No. 10-9646

IN THE SUPREME COURT OF THE UNITED STATES

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EVAN MILLER, Petitioner,

v.

STATE OF ALABAMA, Respondent.

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ON PETITION FOR WRIT OF CERTIORARI TO
THE ALABAMA COURT OF CRIMINAL APPEALS

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# REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## ARGUMENT

Alabama does not dispute any of the essential facts on which Evan's petition relies: (1) that Evan was only fourteen-years-old at the time of the underlying offense; (2) that there are only seventy-three children fourteen or younger who have been sentenced to life imprisonment without parole; and (3) that these children are serving their sentences in only eighteen states. (Pet. Cert. 2–4.) Alabama also does not meaningfully dispute that fourteen-year-olds have significant psychosocial and neurological differences from older teens and adults, or that the law treats fourteen-year-olds differently from older teens and adults.[1] (Pet. Cert. 12–19.)

As laid out in detail in Evan's petition, this Court should grant review in this case to address important constitutional questions left open by this Court's decisions in Roper v. Simmons, 543 U.S. 551 (2005), and Graham v. Florida, 130 S. Ct. 2011 (2010), regarding the imposition of a mandatory life-without-parole sentence on a fourteen-year-old child convicted of homicide. Under the reasoning of Roper and Graham, the identical analysis logically compels the conclusion that consigning a

[1]Although Alabama notes that two of the over thirty studies relied on in Evan's petition found distinctions between older juveniles and adults, the State does actually assert that these studies did not find significant distinctions between young adolescents and older teens nor does it address the numerous additional studies cited. (Resp't's Br. Opp'n 20–21.)

fourteen-year-old child to die in prison through a life-without-parole sentence categorically violates the Eighth and Fourteenth Amendments to the United States Constitution.

## I. THIS COURT SHOULD GRANT REVIEW IN THIS CASE BECAUSE THE ISSUE PRESENTED IS EXCEPTIONALLY IMPORTANT AND THE EXTREME RARITY OF THE SENTENCE AT ISSUE MEANS A JURISDICTIONAL SPLIT IS UNLIKELY.

This Court should grant review to address the important issues of federal law decided by the lower court in this case. See Sup. Ct. R. 10(c) (listing, as reason for granting certiorari review, that "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court"); see also Sup. Ct. R. 10 ("The following [subparagraphs], although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers . . . .").

Although Alabama suggests that "in light of the lack of a split on this issue, a grant of certiorari at this point would not be prudent" (Resp't's Br. Opp'n 15), the State ignores the extreme rarity with which these sentences are imposed. The seventy-three children fourteen or younger serving sentences of life imprisonment without parole represent the total accumulation of such sentences over the past several decades. (Pet. Cert. 20.) The vast majority of these children have exhausted their appeals without ever receiving any meaningful judicial review of their sentences.

In the past few years, only four such sentences have been imposed in only three

states.[2] With such a small number of cases that could serves as the vehicle for review of this issue, there is little possibility that a delay in addressing it will yield any greater diversity of lower court opinions. No child fourteen or younger has been sentenced to life without parole in the federal system, so it is doubtful that any federal circuit court will ever have the opportunity to address such a sentence on direct review. Even in most of the eighteen states that have imposed such sentences, future appellate opinions on this issue are highly unlikely. In two-thirds of these states, no child fourteen or younger has been condemned to die in prison in over ten years. Thus, at most a handful of jurisdictions are likely to ever address the application of Graham to this important issue.

The timing of this Court's decision to address the constitutionality of Evan's sentence is not inconsequential. If this Court does not grant review in this case, Evan will not only be deprived of hope for release. He will also be denied access to rehabilitative programs and services during critical developmental years that are not available to inmates sentenced to life without parole. See Graham, 130 S. Ct. at 2030 (citing Brief for Sentencing Project as Amicus Curiae Supporting Petitioner 11–13). He will spend those years in a maximum security adult prison where he faces an increased risk of physical and sexual assault by older inmates. See 42 U.S.C. § 15601(6);

[2] See Cherie Ward, Teenager guilty of murder, is given life without parole, Mobile Press Register, July 31, 2010, at A1 (14-year-old Tevin Benjamin sentenced to life without parole in Mississippi); Teen Found Guilty of Killing Toddler Appeals His Sentence, KCRG TV-9 News, Dec. 10, 2010 (14-year-old Edgar Conception sentenced to life without parole in Iowa); L.L. Brasier, Teens Sent to Prison for Life, Detroit Free Press, Dec. 3, 2009, at A8 (14-year-olds Thomas McCloud and Dontez Tillman sentenced to life without parole in Michigan).

National Prison Rape Elimination Commission Report 16–19, 70–71, 140–59 (2009). Indeed, during the first months of his incarceration, Evan was attacked by an older inmate and stabbed nine times.[3] By contrast, if he had a parole-eligible life sentence, Evan could be incarcerated in a lower-security, safer facility and would have access to a variety of classes and programs for which he is currently ineligible.

The constitutional question of whether a fourteen-year-old child should be subject to a sentence of life imprisonment without parole is a compelling and important one. The unusual nature of this sentence makes lower court review infrequent but it is a challenging constitutional question that has recently divided several state courts. Recently, in State v. Ninham, No. 2008AP1139, 2011 WL 1902136 (Wis. May 20, 2011), the Wisconsin Supreme Court split over the question of whether sentencing a fourteen-year-old child to die in prison violates the Eighth Amendment. Two justices of that court found that "[a]pplying the analyses the Supreme Court applied in Graham and Roper, consistent with the analysis the Court applied in Atkins and Thompson, and the historic recognition under Wisconsin law of the vulnerability of young juveniles, . . . a death-in-prison sentence for an intentional homicide committed when a juvenile is 14 years old or younger is unconstitutional." Id. at *26. However, a majority voted to uphold the sentence. Id. at *18.

Similarly, in Jackson v. Norris, No. 09-145, 2011 WL 478600 (Ark. Feb. 9, 2011), three justices of the Arkansas Supreme Court expressed concern about the mandatory

[3]The violence that Evan has experienced in adult prison is discussed in the DVD: Sentencing 13- and 14-Year-Old Children to Die in Prison (Equal Justice Initiative 2010).

life-without-parole sentence imposed a fourteen-year-old for felony murder, but the majority found the Graham required upholding the sentence. Id. That already state court judges are disagreeing about the application of Graham to the imposition of a life-imprisonment-without-parole sentence on a fourteen-year-old child and many, like the lower court here, are refusing to acknowledge its implications for such sentences indicates that this Court's guidance will be required to properly resolve this issue.[4]

## II. THE FACT THAT A DETERMINATION WAS MADE THAT EVAN SHOULD BE TRIED AS AN ADULT DOES NOT UNDERMINE THE NEED FOR THIS COURT TO REVIEW HIS MANDATORY SENTENCE.

At the time Evan was sentenced, the sentencer had no discretion to impose any sentence other than life without parole. The trial judge who imposed that sentence specifically stated that "the Court has no other option or discretion in that." (R. 1399.) Evan has argued in his petition for certiorari that such a mandatory sentence, which prevents any consideration of Evan's age and other mitigating circumstances in determining his sentence violates the Eighth and Fourteenth Amendments. (Pet. Cert. 26–30.)

Although the State does not directly dispute that no decision-maker has ever made a determination that life-without-parole is the appropriate sentence in this case, the State suggests that, because a juvenile court judge was permitted to consider mitigation in determining whether to transfer Evan's case to adult court, his sentence

[4]Although Alabama cites to long list of cases that it claims have rejected the issue presented here, it is clear from the State's own parentheticals that, other than Jackson and Ninham, all of these cases are inapposite because they involve older juveniles, do not involve true sentences of life without parole, or were decided prior to Graham. (Resp't's Br. Opp'n 12–15, 24–25.)

was somehow not mandatory. (Resp't's Br. Opp'n 21–23.) The State's argument is contradicted by this Court's precedent which has made clear that transfer decisions are not equivalent to sentencing decisions because there are a number of other reasons for trying serious juvenile offenders as adults:

> 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.

Thompson v. Oklahoma, 487 U.S. 815, 850 (1988) (O'Connor, J. concurring); see also id. at 826 n.24 (Stevens, J. plurality op.) (finding existence of statutes permitting trial as an adult "tells us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders."). In Graham, this Court rejected a similar argument, finding that "the [transfer] provisions the State notes are, nonetheless, by themselves insufficient to address the constitutional concerns at issue." 130 S. Ct. at 2031; see also id. at 2025.

Evan does not contend that Alabama is prevented from determining that a homicide offense committed by a fourteen-year-old cannot adequately be addressed within the state's juvenile justice system, whose jurisdiction extends only until age twenty-one, Ala. Code § 12-15-117; rather, he contends that once that determination is made, at a minimum, his age is still constitutionally relevant to the ultimate sentence that is imposed. It is precisely the false dichotomy urged by Alabama between the limited jurisdiction of the juvenile court and a mandatory sentence of life without parole that exacerbates the constitutional deficiency here. This Court should

grant certiorari to make clear that it is not sufficient to simply consider age at some point, but that the sentencer must be permitted to consider age and other mitigating circumstances when determining the appropriate sentence for a fourteen-year-old offender.

## CONCLUSION

For the foregoing reasons, Petitioner prays that the Court grant a writ of certiorari to the Alabama Court of Criminal Appeals.

Respectfully submitted,


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