

We Can't Execute Them

But should we lock up teens for life?

BY DAHLIA LITHWICK



THIS WEEK, THE Supreme Court will hear a case testing whether the Eighth Amendment's ban on cruel and unusual punishment prohibits sentencing a teen to life in prison

without parole for a nonhomicide crime. Punishment is generally deemed "cruel" if it's more than "graduated and proportional." It is constitutionally "unusual" if imposed so infrequently "that a national consensus has developed against it."

The seeds for this particular constitutional challenge were sown in Justice Anthony Kennedy's majority opinion in a 2005 case, *Roper v. Simmons*, banning capital punishment for juveniles. That case hinged on the growing national consensus against executing teens, bolstered by scientific studies finding teenage brains to be underdeveloped in ways that make their owners less culpable than adults. The question for the court this time is not just whether teens are really different than adults, but whether being sentenced to die in prison is truly different from being sentenced to die there by lethal injection.

The court ordered two different Florida cases to be argued on the same day—suggesting it may resolve each one differently (the court may simply find that age 13 is too young for life without parole but 17 is not). In Joe Sullivan's case, he and two accomplices robbed a 72-year-old woman, then he and a con-

federate allegedly returned to her home and raped her. Sullivan was tried in adult court and sentenced to life without parole. He was 13. Terrance Jamar Graham tried to rob a restaurant with two accomplices. He was charged as an adult, pled guilty to armed burglary charges, and received one year behind bars and three years probation. But when he violated probation, Graham was sentenced, without trial, to life without parole. He was 17. In both cases the sentencing judges were certain these boys were beyond hope or help.

The cases force Justice Kennedy, once more the court's likely decisive vote, to confront the neurological and behavioral science he relied upon in *Roper*. Writing there for five justices, Kennedy found teens prone to "impetuous and ill-considered actions and decisions" and concluded "that the character of a juvenile is not as well formed as that of an adult."

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That same neuroscience has been deployed again in this case. A dramatic friend-of-the-court brief submitted by a group of former juvenile offenders, including Tony-nominated actor Charles Dutton and former Wyoming senator Alan Simpson, argues that "it is fundamentally inhumane to give up on a youthful offender." Detailing Dutton's youthful conviction for manslaughter and Simpson's early experiments with arson and guns, the brief contends that teenagers are risk-takers by nature; some are just unluckier than others: "Had circumstances been different—had [Simpson] not been fortunate regarding where his

stolen bullets struck or what was damaged by his arson—he might have been jailed for the rest of his life."

On the other side of the case, the state of Florida focuses not on the unseen mysteries of the teenage brain, but on the fact that "death is different." Advocates for life without parole argue that courts should stay out of the brain-science business. Just last week an Italian judge reduced an adult murderer's prison sentence based on evidence that his genes were linked to his violent behavior. Sentencing based on someone's genes or frontal cortex is a complicated business—one that might be used to extend sentences rather than just shorten them.

Another highly controversial strand in Kennedy's *Roper* analysis was what he described as "the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty." A reported 2,574 juveniles in the United States are serving life without parole. Sullivan's lawyers now argue that "the United States stands alone in sentencing children to die in prison without hope of ever winning release," an argument which will likely send the court's conservative wing into orbit, since they consider consulting foreign law tantamount to consulting *Bazooka Joe* comics.

Kennedy's willingness to cite foreign practices—which triggered calls for his impeachment after *Roper*—could be a factor this time too. The outcome of these complex cases may well turn on whether Kennedy believes a teenager can possibly attain, as he put it in *Roper*, "a mature understanding of his own humanity" in a prison cell to which his jailers have thrown away the key.