Nos. 10-9646, 10-9647

IN THE

Supreme Court of the United States

EVAN MILLER,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

KUNTRELL JACKSON,

Petitioner,

v.

RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION,

Respondent.

ON WRITS OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS AND THE SUPREME COURT OF ARKANSAS

BRIEF OF *AMICUS CURIAE* THE NATIONAL ORGANIZATION OF VICTIMS OF JUVENILE LIFERS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The National Organization of Victims of Juvenile Lifers ("NOVJL") is a national victims' rights organization comprised of the families of victims murdered by juvenile offenders who were tried and sentenced as adults because of the horrific nature of their extremely violent crimes. NOVJL works to find other victims of violent juvenile offenders tried and sentenced to life imprisonment in order to ensure that their voices are part of the national discussion concerning the imposition of life sentences on juveniles and to support each other as victims of the devastating acts of criminally violent teens. NOVJL works to protect and preserve victims' rights through public policy advocacy at both the federal and state levels and by filing amicus briefs in cases that bear on victims' rights. *See Graham v. Florida*, 130 S. Ct. 2011 (2009).

At the time of our nation's founding, crime victims were actively involved in the administration of justice. Indeed, early American criminal prosecutions generally were brought by the victim. *See* D. Beloof & P. Cassell, *The Crime Victim's Right to Attend the Trial: the Reascendant National Consensus*, 9 Lewis & Clark L. Rev. 481, 484-85 (2005). But as the criminal justice system transformed to a public-prosecution model, victims' rights

1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* NOVJL certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), the parties' letters so consenting have been filed with the Clerk.

often were overlooked. A task force commissioned by President Reagan to assess the treatment of crime victims in the criminal justice system found that these victims "have been overlooked, their pleas for justice have gone unheeded, and their wounds—personal, emotional and financial—have gone unattended." President's Task Force on Victims of Crime, Final Report, Washington, D.C.: U.S. Government Printing Office, Dec. 1982.

Victims' rights groups, buoyed by the work of the Task Force, succeeded in restoring many of the rights of victims in the criminal justice system. Now, every State in the Union either has enacted legislation or amended its constitution (or in some cases both) to expressly guarantee victims' rights.[2]

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2. Ala. Code § 15-23-79; Alaska Const. art. I, § 24; Alaska Stat. § 33.16.120; Ariz. Const. art. II, § 2.1; Ariz. Rev. Stat. Ann. § 13-4414; Ark. Code Ann. §§ 16-90-1109, -1113; Cal. Const. art. I, § 28; Colo. Const. art. II, § 16a; Colo. Rev. Stat. Ann. §§ 24-4.1-302(2), -302.5; Conn. Gen. Stat. Ann. § 54-203; Del. Code Ann. tit. 11, § 9416; Fla. Const. art. I, § 16; Fla. Stat. Ann. § 960.001; Ga. Code Ann. §§ 17-17-13; Haw. Rev. Stat. §§ 706-670, -670.5; Idaho Code Ann. § 19-5306; 725 Ill. Comp. Stat. Ann. 120/4.5; 730 Ill. Comp. Stat. Ann. 5/3-3-4; Ind. Code Ann. § 35-40-5-5; Iowa Code Ann. § 915.18; Kan. Stat. Ann. § 22-3717; Ky. Rev. Stat. Ann. §§ 421.500, 421.520; La. Rev. Stat. Ann. § 46:1844; Me. Rev. Stat. Ann. tit. 17-A, § 1175; Md. Code Ann., Corr. Serv. § 7-801; Mass. Gen. Laws Ann. ch. 258B, § 3; Mich. Comp. Laws Ann. § 780.769; Minn. Stat. Ann. § 243.05; Miss. Code Ann. § 99-43-43; Mo. Ann. Stat. § 595.209; Mont. Code Ann. § 46-24-212; Neb. Rev. Stat. § 81-1848; 2011 Nev. Laws Ch. 23 (A.B. 18); N.H. Rev. Stat. Ann. § 21-M:8-k; N.J. Stat. Ann. § 52:4B-44; N.M. Stat. Ann. § 31-21-25; N.Y. Crim. Proc. Law § 440.50; N.C. Const. art. I, §37; N.C. Gen. Stat. Ann. § 15A-1371; N.D. Cent. Code § 12.1-34-02; Ohio Rev. Code Ann. § 5149.101; Okla. Stat. tit. 57 § 332.2; Or. Rev. Stat. Ann. § 144.098; 61 Pa. Cons. Stat. Ann. § 6140; R.I. Gen. Laws §

Congress also has enacted multiple statutes to protect the rights of crime victims, including the Victim and Witness Protection Act of 1982, the Victim's Rights and Restitution Act of 1990, and the Crime Victims' Rights Act of 2004, which among other things ensures "[t]he right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding." 18 U.S.C. § 3771(a)(4).

Thus, both the States and Congress have recognized the importance of preserving the role of victims and victims' families[3] throughout the criminal process, from trial to sentencing and to parole proceedings for those

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12-28-6; S.C. Const. art. I, § 24; S.C. Code Ann. § 16-3-1560; S.D. Codified Laws § 24-15A-43; Tenn. Code Ann. § 40-38-103; Tex. Code Crim. Proc. Ann. art. 56.02; Utah Code Ann. § 77-27-9.5; Vt. Stat. Ann. tit. 13, § 5305; Va. Code Ann. § 53.1-155; Wash. Rev. Code Ann. § 7.69.032; W. Va. Code Ann. § 62-12-23; Wis. Stat. Ann. §§ 304.06, 950.04; Wyo. Stat. Ann. §§ 1-40-204, 7-13-402; D.C. Code §§ 23-1901, 23-1904.

3. There is a national consensus that the rights afforded to crime victims extend to the family members of murder victims. *See, e.g.*, 18 U.S.C. § 3771(e) ("For the purposes of this chapter, the term 'crime victim' means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter."); Ala. Code § 15-23-60(19) (defining "victim" as a "person against whom the criminal offense has been committed, or if the person is killed or incapacitated, the spouse, sibling, parent, child, or guardian of the person"). For this reason, the term "victim" is sometimes used in the literature on victims' rights as including the family members of a murder victim.

violent offenders that become eligible for release. After all, it is the families of the victims of juvenile murderers, and organizations such as NOVJL, that must always remind those charged with the administration of justice of the heinous acts that led these teenagers to be charged and sentenced as adults. *See* Pub. L. 97-291, § 2(a)(1) ("Without the cooperation of victims … , the criminal justice system would cease to function.").

INTRODUCTION

Petitioners rely on psychological and scientific research to argue that "numerous features of adolescence" make teens who commit crimes "less culpable than adults." Jackson Br. at 5. Even assuming this is true as a general matter, it has little bearing on any individual comparison. *See* The Royal Society, *Brain Waves Module 4: Neuroscience and the law*, at 13 (Dec. 2011) (Given that "[t]here is huge individual variability in the timing and patterning of brain development … decisions about responsibility should be made on an individual basis at this stage of development."). As one court recently remarked, "[e]ven assuming that such psychological and scientific research is constitutionally relevant, the generalizations concluded therein are insufficient to support a determination that 14-year-olds who commit homicide are never culpable enough to deserve life imprisonment without parole." *State of Wisconsin v. Ninham*, 797 N.W.2d 451, 457 (Wis. 2011) (affirming life-without-parole sentence imposed upon fourteen-year-old murderer).

Looking at the facts and circumstances of "[s]pecific cases," *Graham v. Florida*, 130 S. Ct. 2011, 2031 (2010),[4] it is quite clear that, despite their age, certain teen-aged murderers are more than capable of distinguishing right from wrong and fully appreciating the consequences of their actions. Indeed, this observation is reflected in the common-law maxim *malitia supplet ætatem*: malice supplies the want of years. As illustrated below, some teen-aged murderers exhibit sufficient malice to hold them accountable as adults for their murderous acts. Thus, a prophylactic constitutional rule prohibiting the imposition of a life-without-parole sentence on *any person* under 18 years of age would be unwarranted and improper. Whether such a sentence is justified should be assessed on a case-by-case basis. *See generally Graham*, 130 S. Ct. at 2036-42 (Roberts, C.J., concurring in the judgment).

Moreover, engrafting such a rule onto the Eighth Amendment would substantially harm victims' families. When juvenile murderers are sentenced to life, victims' families are able to achieve some measure of finality, at least with respect to the legal process. But if that sentence were made categorically unavailable, even for the worst offenders, these families would be forced to relive the facts of the murder over and over as they prepare for and participate in parole hearings. For them, that process

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4. *See also* Craig Lerner, *Juvenile Criminal Responsibility: Can Malice Supply The Want Of Years?*, 86 Tulane L. Rev. 309, 339-40 (2012) ("Recounting the facts of a crime where a claim of juvenile immaturity is raised is essential in clarifying the kind of juvenile being discussed. … [It] can dispel the idea that [the teen-aged murderers] are typical adolescents; it should alert one to the possibility that [teen-aged] murderers … are atypical. So alerted, one might be inoculated from facile claims that defendants in such cases are just adolescents behaving badly.").

would never end, harming their mental and physical health as a result. Replacing the finality of the life-without-parole sentence with the recurring anguish of the parole process effectively imposes a sentence on victims' families—a sentence under which they must forever relive the crime that took their loved one's life and live in constant fear of a killer being turned loose.

A categorical ban on the imposition of the life-without-parole sentence on teen-aged killers would cause particular harm to the victims' families in cases in which the juvenile lifer's conviction and sentence are final. Because these families rightfully thought they had reached the end of the legal process, they would have had no reason to preserve court records or other relevant information that might bear on a parole decision. Without such information, they would be unable to mount an effective opposition to parole. Such a circumstance would render illusory the participatory rights conferred upon them and protected by the laws of all fifty states and the federal government. *See supra* note 2 & p. 3.

In sum, because the life-without-parole sentence may be constitutionally imposed on teen-aged killers under certain circumstances, categorically banning it under the Eighth Amendment would be improper. This is especially so because such a categorical approach would cause great harm to victims' families and undermine their right to participate in the criminal justice process.

ARGUMENT

I. LIFE IMPRISONMENT WITHOUT PAROLE IS AN APPROPRIATE SENTENCE FOR JUVENILES WHO COMMIT THE MOST HEINOUS MURDERS.

"[T]he capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment." William Blackstone, 4 *Commentaries* 23. At common law, a fourteen-year-old was considered to have the same criminal capacity as an adult. Notwithstanding his age, the fourteen-year old was "*doli capax*" or "fully accountable for his criminal conduct." *Whitehead v. State*, 262 A.2d 316, 318 n.1 (Md. App. 1970) (citing Clark & Marshall, *Law of Crimes*, 6th Ed., § 6.12, pp. 391-394); *see also* Black's Law Dictionary 521 (8th ed. 2004) (defining "*doli capax*" as "[c]apable of committing a crime or tort; esp., old enough to determine right from wrong"). On the other hand, a child of seven years or less was considered *doli incapax*. *See, e.g.*, *Dubiver v. City & S. Ry. Co.*, 75 P. 693, 694 (Or. 1904).

Those between ages seven and fourteen were presumed to be *doli incapax*, but that presumption could be overcome if the crime committed exhibited sufficient malice:

> Between the ages of seven and fourteen years an infant is deemed prima facie to be *doli incapax*; but in this case the maxim applies, *malitia supplet ætatem*—malice (which is here used in its legal sense, and means the doing of a wrongful act intentionally, without just cause or excuse,) supplies the want of mature years.

Angelo v. People, 96 Ill. 209, 1880 WL 10095, at *2 (1880) (quoting *Broom's Legal Maxims* 232-33). "The period between seven and fourteen is subject to much uncertainty: for the infant shall, generally speaking, be judged prima facie innocent; yet if he was *doli capax*, and could discern between good and evil at the time of the offence committed, he may be convicted and undergo judgment and execution of death, though he hath not attained to years of puberty or discretion." 1 W. Blackstone, *Commentaries* 452-53 (1765) (quoted in *Com. v. Ogden O.*, 864 N.E.2d 13, 17 n.3 (Mass. 2007)).

Although the precise age at which the criminal justice system deems people *doli capax* may vary somewhat from jurisdiction to jurisdiction, *see, e.g.*, Alabama Br. at 5,[5] the maxim still holds—*malitia supplet ætatem*. And teen-aged murderers who commit crimes with sufficient malice may properly be deemed "fully accountable" for their conduct.[6]

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5. *See also* The Royal Society, *Brain Waves Module 4: Neuroscience and the law*, at 13 (Dec. 2011) ("In England the age of criminal responsibility is ten. This means that up to the age of ten a child will not be held responsible for criminal acts. From the age of ten however, in the eyes of the law, a child is accountable in the same way as an adult for their behaviour, and is deemed sufficiently mature to stand trial and to engage in legal processes.").

6. It thus is constitutionally irrelevant whether psychological and scientific research suggests that teens as a class are less responsible for their criminal conduct than adults. Jackson Br. at 5. In any event, the research on this point is inconclusive at best. *See* Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 Ohio St. J. Crim. L. 397, 409 (2006) ("The neuroscience evidence in no way independently confirms that adolescents are less responsible."); *see also* Alabama

The following examples illustrate the point. As they show, the life-without-parole sentence may be properly imposed on teen-aged murderers where malice supplies the want of years,[7] especially given that the Court not so long ago upheld a life-without-parole sentence imposed on a first-time offender who committed a nonviolent drug-possession crime, *see Harmelin v. Michigan*, 501 U.S. 957, 1002-04 (1991).[8]

Br. at 43-48. Moreover, some of the scholarly literature on the issue actually suggests that it is not that the underdeveloped brain causes risky behavior but that risky behavior may cause changes to the brain. *See, e.g.*, Robert Epstein, *The Myth of the Teen Brain*, Scientific Am. Mind, April/May 2007, at 58 ("There is clear evidence that any unique features that may exist in the brains of teens—to the limited extent that such features exist—are the result of social influences rather than the cause of teen turmoil.").

7. The relative rarity with which the life-without-parole sentence is imposed on teen-aged murderers demonstrates only that legislatures and prosecutors properly reserve this sentence for particularly depraved murderers. Especially given that most States provide for the possibility of life without parole for at least some teen-aged murderers, *see* Alabama Br. at 9 ("Thirty-nine jurisdictions have statutes allowing 14-year-olds to be sentenced to life without parole for aggravated murder."), the infrequency with which this sentence is opposed cannot possibly support a finding that there is any sort of national consensus against it.

8. A murderer is surely much more criminally culpable than a non-violent, first-time drug offender, principally because murder, like the death penalty, is "'unique in its severity and irrevocability.'" *Graham*, 130 S. Ct. at 2027 (quoting *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)); *see id.* ("The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers.").

1. Donald Torres (age 14)

Victims: **Harry Godt (adult)**
Jennifer Godt (adult)
Jon Godt (age 4)
Jennifer Godt (age 1½)

At approximately midnight on February 24, 1989, Donald Torres broke into the home of his neighbor Harry Godt, knowing that Mr. Godt, his wife, and two young children were asleep on the second floor. Torres spread kerosene over the kitchen floor and the stairway to the second floor of the home. Using his lighter and some newspaper, Torres ignited the kerosene. From outside his apartment, Torres watched the flames spread through and engulf the Godts' home. He watched Mr. Godt run out of the house and then go back inside to attempt to save his family. Harry Godt, his wife, and their two young children all perished in the fire.

According to the State Medical Examiner, the Godts all died of asphyxia due to carbon monoxide saturation of the hemoglobin and third-degree burns that covered 90 to 95 percent of their bodies.[9] After initially denying any involvement, Torres later admitted to police that "he had intentionally started the fire to get back at Harry Godt because Godt had accused Torres of teaching [Godt's] son, Jon, to play with matches." Torres also admitted that he

9. *See Torres v. State of Delaware*, 608 A.2d 731 (Del. 1992); *Torres v. State of Delaware*, 642 A.2d 837 (Del. 1994); *Torres v. Kearney*, No. 04-109, 2005 WL 3263098 (D. Del. Dec. 1, 2005).

had known that "the Godt family was in the home when he started the fire."[10]

A Delaware jury convicted Torres of four counts of intentional first degree murder and four counts of reckless first degree felony murder. He was sentenced to eight consecutive terms of life without parole.[11]

2. Paul Dean Jensen Jr. (age 14)

Victim: Michael Hare (adult)

Paul Jensen already had a record of shoplifting, vandalism, burglary, arson, stalking, and more when he committed premeditated murder.

On January 14, 1996, Jensen engaged in a "dry run" of his plan to rob a taxicab. At about midnight, a Pierre, South Dakota taxicab dispatcher received a call requesting a ride from Buhl's Laundry. When the taxi driver arrived, she was met by Jensen and his sixteen-year-old friend, Shawn Springer. At their request, the taxi driver took Jensen and Springer on a two-stop journey that ended only one block from where they met the cab in the first place. During the drive, Springer asked the taxi driver if anyone had ever stolen or tried to steal the cab money bag. The driver responded that if anyone did try to steal it, they could have it, as it only contained thirty dollars.

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10. *See* Charles D. Stimson & Andrew M. Grossman, Adult Time for Adult Crimes: Life Without Parole for Juvenile Killers and Violent Teens 46 (Heritage Found. Aug. 2009).

11. *Torres*, 608 A.2d 731; *Torres*, 642 A.2d 837; *Torres*, 2005 WL 3263098.

Seven days later, Jensen, his sister, and Springer entered a friend's unlocked apartment and stole some cash, a necklace, a shotgun, and a handgun that turned out to be the weapon used to kill a taxi driver five days later. On the evening of January 26, 1996, Jensen showed the stolen handgun to a friend. He also showed the friend two or three ammunition clips. At around 11:00 pm, the Pierre taxi dispatcher received a call from Springer requesting to be picked up at the Days Inn and insisting to be picked up at "north back door." The dispatcher refused, stating that the cab would arrive at the office door. Springer indicated that there would be two passengers. When the dispatcher asked where they were going, Springer said, "Paul, where are we going?" Jensen replied, "I don't know. Fort Pierre, I guess. I don't know."

The taxi driver, Michael Hare, arrived at the Days Inn and shortly thereafter noticed Jensen and Springer coming from the back of the Days Inn. They entered the cab and directed Hare to take them to Fort Pierre. Jensen and Springer directed Hare to take them down a gravel road near Fort Pierre where the cab stopped. At this very same time, the dispatcher was trying to call Hare's cellular phone. Although Hare did not directly respond to her call, the dispatcher could hear Hare say over the cell phone: "That's all I have is thirty bucks. Take it. Take it all." The dispatcher then heard Jensen and Springer say, "That ain't all you got" and demand "everything." Hare replied, "That's all I have. They only give us thirty bucks. You can have it. Take it, take it all."

Jensen got out of the taxi with the stolen handgun drawn. He ordered Hare to exit the vehicle. After Hare got out of the vehicle, Jensen shot him in the chest. Hare

fell down and pleaded for his life, yelling, "Please God, don't kill me." Jensen approached Hare and shot him once more on each side of the head, killing him. Jensen then grabbed Hare's billfold and other items, which had been placed on the hood of the taxi, and jumped into the passenger seat. Springer and Jensen drove off, leaving Hare's lifeless body at the end of the gravel road. They were apprehended shortly thereafter by police, who had been alerted to the crime by the dispatcher.

Later, while Jensen was being held in the Juvenile Corrections Center in Rapid City, he bragged to the other juveniles in his holding area about having planned and executed the murder of a taxi driver. According to the testimony of one of the juveniles, "Jensen related the story of his cold-blooded execution-style murder in a calm and unfeeling manner."[12] A South Dakota jury convicted Jensen of first-degree murder. He was sentenced to life imprisonment without parole.[13]

3. Ashley Jones (age 14)

Victims:	**Deroy Nalls (adult)**
	Mary Nalls (adult)
	Millie Nalls (adult)
	Mary Jones (age 10)

In 1999, Ashley Jones and her sixteen-year-old boyfriend, Geramie Hart, plotted and executed a horrific crime that involved the murder of her grandfather and

12. *State of South Dakota v. Jensen*, 579 N.W.2d 613 (S.D. 1998).

13. *Id.*

her Aunt Millie and would have involved the murder of her grandmother and her 10-year-old sister had they not miraculously survived the attack.

Hart and her ten-year-old sister Mary lived with their grandparents, Deroy and Mary Nalls. Jones's aunt, Millie Nalls, also lived in the house. Jones's family did not approve of her relationship with Hart, so she plotted with Hart to kill them, set the house ablaze, and abscond with their money.

On the night of August 29, 1999, Deroy Nalls was in the den watching television. His wife, daughter, and younger granddaughter were asleep in their rooms. Jones let Hart into the house. He was armed with Deroy's .38 caliber pistol, which Jones previously had smuggled to him. Jones and Hart entered the den, where Hart promptly shot Deroy twice in the face. Jones and Hart then moved quickly to Millie's bedroom where she had been sleeping and shot her three times. Seeing that she survived the gunshots, Jones and Hart hit her repeatedly with portable heaters, stabbed her in the chest, and set her room on fire. The pair next entered Mary Nalls's bedroom and shot her once in the shoulder, stopping only because it was their last bullet.

Jones and Hart returned to the kitchen area and discovered that Deroy was still alive. Hart hit him with various objects and stabbed him repeatedly, leaving the knife in his back. Jones then poured charcoal lighter fluid on her grandfather and set him on fire. Jones's young sister, Mary, woke up, and Jones led her into the kitchen area where she saw her grandfather on fire but still alive. Hart forced Deroy to disclose where he kept his money, and then stabbed Deroy in the throat. Jones then poured

lighter fluid on her grandmother and set her on fire. Jones and Hart watched her burn, and Hart urged Jones to pour more lighter fluid on her. Young Mary attempted to flee the kitchen, but Jones grabbed her and began hitting her. Hart pointed the gun at the young girl and said, "This is how you are going to die." Jones said, "No, let me do it," and stabbed her little sister 14 times. Jones and Hart then set the house ablaze.

Jones and Hart took $300 that had been hidden beneath her grandparents' mattress and drove away in their Cadillac. Miraculously, Mary Jones survived, despite suffering a collapsed lung and multiple stab wounds. The ten-year-old had pretended to be dead until Jones and Hart fled the burning house and then heroically helped her grandmother out of the house and contacted others for help.

Jones and Hart were arrested the next morning in a hotel room, where her grandparents' car had been found in the parking lot. Jones and Hart voluntarily confessed to the murders of Jones's grandfather and aunt and the attempted murders of her grandmother and little sister.[14] Upon learning that her younger sister had survived the attack, Jones remarked "I thought I killed that bitch."[15]

Jones was convicted of two counts of capital murder and two counts of attempted murder. She was sentenced to life imprisonment without parole. The sentencing judge noted that Jones "did not express genuine remorse for her actions." The judge also noted that "while awaiting her

14. *See Hart v. State of Alabama*, 852 So.2d 839 (Ala. Crim. App. 2002).

15. *See* C. Stimson & A. Grossman, *supra*, at 27.

sentencing, the defendant had threatened older female inmates in the Jefferson County Jail by telling them she would do the same thing to them that she had done to her family."[16]

4. Omer Ninham (age 14)

Victim: Zong Vang (age 13)

Omer Ninham committed a murder that the Supreme Court of Wisconsin described as "a horrific and senseless crime [that] cannot adequately be reduced into words. The terror experienced by the victim and the hurt suffered by his family and friends is, in a word, unimaginable."[17]

On the evening of September 24, 1998, Zong Vang was riding his bike home with a bag of tomatoes his older brother had asked him to pick up from the grocery store. While riding along Webster Avenue in Green Bay, Wisconsin, Vang was approached by five teens: Ninham, 13-year-old Richard Crapeau, 13-year-old Jeffrey P., 14-year-old Amanda G., and 14-year-old Christin J.

Vang did not know any of them and had done nothing to provoke them. He just happened to encounter a group looking for a fight. Crapeau said to Ninham, "Let's mess with this kid," and Ninham responded, "'I got your back,' meaning he would back [Crapeau] up in a fight."[18]

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16. *State of Alabama v. Jones*, No. CC-2000-0151, 0152 (Ala. Cir. Ct. May 25, 2001) (finding of fact from guilt phase of trial).

17. *See State of Wisconsin v. Ninham*, 797 N.W.2d 451, 457 (Wis. 2011).

18. *See id.*

Ninham and Crapeau began taunting Vang and quickly attacked him. Crapeau then yanked Vang's bicycle away from him, grabbed Vang's grocery bag, and threw it in the street. After Vang asked them for his bicycle back, Ninham punched Vang, knocking him to the ground.

Vang got up and attempted to flee, running towards a parking ramp at St. Vincent's Hospital, which was on the same street. The attackers chased Vang, catching up to him at the top of the five-story parking ramp. When they reached Vang, Crapeau punched him in the face. Vang repeatedly begged for mercy and asked why they were trying to hurt him. But Ninham and Crapeau continued to attack Vang.

Ninham then pinned Vang against a concrete wall, and Crapeau punched Vang in the face. As Vang cried and screamed, "Let me go," Ninham and Crapeau lifted Vang up off the ground, with Ninham holding Vang's wrists and Crapeau holding Vang's ankles. Ninham and Crapeau "then began swinging Vang back and forth out over the parking ramp's concrete wall—a drop that measured nearly 45 feet to the ground." Vang, still crying and screaming, pleaded with Ninham and Crapeau not to drop him. Crapeau then let go of Vang's feet and urged Ninham to "[d]rop him." Showing no mercy to the still-pleading Vang, Ninham let go of Vang, leaving him to plunge five stories to his death. At just that time, a bystander exiting the parking facility down at ground level heard what sounded like a "bag of wet cement hitting the pavement." Vang landed on his back on the parking ramp's paved exit lane, 12 feet from the base of the ramp.

Ninham, Crapeau, and their companions fled the scene, leaving Vang in a heap on the concrete. One of the

other companions later testified that Ninham stood for several seconds looking over the edge of the wall at Vang on the ground below. Ninham then looked at Jeffrey P. and said, "Don't say nothing. Better not say shit." Rescue personnel were unable to revive Vang. The official cause of Vang's death was craniocerebral trauma resulting from his fall.

A jury convicted Ninham of first-degree intentional homicide and of physical abuse of a child for the death of the thirteen-year-old Vang. Ninham was sentenced to life imprisonment without parole.[19]

5. Scott Darnell (age 15)

Victim: Vicki Larson (age 10)

Scott Darnell already had a record that included molesting young girls, attempted rape, and assault with a deadly weapon when he raped and murdered Vicki Larson.[20] Indeed, it was only a month earlier that Darnell had been released from incarceration and placed in the custody of a parole officer.[21] He was on an authorized absence from a correctional facility at the time he raped and murdered Vicki.[22]

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19. *State of Wisconsin v. Ninham*, 797 N.W.2d 451, 457 (Wis. 2011).

20. Kris Jensen & Daniel J. Foley, *Who Failed with Scott Darnell?*, Quad-City Times (Davenport, Iowa) (Aug. 12, 1979).

21. *Larson v. Darnell*, 448 N.E.2d 249, 250 (Ill. App. 1983).

22. Kris Jensen & Daniel J. Foley, *Who Failed with Scott Darnell?*, Quad-City Times (Davenport, Iowa) (Aug. 12, 1979).

On July 12, 1979, Darnell lured Vicki away from her brother's baseball game to a location in a nearby cornfield where he had already dug a shallow grave three days earlier. There, Darnell raped and strangled Vicki to death with a bandana. He then dumped her lifeless body into the pre-dug grave and buried her. In an attempt to conceal his crimes, he buried the bandana he had used to strangle Vicki. In addition, he threw his wristwatch into a nearby field in order to set up an alibi that he had been jumped and had his watch stolen.

Darnell and Vicki were the objects of an overnight search after they had been reported missing that evening. Local police came across Darnell the next morning, finding him "extremely dirty, wet and muddy." He told them that he had been jumped by two men on motorcycles who stole his watch.

Later on, Darnell confessed to the rape and murder-by-strangulation of Vicki Larson. He showed officers where he had buried his bandana and where he had thrown his watch. He also showed them the shovel that he had used to dig what would be Vicki's grave.[23]

Darnell was convicted of murder and rape at a bench trial. Darnell showed little emotion during the trial and verdict, but "joked freely with jailers and relatives during the recesses."[24] Darnell was sentenced to life imprisonment without parole. The sentencing judge

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23. Craig Brown, *Witnesses describe Darnell, scene of murder*, Quad-City Times (Davenport, Iowa) (Jan. 29, 1980).

24. Craig Brown, *Judge finds Darnell guilty of rape, murder*, Quad-City Times (Davenport, Iowa) (Feb. 8, 1980).

remarked that Darnell's rape and murder of Vicki Larson were "exceptionally brutal."[25]

A few years later, while Darnell was in prison for the rape and murder of Vicki Larson, prison officials uncovered and thwarted an elaborate escape plan that Darnell was in the process of carrying out. In uncovering the escape, the prison officials found a letter from Darnell addressed to Judge Jeffrey O'Connor, who had been the state's attorney who prosecuted Darnell. The letter read:

> You used me, you took my life as surely as if you would of sent me to the chair.
>
> Do you wonder why I write in red? It is the color of your blood. Do you have daughters, Jeffrey? If they are young, I'll be merciful with them. As merciful as I was with Viki. But regardless, they shall die.
>
> Wether wife sons daughter or any other, they shall die in front of your eyes.
>
> And when every cry is called, every tear shed, every drop of blood spilled before your feet, it will be your turn…. I will keep you alive for days. But you will die finally. And I'll feed you to the dogs.[26]

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25. Craig Brown, *Murderer's chilling letter never sent*, Quad-City Times (Davenport, Iowa) (Aug. 2, 1984).

26. Craig Brown, *Murderer's chilling letter never sent*, Quad-City Times (Davenport, Iowa) (Aug. 2, 1984).

II. A CATEGORICAL BAN ON THE LIFE-WITHOUT-PAROLE SENTENCE FOR JUVENILE KILLERS WILL NEEDLESSLY TRAMPLE ON THE RIGHTS OF VICTIMS.

The Court has remarked that the life-without-parole sentence is somewhat unique. *See Graham*, 130 S. Ct. at 2027. The way in which it is perhaps most unique is that it is the *only* sentence that allows victims to obtain legal finality. The life-without-parole sentence brings them certainty by terminating the legal process. *See Menzias v. Galetka*, 150 P.3d 480, 521 (Utah 2006) (Wilkins, J., concurring) ("[A] sentence of life without parole" is "more certain for the victims."). It avoids the interminable nature of the death penalty appeal process. *See id.* (describing the "seemingly endless requirements to review, re-review, analyze, and re-analyze any possible defect in the proceedings by which those found guilty of crimes so hideous that the death penalty is imposed"). And it enables victims to avoid the recurring pain of the parole process, which forces them to relive the horrors of these heinous crimes and paralyzes them with fear that the murderers who so callously took the lives of their family members might be released.

Imposing the parole process on victims' families thus comes at a substantial cost. Each parole proceeding inflicts on them the mental and physical anguish of replaying the murder in their mind's eye as they prepare for and attend parole hearings. Worse still, they must repeat this process over and over each time the killer become eligible for parole. And throughout this process, they live in constant fear that the killer will be set loose on society. For these reasons, a life-*with*-parole sentence has been likened to

"sentencing the victim and the victim's family, as well. … It's a sort of a virtual prison, because ... as long as [the killers] are in jail ... and as long as they come up for parole, we're sharing that sentence with them."[27] To create a rule prohibiting life-without-parole sentences for all teen-aged killers would thus impose real and immeasurable harm on their victims.

This rule would be particularly unfair where the life-without-parole sentence is already final.[28] The criminal justice system promised these victims that the killers would never be released. Having obtained legal finality, these victims were able to move on. While they may never fully overcome the physical, emotional, and psychological trauma of the crime itself, at least they could rest assured that the killer would no longer be a threat to them or any other innocent person. Reopening final sentences and forcing the victims to again encounter these killers

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27. *Sentencing the Victim* (IVS Video Inc. 2002), PBS, Independent Lens (March 2, 2004), *available at* http://www.hulu.com/watch/55120/pbs-indies-sentencing-the-victim. In addition to the emotional and physical toll on victims, the recurring parole process forces victims to incur substantial financial costs. Victims must regularly take time off from work to attend parole hearings and pay for transportation to and from the location of the parole proceedings.

28. Although such a holding should not apply retroactively, it is possible that lower courts might wrongly conclude otherwise. *See In re Sparks*, 657 F.3d 258 (5th Cir. 2011) (holding that *Graham* applies retroactively to cases on collateral review). The retroactivity problem could be avoided entirely if the issue were properly left to the state legislatures. *See e.g.*, Texas Penal Code § 12.31(a); *Meadoux v. State*, 325 S.W.3d 189, 194 (Tex. Crim. App. 2010) (noting that "the Legislature specified that the amendment of § 12.31(a) was not to be applied retroactively").

through the parole process would effectively transfer the life sentence from the perpetrator of the heinous crime to his innocent victim.

Moreover, invalidating final sentences of teen-aged murderers would thwart victims' participatory rights. There is a national consensus that crime victims have a right to participate in the criminal process. "As might be expected, statutes and constitutional provisions regarding specific crime victims' rights differ across jurisdictions, but there is general agreement about which victims' rights are most important." *See* Dean G. Kilpatrick, *Interpersonal Violence and Public Policy: What About the Victims?*, 32 J.L. Med. & Ethics 73, 78 (2004). These are victims' participatory rights, which "are designed to parallel defendants' rights to participate in criminal proceedings" and thus include the rights "to be notified about key criminal justice system proceedings and hearings, to be present at such hearings and proceedings, and to be heard at appropriate points in such hearings and proceedings." *Id.*; *see, e.g.*, Ala. Code § 15-23-79(b) ("The victim shall have the right to be notified by the Board of Pardons and Paroles and allowed to be present and heard at a hearing when parole or pardon is considered."); Ark. Code § 16-90-1113(a)(1)(A) ("Before determining whether to release the defendant on parole, the Parole Board shall permit the victim to present a written victim impact statement concerning the effects of the crime on the victim, the circumstances surrounding the crime, the manner in which the crime was perpetrated, and the victim's opinion regarding whether the defendant should be released on parole."); *id.* § 16-90-1113(a)(1)(B) ("At the victim's option, the victim may present the statement orally at the parole hearing.").

Because the life-without-parole sentence brings closure to the legal process, victims tend not to retain court records or take steps to preserve witness testimony or other important evidence. As time passes, victims may no longer have access to key evidence and information that has particular relevance to parole proceedings. Some NOVJL members, for example, have indicated that key witnesses to the murder of a family member have passed on. Others have noted that they do not have transcripts of key proceedings, such as when the sentencing judge explained the court's reasons for imposing a sentence of life without parole. And because electronic dockets are of relatively recent vintage (and do not even exist in some places), victims may be left with no means of obtaining information that might be crucial to determining whether a murderer stays in prison or is set free.

Without access to important evidence bearing on a parole determination, the promise of victims' participatory rights is an empty one. And because "parole boards cannot make sound decisions about the release of convicts from prison without information from victims," Kilpatrick, *Interpersonal Violence and Public Policy: What About the Victims?*, 32 J.L. MED. & ETHICS 73, 74 (2004), murderers who remain dangerous to the public may be set free among an unsuspecting public.

CONCLUSION

For the reasons set forth herein, the judgments of the Alabama Court of Criminal Appeals and the Supreme Court of Arkansas should be affirmed.

Respectfully submitted,

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