to end this practice. *Another Kind of Innocence*, *supra*, at 20. Our United States Supreme Court came within a fraction of an inch from abolishing it, and the international community prohibits it. *Id.* at 21. Basic decency and morality raise serious

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Southern Christian Leadership Conference, Union of American Hebrew Congregations, United Church of Christ Commission for Racial Justice, United Methodist Church General Board of Church and Society, and the United States Catholic Conference.

[7] *See Amicus* Brief for the American Society of Adolescent Psychiatry and the American Orthopsychiatric Association, *Wilkins,* 492 U.S. 361.

[8] Congress has expressly determined that society's ultimate punishment cannot apply to adolescent offenders, regardless of their crime. *See* 134 Cong. Rec. -- Senate 7579-7580 (June 10, 1988). *See also* Anti-Drug Abuse Act of 1988 (forbidding capital punishment for under eighteen year old offenders). This decision is consistent with the judgment of a growing number of states. In 1981, Ohio set eighteen as its minimum age for execution, Nebraska did so in 1982, Tennessee in 1984, Colorado and Oregon in 1985, New Jersey in 1986, and Maryland in 1987. *See* Ohio Rev. Code Ann. 2929.02 (A) (Page 1987); Tenn. Code Ann. 37-1-134 (1)(A) (1990); Neb. Rev. Stat. 28-105.01 (1985); Colo. Rev. Stat. 16-11-103 (1986); Or. Rev. Stat. 161.20 (Supp. 1987); N.J. Stat. Ann. 2C:11-3(6) (West Supp. 1988).

Both the American Law Institute, Model Penal Code, and the National Commission of Reform of Federal Criminal Law have repeatedly affirmed the position that eighteen should be the minimum age for execution. *See* American Law Institute, Model Penal Code 210.6 (1) (d); National Commission of Reform of Federal Criminal Laws, Final Report of the New Federal Code 3603.

concerns about a people that would kill their children in the name of justice. *Id.* It is time for us to abandon this practice, embarrassed that we ever participated in it. *Id*.

ARGUMENT II

WHEN INTERPRETING THE EIGHTH AMENDMENT, THE COURT SHOULD TAKE INTO CONSIDERATION CUSTOMARY INTERNATIONAL LAW, WHICH LOUDLY DECRIES THE JUVENILE DEATH PENALTY

A. According to the Supreme Court, an analysis of the "evolving standards of society" as to the Eighth Amendment's prohibition of cruel and unusual punishment necessarily includes consideration of the international community's opinion.

"The Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). In determining the "evolving standards," the Supreme Court has recognized the legitimacy of international opinion as an indicator of the contemporary climate. *Coker v. Georgia*, 433 U.S. 584, 596 (1977); *Enmund v. Florida*, 458 U.S. 782, 796 (1982); *Trop v. Dulles*, 356 U.S. at 99. *Coker* and *Enmund* concerned the death penalty; the Supreme Court, while finding the death penalty unconstitutional in certain instances, specifically referenced the international condemnation of the practice. *Coker*, 433 U.S. at 596; *Enmund*, 458 U.S. at 796.

B. The major human rights treaties reflect the international community's heavy condemnation of sentencing the death penalty for crimes that were committed by a defendant while a juvenile.

Treaties are the most authoritative source of international law. Statute of the International Court of Justice, art. 38. They not only legally bind those nations that are party to the treaties, they are also among the best sources for ascertaining international custom. Lisa Kline Arnett, *Death At An Early Age: International Law Arguments Against the Death Penalty*, 57 U. Cin. L. Rev. 245, 258 (1988). Four major human rights treaties prohibit the death penalty for juveniles: the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the Convention on the Rights of the Child, and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (hereafter the Geneva Convention), Article 68, was the first treaty to prohibit the death penalty for those under eighteen years of age at the time of the offense.[9] The United States both signed and ratified the convention in 1949. *International Human Rights Treaty Ratification History,* <http://www.foodfirst.org./fian/treaties.htm>. Though this instrument, by its own terms, applies only to civilians during "all cases of declared war or of any other armed conflict," the argument against using the death penalty

[9] "[T]he death penalty may not be pronounced against a person who was under eighteen years of age at the time of the offense." Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug.12, 1949, art. 68, 6 U.S.T. 3516, 3560, T.I.A.S. No. 3365, 75 U.N.T.S. 135 (entered into force for United States on Feb. 1, 1965).

to punish juveniles applies by logical extension to peace time as well. Julian S. Nicholls, *Too Young To Die: International Law and the Imposition of the Juvenile Death Penalty in the United States*, 5 Emory Int'l L. Rev. 616, 641 (1991). If such a prohibition is to apply during wartime, why should it not apply during times of peace? *Id*.

The second major international instrument to forbid the juvenile death penalty is the International Covenant on Civil and Political Rights (ICCPR).[10] The International Bill of Rights is a set of highly respected documents that revolve around the Universal Declaration of Human Rights. *Cases and Materials on the International Legal System*, 769 (Covey T. Oliver et al. eds., 4th ed. 1995). The Universal Declaration was the product of the first Commission on Human Rights, chaired by Eleanor Roosevelt, which worked to voice fundamental beliefs concerning human rights. International Centre for Human Rights and Democratic Development, *What is the Universal Declaration of Human Rights?*, <http://www.echrdd.ca/Libertas/English/Libertas1198/DeclarationEnglish.html>. The U.N. General Assembly unanimously adopted the Universal Declaration on December 10, 1948. Oliver et al., *supra*, at 764. The

[10] "A sentence of death shall not be imposed for crimes committed by persons below eighteen years of age." International Covenant on Civil and Political Rights, art.6, para.5, Annex to G.A. Res. 2200, 21 U.N. GAOR Supp. (No.16) at 53, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, reprinted in 6 I.L.M. 368.

International Covenant on Civil and Political Rights (ICCPR) generally details, in treaty form, the provisions of the Declaration. *Id*. at 769. As of 1994, out of the 185 nation members in the U.N., 138 nations are party to it. *International Human Rights Treaty Ratification History,* <http://www.foodfirst.org/fian/ treaties.htm>. The United States ratified the document in 1992, but it included a reservation as to Article 6(5), the juvenile death penalty provision, which means that the U.S. is not legally bound to observe the article. Oliver et al., *supra*, at 770. However, this in no way abrogates the persuasiveness of the treaty as evidencing international custom. The fact that nearly 75% of all nation-state members of the U.N. accept the treaty demonstrates its importance in identifying the evolving standards of decency.

The American Convention on Human Rights (ACHR) is the third instrument to expressly forbid the death sentence for crimes committed while under the age of eighteen.[11] The ACHR is a treaty of the regional human rights regime, the Organization of the American States. Oliver et al., *supra*, at 814. There are thirty-five countries in the OAS and, as of 1988, nineteen nations had ratified the ACHR and three more (including the U.S.) have signed it. Arnett, *supra*, at 258. Though the U.S. has not yet ratified the

[11] "[C]apital punishment shall not be imposed upon persons who, at the time the crime was committed. were under eighteen years of age." American Convention on Human Rights, art. 4, para. 5, O.A.S. Official Records, OEA/ser. X/XVI 1.1, doc. 65 rev.1, corr.1, reprinted in 9 I.L.M. 101 (1970) (entered into force on July 18, 1978).

treaty, it is a principle of customary international law that "a [State] is obliged to refrain from acts [that] would defeat the object and purpose of a treaty when . . . it has signed the treaty . . . subject to ratification . . . until it shall have made its intention clear not to become a party to the treaty." Vienna Convention on the Law of Treaties, art.18, U.N. Doc. A/CONF. 39/27 (1969), reprinted in 8 I.L.M. 679 (1969) (entered into force on Jan. 27, 1980). Thus, the United States should refrain from executing juveniles until it either repudiates the treaty or makes a reservation to it; anything less defeats the object and the purpose of the treaty that it has signed.

The fourth, and most recent, treaty illustrating the international community's disapprobation of the execution of child offenders is the Convention on the Rights of the Child, Article 37(a).[12] This convention, though relatively new (entered into force in 1990), is one of the most highly respected and accepted human rights conventions. The *only countries* that have not ratified it are Somalia and the United States. Amnesty International, *The USA to Confirm its Position as World Leader in Killing Child Offenders,* <http://www.amnesty.org/news/1999/25101099.htm>. The CRC demonstrates the consensus among nearly 100% of all nations concerning the treatment

[12] "No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offenses committed by persons below eighteen years of age." Convention on the Rights of the Child, art. 37, para.a, G.A. Res. 44/25, 44 U.N. GAOR c.1, Supp. (No.49), U.N. Doc. A/44/736 (1989).

of children. It is a glaring example of the international community's extreme disapprobation of the execution of children, which is expressly prohibited. Though the U.S. has not ratified the convention, it has signed it. *Id*. As with the ACHR, once the U.S. signed the document, it arguably became bound not to "defeat the object and purpose of the treaty" until it decided to either ratify or repudiate the treaty. Vienna Convention on the Law of Treaties, *supra*, art. 18.

These four treaties are highly indicative of the international community's opinion and its consistent and extreme displeasure at the concept of sentencing to death those who committed crimes while still legally a child. Because of the widespread acceptance of these instruments, especially the ICCPR and the CRC, these treaties should inform the court's definition of the "evolving standards of decency."

C. Customary international law, as evidenced by treaties, the domestic law of the majority of nations, actual state practice and U.N. Resolutions, overwhelmingly rejects the death penalty as an appropriate sentence for the crime of a juvenile.

Customary law is defined as state practice and *opinio juris*; it is composed of general international practices (*e.g.*, the prohibition of executing juveniles) that are considered legally obligatory by the nations that practice them.[13] Oliver et al., *supra*, at 4. These practices and opinions are so widely recognized that they create binding legal

[13] These practices are considered obligatory as opposed to those which are merely courteous, fair, or moral. Oliver et al., *supra*, at 4.

obligations on nations, regardless of their consent to a treaty. Arnett, *supra*, at 251. For international opinion to become customary law, the practice and opinion of the different nations "must be general and consistent." Restatement (Third) of the Foreign Relations Law of the United States § 102 cmt. b. There is no precise formula or fixed length of time necessary to create customary law, but the practice and opinion "should reflect wide acceptance." Nicholls, *supra*, at 644. *See* Oliver et al., *supra*, at 4.

The Supreme Court has explicitly recognized the legitimacy of customary international law. In *The Paquete Habana*, 175 U.S. 677, 700 (1900), the Court held:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . .

The Court reaffirmed this stance concerning customary law in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983). The court quoted *The Paquete Habana* and used international law as well as domestic principles to inform its holding. *Id*. at 623.

The prohibition of the execution of juveniles has plainly become customary international law. The wide acceptance of the treaties discussed above is heavy evidence that it is a general and consistent state practice. Nicholls, *supra*, at 647. In the domestic

law of other countries, the vast majority of nations reject the juvenile death penalty. *Id*. at 633. As of 1991, the only countries to judicially sanction it were the U.S., Bangladesh, Iran, and Iraq. *Id*. at 634. The juvenile death penalty is rarely practiced even in those states where domestic law does not prohibit the juvenile death penalty. *Id*. Amnesty International reported that of the thousands of legal executions between 1990 and 1999, only nineteen were of offenders who committed their crimes while a juvenile. Amnesty International, *The USA to Confirm its Position as World Leader in Killing Child Offenders,* <http://www.amnesty.org/news/1999/25101099.htm>. Out of these nineteen executions, more occurred in the U.S. than in all the other countries combined.[14] *Id*. In total, 144 countries have either abolished the death penalty altogether, prohibited it for punishing ordinary criminal offenses, or have banned it in the case of juveniles. Nicholls, *supra*, at 633.

Even the behavior of the United States has arguably contributed to this consensus of the international community. The U.S. sponsored the U.N. General Assembly Resolution, which recognized the prohibition of Article 6 of the ICCPR as a minimum

[14] Between the five other countries who are known to have killed child offenders since 1990 (Iran, Nigeria, Pakistan Saudi Arabia and Yemen), there have been nine executions. In the U.S. alone there have been ten executions of those who were children when they committed the crime. Amnesty International, *The USA to Confirm its Position as World Leader in Killing Children,* <http://www.amnesty. org/news/1999/25101099.htm>.

standard for *all* U.N. members and not just for those who ratified it. Arnett, *supra*, at 259 (citing G.A. Res. 35/172, U.N. GAOR Supp. (No.48) at 195, U.N. Doc. a/35/48 (1980)). Again, when the U.N. General Assembly adopted the "Standard Minimum Rules for the Treatment of Prisoners," which stated that "Capital punishment shall not be imposed for any crime committed by juveniles," the U.S. did not vote against the adoption. Nicholls, *supra*, at 642.

Due to the overwhelming embrace of treaties prohibiting the execution of juveniles, the status that some of those treaties have currently achieved, the lack of judicial sanction of the practice that is nearly universal, and the absence of the actual use of the practice even among those states that ostensibly allow it, it is clear that customary international law generally and consistently prohibits the death penalty. This court should consider this staggering international consensus when interpreting the Eighth Amendment according to the "evolving standards of decency."

ARGUMENT III

THE EXECUTION OF JUVENILES IS CRUEL PUNISHMENT PROHIBITED BY THE FLORIDA CONSTITUTION[15]

The Florida Constitution, Article I, Section 17, forbids punishments that are cruel

[15] Credit for many of the arguments and ideas in this section, as well as in the next section, "Argument IV", is owed to Children First Partners. Their amicus curiae brief in the case of *Jerome M. Allen v. State of Florida*, No. 79,003, served as the basis for much of these two state law sections of our brief. The Rutherford Institute thanks them, and their attorney Mark Even Olive.

and unusual. Executing a person for an offense committed as a juvenile is both a cruel and an unusual punishment in Florida; cruel because it serves no penological purpose and does not comport with Florida's evolving standards of decency, and unusual because it is unorthodox and Florida courts so rarely carry it out.

A. The Florida legislature presumes that children in Florida charged with capital offenses should not be punished like adults.

In 1988, this court examined whether executing a juvenile offender was unconstitutional. *LeCroy v. State*, 533 So. 2d 750 (Fla. 1988) In its analysis of the issue, this court considered Chapter 39 of the Florida Statutes and other legislative actions concerning juveniles for evidence of the standard of decency regarding the treatment of children charged with serious crimes. This Court concluded at that time that children charged with serious offenses including murder in Florida should be treated as adult criminals. *Id.* at 757.

In the eleven years since *LeCroy* was decided, the legislature's view of how courts should treat children charged with serious crimes, including murder, has changed. The current legislative environment and popular consensus regarding adolescents who have committed violent crimes are now strikingly different.

1. Florida prefers treatment for juveniles, rather than adult punishments, as evidenced by The Juvenile Justice Reform Act of 1990.

In 1989 the Florida legislature instigated an ongoing study of at-risk children in Florida. The survey results demonstrate our evolving standard of decency regarding proper treatment of children. In its *Report of the Study Commission on Child Welfare, Part Two, Background and Findings* (1991), the Commission reported that children comprise the greatest percentage of those Floridians who live below the poverty level, that they are abused and neglected at an alarmingly high rate, and that many do not receive adequate medical care. *Id.* at 4-5. Not surprisingly, the report concluded that children treated this way cannot develop into contributing members of society: "The result may be an individual who cannot respond to the educational system or who cannot comprehend the possible consequences of behavior." *Id.* at 3-4. These are the children who repeatedly commit crimes.

The 1989 legislature also created a committee to study the juvenile justice system "in response to concerns by judges, lawyers, child advocates and other observers that the provisions of Chapter 39, governing delinquency [were] neither relevant nor effective." Michael J. Dale, *Juvenile Law* in *The 1989 Survey of Florida Law,* 14 Nova L. Rev. 859 (1990). *See also* Act effective July 1, 1989, 1989 Fla. Laws ch. 89-295.

The Juvenile Justice Reform Act of 1990 (JJRA) later implemented many of the recommendations of this committee, entirely renovating Florida's juvenile justice system. Commission on Juvenile Justice, *Juvenile Justice Fact Book* 1 (1992). The Reform Act

recognized the correlation between underserved children and delinquent children, and it mandated earlier and more comprehensive intervention in the lives of at-risk children. *Id.*

The Juvenile Justice Reform Act of 1990 also revealed the legislature's intent that courts no longer sentence juvenile offenders as if they were adults. For example, the Act states:

> In order to promote effective facility management of a difficult population and to promote rehabilitation that protects the public, children who require secure facilities due to serious or habitual delinquent behavior shall, to the maximum extent practicable, be placed in small, secure, intensive rehabilitation facilities.

Fla. Stat. Section 39.002 (3)(b) (1992).

It is clear that the legislature now mandates rehabilitation for all juvenile offenders, including juveniles who have committed murder. For example, Florida Statute, Chapter 39 (1991), the Juvenile Justice Act, specifically articulates juvenile sanctions for persons who have *previously* been adjudicated delinquent for up to three capital offenses, Section 39.01 (46) (b); it contemplates having a child "adjudicated delinquent for murder," Section 39.052 (2) (a); and it provides for children who have been "committed to the department for . . . [a] *capital*, life, first degree, or second degree felony," Section 39.057 (3) (a).

Further, the JJRA instructs that "[t]he supervision, counseling, rehabilitative

treatment, and punitive efforts of the juvenile justice system should avoid the inappropriate use of correctional programs and large institutions." Section 39.002 (6). This does not contemplate adult punishment, nor does it include the death penalty as an option. Instead, the legislature specifically recommends that children adjudicated delinquent for a capital crime should be "provide[d] an intensive educational and physical training and rehabilitative program." Section 39.057 (1).

While a juvenile may be treated as an adult when charged with a capital offense, the legislature instructs the courts not to proceed in that manner. Today, if a child *is* prosecuted as an adult, it is not because the legislature "has consistently" required it or has "reiterated the historical rule" in favor of treating children charged with a capital offense as adults, but rather because the legislature's intent to rehabilitate child offenders has failed at some juncture. *See* Commission on Juvenile Justice, 1992 *Annual Report* 6 (1992).

2. Legislative studies of the Reform Act from 1990-1992 confirm the advantage of treatment for persons under the age of eighteen.

The premise of the Reform Act was that juveniles should receive help, not punishment, when they commit criminal acts. The studies of the Commission on Juvenile Justice, confirm that rehabilitation is the appropriate response to juvenile crime.

The Commission has reported that most juveniles in the juvenile justice system

lack essentials to meet their basic needs, and are often victims of sexual and physical abuse.[16] The Commission also identified major factors contributing to delinquency: poverty, broken homes, drug abuse, dropping out of school; child abuse and neglect; high unemployment rates among poor youth; and the influence of parents who abuse drugs or alcohol or who have a criminal record. Florida Commission on Juvenile Justice, *1992 Annual Report to the Florida Legislature* 98, 98-99 (1992).

Florida is now comitted to focusing on eliminating the contributors to juvenile delinquency: poverty, an inadequate education, poor medical care, and a troubled home life. Rather than punishing blindly, Florida chooses treatment, the provision of services, and serious attempts at rehabilitation for children. The Reform Act set goals based upon the standards of decency of the people of Florida.

3. The standard of decency in Florida has evolved into a commitment to the rehabilitation model for "at risk" children.

Not only is the Florida legislature committed to the rehabilitation of Florida's delinquent juveniles, but the public supports the effort as well. Florida supports spending on their children. The Florida Commission on Juvenile Justice, citing surveys of public opinion on juvenile issues, found that "the public is concerned about the plight of children and is willing to support a tax increase dedicated to children's services." *See*

[16] *See Eddings*, 455 U.S. at 115 n. 11.

Commission of Juvenile Justice, *Juvenile Justice Fact Book* 3 (June 1992). Florida legislation and Floridians' attitudes regarding children demonstrate their reluctance to treat children charged with serious crime as adults.

B. Execution of juveniles is inconsistent with Florida's standard of decency and its commitment to rehabilitation of children.

To be justified as a penalty, execution must serve as just retribution or as a deterrent. If neither purpose is served by the penalty, then execution is "so totally without penological justification that it results in the gratuitous infliction of suffering." Gregg v. Georgia, 428 U.S., 153, 183 (1976), and it is "nothing more than the purposeless and needless imposition of pain and suffering." *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

Execution of a juvenile offender will not deter other persons of like age and will be an excessive punishment. Moreover, by *not* executing such persons, the Court would be acting consistently with the Juvenile Justice Reform Act's penological goal of rehabilitation.

1. Children are impulsive and less blameworthy than adults.

A child's character is a product of inexperience and lack of insight and perspective. *Eddings*, 455 U.S. at 115-16. It also harbors an amazing "capacity for growth." *Thompson*, 487 U.S. at 837. Florida nurtures its adolescents by denying them adult

privileges[17] and saving them from adult responsibilities.[18] We also protect them[19] and to provide them with an education,[20] food, clothing, and shelter.[21] In recognizing that children deserve such special protection and restriction, we inherently realize that children are less responsible for their actions than adults.

In order to be deterred, a person must be capable of exercising judgment and planning. "'[M]inors often lack the experience, perspective, and judgment' expected of adults." *Eddings*, 455 U.S. at 115-16 (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1973)).[22] They are easily influenced by others, and they tend to act impulsively without

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[17] Children cannot be out late; attend certain movies or plays; skip school; enter certain business establishments; purchase certain magazines, lottery tickets, or cigarettes; drive a car, and choose to leave home. Children seventeen and younger, the "at-risk group," cannot legally go to a dog race, enter into a binding contract, ingest or possess alcoholic beverages, serve on a jury, vote or sue someone. *See LeCroy v. State*, 533 So. 2d 750, 759 (Fla. 1988) (Barkett, C.J., (then J.), concurring in part, dissenting in part).

[18] *See* Chapter 39.0205-39.078, Fla. Stat. (1992); Dorne, C., and Gewerth, K., *Imposing the death penalty on juvenile offenders: A constitutional assessment*, 75 Judicature 6, n.3 (1991); Commission on Juvenile Justice, *Juvenile Justice Fact Book* 1 (1992).

[19] *See* Fla. Stat. Sections 39.40-418 (1992).

[20] Section 1, Article IX, Florida Constitution (1968). *See* Fla. Stat. Section 228.001.

[21] *See* Fla. Stat. sections 39.42-447. *See also* section 39.002 (1) (1992).

[22] *See* Jeremy Bentham, *Theory of Legislation* (Boston: Weeks, Jordan, 1840, Vol. I., p. 248). *See also Thompson*, 487 U.S. at 825 n.23 (plurality opinion).

a "cold calculus . . . preced[ing] the decision to act." *Gregg*, 428 U.S. at 186. Personalities such as these are not deterred. "The likelihood that the teenage offender has made the type of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." *Thompson*, 487 U.S. at 836.

Not only are juveniles impulsive, but they also tend to lack a reasonable fear of death or personal harm. *See* Irwin & Millstein, *Correlates of Risk-Taking Behaviors*, 7 J. Adolescent Health Care, No. 6S, 82S (Nov. 1986 Supp.).[23] The remote possibility of death is therefore not great enough to deter a juvenile.

Furthermore, "punishment should be directly related to the personal culpability of the criminal defendant." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). Therefore, retribution is clearly inappropriate when applied to the juvenile execution context, where children are naturally less culpable than adults. It therefore follows that Florida should not execute adolescents because these children are incapable of forming the "highly culpable mental state," *Tison v. Arizona*, 481 U.S. 137, 157 (1987), that warrants retribution.

2. Florida's standard of decency covers all persons

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[23] Moreover, teenagers are unafraid of death and frequently do not comprehend that death is different or that death could happen to them. *See* Sheras, *Suicide in Adolescents*, in *Handbook of Clinical Child Psychology* 759, 769-70 (C. Walker & M. Roberts eds. 1983).

younger than eighteen.

"[T]here is some age below which a juvenile's crimes can never be constitutionally punished by death, and . . . our precedents require us to locate this age in light of the 'evolving standards of decency that mark the progress of a maturing society.'" *Thompson*, 487 U.S. at 849 (O'Connor, J., concurring) (citations omitted). Choosing that age is admittedly somewhat arbitrary. But eighteen -- the age at which all persons are fully entitled to the enjoyment of freedom regarding their life, liberty, and property -- seems like a logical choice. By then they can vote, drink alcohol, see all movies, and fight in the military. Before that age, we judge them to be too young for these things. Furthermore, Florida has chosen to make children subject to juvenile court jurisdiction, and has committed the juvenile court to the rehabilitation model. This Court should reexamine the standards of decency in Florida regarding crimes by minors.

ARGUMENT IV

EXECUTION OF JUVENILES IN FLORIDA ARE RARE, AND SUCH "UNUSUAL" PUNISHMENT VIOLATES THE FLORIDA CONSTITUTION.

Between 1972 and 1993, this court reviewed the sentences of eleven persons sentenced to death who were under the age of eighteen at the time of their offense. For five of these juveniles, this court reduced the sentences to life imprisonment. [24] Four of

[24] *Thompson v. State*, 328 So. 2d 1 (Fla. 1976) (unanimous life recommendation for seventeen-year-old); *Livingston v. State*, 565 So. 2d 1288 (Fla. 1988) (7-5 death recommendation for seventeen-year-old); *Bernell v. Hegwood*, 575 So. 2d 170 (Fla.

the other cases were remanded by this court, and the United States Court of Appeals for the Eleventh Circuit remanded one, for a new trial or sentencing. All five of these defendants were resentenced to life in prison. Four of these defendants were seventeen years old at the time of the offense,[25] and one of them was fifteen years old.[26]

Juveniles in Florida are rarely sentenced to death, and when a death penalty is imposed on such an offender, courts almost always reduce it to life or order a new sentencing rehearing on appeal.

Unusual punishments are prohibited in Florida by Article I, section 17, of the Florida Constitution. A death sentence for a juvenile offender is constitutionally unusual, and should be overturned.

CONCLUSION

For the reasons stated above, *Amici* respectfully request that this Court reverse appellant's sentence of death and, if there are no errors regarding the determination of

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1991) (life recommendations) for seventeen year old; *Brown v. State*, 367 So. 2d 616 (Fla. 1979) (life recommendation for sixteen-year-old); *Vasil v. State*, 374 So. 2d 465 (Fla. 1979) (death recommendation for fifteen-year-old).

[25] *Simpson v. State*, 418 So. 2d 984 (Fla. 1983) (death recommendation); *McGill v. Dugger*, 824 F.2d 879 (11th Cir. 1988) (death recommendation); *Peavy v. State*, 442 So. 2d 200 (Fla. 1983) (7-5 death recommendation); and *Lamb v. State*, 532 So. 2d 1051 (Fla. 1988) (8-4 death recommendation).

[26] *Ross v. State*, 386 So. 2d 1191 (Fla. 1980) (death recommendation).

guilt, that the Court order imposition of a life sentence.

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