No. __________

IN THE SUPREME COURT OF THE UNITED STATES

EVAN MILLER, Petitioner,

v.

STATE OF ALABAMA, Respondent.

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

PETITION FOR WRIT OF CERTIORARI

BRYAN A. STEVENSON
Counsel of Record
RANDALL S. SUSSKIND
ALICIA A. D'ADDARIO
Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104
(334) 269-1803

Counsel for Petitioner

March 21, 2011

QUESTIONS PRESENTED

Evan Miller was sentenced to a mandatory sentence of life imprisonment without parole for a homicide offense committed when he was only fourteen years old. Evan is one of only seventy-three fourteen-year-olds nationwide who are serving such sentences. The questions presented are:

1. Does imposition of a life-without-parole sentence on a fourteen-year-old child convicted of homicide violate the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishments, when the extreme rarity of such sentences in practice reflects a national consensus regarding the reduced criminal culpability of young children?

2. Does imposition of a mandatory sentence of life imprisonment without parole on a fourteen-year-old child convicted of homicide – a sentence imposed pursuant to a statutory scheme that categorically precludes consideration of the offender's young age or any other mitigating circumstances – violate the Eighth and Fourteenth Amendments' prohibition on cruel and unusual punishments?

TABLE OF CONTENTS

QUESTIONS PRESENTED. i

TABLE OF CONTENTS. ii

TABLE OF CITED AUTHORITIES.. iv

OPINIONS BELOW. 1

JURISDICTION. 1

RELEVANT CONSTITUTIONAL PROVISIONS. 2

STATEMENT OF THE CASE. 2

A. The Rarity of Life Without Parole Sentences for Young Adolescents. . 3

B. Evan Miller's Background, Offense, and Conviction. 4

C. Procedural History and the State Court Ruling on Review.. 7

REASONS FOR GRANTING THE WRIT. 9

I. REVIEW SHOULD BE GRANTED TO DECIDE THE QUESTION UNRESOLVED BY GRAHAM v. FLORIDA AND SULLIVAN v. FLORIDA, WHETHER SENTENCING A FOURTEEN-YEAR-OLD CHILD TO LIFE IMPRISONMENT WITH NO POSSIBILITY OF PAROLE CONSTITUTES CATEGORICALLY CRUEL AND UNUSUAL PUNISHMENT THAT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS... 9

A. Children Fourteen and Younger Are a Distinct Group of Juveniles for Whom a Sentence of Life Imprisonment Without Parole is Unconstitutional.. 12

B. The Extreme Rarity With Which Life Without Parole Sentences Are Imposed on Fourteen-Year-Old Children Demonstrates That There Is a National Consensus Against Such Sentences.. 19

C. The Characteristics of Fourteen-Year-Old Offenders

Demonstrate That the Extremely Harsh, Permanent Punishment of Life Without Parole Is Not Appropriate.. 22

II. THE COURT SHOULD ALSO GRANT THIS PETITION TO CONSIDER WHETHER THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE FORBIDS THE IMPOSITION OF A MANDATORY SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE ON A FOURTEEN-YEAR-OLD CHILD – A PROCEDURE WHICH PRECLUDES THE SENTENCER FROM TAKING THE CHILD'S AGE OR ANY OTHER MITIGATING CIRCUMSTANCES INTO CONSIDERATION.. 26

CONCLUSION. 30

APPENDIX A Alabama Court of Criminal Appeals, Opinion affirming conviction and sentence, Miller v. State, No. CR-06-0741, 2010 WL 3377692 (Ala. Crim. App. Aug. 27, 2010).

APPENDIX B Alabama Court of Criminal Appeals, Order withdrawing previous opinion, substituting a new opinion, and overruling petitioner's application for rehearing, Miller v. State, No. CR-06-0741, 2010 WL 2546422 (Ala. Crim. App. Aug. 27, 2010).

APPENDIX C Alabama Supreme Court, Order denying a petition for a writ of certiorari, Ex parte Miller, No. 1091663 (Ala. Oct. 22, 2010).

TABLE OF CITED AUTHORITIES

CASES

State v. Andrews, 329 S.W.3d 369 (Mo. 2010). 29

Atkins v. Virginia, 536 U.S. 304 (2002). 19, 20, 21

Ex parte E.J.M., 928 So. 2d 1081 (Ala. 2005). 7

Eddings v. Oklahoma, 455 U.S. 104 (1982). 27

Graham v. Florida, 130 S. Ct. 2011 (2010). . . . . passim

Harmelin v. Michigan, 501 U.S. 957 (1996).. 9

Jackson v. Norris, No. 09-145, 2011 WL 478600 (Ark. Feb. 9, 2011). 28

Kennedy v. Louisiana, 554 U.S. 407 (2008). 10

Lockett v. Ohio, 438 U.S. 586 (1978). 27

Ex parte Miller, No. 1091663 (Ala. Oct. 22, 2010).. . . . . 1, 2, 9

Miller v. State, No. CR-06-0741, 2010 WL 3377692 (Ala. Crim. App. Aug. 27, 2010). 1, 8, 9

Miller v. State, No. CR-06-0741 (Ala. Crim. App. June 6, 2007). 8

In re Nunez, 93 Cal. Rptr. 3d 242 (Cal. Ct. App. 2009).. . . . . 3, 20, 21

Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51 (1937). 26

Roberts v. Louisiana, 431 U.S. 633 (1977).. 27

Roper v. Simmons, 543 U.S. 551 (2005). . . . . passim

Sullivan v. Florida, 130 S. Ct. 2059 (2010). 10, 13

Summer v. Shuman, 483 U.S. 66 (1987). 27

Thompson v. Oklahoma, 487 U.S. 815 (1988). 22, 24

Tison v. Arizona, 481 U.S. 137 (1987). 23

Trop v. Dulles, 356 U.S. 86 (1958). 10, 11, 12

Weems v. United States, 217 U.S. 349 (1910). 10

Woodson v. North Carolina, 428 U.S. 280 (1976). 27

STATUTES

28 U.S.C. § 1257. 2

Ala. Code § 13A-5-39 et seq. 26

Ala. Code § 13A-6-40. 13

Ala. Code § 13A-6-62. 13

Ala. Code § 13A-6-64. 13

Ala. Code § 13A-6-67. 13

Ala. Code § 3A-6-69. 13

Ala. Code § 13A-13-6. 13

Ala. Code § 15-3-5. 13

Ala. Code § 15-25-2. 13

Ala. Code § 15-25-3. 13

Ala. Code § 13A-6-70. 13

Ala. Code § 25-8-33. 13

Ala. Code §§ 30-1-4. 13

Ala. Code § 32-6-7. 13

Ala. Code § 32-6-8. 13

Cal. Pen. Code, § 190.5. 3

Colo. Rev. Stat. § 17-22.5-104. 21

Tex. Penal Code Ann. §12.31. 21

MISCELLANEOUS

Jeffrey Arnett, Reckless Behavior in Adolescence, 12 Dev. Rev. 339 (1992). 17

Elizabeth Cauffman & Laurence Steinberg, (Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable than Adults, 18 Behav. Sci. & Law 741 (2000). 14

Connie De La Vega & Michelle Leighton, Sentencing Our Children to Die in Prison: Global Law & Practice, 42 U.S.F. L. Rev. 983 (2008). 4

Equal Justice Initiative, Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison (2007). 3, 19, 20

Charles Geier & Beatriz Luna, The Maturation of Incentive Processing and Cognitive Control, 93 Pharmacol. Biochem. Behav. 212 (2009). 14, 15

Jay N. Giedd et al., Brain Development During Childhood and Adolescence: a Longitudinal MRI Study, 2 Nature Neurosci. 861 (1999). 14, 15

Jay N. Giedd, Structural Magnetic Resonance Imaging of the Adolescent Brain, 1021 Annals N.Y. Acad. Sci. 77 (2004). 14

Bonnie L. Halpern-Felsher & Elizabeth Cauffman, Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults, 22 J. Applied Dev. Psychol. 257 (2001). 14, 15

Ann E. Kelley et al., Risk Taking and Novelty Seeking in Adolescence, 1021 Annals N.Y. Acad. Sci. 27 (2004). 15

Catherine C. Lewis, How Adolescents Approach Decisions, 52 Child Dev. 538 (1981). 14

B. Luna, The Maturation of Cognitive Control and the Adolescent Brain, in From Attention to Goal-Directed Behavior 249 (F. Aboitiz & D. Cosmelli eds., 2009). 14

Beatriz Luna & John A. Sweeney, The Emergence of Collaborative Brain

Function, 1021 Annals N.Y. Acad. Sci. 296 (2004). 15

Leon Mann et al., Adolescent Decision-Making, 12 J. Adolescence 265 (1989). 14, 16

Jari-Erik Nurmi, How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning, 11 Dev. Rev. 1 (1991). 14, 17, 18

Office of Juvenile Justice & Delinquency Prevention, U.S. Dep't of Justice, Juvenile Justice: A Century of Change (1999). 3

Elizabeth R. Sowell et al., In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions, 2 Nature Neurosci. 859 (1999). 15

Elizabeth R. Sowell et al., Localizing Age-Related Changes in Brain Structure Between Childhood and Adolescence Using Statistical Parametric Mapping, 9 NeuroImage 587 (1998). 15

N. Dickon Reppucci, Adolescent Development and Juvenile Justice, 27 Am. J. Community Psychol. 307 (1999). 16, 17, 18

Tracy Rightmer, Arrested Development: Juveniles' Immature Brains Make Them Less Culpable than Adults, 9 Quinnipiac Health L.J. 1 (2005).. 15

Daniel Seagrave & Thomas Grisso, Adolescent Development and the Measurement of Juvenile Psychopathy, 26 L. & Human Behav. 219 (2002). 16, 17

L.P. Spear, The Adolescent Brain and Age-Related Behavioral Manifestations, 24 Neurosci. & Biobehav. Rev. 417 (2000). 15, 16

Laurence Steinberg, Adolescent Development and Juvenile Justice, 5 Ann. Rev. Clinical Psychol. 459 (2009).. . . . . 16, 18

Laurence Steinberg, Sandra Graham et al., Age Differences in Future Orientation and Delay Discounting, 80 Child Dev. 28 (2009). 18, 25

Laurence Steinberg & Kathryn C. Monahan, Age Differences in Resistance to Peer Influence, 43 Dev. Psycho. 1531, 1540 (2007). 18

Laurence Steinberg, Elizabeth Cauffman, et al., Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report, 44 Dev.

Psychol. 1764 (2008). 15, 18

Laurence Steinberg, A Social Neuroscience Perspective on Adolescent Risk-Taking, 28 Dev. Rev. 78 (2008). 17

Laurence Steinberg & Elizabeth S. Scott, Less Guilty by Reason of Adolescence, 58 Am. Psychologist 1009 (2003). 15

Laurence Steinberg & Elizabeth Cauffman, Maturity of Judgment in Adolescence, 20 L. & Human Behav. 249 (1996). 17

Laurence Steinberg, Risk-Taking in Adolescence: New Perspectives from Brain and Behavioral Science, 16 Current Dir. Psychol. Sci. 55 (2007). 15, 16

Laurence Steinberg & Susan B. Silverberg, The Vicissitudes of Autonomy in Early Adolescence, 57 Child Dev. 841 (1986). 16

U.S. Dept. of Justice, Uniform Crime Reports: Crime in the United States. 4

Victor L. Streib, Death Sentences and Executions for Juvenile Crimes, January 1, 1973 - September 30, 2004 (2004). 19

Thomas J. Whitford et al., Brain Maturation in Adolescence, 28 Human Brian Mapping 228 (2007). 14

PETITION FOR WRIT OF CERTIORARI

Evan Miller respectfully petitions for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals, Miller v. State, No. CR-06-0741, 2010 WL 3377692 (Ala. Crim. App. Aug. 27, 2010), has not yet been reported and is attached as Appendix A. The order of the Alabama Court of Criminal Appeals withdrawing its previous opinion, substituting a new opinion, and overruling petitioner's application for rehearing, Miller v. State, No. CR-06-0741, 2010 WL 2546422 (Ala. Crim. App. Aug. 27, 2010), is unreported and is attached as Appendix B. The order of the Alabama Supreme Court denying a petition for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals, Ex parte Miller, No. 1091663 (Ala. Oct. 22, 2010), is unreported and is attached as Appendix C.

JURISDICTION

The initial judgment of the Alabama Court of Criminal Appeals was issued on June 25, 2010. Miller v. State, No. CR-06-0741, 2010 WL 2546422 (Ala. Crim. App. June 25, 2010). That court overruled a timely application for rehearing, withdrew its opinion, and substituted a new opinion on August 27, 2010. Miller v. State, No. CR-06-0741, 2010 WL 3377692 (Ala. Crim. App. Aug. 27, 2010). The Alabama Supreme Court denied Mr. Miller's timely Petition for Writ of Certiorari to the Alabama Court

of Criminal Appeals on October 22, 2010. Ex parte Miller, No. 1091663 (Ala. Oct. 22, 2010). On January 13, 2011, Justice Thomas extended to and including March 21, 2011, the time for filing this petition for writ of certiorari. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case presents important constitutional questions regarding the propriety of imposing a mandatory sentence of life imprisonment without parole on a fourteen-year-old child. Petitioner Evan Miller is one of only seventy-three children who have been condemned to be imprisoned until death for an offense committed when they were fourteen years of age or younger. Evan, like nearly all of these young adolescents, was sentenced under a statute that made a life-without-parole sentence mandatory, precluding any consideration of his age or other mitigating circumstances which would call for a sentence of less than lifelong incarceration.

A. The Rarity of Life Without Parole Sentences for Young Adolescents

Nationwide, Evan Miller is one of only seventy-three children age fourteen or younger who have been condemned to die in prison through sentences of life without parole.[1] In the vast majority of states, no child Evan's age has ever received such a sentence. Only eighteen states have imposed such sentences on children fourteen or younger.[2] In ten of these states, including Alabama, no more than one or two children Evan's age have been sentenced to life imprisonment without parole. Moreover, in most states where children fourteen or younger have been sentenced to life without parole, the legislatures have never expressly authorized life-without-parole sentences for young children; such sentences are a byproduct of legislation expanding the susceptibility of juveniles to adult prosecution.[3] Internationally, the United States is the only country in the world where death-in-prison sentences have been imposed on

---

[1] Equal Justice Initiative, Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison 20 (2007), available at http://www.eji.org/eji/files/20071017cruelandunusual.pdf [hereinafter Cruel and Unusual]. Prior to the publication of this report, Evan presented evidence below that there were approximately five dozen children fourteen or younger. (C. 170.) Since the publication of this report, while a handful of these children have obtained relief from their convictions or sentences, including under this Court's decision in Graham v. Florida, 130 S. Ct. 2011 (2010), there have also been a few new sentences imposed. Thus, this number remains fairly constant at just over seventy children.

[2] Cruel and Unusual at 20. This report identified eighteen states, in addition to Alabama, where thirteen- or fourteen-year-olds have been sentenced to death in prison. A total of eighteen states, not nineteen, is more relevant to this Court's analysis because California statutorily prohibited the imposition of life imprisonment without parole on a defendant under age sixteen who, like Evan Miller, is convicted of first-degree murder, Cal. Pen. Code, § 190.5(b), and also no longer permits fourteen-year-olds to be sentenced to life without parole for any offense, see In re Nunez, 93 Cal. Rptr. 3d 242 (Cal. Ct. App. 2009).

[3] See Office of Juvenile Justice & Delinquency Prevention, U.S. Dep't of Justice, Juvenile Justice: A Century of Change 4–5 (1999), available at http://www.ncjrs.gov/pdffiles1/ojjdp/178995.pdf (describing the expansion of laws exposing children to trial as adults).

young adolescents.[4]

These seventy-three cases represent just a tiny fraction of cases in which children fourteen or younger might have received such sentences. According to the FBI's Uniform Crime Statistics, since 1990, 3,632 children age fourteen or younger were arrested for homicide.[5] Yet only fifty-eight children that age have been sentenced to life without parole for homicide offenses during the same period, representing less than two percent of those arrested.

B. Evan Miller's Background, Offense, and Conviction

Evan Miller's childhood up to the age of fourteen was characterized by violent physical abuse, extreme neglect, and severe poverty. Both his parents were alcoholics and his mother was also addicted to illegal drugs. (C. 83; Ex. 59.)[6] The family moved so often that, at trial, his mother could not recall all the schools Evan had attended. (R. 1213.)

Beginning at an early age, Evan's father frequently inflicted severe beatings on Evan, his mother, and his siblings. (R. 1208; Ex. 59; C. 83.) After one such incident, at the age of five, Evan attempted to hang himself in order to escape his father's violence. (R. 1209.) Evan went on to attempt suicide five more times during his

---

[4] See Connie De La Vega & Michelle Leighton, Sentencing Our Children to Die in Prison: Global Law & Practice, 42 U.S.F. L. Rev. 983, 990 (2008).

[5] This total is based on the Department of Justice Uniform Crime Reports for 1990 to 2009. See generally U.S. Dept. of Justice, Uniform Crime Reports: Crime in the United States, http://www.fbi.gov/ucr/ucr.htm. The underlying data for each year is found in the report for that year at Table 38.

[6] References are to the appellate record below in this case. "C." refers to the clerk's record. "R." refers to the trial transcript. "Ex." refers to the exhibit volume pages. "S." refers to the supplemental record.

childhood. (R. 1210; C. 84.) He also attempted to escape his brutalizing environment by drinking and using drugs beginning as young as age eight. (C. 83–84; see also R. 1210–12.) Unable to cope with his life of violence and neglect, he also began receiving mental health treatment at age eight (C. 84); he was treated intermittently during his childhood by several local mental health centers. (R. 1206.)

When Evan was ten, the state finally responded to his father's abuse by removing him and his siblings from their home and placing him in foster care. (R. 1207–08; C. 83.) His parents divorced at that time. (Ex. 59.) After he was returned to the custody of his drug-addicted mother a few years later, she continued to fail to provide him with the most basic necessities or even minimal supervision. (R. 1214, 1251; C. 86.) With no guidance or support, Evan followed his parents' models: his own drug addiction continued to escalate, ultimately leading to daily off-label use of prescription medications in addition to frequent use of marijuana and crystal methamphetamines. (C. 84.)

In this environment, late at night on July 15, 2003, Evans' fifty-two-year-old neighbor, Cole Cannon, interrupted Evan, his family, and his friend, Colby Smith, as they prepared to go to bed. (R. 710, 1135.) Evan was then fourteen years old; Colby Smith was sixteen. (R. 1022.) Mr. Cannon, who was visibly intoxicated (R. 980), made a drug deal with Evan's mother within earshot of the two boys. (R. 1004.) Later, when Mr. Cannon returned to his own home, the two boys accompanied him. Mr. Cannon gave them alcohol (R. 710) and asked the boys to go buy some marijuana with money that he provided. (R. 1008, 1012.) The three of them all smoked the marijuana and

played drinking games. (R. 983.) Colby Smith testified that the boys planned to steal Mr. Cannon's wallet. (R. 981.) By this point of the evening, Evan was highly intoxicated, having consumed almost a fifth of whiskey and two Klonopin pills in addition to the marijuana that he smoked. (R. 873.)

At some point while the boys were at Mr. Cannon's home, an altercation began. The cause of the altercation was disputed, but both boys agreed that Mr. Cannon initiated the physical aggression by grabbing Evan's throat. (R. 710–11, 984.) Colby admitted at trial that he reacted by beating Mr. Cannon in the head with a baseball bat. (R. 985.) Colby also testified that Evan later hit Mr. Cannon with the bat (R. 985), although Evan told police in his statement that he hit Mr. Cannon with his fists. (R. 711.) Colby claimed that Evan then put a sheet over his head and said, "I am God, I've come to take your life." (R. 986.) Both boys started fires in the home. (R. 1019.) As they were doing so, Mr. Cannon asked Colby, "[W]hy are y'all doing this to me?" (R. 990.) The boys then left. (R. 991.) Mr. Cannon died later that morning of smoke inhalation. (R. 939.)

A week later, Evan was brought to the police station and interrogated regarding Mr. Cannon's death. (R. 699–701.) Although Evan, who had only a seventh grade education (R. 701), did not understand his rights to remain silent or to consult a lawyer (R. 666–67, 1162–63), after two hours of questioning by adults (R. 656), he signed an inculpatory statement written by the investigating officer (Ex. 9; R. 773), and he was then arrested (R. 714).

The State moved to transfer Evan from the juvenile to the circuit court for trial

as an adult. After denying the defense funds to hire an independent mental health expert to evaluate Evan, the juvenile court ordered that Evan's case be transferred. See Ex parte E.J.M., 928 So. 2d 1081 (Ala. 2005). In making this determination, the juvenile court judge gave no consideration to whether life without parole would be an appropriate sentence if Evan were convicted. (C. 25–27.)

Evan was subsequently indicted for two counts of capital murder. (C. 10–11.) In exchange for testifying against Evan, sixteen-year-old Colby Smith was permitted to plead guilty to felony murder and was sentenced to life with parole eligibility. (R. 1037.) Following a jury trial, Evan was convicted of capital murder in the course of an arson but acquitted of capital murder in the course of a robbery. (C. 93.) On the same day and without further proceedings, Evan was sentenced to a mandatory sentence of life in prison without the possibility of parole. (R. 1399.) At sentencing, Evan expressed remorse for his actions and apologized to the victim's family, even though he knew it could not make any difference in the sentence he received. (R. 1399.)

C. Procedural History and the State Court Ruling on Review

Evan's trial counsel filed a pretrial motion challenging the constitutionality of the mandatory life-without-parole sentence that would apply if he were convicted, which was denied by the circuit court. (C. 57–58.) Following his conviction and sentence, Evan's counsel filed a motion for new trial raising a categorical challenge to life without parole sentences for children fourteen and younger as cruel and unusual under the Eighth and Fourteenth Amendments to the United States Constitution (C. 100–05) and presenting uncontroverted evidence of the rarity of such sentences (C.

169–70). Evan's motion also challenged as cruel and unusual the imposition of a mandatory life-without-parole sentence on a fourteen-year-old without any opportunity to consider his young age or other mitigating circumstances. (C. 105–15.) The circuit court denied the motion. (C. 116.)

Evan filed a timely appeal from his conviction and sentence in the Alabama Court of Criminal Appeals. He continued to raise his categorical challenge to the constitutionality of sentencing a fourteen-year-old child to life imprisonment without parole, and his challenge to the constitutionality of imposing a mandatory sentence of life without parole on a fourteen-year-old child. Br. of Appellant at 7–29, Miller v. State, No. CR-06-0741 (Ala. Crim. App. June 6, 2007). The Alabama Court of Criminal Appeals affirmed Evan's conviction and sentence. See Miller v. State, No. CR-06-0741, 2010 WL 3377692 (Ala. Crim. App. Aug. 27, 2010).

With respect to Evan's categorical challenge, the Court of Criminal Appeals held that "Miller's sentence of life in prison without the possibility of parole — the second harshest sentence — for capital murder does not violate the Eighth Amendment." Id. at *9. Although the court acknowledged that this Court's decision in Graham v. Florida, 130 S. Ct. 2011 (2010), supplies the appropriate analysis, the court found that the number of fourteen-year-olds who have actually been sentenced to life imprisonment without parole "is of little value" in evaluating whether a national consensus against such sentences exists; and the court thus concluded that no consensus had been established. Miller, 2010 WL 2546422, at *6. The court found that "Miller was a juvenile when he committed capital murder; therefore, he must be

considered less culpable than adult offenders," but did not address Evan's argument that fourteen-year-olds also have lessened culpability when compared to older juveniles. Id. at *7. The court concluded that the seriousness of the offense of capital murder supported a sentence of life imprisonment without parole regardless of age. Id. at *7–8. Turning to Evan's mandatory sentencing claim, the court cursorily disposed of the issue by finding that it was foreclosed by this Court's decision in Harmelin v. Michigan, 501 U.S. 957, 995–96 (1996), without addressing whether Evan's young age might impact the analysis. Miller, 2010 WL 2546422, at *9.

Evan filed a timely application for rehearing, which was denied. He then petitioned the Alabama Supreme Court for a writ of certiorari to review the decision of the Alabama Court of Criminal Appeals, again raising both challenges to his sentence. Pet. for Writ of Cert. at 4–16, Ex parte Miller, No. 1091663 (Ala. Sept. 10, 2010). The Alabama Supreme Court denied the writ. Ex parte Miller, No. 1091663 (Ala. Oct. 22, 2010). This petition follows.

REASONS FOR GRANTING THE WRIT

I. REVIEW SHOULD BE GRANTED TO DECIDE THE QUESTION UNRESOLVED BY GRAHAM v. FLORIDA AND SULLIVAN v. FLORIDA, WHETHER SENTENCING A FOURTEEN-YEAR-OLD CHILD TO LIFE IMPRISONMENT WITH NO POSSIBILITY OF PAROLE CONSTITUTES CATEGORICALLY CRUEL AND UNUSUAL PUNISHMENT THAT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

Evan Miller is one of only seventy-three children in this country who have been sentenced to spend the rest of their natural lives in prison, with no eligibility for parole consideration at any time, as a result of a crime committed when they were fourteen

years of age or younger. Their sentences are unusual in the extreme, but they are not unimportant. In the wake of Graham v. Florida, 130 S. Ct. 2011 (2010), and Sullivan v. Florida, 130 S. Ct. 2059 (2010), this Court will inescapably be called upon, sooner or later, to determine whether sentences such as these violate the Constitution's ban on cruel and unusual punishments. Petitioner Miller respectfully urges that that determination be made now, before he is consigned to imprisonment with no hope that he can ever be considered for release alive.

Children fourteen and younger are a distinct group of juvenile offenders. Under this Court's reasoning in Roper v. Simmons, 543 U.S. 551 (2005), and Graham, the identical analysis which led to the results in those cases logically compels the conclusion that consigning a 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. The Court should grant review in Evan Miller's case to make that logical conclusion the law of the land.

"[T]he Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.'" Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) (quoting Weems v. United States, 217 U.S. 349, 367 (1910)). This precept "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958).

In recent years, this Court has twice addressed the application of the Eighth Amendment to harsh penalties imposed on children and has recognized each time that

the substantial differences between children and adults are constitutionally relevant. In Roper, this Court addressed cases in which older teens had been convicted of aggravated homicide and sentenced to death. This Court found that, even in the most serious murder cases, three general differences between adolescents and adults "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." Id. at 569. When compared to adults, teenagers have "[a] lack of maturity and an underdeveloped sense of responsibility," they "are more vulnerable or susceptible to negative influences and outside pressures," and their character "is not as well formed." Id. at 569–70. Because these differences make juveniles less culpable than adults, this Court concluded that "[w]hen a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity." Id. at 573–74.

In Graham, this Court found that the same differences between children and adults recognized in Roper are also relevant when reviewing the constitutionality of sentences of life imprisonment without parole. Id. at 2026. In Graham, the Court specifically addressed a case in which a sixteen-year-old had been sentenced to life without parole for armed burglary. Id. at 2020. The Court held "that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." Id. at 2030. Graham thus applied the reasoning of Roper – including Roper's recognition that differences between children and adults are constitutionally significant – to resolve an age-based categorical Eighth Amendment

challenge to a sentence of life imprisonment without parole. Id. at 2022–23, 2026.

Thus, this Court has now held that a child convicted of aggravated homicide is entitled to Eighth Amendment protection against excessive punishment despite the heinous nature of the offense, Roper, 543 U.S. at 573–74, and that the Eighth Amendment's limitations on severity in punishing children apply to sentences of life imprisonment without parole, Graham, 130 S. Ct. at 2030. But these generalities, important as they are, are not all that Roper and Graham contribute to the proper analysis of the issues presented by Evan Miller's case. A fair reading of the detailed reasoning of the Roper and Graham opinions demonstrates that every factor which the Court considered constitutionally critical to the results in those cases equally or more strongly compels the invalidation of Evan's life-without parole sentence.

A. Children Fourteen and Younger Are a Distinct Group of Juveniles for Whom a Sentence of Life Imprisonment Without Parole is Unconstitutional.

As we have noted above, Roper and Graham stress three key features of youth as bearing on the judgment that young offenders are significantly less culpable than adults: children's lack of maturity, their vulnerability to negative external influences, and the fact that they are not fully formed personalities but rather human works in progress. Each of these considerations gains added force in considering the culpability of children fourteen years of age and younger. Unlike the older teens addressed in Roper and Graham, Evan was only fourteen years old at the time of the offense for which he was sentenced to life imprisonment without parole. Young adolescents like Evan are legally and developmentally distinct from older teens and adults in ways that

are constitutionally relevant to the excessiveness of punishment under Roper and Graham.

Alabama, like every other state and the federal government, has long recognized that fourteen-year-olds, more than older teens, are in need of additional protections and unprepared for adult responsibilities.[7] Unlike older teens, fourteen-year-olds are considered incapable of consenting to sexual activity, Ala. Code § 13A-6-70, and prohibited from marrying, even with parental consent, Ala. Code §§ 30-1-4. They cannot drive, or even obtain a learners permit, Ala. Code §§ 32-6-7, 32-6-8, or work more than limited hours, Ala. Code § 25-8-33. Because of their greater vulnerability, fourteen-year-old crime victims are given extra protections under a number of criminal statutes that do not apply to older teens. Ala. Code §§ 13A-6-40, 13A-6-62, 13A-6-64, 13A-6-67, 13A-6-69, 13A-13-6, 15-3-5, 15-25-2–3. That these restrictions and protections are not applied to late adolescents demonstrates that society recognizes that early adolescents are developmentally distinct from adults and older teens.

Recent scientific research of the identical kind relied on by this Court in Roper and Graham supports the legal recognition of young adolescence as a distinct developmental period. See Graham, 130 S. Ct. at 2026–30; Roper, 543 U.S. at 569–75. Relative to the cognition of adults and even older adolescents, young teenage judgment is handicapped in nearly every conceivable way: young adolescents lack life experience and background knowledge to inform their choices; they struggle to generate options

[7] See also App. to Br. for Pet'r, Sullivan v. Florida, 130 S. Ct. 2059 (2010) (cataloguing hundreds of state laws that distinguish between younger and older adolescents).

and to imagine consequences; and, perhaps for good reason, they lack the necessary self-confidence to make reasoned judgments and stick by them.[8] Even when compared to twelfth graders (rather than adults), eighth graders show relative deficiencies in imagining risks and future consequences.[9] At fourteen, the major transformation in brain structure that will result in a sophisticated system of circuitry between the frontal lobe and the rest of the brain, enabling adults to exercise cognitive control over their behavior, is barely underway.[10]

---

[8]See B. Luna, The Maturation of Cognitive Control and the Adolescent Brain, in From Attention to Goal-Directed Behavior 249, 252–56 (F. Aboitiz & D. Cosmelli eds., 2009) (cognitive functions that underlie decision-making are undeveloped in early teens: processing speed, response inhibition, and working memory do not reach maturity until about 15); Elizabeth Cauffman & Laurence Steinberg, (Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable than Adults, 18 Behav. Sci. & Law 741, 756 (2000) (significant gains in psychosocial maturity take place after 16); Leon Mann et al., Adolescent Decision-Making, 12 J. Adolescence 265, 267–70 (1989) (Young adolescents show less knowledge, lower self-esteem as decision-maker, produce less choice options, and are less inclined to consider consequences than mid-adolscents); Jari-Erik Nurmi, How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning, 11 Dev. Rev. 1, 12 (1991) (planning based on anticipatory knowledge, problem definition, and strategy selection used more frequently by older adolescents than younger ones).

[9]Catherine C. Lewis, How Adolescents Approach Decisions, 52 Child Dev. 538, 543 (1981); see also Bonnie L. Halpern-Felsher & Elizabeth Cauffman, Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults, 22 J. Applied Dev. Psychol. 257, 271 (2001) (noting important differences in decision-making competence of early adolescents and older teenagers).

[10]See Luna, supra note 8, at 257; see also Thomas J. Whitford et al., Brain Maturation in Adolescence, 28 Human Brian Mapping 228, 228 (2007) (adolescence is "peak period of neural reorganization"). At the core of this transformation are co-occurring increases in white matter (myelination) and decreases in gray matter (synaptic pruning). Jay N. Giedd, Structural Magnetic Resonance Imaging of the Adolescent Brain, 1021 Annals N.Y. Acad. Sci. 77, 77–83 (2004). Myelination increases the efficiency of information processing and supports the integration of the widely distributed circuitry needed for complex behavior – it is the wiring of connections among and between the frontal regions and the rest of the brain. Immature myelination is thought to make adolescents vulnerable to impulsive behavior, while the increased processing speed facilitated by myelination facilitates cognitive complexity. Charles Geier & Beatriz Luna, The Maturation of Incentive Processing and Cognitive Control, 93 Pharmacol. Biochem. Behav. 212, 216 (2009); see also Giedd, supra, at 80 (during myelination transmission time between neurons is increased up to 100 times). White matter in the brain increases in a linear fashion, such that older adolescents and adults benefit from a greater number of myelinated neurons than younger teens. Giedd, supra, at 80.

Cortical gray matter is thickest early in adolescence. Id. at 82. Later in the teenage years, this

Early teenagers' incapacity for responsible decisionmaking is closely related to adolescent risk-taking.[11] A "rapid and dramatic increase in dopaminergic activity within the socioemotional system around the time of puberty" drives the young adolescent toward increased sensation-seeking and risk-taking; "this increase in reward seeking precedes the structural maturation of the cognitive control system and its connections to areas of the socioemotional system, a maturational process that is gradual, unfolds over the course of adolescence, and permits more advanced self-regulation and impulse control."[12] "The temporal gap between the arousal of the

---

cortical gray matter undergoes significant "pruning," making more efficient that part of the brain responsible for inhibiting impulses and assessing risk. Id.; see also Tracy Rightmer, Arrested Development: Juveniles' Immature Brains Make Them Less Culpable than Adults, 9 Quinnipiac Health L.J. 1, 12 (2005); L.P. Spear, The Adolescent Brain and Age-Related Behavioral Manifestations, 24 Neurosci. & Biobehav. Rev. 417, 439 (2000).

Pruning typically is not complete until middle to late adolescence, and the parts of the brain that control executive functioning and process risk do not finish myelinating until late adolescence or early adulthood. Jay N. Giedd et al., Brain Development During Childhood and Adolescence: a Longitudinal MRI Study, 2 Nature Neurosci. 861, 862 (1999); see also Elizabeth R. Sowell et al., In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions, 2 Nature Neurosci. 859, 860 (1999) (in longitudinal study of brain development, finding prefrontal cortex loses gray matter only at end of adolescence); Beatriz Luna & John A. Sweeney, The Emergence of Collaborative Brain Function, 1021 Annals N.Y. Acad. Sci. 296, 301 (2004). These "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." Laurence Steinberg & Elizabeth S. Scott, Less Guilty by Reason of Adolescence, 58 Am. Psychologist 1009, 1013 (2003). Indeed, the brain does not appear to finish growing completely until late adolescence. Elizabeth R. Sowell et al., Localizing Age-Related Changes in Brain Structure Between Childhood and Adolescence Using Statistical Parametric Mapping, 9 NeuroImage 587, 596 (1998); see also Halpern-Felsher & Cauffman, supra note 9, at 271 ("Importance progress in the development of decision-making competence occurs sometime during late adolescence. . . .").

[11] See, e.g., Laurence Steinberg, Risk-Taking in Adolescence: New Perspectives from Brain and Behavioral Science, 16 Current Dir. Psychol. Sci. 55, 56–58 (2007); Geier & Luna, supra note 10, at 218; Ann E. Kelley et al., Risk Taking and Novelty Seeking in Adolescence, 1021 Annals N.Y. Acad. Sci. 27, 27 (2004). The literature documenting adolescents' proclivity for risk-taking is too extensive even to summarize within the compass of this brief.

[12] Laurence Steinberg, Elizabeth Cauffman, et al., Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report, 44 Dev. Psychol. 1764, 1764 (2008).

socioemotional system, which is an early adolescent development, and the full maturation of the cognitive control system, which occurs later, creates a period of heightened vulnerability to risk taking during middle adolescence."[13] This is compounded by the fact that, while all adolescents are more peer-oriented than adults, the research indicates that vulnerability to peer pressure, especially for boys, increases during early adolescence to an all-time high in eighth grade.[14] Indeed, extreme vulnerability to peer influence (especially when it is to do something bad) is a defining characteristic of young adolescence, reflected in the fact that it is statistically aberrant for boys to refrain from minor criminal behavior during this period.[15] But most teens grow out of this behavior as a predictable part of the maturation process.[16]

Young adolescents also have less ability than older adolescents and adults to free themselves from morally toxic or dangerous environments. State and federal laws meant to protect young teens from exploitation and from their own underdeveloped

---

[13] Laurence Steinberg, Adolescent Development and Juvenile Justice, 5 Ann. Rev. Clinical Psychol. 459, 466 (2009).

[14] Laurence Steinberg & Susan B. Silverberg, The Vicissitudes of Autonomy in Early Adolescence, 57 Child Dev. 841, 848 (1986); id. at 846 (autonomy in the face of peer pressure has been shown to decline during early adolescence, "especially for boys, and especially when the pressure is to do something wrong"); see also Mann supra note 8, at 267–268, 274 (early adolescence associated with greatest conformity to peer group pressure); Steinberg, Risk-Taking, supra note 11, at 57 (susceptibility to antisocial peer influence peaks in mid-adolescence); N. Dickon Reppucci, Adolescent Development and Juvenile Justice, 27 Am. J. Community Psychol. 307, 318 (1999) (social conformity peaks around age 15)

[15] Spear, supra note 10, at 421; Reppucci, supra note 14, at 319.

[16] Spear, supra note 10, at 421 (adolescent experimentation in risk-taking is transient for most individuals); Daniel Seagrave & Thomas Grisso, Adolescent Development and the Measurement of Juvenile Psychopathy, 26 L. & Human Behav. 219, 229 (2002) (defying rules is part of adolescent experimentation with autonomy and identity development, and many youths who manifest "deviance" in adolescence will not do so in adulthood); Reppucci, supra note 14, at 319 ("[D]esistance from antisocial behavior is also a predictable part of the maturation process.").

sense of responsibility – including restrictions on driving, working, and leaving school – also operate conversely to disable a fourteen-year-old from escaping an abusive parent, a dysfunctional or violent household, or a dangerous neighborhood.

Young teens, to a greater extent than older teens, are also handicapped by their undeveloped sense of self and their inability to imagine their futures.[17] It is not until the late teens or early twenties that they begin to form a coherent identity – although teens sixteen and older have a more mature sense of self than adolescents under fifteen.[18] Very few young adolescents think about their future beyond age 30.[19] As adolescents grow older, they become increasingly focused upon tasks of self-development, contemplating future education, occupation, and family; with this added perspective, their ability to plan and to realistically anticipate long-term consequences

---

[17] See Nurmi, supra note 8, at 12–13; see also Laurence Steinberg & Elizabeth Cauffman, Maturity of Judgment in Adolescence, 20 L. & Human Behav. 249, 255 (1996) (moral reasoning and reflectiveness are associated with sense of identity, which does not begin to consolidate until late teens or early twenties; extreme vulnerability in self-image seen especially in younger adolescents); Seagrave & Grisso, supra note 16, at 229 ("Many adolescents focus excessively on present circumstances and weight the importance of risks differently than do adults, especially when under emotional stress or in situations where a solution is not readily apparent."); Reppucci, supra note 14, at 318 (adolescents "discount the future more than adults" and "weigh more heavily the short-term versus the long-term consequences of decisions"); Jeffrey Arnett, Reckless Behavior in Adolescence, 12 Dev. Rev. 339, 344 (1992) (adolescents' limited life experience impairs ability to fully apprehend possible negative consequences of their actions); Laurence Steinberg, A Social Neuroscience Perspective on Adolescent Risk-Taking, 28 Dev. Rev. 78, 90 (2008) (feelings of self-consciousness increase during early adolescence, peak around age 15, then decline).

[18] Steinberg, Social Neuroscience, supra note 17, at 94 (future orientation and planning increase from 16–18); Seagrave & Grisso, supra note 16, at 226 (adolescence is time of dramatic changes in identity, during which adolescent may present an "insincere and seemingly choreographed social facade, either by attempting to manage peers' impressions or because they are 'trying on' a not yet established personality style, which can be misinterpreted as the manipulative, false, and shallow features of the psychopathic offender"); id. at 229 (adolescents "focus excessively on present circumstances").

[19] Nurmi, supra note 8, at 27.

improves.[20]

The flip side of young adolescents' nascent sense of self is that they have, relative to older individuals, more potential to change and develop positive character traits as they grow up. A typical fourteen-year-old who acts irresponsibly in reaction to a thrilling impulse or succumbs to peer pressure is not irretrievably depraved or permanently flawed. Nothing about his character is permanent, and he has years of development ahead, during which he can (and, in most cases, will) grow into a moral, law-abiding adult.[21]

> Dozens of longitudinal studies have shown that the vast majority of adolescents who commit antisocial acts desist from such activity as they mature into adulthood and that only a small percentage – between five and ten percent, according to most studies – become chronic offenders. Thus, nearly all juvenile offenders are adolescent limited. . . .
>
> . . . [M]ost juvenile offenders mature out of crime . . . and . . . will desist whether or not they are caught, arrested, prosecuted or sanctioned . . . .[22]

As is readily observable and widely accepted, the youngest adolescents are the least mature, most susceptible to internal impulses and external influences, and have the greatest capacity for change.[23] This particular vulnerability has longstanding recognition in the laws of every state. For these reasons, adolescents fourteen and

---

[20]Id. at 27–29.

[21]See supra note 16.

[22]Steinberg, supra note 13, at 478.

[23]See, e.g., Laurence Steinberg, Sandra Graham et al., Age Differences in Future Orientation and Delay Discounting, 80 Child Dev. 28, 28 (2009) [hereinafter Steinberg, Graham, et al., Future Orientation]; Laurence Steinberg & Kathryn C. Monahan, Age Differences in Resistance to Peer Influence, 43 Dev. Psycho. 1531, 1540 (2007); Steinberg, Cauffman, et al., supra note 12, at 1775–76.

younger are a distinct group of young offenders who must be considered separately from older juveniles when evaluating whether a sentence of life imprisonment without parole is cruel and unusual.

B. The Extreme Rarity With Which Life Without Parole Sentences Are Imposed on Fourteen-Year-Old Children Demonstrates That There Is a National Consensus Against Such Sentences.

In evaluating whether a sentence is cruel and unusual, "[t]he analysis begins with objective indicia of national consensus." Graham, 130 S. Ct. at 2023. This Court has recognized that "[a]ctual sentencing practices are an important part of the . . . inquiry into consensus." Id. Evan is one of only two children in the State of Alabama serving a sentence of life imprisonment without the possibility of parole for a crime committed at the age of fourteen. Nationwide only seventy-three children age fourteen or younger have been sentenced to spend the rest of their lives in prison.[24] This number is substantially less than the 123 sentences which this Court in Graham found demonstrated that "[t]he sentencing practice now under consideration is exceedingly rare." 130 S. Ct. at 2024, 2026. It is also similar to the number of sentences found indicative of a national consensus in previous cases. When Roper recognized a national consensus against death sentences for juveniles, seventy-two juvenile offenders were under that sentence.[25] When Atkins v. Virginia, 536 U.S. 304 (2002), found a national consensus against death sentences for persons with mental retardation, it was

[24] See Cruel and Unusual, supra note 1, at 20.

[25] Victor L. Streib, Death Sentences and Executions for Juvenile Crimes, January 1, 1973 – September 30, 2004 3 (2004), available at http://www.demaction.org/dia/organizations/ncadp/Affiliate/Toolkit/Resources/DeathPenalty/JuvDeathSept302004.pdf.

estimated that one to three percent of the death-row population – roughly seventy-one people – were mentally retarded.[26]

The total of seventy-three young adolescents who are serving sentences of life without parole is particularly strong evidence of the rarity of these sentences for two reasons. First, as this Court noted in Graham, because "a juvenile sentenced to life without parole is likely to live in prison for decades," "these statistics likely reflect nearly all [young adolescent] offenders who have received a life without parole sentence stretching back many years." 130 S. Ct. at 2024. Second, as laid out in the Statement of the Case above, these cases represent just a tiny fraction of cases in which people fourteen or younger might have received such sentences. Of 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.[27] This Court in Graham found that similar data supported a conclusion that the sentencing practice at issue was unusual. 130 S. Ct. at 2025.

Additionally, children fourteen or younger are known to have been sentenced to life without parole in only eighteen states; and, in ten of these states, no more than one or two children have received that sentence.[28] Thus, in most states, no child Evan's age

---

[26]See Atkins, 536 U.S. at 309 n.5; Death Penalty Information Center, Size of Death Row By Year, http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year#year (last visited Mar. 21, 2011) (showing 3,557 death row inmates in 2002).

[27]See supra page 4 & note 5.

[28]Cruel and Unusual, supra note 1, at 20. Although this report indicates that there are nineteen states in which thirteen- and fourteen-year-olds have been sentenced to life without parole, there are now only eighteen because the only such sentence in California has recently been overturned. See In re Nunez, 93 Cal. Rptr. 3d 242 (Cal. Ct. App. 2009).

has been subjected to life imprisonment without possibility of parole. That only a minority of states have imposed these sentences is strong evidence of a national consensus. See, e.g., Roper, 543 U.S. at 564–65; Atkins, 536 U.S. at 316.

One of these eighteen states, Colorado, no longer allows imposition of life without parole on any juvenile. See Colo. Rev. Stat. § 17-22.5-104(IV). California courts have also now prohibited life without parole for children under sixteen. See In re Nunez, 93 Cal. Rptr. 3d 242 (Cal. Ct. App. 2009). The fact that these two states that formerly permitted this sentence have moved away from it makes clear that the trend is against imposing this unusual sentence. Reflecting this trend, in 2009, Texas also formally abolished life without parole for all juveniles. See Tex. Penal Code Ann. § 12.31(b)(1).

As Graham recognized, this strong evidence of a national consensus is not undermined by the fact that many states do not explicitly prohibit life without parole for fourteen-year-old children. 130 S. Ct. at 2025. While most states have statutory schemes that theoretically permit a life-without-parole sentence for a fourteen-year-old child (because these states have made the two distinct decisions (1) to authorize they life-without-parole sentences for adults and (2) to authorize the transfer of fourteen-year-olds to adult court), this is insufficient to demonstrate that these states have made the deliberate judgment that such a sentence is appropriate, especially where, as in the vast majority of states, such a sentence has never actually been imposed. See Graham, 130 S. Ct. at 2025 ("[T]he fact that transfer and direct charging laws make life without parole possible for some juvenile nonhomicide offenders does not justify a

judgment that many States intended to subject such offenders to life without parole sentences."); Thompson v. Oklahoma, 487 U.S. 815, 829 n.24 (1988) (plurality op.) ("That these three States have all set a 15-year-old waiver floor for first-degree murder tells us 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.").

The extreme rarity with which sentences of life imprisonment without parole are imposed on fourteen-year-old children demonstrates that "[t]he sentencing practice now under consideration is exceedingly rare." Graham, 130 S. Ct. at 2026. The national consensus against such sentences strongly supports the conclusion that such sentences are cruel and unusual.

C. The Characteristics of Fourteen-Year-Old Offenders Demonstrate That the Extremely Harsh, Permanent Punishment of Life Without Parole Is Not Appropriate.

In addition to community consensus, this Court has also looked to "the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question," including "whether the challenged sentencing practice serves legitimate penological goals." Graham, 130 S. Ct. at 2026. Here, the characteristics of fourteen-year-olds frustrate any possible purpose for imposing the permanent sanction of life imprisonment without parole.

As discussed above, both Roper and Graham recognized that teenagers differ from adults in that they suffer from "[a] lack of maturity and an underdeveloped sense

of responsibility," "are more vulnerable or susceptible to negative influences and outside pressures," and their character "is not as well formed as that of an adult." Roper, 543 at 569–70. The research cited at pages 13 to 18 above documents beyond dispute that each of these characteristics applies with even greater force to young adolescents. Compared to older teens, fourteen-year-olds are less mature and more impulsive, have even more limited control of their environments, are uniquely susceptible to peer pressure, and have a greater capacity for change.

As to the severity of the sentence, Graham recognized that, while death sentences are unique, a sentence of life without parole also "alters the offender's life by a forfeiture that is irrevocable." Id. at 2027. Such a sentence "deprives the convict of the most basic liberties without giving hope of restoration." Id. Moreover, "[l]ife without parole is an especially harsh punishment for a juvenile," who will "serve more years and a greater percentage of his life in prison than an adult offender." Id. at 2028. For these reasons, Evan's life without parole sentence constitutes an extremely harsh, final judgment that denies all hope for the future.

None of the generally recognized purposes of punishment is adequate to justify imposing such a permanent sentence on a young adolescent. "Retribution is a legitimate reason to punish," but "'[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.'" Graham, 130 S. Ct. at 2028 (quoting Tison v. Arizona, 481 U.S. 137, 149 (1987)). As both Roper and Graham recognized, even with respect to older teens, "the case for retribution is not as strong with a minor as with an adult." Id. (quoting Roper,

543 U.S. at 571). "[B]ecause juveniles have lessened culpability they are less deserving of the most severe punishments." Graham, 130 S. Ct. at 2026; see also Roper, 543 U.S. at 571. "A juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.'" Graham, 130 S. Ct. at 2026 (quoting Thompson, 487 U.S. at 835). It is still more true of younger teens that their "culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." Roper, 543 U.S. at 571. Much like the older juvenile nonhomicide offenders addressed in Graham, young adolescents in many ways have a "twice diminished moral culpability," 130 S. Ct. at 2027, compared to adults because they are an additional step behind even older teens in their maturity and development.

The deterrence rationale for punishment also fails in the case of young adolescents. Even with respect to older teens, this Court has recognized that "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." Roper, 543 U.S. at 571. Teenager's impulsivity and lack of future-orientation means that they are "less likely to take a possible punishment into consideration when making decisions." Graham, 130 S. Ct. at 2028–29. Again these observations are especially true of young adolescents. Given that eighth graders struggle to imagine their lives only a few years into the future, it is unlikely that they would plan their current actions by assigning heavier deterrent weight to a life-without-parole sentence than to a life-with-eligibility-for-parole sentence. Testing of individuals from ten and thirty years of age shows "significantly lower planning scores among adolescents between 12 and 15 than among younger or

older individuals."[29]

"[W]hile incapacitation may be a legitimate penological goal sufficient to justify life without parole in other contexts," Graham, 130 S. Ct. at 2029, it is insufficient to support making a permanent, unalterable judgment about a young adolescent whose character is as yet unformed. "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, 130 S. Ct. at 2029. Yet even with respect to older teens, "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Roper, 543 U.S. at 572. Young adolescents have an even greater capacity for change, and thus, for "the sentencer to make a judgment that the juvenile is incorrigible" is particularly inappropriate. Graham, 130 S. Ct. at 2029.

Finally, a life without parole sentence for a young adolescent "forswears altogether the rehabilitative ideal." Id. at 2030. Given the especially high potential for rehabilitation of young adolescents, such a denial of the "chance to demonstrate growth and maturity," id. at 2029, cannot be justified. Because none of the purposes of punishment adequately supports a sentence of life without parole for a fourteen-year-old child, Evan should be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. at 2030.

---

[29] Steinberg, Graham et al., Future Orientation, supra note 23, at 36.

II. THE COURT SHOULD ALSO GRANT THIS PETITION TO CONSIDER WHETHER THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE FORBIDS THE IMPOSITION OF A MANDATORY SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE ON A FOURTEEN-YEAR-OLD CHILD – A PROCEDURE WHICH PRECLUDES THE SENTENCER FROM TAKING THE CHILD'S AGE OR ANY OTHER MITIGATING CIRCUMSTANCES INTO CONSIDERATION.

Evan Miller's sentence of life imprisonment without parole was mandatory.[30] The sentencing court was statutorily prohibited from considering Evan's young age or any other mitigating circumstances. This Court's recognition of the unique constitutional considerations relevant to imposing permanent criminal sentences on children calls into question the constitutionality of imposing a sentence of life without parole on a fourteen-year-old child without permitting the sentencer to consider whether or not the pentultimate sentence is appropriate for that individual child.

This Court has frequently engaged in close scrutiny of mandatory sentences under the Eighth Amendment. It has previously recognized that "justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55 (1937). In the death penalty context, this Court has struck down mandatory sentences as inconsistent with "the fundamental respect for humanity underlying the Eighth Amendment" which "requires consideration of the character and record of the individual offender and the circumstances of the particular

---

[30] Under Alabama law, the only available sentence for someone convicted of capital murder is life without parole or the death penalty. See Ala. Code § 13A-5-39 et seq.

offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976); see also Roberts v. Louisiana, 431 U.S. 633 (1977); Summer v. Shuman, 483 U.S. 66 (1987).

Correspondingly, this Court has held that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978); see also Eddings v. Oklahoma, 455 U.S. 104, 116 (1982) (emphasizing the importance of considering youth as a mitigating circumstance). In so finding, this Court noted the importance of individualized consideration where the nature of the sentence includes the "nonavailability of corrective or modifying mechanisms" such as "probation, parole, work furloughs." Lockett, 438 U.S. at 605.

Although this Court has previously upheld a mandatory life-without-parole sentence for an adult, this Court's recent jurisprudence regarding the imposition of permanent sentences on children compels a different result where such sentences are imposed on young teens like Evan. In both Roper v. Simmons, 543 U.S. 551 (2005), and Graham v. Florida, 130 S. Ct. 2011 (2010), this Court recognized that there are "[t]hree general differences between juveniles under 18 and adults": immaturity, impetuosity, and an underdeveloped sense of responsibility; susceptibility to outside influences, peer pressure, and other external persuasions of bad behavior; and the yet-to-be-developed, still-malleable nature of a young adolescent's personality. Mandatory

life-without-parole sentencing regimes not only fail to take account of these general characteristics; they affirmatively preclude consideration of the extent to which the considerations exist and are mitigating in the case of any individual young juvenile offender. See Graham, 130 S. Ct. at 2016; Roper, 543 U.S. at 569–70.

In Graham, this Court specifically recognized the importance of sentencing procedures that, at a minimum, permit consideration of the accused's young age. The Court noted that "[a]n offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." 130 S. Ct. at 2031. Chief Justice Roberts, concurring in the judgment, also agreed that, in evaluating a sentence of life without parole imposed on a juvenile, "[t]here is no reason why an offender's juvenile status should be excluded from the analysis," and, indeed, an offender's age should play a "central role." Id. at 2039.

Since Graham, several state court judges have expressed doubts about imposing mandatory life-without-parole sentences on children. See Jackson v. Norris, No. 09-145, 2011 WL 478600 (Ark. Feb. 9, 2011) (Brown, J., concurring) ("[T]his state needs a procedural mechanism for the jury to hear aggravating and mitigating circumstances before a juvenile is put away in prison for the rest of his life without the possibility of parole."); id. (Danielson, J., dissenting) (stating he would find 14-year-old's life-without-parole sentence unconstitutional in part because "the circuit court could not consider the defendant's age or any other mitigating circumstances-the circuit court only had jurisdiction to sentence Jackson to life imprisonment without the possibility

of parole"); State v. Andrews, 329 S.W.3d 369, 388 (Mo. 2010) (Wolff, J., dissenting) ("The imposition of a life sentence without parole—without consideration of Andrews' age—fails to ensure that Andrews' sentence is proportional to his crime. As such, the Missouri sentencing mandate is flawed and violates the Eighth Amendment.").

It is noteworthy that the vast majority of the children fourteen and younger who have been sentenced to life imprisonment without parole have been condemned under mandatory sentencing schemes.[31] This fact confirms Graham's intuition that our nation's evolving standards of decency require the consideration of age as a mitigating circumstance. It demonstrates that where judges or juries have discretion to impose lesser sentences on young teens, they nearly always do so.

In this case, there was extensive mitigating evidence that the sentencing court was unable to take into account. This included not only the crucial fact of Evan's young age, but also his childhood of extreme physical abuse and consistent neglect by his parents; his repeated suicide attempts and struggles with addiction; the fact that the adult victim gave fourteen-year-old Evan and his sixteen-year-old co-defendant drugs and alcohol on the night of this offense; Evan's sincere expression of remorse for his participation in the crime; and the more lenient sentence received by his older, equally culpable co-defendant.

As this Court has recognized, "[l]ife without parole is an especially harsh

---

[31] Undersigned counsel extensively consulted with state departments of corrections, exhaustively reviewed published decisions and news articles available in electronic databases, and consulted with juvenile justice scholars and practitioners to identify the seventy-three children fourteen and younger serving sentences of life imprisonment without parole. A review of these cases reveals that nearly all of these sentences, like Evan's, were mandatory.

punishment for a juvenile." Graham, 130 S. Ct. at 2028. The Eighth Amendment requires that such a severe and hopeless sentence should only be imposed on a fourteen-year-old, if at all, after an individualized determination that such a sentence is appropriate and necessary in a particular case. Accordingly, and for all the reasons stated above, this Court should grant certiorari and declare that Evan Miller's mandatory sentence violates the Constitution.

CONCLUSION

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

Respectfully submitted,

____

BRYAN A. STEVENSON
Counsel of Record
RANDALL S. SUSSKIND
ALICIA A. D'ADDARIO
Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104
(334) 269-1803

Counsel for Petitioner

March 21, 2011

APPENDICES

A. Alabama Court of Criminal Appeals, Opinion affirming conviction and sentence, Miller v. State, No. CR-06-0741, 2010 WL 3377692 (Ala. Crim. App. Aug. 27, 2010).

B. Alabama Court of Criminal Appeals, Order withdrawing previous opinion, substituting a new opinion, and overruling petitioner's application for rehearing, Miller v. State, No. CR-06-0741, 2010 WL 2546422 (Ala. Crim. App. Aug. 27, 2010).

C. Alabama Supreme Court, Order denying a petition for a writ of certiorari, Ex parte Miller, No. 1091663 (Ala. Oct. 22, 2010).