Nos. 08-7412 & 08-7621

IN THE
Supreme Court of the United States

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

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

On Writs Of Certiorari to the District Court Of Appeal, First District, State Of Florida

BRIEF FOR THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE & JUSTICE, AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, amici NAACP Legal Defense and Educational Fund, Inc., Charles Hamilton Houston Institute for Race and Justice, and National Association of Criminal Defense Lawyers certify that each are non-profit corporations with no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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INTEREST OF AMICUS CURIAE[1]

The NAACP Legal Defense & Educational Fund, Inc. (LDF), is a non-profit corporation formed to assist African Americans and others who are unable, on account of poverty, to employ legal counsel to secure their rights by the prosecution of lawsuits. LDF has a long-standing concern with the impact of racial discrimination on the criminal justice system. It has served as counsel of record and/or as *amicus curiae* in this Court in, *inter alia*, *Furman v. Georgia*, 408 U.S. 238 (1972), *McClesky v. Kemp*, 481 U.S. 279 (1987), *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972) and *Ham v. South Carolina*, 409 U.S. 524 (1973) and appeared as *amicus curiae* in *Roper v. Simmons*, 543 U.S. 551 (2005), *Kimbrough v. United States*, 552 U.S. 85 (2007), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), and *Batson v. Kentucky*, 476 U.S. 79 (1986).

The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School (CHHIRJ) continues the unfinished work of Charles Hamilton Houston, one of the Twentieth Century's most talented legal scholars and litigators. The CHHIRJ marshals resources to advance Houston's dreams for a more equitable and just society. It brings together students, faculty, practitioners, civil rights and business leaders, community advocates, litigators,

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[1] Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. Pursuant to S. Ct. Rule 37.6, counsel for the *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than the *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

and policymakers to focus on, among other things, reforming criminal justice policies.

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense lawyers, public defenders and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives is the promotion of the proper administration of justice.

SUMMARY OF ARGUMENT

Experience, science and this Court's precedents all recognize that children are fundamentally different than adults.[2] One of the most significant aspects

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[2] Since its inception, the juvenile justice system has countered the stark differences between youth and adults through "individual assessment and treatment" of children in an effort to reintegrate young offenders into society. C. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 U. Kan. L. Rev. 659, 667 (2005); s*ee also* Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 Ann. Rev. Clin. Psych. 459, 462 (2009) ("[I]t is clear that the founders of the juvenile justice system

of this difference is that children who commit criminal offenses are less culpable than adults. *Roper v. Simmons*, 543 US. 563, 569-70 (2005). These principles bear directly on the constitutionality of juvenile life without parole sentences. Such sentences fail to comport with the requirements of the Eighth Amendment for the reasons raised by the Petitioners and supporting *amici* and because the unique characteristics of youth can critically undermine defense counsel's ability to effectively assist their teenaged clients, and the compromised attorney-client relationship contributes to an increased likelihood of unreliable sentencing outcomes that fail to reflect culpability and guilt. *Atkins v. Virginia*, 536 U.S. 304, 320 (2002). For these reasons, individuals younger than age 18 at the time of the offense should not be subject to life without parole sentences.

ARGUMENT

This brief explains how the characteristics of youth can interfere with the development of an effective attorney-client relationship and how the impaired relationship with counsel, in combination with the concerns raised by Petitioners and their

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began from the premise that adolescents are developmentally different from adults in ways that should affect our interpretation and assessment of their criminal acts."). This Court has appropriately addressed the developmental concerns of youth by affording children the rehabilitative benefits of the juvenile justice system and such procedural and substantive safeguards rooted in due process as the rights to counsel, confrontation, cross examination, proof beyond a reasonable doubt and freedom from compelled self-incrimination. *See In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541 (1966).

supporting *amici*, so undermine the reliability of life without parole sentences that such punishments are unconstitutionally disproportionate for children younger than age 18 at the time of the offense.

This Court has acknowledged that a child's immature judgment, impulsive decision-making and vulnerability to peer pressure reduce culpability such that the capital sentencing of offenders younger than age 18 violates the Eighth Amendment. *See Roper,* 543 U.S. at 569-70; *Thompson v. Oklahoma*, 487 U.S. 833, 834-35 (1988). These attributes, in addition to the dynamics of race, class and the nature of indigent defense, can also disadvantage a child's relationship with counsel and contribute to a significant risk of an unreliable sentencing outcome that fails to reflect actual culpability.[3] Given the severity and finality of a death-in-prison sentence, this Court should categorically exempt children from life without parole sentences.

I. The Challenges of Developing an Effective Attorney-Client Relationship with a Teenager.

A criminal defense attorney's ability to effectively represent her client and fairly subject the prosecu-

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[3] *See* Samuel Gross, *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 545, 548-51 and Table 6 (2005) (describing unreliable outcomes for children and adolescents in the criminal justice system and noting higher concentration of false confessions among adolescent as compared to adult exonerees); *see also* Steven Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. Ky. L. Rev. 257 (2007) (discussing characteristics of children, juvenile, and criminal justice system that lead to wrongful convictions).

tion's case to "a reliable adversarial testing process," *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (citations omitted), is critically dependent on the existence of a trusting attorney-client relationship and the client's ability to assist counsel, guided by a meaningful understanding of the legal proceedings. *See Powell v. Alabama*, 287 U.S. 45, 69 (1932) (stating that defendants need "the guiding hand of counsel at every step in the proceedings against [them]").[4]

This Court has acknowledged that children, as a class, "lack [ ] maturity and [possess] an underdeveloped sense of responsibility [that] often result[s] in impetuous and ill-considered actions and decisions," are "vulnerable and susceptible to negative influences and outside pressures," and have a "transitory, less fixed" personality. *Roper*, 543 U.S. at 569 (citations omitted). Experts consistently concur with this Court's assessment and note that each of these youthful qualities, which are rooted in the neurological differences between adults and children,[5] can

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[4] *See also Morris v. Slappy*, 461 U.S. 1, 21 n.4 (1983) (citing A.B.A. Standards for Criminal Justice, commentary to § 4.29 (2d ed. 1980)) ("Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence."); *Gault,* 387 U.S. at 36 (1967) (determining that a child "needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it")*; Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (describing the right to counsel as "fundamental and essential to fair trials").

[5] These unique characteristics of adolescent children are a direct product of the neurological development of the brains prior to adulthood. The frontal lobe of the brain, which "man-

and often do impede a child's judgment, decision-making, and ability to develop the trust, confidence and open communication necessary for an effective attorney-client relationship. *See* Steinberg, *supra* note 2, at 468-71; Patricia Puritz & Katayoon Majd, *Ensuring Authentic Youth Participation in Delinquency Cases: Creating a Paradigm for Specialized Juvenile Defense Practice*, 45 Fam. Ct. Rev. 466, 474 (2007).

Many characteristics of youth complicate the development of a proper attorney-client relationship. As detailed below, a teenager's tendency to distrust adults, limited understanding of the criminal justice system and the role of the defense lawyer within it, deficits in judgment, and considerations of race and class combine to inhibit the development of an effective attorney/child-client relationship and further demonstrate how juvenile life without parole sentences cannot be reconciled with the Eighth Amendment.

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ages impulse control, long-term planning, priority setting, calibration of risk and reward and insight [,] is still growing and changing during adolescence and beyond . . . ." Abbe Smith, *"I Ain't Takin No Plea*": *The Challenges in Counseling Young People Facing Serious Time*, 60 Rutgers L. Rev. 11, 20 (2007); *see also* Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 Tex. L. Rev. 799, 816 (2003) (discussing the connection between brain development, judgment, and decision-making). "[T]asks involving planning, self control, inhibiting impulsive actions, learning from experience, social judgment, and weighing rewards and risks in decision-making situations" may not reach full development "until adolescents reach their twenties." Clarke, *supra* note 2, at 710.

A. A Child's Tendency to Mistrust Adults Impedes the Development of a Proper Attorney-Client Relationship.

The well-known failure of adolescents to relate to and trust adults and authority figures presents a fundamental impediment to the candid communication necessary for an effective attorney-client relationship. *See* Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 Psychol. Pub. Pol'y & L. 3, 16 (1997) (explaining that this mistrust may be the product of the natural adolescent stage of a child working through "developmental issues of independence and identity" or from previous experiences with adult authority figures). A child's process of "establishing autonomy from . . . parents" can manifest itself in a "rebellion against parental values . . . until late adolescence or early adulthood." Clarke, *supra* note 2, at 697 (footnotes omitted); *see also* Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. Crim. L. & Criminology 137, 156 (1997) ((citing Terrie Moffitt, *Adolescent-Limited and Life Course Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 Psychol. Rev. 674 (1993)) noting that "adolescents are striving for elusive autonomy from parental and adult authority in a context in which most privileges of adult status are withheld"). As a result of this process, adolescents are notoriously "reluctant to participate in conversation with adults or answer their questions . . . ." Theresa Hughes, *A Paradigm of Youth Client Satisfaction: Heightening Professional Responsibility for Children's Advocates*, 40 Colum. J. L. & Soc. Probs. 551, 566 (2007).

This adolescent aversion is likely to affect the attorney-client relationship because "lawyers are not familiar figures in children's lives, unlike teachers, doctors, and nurses. . . . [Y]outh are more likely than adults to refuse to speak with their attorney, thereby inhibiting the effectiveness of the representation." *Id.* at 566-67 (footnotes omitted). As a result, children are more likely to distrust counsel and are less likely to engage in the type of communication required for an effective relationship with an attorney.

Trust barriers may also be exacerbated by the cross-racial nature of many attorney/child-client relationships.[6] African-American children are overrepresented[7] among those subjected to life-without- -

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[6] *See* Annette Ruth Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, 39 Colum. Hum. Rts. L. Rev. 573, 596 (2008) (describing cross racial nature of representation for children).

[7] The overrepresentation of African-American children in the criminal justice system is a well documented subject of numerous respected studies. The United States Department of Justice, Office of Justice Programs noted that in 2004, minority youth comprised 70% of juveniles held in custody for violent offenses, and that black youth were twice as likely as white youth to be sentenced to prison. *See* U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juveniles in Corrections*, 9, 21 (June 2004). In 1999, DOJ found that "[m]ore than three-quarters of youth newly admitted to State prison were minorities." U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, *Minorities in the Juvenile Justice System*, 15 (Dec. 1999); *see also* Paolo G. Annino et al., *Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to the Nation*, 3 (July 2009) (finding that in Florida, the state from which the two cases before this Court arise, 84% of the total population of children serving life without parole for non-homicide offenses are African American);

parole sentences,[8] and many factors—including the phenomenon of racial profiling and the negative impression of the criminal justice system that it naturally produces—are likely to breed significant mistrust of the criminal justice system and its actors, including defense attorneys, among African-

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Barry Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution that Failed*, 34 N. Ky. L. Rev. 189, 252 (2007) ("[F]orty-one of forty-two states found minority youths overrepresented in secure detention facilities and all thirteen states that analyzed institutional commitment decisions reported disproportionate minority confinement."); Michael Lindsay, *The Impact of Gault on the Representation of Minority Youth*, 44 No. 3 Crim. Law Bulletin 4 (2008) (African-American youth are in the juvenile justice system are "most consistently, and pervasively overrepresented across the United States."); Nat'l Council on Crime and Delinquency, *And Justice for Some: Differential Treatment of Youth of Color in the Justice System*, 3, 34 (Jan. 2007) (finding that in 2002, three out of four adolescents who were newly admitted into adult prisons were youth of color, and "African American youth accounted for 58% of total admissions to adult prisons"); Kenneth Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DePaul L. Rev. 679, 686-87 (2002) (discussing the racial disparities present in the juvenile justice system and disproportionate number of African-American youth arrested, detained, charged and sentenced); U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, *Disproportionate Minority Confinement 2002 Update*, 2 (Sept. 2004) (examining data from 1990-1997 and describing African-American youth as overrepresented at all stages of the juvenile justice system compared with their proportion in the U.S. population).

[8] *See* Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Youth Offenders in the United States in 2008*, 39 (2008) (stating that nationwide, black teenagers are ten times more likely to receive life-without-parole sentences than their white counterparts and African Americans constitute 60% of youth serving life without parole sentences).

American youth.[9] *See, e.g., Illinois v. Wardlow*, 528 U.S. 119, 133-34 nn.9-10 (2000) (Stevens, J., concurring in part and dissenting in part) (noting the prevalence of racial profiling by law enforcement against citizens of color); *U.S. v. Leviner,* 31 F. Supp. 2d 23, 33 & n.26 (D. Mass. 1998) (describing the criminal history score of an African-American defendant as reflective of racial disparities that have grown out of racial profiling). This problem of distrust may also be enhanced among poor children who must rely on appointed counsel whose commitment to zealous advocacy the child may doubt. *See* Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 Crime & Just. 81, 136-37 (2000) (footnote omitted) (finding several respondents in the study to be "especially critical of public defenders, whom they believed feigned advocacy in an effort to manipulate them to accept pleas that were not in their best interests"); Puritz, *supra*, at 474 (citing studies "suggest[ing] that children are less likely to trust or communicate with attorneys whom they know are court-appointed").[10]

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[9] *See* Michelle Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 Golden Gate U. L. Rev. 345, 377 (1997) (discussing influence of cultural dynamics on attorney-client relationship); Puritz, *supra* at 472 ("Research indicates that African American children . . . are consistently less likely than their White counterparts to trust their defense attorneys.").

[10] As of 2007, African-American and Hispanic youth were nearly three times as likely to live in poverty as white youth. U.S. Dept. of Justice, *OJJDP Statistical Briefing Book* (2008), *available at http://ojjdp.ncjrs.gov/ojstatbb/population/qa0140.asp.qaDate=2007.*

Thus the trust necessary for an effective and collaborative relationship between attorney and client is often undermined by an adolescent defendant's age-based likelihood to distrust counsel.

B. Adolescents' Limited Comprehension of Core Legal Concepts, Institutional Actors, and the Adjudicatory Process Complicates the Development of an Effective Attorney-Client Relationship.

The attorney-client relationship and its critical requirement of confidentiality are difficult concepts that few children can fully understand. Children often assume that their lawyers are required to report the substance of their communications to the court or other authority figures, such as police officers or parents. Youth under age 19 often "incorrectly believe[ ] that [a defense] attorney was authorized to tell judges or police officers what was discussed in confidential attorney-defendant conversations." Grisso, *supra,* at 15 (citations omitted). Moreover, children "may develop a belief that all adults involved in the proceedings are allied against [them], perhaps after seeing defense attorneys and prosecutors chatting together outside the courtroom." Steinberg, *supra* note 2, at 475. Accordingly, "[m]any youths fail[ ] to differentiate the roles and functions of judges, prosecutors, and defense counsel, whom they perceived as one, and as adversarial." Bishop, *supra*, at 136.

These mistaken beliefs can have devastating consequences. "[A] child who is unpersuaded by his attorney's loyalty may simply withhold information from the attorney, depriving both the attorney and

the child of an opportunity to exchange important insights in the case." Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 Notre Dame L. Rev. 245, 273 (2006).

C. Adolescent Deficits in Judgment, Temporal Perspective and Susceptibility to Peer Influence Hamper Effective Representation of a Child Client.

A young client's immaturity in judgment and limited temporal perspective may frustrate the development of a viable relationship between counsel and client. *See* Feld, *supra* note 7, at 225 ("[G]eneric developmental limitations impair juveniles' ability to understand legal proceedings, make rational decisions, and assist counsel."); Henning, *supra*, at 272-73 (discussing influence of peers, temporal perspective and deficits in judgment on decision-making and relationship with counsel). "It has been noted that 'adolescents are overrepresented statistically in virtually every category of reckless behavior.'" *Roper*, 543 U.S. at 569 (quoting Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339 (1992)). It is therefore not surprising that deficiencies in judgment can also prevent a child from fully considering all available adjudicative options and limit his or her ability to "assess or integrate long-term consequences into their analysis." Laura Cohen & Randi Mandelbaum, *Kids Will Be Kids: Creating a Framework for Interviewing and Counseling Adolescent Clients,* 79 Temp. L. Rev. 357, 367 (2006). For example, an adolescent "engaging in a cost-benefit analysis [may] 'weigh the particular cost or benefit[s]'" of certain choices dif-

ferently from an adult who possesses the experience and temporal perspective to make well-reasoned choices. *Id.* at 368 (quoting Elizabeth S. Scott, et al. *Evaluating Adolescent Decision Making in Legal Contexts*, 19 L. & Hum. Behav. 221, 233 (1995)). Similarly, an adolescent may "withhold information from his attorney in order to feel the immediate benefit of not fully incriminating himself, but fail to recognize the long-term costs of compromising his own defense . . . ." Henning, *supra*, at 273; s*ee also* Hughes, *supra*, at 565 (noting the difficulty children have in comprehending the role of a lawyer and the influence on information sharing caused by differences between children and adults in future orientation, cost-benefit analytical processes, and the child's focus on immediate gains).[11]

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[11] S*ee also* Barry Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J. L. & Fam. Stud. 11, 53 (2007) (noting that adolescents "undersestimate the magnitude or probability of risks, use a shorter time-frame, and focus more on potential gains rather than losses" as compared to adults); Michael Pinard, *The Logistical and Ethical Difficulties*, 6 Nev. L. J. 1111, 1121 (2006) ("[S]tudies have found both that [children] do not understand the various phases of the criminal process and that they cannot fully comprehend long-term consequences (or tend to ignore these consequences in favor or immediate consequences) . . . ."); Scott, *Evolution*, *supra*, at 171 (noting that a youth's narrow temporal perspective, which leads to a focus on short-term rather than long-term consequences, limited concept of time and tendency to take risks can "influence judgments about the value of accepting plea bargains"); Steinberg, *supra* note 2, at 475 ("Immature youths may lack capacities to process information and exercise reason adequately in making trial decisions, especially when the options are complex and their consequences are far reaching."); Donna M. Bishop & Hillary Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with*

The influential role that a teenager's peers may play in the decision-making process also has the potential to impede the development of a proper relationship between counsel and client. "Peer influence affects adolescent judgment both directly and indirectly." Steinberg, *supra* note 2, at 469. Adolescents may "make choices in response to direct peer pressure" or act in ways that relate to their "desire for peer approval and consequent fear of rejection . . . ." *Id.* As a result, judgments about collaboration and cooperation with authorities and counsel are sometimes made through the often illegitimate filter of a child's feelings about how decisions will inform and define their role among peers. *See* Cohen, *supra*, at 363-64 (discussing the influence of peers on adolescent decision-making); Henning, *supra*, at 273 (same); Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. Rev. 793, 816 (2005) ("[S]ubstantial evidence supports that adolescents are more susceptible to peer influence than adults. . . . At least during the period of early- and mid- adolescence, decisions often are driven by acquiescence or opposition to authority or by efforts to gain peer approval (or avoid peer rejection)."); Cohen, *supra*, at 363 ("Susceptibility to peer influence appears to increase between childhood and early adolescence, peaks at about age fourteen, and then . . . decreases into early adulthood.").

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the Legal Rights Provided by In Re Gault, 60 Rutgers L. Rev. 125, 158-59 (2007) (explaining that "perceived difference between a sentence of five years and ten years is a lot less meaningful to a teen than to an adult").

Thus, an attorney's ability to develop a constitutionally effective relationship with a child client is often impaired by the characteristics of youth.

II. Compromised Attorney/Child-Client Relationships Hinder Defense Counsel's Ability To Conduct a Constitutionally Appropriate Factual Investigation.

As detailed above, the characteristics of youth can significantly complicate the development of a proper attorney-client relationship. An attorney's capacity to adequately investigate his child-client's case is directly affected by this compromised relationship.

The duty to investigate is a vital component of every defense attorney's constitutional obligation to his or her client. *Williams v. Taylor,* 529 U.S. 362, 395-96 (2000); *Wiggins v. Smith*, 539 U.S. 510, 522-27 (2003); *Strickland*, 466 U.S. at 690-91; *see also* A.B.A. Standards for Criminal Justice: Prosecution & Def. Function, Standard 4-3.2(a) ("[D]efense counsel should seek to determine all relevant facts known to the accused . . . [a]s soon as practicable."). A lawyer's ability to conduct an adequate defense investigation is, in turn, dependent upon her ability to communicate with the client.

> Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. . . . For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may

> be considerably diminished or eliminated altogether. . . . In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

Strickland, 466 U.S. at 691 (citation omitted); *see also* A.B.A. Standard for Criminal Justice: Prosecution & Def. Function, Standard 4-3.2, cmt. ("The client is usually the lawyer's primary source of information for an effective defense.").[12]

"A trusting client is far more likely to reveal facts and details that not only help in formulating the defense, but, in the absence of broad discovery rules, help the attorney learn more about the prosecution's case." Janet C. Hoeffel, *Toward a More Robust Right to Counsel of Choice*, 44 San Diego L. Rev. 525, 541-42 (2007) (citing *Morris,* 461 U.S. at 20-21). A lawyer-client relationship characterized by suspicion and mistrust will leave an attorney less likely to learn critical facts and less able to provide effective

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[12] *See also Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (the attorney-client privilege was developed "to encourage full and frank communication between attorneys and their clients" in recognition of the fact "that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) ("The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity . . . of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.").

representation. Thus open communication is a necessary precursor to an adequate factual investigation and "is well recognized by the courts and ethical rules as 'the cornerstone of the adversary system.'" Hoeffel, *supra*, at 541-42 (quoting *Linton v. Perini*, 656 F.2d 207, 212 (6th Cir. 1981)).

As described in Section I.A, *supra*, the communication needed to shape counsel's investigation can be significantly precluded by a teenager's natural mistrust of adults. A child may be unwilling to share relevant factual information regarding her case or refuse to speak with her attorney at all, thereby narrowing the scope and adequacy of counsel's investigation.

Additionally, a child's "ability to receive and communicate information adequately . . . may be compromised by impairments in attention, memory, and concentration," and this can and often does impede an attorney's capacity to elicit the information necessary for a constitutionally adequate investigation. Steinberg, *supra* note 2, at 475. Specifically, children may experience difficulty "respond[ing] to instructions or . . . provid[ing] important information to [counsel], such as a coherent account of the events surrounding the offense." *Id.*; *see also Kennedy v. Louisiana*, 554 U.S. ___, 128 S. Ct. 2641, 2663 (2008) ("The problem of unreliable, induced, and even imagined child testimony means there is a 'special risk of wrongful execution' in some child rape cases." (quoting *Atkins*, 536 U.S. at 321)); Cohen, *supra*, at 360 (explaining that youth inhibits counsel's ability to gather information from a child client).

Furthermore, as discussed in Section I.C, *supra*, a child may, to her own detriment, place greater value in protecting her peers or winning their approval than providing counsel with the factual information necessary for appropriate investigative efforts. *See* Julie Whitman & Robert Davis, *Snitches Get Stitches: Youth Gangs and Witness Intimidation in Massachusetts*, The National Center for Victims of Crime, 47 (2007) (detailing results of a study showing that "the idea of being viewed as a snitch was a huge deterrent to reporting crime for youth" and that "youth do not want to be labeled and rejected by their neighbors or peers for snitching").

A child's failure to relate all necessary and relevant information to defense counsel can have devastating consequences for the outcome of her case. When defense counsel is not provided with all of the information necessary for an adequate investigation, "the defendant can be harmed by the inevitable narrowing of vision when the full flexibility of disposition is not considered." Sheldon Krantz et al., The Right to Counsel in Criminal Cases: The Mandate of *Argersinger v. Hamlin* 184 (1976); *see also Strickland*, 466 U.S. at 691 ("[C]ounsel has a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary."); Douglas L. Colbert et al., *Do Attorneys Really Matter?: The Empirical and Legal Case for the Right of Counsel at Bail*, 23 Cardozo L. Rev. 1719, 1763, 1776 (2002) (explaining that those who are held in pretrial detention "are more likely to be convicted and to receive a harsher sentence than people freed pending trial," largely because "the defense's ability to locate witnesses is greatly en-

hanced" when a client gains pretrial release since "[m]any potential witnesses are more likely to cooperate and provide information when the lawyer, an unfamiliar face and frequently from a different race and class background, is accompanied by someone they know."). Determinative evidence may go undiscovered. Strategic decisions regarding the representation will be limited by the disadvantage suffered by counsel who is not privy to all the facts at issue. Potentially viable defense theories may be discarded because counsel lacks the factual clarity that a client who was willing to communicate could provide. Accordingly, for child defendants who have not fully communicated all relevant information to counsel, the chances of suffering an extremely harsh and potentially inappropriate sentencing outcome are substantially increased.

III. Compromised Attorney/Child-Client Relationships Can Yield Flawed Decisions to Accept or Reject Plea Bargains.

Defense counsel's diminished ability to obtain vital information from an adolescent client can also have a profound impact on plea negotiations. In order to evaluate the appropriateness of a plea bargain, counsel must have a clear command of all relevant facts. Indeed, the American Bar Association cautions that "[u]nder no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation . . . has been completed . . . ." A.B.A. Standards for Criminal Justice: Prosecution & Def. Function, Standard 4-

6.1(b).[13] As previously discussed, and for a variety of reasons, children often struggle to convey information to counsel and may be unable or unwilling to provide their attorney with all necessary facts and information about their case. As a result, the ability of both the attorney and client to effectively analyze the appropriateness of a plea bargain is critically reduced.

Additionally, a child client must fully understand the conditions and obligations of a plea bargain as well as the rights that will be waived. "A guilty plea . . . is an event of signal significance in a criminal proceeding. . . . [A]nd the high stakes for the defendant require 'the utmost solicitude.'" *Florida v. Nixon*, 543 U.S. 175, 187-88 (2004) (quoting *Boykin v. Alabama*, 395 U.S. 238, 243 (1969)). Criminal proceedings that expose children to the possibility of a life-without-parole sentence require the child defendant to take stock of a wide range of possible sentencing alternatives and consider the long-term consequences of decisions made during the adjudicatory process:

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[13] S*ee also* Douglas A. Berman, *From Lawlessness To Too Much Law?: Exploring the Risk of Disparity from Differences in Defense Counsel Under Guidelines Sentencing*, 87 Iowa L. Rev. 435, 446 (2002) ("From the very outset of representation, a defense attorney needs to assess the range of possible trial and sentencing outcomes for his client in order to properly craft an effective defense strategy and evaluate the prospects for striking a beneficial plea bargain."); Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 Conn. L. Rev. 569, 576 (1998) (noting that a "defense attorney is more likely to favorably affect his client's sentence if he possesses," *inter alia*, "good lines of communication with his client").

> A defendant who enters . . . a [guilty] plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. . . . [B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.

McCarthy v. United States, 394 U.S. 459, 466 (1969) (citation and footnotes omitted). Thus, a child must weigh costs and benefits, understand the quantum of proof and caliber of evidence associated with particular charges and evaluate the long and short-term repercussions of all available options before deciding whether to go to trial or enter a guilty plea.

As discussed in Section I.C, *supra*, a child's capacity to fully engage in this critical evaluative process is greatly reduced, relative to that of an adult, because adolescents' ability to conduct reasoned deliberation regarding a plea offer may be diminished by their impulsive and reckless nature and limited temporal perspective that often focuses on immediate, rather than long-term, consequences.

A child's ability to thoroughly consider a plea bargain is also reduced by the simple fact that children possess significantly less practical knowledge and experience to inform their choices and understand the consequences of a guilty plea or trial than adults. Puritz, *supra*, at 474; Clarke, *supra* note 2, at 694 ("As a class, adolescents are likely to have less knowledge and experience to draw on in making de-

cisions than adults."). The values and experiences that drive a teenager's choices are grounded upon characteristics that are not as established or static as those of adults. Melinda Schmidt et al., *Effectiveness of Participation as a Defendant: The Attorney-Juvenile Client Relationship*, 21 Behav. Sci. Law 175, 179 (2003). Unlike an adult, the experiences, values, and priorities that a child will rely on in evaluating the desirability of a plea bargain are likely to change because teenagers are still in the process of maturation. Thus their decision-making is likely to be very different from that of an adult. Schmidt, *supra*, at 179-80.

The barriers of trust described in Section I.A, *supra*, also affect the attorney's ability to properly counsel a child about a plea offer. "A good lawyer tries to persuade his client to plead guilty when, in his or her professional opinion, a plea will produce a better outcome. . . . If the [child] client does not trust his lawyer, the client's instincts will tell him to fight the lawyer at every step. Representation, and likely the outcome, will suffer." Hoeffel, *supra*, at 542 (footnotes omitted); *see also* Scott, *Evolution, supra*, at 171 (footnotes omitted) (explaining that "[h]ow defendants respond to attorneys' advice and weigh the consequences of their choices in the trial process may be affected by psychosocial factors such as peer and adult influence, temporal perspective, and risk preference and perception," and these factors "might influence youths' judgments about the value of accepting plea bargains and of waiving important rights in the legal process").

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Even in those instances when children heed their attorney's advice, the questionable reasoning and judgment a child may employ in reaching a decision to accept or reject a plea bargain is also a source for concern. The potential problem can manifest itself in one of two ways: (1) as discussed in Section I.A, *supra*, a child may reject, out of hand, an attorney's recommendation regarding a plea bargain because she is inclined to reject any advice offered by an adult or authority figure; or (2) the child may fail to take on the requisite directive role in the attorney-client relationship due to her socialization to let adults make decisions for her. *See* Scott, *Developmental Incompetence, supra*, at 824 (noting that in a recent study of psychosocial influences on adolescent decision-making regarding plea offers, "75% of the eleven- to thirteen-year-olds, 65% of the fourteen- to fifteen-year-olds, and 60% of the sixteen- to seventeen-year-olds recommended accepting the plea offer," compared to the "evenly divided" responses of young adults, thus suggesting "a much stronger tendency for adolescents than for young adults to make choices in compliance with the perceived desires of authority figures"); *see also* Grisso, *supra*, at 19 ("[T]he process of achieving autonomy and a sense of identity often takes the adolescent through phases in which others' values play a strong role in his or her choices. At times this will be manifested in extreme deference to others' judgments . . . , while at other times choices may be made primarily in opposition to others' preferences."). Whether a youth rebels against the judgment of adult actors, exercises a strict fidelity to the views of others, or acts in a way that combines or contradicts both of these methods of decision-making, children are forced to find an ap-

propriate balance between their own feelings of distrust in the system and reliance on counsel. In reaching this balance a young person often acts to her own detriment, ensuring that the ultimate result is an exceedingly complicated and often deficient relationship with counsel. *See generally* Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. and Hum. Behav. No. 4, 333, 357-361 (2003) (discussing influence of authority figures on adolescent decision-making).

At bottom, children facing the possibility of a life without parole sentence must engage in the daunting task of weighing a multitude of complex factors in order to reach a decision about a plea bargain that may have permanent and lifelong consequences. The compromised attorney/child-client relationship combined with the characteristics of youth and other factors yield a strong likelihood of error in this critical decision-making process. *See* Pinard, *supra*, note 11 at 1121 ("[G]iven the studies that have found both that juveniles do not understand the various phases of the criminal process and they cannot fully comprehend long-term consequences (or tend to ignore these consequences in favor of immediate consequences), serious questions should arise as to whether juveniles can adequately consider, weigh and understand these consequences when analyzing the merits of entering a guilty plea.").

For children subject to life without parole sentences, a faulty plea decision can result in a veritable death sentence with no hope for a life outside of prison.

IV. Compromised Attorney/Child-Client Relationships Can Contribute to Children Facing Inappropriately Harsh Prison Conditions.

For the reasons detailed above, a reduced capacity to develop and sustain a meaningful attorney/client relationship can play a critical role in inappropriate sentence outcomes. This concern is particularly salient in the context of extreme sentences where children may not only receive severe and permanent sentences that fail to accurately reflect culpability, but also where children, once sentenced, are likely face unique suffering in adult prison.[14] This circumstance further demonstrates the inappropriateness of juvenile life without parole sentencing.

"Adolescents in adult institutions have a relatively low and weak position in the social hierarchy of prison, and physical vulnerability to attack accompanies their low status." Jeffrey Fagan, *This Will Hurt Me More Than It Hurts You*, 16 Notre Dame J. L. Ethics & Pub. Pol'y 1, 22 (2002). Consequently, when compared to adults, children in the adult institutions are "eight times more likely to commit suicide, 500 times more likely to be sexually assaulted and 200 times more likely to be beaten by staff than adults." Amanda M. Kellar, *They're Just*

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[14] A majority of states (31) house transferred youth offenders in adult correctional facilities. Bishop, *Juvenile Offenders*, *supra*, at 138. "Florida leads the nation in incarcerating children between the ages of thirteen and seventeen in adult prisons." Paolo G. Annino, *Children in Florida Adult Prisons: A Call for a Moratorium*, 28 Fla. St. U. L. Rev. 471, 471 (2001).

Kids: Does Incarcerating Juveniles With Adults Violate the Eighth Amendment?, 40 Suffolk U. L. Rev. 155, 171 (2006) (citing Jeffrey Fagan, *Juvenile Justice Policy and Law: Applying Recent Social Science Findings to Policy and Legislative Advocacy*, 183 PLI/Crim. 395, 407-08 (1999) (citing an American Bar Association study comparing violence juveniles face to violence adults face)). Unfortunately, traditional attempts to protect children in adult prison often fail because isolation in protective custody excludes the child from educational and other programming activities. Bishop, *Juvenile Offenders, supra*, at 146.

Thus, the adult "correctional setting becomes the environment for social development" during an adolescents' most "formative period of development," thereby "stunt[ing] the development of cognitive growth and psychosocial maturity . . . [and] likely exacerbat[ing] rather than ameliorat[ing] many of the very factors that lead juveniles to commit crimes in the first place (mental illness, difficulties in school or work, and . . . psychological immaturity)." Steinberg, *supra* note 2, at 478, 480.

While these problems affect children in adult prison regardless of their sentence, they take on a qualitative difference for those young people who have no hope of ever escaping the violence of their surroundings.

CONCLUSION

The characteristics of youth may always present a potential barrier to effective representation by counsel and contribute to unfair criminal justice outcomes. Given the severity and finality of juvenile life without parole sentencing, the ways in which compromised attorney/child-client relationships can contribute to unreliable sentencing outcomes supports the significant constitutional concerns raised by Petitioners and their other supporting *amici*. This Court should therefore conclude that life without parole sentences for offenders under age 18 at the time of their offense violates the Eighth Amendment.

Respectfully submitted,

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