

No. \_\_\_\_\_

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In the  
**Supreme Court of the United States**

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CHRISTOPHER PITTMAN, *Petitioner*,

v.

STATE OF SOUTH CAROLINA, *Respondent*.

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On Petition for Writ of Certiorari to the  
Supreme Court of South Carolina

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PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Is a sentence of 30 years without possibility of parole constitutionally disproportionate as applied to a 12-year-old child?
2. Are the mitigating qualities of youth relevant to whether a 12-year-old's non-capital sentence is constitutionally disproportionate?
3. Does the Eighth Amendment prohibit the imposition of a sentence of 30 years without possibility of parole on a 12-year-old child where the sentencer was absolutely precluded from considering youth as a mitigating factor justifying lesser punishment?

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Patrick Griffin, *Trying and Sentencing Juveniles as Adults: An Analysis of State Transfer and Blended Sentencing Laws*, National Center for Juvenile Justice (2003) ..... 31

Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134 (1980) ..... 27

Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUMAN BEHAVIOR 333 (2003) ..... 27

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Christopher Pittman respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of South Carolina in his case.

### INTRODUCTION

When he was 12 years old, petitioner killed his paternal grandparents. He was certified as an adult and tried for murder in a system with a mandatory minimum sentence (which he received) of 30 years without possibility of parole. That sentence is unconstitutionally disproportionate as applied to a 12-year-old child. Although the statutory schemes in many states appear to authorize the imposition of harsh sentences on such young children, and 12-year-olds commit many serious offenses, petitioner is the nation's only inmate serving such a harsh sentence for an offense committed at such a young age.

The unwillingness of U.S. jurisdictions to punish 12-year-olds so harshly—even when statutorily possible—reflects a societal consensus that lengthy imprisonment without possibility of parole constitutes excessive punishment as applied to 12-year-old children. The fact that many jurisdictions authorize a particular punishment for certain offenses or offenders does not insulate such punishment from Eighth Amendment attack when prosecutors, courts, and juries consistently refuse to seek or impose it. The striking contrast between the extent of statutory authorization of severe punishment for 12-year-old children and the near-universal rejection of that punishment in practice brings this case within the core of the Eighth Amendment prohibition of cruel and unusual punishments.

Even if the Eighth Amendment were to tolerate lengthy imprisonment without possibility of parole as applied to 12-year-old children, the state scheme under which petitioner was sentenced violated his Eighth Amendment rights by precluding the sentencer from considering his

youth-related diminished culpability when imposing his lengthy sentence. South Carolina is among a very small number of states that both allow for the transfer of 12-year-old children to adult proceedings and then apply mandatory minimum sentencing provisions of this length. That scheme impermissibly forecloses consideration of a child's youth as a relevant sentencing factor. Although states are not generally required to afford individualized sentencing in non-capital cases, the Eighth Amendment cannot tolerate subjecting young children to severe adult punishments without the opportunity of the sentencer to consider and address the significance of the offender's youth. That conclusion follows from this Court's recognition of the special status of youth as mitigating an offender's culpability.

At a minimum, the decision to subject 12-year-old children to mandatory minimum sentences must be a deliberate one, and there is no evidence that the South Carolina legislature clearly intended its decision to permit 12-year-olds to be tried as adults and its creation of mandatory minimum sentences for certain offenses to interact to produce such harsh and unusual results. Absent evidence of clear legislative intent, the Eighth Amendment should not tolerate subjecting young children to severe mandatory minimum sentences without possibility of parole.

Few could deny that the Eighth Amendment prohibits the imposition of a sentence as severe as petitioner's on a child below *some* age. It is inconceivable that our Constitution would permit South Carolina to impose a 30-year sentence without possibility of parole on, for example, a seven-year-old child (even though its statutes appear to authorize such a sentence). The question, therefore, is where the Constitution draws the line. Every factor relevant to this constitutional line drawing—petitioner's youth, the mandatory nature of the sentence, and the absence of parole—indicate that the line has been crossed, and petitioner's sentence is unconstitutional.

### **OPINIONS BELOW**

The opinion of the South Carolina Supreme Court is reported at 373 S.C. 527, 647 S.E.2d 144 (2007), and is reprinted as Appendix 1, App. 1a–49a. The unreported order of the South Carolina Family Court, Sixth Judicial Circuit, transferring jurisdiction to the Court of General Sessions is reprinted as Appendix 2, App. 50a–51a. The unreported order of the South Carolina Court of General Sessions, Ninth Judicial Circuit, denying the motion to remand to Family Court is reprinted as Appendix 3, App. 52a–68a. The unreported order of the South Carolina Court of General Sessions, Ninth Judicial Circuit, denying the motion to reduce the sentence to comport with the Eighth Amendment is reprinted as Appendix 5, App. 72a–82a. It is also available electronically at 2005 WL 831970.

### **JURISDICTION**

The South Carolina Supreme Court entered judgment on June 11, 2007, *see* App. 1a, and denied petitioner’s timely petition for rehearing on July 18, 2007, App. 84a. On September 13, 2007, the Chief Justice extended the time for filing a petition for writ of certiorari to and including December 17, 2007. No. 07A219. This petition was filed on that date. This Court has jurisdiction under 28 U.S.C. § 1257(a).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Eighth and Fourteenth Amendments to the Constitution of the United States are reprinted as Appendices 8 and 9, App. 86a–87a. South Carolina Code of 1976, § 20-7-7605, which governs transfers of jurisdiction from the Family Court to the Court of General Sessions, is reprinted as Appendix 10, App. 88a–89a. South Carolina Code of 1976, § 16-3-20, which specifies the sentence for murder, is reprinted as Appendix 11, App. 90a–93a.

## STATEMENT

### A. Factual Background

On the night of November 28, 2001, petitioner Christopher Pittman killed his paternal grandparents. He was 12 years old at the time. Petitioner had no prior criminal history.

Several months before the murders, petitioner had been committed to an inpatient psychiatric facility in Florida, where he was diagnosed with depression. While he was institutionalized, petitioner's doctor and father agreed that he should begin taking the antidepressant Paxil, a member of the family of drugs called "selective serotonin reuptake inhibitors" (SSRIs). As with most SSRIs, Paxil is not approved for treatment of pediatric depression in the United States. Indeed, since 2004, SSRIs have been subject to "black box" warnings that their administration to children and adolescents can cause suicidality and other aggressive behavior, especially during the initial few months of drug therapy.

Petitioner was removed from the psychiatric facility by his father and sent to live with his grandparents in Chester, South Carolina. Petitioner enrolled in school and began to participate in church with his grandparents. His transition was smooth and uneventful. When his prescription for Paxil expired, his grandmother took him to a local general practitioner. This doctor, temporarily out of free samples of Paxil, instead gave his grandmother free samples of a different SSRI drug, Zoloft. Zoloft is also not approved for treating pediatric depression in the United States. Petitioner's grandparents administered the Zoloft to petitioner as prescribed.

Petitioner's condition immediately deteriorated. He began suffering classic symptoms of drug-induced akathisia. Akathisia is characterized by an extremely unpleasant subjective feeling of "inner restlessness" and constant compulsion to move or fidget. It is a recognized side-effect of SSRIs and is considered an antecedent condition to drug-induced violence. On November 26,

2001, petitioner told his aunt over the telephone that he felt like “his skin was crawling,” and “burning underneath,” and that he could not “put it out.”

Two days later, petitioner’s grandparents were summoned to his school by the assistant principal to discuss petitioner’s involvement in a serious altercation on the school bus the day before. After that meeting, petitioner left school early with his grandparents. That evening the three of them went to church, where petitioner was reprimanded for disrupting choir practice. When they returned home, petitioner’s grandparents sent him to his room. Later that evening, petitioner used his grandfather’s shotgun to kill both of his grandparents while they slept. He then set fire to the house and fled in his grandparents’ SUV, taking his dog and several weapons with him.

The next morning, two off-duty firefighters found petitioner wandering in the woods, hysterical. He told them that an intruder had shot his grandparents and kidnapped him, but that he had escaped. The firefighters took petitioner into protective custody at the fire station and alerted the police, who began a search for the kidnapper. Shortly after he arrived at the fire station, petitioner was joined by Lucinda McKellar, an investigator with the Chester County Sheriff’s Department who had prior law enforcement experience as a victim’s advocate. During the next four hours, McKellar served as petitioner’s babysitter. They played “Go Fish” and had lunch together. They discussed the events of the prior evening. Petitioner napped.

That afternoon, McKellar was told that the investigation did not support petitioner’s story about an intruder. At that moment, petitioner became a suspect, not a victim. And McKellar became an interrogator, not a babysitter. McKellar took petitioner to the sheriff’s office, where they went into a conference room together, and McKellar told her former “Go Fish” partner – the child she had been babysitting just moments before – that they needed to have an “adult conver-

sation.” They were joined by another officer, Detective Scott Williams, who apparently assumed the role of “tough cop” in juxtaposition to McKellar’s compassionate questioning. *See* App. 48a. Although petitioner’s father had arrived in Chester by this time, and was at the sheriff’s office, he was not permitted into the conference room and petitioner was not told of his presence in the building. McKellar informed petitioner of his *Miranda* rights, and petitioner waived them. After several rounds of questioning, petitioner – without the advice or consent of an interested adult – confessed to the murders. McKellar wrote the statement of confession and petitioner signed it. The police arrested petitioner and charged him with homicide and arson.

### **B. Proceedings Below**

Because petitioner was a 12-year-old child, the Family Court had original jurisdiction over his case. The State requested a transfer to the Court of General Sessions under S.C. Code Ann. § 20-7-7605(6), App. 89a, so that he could be tried as an adult. App. 188a–89a. After a short transfer hearing (only three witnesses were called and the full transcript of this proceeding is only 46 pages long), the Family Court transferred jurisdiction to the Court of General Sessions. App. 50a-51a. In its transfer order, the Family Court made the following findings based on the criteria enumerated by this Court in *Kent v. United States*, 383 U.S. 541 (1966):

4. There is probable cause to believe the Defendant committed the crimes for which he is charged.
5. The seriousness of the offenses is against persons and is of such gravity as to require waiver for the protection of the community.
6. The alleged offenses are of a premeditated nature.
7. There is sufficient merit to warrant the grand jury returning a true bill on the charges.
8. The crimes for which the defendant is charged are of a serious nature and if found guilty, would suggest he is capable of acting without regard for others.
9. Based on the evidence presented it is the opinion of this Court that it is not likely the Defendant could be rehabilitated.

App. 50a-51a. These findings are concerned only with the seriousness of the offense and the likelihood that petitioner would be found guilty. The only mention of petitioner's youth in the transfer order is the recitation of petitioner's birth date, current age, and age at the time of the offense. App. 50a.

In the Court of General Sessions, petitioner moved to remand the case to the Family Court. App. 94a-102a. In conjunction with that motion, he argued that § 20-7-7605(6), the provision of the South Carolina statute under which petitioner's case was transferred, is unconstitutional under the Eighth Amendment as applied to a 12-year-old child. App. 103a-22a. That argument relied primarily on this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), see App. 104a-07a, and the Missouri Supreme Court's decision in *State ex rel. Simmons v. Roper*, 112 S.W.3d 397 (Mo. 2003), see App. 107a-11a, which was later affirmed by this Court in *Roper v. Simmons*, 543 U.S. 551 (2005). Indeed, petitioner relied heavily on two of the amicus briefs that had been filed with this Court in *Simmons* (and he furnished courtesy copies of them for the court). See App. 113a. The trial court declined to address the issue at that point because petitioner had not yet been convicted of a crime and, therefore, no punishment had actually been imposed. App. 67a. Applying a highly deferential standard of review to the Family Court's decision, see App. 58a-59a, the Court of General Sessions held that the Family Court had a sufficient basis on which to transfer the murder charges. App. 59a-66a.

After his trial in the Court of General Sessions, petitioner was convicted of two counts of murder. As the trial court recognized, App. 70a, it had very few sentencing options. Under S.C. Code Ann. § 16-3-20(A), App. 90a, a person convicted of murder must be sentenced to death,<sup>1</sup> imprisonment for life, or a mandatory minimum of 30 years in prison without the possibility of

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<sup>1</sup> Because of his age, petitioner was not eligible for the death penalty. *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

parole. Petitioner renewed his Eighth Amendment challenge. He argued that the trial court's lack of discretion at the sentencing stage was a violation of the Eighth Amendment, emphasizing that constitutional violation resulted from the fact that in South Carolina it is "okay to try 12-year-olds in adult court for murder and inherently thereby to submit them to this mandatory scheme whereby the court has no discretion under the statute to give them less than 30 years." App. 125a. Recognizing "the moral significance of [its] decision," along with "the emotional aspects of this case" and "the policies of the juvenile justice system," the court sentenced petitioner to the shortest sentence permitted under state law—two concurrent 30 year terms of imprisonment with no possibility of parole. App. 70a–71a.

Petitioner filed a post-trial "Motion to Reduce Sentence to Comport with Eighth Amendment," App. 129a–52a, which asserted "that the South Carolina statute that, as construed in 2000 by the South Carolina Supreme Court to not only allow him to be tried as an adult for a crime he allegedly committed at the age of 12, but more importantly to requires [sic] a minimum prison sentence for thirty years, is violative of the 8<sup>th</sup> Amendment prohibition against 'excessive punishments.'" App. 130a. This Court announced its decision in *Simmons* on the day that motion was heard, after which petitioner supplemented that motion with a brief on evolving standards of decency regarding the diminished culpability of children. App. 153a–68a. The Court of General Sessions denied the motion. App. 72a–82a.

Petitioner then filed a notice of appeal. The South Carolina Supreme Court ordered an expedited appeal pursuant to Rule 204(b) of the South Carolina Appellate Court Rules and took the case directly from the Court of General Sessions. *See* App. 4a, 83a. On appeal, petitioner raised many issues, including that the "inflexible sentencing requirement," pursuant to which petitioner "was sentenced to thirty years, without parole, which is the mandatory, minimum sen-

tence for a person convicted of murder in South Carolina,” constituted “‘excessive punishment’ for a 12-year-old” and violated the Eighth Amendment. *See* App. 172a–73a. *See generally* App. 169a–78a (excerpts from petitioner’s initial brief in the South Carolina Supreme Court); App. 179a–87a (excerpts from petitioner’s reply brief). The South Carolina Supreme Court rejected this argument. It dismissed the comprehensive scientific evidence regarding juvenile brain development, which this Court found persuasive in *Simmons*, *see* 543 U.S. at 568–75, based on the “the nature of the criminal acts of which [petitioner] was convicted.” App. 24a. Citing several pre-*Simmons* cases in which older juveniles “convicted of similarly violent crimes” had received “lengthy sentences,” the court rejected the proposition that “evolving standards of decency in our society dictate that it is cruel and unusual to sentence a twelve-year-old convicted of double murder to a thirty-year prison term.” App. 25a.

Ultimately, the court concluded that petitioner’s sentence was proportionate to the offense, without seriously considering the fundamental issue of whether the punishment was proportionate to the *offender*. Remarkably, the court below did not even address the impact of this Court’s decisions in *Simmons*, *Atkins*, and *Thompson* on the Eighth Amendment issue, although they had been a principal focus of petitioner’s argument. *See* App. 175a–77a, 182a–87a. Its only reference to this argument was in one sentence: “[t]o paraphrase what the Tenth Circuit stated in *Hawkins* [*v. Hargett*, 200 F.3d 1279 (10th Cir. 1999)], ‘[a]lthough [Appellant’s] culpability may be diminished somewhat due to his age at the time of the crimes, it is arguably more than counterbalanced by the harm [Appellant] caused to his victims.’” Indeed, the court below cited *Simmons*, this Court’s most recent decision addressing proportionality vis-à-vis the offender, only in a footnote and only for the proposition that “evolving standards of decency”

have become “the touchstone of Eighth Amendment jurisprudence.” App. 24a n.4 (citing *Simmons*).

Petitioner sought rehearing, which was denied without comment. App. 84a–85a.

## REASONS FOR GRANTING THE PETITION

### **I. This Court Should Grant Review to Make Clear that the Eighth Amendment Imposes Meaningful Limits on the Non-Capital Sentencing of Young Children.**

This Court’s Eighth Amendment jurisprudence has developed on two fronts: in the context of the death penalty and in the context of all other punishments. In capital cases, this Court has long recognized that the Eighth Amendment requires consideration of the relationship of the punishment to both the character of the offense and the culpability of the offender. And in *Roper v. Simmons*, 543 U.S. 551 (2005), this Court held that the age of the offender is a fundamental determinant of culpability.

In non-capital contexts, this Court has identified types of constitutionally impermissible punishments, and has made clear that constitutionally permissible types of punishments will rarely be held to violate the Eighth Amendment when imposed on adult offenders. It has not, however, directly addressed the appropriate role of the diminished culpability of juveniles in a non-capital Eighth Amendment challenge. This case clearly presents the issue for this Court’s resolution.

#### **A. The decision below ignores this Court’s recognition in *Roper v. Simmons* of the importance of considering diminished culpability in Eighth Amendment challenges involving children.**

##### **1. A 30-year sentence without possibility of parole is grossly disproportionate for a 12-year-old child.**

The failure of the South Carolina Supreme Court to give serious weight to petitioner’s young age in considering the constitutionality of his harsh sentence is inconsistent with this

Court's recent decision in *Roper v. Simmons*, 543 U.S. 551 (2005), and its necessary implications for Eighth Amendment proportionality analysis.

Eighth Amendment challenges to harsh non-capital sentences begin with a threshold inquiry into whether the extreme sentence imposed is “grossly disproportionate” to the crime. *Harmelin v. Michigan*, 501 U.S. 957 (1991); *Ewing v. California*, 538 U.S. 11 (2003). This threshold inquiry serves the four principles of proportionality review—“the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors.” *Ewing*, 538 U.S. at 21. In light of these four principles, it is now well established that successful challenges to the proportionality of particular non-capital sentences will be exceedingly rare. *See Solem v. Helm*, 463 U.S. 277, 290 n.16 (1983); *Harmelin*, 510 U.S. at 1004 (Kennedy, J., concurring in part and concurring in judgment); *Ewing*, 538 U.S. at 36 (Breyer, J., dissenting). The Court should grant review in this case to make clear that the imposition of a 30-year sentence without possibility of parole on a 12-year-old child is, in fact, one such very rare circumstance.

Indeed, this Court's review is particularly warranted because an intolerable degree of confusion has developed among lower courts regarding the appropriate role, if any, that the age of the offender should play in the threshold “gross disproportionality” inquiry in non-capital Eighth Amendment challenges by children. This confusion was brought into stark relief by this Court's recent articulation in *Simmons* of the critical link between youth and culpability for Eighth Amendment purposes. Given the importance of “the requirement that proportionality review be informed by objective factors to the maximum possible extent,” *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring in part and concurring in judgment)), and the context in which this confusion arises—the imposition of

extraordinarily long prison sentences on very young children—this intolerable degree of disarray calls out for this Court’s intervention now.

Even prior to *Simmons*, several lower courts recognized the importance of the diminished culpability of youthful offenders in Eighth Amendment challenges to terms of imprisonment by incorporating this consideration into *Harmelin*’s threshold inquiry. In determining whether a sentence of imprisonment was “grossly disproportionate,” these courts looked to this Court’s admonition in *Solem v. Helm*, 463 U.S. 277, 292 (1983), to consider both “the harm caused or threatened to the victim or society, and the culpability of the offender.” See, e.g., *Harkins v. Hargett*, 200 F.3d 1279 (10th Cir. 1999) (“The chronological age of a defendant is a factor that can be considered in determining whether a punishment is grossly disproportionate to the crime in as much as it relates to his culpability”); *State v. Green*, 348 N.C. 588, 502 S.E.2d 819 (N.C. 1998) (“[T]he chronological age of a defendant is a factor that can be considered in determining whether a punishment is grossly disproportionate to the crime . . . .”); *Phillips v. State*, 807 So.2d 713, 718 (Fla. Dist. Ct. App. 2002) (“A final issue in this analysis is whether Mr. Phillips’ chronological age is a factor that must be considered in a proportionality review under *Harmelin* and *Solem*. We hold that his age is a factor that must be considered.”); *State v. Ira*, 132 N.M. 8, 14-16, 43 P.3d 359, 365-367 (N.M. App. 2002) (undertaking the gross disproportionality evaluation in light of the defendant’s age); *State v. Moore*, 127 Idaho 780, 906 P.2d 150 (1995) (considering defendant’s youth but rejecting the claim that a sentence of 25 years was grossly disproportionate for a 14 year old repeat offender convicted of killing a law enforcement officer). Cf. *People v. Miller*, 202 Ill.2d 328, 781 N.E. 2d 300 (2002) (concluding that a mandatory life sentence imposed on a 15-year-old convicted of multiple murders violates the proportionate

penalties clause of the Illinois constitution, which it interpreted by reference to *Atkins* and *Harmelin*).

Other courts in the pre-*Simmons* era failed to see the relevance of the age of the offender in the context of Eighth Amendment challenges to sentences less than death. E.g., *Rodriguez v. Peters*, 63 F.3d 546, 566-68 (7th Cir. 1995) (holding that the fact that defendant was 15-years-old at the time he committed his offense is constitutionally irrelevant to the Eighth Amendment challenge); *Harris v. Wright*, 93 F.3d 581, 585 (9th Cir. 1996) (“Accordingly, while capital punishment is unique and must be treated specially, mandatory life imprisonment without parole is, for young and old alike, only an outlying point on the continuum of prison sentences.”). These courts looked only to the seriousness of the offense committed in assessing claims of gross disproportionality, treating even the youngest child offender in the same way as a hardened adult criminal for Eighth Amendment purposes.

In the aftermath of *Simmons*, the constitutional significance of youth with respect to culpability is undeniable. Accordingly, one would expect to see a convergence in the lower courts toward serious consideration of a young offender’s age in Eighth Amendment challenges to terms of imprisonment. But the disagreement seems to be becoming more, not less, entrenched. This year alone, notwithstanding this Court’s careful explanation of the relevance of age to culpability in *Simmons*, at least two lower federal courts have expressly refused to consider the culpability-related implications of the age of the offender in Eighth Amendment challenges to prison sentences brought by juveniles. See *Singleton v. Tilton*, 234 Fed. Appx. 745, 746 (9th Cir. 2007) (“Petitioner also raises a claim under the Eighth Amendment of the United States Constitution. The factors upon which he relies, including youth and mental illness, must be considered as mitigating factors under federal law only in the death penalty context.”)

*Culpepper v. McDonough*, No. 8:07-cv-672-T-17TGW, 2007 WL 2050970 (M.D. Fla. July 13, 2007) (“*Roper* strictly applies to a violation of the Eighth and Fourteenth Amendments as cruel and unusual punishment regarding the death sentence of a minor. Therefore petitioner’s assertion that his life sentence is in violation of the *Roper* rule is without merit.”) In a related context, the Eighth Circuit has indicated its agreement with these two courts. See *United States v. Feemster*, 483 F.3d 583, 587 (8th Cir. 2007) (stating that “the rationale of *Simmons* applies only with limited, if any, force outside of the context of capital punishment.”) Similarly, the court below made only passing reference to petitioner’s youth in its cursory dismissal of his Eighth Amendment challenge to his excessively long sentence.

This Court should grant review in this case to make clear that petitioner’s age at the time of offense—his status as a 12-year-old child—is constitutionally relevant in a meaningful way to the question whether his harsh prison sentence constitutes cruel and unusual punishment.

**2. This grossly disproportionate sentence is unconstitutional because it is inconsistent with evolving standards of decency.**

This Court has long recognized that the Eighth Amendment’s prohibition against “cruel and unusual punishments” must be interpreted flexibly, for the prohibition “acquire[s] meaning as public opinion becomes enlightened by a humane justice.” *Gregg v. Georgia*, 428 U.S. 153, 171 (1976). Determining which punishments are so disproportionate as to be “cruel and unusual” thus requires consideration of the “evolving standards of decency that mark the progress of a maturing society.” *Roper v. Simmons*, 543 U.S. 551 (2005) (citing *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958)).

The first step in determining contemporary standards of decency is a review of the “objective indicia of society’s standards, as expressed in legislative enactments and state practice.” *Simmons*, 543 U.S. at 563. In both *Simmons* and *Atkins*, this Court found a national consensus in

part because only 5 or 6 of the 20 states that statutorily authorized the death penalty for juveniles and persons with mental retardation actually sentenced such offenders to death as a matter of practice. *See id.* at 564–65. The evidence of a national consensus precluding a 30-year term without possibility of parole for 12-year-old children is even stronger here. This national consensus is also consistent with international law and practice. Both reflect the lack of any penological justification for imposing such severe sentences in light of the diminished culpability of young children.

**a. Over half of the nation’s legislatures have rejected even the possibility of such a harsh sentence for such a young offender.**

In 25 states and the District of Columbia, it is simply not possible to try a 12-year-old child as an adult.<sup>2</sup> The legislatures in these jurisdictions have set the minimum age of transfer to the adult court for a juvenile charged with murder at age 13, 14, or 15. *See* Appendix 21, App. 195a–202a.<sup>3</sup> Had petitioner been charged in one of those states, his case would have been handled entirely in the juvenile system, where harsh punishments such as 30 years without possibility of parole do not exist.

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<sup>2</sup> The American Bar Association has taken the position that juveniles should not be transferred to adult court below the age of 14. *See IJA-ABA Juvenile Justice Standards: Standards Relating to Transfer Between Courts* standard 1.1B (1996).

<sup>3</sup> Appendix 21 summarizes the relevant situation in each state. Seven states—Georgia, Illinois, Mississippi, New Hampshire, New York, North Carolina, and Wyoming—do not try children younger than 13 as adults. Eighteen—Alabama, Arizona, Arkansas, California, Connecticut, Iowa, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, North Dakota, Ohio, Texas, Utah, and Virginia—do not try children younger than 14 as adults. And the District of Columbia does not try children younger than 15 as adults.

**b. Every other state (except South Carolina) has in practice rejected such a harsh sentence for such a young child.**

In the remaining 24 states (other than South Carolina) in which a 12-year-old child could in theory be transferred to the adult court,<sup>4</sup> we have not been able to identify a case in which such a young child has in fact received such a long sentence.<sup>5</sup> This is not because young children do not commit serious offenses (including murder); unfortunately, they do. *See infra* at 17-18. It is the extraordinarily harsh sentence that makes this case significant.

The available national statistics confirm that the practice of transferring 12-year-old children to adult court is extremely rare, even in cases of offenses against the person. Courts and prosecutors overwhelmingly recognize the need to treat 12-year-olds differently from older juveniles. *See, e.g.*, MICHAEL CORRIERO, JUDGING CHILDREN AS CHILDREN: A PROPOSAL FOR A JUVENILE JUSTICE SYSTEM (2007) (juvenile judge recommending that 14 should be the minimum age for the transfer of juveniles to adult court). In the five years from 2000 to 2004, for example, only 230 children under age 13 were transferred from juvenile court to adult court—compared to 40,911 older juveniles who were transferred to adult court—illustrating a clear distinction between the more common practice of punishing adolescents and older teenagers as adults and the rare practice of punishing 12-year-olds and other pre-adolescents as adults. *See Appendix 22,*

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<sup>4</sup> Those 24 states are: Alaska, Colorado, Delaware, Florida, Hawaii, Idaho, Indiana, Kansas, Maine, Maryland, Missouri, Montana, Nebraska, Nevada, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Washington, West Virginia, Wisconsin, and Vermont. *See Appendix 21, App. 195a–202a.*

<sup>5</sup> Two other highly publicized cases may superficially appear to contradict the statement in the text. Lionel Tate, who at trial received a life sentence for a murder committed when he was 12 years old, is the closest case to petitioner's that we have been able to find. But Tate's conviction was reversed on appeal (on due process grounds relating directly to "his extremely young age"). *See Tate v. State*, 864 So.2d 44, 48-51 (Fla. App. 2003). On remand, a plea arrangement permitted him to be released in 2004 after serving three years.

In a prior South Carolina case, the state courts upheld the transfer of another 12-year-old child charged with murder. *See State v. Corey D.*, 339 S.C. 107, 529 S.E.2d 20 (2000). If that defendant had been tried for murder, he would have faced the same mandatory minimum sentence that petitioner did. But that charge was dropped for insufficient evidence. *Corey D.*, when considered with petitioner's case, illustrates the real prospect that other 12-year-old children in South Carolina will be subject to similar treatment until this Court intervenes. *See infra* at 34-35.

table 1, App. 203a. Moreover, in the extremely rare cases in which younger children have been transferred to adult court, roughly half the offenses involved less serious non-person crimes, such as property or drug offenses (*see* Appendix 22, table 2, App. 203a), meaning the younger children have not generally faced the strict penalties that are reserved for the worst offenses, such as murder.

For young children charged with the more serious offenses, states overwhelmingly use the juvenile justice system.<sup>6</sup> In 2004, for example, 27,603 12-year-old children were charged with offenses against the person, and only 8 of them in the entire nation were transferred to the adult court. *See* Appendix 22, table 3, App. 204a. Moreover, the data for recent years show a steady drop in the number of younger children transferred to adult court (even while the number of older juveniles being transferred has remained constant or gone up). *See* Appendix 22, table 1, App. 203a.<sup>7</sup>

An examination of the individual cases involving serious crimes committed by young children<sup>8</sup> in recent years confirms the national consensus. A few examples from our extensive review illustrate the point. Last year, a 12-year-old boy in Maryland was charged with beating and stabbing his mother and younger brother to death. Because Maryland does not permit 12-year-old children to be tried as adults, if convicted this child might be sentenced to a juvenile facility and would have to be released by age 21. In Ohio in 2004, 12-year-old Bryan Sturm was convicted of the shotgun slayings of his grandmother and his aunt, crimes eerily similar to

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<sup>6</sup> The juvenile justice system routinely handles even extremely serious juvenile offenders. *See, e.g.*, JOHN HUBNER, *LAST CHANCE IN TEXAS: THE REDEMPTION OF CRIMINAL YOUTH* (2005) (discussing the juvenile capital murderer program in the Texas juvenile justice agency).

<sup>7</sup> Indeed, recent press coverage has recognized this evolving standard of decency and the trend away from treating even older juveniles as adults. *See, e.g.*, Sharon Cohen, *States Rethink Charging Kids as Adults*, *Washington Post*, Dec. 2, 2007 (<http://www.washingtonpost.com/wp-dyn/content/article/2007/12/01/AR2007120100792.html>)

<sup>8</sup> Because petitioner's trial as an adult is so unusual for a 12-year-old child, and juvenile proceedings are not part of the public record, exhaustive information about the fates of other child offenders is difficult to obtain. This information was taken mostly from the popular press.

petitioner's offenses. Under Ohio's serious youthful offender statutes, however, Sturm was sentenced to detention in a juvenile facility until age 21, unless he commits another serious offense after age 14, in which case the juvenile court can impose an adult punishment. *See In re Sturm*, No. 05CA35, 2006 WL 3861074, at \*16-17 (Ohio App. Dec. 22, 2006). In 2005 in Massachusetts, a 12-year-old boy was charged with raping and killing the 3-year-old son of family friends. The younger child had been living with the family of the 12-year-old while his parents were in Puerto Rico on family business. If convicted, he can be held in state custody only until age 21.<sup>9</sup> Sadly, there are many more examples of very serious crimes committed by very young children. In each of case, a young child committed a horrific offense, as did petitioner. Yet every other child was adjudicated and sentenced in a humane manner consistent with his tender years. Petitioner, alone, has been tried and sentenced as if his youth were of no consequence.

**c. International norms and practices confirm the unacceptability of such a harsh sentence for such a young child.**

The voice of the rest of the world confirms the U.S. consensus against punishing young children under such harsh adult sentencing laws. This Court has long "referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'" *Simmons*, 543 U.S. at 575; *see Atkins*, 536 U.S. at 316 n.21 (recognizing the relevance of international law and practice); *Thompson*, 487 U.S. at 830 n.31 (considering the views of "other nations that share our Anglo-American heritage, and . . . the leading members of the Western European community"). Here,

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<sup>9</sup> *See Adult, 12-year-old Face Murder Charges*, MSNBC.com (Jan. 12, 2005) (available at <http://www.msnbc.msn.com/id6819171>).

the message is clear: South Carolina's treatment of petitioner (1) violates accepted tenets of international law and (2) would not be permitted in virtually all other nations.

Punishing young children with excessive sentences violates international norms of human rights and juvenile justice law. The U.N. Convention on the Rights of the Child ("CRC"), Nov. 20, 1989, 1577 U.N.T.S. 3—now ratified by every country in the world except the United States and Somalia—establishes universal principles with regard to the disposition of child offenders.<sup>10</sup> First, "the best interests of the child shall be a primary consideration" in any proceeding. CRC art. 3(1). Second, the "imprisonment of a child . . . shall be used only as a measure of last resort and for the *shortest appropriate period of time*." Art. 37(b) (emphasis added).

Virtually no other nation in the world subjects young children to such long sentences. Most countries have simply established a minimum age of criminal responsibility higher than 12. UNICEF, PROGRESS OF NATIONS (1997); *see also* U.N. Comm. on the Rights of the Child, *General Comment 10: Children's rights in Juvenile Justice*, ¶¶ 16-19, U.N. Doc. CRC/C/GC/10 (Feb. 2, 2007) (urging all nations to raise the minimum age for criminal responsibility above 12). But even among those that have not, we have not found a single modern account of a foreign court imposing a sentence of 30 or more years (with or without parole) on a child aged 12 or younger.

None of the "nations that share our Anglo-American heritage" or "leading members of the Western European community," *cf. Thompson*, 487 U.S. at 830 n.31, would sentence a 12-

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<sup>10</sup> In addition to promulgating the foundational CRC, the U.N. has adopted several sets of standards and guidelines clarifying the relevant requirements of international law. *See, e.g.*, U.N. Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules"), G.A. Res. 40/33, ¶ 18.1, U.N. Doc. A/RES/40/33 (Nov. 29, 1985) (noting need "to avoid institutionalization to the greatest extent possible."); U.N. Rules for the Protection of Juveniles Deprived of Their Liberty ("Havana Rules"), G.A. Res. 45/113, ¶ 2, U.N. doc. A/RES/45/113 (Dec. 14, 1990) (sentence should not "preclud[e] the possibility of . . . early release"); *see also* International Covenant on Civil and Political Rights ("ICCPR"), Dec. 16, 1966, art. 14(4), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) ("In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.").

year-old child to a term of 30 years without possibility of parole. The United Kingdom—whose “experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment’s own origins,” *Simmons*, 543 U.S. at 577—abolished long sentences without possibility of parole for children convicted of murder as far back as 1965. *See Regina v. Sec’y of State for the Home Dep’t ex parte V & T*, [1998] A.C. 407, 423-37 (H.L.) (explaining how the U.K. instituted the flexible sentence of “detention during Her Majesty’s pleasure” specifically for child offenders).

**d. No valid penological purpose exists for such a harsh sentence for such a young child.**

The application of a mandatory 30-year minimum sentence to a 12-year-old child cannot be squared with the principles that this Court announced just three Terms ago in *Roper v. Simmons*, 543 U.S. 551 (2005). The courts below simply failed to apply *Simmons*—and thus failed to recognize the principle that children are fundamentally different from adults for purposes of applying the Eighth Amendment. In rejecting the imposition of a capital sentence on a 17-year-old offender, this Court identified three constitutionally significant ways in which children are different: First, children are different from adults in ways that diminish their culpability; second, that diminished culpability undermines traditional penological justifications in sentencing; and third, it is particularly difficult to identify the children that are most deserving of severe punishment. *See Simmons*, 543 U.S. at 568–74. Moreover, that petitioner is the only inmate serving a 30-year sentence without possibility of parole for an offense committed when he was 12 years old indicates that such harsh punishments are so rarely and arbitrarily imposed that they cannot possibly serve any valid penological purpose. Each of these principles suggests the unconstitutionality of imposing a mandatory 30-year minimum sentence on a 12-year-old child, yet the State ignored them all.

(i) **Reduced culpability.** In *Simmons*, this Court explained why the particular characteristics of children make them less criminally culpable than adults. *Id.* at 569. Specifically, this Court recognized that the typical child under 18 lacks maturity, is more vulnerable to negative influences in an environment over which the child has less control, and has an unformed or transitory character. *Id.* at 569–70. These findings apply with even greater force in the present context because the disparity in culpability as compared to an adult is even more pronounced for a 12-year-old child (such as petitioner) than for a 17-year-old juvenile (as in *Simmons*).

Both the scientific community and this Court accept that young children lack maturity and have “an underdeveloped sense of responsibility,” which “often result[s] in impetuous and ill-considered actions and decisions.” *Johnson v. Texas*, 509 U.S. 350, 367 (1993). A recent study of the interaction between age and risk assessment found that the “effect of chronological age on risk taking and risky decision making was significant.” Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEVELOPMENTAL PSYCH. 625, 629 (2005). Moreover, young children, “especially those 13 and younger[,] are not able to put facts together and draw logical conclusions, and [are] less able than adults to think about the future consequences of their decisions.” Laurence Steinberg & Laura Carnell, *Juveniles on Trial: MacArthur Foundation Study Calls Competency into Question*, 18(3) CRIMINAL JUSTICE (Fall 2003); see also Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence*, 58 AMERICAN PSYCHOLOGIST 1009 (2003). These recent studies merely confirm the overwhelming agreement within the scientific community, which the *Simmons* Court recognized, that a child’s lack of maturity often results in poor decision making. See *Simmons*, 543 U.S. at 569 (“[A]dolescents are overrepresented statistically in virtually every category of reckless behavior.”) (quoting

Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339 (1992)).

This Court has also expressed its own judgment that children lack the maturity required for responsible decision making in a variety of contexts. For instance, in *Ashcroft v. ACLU*, 542 U.S. 656 (2004), this Court reaffirmed the principle that children have lesser First Amendment rights than adults to access pornography on the internet. Similarly, in recognizing a state's substantial and compelling interest in preventing minors (as opposed to adults) from using tobacco, this Court reasoned that "it is understandable for the States to attempt to prevent minors from using tobacco products before they reach an age where they are capable of weighing for themselves the risks and potential benefits of tobacco use and other adult activities." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 570 (2001). Even earlier, in *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962), this Court barred the use of a murder confession because the youth and immaturity of the defendant could not "be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions." The states, sharing this Court's understanding that children have not developed the ability to make responsible decisions, prohibit children from "voting, serving on juries, [and from] marrying without parental consent." *Simmons*, 543 U.S. at 569.

In addition to a lack of maturity, young children are also more vulnerable to negative influences in an environment over which they have less control. As the Gardner study found, peer influence affects younger individuals to a greater extent than adults. See Gardner, *supra*, at 630. Recognizing children's unique level of vulnerability to influence by their peers, this Court has upheld randomized drug testing in the school context while expressly acknowledging that such tests would not pass muster for adults under the Fourth Amendment. See *Vernonia Sch. Dist.*

*47J v. Acton*, 515 U.S. 646, 665 (1995). Similarly, a city ordinance restricting dance hall access to youth was held to further the legitimate city interest of “separat[ing] 14- to 18-year-olds from what may be the corrupting influences of older teenagers and young adults.” *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989).

Petitioner’s vulnerability due to his young age manifested itself in particular in his lack of control over key aspects of his environment. His mother left his home at a young age and refused to sustain a relationship with him. He was sent to live at various times with caregivers other than his father. He was committed for a period to a psychiatric facility. Most significantly, he was required to take psychological medication that caused distressingly unpleasant side effects. Petitioner’s “comparative lack of control over [his] immediate surroundings” makes his conduct less culpable than that of adults who can take steps to improve their surrounding environment. *See Simmons*, 543 U.S. at 570 (citing *Stanford v. Kentucky*, 492 U.S. 361, 395 (1989) (Brennan, J., dissenting)).

Finally, “the character of a juvenile is not as well formed as that of an adult.” *Simmons*, 543 U.S. at 570. Because children have yet to define their identity, there is a greater possibility of reform for a child than for an adult. *See generally* Laurence Steinberg & Elizabeth Cauffman, *A Developmental Perspective on Jurisdictional Boundary*, in JEFFREY FAGAN & FRANKLIN ZIMRING (EDS.), *THE CHANGING BORDERS OF JUVENILE JUSTICE* 399-403 (2000). Even the most heinous crime committed by a child does not necessarily indicate an irretrievably depraved character, because that child’s character is still in the midst of its most significant development. The lesser culpability of that child’s character, therefore, indicates a greater need for flexibility in sentencing a young child in comparison with a fully developed adult. At the very least, it

suggests the need for a mechanism by which the sentencer can re-evaluate the child and the need for continued incarceration once he or she reaches the age of maturity.

**(ii) Retribution and deterrence.** The traditional justifications for severe punishment are not served by imposing harsh sentences on 12-year-old children. This Court recognized in *Simmons* that the traditional justifications for the death penalty—retribution and deterrence—apply with “lesser force” due to the “diminished culpability” of 17-year-old juveniles. *See Simmons*, 543 U.S. at 571. Similarly, the even more substantially diminished culpability of very young children dramatically calls into question the penological justifications for imposing excessively long prison sentences on 12-year-old children.

Moreover, *Simmons* recognized that “the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.” *Id.* In particular, juveniles lack the capacity to weigh the future consequences of their actions. *See, e.g., Thompson*, 487 U.S. 815, 835 n.43 (1988) (“The adolescent lives in an intense present; ‘now’ is so real to him that past and future seem pallid by comparison. Everything that is important and valuable in life lies either in the immediate life situation or in the rather close future.”). If children do not weigh their future actions in any meaningful way, this Court explained, there is little reason to believe that the severe threat of the death penalty will have any deterrent effect on juvenile conduct. *Simmons*, 543 U.S. at 571–72 (“[T]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.”).

This Court’s conclusions about the lack of deterrence in *Simmons*—premised on the understanding that older juveniles do not weigh the future consequences of their actions in the rational manner expected of adults—applies with even greater force in the context of a 12-year-

old child. The scientific community has overwhelmingly rejected the proposition that such a young child would have the capability fully to appreciate the prospect of adult imprisonment decades into the future. *See, e.g.*, Laurence Steinberg & Laura Carnell, *Juveniles on Trial: MacArthur Foundation Study Calls Competency into Question*, 18(3) CRIMINAL JUSTICE (Fall 2003) (analyzing a study of 1,400 juveniles and explaining that those under 13 are less likely to consider the consequences of their choices); Mary Beckman, *Crime, Culpability, and the Adolescent Brain*, 305 SCIENCE 596, 596–99 (2004) (explaining that the ability to look into the future and evaluate consequences emerges between age 15–18). Simply stated, due to their reduced capability to rationally weigh the potential consequences of their actions, the prospect of extended adult incarceration is unlikely to provide meaningful deterrence to young children.

Indeed, a Task Force of the Center for Disease Control recently analyzed the scientific literature on the effects of transferring juveniles to the adult system and found overwhelming evidence that transfer decisions and the attendant harsh sentencing options had no general or specific deterrent value. *See* Center for Disease Control, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System*, November 30, 2007 (available at: <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm>). Even more troubling is the Task Force's conclusion that the transfer decision in fact results in increased violence and recidivism on the part of those juveniles transferred to adult court. *See id.* (children previously tried as adults are 34% more likely to commit future violent or general crime than similarly-situated children retained in the juvenile justice system). Such conclusions led the CDC to recommend that transfer statutes run counter to public safety and should be repealed. The absence of a legitimate public safety rationale for treating 12-year-old children as adults underscores the statute's lack of valid penological objectives.

This Court has been equally clear about the relative weakness of retribution as a justification for harsh punishment of young children: “Whether viewed as an attempt to express the community’s moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult.” *Simmons*, 543 U.S. at 571.

**(iii) Difficulty identifying children deserving adult punishment.** The *Simmons* Court recognized the unacceptable risk of error inherent in any attempt to identify juveniles sufficiently culpable to warrant imposition of the ultimate punishment: “It 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.” *Simmons*, 543 U.S. at 573. The difficulty in attempting to parse the relative culpability of 12-year-old offenders is even greater. If it is “difficult” to differentiate levels of maturity among 17-year-old juveniles, it is Herculean to do so among 12-year-old children. As noted above, the character of a young child in particular often remains unformed or transitory. The scientific community uniformly acknowledges the problems inherent in labeling a child incorrigible at a young age. *See generally* Lisa Ells, *Juvenile Psychopathy: The Hollow Promise of Prediction*, 105 COLUMBIA L. REV. 158 (2005) (reviewing the scientific literature on the difficulty of predicting adult criminal behavior based on juvenile behavior). Even more so than with older juveniles, as concerned this Court in *Simmons*, the likelihood of underestimating a child’s potential for reform is exceptionally high for pre-adolescent children.

These problems are compounded by the fact that the adult criminal justice system is not well-equipped to handle the special needs of young children. Young children are more willing to confess—even falsely—because they view police officers as authority figures. Thus, they often “over-implicate themselves” or give contradictory statements to police. *See* Patricia Allard &

Malcolm Young, *Prosecuting Juveniles in Adult Court: Perspectives for Policymakers and Practitioners*, 2 J. FORENSIC PSYCHOL. PRAC. 65, 73 (2002). Children may not be helpful even to their own attorneys, as they tend to alter the truth to reflect what they believe (often inaccurately) an attorney wants to hear. They do not have sufficient mental capacity and agility to testify on their own behalf, and will often fall victim to basic cross-examination techniques. They lack the capacity to evaluate plea offers rationally, or to ratify fundamental trial decisions, such as the decision whether to waive a jury trial.

Empirical research confirms the intuitive notion that children lack the developmental capacity to participate properly in their own defense. For instance, one prominent researcher found that children under the age of 15 were significantly less capable of understanding, or intelligently waiving, their *Miranda* rights than those aged 16 or older. Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1160 (1980). Another study tested youths' abilities to comprehend aspects of the legal process and competently defend themselves. Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUMAN BEHAVIOR 333 (2003). Using tools designed to test whether mentally ill adults were competent to stand trial, the study found that approximately one-third of children between the ages of 11 and 13 would be classified as incompetent to stand trial. *Id.* at 356. The study also found that 11- to 13-year-olds are significantly more likely than adults to cooperate with authorities and confess crimes, and they were much less likely than adults to recognize any long-term consequences that would result from their legal decisions. *Id.* at 357. In short, when children are tried in adult courts the risk of error on the relatively simple question of guilt or

innocence is much higher. For the more difficult questions of appropriate treatment or punishment, the risk of error is even greater.

This concern is particularly significant in the present context of a system with lengthy mandatory minimum sentences. In South Carolina, whether a young child should be eligible to receive adult-level punishment is determined only *once*,<sup>11</sup> at the very beginning of the process, when the family court considers waiver.<sup>12</sup> *See infra* at 33-35. If that judge determines that a child charged with murder should be tried in the adult system and he or she is convicted, the sentence will be no less than 30 years' imprisonment without possibility of parole. The judge who actually hears the case and knows the evidence will have very little flexibility, and will have no option to hold that the child's lack of culpability or potential for rehabilitation justify a sentence below the mandatory minimum. What had been a Herculean task for an expert with full information becomes impossible for a sentencing judge whose hands are tied or a family court judge who must render a decision long before the information that would typically be available at sentencing has been collected.

**(iv) Arbitrary and capricious imposition.** As far as we can determine, petitioner is the sole inmate in the entire United States serving such a severe sentence—30 years without possibility of parole—for an offense committed at such a young age. Sadly, a nontrivial number of young children commit murder in the United States each year. According to statistics compiled by the Federal Bureau of Investigation, an average of 15 children between the ages of 9 and 12

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<sup>11</sup> The child may also seek to have the adult court remand the case to the family court, *see supra* at 7, but the review of the family court's decision is so deferential as to be all but meaningless. In any event, even if the remand decision involved an independent review of the original transfer decision, it would still occur at the very beginning of the process—long before the court had a full understanding of the information that would be necessary for an informed decision.

<sup>12</sup> To further compound the problem, the focus of waiver hearings in South Carolina has not been on whether the child possesses sufficient maturity to justify adult treatment but on whether the alleged offense was serious enough to demand a lengthy sentence. *See infra* at 33-35.

committed murder annually in the five years between 2002 and 2006.<sup>13</sup> In the past 10 years, then, approximately 150 pre-adolescent children have committed murder. Notwithstanding the fact that the statutory scheme in almost half of the states leaves open the possibility that a 12-year-old child who has committed murder may be tried in an adult court and sentenced to the full range of punishments available to adult murderers, no such child, save petitioner, has been so harshly treated. That is true even though many of the murder cases that remained in the juvenile system involved crimes far more brutal and threatening to public safety than the murders committed by petitioner. *See supra* at 12-14, 17-18.

A punishment so rarely and arbitrarily imposed can serve no valid penological purpose. As this Court noted in *Furman*, “When [a punishment] is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system.” *Furman v. Georgia*, 408 U.S. 238, 295 (Brennan, J., concurring); *see also Furman*, 408 U.S. at 309 - 310 (Stewart, J., concurring) (explaining that the death sentences examined by the Court in *Furman* were “cruel and unusual in the same way that being struck by lightning is cruel and unusual,” and noting that “the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed”); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (reaffirming the prohibition on arbitrarily rare and capricious punishment).

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<sup>13</sup> *See* Federal Bureau of Investigation, Unified Crime Reports (available at <http://www.fbi.gov/ucr/ucr.htm>).

**B. The decision below contravenes the teachings of *Simmons* by upholding a mandatory sentencing scheme in which the sentencer was precluded from giving sufficient mitigating weight to petitioner's diminished culpability due to his very young age.**

Although petitioner contends that the Eighth Amendment never permits a 12-year-old child to be sentenced to a 30-year term without possibility of parole, *see supra* at 10-29, at the very least it prohibits the imposition of such a harsh penalty on such a young child without providing an opportunity at the time of sentencing for the sentencer to consider the offender's youth as a mitigating factor. Once petitioner was tried as an adult, he was subject to South Carolina's mandatory minimum sentencing provisions. As the trial court recognized, it did "not [have] a lot [of discretion] in this matter." App. 70a. "[T]he options [were] 30 years or life." *Id.* The trial court imposed the minimum authorized sentence under the statute, but it had no discretion to reduce the sentence below the mandatory minimum to account for petitioner's youth.

Once again, *cf. supra* at 14, the first step is a review of the "objective indicia of society's standards, as expressed in legislative enactments and state practice." *Simmons*, 543 U.S. at 563. The argument is even stronger for prohibiting the imposition of such long mandatory minimum sentences on such young children. Not only are long mandatory minimum sentences not generally imposed on young children in practice, but the legislatures of over 40 states have rejected even the possibility of such harsh treatment.

**1. Over 40 states have rejected even the possibility of imposing excessively long mandatory minimum sentences on young children.**

In 25 states and the District of Columbia, it is simply not possible to try a 12-year-old child as an adult. *See supra* at 15 & n.3. In those jurisdictions, 12-year-old children never face adult sentences, let alone long mandatory minimum sentences.

Of the remaining 24 states (other than South Carolina) in which a 12-year-old child could be transferred to the adult court, *see supra* at 16 & n.4, most have some other statutory provision

that has the effect of ensuring that no child as young as 12 is treated as harshly as petitioner was treated here without at least allowing the sentencer to consider the child's age as a mitigating factor.<sup>14</sup> Some states permit an adult court to consider a child's age as a mitigating circumstance to reduce the sentence below the mandatory adult sentence,<sup>15</sup> or provide for a shorter sentence for murder than does South Carolina,<sup>16</sup> or at least provide for earlier parole eligibility.<sup>17</sup> In 7 of these 24 states, the legislature has established "blended sentencing" for juveniles convicted of crimes in adult criminal courts. This sentencing option acknowledges and responds to research showing that children continue to mature and are capable of significant changes throughout adolescence and, accordingly, serves as a safety valve against unjustifiably long sentences.<sup>18</sup> Blended sentencing allows the judge to reevaluate the child's development once he has reached the age of maturity, and to decide at that time whether the adult portion of a sentence should be served. *See generally* Patrick Griffin, *Trying and Sentencing Juveniles as Adults: An Analysis of State Transfer and Blended Sentencing Laws*, National Center for Juvenile Justice (2003).

The net result is that only 8 states other than South Carolina have a statutory scheme in which a 12-year-old child could be tried as an adult and subject to a mandatory minimum sentence of at least 30 years without possibility of parole.<sup>19</sup>

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<sup>14</sup> The American Bar Association has also recognized the need to preserve the sentencer's discretion. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: SENTENCING, standard 18-3.21(b) (3d ed. 1994) (rejecting the application of mandatory minimum sentences); ABA JUSTICE KENNEDY COMMISSION, REPORT TO THE HOUSE OF DELEGATES 26 (2004) (calling for judicial consideration of "the unique characteristics of offenses and offenders that may warrant an increase or decrease in a sentence").

<sup>15</sup> *See, e.g.*, 13 Vermont Stat. § 2303 (allowing for a lesser sentence to be imposed upon a finding of youth).

<sup>16</sup> Alaska, Maine, Oregon, and Washington provide for shorter sentences than South Carolina. *See* Appendix 21.

<sup>17</sup> Alaska, Idaho, Maryland, Nevada, Rhode Island, Tennessee, and Wisconsin provide for parole eligibility sooner than South Carolina. *See* Appendix 21.

<sup>18</sup> Colorado, Idaho, Kansas, Missouri, Montana, Vermont, and West Virginia offer blended sentencing in the present context. *See* Appendix 21.

<sup>19</sup> The eight states are Delaware, Florida, Hawaii, Indiana, Nebraska, Oklahoma, Pennsylvania, and South Dakota. *See* Appendix 21.

**2. In those few states in which a 12-year-old child could in theory be subject to a 30-year mandatory minimum sentence without possibility of parole, such an extreme sentence has not been imposed in practice except in this case.**

As noted above, *see supra* at 16 & n.5, we have been unable to identify a single case in which a child has in fact received such a long sentence for an offense committed as a pre-teen. Thus it necessarily follows that we have been unable to identify any cases in which such a young child received such a long sentence on a mandatory minimum basis.

**3. International norms and practices confirm the unacceptability of mandatory minimum sentences for children.**

We have already noted that international norms and practices prohibit the imposition of such a long sentence on such a young child. *See supra* at 18-20. International law is even more emphatic in its prohibition of mandatory minimum sentences for children. The almost universally accepted U.N. Convention on the Rights of the Child (“CRC”) explicitly requires a “variety of dispositions [to] be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.” Art. 41(4). The Beijing Rules, *supra* note 10, require “[a] large variety of disposition measures [to] be made available to the [sentencer], allowing for flexibility so as to avoid institutionalization to the greatest extent possible.” Para. 18.1. Similarly, the Havana Rules, *supra* note 10, provide that “[t]he length of the sanction should be determined by the judicial authority, without precluding the possibility of [the child’s] early release.” Para. 2.<sup>20</sup>

The Supreme Court of Appeal of South Africa recently reached a similar conclusion in the course of holding that mandatory sentencing legislation did not apply to children: “The overriding message of the international instruments . . . is that child offenders should not be deprived

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<sup>20</sup> The Committee on the Rights of the Child has repeatedly noted the necessity of sentencing flexibility in its periodic reports on individual states. *See, e.g.*, Committee on the Rights of the Child, *Concluding observations: Kyrgyzstan*, ¶ 66 U.N. Doc. CRC/C/15/Add.244, (Oct. 1 2004) (“[T]he lack of alternative penalties for those under the age of 14 years (i.e. only deprivation of liberty) [is] also of concern to the Committee.”)

of their liberty except as a measure of last resort and, where incarceration must occur, the sentence must be individualized with an emphasis on preparing the child offender . . . for his or her return to society.” *Brandt v. State* 2005 (2) All SA 1 (SCA) at ¶¶ 16-20 (S. Afr. 2005).

**4. The transfer hearing was an inadequate vehicle for considering petitioner’s youth as it bears on reduced culpability and appropriate punishment.**

It is undisputed that the sentencing judge was statutorily precluded from sentencing petitioner to less than 30 years without possibility of parole. S.C. Code Ann. § 16-3-20(A), App. 90a. During petitioner’s sentencing hearing, the court expressed its frustration with the moral implications of this constraint, but accurately concluded that its discretion was statutorily circumscribed and that it had no choice but to sentence petitioner to 30 years in prison without the possibility of parole. App. 69a. Thus the only possible point at which petitioner’s diminished culpability could have been given the constitutionally mandated consideration was during the transfer hearing. Juvenile court transfer hearings, however, are incapable of fulfilling this crucial constitutional mandate.

To be sure, transfer proceedings in South Carolina are loosely informed by the guidelines established by this Court in *Kent v. United States*, 383 U.S. 541 (1966). These guidelines, in turn, include several factors that appear to be relevant to the constitutionally mandated consideration of diminished culpability that must occur before a child can be sentenced to an extraordinarily long term of imprisonment.<sup>21</sup> The application of the *Kent* factors at a juvenile

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<sup>21</sup> The factors identified as relevant in *Kent* are: the seriousness of the alleged offense; whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner; whether the alleged offense was against persons or against property . . . ; the prosecutive merit of the complaint; the desirability of trial and disposition of the entire offense in one court; the sophistication and maturity of the juvenile as determined by the consideration of his home, environmental situation, emotional attitude and pattern of living; the record and previous history of the juvenile . . . , the prospects for adequate protection for the public and the likelihood for rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available. See *Kent v. United States*, 383 U.S. 541 (1966).

transfer proceeding, however, cannot provide constitutionally sufficient safeguards against the capricious imposition of excessively long sentences on young offenders for several reasons.

First, the transfer hearing occurs before the trial, without the benefit of the adversarial development of the facts most relevant to the Eighth Amendment inquiry. When considering whether to transfer an accused child to an adult court, the family court judge has access only to inchoate information, not yet tested by the crucible of trial, about the details of the offense, the degree of involvement of the accused child, the child's maturity and susceptibility to rehabilitation, and other factors relevant to diminished culpability. This Court has recognized the difficulty of identifying the most culpable juvenile offenders even after a capital trial and full sentencing hearing. *Simmons*, 543 U.S. at 568–74. It is simply impossible to identify which children, if any, are sufficiently culpable to deserve harsh sentences without possibility of parole after a strikingly short Family Court transfer proceeding.

Second, the characteristic that is most relevant to the child's diminished culpability—his very youth—works at cross-purposes during the Family Court transfer proceeding. *Cf. Simmons*, 501 U.S. at 573 (“In some cases a defendant's youth may even be counted against him. In this very case, as we noted above, the prosecutor argued *Simmons*' youth was aggravating rather than mitigating.”) When petitioner stood accused of a horrific crime in Family Court, the judge had to choose between two unsatisfactory options: retain jurisdiction and ensure petitioner's release at the age of 21 or waive jurisdiction and ensure that no judge could meaningfully consider the mitigating aspect of petitioner's youth. In this context, petitioner's young age is as likely to compel the Family Court to waive jurisdiction to protect the public as to counsel leniency due to diminished culpability. In fact, only two years before petitioner's transfer hearing, the Supreme Court of South Carolina had reversed a Family Court's decision to retain jurisdiction over a 12-

year-old accused of murder. *State v. Corey D.* 339 S.C. 107, 529 S.E.2d 20 (2000). In *Corey D.*, the court emphasized the violent, premeditated nature of the crime and the facts suggesting that the accused child was a full participant, and held that the family court had abused its discretion in retaining jurisdiction. *Id.* at 26. There was no discussion his diminished culpability as a 12-year-old. It is not surprising, therefore, that the Family Court below waived jurisdiction over petitioner based on the severity of the crime and the likelihood that petitioner would be indicted. App. 50a. Consistent with the teachings of *Corey D.*, the Family Court did not consider petitioner's diminished culpability.

This shortcoming in the transfer process is, apparently, not unique to the state of South Carolina. As another court has observed in identical circumstances:

[T]he circumstances of this case reveal an inadequacy in our juvenile justice sentencing scheme. As noted above, when a youthful offender is sentenced as a child, the court's power over the child must end when the child reaches the age of twenty one. However, in some instances, successful rehabilitation would require a longer commitment to the rehabilitative resources of the juvenile justice system. And unfortunately, in some cases, despite providing the best treatment options available, rehabilitation will prove impossible. Because of these very real possibilities and the obligation that every sentencing court also has to protecting public safety, many courts, like the court in this case, will opt for a longer term of adult incarceration of a juvenile offender instead of risking a short-term, unsuccessful juvenile detention that would result in the premature release of a dangerous offender.

*State v. Ira*, 43 P.3d 359 (N.M. App 2002).

Third, the inadequacy of the transfer process to ensure consideration of diminished culpability as a mitigating factor is well illustrated by the proceedings in this case. As indicated above, the family court's findings in support of its transfer order focused entirely on the severity of the offense and the defendant's prospects for rehabilitation. Thus, the decision to transfer did not incorporate an assessment of petitioner's diminished culpability attributable to his youth or

whether this factor warranted a less severe punishment than the 30 year mandatory minimum sentence he would receive if convicted in adult court.

Finally, if the Family Court transfer hearing serves the constitutionally mandated role of distinguishing the most blameworthy child offenders from all the others for purposes of making them eligible for heightened punishment, this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) indicates that the facts justifying the transfer must be found by a jury beyond a reasonable doubt. That this did not happen counsels against concluding that the Family Court hearing provides constitutionally adequate fact-finding regarding petitioner's diminished culpability.

**II. This Court Should Grant Review To Establish, at the Very Least, That the Eighth Amendment Prohibits the Imposition of a Mandatory 30-Year Sentence Without Possibility of Parole on a 12-Year-Old Child Absent Evidence of the Legislature's Clear Intent To Authorize Such a Sentence.**

Petitioner's mandatory sentence of 30 years without possibility of parole is unconstitutional because the statutory scheme under which it was imposed does not evince the South Carolina Legislature's clear intent to authorize a mandatory minimum sentence of 30 years without parole for 12-year-old children. In *Thompson v. Oklahoma*, 487 U.S. 815, 849-50 (1988) (O'Connor, J., concurring in the judgment), this Court rejected the imposition of the death penalty on 15-year-old offender because there was no clear evidence that the Oklahoma Legislature had deliberately enacted a statutory scheme under which 15-year-old defendants could be sentenced to death. *Id.* at 857. In that case, Oklahoma had enacted a statute that authorized capital punishment for murder, without setting any minimum age at which the commission of murder may lead to the imposition of that penalty. The State had also separately provided that 15-year-old murder defendants may be treated as adults in certain circumstances. As a consequence, the Court concluded that "there is a considerable risk that the Oklahoma

Legislature either did not realize that its actions would have the effect of rendering 15-year-old defendants death eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death eligibility.” *Id.*, at 857.

Even more so than the Oklahoma legislative scheme invalidated in *Thompson*, the legislative scheme under which petitioner was sentenced to a mandatory 30 year sentence without parole lacks the “earmarks of careful consideration” required of harsh punishments of “dubious constitutionality.” *Id.* at 857. As with the Oklahoma scheme, there is no evidence that the legislature actually considered the consequences of its choices on very young offenders. The 30-year mandatory minimum sentence for first degree murder was adopted in its 1995 session, the first time that South Carolina had enacted a mandatory minimum sentence for murder. *See* 1995 S.C. Laws Act 83 (H.B. 3096). In the next session, the legislature comprehensively revised that portion of its laws relating to the treatment of juveniles, enacting the juvenile transfer statute as it is currently written. *See* 1996 S.C. Laws Act 383 (H.B. 3566). There is no indication that the Legislature considered the consequences of the mandatory minimum provision during its revamping of the juvenile transfer provisions.

The ambiguity of the South Carolina juvenile transfer statute negates any possibility that the scheme is the product of careful consideration or deliberate decision making. Section 20-7-7605 sets forth the circumstances under which children age 16 and younger can be transferred from Family Court to the Court of General Sessions.<sup>22</sup> Nowhere in this section does the South Carolina expressly stat that a 12-year-old child can be transferred to adult court to be tried for murder. Rather, the conclusion that this is statutorily permissible is reached through a tortured interpretation of three provisions. First, section 20-7-7605 (4) permits the Family Court to

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<sup>22</sup> A different section of the South Carolina code provides that all 17-year-olds charged with a Class A felony (such as murder) must be tried as adults. S.C. Code Ann. § 20-7-6605(1).

transfer “a child” 16 years-old or older who is charged with a misdemeanor or a Class E or F felony. Second, section 20-7-7605(5) permits the Family Court to transfer “a child” who is 14- or 15-years-old who is accused a Class A, B, C, or D felony. Finally, section 20-7-7605 (6) shifts its reference from “a child” to “the child,” and provides guidance for the transfer of “the child” who is accused of committing murder or criminal sexual conduct. This shift in modifier – from “a” to “the”—seems clearly to reflect the legislature’s intent to reference the class of children discussed in the immediately preceding provision, which applies only to children 14- or 15-years-old. The South Carolina Supreme Court, however, has rejected this interpretation, holding that section 20-7-7605(6) permits the transfer of children of any age into adult court to be tried for murder.<sup>23</sup> *State v. Corey D.*, 529 S.E.2d 20 (2000) (“We hold that the Legislature intended to give the family court discretion to transfer jurisdiction in a murder case for any juvenile, regardless of age.”). Under this provision, as interpreted by the South Carolina Supreme Court, the Court can be no more confident of the legislature’s intent to subject 12-year-olds to the mandatory minimum than of its intent to subject 7-year-olds to such harsh punishment. The absence of a minimum age for transfer in cases of children accused of murder demonstrates that the statutory scheme under which petitioner was sentenced to a mandatory term of 30 years without parole lacks the imprimatur of clear legislative intent required to withstand Eighth Amendment scrutiny.

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<sup>23</sup> For our purposes, of course, this interpretation is definitive, and petitioner does not suggest that this Court has the power to revisit the matter.

**III. This Case Provides the Court with an Excellent Vehicle for Resolving a Compelling Eighth Amendment Question.**

For several reasons, this Court should seize this opportunity to resolve the compelling question whether the Eighth Amendment provides substantive or procedural limitations on the non-capital sentencing of young children.

1. This case comes to the Court on direct review from a final judgment affirming the imposition of mandatory minimum sentence without parole on a young child after he was tried as an adult. The Supreme Court of South Carolina recognized the extraordinary nature of the case; tellingly, it bypassed the usual appellate process and certified the case for immediate review directly from the trial court. *See* App. 4a, 83a; *see also* S.C. APP. CT. RULES 204(b) (“Certification is normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance.”). The court below clearly and unconditionally approved the punishment, expressly addressing the Eighth Amendment arguments advanced against it. App. 23a–26a. Thus, the procedural posture of this case is simple, and the constitutional issue is well framed for this Court’s resolution.

2. Lower courts disagree about what role, if any, considerations of diminished culpability due to youth should play in Eighth Amendment challenges to sentences of imprisonment. This disagreement has existed for many years and appears to be deepening. The issue is thoroughly discussed in several lower court opinions, and the contrasting views of the legal relevance of youth to the Eighth Amendment inquiry are clearly defined. This case clearly presents one interpretation of the legal standard—the erroneous one—in a perfect vehicle for resolving the dispute now. Nothing would be gained from further percolation.

3. The issue presented in this case is uncommon in that it arises relatively rarely but a very real potential for great harm exists. While petitioner is unique in having received such a

harsh mandatory minimum sentence, the state of South Carolina has demonstrated a strong and troubling commitment to the practice. *See, e.g., State v. Corey D.*, 339 S.C. 107, 529 S.E.2d 20 (2000) (reversing, as abuse of discretion, a family court's decision not to transfer a 12-year-old child into the court of general sessions to be tried for murder); *Sanders v. State*, 314 S.E.2d 319, 320 (S.C. 1984) (approving the sentencing of a 13-year-old child to two consecutive 30-year sentences after conviction in adult court on charges of voluntary manslaughter).

4. Finally, apart from these considerable systemic concerns, there is the substantial interest in justice for petitioner. On the day of the tragic murders, 12-year-old Christopher Pittman was—in mind, body,<sup>24</sup> and temperament—a young child. He was also a young child who had apparently been deeply affected by the antidepressant Zoloft. The trial court likely recognized these unfortunate facts when sentencing petitioner to the lowest sentence possible; yet the system in South Carolina denied petitioner his Eighth Amendment right to full consideration of his diminished culpability attributable to his youth. He was denied *even the possibility* of less than three decades of imprisonment, when he himself had lived barely one decade.

#### CONCLUSION

The petition for writ of certiorari should be granted.

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<sup>24</sup> Petitioner's Little League baseball card from the previous season lists his height as 5 feet tall and his weight as 68 pounds.

Respectfully submitted,

A handwritten signature in cursive script, reading "Michael F. Sturley", is written over a horizontal line.

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