IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RODRIGO CABALLERO, Defendant and Appellant.	Case No. S190647 2nd Appellate District Division 4 Case No. B217709 Los Angeles Superior Court Case No. MA043902 The Honorable Hayden Zacky, Judge

BRIEF OF JUVENILE LAW CENTER, HUMAN RIGHTS ADVOCATES, HUMAN RIGHTS WATCH, LOYOLA LAW SCHOOL CENTER FOR LAW AND POLICY, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS, AND THE DISABILITY RIGHTS LEGAL CENTER AS *AMICI CURIAE* ON BEHALF OF APPELLANT

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INTRODUCTION

In 2009, Rodrigo Caballero was found guilty on three counts of attempted murder with special enhancements and was sentenced to three consecutive life terms totaling 110 years to life. Caballero committed the offenses at age 16, was sentenced at age 18, and his earliest eligible parole date is June 5, 2112 when he will be 122 years of age.[1] As such, he will not be eligible for parole in his lifetime and was thus sentenced to the functional equivalent of life without parole, i.e., he will die in prison.[2] The United States Supreme Court's decision in *Graham v. Florida* 130 S.Ct. 2011 (2010) requires that this sentence be vacated.

The Supreme Court ruled in *Graham* that juvenile offenders cannot be sentenced to life without a meaningful and realistic opportunity for re-entry into society *prior to the expiration of their sentence* for non-homicide offenses. *Id.* at 2010. The Court explained:

> The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. . . . Life in prison without the possibility of parole gives no chance for fulfillment

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[1] California Penal Code §3046(b) requires that Caballero serve a minimum of 110 years before becoming parole-eligible.

[2] Under the Supreme Court's Eighth Amendment jurisprudence, courts must consider the actual impact of the sentence upon the individual regardless of how that sentence is characterized. For example, in *Rummel v. Estelle* 445 U.S. 263 (1980), the Court examined a challenge to a "mandatory life sentence." The Court upheld the sentence, based upon its view that "a proper assessment of Texas' treatment of Rummel could hardly ignore the possibility that *he will not actually be imprisoned for the rest of his life*. If nothing else, the possibility of parole, however slim, serves to distinguish Rummel from a person sentenced under a recidivist statute...which provides for a sentence of life without parole ..." *Id.* at 280-81 (emphasis added). Unlike Rummel, Caballero *will actually be imprisoned for the rest of his life,* a fact this court cannot ignore.

outside prison walls, no chance for reconciliation with society, no hope. *Id.* at 2032. *Graham* therefore held that a sentence that provides no "meaningful opportunity to obtain release" before the end of the term is unconstitutional. *Id* at 2033. Here, Appellant was sentenced to remain in prison until he is approximately 122 years old for non-homicide offenses for which he was charged when he was a juvenile. Because this sentence means that Petitioner will unquestionably die in prison before any possibility of release, it is unconstitutional under *Graham.*

PROCEDURAL HISTORY

Amicus adopts the procedural history presented by Appellant in his brief.

STANDARD OF REVIEW

Amicus adopts the standard of review articulated by Appellant in his brief.

ARGUMENT

I. A Sentence That Is The Functional Equivalent Of Life Without Parole For A Juvenile Who Was Convicted of A Non-Homicide Offense Is Unconstitutional

In *Graham v. Florida,* the United States Supreme Court held that "the Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Graham v. Florida* 130 S.Ct. 2034, 2011 (2010).[3] The Court's reasoning was grounded in developmental and

[3] A conviction for attempted murder is not homicide because, as the *Graham* Court put it, "[t]here is a line 'between homicide and other serious violent offenses against the individual. Serious non-homicide crimes 'may be devastating in their harm . . . but in terms of moral depravity and of the injury to the person and to the public . . . they cannot be compared to murder in their severity and irrevocability. This is because [l]ife is over for the victim of the murderer, but for the victim of

scientific research that demonstrates that juveniles possess a greater capacity for rehabilitation, change and growth than adults. Emphasizing these unique developmental characteristics, the Court held that juveniles who are convicted of non-homicide offenses require a distinctive treatment under the Constitution.

A. Caballero's 110 Year Sentence For A Non-Homicide Offense Is Unconstitutional As It Serves No Legitimate Penological Purpose

According to *Graham*, a sentence "lacking any legitimate penological justification is by its nature disproportionate to the offense" and therefore unconstitutional. The Court concluded that no penological justification warrants a sentence of life without parole as applied to juveniles convicted of non-homicide

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even a very serious non-homicide crime, life . . . is not over and normally is not beyond repair." (*Graham, supra,* 130 S.Ct. at 2027 (*internal quotations and citations omitted.*); *see also id.* at 2043 (Thomas, J. dissenting) "The Court holds today that it is 'grossly disproportionate' and hence unconstitutional for any judge or jury to impose a sentence of life without parole on an offender less than 18 years old, unless he has committed a homicide." (*internal citation omitted*).) Recently, a justice of the California Court of Appeal also rejected the argument that juveniles convicted of attempted murder are excluded from *Graham*'s remedy, noting, "I believe the Supreme Court intended its categorical rule to apply to juveniles convicted of attempted murder. I base this conclusion primarily on the language the court twice chose to express its holding . . . I further rely on the court's discussion of the line between homicide and other serious violent offenses against the individual. . . If *Graham* applies to a juvenile child rapist—as it clearly does—there is no rational basis for declining to apply it to someone like appellant, who attempted but failed to kill, and whose victims walked into court to testify." *People v. Ramirez* 123 Cal.Rptr.3d 155 (2011), 170 -171 (Manella, J. dissenting); *see also People v. De Jesus Nunez* 125 Cal.Rptr.3d 616 (2011) (applying *Graham* to case where defendant convicted of four counts of attempted murder). Courts in Florida have also recognized that attempted murder is within the non-homicide definition of *Graham*. *See Manuel v. State* 48 So.3d 94, 97 2010 ("[S]imple logic dictates that attempted murder is a non-homicide offense because death, by definition, has not occurred."); *see also McCullum v. State* (60 So.3d 502, 503 (2011) ("we reject the state's assertion that an attempted homicide should be treated as an actual homicide under *Graham*....").

offenses. *Id.*. As in *Graham*, the 110-year sentence meted out to Caballero, which ensures he will die in prison, does not serve any of the traditional penological goals -- deterrence, retribution, incapacitation, or rehabilitation.

Relying on the analysis set forth in *Roper*, the *Graham* Court concluded that the goal of deterrence did not justify the imposition of life without parole sentences on juveniles:

> *Roper* noted that "the same characteristics that render juveniles less culpable than adults suggest ... that juveniles will be less susceptible to deterrence." *Ibid.* ..... they are less likely to take a possible punishment into consideration when making decisions.

Graham, 130 S.Ct. at 2028-2029. Because youth would not likely be deterred by the fear of a life without parole sentence, this penological goal did not justify the sentence.

The *Graham* Court also concluded that retribution does not justify the imposition of life without parole sentences for juveniles. The Court echoed *Roper's* assessment that "the case for retribution is not as strong with a minor as with an adult." *Id.* at 2028 (citing *Roper*, 543 U.S. at 571). As the *Roper* Court had explained, such a severe retributive punishment was inappropriate in light of juvenile immaturity and capacity to change. The *Graham* Court recognized that these same considerations applied to "imposing the second most severe penalty on the less culpable juvenile." *Id.*

The *Graham* Court also held that incapacitation could not justify the sentence of juvenile life without parole. To justify incapacitation for life "requires

the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable." *Id.* at 2029. Indeed, at its core, the developmental research proves the opposite – adolescents' natures are transient and adolescents must be given "a chance to demonstrate growth and maturity." *Id.* As a result, a child sent to prison should have the opportunity to rehabilitate and qualify for release after some term of years. Mechanisms such as parole boards can provide a crucial check to ensure that the purposes of punishment are satisfied without unnecessarily incapacitating fully rehabilitated individuals and keeping youth "in prison until they die." *Naovarath v. State* 779 P.2d 944, 948 (1989).

> Finally, *Graham* concluded that a life without parole sentence cannot be justified by the goal of rehabilitation. The penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society.

Graham, 130 S Ct. at 2030. The Court also underscored that the denial of rehabilitation was not just theoretical: the reality of prison conditions prevented juveniles from growth and development they could otherwise achieve, making the "disproportionality of the sentence all the more evident...." *Id.* During a lengthy adult sentence, youth lack an incentive to try to improve their character or skills. Indeed, many juveniles sentenced to spend the rest of their lives in prison commit suicide, or attempt to commit suicide. *See* Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 Wake Forest L. Rev. 681, 712, nn.141-47 (1998). Because this 110-year

sentence, which is equivalent to life without parole, serves no legitimate penological purpose, it is unconstitutional.

B. Caballero's Sentence Is Unconstitutionally Disproportionate In Light Of His Age

1. The Eighth Amendment Requires That Sentences Must Be Proportionate

Even if a 110-year sentence does not equal life pursuant to *Graham*, the sentence is still disproportionate. Proportionality is central to the Eighth Amendment. The U.S. Supreme Court has interpreted the Eighth Amendment's ban on cruel and unusual punishment to include punishments that are "grossly disproportionate" to the crime. *Graham, supra* (citing *Harmelin v. Michigan* 501 U.S. 957, 997 (1991). In *Graham,* the Court instructed, "to determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" *Id.* (citing *Estelle v. Gamble* 429 U.S. 97, 102 (1976). Courts apply a proportionality review to determine if a sentence meets that standard. *Id.*

The Court in *Graham* held that cases addressing the proportionality of sentences "fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case." *Id.* at 2021. "The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty." *Id.*

Under the first classification the Court considers all of the circumstances of

the case to determine whether the sentence is unconstitutionally excessive. A court must begin by comparing the gravity of the offense and the severity of the sentence. In the rare case where this "threshold comparison . . . leads to an inference of gross disproportionality," the Court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. *Id.* at 2022. If this comparative analysis "validate[s] an initial judgment that [the] sentence is grossly disproportionate, the sentence is cruel and unusual." *Id.* at 2022.

The second, "categorical," classification of cases assesses the proportionality of a sentence as compared to the nature of the offense or the *characteristics of the offender*. *Id.* at 2022 (emphasis added). In this line of cases – in which a particular sentence is deemed unconstitutional for an entire class of offenders – the Court has found that some offenders have characteristics that make them categorically less culpable than other offenders who commit similar or identical crimes. *See, e.g. Roper v. Simmons* 543 U.S. 551 (2005) (applying a categorical approach to ban the death penalty for defendants who committed crimes before turning 18); *Atkins v. Virginia* 536 U.S. 304 (2002) (applying the approach to ban the death penalty for defendants who are mentally retarded); *Kennedy v. Louisiana* 554 U.S. 407 (2008) (applying the approach for defendants convicted of rape where the crime was not intended to and did not result in the victim's death); *Graham v. Florida* 130 S.Ct. 2011 (2010) at 2022 (applying the

cruel and unusual punishment under the federal and California proportionality tests." *Id.* The court in *People v. Mendez* similarly reasoned, "youth is relevant [to the proportionality analysis] because the harshness of the penalty must be evaluated in relation to the particular characteristics of the offender." *People v. Mendez* 188 Cal.App.4th 47, 66 (2010).

Other state courts similarly have adopted a proportionality analysis that takes into account the unique characteristics of the offender. For example, Kansas looks to "the nature of the offense and the character of the offender . . . with particular regard to the degree of danger present to society" *State v. Gomez* 235 P.3d 1203, 1210 (2010), and Massachusetts considers "the nature of the offender and offence ... in light of the degree of harm to society." *Cepulonis v. Com.* 427 N.E.2d 17, 20 (1981). At least one state explicitly requires an individualized assessment of maturity at the time of the offense for all offenders under the age of eighteen. *See State v. Davolt* 84 P.3d 456, 479–481 (2004).

3. The Eighth Amendment Requires A Separate Proportionality Analysis For Children And Adolescents

Both state and federal proportionality standards prohibit punishment that is grossly disproportionate to the crime or the individual culpability of the offender. *J.I.A.*, 2011 WL 2529837 at 12-13; *Graham*, 130 S.Ct. at 2037. As children are categorically less culpable than adults, a formal and separate proportionality analysis for juveniles should be incorporated into Eighth Amendment jurisprudence.

a. Children's Developmental Differences Are Salient To The Eighth Amendment Analysis Whenever Children Receive A Sentence Designed For Adults

The Supreme Court has consistently held that children are different from adults in constitutionally relevant ways. *See, e.g., J.D.B. v. North Carolina* 131 S.Ct. 2394 (2011); *Graham v. Florida* 130 S.Ct. 2011 (2010); *Roper v. Simmons* 543 U.S. 551 (2005); *Haley v. Ohio* 332 U.S. 596 (1948). A child's age is far "more than a chronological fact." *J.D.B., supra*; accord *Eddings* v. *Oklahoma,* 455 U. S. 104, 115 (1982); *Gall* v. *United States* 552 U. S. 38, 58 (2007); *Roper,* 543 U.S. at 569; *Johnson* v. *Texas* 509 U. S. 350, 367 (1993). In recent years, the firmly established doctrine that children merit distinct treatment under the Constitution has been supported and reinforced by a growing body of scientific research demonstrating that youth are not only socially, but also psychologically and physiologically different from adults. *See, e.g.,* Steinberg, Cauffman, Banich & Graham, *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 Dev. Psych. 1764 (2008).[6]

The *Graham* Court noted that three essential characteristics distinguish youth from adults for culpability purposes:

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[6] The Court in *J.D.B.* noted that "[a]lthough citation to social science and cognitive science authorities is unnecessary to establish these commonsense propositions [that children are different than adults], the literature confirms what experience bears out." (131 S.Ct. at 2403 n.5.)

> As compared to adults, juveniles have a "lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed." These salient characteristics mean that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Accordingly, "juvenile offenders cannot with reliability be classified among the worst offenders."

130 S.Ct. at 2026 (quoting *Roper*, 543 U.S. at 569-70, 573). In light of these differences, the *Graham* Court concluded, "[a] juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.'" *Id.* (quoting *Thompson v. Oklahoma* 487 U.S. 815, 835 (1988). [7] Because of a youth's developmental characteristics and capacity for change, the Supreme Court in *Roper* and *Graham* found that sentences that are constitutional for adults are unconstitutional when imposed on juveniles.

Though *Roper* and *Graham* involved sentences of death and life without parole, the research relied upon in both cases establishing that adolescents are less culpable adults applies with equal force to any juvenile – regardless of his or her offense and regardless of his or her sentence. Therefore, when assessing whether a sentence imposed on a juvenile is proportionate under the Eighth Amendment, a court must consider the characteristics of the juvenile offender, not merely

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[7] *See* Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 31 (2008) (explaining that "[m]ost teenagers desist from criminal behavior . . . [as they] develop a stable sense of identity, a stake in their future, and mature judgment." Thus, because most adolescents who commit crimes are "not on a trajectory to pursue a life of crime, a key consideration in responding to their criminal conduct is the impact of dispositions on their prospects for productive adulthood.")

compare the gravity of the offense to the severity of the sentence. *See Graham,* 130 S.Ct. at 2202.

b. Courts Must Consider Mitigating Circumstances Whenever A Child Receives A Harsh Adult Sentence

In extending the proportionality jurisprudence that recognizes that children merit distinct treatment under the Eighth Amendment, courts must consider the offender's juvenile status and individual characteristics of the juvenile that would reflect a diminished level of culpability – in short, the court must look to mitigating factors.

i. The Supreme Court Has Historically Considered Mitigating Factors in Death Penalty Cases

The Supreme Court has recognized that mitigating factors can justify less harsh sentences. The Court has held that, in adult death penalty cases, "the fundamental respect for humanity underlying the Eighth Amendment requires that the defendant be able to present any relevant mitigating evidence that could justify a lesser sentence." *Sumner v. Nevada Dept. of Prisons* 483 U.S. 66, 85 (1987). The sentencer must consider all mitigating evidence and allow for individualized sentencing that hypothetically takes into account the full context in which the crime occurred *See* J. Kirchmeier *(1998), Aggravating and mitigating factors: The paradox of today's arbitrary and mandatory capital punishment scheme.* William & Mary Bill of Rights Journal, *345.*

In death penalty cases, youth is one of these mitigating principles. *See, e.g., Eddings v. Oklahoma* 436 U.S. 921 (1978); *Thompson v. Oklahoma* 487 U.S.

815 (1988). The *Roper* Court, in banning the death penalty for juveniles, found that the "differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood [exists] that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." *Roper,* 543 U.S. at 573.

ii. When Sentencing A Child To An Adult Sentence, Courts Must Always Look To Mitigating Factors, Even In Non-Death Penalty Cases

Courts should consider mitigating factors whenever considering an adult sentence for a child. The Supreme Court has required mitigating factors only in death penalty cases as "death is a punishment different from all other sanctions in kind rather than degree." *Woodson v. North Carolina* 428 U.S. 280, 303-04 (1976). *Graham,* however, eliminated the "death is different" adult sentencing distinction – at least when juveniles are involved. This consequence of *Graham* was expressly noted by the dissent. *See Graham,* 130 S.Ct. at 2046 ("Today's decision eviscerates that distinction [between capital and noncapital sentencing]. 'Death is different' no longer.") (Thomas, J., dissenting). Under *Graham* and *Roper,* sentences that would be deemed appropriate for adult offenders would be unconstitutional for a child who committed like offenses. In the wake of these

cases, courts should similarly look to mitigating factors that may justify a less harsh sentence whenever a child receives a sentence designed for an adult.

Because youth are categorically less culpable than adults, courts should always treat their youth as a mitigating factor that may justify a lesser sentence. *See, e.g., Roper*, 543 U.S. at 553 (finding that youth's irresponsible conduct is not as morally reprehensible as that of an adult and that juveniles' own vulnerability and comparative lack of control over their immediate surroundings mean they have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment). Other mitigating factors that courts typically consider may also be affected by a youth's age, immaturity and development.

In California the mitigating factors a jury can also consider include: whether the crime was committed while the defendant was under the influence of extreme mental or emotional disorder; whether the defendant acted under extreme duress or under the substantial domination of another person; whether the defendant was an accomplice to the crime and his participation was relatively minor in addition; and any other special or extenuating circumstances that affect the conduct of the offender at the time of the crime.[8] Cal. Penal Code § 190.2. A

[8] Other states use similar factors. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-751; Va. Code Ann. § 19.2-264.4. However, in *Lockett v. Ohio* 438 U.S. 586 (1978) and later in *Eddings v. Oklahoma* 455 U.S. 104 (1982) the Court ruled that all relevant mitigating evidence presented must be admitted and considered by the sentencer in a capital case, even if the mitigating factor is not specifically enumerated in a statute. In *Penry v. Lynaugh* 492 U.S. 302 (1989), *abrogated on other grounds by*

juvenile offender's adolescence and development may play a role in many of these factors for consideration. Circumstances that would not be "special" for an adult may be "special" because an adolescent lacks the tools and sophistication to assess risk and consider the consequences of their actions.[9]

To ensure that sentences for juveniles are not unconstitutionally disproportionate, courts should therefore evaluate mitigating factors including the juvenile's age, level of involvement in the offense, external or coercive pressures surrounding the criminal conduct, and other relevant characteristics. These factors should be considered in light of the juvenile's diminished capacity, increased impulsivity, and capacity for change or rehabilitation.

Atkins v. Virginia 536 U.S. 304 (2002), the Court held that the trial judge must instruct the jury that it may consider evidence of non-statutory mitigating factors presented by the defendant.

[9] For example, youth are more susceptible to peer pressure and coercion. In fact, research shows that a youth's desire for peer approval and fear of rejection affects their choices even without clear coercion . *See* Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy,* 1993. Because adolescents are more impulsive than adults, it may take less of a threat to provoke an aggressive response from a juvenile. Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psych. 1009 (2003). Immediate and tangible rewards, along with the reward of peer approval, weigh more heavily in their decisions and hence they are less likely than adults to think through the consequences of their actions. *Id.* Because a juvenile's decision-making skills are immature and their autonomy is constrained, their ability to make good decisions is mitigated by stressful, unstructured settings and the influence of others.

C. Where There Is Evidence Of A Mental, Educational Or Cognitive Disability, Courts Must Consider The Disability As A Mitigating Factor

Caballero's 110-year sentence is unconstitutionally disproportionate not only because of his young age, but also because he suffered from significant mental illness at the time of the offense and at trial.[10] The trial court never considered whether Caballero's mental disability, which rendered him incompetent to stand trial in juvenile court, impacted Caballero's behavior at the time of the offense or how it impacted his competence to stand trial or participate in his defense.[11]

1. Caballero Suffered From Significant Mental Illness Which Impacted The Fairness Of The Proceedings And The Constitutionality Of The Sentence Imposed

At the age of 12, Rodrigo Caballero began to hear voices. SBE 23 (Child Adolescent Assessment—Short Form p. 1 of 3). Initially, he did not understand what was happening, and told no one. By the time he was arrested and in custody, however, his symptoms advanced to the point that he was actively psychotic,

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[10] While *Amici* recognize that this proceeding is not a challenge to the effectiveness of Caballero's counsel, *Amici* note that the failure of counsel to investigate, develop, and present the clear evidence of Caballero's schizophrenia, available from the juvenile court proceedings and the psychiatric hospitalization records, critically impacted the fairness of the proceedings, and the constitutional soundness of the sentence.

[11] Counsel, for example, failed to raise the question of Caballero's competence to stand trial, failed to argue his lack of specific intent to commit the crime, failed to inquire about the impact of no medication on his client's obviously irrational and unconsidered decision to testify, and failed to argue to the court any mitigation based on Caballero's mental illness.

significantly impair an individual's ability to appreciate the nature and consequences of their conduct and inhibit their ability to conform their conduct to the requirements of law. *Recommendations and Report on the Death Penalty and Persons with Mental Disabilities*, 20 Mental & Physical Disability L. Rep. 668 (2006) [hereinafter *ABA Recommendation*].

In addition, individuals who suffer from severe mental illness tend to be "more vulnerable or susceptible to negative influences and outside pressures." *Roper*, 543 U.S. at 569.) Individuals with psychotic or delusional disorders may be particularly susceptibility to outside influences because of their "disoriented, incoherent, and delusional thinking." *See* Ronald & Lydia Patia Spear, *Adolescent Brain Development: Vulnerabilities and Opportunities* (2004); DSM-IV, at 27-37; ABA Recommendation, at 671. In fact,

> people proven to be psychotic at the time of the offense are as volitionally and cognitively impaired at the crucial moment as children . . . who commit crimes. If anything, the delusions, command hallucinations, and disoriented thought process of those who are mentally ill represent greater dysfunction than that experienced by . . . virtually any non-mentally ill teenager.

See Christopher Slobogin, *Mental Illness and the Death Penalty*. 1 Cal. Crim. L. Rev. 13 (2000).

Finally, the manifestations of mental illness are "transitory, [and] less fixed." *Roper*, 543 U.S. at 570. While there is no established cure for mental illness, the corresponding symptoms and behaviors can be treated with appropriate medication and participation in an individualized psychosocial therapy program.

See Slobogin, *supra.* Studies show that psychotropic medication can be quite successful and expeditious in eliminating psychotic symptomatology. *See* Harold I. Kaplan & Benjamin J. Sadock, *Comprehensive Textbook of Psychiatry* (6th Edition 1989) (response time to medication is four to five weeks); National Alliance on Mental Health, *Mental Illnesses,* http://www.nami.org/template.cfm?section=mental_illness (last visited Oct. 21, 2011) (reporting that between 70% and 90% of individuals who receive regular treatment for their mental illness experience a significant reduction in symptoms). Because children with mental illnesses may be able to receive treatment that renders them unlikely to commit subsequent offenses, they should be offered an opportunity for rehabilitation instead of receiving irrevocable sentences.

3. Youth With Disabilities Are More Vulnerable And More Susceptible To Unjust Proceedings And Sentences

At every stage of criminal proceedings, children and adolescents with disabilities are likely to be at an even greater disadvantage than their typically-developing peers. In *Atkins v. Virginia,* the Court noted that persons with intellectual disabilities are at higher risk of false confessions, may be less able to give meaningful assistance to their counsel, are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crime. *Atkins*, 536 U.S. at 320-21. A child's young age compounds the effects of disability, leaving youth with disabilities particularly vulnerable. Research suggests, however, that instead of treating youth and disability as mitigating

concluded categorically apply to all juvenile offenders under 18. 130 S. Ct. at 2026.

Graham is clear that long-term judgments about youth must not be made "at the outset." *Id.* at 2029. Yet California's mandatory sentencing scheme at issue here requires that such a judgment be made – a particular sentence *must* be imposed regardless of the individual's characteristics or circumstances of the case and without an opportunity for review or parole. Mandatory sentencing schemes by definition allow for no individualized determinations – *at the outset*, the legislature implicitly determines that everyone who commits a certain offense is identically culpable. This "one size fits all" approach is directly at odds with *Graham* as it prohibits consideration of age as a factor at all in sentencing. *Id.* at 2034. It also directly conflicts with Chief Justice Roberts' caution in his concurring opinion in *Graham* that "[o]ur system depends upon sentencing judges applying their reasoned judgment to each case that comes before them." *Id.* at 2042 (Roberts, C.J., concurring).[14]

As Justice Frankfurter wrote over fifty years ago in *May v. Anderson* 345 U.S. 528, 536 (1953), "[c]hildren have a very special place in life which law

[14] Similarly, in his dissent in *J.D.B.*, Justice Alito distinguished the *Miranda* analysis at issue in that case with the Court's Eighth Amendment jurisprudence, noting that the Eighth Amendment cases involve "the 'judicial exercise of independent judgment' about the constitutionality of certain judgments," not "on-the-spot judgments" as in the *Miranda* analysis." *J.D.B.*, 131 S.Ct. at 2416-17 (quoting *Graham*, 130 S. Ct. at 2026) (Alito, J., dissenting). Mandatory sentences, however, do not allow for the deliberation and individualization envisioned by the Court.

should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." Even today, adult sentencing practices that take no account of youth – indeed permit no consideration of youth – are unconstitutionally disproportionate as applied to juveniles. Requiring individualized determinations does not also require that children who commit serious offenses should escape punishment. It merely ensures that that sentences take account of youth's distinct developmental characteristics. This approach builds upon recent Supreme Court jurisprudence that recognizes that juveniles who commit crimes – even serious or violent crimes – can outgrow this behavior and become responsible adults, and therefore courts cannot make judgments about their personal irredeemability at the outset. *Graham,* 130 S. Ct. at 2030.

II. International Practice And Opinion And Treaty Obligations Support Holding Life Sentences For Juveniles Unconstitutional

The United States is the only nation in the world that currently imposes life without parole sentences on juveniles. Connie de la Vega and Michelle Leighton, "*Sentencing our Children to Die in Prison: Global Law and Practice,*" 42 U.S.F. L. Rev. 983 (2008). Most governments either have expressly prohibited, never allowed, or do not impose such sentences on children. *Id.* at p. 989-90. Of the ten countries other than the United States that have laws that arguably permit sentencing child offenders to life without parole, there are no known cases where the sentence has been imposed on a juvenile. *Id.* at p. 990.

Pursuant to *Graham v. Florida* the laws of other countries and international practice and opinion are relevant to the court's determination of whether a sentence is cruel and unusual under the United States Constitution. *Graham,* 130 S.Ct. at pp. 2033- 2034; *see also Roper v. Simmons* (2005) 543 U.S. 551. Not only is there a clear international consensus against sentencing a child to die in prison, but equally importantly, the United States is party to treaties that have been interpreted to prohibit life sentences for juvenile offenders. Under the United States Constitution, treaty provisions bind judges of the states. The Court should consider both issues in determining whether the sentence is unconstitutional in this case.

A. International Practice And Opinion Has Been A Part Of Eighth Amendment Analysis By The United States Supreme Courts For Decades

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

551, 577 (2005). In his concurrence, Justice Stevens reaffirmed the Court's reliance on international law for at least a century when interpreting the Eighth Amendment's "evolving standards of decency." *Graham, supra*, 130 S.Ct. at p. 2036, *citing Weems v. United States* 217 U.S. 349, 373–378 (1910).

The rationale of *Graham* should apply equally to a sentence of 110 years to life imposed on a juvenile offender. In the past 50 years, United States Supreme Court jurisprudence on issues of cruel and unusual punishment has tended toward "evolving standards of decency" in "civilized" society. The Court has consistently relied upon international law, practice and custom as instructive to cruel and unusual punishment analysis.

In *Trop v. Dulles,* the Court expounded upon the need for dignity and civility in interpreting the Eighth Amendment. *Trop v. Dulles* 356 U.S. 86, 100 (1958). "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." *Id.* at 100. Because the Eighth Amendment's words are not precise and the scope is not static, the Court "established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual." *Id.* at 100-101. For example, it noted that the "civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime." *Id.* at 102-103.

In *Coker v. Georgia* the Court considered "the climate of international opinion concerning the acceptability of a particular punishment" in a footnote. *Coker v. Georgia*, 433 U.S. 584, 596, fn. 10 (1977). In support of its conclusion that a death sentence for a rape conviction was cruel and unusual, it stated "[it] is not irrelevant that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue." *Id.*

In *Enmund v. Florida* the Court acknowledged *Coker* noting that "the climate of international opinion concerning the acceptability of a particular punishment" is an additional consideration that is "not irrelevant." *Enmund v. Florida* 458 U.S. 782, 796, fn. 22 (1982) (finding the death penalty is cruel and unusual punishment for felony murder). The Court went on to note the "doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe." *Id.* "It is also relevant that death sentences have not infrequently been commuted to terms of imprisonment on the grounds of the defendant's lack of premeditation and limited participation in the homicidal act." *Id.*

In *Thompson v. Oklahoma*, the Court recognized the relevance of the views of "respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western community" in its conclusion that the Eighth and Fourteenth Amendments prohibited execution of a defendant convicted of first degree murder that he committed when he was 15

years old. *Thompson v. Oklahoma* 487 U.S. 815, 830 (1988). The Court made an additional reference to international practice and opinion in a footnote: "[w]e have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual." *Id.* at fn. 31.

In *Atkins v. Virginia*, the Court looked to the overwhelming disapproval of the "world community" to sentencing mentally retarded offenders to death. *Atkins v. Virginia* 536 U.S. 304, 316, fn. 21. (2002). "Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue." *Id.*

In *Roper v. Simmons*, the Supreme Court abolished the juvenile death penalty. The Court relied upon the 'evolving standards of decency' reasoning applied in *Trop* and *Thompson,* and looked to international law, practice and opinion to categorically prohibit juveniles from receiving the death penalty. *Roper,* 543 U.S. at 575-78. Yet at least from the time of the Court's decision in *Trop,* the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." *Id.* at 575. In the inquiry of whether that punishment is cruel and unusual, the Court gave due deference to international treatment of juvenile offenders. "It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and

other international principles, are relevant to whether a term of 110 years to life is cruel and unusual punishment. As evidence of international practice and opinion, *Graham* recognized that Article 37(a) of the CRC, "prohibits the imposition of 'life imprisonment without possibility of release...for offences committed by persons below eighteen years of age.'" *Graham,* 130 S.Ct. at 2034.[15]

Caballero's three consecutive sentences totaling 110 years to life also fit within the prohibitions of Article 37(a) because there is no real possibility of release within his lifetime. Moreover, the oversight committee for the CRC specifically recommends that "parties abolish *all* forms of life imprisonment for offences committed by persons under the age of eighteen. For *all* sentences imposed upon children the possibility of release should be realistic and regularly considered." Comm. on Rights of the Child, Children's Rights in Juvenile Justice, General Comment No. 10, U.N. Doc. CRC/C/GC/10 par. 77 (Apr. 25, 2007) (*emphasis added*). Also, Article 37(b) of the CRC provides that imprisonment be used only as a measure of last resort and for the shortest appropriate time. U.N. Convention on the Rights of the Child, GA Res. 44/25, Annex, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/49 (Nov. 20, 1989). Because Caballero's sentence provides no possibility of release and is not the shortest

[15] While the United States is not party to the CRC, all other countries in the world besides Somalia are. Thus, the practice of nations in this regard is arguably done pursuant to their legal obligations under and thus constitutes customary international law.

Because Caballero's total sentence of 110 years to life is out of step with international law, including the CRC, and practice and opinion, there is compelling support to find that this sentencing practice is cruel and unusual. As *Graham* found with JLWOP, "[t]he judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it." *Graham,* 130 S.Ct. at 2034. Further, in the inquiry of whether a punishment is cruel and unusual, "'the overwhelming weight of international opinion against' life without parole for non-homicide offenses committed by juveniles 'provide[s] respected and significant confirmation for our own conclusions.'" *Id.* The weight of global law, practice and opinion against life without parole similarly supports the conclusion that a sentence of 110 years to life, which is the functional equivalent of life without parole, is unconstitutional.

C. The Imposition Of A 110 Years To Life Sentence On A Juvenile Offender Violates United States Treaty Obligations

The United States is a party to several treaties that have been interpreted by their oversight bodies to prohibit juvenile life without parole sentences. Under the Constitution, the states must uphold these treaty obligations.

In determining whether the United States Constitution permits the challenged sentence, this Court should consider the mandates of the Supremacy Clause, which provides that "[a]ll Treaties made . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const. art.

VI, cl. 2. As Justice Stevens has stated: "[o]ne consequence of our form of government is that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation." *Medellin v. Texas* 552 U.S. 491, 536 (2008) (Stevens, J. concurring). In a follow-up opinion on the denial of habeas corpus relief, Justice Stevens again emphasized the point: "I wrote separately to make clear my view that Texas retained the authority and, indeed, the duty as a matter of international law to remedy the potentially significant breach of the United States' treaty obligations . . ." *Medellin v. Texas* 129 S.Ct. 360, 362 (2008) (Stevens, J., dissenting).

Accordingly, California has an obligation to ensure that its criminal punishments comply with the United States' international treaty obligations. Thus, this Court must consider treaties to which the United States is a party, including: (1) the International Covenant on Civil and Political Rights ("ICCPR"), 999 U.N.T.S 171, *entered into force*, Mar. 23, 1976, ratified by the United States; (2) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), 1465 U.N.T.S. 85, entered into force, June 26, 1987, ratified by the United States, Oct. 21, 1994; and (3) the Convention on the Elimination of Racial Discrimination ("CERD"), 660 U.N.T.S. 195, entered into force, Jan. 4, 1969, ratified by the United States, Oct. 21, 1994. In ratifying the ICCPR, Congress stated, "The United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise

by the State and local governments;. . .". Senate Committee on Foreign Relations, ICCPR, S. Exec. Rep. No. 102-23, at 19 (1992).

Under California law, the 110 years to life sentence imposed in this case was mandatory due to the nature of the Petitioner's offenses. A treaty to which the United States is a party requires that the *age of the juvenile* and his *status as a minor* be considered in sentencing, but a mandatory sentencing scheme prevents such consideration. In 2006, the Human Rights Committee, oversight authority for the ICCPR, determined that allowing a life without parole sentence contravenes Article 24(1), which states that every child shall have "the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State" and Article 7, which prohibits cruel and unusual punishment. Concluding Observations of the Human Rights Committee: The United States of America, U.N. Doc. CCPR/C/USA/CO/ 3/Rev.1, para. 34, (Dec. 18, 2006). Article 14(4) of the ICCPR further requires that criminal procedures for juvenile persons should take into account their age and desirability of promoting their rehabilitation. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95020 (1992), 999 U.N.T.S. 171, Article 14(4) [hereinafter ICCPR].)[16]

[16] Article 10(3) of the ICCPR further requires that "juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status." *Id.* at Article 10(3). Also of relevance is Article 15(1) of the ICCPR, which provides: "If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby." *Id.* at Article 15(1). Because *Graham* held that a juvenile

The Committee Against Torture, the official oversight body for the Convention Against Torture, in evaluating the United States' compliance with that treaty, found that life imprisonment of children "could constitute cruel, inhuman or degrading treatment or punishment" in violation of the treaty. Committee Against Torture, Conclusions and Recommendations of the Committee Against Torture: United States of America, at para. 34, U.N. Doc. CAT/USA/CO/2 (July 25, 2006). Caballero would be imprisoned for life with a sentence of 110 years to life, thus also raising concerns under this treaty's provisions.

Moreover, in 2008, the Committee on the Elimination of Racial Discrimination, the oversight body for the Convention on the Elimination of Racial Discrimination ("CERD"), found the juvenile life without parole sentence incompatible with Article 5(a) of the CERD because the sentence is applied disproportionately to youth of color and the United States has done nothing to reduce what has become pervasive discrimination. In California, African American youth are 18 times more likely to be serving a sentence of life without parole than white youth and Hispanic youth are more than five times more likely to be serving a sentence of life without parole than white youth. *See,* C. Back & E. Calvin, "*When I Die, They'll Send Me Home" Youth Sentenced to Life without Parole in California*, 20 Human Rights Watch Report, No.1 (G), pp. 24-25 (Jan.

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life without parole sentence is unconstitutional for a juvenile non-homicide offender, Caballero should get the benefit of that decision applied to a sentence that is the functional equivalent.

2008). Even when youth of different racial groups arrested for murder are compared, California has the worst racial disparities in the nation: for every 21.14 black youth arrested for murder in the state, one is serving a LWOP sentence; whereas for every 123.31 white youth arrested for murder, one is serving LWOP. In other words, black youth arrested for murder are sentenced to LWOP in California at a rate that is 5.83 times that of white youth arrested for murder. *See* Human Rights Watch, *Submission to the Committee on the Elimination of Racial Discrimination,* p. 8 (Feb. 2008). The Committee on the Elimination of Racial Discrimination referred to the concerns raised by the Human Rights Committee and Committee Against Torture's on the U.S. practice of sentencing juveniles to life without parole, and added its own conclusion:

> In light of the disproportionate imposition of life imprisonment without parole on young offenders, - including children - belonging to racial, ethnic and national minorities, the Committee considers that the persistence of such sentencing is incompatible with article 5 (a) of the Convention. The Committee therefore recommends that the State party discontinue the use of life sentence without parole against persons under the age of eighteen at the time the offence was committed, and review the situation of persons already serving such sentences.

CERD, Concluding Observations of the United States, ¶ 21, U.N. Doc. CERD/C/USA/CO/6 (Feb. 6, 2008).

In light of these treaty obligations, this Court should consider the views of the bodies authorized to monitor treaty compliance in determining whether the sentence of 110 years to life violates international treaties.[17]

[17] In considering the treaties for this purpose, this Court need not address the issue

CONCLUSION

The Supreme Court has acknowledged that a child's age is far "more than a chronological fact." *See J.D.B. v. North Carolina* 564 U. S. 1, 8 (2011). For the foregoing reasons, the Court should engage in an offender-based analysis for juveniles that reflect both our society's evolving standards of decency[18] and our greater understanding of adolescent development.

As the Supreme Court did in *Graham v. Florida*, this Court should treat practice and opinions of other nations and international agreements as relevant to the Court's interpretation of both the Eighth Amendment and the California Constitution. Further, it should apply the provisions of treaties to which the United States is a party. Therefore, this court should vacate the instant 110 years

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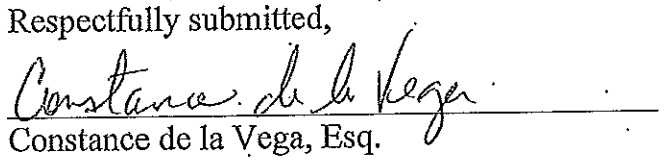
of whether the treaty provisions are self-executing or the validity of the non-self-executing declarations to some of the treaties. For background and legislative history of the declarations, *see* Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 Cinn. L. Rev. 423, 456-62 (1997). Courts have applied treaty provisions in defensive postures without considering whether they are self-executing. *See*, *United States v. Rauscher* 119 U.S. 407 (1886); *United States v. Alvarez-Machain* 504 U.S. 655 (1992).

[18] *See e.g. Roper,* 543 U.S. at 552 (explaining that in *Atkins,* the Court held that standards of decency had evolved ... and now demonstrated that the execution of the mentally retarded is cruel and unusual punishment); The Eighth Amendment's prohibition against "cruel and unusual punishments" must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework this Court has established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be "cruel and unusual.") *Trop,* 356 U.S. at 100–101; *Roper,* 543 U.S. at 551.

to life sentence and resentence Caballero to a sentence that would permit meaningful consideration of parole.

For the foregoing reasons, *Amicus Curiae* respectfully requests that this Court vacate Petitioner Caballero's sentence and remand the case for sentencing in accordance with *Graham.*

Respectfully submitted,



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CERTIFICATE OF WORD COUNT

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RODRIGO CABALLERO, Defendant and Appellant.	Case No. S190647

DECLARATION OF SERVICE BY MAIL

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