No. 10-9646

In The
Supreme Court of the United States

EVAN MILLER,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Writ Of Certiorari To The Alabama Court Of Criminal Appeals

REPLY BRIEF FOR PETITIONER

BRYAN A. STEVENSON*
RANDALL S. SUSSKIND
ALICIA A. D'ADDARIO
EQUAL JUSTICE INITIATIVE
122 Commerce Street
Montgomery, AL 36104
(334) 269-1803
bstevenson@eji.org

Attorneys for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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1. The Factual and Legal Defects in Respondents' Argument that the Minuscule Number of 14-Year-Old Children Sentenced to Life Without Parole Is the Product of a Rational Process for Selecting the Most Culpable Juvenile Homicide Offenders

Alabama and its *amici* suggest that the handful of life-without-parole sentences imposed on 14-year-old children are the product of a rational and careful selection of the worst-of-the-worst young homicide offenders. Ala. Resp't Br. 1, 50-51; Nat'l Dist. Att'ys Ass'n *Amicus* Br. 13-16.[1] The mandatory nature of the vast majority of these sentences, including Evan Miller's, makes it highly unlikely that a systematic selection process for assigning life-without-parole sentences to only the most culpable offenders is in operation; and it makes the regularity of any such process legally unreviewable and factually unverifiable.[2] But the circumstances of Evan Miller's case –

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[1] This is coupled with an argument that the rarity of life-without-parole sentences for homicides by children 14 and under simply reflects the relatively low incidence of such homicides. Ala. Resp't Br. 1, 10, 31-33. That argument is addressed at pages 2-10 of the *Jackson* petitioner's Reply Brief.

[2] When Alabama asserts that "prosecutors appropriately exercise discretion" to limit the number of life-without-parole sentences imposed under a mandatory life-without-parole sentencing statute (Ala. Resp't Br. 1), it must be talking about a prosecutorial power either (1) to proceed in juvenile court rather than in adult court under "*[co]ncurrent-jurisdiction statutes* [that] give the prosecutors discretion to choose to file 'cases in either' court" (Ala. Resp't Br. 4; *see also id*. at 8 (reciting that in Evan's case, "[b]ecause the juvenile court had limited power to

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as well as those of Kuntrell Jackson's case – cast added doubt on Alabama's theory that prosecutorial discretion can be relied upon to reserve juvenile life-without-parole sentences for the most culpable offenders.

It is noteworthy that, in contending that "the evidence presented at [Evan Miller's] trial shows why life without parole can be an appropriate punishment when 14-year-olds commit aggravated murder" (Ala. Resp't Br. 6), the State adverts only to "evidence" about the events on the night of the crime. *See* Ala. Resp't Br. 6-7. This exclusive focus, ignoring everything else in Evan Miller's life history, must reflect a confidence that Evan's crime *alone* will support an inference of lifelong incorrigibility, making it "appropriate" to deny him consideration for parole forever.[3] Such confident prediction is unwarranted by the facts surrounding the crime and is undermined still further when Evan's background is considered.

"[T]he evidence presented at trial" (Ala. Resp't Br. 6) shows that the killing of Mr. Cole Cannon was

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punish him, . . . , the District Attorney asked that court to move the case to adult court")), or (2) to forestall the statutorily mandated sentence by filing lesser charges even when the evidence of a life-without-parole-punishable homicide offense is ample.

[3] "To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible." *Graham v. Florida*, 130 S. Ct. 2011, 2029 (2010).

not calculated or considered but occurred spontaneously and impulsively in the setting of a drug-, alcohol-, and crime-saturated environment into which 14-year-old Evan Miller was situated by the adults around him. Evan and his older friend Colby Smith were preparing to go to bed when the 52-year-old Mr. Cannon came to Evan's trailer (R. 710), late at night and visibly intoxicated, not only looking for food, but also to purchase drugs from Evan's mother (R. 1003-04). When he returned to his own trailer at around 2 or 3 a.m., Mr. Cannon permitted the teens to accompany him. R. 710, 982. He provided them with alcohol (R. 710) and requested that they purchase marijuana, which they did (R. 982, 1008-09). Mr. Cannon shared the marijuana with the teens and played drinking games with them. J.A. 132-33; R. 983, 1009.

It was in this context of intoxication (J.A. 45, 138) that violence flared and grew progressively wilder in the wee hours of the morning. To the extent that Evan and Colby had any intentions of committing a crime when they accompanied Mr. Cannon to his trailer, it was solely to steal his money, not to kill him. R. 981. This was undisputed at trial. J.A. 132. Only when Mr. Cannon unexpectedly awakened and initiated the chain of physical aggression by grabbing Evan's throat and choking him did any violence arise. R. 984; J.A. 133. Drunk, high, and reacting to this assault, Evan and Colby responded brutally. R. 985. They then went on to beat Mr. Cannon in the frighteningly ugly manner detailed by the State at Ala. Resp't Br. 6-7. Only fifteen minutes later, the teens

returned to Mr. Cannon's trailer and made a panicked effort to conceal what had happened by setting the fires that ultimately caused his tragic death. R. 1021; J.A. 133.

As set forth more fully in Evan's opening brief (Miller Pet'r Br. 5-6), the circumstance that, at age 14, he could be found at Mr. Cannon's trailer at 2 a.m. playing drinking games exemplifies the abusive and neglectful environment in which he was raised. The adults responsible for his upbringing had physically abused him, failed to provide him with a safe place to live or other basic necessities, and taught him to use drugs and alcohol. J.A. 26-27, 61-68. His father violently beat Evan, his mother, and his siblings on a regular basis throughout his early childhood. J.A. 26, 61-63. This abuse was so extreme that, as young as age five, Evan attempted to hang himself to escape. J.A. 28, 63. After the abuse continued for several more years, the State finally removed Evan and his siblings from the home. J.A. 26, 61.

Evan had no significant difficulties until he was returned to his mother's care more than two years later. J.A. 26, 62. Following his return, his mother was absent for up to sixteen hours a day, was addicted to alcohol and illegal drugs, and failed to adequately provide for him. J.A. 26, 33, 67, 68; R. 1251. Despite the violence and neglect to which he had been exposed, Evan had only two prior juvenile adjudications for minor, nonviolent offenses – truancy and misdemeanor criminal mischief. R. 154-55.

As awful as the killing of Mr. Cannon itself surely was, does it provide a sufficient basis for the prediction that Evan is "the rare juvenile offender whose crime reflects irreparable corruption" (*Graham v. Florida*, 130 S. Ct. 2011, 2029 (2011), quoting *Roper v. Simmons*, 543 U.S. 551, 572 (2005))? More so than Evan's co-defendant, 16-year-old Colby Smith, whom the State allowed to plead to the lesser charge of felony murder and to receive a sentence of life *with* the opportunity for parole (R. 1000)? In all its graphic recounting of the crime, what has the State produced to put Evan Miller wholly outside the sphere of *Graham*'s perceptions that courts, let alone prosecutors, cannot "with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change,"[4] and that "an 'unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true

[4] The basis upon which prosecutors make their decisions to seek a life-without-parole sentence or something less are unfathomable. A recent study of the sentences given teenagers accused of murder in Massachusetts "found no obvious pattern to explain why some killers got life without parole and others won lesser sentences" through prosecutorial charge reduction and plea bargaining. Sarah Favot, Kirsten Berg, & Jenna Ebersole, *Our Youngest Killers: Massachusetts Teens Sentenced to Life Without Parole Reveal Inequities in 1996 Law*, New England Center for Investigative Reporting, Dec. 27, 2011, ¶ 8, *available at* http://necir-bu.org/our-youngest-killers/.

depravity'" should require a less severe sentence (*Graham*, 130 S. Ct. at 2032, quoting *Roper*, 543 U.S. at 573)?

The *Graham* Court's perceptions find additional support in the reality that those procedures which produce judicial or prosecutorial assessments of lifelong incorrigibility are particularly error-prone because "the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings." 130 S. Ct. at 2032. Only by ignoring these perceptions does "the evidence presented at [Evan Miller's] trial show[ ] why life without parole can be an appropriate punishment when 14-year-olds commit aggravated murder" (Ala. Resp't Br. 6).

2. Alabama's and Arkansas's Recycling of the Rejected Argument That the Confluence of Distinct State Laws (a) Permitting or Requiring Adult-Court Trial of Some Juveniles and (b) Authorizing or Requiring Adult Life-Without-Parole Sentences Reflects an Endorsement of Life Without Parole for Children

All parties to the *Miller* and *Jackson* cases agree that laws in 39 jurisdictions expose 14-year-olds to life-without-parole sentencing for murder as a consequence of the interaction between statutes providing for adult-court prosecution of some juveniles and other statutes punishing adult-court murder convictions with life without parole. Alabama and Arkansas

argue extensively that the existence of these statutes precludes the Court from finding a national consensus against life-without-parole sentences for these young teens. Ala. Resp't Br. 15-29; Ark. Resp't Br. 13-19.

The short, sufficient answer to this argument is that *Graham v. Florida* found a national consensus against life-without-parole sentences for juveniles convicted of nonhomicide crimes although such sentences were legislatively authorized in 39 jurisdictions: "[t]hirty-seven States as well as the District of Columbia . . . [and f]ederal law" (*Graham*, 130 S. Ct. at 2023).

Alabama seeks to distinguish *Graham* on the ground that fewer of the life-without-parole statutes there than here were mandatory. Ala. Resp't Br. 19-20. Its basic point seems to be that mandatory statutes (statutes which "make clear that once a defendant is transferred to the adult system and convicted . . . , the court has no choice but to impose a life-without-parole sentence" (*id*. at 20)) "'justify a judgment that . . . [the enacting Legislatures]' affirmatively 'intended to subject such offenders to life-without-parole sentences'" (*id*.), whereas the varying range of statutes within *Graham*'s purview of 39 – some discretionary, some mandatory, some "mandatory only when the nonhomicide offender had a criminal history that no one would expect to see from someone under age 18" (*id*. at 19) – generated only a *possibility* of life-without-parole sentencing of juveniles; and the *Graham* Court "concluded that this

mere possibility was not strong evidence that 'the legislatures in those jurisdictions' had 'deliberately concluded that it would be appropriate' to impose life-without-parole sentences on juveniles for non-homicide crimes" (*id*. at 20).

This analytic effort obfuscates the obvious. If a statute which exposes juveniles to a mandatory life-without-parole sentence demonstrated a deliberate legislative conclusion that *all* such juveniles deserved life without parole, then – to exactly the same extent and by exactly the same inference – a statute which exposes juveniles to a discretionary (or less than universal) life-without-parole sentence would demonstrate a deliberate legislative conclusion that *some* such juveniles deserve life without parole. Yet *Graham* found that 39 statutes exposing juvenile non-homicide offenders to life imprisonment without parole (some discretionary, some mandatory, some less-than-universally mandatory) did not defeat a finding of a national consensus pointing to an Eighth Amendment ban against sentencing *any* juvenile nonhomicide offender to life without parole. The reason for *Graham*'s finding was clearly stated and is simply ignored by Alabama's attempt to reduce *Graham* to a case about "mere possibility" as distinguished from some more-than-mere possibility.[5] The

[5] We say "some more-than-mere possibility" rather than "certainty" because Alabama cannot seriously be contending that a statute which exposes juveniles to adult-court trial and thus to a mandatory life-without-parole sentence for certain crimes

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relevant passage in *Graham* bears quotation in full because it explicitly states that *Graham*'s basis for concluding that "[t]he evidence of consensus is not undermined by the fact that many jurisdictions do not prohibit life without parole for juvenile nonhomicide offenders" (130 S. Ct. at 2025) had nothing to do with Alabama's "mere possibility" theory. Referring to *Thompson v. Oklahoma*, 487 U.S. 815 (1988), the *Graham* Court wrote:

> As is the case here, those States [whose statutes were considered in *Thompson*] authorized the transfer of some juvenile offenders to adult court; and at that point there was no statutory differentiation between adults and juveniles with respect to authorized penalties. The plurality concluded that the transfer laws show "that the States consider 15-year-olds to be old enough to be tried in criminal court for serious crimes (or too old to be dealt with effectively in juvenile court), *but tells us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders.*" 487

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reflects a legislative expectation that life-without-parole sentences will be a *certainty* for juveniles guilty of those crimes. Such a contention would ignore Alabama's own reliance on prosecutorial discretion as a part of its explanation for the extreme rarity of life-without-parole sentences imposed on young teens for murder (*see* Ala. Resp't Br. 1) although "enactments by 26 States and the federal government . . . make these punishments mandatory" whenever "juvenile judges transfer 14-year-olds and juries convict them of aggravated murders" (*id*. at 16).

> U.S., at 826, n. 24, 108 S. Ct. 2687. Justice O'Connor, concurring in the judgment, took a similar view. *Id.*, at 850, 108 S. Ct. 2687 ("When a legislature provides for some 15-year-olds to be processed through the adult criminal justice system, and capital punishment is available for adults in that jurisdiction, the death penalty becomes at least theoretically applicable to such defendants. . . . [H]owever, it does not necessarily follow that the legislatures in those jurisdictions have deliberately concluded that it would be appropriate").

Graham, 130 S. Ct. at 2025 (emphasis in *Thompson*).

In *Thompson* as in *Graham*, the Court flatly rejected the argument which Alabama once again advances here. *See Thompson*, 487 U.S. at 826 n.24 (plurality opinion); *id.* at 850-51 (Justice O'Connor, concurring and noting that "[t]here are many reasons, having nothing whatsoever to do with . . . [a choice of the appropriate punishment], that might motivate a legislature to provide as a general matter for some 15-year-olds to be channeled into the adult criminal justice process. The length or conditions of confinement available in the juvenile system, for example, might be considered inappropriate for serious crimes or for some recidivists. Similarly, a state legislature might conclude that very dangerous individuals, whatever their age, should not be confined in the same facility with more vulnerable juvenile offenders.

Such reasons would suggest nothing about the appropriateness of . . . [any specific] punishment for 15-year-olds.").[6]

Alabama's and Arkansas's contrary argument – that statutes providing for the prosecution of juveniles in adult court must be read as expressing a deliberate determination that the life-without-parole sentences prescribed for adult offenders are also appropriate for those juveniles – offends not only *Thompson* and *Graham* but common-sense plausibility. In 18 of the 39 jurisdictions to which they attribute this deliberate determination, the statutes which expose 14-year-olds to life without parole also expose 13-year-olds, 12-year-olds, 11-year-olds, and 10-year-olds to life without parole.[7] Is this Court therefore to

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[6] Alabama's own brief acknowledges that the 1990s' legislation readjusting the boundaries between juvenile-court jurisdiction and adult-court jurisdiction and thus exposing young adolescents to life-without-parole sentences were due to "concerns about increases in juvenile crime and a general sentiment that the law should hold these offenders responsible for their actions" (Ala. Resp't Br. 4), rather than to a specific determination that young adolescents should be sentenced to life imprisonment without parole.

[7] Del. Code Ann. tit. 10, § 1010; Fla. Stat. Ann. § 985.56(1); Haw. Rev. Stat. § 571-22(d)(1); Idaho Code Ann. § 20-509(1) (amended in non-pertinent part by S.B. 1219, 2012 Idaho Sess. Laws ch. 19); Me. Rev. Stat. Ann. tit. 15, § 3101; Md. Code Ann., Cts. & Jud. Proc. § 3-8A-06(a)(2); Mich. Comp. Laws Ann. § 712A.2d; Neb. Rev. Stat. § 43-247; Nev. Rev. Stat. Ann. §§ 62B.330(3)(a), 194.010(1); 42 Pa. Cons. Stat. Ann. § 6302; R.I. Gen. Laws § 14-1-7; S.C. Code Ann. § 63-19-1210(6); S.D. Codified Laws §§ 22-3-1, 26-11-4; Tenn. Code Ann.

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suppose that the legislatures of these 18 States have deliberately determined that life imprisonment without the possibility of parole is sometimes appropriate for 10-year-olds? Or that the 13 States which punish adult homicides with life without parole and which set *no* minimum age for adult prosecution[8] have deliberately determined that life without parole is sometimes appropriate for prepubescent children?[9]

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§ 37-1-134(a)(1); Vt. Stat. Ann. tit. 33, § 5204(a); Wash. Rev. Code Ann. §§ 9A.04.050, 13.40.110; W. Va. Code Ann. § 49-5-10(e); Wis. Stat. Ann. § 938.183(1)(am).

[8] Delaware, Florida, Hawaii, Idaho, Maine, Maryland, Michigan, Nebraska, Pennsylvania, Rhode Island, South Carolina, Tennessee, and West Virginia. See the statutes of those States cited in note 7 *supra*.

[9] In six of these States – Delaware, Florida, Hawaii, Michigan, Nebraska, and Pennsylvania – life without parole is mandatory upon adult-court conviction for one or more specified categories of homicides. *See* Del. Code Ann. tit. 11, § 4209(a); Fla. Stat. Ann. § 775.082(1); Haw. Rev. Stat. § 706-656(1); Mich. Comp. Laws Ann. § 750.316; Neb. Rev. Stat. § 29-2522; 18 Pa. Cons. Stat. Ann. § 1102. These six States are among those to which Alabama refers in arguing that because "each [State] sets the minimum sentence for certain aggravated murders as life without parole," their statutes "evince shared legislative judgment that certain aggravated murders are so offensive to society's standards that life without parole is the minimum appropriate sentence, even when the defendant is as young as 14." Ala. Resp't Br. 19; *and see id*. at 20 (arguing that statutes which prescribe "mandatory-minimum sentences" of life without parole justify the conclusion that the legislatures which enacted them "affirmatively 'intended to subject such offenders to life without parole sentences' for aggravated murders"). Under Alabama's logic, the three additional States which mandate life-without-parole sentences for some murders and which expose children as young as the age of 10 to adult-court prosecution for

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"All would concede this to be unrealistic, but the[se] example[s] underscore[ ] that the statutory eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration." *Graham*, 130 S. Ct. at 2026.[10]

murder – South Dakota, Vermont and Washington – should be viewed as affirmatively intending to imprison for their entire lives all children 10 and older who are found guilty of the specified murders. *See* S.D. Codified Laws §§ 22-6-1(1), 24-15-4; Vt. Stat. Ann. tit. 13, § 2311(c); Wash. Rev. Code Ann. § 10.95.030(1).

[10] Alabama also argues that a handful of sentencing statutes which mention juveniles indicate an express endorsement of life without parole for 14-year-olds. Ala. Resp't Br. 21-23. Several of these provisions make no reference whatsoever to life without parole. *See* 18 U.S.C. § 3591(a); Haw. Rev. Stat. § 706-667; Miss. Code Ann. § 99-19-15. Others were adopted simply to bring the State's statutes into compliance with this Court's decisions in *Roper* or *Graham*. *See* Conn. Gen. Stat. Ann. § 53a-46a(h)(1); Iowa Code Ann. § 902.1; Mo. Ann. Stat. § 565.020; N.C. Gen. Stat. Ann. § 14-17; Va. Code Ann. § 18.2-10; Wyo. Stat. Ann. § 6-2-101. Regardless, to the extent that these statutes may contemplate life without parole for *some juveniles*, it is far less clear that they contemplate it for children as young as 14 because, with the exception of Massachusetts (Mass. Gen. Laws Ann. ch. 119, § 72B), they set no minimum age for such sentences. And most of these jurisdictions, even including Massachusetts, have never imposed life without parole on a 14-year-old child. *See* Equal Justice Initiative, *Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison* 20 (2007) (no 14-year-olds serving life without parole in Connecticut, Hawaii, Wyoming, Virginia, Massachusetts, or federal system).

CONCLUSION

This Reply Brief and that in *Jackson* together address the criticisms which either Alabama or Arkansas have offered of the submissions in the interconnected[11] Briefs for the Petitioners in the two cases. These criticisms are insufficient to prevent this Court from granting relief to Petitioners and striking down the death-in-prison sentences imposed on these children.

Respectfully submitted,

BRYAN A. STEVENSON*
RANDALL S. SUSSKIND
ALICIA A. D'ADDARIO
EQUAL JUSTICE INITIATIVE
122 Commerce Street
Montgomery, AL 36104
(334) 269-1803
bstevenson@eji.org

Attorneys for Petitioner

**Counsel of Record*

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[11] *See* the Introductory Statement at page 2 of the Miller Pet'r Br.