No. 10-9646

In the SUPREME COURT of the UNITED STATES

EVAN MILLER,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for a Writ of Certiorari to the
Alabama Court of Criminal Appeals

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED
(Rephrased)

I. Should this Court grant certiorari to determine whether the imposition of a life without parole sentence on a fourteen year old defendant convicted of capital murder categorically violates the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishment, despite the lack of a split among the lower courts on this issue?

II. Should this Court grant certiorari to determine whether a mandatory sentence of life without parole on a fourteen year old defendant convicted of capital murder categorically violates the Eighth and Fourteenth Amendments' prohibition on cruel and unusual punishment, despite the lack of a split among the lower courts on this issue?

PARTIES

The caption contains the names of all parties in the courts below. The Attorney General for the State of Alabama represents Respondent in this proceeding.

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After being transferred by the Juvenile Court of Lawrence County, Alabama to the Lawrence County Circuit Court, Miller was convicted of capital murder. *Ex parte E.J.M.*, 928 So. 2d 1081, 1082 (Ala. 2005); *Miller*, 2010 WL 3377692, at *1. The Alabama Court of Criminal Appeals affirmed the circuit court's decision on August 27, 2010. *See Miller*, 2010 WL 3377692, at *25. The Supreme Court of Alabama denied Miller's petition for a writ of certiorari, without opinion, on October 22, 2010. *Ex parte Miller*, No. 1091663 (Ala. Oct. 22, 2010).

JURISDICTION

After obtaining a extension of time, Miller filed a petition for writ of certiorari with this Court on March 21, 2011. This Court has jurisdiction to consider Miller's petition under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND RELEVANT STATUTES

Miller correctly cites and quotes the relevant parts of the Eighth and Fourteenth Amendments to the United States Constitution, which govern the issues presented in his petition.

STATEMENT OF THE CASE

A. Facts of the Crime

There is no question about Evan Miller's guilt here—or that the murder at issue is among the most gruesome and intolerable crimes a human being can commit. Miller beat Cole Cannon repeatedly with his fists and a baseball bat and then set his trailer on fire, killing him—all because Miller's plan to steal Cannon's wallet did not go smoothly. (R. 613-1117)[1]

Colby Smith testified that in July of 2003, Miller brutally beat Cannon with a baseball bat and burned his trailer, killing him in the process. Smith had known Miller from his high school for about four to five months. (R. 979) On July 15, 2003, Smith was spending the night at Miller's home when Cannon, who lived in the trailer next door, came to the Millers' trailer around midnight complaining that he had burned his food and asking for something to eat. (R. 710, 980) As Miller's mother told Cannon he was welcome to some spaghetti, Smith could tell that Cannon had been drinking because he had alcohol on his breath and was "staggering." (R. 710, 980) While Cannon was at the Millers' trailer, Miller and Smith went to Cannon's trailer to look for drugs. (R. 981) Unable to find any, they decided to take some of Cannon's baseball cards and hide them by another trailer before returning to the Millers'. (R. 981-82)

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[1] Citations to the trial transcript are marked (R. __), while citations to the state-court record on appeal are marked (C. ___).

Miller and Smith went back over to Cannon's trailer with Cannon, intending to get him drunk and take his money. (R. 982) They all smoked a joint and began to play drinking games. (R. 982) Smith testified that, while Cannon was becoming drunk, he and Miller merely pretended to be drinking. (R. 983) When Cannon lay on the couch and passed out, Miller took his wallet. (R. 984) Miller and Smith went into the bathroom, where they split a little over $300. (R. 984) When Miller tried to put the wallet back in Cannon's back pocket, Cannon jumped up and grabbed Miller around the throat. (R. 984, 1016) Smith grabbed a baseball bat and hit Cannon in the head, throwing the bat down when Cannon hit the floor. (R. 984-85) Miller, however, got on top of Cannon and began hitting him continuously in the face with his fists. (R. 985) As Cannon was screaming, Miller picked up the bat and began hitting him "everywhere." (R. 985) Every time Cannon tried to get, he fell back down. (R. 985) After he stopped hitting Cannon with the bat, Miller placed a sheet over his head, saying, "Cole, I am God, I've come to take your life." (R. 986) He hit Cannon once more with the bat before returning to his own trailer with Smith. (R. 987)

After five minutes, Miller and Smith returned to Cannon's trailer, where they cleaned up the blood and set fires. (R. 987-88) Smith started a fire with a lighter in the back bedroom on a couch, and Miller set another couch on fire "to cover up the evidence." (R. 990) Before they left the trailer, Smith saw Cannon

"[j]ust laying there" and, feeling sorry for him, placed a towel under his head to stop the bleeding. (R. 989-90) As they were leaving Smith turned on the faucet in the kitchen sink and stopped it up, hoping it would put out the fires, and heard Cannon ask, "why are y'all doing this to me?" (R. 990-91) After going back to the Miller's trailer, Smith lay down for about ten minutes before trying to return to Cannon's trailer without telling Miller. (R. 992) When he got there, however, he could hear Cannon coughing but "smoke was coming out and [Miller was] coming behind [him,]" so he returned to the Miller's trailer. (R. 992)

Investigator Tim Sandlin of the Sheriff's Department interviewed Miller, who at first concocted a false story about the events at issue. Sandlin got basic information from Miller, learning that he was fourteen years old, and read him the Juvenile *Miranda* Form, which both Miller and his mother signed. (R. 700-04) Miller then began to recount the events of the evening of July 15th and early morning of July 16th, stating that he had spent the night at his trailer watching a movie before going to sleep. (R. 705-06) Although he reported that Cannon did come over, he asserted that he never went to Cannon's trailer and learned about the fire when the fire department arrived the next morning. (R. 705-06)

Soon, however, Miller changed his story and relayed a different false account. When Sandlin asked Miller to begin by describing the morning and work backwards to the previous evening, Miller became "frustrated and agitated," told

Sandlin "to forget all that, that that wasn't true," and asked if everyone but he and Sandlin could be removed from the room. (R. 706-07) After Miller's mother and juvenile officers left the room, Miller gave Sandlin a statement which Sandlin typed up for Miller to read and sign. (R. 706-07) In his new statement, Miller stated that on July 15th, his family was getting ready to go to bed in his trailer when "Cole" arrived to use the telephone. (R. 709-10) Miller then went to Cole's trailer where he saw some baseball cards that "looked like they were worth money." (R. 710) When Cole came back to his trailer around midnight for some spaghetti, Miller returned to Cole's trailer and took the cards. (R. 710) Miller said that around 2:00 or 3:00 a.m., he and Colby Smith had returned to Cole's trailer , where Miller had a beer and Cole had become so drunk that he had trouble standing. (R. 710) As a result, Miller said, Cole fell down, hitting his nose and lip on a table. (R. 710) Miller stated that when he tried to help Cole, Cole grabbed him by the throat. (R. 711) When Smith pushed Cole off of him, Cole grabbed a bat and hit Miller on the arm. (R. 711) According to Miller's statement, Smith then grabbed the bat from Cole and hit him on the arm. (R. 711) When Smith threw the bat down, Miller kicked it under the couch before landing Cole on the floor and punching him several times in the face. (R. 711) Seeing Cole's wallet on the floor, he took about $350 in cash and a driver's license for "things I want, I need, thing I don't have." (R. 711) When Miller's mother began knocking on the

front door and saying that the police were arriving, Miller and Smith ran out the back door, hearing Cole say, "why did you do this to me?" (R. 711-12)

Forensic pathologist Dr. Adam Craig initially performed an external examination on Cannon's body rather than a full autopsy. (R. 910-14) Not having received any indication that Cannon's death had resulted from a crime, Dr. Craig initially ruled that it had been an accident caused by the inhalation of smoke and soot. (R. 194, 925) Although Cannon's body was then buried, Sandlin requested that it be exhumed so that a full autopsy could be performed. (R. 726) On August 1, 2003, Dr. Craig performed a full autopsy, discovering injuries not caused by the fire – including a two-inch contusion to the left side of the forehead caused by blunt force and six rib fractures on both sides of the body. (R. 926-37) Dr. Craig was able to determine from hemorrhaging that these injuries occurred before Cannon died. (R. 935-36) Toxicology analysis showed Cannon's blood alcohol level to be .216 grams per 100 milliliters. (R. 941) Based upon these findings, Dr. Craig reaffirmed his initial finding that the cause of Cannon's death was "inhalation of products of combustion" but added that "multiple blunt force injuries and ethanol intoxication" were contributing factors because they made it more difficult to breath in the fire. (R. 939-40)

Later, Miller changed his story yet again. On July 31, 2003, and August 4, 2003, Deputy Tim McWhorter of the Lawrence County Sheriff's Department

transported Miller from one detention center to another. (R. 850-852) Although Deputy McWhorter engaged in "small talk" with Miller, he did not interrogate him, talk about the murder investigation, threaten him, or offer him any benefit for making any statement. (R. 851-85, 868-73) On July 31, Miller asked McWhorter "if he had previously told something that wasn't true but now wanted to go back and tell the truth, would he get in any trouble?" (R. 871) He also stated that he deserved "to do some time in a correctional facility, that he was not innocent and he had been involved in the assault on Mr. Cole Cannon." (R. 871) On August 4th, Miller told McWhorter that he "had been really messed up" when Cannon died, having taken two Klonopin and drunk most of a fifth of whiskey. (R. 873) He stated further that he and Smith went to Cannon's trailer when he told them that he had some acid, but when they got over there he would only discuss music. (R. 873-74) When they attempted to leave, Cannon grabbed Miller by the neck. (R. 874) Because he was "really pissed off," Miller then "slammed Mr. Cannon really hard." (R. 874) Miller knew that the autopsy had to show marks and bruises because "they had roughed him up pretty good." (R. 974) Contrary to a rumor Miller had heard that there was $1700 in Cannon's wallet, they only found $300. (R. 874) Miller could not remember everything, but "the more he thought about it, the more it made him think he started the fire." (R. 874) Smith informed him the next morning that Cannon had died in the fire. (R. 875)

B. Procedural History

Even at the outset of the proceedings, the court system considered the effect of Miller's age—14, at the time of the murder—on the proper approach to his prosecution and punishment. In 2004, after a hearing at which he was represented by counsel, Miller was transferred from the Lawrence County Juvenile Court to the Lawrence County Circuit Court to be tried as an adult on one charge of capital murder during the course of an arson and on one count of capital murder during a robbery. (C. 25-27) In 2006, Miller was indicted by a grand jury for two counts of capital murder, one count for intentionally killing of Cole Cannon in the course of a first degree robbery in violation of Section 13A-5-40(a)(2) of the Code of Alabama and a second count for intentionally killing Cannon in the course of a first- or second-degree arson in violation of Section 13A-5-40(a)(9) of the Code of Alabama. (C. 10-11)

Miller was tried before a jury, in 2006. (R. 2, 263-1405) It returned a verdict of guilty of capital murder during the course of a first degree arson. (R. 1394) Based on Section 13A-5-39(1) of the Code of Alabama and in accordance with Roper v. Simmons, 543 U.S. 551 (2001), the trial court sentenced Miller to a mandatory term of life imprisonment without the possibility of parole. (R. 1396-99)

Miller later filed a postrial "Motion for a New Trial," arguing that sentencing a 14-year-old to life without the possibility of parole constituted cruel and unusual punishment under the Eighth Amendment to the United States Constitution and that the mandatory sentencing scheme under which he was sentenced violated the Eighth and Fourteenth Amendments. (C. 99-116) After holding a hearing on the motion, trial court denied it. (C. 8, 177; R. 14-1438) The Alabama Court of Criminal Appeals affirmed Miller's conviction and sentence, and the Alabama Supreme Court denied his petition for writ of certiorari. *Miller v. State*, No. 06-0741, 2010 WL 3377692 (Ala. Crim. App. Aug. 27, 2010); *Ex parte Miller*, No. 1091663 (Ala. Oct. 22, 2010).

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD DENY THE WRIT CONCERNING WHETHER SENTENCING A FOURTEEN YEAR OLD CAPITAL MURDER DEFENDANT TO LIFE WITHOUT PAROLE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

Although some aspects of this case admittedly render it a good vehicle for consideration of the first question presented, other considerations render this case thoroughly uncertworthy. On the one hand, this murder was as grisly as they come. If this Court is to consider whether the Eighth Amendment categorically bars the imposition of a sentence of life without the possibility of parole for a

juvenile offender, it should probably do so in a context like this one—where the extreme facts of the defendant's crime mean that he has no colorable argument that his sentence is unconstitutional absent a categorical rule forbidding this level of punishment for all offenders of his age. That said, this is still not the right case in which to grant certiorari on this issue. That is so in part because the Alabama Court of Criminal Appeals answered this question correctly. But even more importantly, this Court's decision in *Graham v. Florida*, 130 S.Ct. 2011 (2010), on which Miller's argument is premised, is of sufficiently recent vintage that there is no colorable argument that a consensus has developed, in the meantime, that its rationale categorically bars the imposition of life-without sentences for juvenile homicide offenders. Indeed, there is no split of authority among the lower courts on this issue, with the States uniformly concluding, thus far, that the Eighth Amendment does not bar this sentence for these offenders. Because death sentences are not at issue in this context, there is no need for the Court to consider this issue right away, and the law would benefit from more percolation on this issue before this Court definitively resolves it.

A. The lack of a split—or, for that matter, a meaningful opportunity for states to consider *Graham*'s application in this context—counsels heavily against granting certiorari.

Certiorari review is inappropriate on the question of whether it is constitutionally permissible to sentence a 14-year-old capital murder defendant to life without parole because this Court indicated that such sentences are constitutionally permissible in both *Roper v. Simm*ons, 543 U.S. 551 (2005), and in *Graham v. Florida*, 130 S. Ct. 2011, (2010). Only five years have passed since *Roper,* and merely a year has passed since *Graham.* It would be imprudent to reconsider the lines drawn in these decisions at this juncture when the few courts that have considered the constitutionality of life without parole sentences for juvenile defendants convicted of homicide since *Graham* have held uniformly that such sentences are constitutionally permissible.

Although this Court has not expressly held that a juvenile could not be sentenced to life without parole for committing a homicide, it has drawn distinct lines indicating that such a sentence would be constitutionally permissible. In *Roper*, 543 U.S. at 572, this Court affirmed the lower court's decision imposing a life-without-parole sentence for a juvenile homicide offender instead of a death sentence. In *Graham*, meanwhile, this Court stated that "[t]here is a line 'between homicide and other serious violent offenses against the individual'" in the context of holding that the imposition of a life without parole sentence on a juvenile *non-*

homicide defendant was unconstitutional. 130 S.Ct. at 2027 (quoting *Kennedy v. Louisiana*, 547 U.S. 407, 128 S.Ct. 2641, 2659-60, (2008)). Indeed, this Court in *Graham* repeatedly made clear that its holding applied to non-homicide offenses alone. These cases, taken together, indicate that the sentencing of juvenile homicide defendants to life without parole is constitutionally permissible. Yet Miller now asks this Court to find his life without parole sentence to be cruel and unusual punishment under the Eighth and Fourteenth Amendments without allowing enough time for a significant number of lower courts to address this specific question in light of this Court's *Roper* and *Graham* decisions. This Court should reject that imprudent course.

The Court should do so in part because perhaps due to the recency of *Graham*, the lower courts are not split on this issue. All of the lower courts that have addressed the question of whether juveniles can be sentenced to life without parole under the Eighth Amendment for homicide have determined that such sentences are constitutional.

On the federal level, the few Circuit Courts of Appeal addressing the issue before *Graham* all held that life without parole or its equivalent was not cruel and unusual punishment when imposed on a juvenile for committing a homicide—including juveniles who were as young as 15 when they committed the crime. *See Rodriguez v. Peters*, 63 F.3d 546 (7th Cir. 1995) (rejecting Rodriquez's argument

that, because a "natural life" sentence was equivalent to a death sentence, imposition of such a sentence on a 15-year -old juvenile was disproportionate); *Rice v. Cooper*, 148 F.3d 747 (7th Cir. 1998) (holding that sentencing "illiterate and mildly retarded" 16-year-old who tossed bottle of gasoline into apartment killing four people to "natural life" was not cruel and unusual punishment.); *Harris v. Wright*, 93 F.3d 581, 584-85 (9th Cir. 1996)(holding that mandatory life-without-parole sentence imposed on 15-year-old convicted of aggravated first-degree murder was constitutional); *United States v. Pete*, 277 Fed.Appx. 730, 2008 WL 2019559, at *3 (9th Cir. 2008), (stating that "Pete's sentence of life imprisonment without parole [for convictions for second degree murder, felony murder, and conspiracy to commit murder] is not cruel and unusual punishment for a juvenile.").

Likewise, all of the state courts that have addressed the question before and after *Graham* have uniformly held that juvenile defendants who have been convicted of homicide—including defendants in some cases who were as young as 14—may be sentenced to life without parole under the Eighth and Fourteenth Amendments. *See State v. Ninham*, No. 2008AP1139, 2011 WL 1902136, at *22 (Wis. May 20, 2011)(" 14-year-old); *People v. Donald*, No. A121820, 2010 WL 2594940, at *19 (unpublished) (Cal. App. June 29, 2010), *review denied* (Oct. 20, 2010)(17-year-old); *State v. Kelly*, 46 So. 3d 229, 233-34 (La. App. 2010)

(mandatory life without parole sentence imposed on 15-year-old); *Meadoux v. State*, 325 S.W.3d 189, 193-96 (Tex. Crim. App. 2010) (16-year-old"); *State v. Andrews*, 329 S.W. 3d 369, 377-78 (Mo. 2010)(mandatory life-without parole sentence imposed on 15-year-old); *Gonzalez v. State*, 50 So. 3d 633, 635-36 (Fla. 1st DCA 2010)(16-year-old); *State v. Windom*, No. 36656, 2011 WL 891318, at *8-9 (Idaho Mar. 16, 2011) (16-year-old); *Wilson v. State*, No. 14-09-01040-CR, 2011 WL 1364972, at *5-7 (Tex. Crim. App. Apr. 12, 2011)(17-year-old.); *Paolilla v. State*, No. 14-08-00963-CR, 2011 WL 2042761 (Tex. Crim. App. May. 26, 2011)(17-year-old).

Other recent state-court decisions, though not citing the exact age of the juvenile defendant, have followed this same trend. *Jackson v. Norris*, No. 09-145, 2011 Ark. 49, 2011 WL 478600 (Ark. Feb. 9, 2011); *People v. Hernandez*, No. B223310, 2011 WL 539448, at *7 (unpublished) (Cal. App. 2 Dist. Feb. 17, 2011), rehearing denied (Mar. 2, 2011), review denied (Apr. 27, 2011); *Cox v. State*, No. CR-00-345, 2011 WL 737307, at *2 (Ark. Mar. 3, 2011); *Commonwealth v. Ortiz*, 2011 PA Super 56, 2011 WL 940769 (Pa. Super. Mar. 19, 2011).

Still other state courts have stated, in dictum, that the *Graham* rationale does not apply to juvenile homicide defendants, including those as young as 14. *People v. Cabanillas*, No. F058890, 2011 WL 1143230, at *28 (unpublished) (Cal. App. 5 Dist. Mar. 30, 2011), review filed (May 4, 2011)("[e]ven assuming arguendo that

appellant's enhanced term-of-years sentence was a *de facto* LWOP sentence, *Graham* is still inapplicable here because the Court expressly limited its holding to juveniles sentenced to LWOP for *nonhomicide* offenses."); *People v. Soto*, No. C060566, 2011 WL 1303400, at 21-23 (unpublished) (Cal. App. 3 Dist. Apr. 6, 2011), rehearing denied (Apr. 22, 2011), review filed (May 16, 2011)(while the court agreed that 14-year-old defendant's sentence "amount[ed] to a *de facto* LWOP sentence," it stated that to hold that such a sentence was grossly disproportionate to his crimes – one count of premeditated murder and several counts of premeditated attempted murder – "would be insulting to the victims and their families."); *State v. Golka*, 796 N.W. 2d 198, 215-16 (Neb. 2011)(Nebraska Supreme Court held that 17-year-old's consecutive life sentences for two counts of first-degree murder were permissible under *Graham*.). Accordingly, Miller cannot cite any split or disagreement among the lower courts as a compelling reason to grant certiorari.

Indeed, in light of the lack of a split on this issue, a grant of certiorari at this point would not be prudent. No significant developments since *Roper* and *Graham* have occurred that would signal the emergence of a national consensus against the imposition of life without parole sentences on juvenile homicide defendants. While Miller cites three states that have recently abolished life without parole for 14-year-olds, in light of the overwhelming majority of states that currently allow for such

punishment, such a "trend" does not show that there is currently a national consensus that the punishment is cruel and unusual. As Miller's own statistics attest, 36 states permit sentencing 14-year-olds to life without parole. *Miller v. State*, No. CR-06-0741, 2010 WL 3377692, at *5 (Ala. Crim. App. Aug. 22, 2010). Likewise, the studies relied on by Miller are either the same studies relied on by this Court in *Roper* or reach the same conclusions as those studies regarding the criminal culpability of juveniles generally, as opposed to 14-year-olds.

B. The decision below was correct.

Moreover, this Court need not grant certiorari here because the decision below—like the legion of other lower-court decisions addressing this issue generally—was correct. In attempting to create a new category in which life without parole sentences cannot be constitutionally imposed, Miller bears a "heavy burden." *See Gregg v. Georgia*, 428 U.S. 153, 175 (1976)("[A] heavy burden rests on those who would attack the judgment of the representatives of the people [concerning the appropriateness of punishment for crime]."). Miller has not met that burden. As noted below, both *Roper* and *Graham*—as well as this Court's decision in *Kennedy v. Louisiana* 547 U.S. 407 (2008)—drew a categorical line that is critical here: the Court found that non-homicide offenders are categorically less culpable than homicide offenders. It follows from that premise that if life with

parole is the maximum punishment a juvenile homicide offender can receive, then the categorically more culpable homicide offender must be subject, for Eighth Amendment purposes, to the categorically more severe sentence of life without the possibility of parole. Moreover, Miller's argument for a "consensus" here bypasses what this Court termed in *Graham*, 130 S.Ct. at 2023, "the clearest and most reliable objective evidence of contemporary values," namely, "the legislation enacted by the country's legislatures." In its opinion below, the Alabama Court of Criminal Appeals analyzed both actual legislation and actual sentencing practices to determine whether a national consensus existed. The court found that "according to the statistics submitted by Miller, 36 states permit a sentence of life in prison without the possibility of parole for offenders who were 14 years of age or younger at the time of the offense." *Miller v. State*, No. CR-06-0741, 2010 WL 3377692, at *5 (Ala. Crim. App. Aug. 22, 2010).

Miller now concedes that "most states have statutory schemes that theoretically permit a life without parole sentence for a fourteen year old child," but assumes that most of these states only permit such a sentence because they allow for the transfer of children to adult court and allow life without parole sentences for adults. Petition, p. 21. In other words, Miller claims that the legislatures of these states do not know the consequences of their actions in light of the entire legal framework. This assumption goes directly counter to this Court's assumption that

legislatures understand the consequences of the interplay of specific acts with the surrounding legal landscape. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S.Ct. 317, 325 (1990)("We assume that Congress is aware of existing law when it passes legislation."). In fact, the Alabama Legislature made it clear that it knew the consequences of passing its juvenile transfer statute, as Section 12-15-34(h)(1) provides that "[a] child whose case is transferred for criminal prosecution shall not be granted youthful offender status and, if convicted, shall be sentenced as an adult if the act which if committed by an adult would constitute [a capital offense]." Rather than rely on legislative action to evince consensus, Miller asserts "the extreme rarity with which life without parole sentences are imposed on fourteen-year-old children," citing to the bare number that only 73 14-year-olds have been sentenced to life without parole in the United States. Petition, p. 19. But as the Court of Criminal Appeals noted below, Miller fails to show the relevance of his bare statistic that 73 14-year-olds have received life without parole sentences because he does not tie it to any other relevant statistic. Miller states that "[o]f the 3,632 children age fourteen or younger arrested for homicide since 1990, less than two percent of these children were sentenced to life imprisonment without parole." But the Court of Criminal Appeals discounted the importance of this overly broad baseline for a comparison, reasoning that a comparison with 14-year-olds convicted of *capital or aggravated murder* would have been more meaningful. *Miller*, 2010

WL 3377692, at *5-6. The Court of Criminal Appeals found this evidentiary failing substantial, and that failing alone militates strongly against certiorari here. If this Court decides to consider this issue it some point, it should be in a case in which the petitioner has developed the record more fully. In accordance with this conclusion, the low number of 14-year-olds who have been sentenced to life without parole is a reflection of the fact that 14-year-olds rarely commit crimes heinous enough to warrant such punishment.

The heinousness of Miller's own murder of Cole Cannon, uncommon for that of a crime committed by a 14-year-old, demonstrates the rare circumstance under which a life without parole sentence is appropriately imposed on such a young defendant. As recounted by the Court of Criminal Appeals, the evidence at trial showed that Miller intentionally killed Cannon by beating him with a baseball bat repeatedly and setting his trailer on fire after his plan to steal his wallet did not go smoothly. *Miller*, 2010 WL 3377692, at *1-3. This Court found in *Solem v. Helm*, 463 U.S. 277, 288-90, n. 15 (1983), that "clearly no sentence of imprisonment would be disproportionate" for the crime committed in *Enmund v. Florida*, 458 U.S. 782 (1982)– "felony murder when defendant did not take life, attempt to take life, or intend that a life be taken or that lethal force be used." Even if a sentence of imprisonment could be deemed disproportionate to a murder conviction in certain cases, Miller's case does not illustrate such a situation. Miller

has failed to show that his own sentence is disproportionate to his crime, much less that life without parole sentences are categorically disproportionate when imposed on 14-year-old capital murder defendants.

As a final matter, Miller has not set forth the sort of statistical data, focused on defendants who are 14-year-old and younger, that would help the Court decide the question as he has chosen to frame it. Miller relies on much of the same studies this Court cited in *Roper* and *Graham*. But those studies focused on all juveniles, and not simply juveniles under the age of 15. In *Roper*, 543 U.S. at 569, this Court cited to Laurence Steinberg and Elizabeth S. Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003), for the proposition that juveniles as a class have less control over their environment than do adults. Curiously, Miller cites this very same study for the proposition that "patterns of development in the prefrontal cortex, which is active during the performance of complicated tasks involving long-term planning and judgment and decision making, suggest that these higher order cognitive capacities may be immature *well into late adolescence*." (Emphasis added.) Petition, p. 15, n. 10. Miller cites a more recent study conducted by Steinberg to show that there is a "period of heightened vulnerability to risk taking during middle adolescence," Steinberg, however, specifically warns in the same study that "[w]hen lawmakers

focus on juvenile justice policy, the distinction between adolescence and adulthood, rather than that between childhood and adolescence, is of primary interest." Petition, p. 16, n. 13, citing Laurence Steinberg, Adolescent Development and Juvenile Justice, Annu. Rev. Clin. Psychol. 2009. 5:47-73, at 54; Steinberg, Adolescent Development and Juvenile Justice, at 53. If defendants like Miller are to advance the position that life-without sentences are unconstitutional as to a narrower subset of juveniles, this Court should not grant certiorari on that issue absent some indication that their evidence draws the distinction they are attempting to impose on the Eighth Amendment.

II. THIS COURT SHOULD DENY THE WRIT CONCERNING WHETHER A MANDATORY LIFE WITHOUT PAROLE SENTENCE IMPOSED ON A FOURTEEN YEAR OLD CAPITAL MURDER DEFENDANT.

For largely the same reasons, this Court should deny certiorari on the second question presented as well. Miller argues that his life without parole sentence is unconstitutional because it was imposed pursuant to a mandatory sentencing scheme which precluded the consideration of mitigating evidence. Petition, pp. 26-30. This Court in *Harmelin v. Michigan*, 501 U.S. 957 (1996), however, reached the conclusion that mandatory sentencing schemes were not reviewable except in death-penalty cases. Furthermore, contrary to Miller's claim, mitigating factors such as his age were considered when he was transferred from juvenile to adult

court – proceedings which he does not challenge. Because Miller has failed to cite any compelling reason for overturning this Court's decision in *Harmelin*, this Court should deny his petition for certiorari review concerning this issue.

While this Court has previously considered the constitutionality of mandatory sentencing schemes under the Eighth and Fourteenth Amendments, it has drawn a distinct line between cases involving the death penalty and those not involving the death penalty. In Part IV of the majority opinion in *Harmelin*, 501 U.S. at 996, the Court stated, "[w]e have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further." Because Miller did not receive the death penalty, his claim that the mandatory sentencing scheme precluded the consideration of mitigating factors fails to show that his sentence constituted cruel and unusual punishment or violated his due process rights.

Contrary to Miller's claim that Alabama's mandatory sentencing scheme precluded the consideration of mitigating factors such as his age, such factors were considered when he was transferred from juvenile to adult court. According to Section 12-15-34(d) of the Code of Alabama, a juvenile court must consider various factors when determining whether to transfer a juvenile to adult court, including "[t]he nature of the present offense, [t]he extent and nature of the prior delinquency record of the child, [t]he nature of past treatment efforts and the nature

of the response to the child to the efforts, [d]emeanor, [t]he extent and nature of the physical and mental maturity of the child, [and t]he interests of the community and of the child requiring that the child be placed under legal restraint or discipline." While this list of factors does not expressly require that the juvenile's "age" be considered, it does require the consideration of the juvenile's "physical and mental maturity," which is a more complete and individualized consideration than the bare statistic of the juvenile's age.

Not only was Miller transferred under Section 12-15-34(d), but he has failed to argue that this statute or his transfer proceedings failed to protect his rights when being prosecuted as an adult. In *Ex parte E.J.M.*, 928 So. 2d 1081, 1085, 1088 (Ala. 2005), the Alabama Supreme Court affirmed Miller's transfer proceedings, noting that a transfer hearing was conducted at which Miller was represented by counsel and a psychological evaluation was conducted at state expense. It must be presumed that the juvenile court was aware of the severity of Miller's crime and the possibility that he could receive life without parole if transferred to adult court. Because Miller has not contested these proceedings or argued that the juvenile court's consideration of the relevant factors was insufficient to justify his transfer to adult court, he may not now challenge the mandatory nature of his sentence, which only became mandatory once he was transferred and convicted. Petition, pp. 26-30.

Miller has asserted no split on this issue, and the Alabama Court of Criminal Appeals' decision on this front is consistent with the decisions reached by other courts. In *State v. Andrews*, 329 S.W.3d 369, 377-78 (Mo. 2010), the Missouri Supreme Court held that Missouri's mandatory life without parole sentence imposed on a 15-year-old juvenile convicted of first degree murder was not unconstitutional when the Missouri's juvenile-certification statute required the juvenile court to consider "[t]he age of the child" among other relevant factors when determining whether such juveniles are to be transferred to adult court. Likewise, because the juvenile court was required to consider Miller's physical and mental maturity before transferring him to be tried as an adult, Miller cannot argue that the mandatory nature of his life without parole sentence violated the Eighth and Fourteenth Amendments.

Other courts, furthermore, have uniformly upheld the constitutionality of mandatory life without parole sentences imposed on juveniles. See *Paolilla v. State*, No. 14-08-00963-CR, 2011 WL 2042761 (Tex. Crim. App. May. 26, 2011); *Meadoux v. State*, 325 S.W.3d 189, 193-96 (Tex. Crim. App. 2010); *Wilson v. State*, No. 14-09-01040-CR, 2011 WL 1364972, at *5-7 (Tex. Crim. App. Apr. 12, 2011); *State v. Kelly*, 46 So. 3d 229, 233-34 (La. App. 2010); *Forcey v. State*, No. 10-09-00335-CR, 2010 WL 2010942, at *1-2 (unpublished) (Tex. App. May 19, 2010); *Culpepper v. McDonough*, No. 8:07-cv-672-T-17TGW, 2007 WL 2050970,

at *4-5 (unreported)(M.D. Fla. Jul. 12, 2007); *Phillips v. State*, 807 So. 2d 713, 715-20 (Fla. 2nd DCA 2002); *People v. McKinney*, No. 1777618, 1997 WL 33350488, at *2 (unpublished)(Mich. App. 1997); *Harris v. Wright*, 93 F.3d 581, 584-85 (9th Cir. 1996); *People v. Perry*, 554 N.W.2d 362, 371-74 (Mich. App. 1996); *People v. Edwards*, No. 182297, 1996 WL 33347690, at *1 (unpublished)(Mich. App. Dec. 17, 1996); *People v. Launsberry*, 551 N.W. 2d 460, 463-64 (Mich. App. 1996); *Rodriguez v. Peters*, 63 F.3d 546, 567-68 (7th Cir. 1995) .

This case is also an exceedingly poor vehicle for considering this second question presented. Miller's crime was exceedingly grisly—so grisly, in fact, that Miller has not argued that he could prevail under a traditional Eighth Amendment proportionality analysis and instead seeks refuge in a categorical prohibition on this punishment. Thus, even if the mandatory nature of the penalty were relevant for Eighth Amendment purposes—and it is not—Miller would receive the same punishment in the end. If there is a proper vehicle for reviewing this question, it should be in a case in which a defendant has a colorable argument that his life-without-parole sentence is constitutionally disproportionate under a traditional proportionality analysis.

CONCLUSION

For the reasons outlined above, this Court should deny Miller's petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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