ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
DEC 17 2012
SC Court of Appeals

Appeal from Florence County

William H. Seals, Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

TAVARIO D. BRUNSON,

APPELLANT

Appellate Case No. 2012-211593

Motion to Stay Appeal Pending
Supreme Court's Decision in Aiken, et al. v. Byars

Pursuant to Rule 240 SCACR, counsel for the appellant, Tavario Brunson, moves to stay the filing of the initial brief and designation of matter pending the South Carolina Supreme Court's resolution of Aiken, et al. v. Byars filed in the Court's original jurisdiction on October 29, 2012.

On April 11, 2012, a jury returned its verdict finding Appellant guilty of murder. During the sentencing proceeding, Appellant informed the Court of a case pending on appeal in the United States Supreme Court challenging the application of life sentences to

individuals less than eighteen years of age. See Exhibit 1. Thereafter, the Honorable William H. Seals sentenced Appellant to life in prison. See Exhibit 2.

On June 25, 2012, the United States Supreme Court issued its opinion in Miller v. Alabama, ___ U.S. ___, 132 S.Ct. 2445 (2012), the case referenced by Appellant in the sentencing proceeding after his trial. The Court held that mandatory sentences of life without parole violate the cruel and unusual provision of the Eighth Amendment to the United States Constitution. Id. at 2464. In addition, the Court found that a sentence of life without parole, when imposed upon a juvenile, is akin to the death penalty and that similar protections should be afforded to juveniles facing such a sentence as provided for defendants facing the death penalty. Id. at 2466-2468.

On October 29, 2012, a class of petitioners filed a petition for writ of habeas corpus in the original jurisdiction of the South Carolina Supreme Court asking for new sentencing hearings for all juveniles sentenced to life without parole. See Exhibit 3. Although Appellant is not a named petitioner in the action, he falls within the class of individuals seeking redress as he is similarly-situated. Additionally, the claim is preserved for appeal in Appellant's case in light of Appellant's objection to the imposition of a life sentence and his reference to the pending Miller case. Therefore, the outcome of the petition is highly relevant to, and potentially dispositive of, Appellant's appeal

In conclusion, counsel for Appellant respectfully moves that this Court stay the appeal in Appellant's case pending the South Carolina Supreme Court's decision in Aiken, et al. v. Byars.

Susan B. Hackett

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT.

This 17th day of December, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

William H. Seals, Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

TAVARIO BRUNSON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Motion to Stay in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 17th day of December, 2012.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 17th day of December, 2012.

Emily Byrn (L.S.)

Notary Public for South Carolina
My Commission Expires: November 16, 2022.

Exhibit #1

I ask, Your Honor, that you give him life, you give him the maximum on the other charges and, Your Honor, I ask that you consider making them consecutive. If life ever gets changed by our legislature so that it's no longer a natural life, I would ask that you consider consecutive sentences.

THE COURT: All right, thank you.

MR. CLEMENTS: And that's all I have to say for the State.

THE COURT: Sure. I'll be glad to hear from the lawyers.

MR. MEETZE: Thank you, Your Honor, may it please the Court.

THE COURT: Sure.

MR. MEETZE: Your Honor, obviously, as of today Mr. Brunson has been incarcerated for 366 days. The Court has obviously sat through the trial and is familiar with the case and the facts and all of that and is familiar with the punishments for these charges. Murder by itself carries a minimum of 30 years and up to a life sentence. The -- So either way you slice that, it's a long time.

It's my understanding and I don't know anything specifically about it, but it is my understanding that there is currently a case pending in the Supreme Court along the lines of the case that Mr. Clements referenced as it pertains to the 17-year-olds and the death penalty. I think there's a case currently on appeal in the U.S. Supreme Court with

regards to a 17-year-old as it pertains to a life sentence as well with the same issues involved, whether that would be considered cruel and unusual punishment. Nothing has been decided in that regard, so there is no law in that regard right now, but at -- at some point in time there very well may be.

Your Honor, we also understand that the sentencing function of judges is the most difficult job that a judge has. I can tell you that I've only met and spoken with his mother and -- and family members on that side of the family, but I can tell you that from talking to her and getting to know her a little bit and hearing her talk about some of her other children, Tavario's siblings, he wouldn't come from a background where this would be something that you would expect and it's, you know -- I mean this case is -- is a very difficult case from all aspects and we would just ask the Court to consider some kind of mercy on his behalf, understanding that your job is indeed a difficult one.

THE COURT: All right, anything further?

MR. FLOYD: Nothing further, Your Honor.

SENTENCE OF THE COURT

THE COURT: All right. Under these circumstances in reference to the murder, the sentence of the Court is that the defendant is committed to the State Department of Corrections for life.

Exhibit #2

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS

COUNTY OF Florence)
STATE VS.)
Tavario Dormell Brunson)
AKA:)
Race: B Sex: M Age: 18)
DOB: SS#:)
Address:)
City,State,Zip: Florence, SC 29501)
DL#: SID#:)
*CDL Yes☐ No☐ CMV Yes☐ No☐ Hazmat Yes☐ No☐

INDICTMENT/CASE#: 2011-GS-21-1197
A/W#: M377825
Date of Offense: 4/12/2011
S.C. Code § : 16-03-0010; 16-03-0020
CDR Code #: 0116

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: Murder / Murder 30 yrs - Life

in violation of § 16-03-0010; 16-03-0020 of the S.C. Code of Laws, bearing CDR Code # 0116
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Clements, III, E. L	SC Bar#	Defendant	Attorney for Defendant	SC Bar#
	15295			

WHEREFORE, the Defendant is commited to the ☑ **State Department of Corrections,** ☐ **County Detention Center,**
for a determinate term of life days/months/years or ☐ under the **Youthful Offender Act** not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT or ☑ CONSECUTIVE to sentence on: today
☑ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 366 days
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922,It is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship,transport,possess,or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered**
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$
§ 14-1-213 (Drug Court Surcharge)	$150	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$ 500
3% to County (if paid in installments)		$
TOTAL		$ 1050

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel, § 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk _____
Court Reporter: K. Smith

Presiding Judge _____
Judge Code: 2157
Sentence Date: 4-11-2012

SCCA/217 (03/2011)

Exhibit #3

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION

Tyrone Aiken, Matthew Clark, Eric Graham, Bradford M. Haigler, Angelo Ham, J'Corey S. Hull-Kilgore, Damian Inman, Roger Legette, Terriel Mack, Jennifer L. McSharry, Wallace Priester, Davon Reed, Dondre M. Scott, Edgar L. Thomas, James Vang, et al, *Petitioners*

v

William R. Byars, Jr., Director, South Carolina Department of Corrections, and **Alan Wilson,** Attorney General of South Carolina, *Respondents*

PETITION FOR WRIT OF CERTIORARI

INTRODUCTION AND STATEMENT OF JURISDICTION

Petitioners, Tyrone Aiken, Matthew Clark, Eric Graham, et al., pray that this Court grant this petition for a writ of certiorari filed in the Court's original jurisdiction.

In the wake of the United States Supreme Court's recent decision in *Miller v. Alabama,* ___U.S.___, 132 S.Ct. 2455 (2012), petitioners submit that it is incumbent upon this Court to grant certiorari and establish both a constitutionally appropriate remedy for the petitioners and others similarly situated[1] (i.e., a new sentencing hearing), and constitutionally adequate procedures for

[1]Based on publicly available information from the South Carolina Department of Corrections, it appears that approximately thirty-six (36) individuals, including those named herein, are presently serving sentences of life without parole imposed by South Carolina courts for crimes committed before they reached the age of eighteen.

sentencing hearings in cases where juveniles either have been sentenced to, or face a possible sentence of, life imprisonment without the possibility of parole. As will be explained in more detail later in this petition, *Miller* held that mandatory sentences of life without parole, when imposed upon juveniles, violate the Eighth Amendment to the United States Constitution. 132 S.Ct. at 2464. Additionally, while reserving the question whether juveniles may ever be sentenced to life without parole, *id.* at 2469, the High Court also created a presumption against a sentence of life without parole for juveniles and explicitly imported Eighth Amendment capital sentencing principles into cases where juveniles face the possibility of a sentence of life without parole. Just as "death is different" when imposed upon an adult offender, life imprisonment without the possibility of parole is different when imposed upon a juvenile. 132 S.Ct. at 2470 (just as "'death is different,' children are different").

Given this fundamental change in the relevant legal landscape, juveniles who have been sentenced to life imprisonment without parole in South Carolina are entitled to be resentenced in a manner consistent with *Miller*'s requirement of individualized sentencing and the "distinct set of legal rules" now applicable in juvenile homicide cases, *id.* at 2466. The circuit courts of this state are therefore in need of guidance as to how to proceed in cases where a juvenile offender faces the possibility of a life without parole sentence. Because the questions presented in these cases are not only of grave importance, but also involve issues which must be resolved in these and other cases pending at trial, on direct appeal and in post-conviction proceedings, *certiorari* is especially appropriate.

This petition is not without precedent. A decade ago, following the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that persons with mental retardation

are not eligible for capital punishment, this Court granted a similar petition filed on behalf of death row inmates who alleged they fell within the category of persons for whom the death penalty was no longer a constitutionally permissible punishment in order to address issues concerning the definition of mental retardation, and to establish procedures for cases in various procedural postures. *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). Additionally, three decades ago, this Court accepted a case in its original jurisdiction following the United States Supreme Court's ruling in *Woodson v. North Carolina*, 428 U.S. 280 (1976), in order that it might "clarify the law and assure the validity of the sentences imposed, or to be imposed," in the affected cases. *State v. Rodgers*, 270 S.C. 285, 242, S.E.2d 215, 217 (1978). After the statute under which six capital defendants had been convicted and sentenced to death was found unconstitutional, the Attorney General brought the cases before this Court and requested its guidance as to how to proceed. *Id.* This Court intervened.

In light of *Miller v. Alabama*, it is likewise necessary for this Court to grant *certiorari* in this case. Doing so will both provide these petitioners and others similarly situated with a constitutionally adequate remedy, and supply needed guidance to the judiciary, solicitors and defense counsel in pending and future cases. The public interest will also be well served if this Court promptly establishes a remedy and procedures for cases involving juveniles either sentenced to life without parole or facing the possibility of life without parole, thus avoiding the inconsistencies and potential errors inherent in an *ad hoc* approach to the issues raised by *Miller*. *See Westside Quik Shop Inc. v. Steward*, 341 S.C. 297, 300, 534 S.E.2d 270, 271 (2000) (court accepted video gaming case in original jurisdiction due to the "great public interest in finally determining the matter"); *Key v. Currie*, 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991) (citing "significant public interest" as appropriate basis for exercising original jurisdiction).

STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY

Petitioners are all juveniles[2] who have been sentenced to life without the possibility of parole following truncated sentencing proceedings which failed to comport with the Eighth Amendment procedures established in *Miller*. Brief descriptions of their circumstances are set forth below.

> **Tyrone Aiken** was a seventeen-year-old with mental retardation at the time he took part in the armed robbery and murder for which he was sentenced to life without parole. According to official school records, Aiken has a full scale IQ in the low 60s, and spent his entire school career in special education classes.
>
> **Matthew Clark** was seventeen years old at the time of the offense. He was convicted of homicide by child abuse and sentenced to life without parole in connection with the death of his twenty-two-year-old girlfriend's three-year-old daughter.
>
> **Eric Graham** was sentenced to life without parole for a murder committed when he was seventeen years old. The victim was Graham's girlfriend, and she died of a single gunshot wound; according to Graham, the gun went off accidentally while the two of them were watching a movie. There was no evidence of a fight or a disagreement presented at trial, and Graham's cousin, who was present at the shooting, corroborated Graham's account. When the police came into the house they found Graham crying and screaming on the floor. The sentencing proceeding covers seven transcript pages, and the trial judge said nothing concerning Graham's age.
>
> **Bradford Haigler** was a seventeen year old high school junior with no criminal record at the time of the homicide for which he was sentenced to life without parole. The victim, John Bovain, was a member of a group known to police as the "Edisto Boys." On the night of the homicide, Bovain picked up Haigler in his car and, while driving, threatened Haigler. When Bovain appeared to reach under his seat, Haigler, fearing for his own safety, shot him. Haigler has been a model inmate since his conviction in May 1997, and is a longtime resident of the honor dorm at Lee Correctional Institution.
>
> **Angelo Ham** was fifteen years old at the time of his offense; his two codefendants were seventeen and nineteen. Despite a psychologist's recommendation that the case remain in family court in light of his troubled childhood and IQ in the 70s, Ham was transferred to adult court, where he pled guilty. Although he was not the triggerman,

[2]For purposes of this pleading, juvenile offenders are persons that are convicted of crimes which occurred before the age of eighteen. *See Miller*, 132 S.Ct. at 2460.

was high on drugs at the time of the crime, and was well known to be easily influenced by others, Ham received the same life without parole sentence as the actual killer, who was an adult. His sentencing hearing included four pages of argument by counsel, and no testimony or other evidence was presented on his behalf.

J'Corey Hull-Kilgore was seventeen years old at the time of the shooting for which he was sentenced to life without parole. The victim died from a single gunshot wound. Hull-Kilgore's codefendants, ages twenty-two and twenty-four, each pled guilty and received suspended sentences. After turning down a favorable plea offer, Hull-Kilgore was tried twice: the first jury acquitted him of armed robbery and hung on the murder charge; the second jury convicted him of murder. The trial evidence was in conflict on numerous important facts including the identity of the shooter. The defense presentation at sentencing included two pages of argument by counsel, and no testimony or other evidence was presented on his behalf.

Damian Inman was seventeen years old and had no prior criminal record at the time he took part, along with his older brother and a friend, in the armed robbery and homicide of Mary Alice Stutts. Prior to sentencing Inman to life without parole, the trial judge remarked that he and his codefendants were "no different than those folks that flew planes into the towers in New York," and lamented Inman's failure to plead guilty "to prevent this family from having to go through this trial."

Roger Legette was fifteen years old and had no prior criminal record when he was convicted of murder and sentenced to life without parole. Legette shot a cab driver after a heated argument, and then called the police and told them what he had done. While the State offered him a sentence of no more than thirty years in exchange for a guilty plea, Legette did not learn of that offer until after he had been tried, convicted and sentenced to life without parole.

Terriel Mack was seventeen years old at the time of the homicide for which he was sentenced to life without parole. His two codefendants, Islam Horn and Gregory Johnson, pled guilty and testified against Mack. In exchange for their cooperation with prosecutors, they were each sentenced to less than two years.

Jennifer McSharry was a seventeen-year-old girl with no prior record and a drug habit cultivated by her own mother when she accompanied four people, including her mother, during an attempt to obtain money from the victim. It has never been disputed that McSharry was outside, in a car, at the time the victim was killed inside his camping trailer. After refusing a deal that would have required her to testify against her mother, McSharry was convicted of murder under an accomplice liability theory. After remarking on McSharry's apparent lack of "any Christian bringing-up," the trial court sentenced her to life without parole. The admitted triggerman was

sentenced to fifty-five years in a separate proceeding.

Wallace Priester turned fifteen years old only ten days before the crime for which he was sentenced to life in prison without parole. He had no prior criminal record before becoming involved with his eighteen-year-old codefendant. In addition to his young age and corresponding immaturity, Priester's background made him particularly vulnerable to negative influence. He lacked any kind of father figure, and spent his childhood with a mother and grandmother who abused alcohol, and in foster care made necessary by his mother's abuse and neglect. Although this information had been identified by a state psychologist and was known to Priester's trial counsel, none of it was presented to or considered by the court.

Davon Reed was sentenced to life without parole for a murder committed when he was seventeen years old. As a result of his mother's chronic addiction to crack cocaine, much of Reed's childhood was spent in a series of foster placements. At sentencing, the judge remarked that "age is really no consequence, considering the nature of offense. Society has nothing left to give Reed than to lock him up."

Dondre Scott was seventeen years old at the time of the botched armed robbery and subsequent murder of an elderly man that resulted in his sentence of life without parole. He had no prior criminal record. Scott fired one shot that struck the victim under his arm and killed him. His twenty-five-year-old co-defendant, Sylvester Davis, had an extensive criminal record and was the person who initiated the shooting. Unlike Scott, Davis pled guilty, testified for the prosecution, and was sentenced to thirty years.

Edgar Leron Thomas pled guilty but mentally ill to avoid the death penalty for a murder and armed robbery committed when he was seventeen years old. Thomas has brain damage, and has been diagnosed with multiple mental illnesses, including chronic paranoid schizophrenia.

James Vang was fifteen years old when he accompanied an older codefendant, Ae Kingratsaiphon, during a botched armed robbery of a video poker parlor. Although it was undisputed that Vang was not the triggerperson, he was convicted of murder under an accomplice liability theory. At sentencing, Vang's attorney proceeded under the mistaken impression that he faced a maximum sentence of thirty years. Although a wealth of mitigating evidence was available, none was presented, and the trial court sentenced Vang to life without parole.

REASONS THE WRIT SHOULD BE GRANTED

THE UNITED STATES SUPREME COURT'S RECENT DECISION IN *MILLER V. ALABAMA* CALLS INTO QUESTION THE LEGITIMACY OF A LIFE WITHOUT PAROLE SENTENCE FOR ANY CRIME COMMITTED BY A JUVENILE, MANDATES THAT ALL JUVENILES WHO HAVE SENTENCED TO LIFE WITHOUT PAROLE BE RESENTENCED, AND REQUIRES THIS COURT TO ESTABLISH CONSTITUTIONALLY ADEQUATE PROCEDURES FOR SENTENCING JUVENILE OFFENDERS.

I. Overview of the Supreme Court's decisions involving juvenile offenders.

Over the last decade, the Supreme Court of the United States has dramatically altered the legal framework governing criminal sentences which can be imposed upon juvenile offenders. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court held that the Eighth Amendment's ban on cruel and unusual punishment barred states from sentencing juveniles to death. Then, in *Graham v. Florida*, 560 U.S.___, 130 S.Ct. 2011 (2009), the Court went a step further holding that a sentence of life without parole imposed upon a juvenile for a non-homicide offense was cruel and unusual punishment barred by the Constitution. Several months ago, the Court issued its opinion in *Miller v. Alabama*, *supra*, and while it explicitly reserved the question whether the Eighth Amendment permits juveniles to be sentenced to life without parole under any circumstances, the Court held that even in homicide cases there can be no mandatory sentence of life without parole for juvenile offenders. *Miller*, 132 S.Ct. at 2464. All three cases were grounded in one core constitutional fact: "children are constitutionally different from adults for purpose of sentencing." *Id.*

A closer examination of the Court's reasoning in *Miller* is of particular importance to the issues raised in this petition. The Court first observed that the question presented implicated "two strands of precedent reflecting our concern with proportionate punishment." *Miller*, 132 S.Ct. at 2463. The first set of cases are those adopting "categorical bans on sentencing practices based on

mismatches between the culpability of a class of offenders and the severity of the penalty." *Id.* As examples, the Court referred to *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (holding that the death penalty is disproportionate for nonhomicide crimes committed by adults), and *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the death penalty may not be imposed upon persons with mental retardation). *Id.* After reaffirming that *Graham, supra*, "likened life without parole for juveniles to the death penalty itself," *id.* at 2463, the Court turned to the second strand of relevant cases: those holding that mandatory impositions of capital punishment violate the Eighth Amendment. *Id.* at 2463-64 (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976) and *Lockett v. Ohio*, 438 U.S. 586 (1978)). The Court then concluded that "the confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." *Id.* at 2464.

The Court further explained that all of its recent holdings regarding juveniles hinged on the now established constitutional maxim that juveniles have both "diminished culpability and greater prospects for reform" and are thus "'less deserving of the most severe punishments.'" *Miller*, 132 S.Ct. at 2464 (quoting *Graham*, 130 S.Ct. at 2026). The lessened culpability and possibility of rehabilitation are grounded in three significant differences between juveniles and adults:

- Children are less mature and developed than adults leading to "'recklessness, impulsivity, and needless risk-taking,'" *id.* (quoting *Roper*, 534 U.S. at 569);
- Children are more "'vulnerable ... to negative influences and outside pressures,'" have "'limited control over their own environment and "'lack the ability to extricate themselves from horrific, crime-producing settings;'" *id.*; and,
- A child's character is not as "'well formed' as an adult's, his traits are "'less fixed,'" and thus his actions are "less likely to be 'evidence of irretrievable deprav[ity],'" *id.*

These differences, *Miller* noted, result in part from a consistently growing body of social science and neuroscience research conclusively establishing: a) that only a small percentage of adolescents who commit crimes, even serious crimes, "'develop entrenched patterns of problem behavior,'" *Miller*, 132 S.Ct. at 2464 (quoting *Roper*, 543 U.S. at 570), and, b) there are fundamental differences between the brains of juveniles and adults in areas "'involved in behavior control,'" *id.* at 2464-65 (quoting *Graham*, 130 S.Ct. at 2026). Because the brains of juveniles are not "fully mature in regions and systems related to higher executive functions such as impulse control, planning and risk avoidance," *id.* at 2464 n. 5 (quoting Brief of the American Psychological Association et al), juveniles have a constitutionally different level of moral blameworthiness and, for that reason, the penological justifications for any criminal punishment – deterrence and retribution – are inconsistent with life without parole sentences. The same characteristics that make this category of offenders less culpable necessarily mean that "'an irrevocable judgment about a [juvenile] offender's value and place in society,' [is] at odds with a child's capacity for change." *Id.*

For these reasons, the Court concluded that a sentence of life without parole, when imposed on a teenager as compared to an adult is the same "in name only." *Miller*, 132 S.Ct. at 2466. From a constitutional perspective, it is akin to the death penalty. *Id.* ("[W]e viewed this ultimate penalty for juveniles as akin to the death penalty, we treated it similarly to that most severe punishment."). Thus, the Court held that the same constitutional protections afforded adults in capital cases must be provided in any case where a juvenile faces a possible sentence of life without parole. *Id.* at 2468 ("a similar rule [to capital cases] should apply when a juvenile confronts a sentence of life (and death) in prison"). The Eighth Amendment, in fact, demands "individualized sentencing ... analogous to [that required in] capital punishment [cases].'" *Id.* It was both the fact that the

sentences were mandatory as well as the absence of a process for allowing a juvenile to present the full range of mitigating evidence at a meaningful sentencing hearing similar to the penalty phase of a capital trial which rendered the life without parole sentences imposed upon the petitioners constitutionally infirm. *Id.*[3]

Because the Court was confronted only with cases involving mandatory sentences of life without parole, it did not reach the question whether "the Eighth Amendment requires a categorical bar on life without parole for juveniles ...." 132 S.Ct. at 2469. However, the Court established a presumption against such sentences:

> [G]iven all that we have said in *Roper*, *Graham* and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. This is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age 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 573; *Graham*, 560 U.S. , at ___ (slip op. at 17). Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

Id.

[3]*Miller*'s impact on non-mandatory sentences imposed in the absence of informed and individualized sentencing is illustrated by the Supreme Court's recent order summarily vacating the Wyoming Supreme Court's decision in *Bear Cloud v. State*, 275 P.3d 377 (2012). *Bear Cloud v. Wyoming*, ___S.Ct.___, 2012 WL 2002444 (Oct. 1, 2012). As the state court observed, "Bear Cloud did *not* receive a 'life without parole' sentence," *Bear Cloud*, 275 P.3d at 387 n.3, and "[r]ehabilitation and even release are still possible," *id.* at 412. Despite these features, the Supreme Court remanded the case for further consideration in light of *Miller*.

II. Issues to be resolved.

Given both the Supreme Court's explicit holdings and the reasoning it employed in *Miller*, *Graham* and *Roper*, states like South Carolina must now resolve a number of important constitutional issues. Petitioners will address several of the more pressing issues raised by *Miller* below

A. Whether the Eighth Amendment precludes life imprisonment without the possibility of parole for juvenile offenders?

As will be set forth in detail below, given both the Supreme Court's clear foreshadowing of an absolute categorical prohibition against life without parole sentences for juvenile offenders, and the characteristics shared by all juvenile offenders, regardless of the offense they have been convicted of committing, this Court should declare such sentences unconstitutional.

Miller reaffirmed what the Court had established in *Graham* and *Roper*: "Children are constitutionally different from adults for the purposes of sentencing." *Miller*, 132 S.Ct. at 2464. This immutable constitutional fact led the Court in *Roper* and *Graham* to declare that juveniles may not be sentenced to death regardless of the circumstances of the crime, and to similarly ban life without parole for non-homicide offenses, regardless of the underlying facts of the case. In *Miller*, the Court simply took the next logical step and held that the Eighth Amendment also bars mandatory life without parole sentences for homicides committed by juveniles.

Because the defendants in *Miller* were sentenced pursuant to mandatory schemes, the Court was not required to address the remaining issue: whether the Eighth Amendment bars juveniles from being sentenced to life without parole under any circumstances. Nevertheless, the constitutional reasoning that drove the decisions in *Roper*, *Graham* and *Miller*, leads inexorably to the conclusion that any life without parole sentence imposed on a juvenile offender is cruel and unusual punishment

proscribed by the Eighth Amendment. There can be no genuine doubt that the Supreme Court will eventually so hold. Thus, rather than wait for the High Court to act, this Court should now hold that life without parole sentences are barred for juvenile offenders by the Eighth Amendment of the United States Constitution and Article I §5 of the South Carolina Constitution.

South Carolina would not be the first jurisdiction to make life without parole unavailable for juveniles. In *Graham*, the Supreme Court spoke of national consensus[4] and noted that six jurisdictions[5] did not allow life without parole sentences for any juvenile offenders. As of 2011, twelve jurisdictions in the United States prohibited sentencing juveniles to life without parole,[6] and other states are currently in the process of eliminating life without parole as a sentencing option.[7] At the international level, universal human rights principles, including the American Declaration of the Rights and Duties of Man,[8] preclude the imposition of life without parole sentences for children on

[4]The Court has repeatedly stated that, "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Graham*, 130 S.Ct. at 2023, *Atkins*, 536 U.S. at 312.

[5]The Court referred to Alaska, Colorado, Montana, Kansas, Kentucky, and Texas. *Graham*, 130 S.Ct. at Appendix III.

[6]These states are: Alaska, Colorado, Kansas, Kentucky, Maine, Montana, New Mexico, New York, Oregon, Texas, West Virginia, and the District of Columbia.

[7]These states include: Arkansas, Florida, Illinois, Iowa, Louisiana, Massachusetts, Michigan, Nebraska, and Washington. *See Graham*, 130 S.Ct. at 2024; *see also* Amnesty International and Human Rights Watch Report, *The Rest of Their Lives: Life Without Parole for Child Offenders in the U.S.*, October 2005.

[8]The International Covenant on Civil and Political Rights, to which the United States is a party, prohibits a life without parole as a sentencing option in cases involving juveniles, International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171, Articles 7,14, 24. Such sentences also constitute a violation of numerous human rights treaties. *See* American Declaration of the Rights and Duties of Man, Article VII; American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S. 143, Article 19; Convention

the basis that the unique characteristics of youth mandate a second opportunity for review.[9] In *Graham*, the Court recognized that the U.N. Convention on the Rights of the Child,[10] ratified by every country except Somalia and the United States, is evidence of international opinion. It explicitly prohibits life without parole sentences on juvenile offender cases. *Graham*, 130 S.Ct. at 2033.[11]

In addition to the unmistakable trend toward rejection of life without parole sentences for juveniles, *Miller* relied heavily upon the fact that a child's character is not yet fully formed; his traits are "more transitory and less fixed" and his actions less likely to be "evidence of irretrievable depravity." *Miller*, 132 S.Ct. at 2464; *see also Roper*, 534 U.S. at 570. The Court also noted that children "have limited control over their own environment," lack maturity and responsibility, and are thus inclined toward "recklessness, impulsivity and needless risk-taking." *Id.* Elaborating on the

Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc No. 95-20 (1922), 1465 U.N.T.S. 85.

Barbara Hernandez, a sixteen year old girl, together with thirty-one other Michigan residents serving life without parole sentences for crimes committed as children, have filed actions to the Inter-American Commission on Human Rights. Their petition alleges that the U.S. and the State of Michigan are violating the American Declaration of the Rights and Duties of Man and universal human rights principles by sentencing them to a life sentence without the possibility of parole. See American Civil Liberties Union (http://www.aclu.org), Source URL: http://www.aclu.org/blog/criminal-law-reform-human-rights/seeking-second-chance-children-sentenced-life-without-parole.

[9]*See T. v. United Kingdom*, 170 Eur.Ct. H. R. ¶ 121 (1999) (holding that a sentence of detention is illegal under international law where no parole eligibility date is set, and relying upon many of the same reasons contemplated in United States' domestic case law concerning the need for a second chance of review in these cases).

[10]Convention on the Rights of a Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

[11]*See Graham*, 132 S.Ct. at 2034 (quoting *Roper*, 543 U.S. at 577) (observing that "'the United States now stands alone in a world that has turned its face against'" life without parole sentences for juvenile non-homicide offenders); *see also id.* at 2036 (Stevens, J., concurring) (reaffirming the Court's reliance on international law for at least a century when interpreting the Eighth Amendment's "'evolving standards of decency'").

cruelty of imposing a life without parole sentence on a juvenile, the Court noted "the great difficulty ... of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. ... We believe that incorrigibility is inconsistent with youth." *Miller*, 132 S.Ct. at 2469 (quoting *Roper*, 543 U.S. at 573); *see also Graham*, 130 S.Ct. at 2026-27; *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. Ct. App. 1968).

Significantly, "[n]othing the Court said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific." *Miller*, 132 S.Ct. at 2465. Those characteristics are "evident in the same way, and to the same degree" in juveniles who commit homicide as they are in those who commit armed robbery, kidnaping or any other offense. *Id.* at 2465. In short, the constitutional difference between juvenile and adult offenders does not turn in any respect on the nature of the crime, and any purported distinction on that basis finds no support in the Court's recent decisions.

Finally, the Court also relied upon the difficulty of distinguishing between the "unfortunate" and the truly culpable offender: "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. The characteristics of juveniles make that judgment questionable." *Graham*, 130 S.Ct. at 2030. Indeed, it is difficult, if not impossible, for even highly trained child psychologists and psychiatrists to differentiate juvenile offenders whose crimes are the product of permanent fixed character traits from those whose crimes are the result of circumstances and the transient qualities of

youth.[12] *Miller*, 132 S.Ct. at 2469 (citing *Roper*, 543 U.S. at 573, and *Graham*, 130 S.Ct. at 2026-27). It is equally impossible for a judge or a jury to make such a determination. The potential for reform that is present in all juvenile offenders thus requires States to maintain the possibility of eventual release as a sentencing option. It would be constitutionally excessive to render a final, permanent judgment that a juvenile offender should never be released; a mechanism for future review must be available, because States cannot ignore the juvenile's "potential to attain a mature understanding of his own humanity." *Roper*, 543 U.S. at 573.

Given the direction of the Supreme Court's juvenile sentencing decisions, the legal principles governing the sentencing of juvenile offenders, and the heightened capacity for change in all juvenile offenders, this Court should take the sensible – and likely inevitable – step of adopting a categorical ban against the imposition of life-without-parole sentences for juvenile offenders.

B. Whether all juveniles sentenced to life imprisonment without the possibility of parole are entitled to a new sentencing proceeding?

Even if this Court is not prepared at this point to declare any life without parole sentence imposed upon a juvenile offender to be cruel and unusual punishment under the United States and/or South Carolina Constitutions, the petitioners in this case and others similarly situated are still entitled to be resentenced because the procedures which produced their sentences did not comply with *Miller*'s mandates. The State may argue that *Miller* is of no avail to some of the South Carolina juveniles sentenced to life without parole because the sentences they received were not mandatory,

[12] *See Miller*, 132 S.Ct. at 2464 (referencing American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 701–706 (4th ed. text rev.2000); Steinberg & Scott 1015).

i.e., the judge had the power to impose a lesser sentence.[13] Such an argument would be technically true but legally irrelevant.

As this Court is aware, and as a review of the record of the sentencing proceedings in the petitioners' cases establishes, sentencing hearings in South Carolina are very brief and informal. Pre-sentence reports are not utilized and witnesses are rarely, if ever, called to testify. The sentencings ordinarily take place immediately after the verdict is rendered and generally consist of: a) the prosecution advising the trial judge of the defendant's prior record and – in some cases – asking the court to impose the maximum sentence; b) defense counsel making a brief argument regarding any mitigating circumstances (e.g., youth, substance abuse, family circumstances) and suggesting reasons why the judge should consider a lesser sentence; and, c) the defendant (and in some cases one or more family members) telling the court why the maximum punishment is not deserved. The judge then immediately imposes sentence. A typical sentencing hearing in South Carolina takes no more than a few minutes. The sentencing hearings at issue in the petitioners' cases mirror the norm. On average, the proceedings span just a few pages of the trial record, and involve no evidentiary presentations (e.g., mental health experts, social workers, teachers, character witnesses, etc.). Given

[13]The State may also argue that *Miller* created a new rule which does not apply to life without parole sentences imposed before the Supreme Court's decision, or more specifically, to cases which were "final on direct review" before the Court's decision. *See Teague v. Lane*, 489 U.S. 289 (1989) (holding that new rules of criminal procedure do not apply retroactively to cases final on direct review unless they fall within one of two exceptions). Such an argument, if made, cannot withstand even minimal scrutiny. First, the Supreme Court's other decisions finding punishments imposed upon juveniles to violate the Eighth Amendment, e.g., *Roper* and *Graham*, have universally been recognized to apply retroactively by the state and federal courts because they established limitations on the state's power to impose a particular punishment upon a particular category of offenders. Second, *Miller* itself came to the Supreme Court in a post-conviction setting. Thus, if the Supreme Court did not intend for the principles it announced in *Miller* to apply retroactively, it would not have had the power to declare the life without parole sentences imposed upon the petitioners to violate the Constitution.

the summary nature of the sentencing proceedings that produced the life without parole sentences at issue, resentencing is required in each petitioner's case, and in the cases of all others similarly situated, for two reasons.

First, even assuming that life without parole is still a permissible punishment for some juvenile offenders, *Miller* undeniably created a strong constitutional presumption against it because "children are different" for sentencing purposes. 132 S. Ct. at 2469. Because of their "diminished culpability and heightened capacity for change," the Court made clear that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* The constitutional presumption in favor of providing an opportunity for release at some point in time, flows naturally from the "great difficulty ... of distinguishing ... between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* Given this significant change in the legal framework governing sentencing hearings where life without the possibility of parole is a sentencing option for a juvenile offender, the petitioners are entitled to be resentenced by a judge who is aware of and applies the constitutional presumption against such sentences. That was not the case in any sentencing hearing that resulted in a juvenile being sentenced to life without parole in South Carolina prior to *Miller*.

Second, *Miller* made clear that the kind of individualized sentencing which occurs in capital cases involving adult offenders, and its attendant procedures, are constitutionally required in sentencing proceedings involving juveniles who face life without parole. *Id.* at 2468 ("In meting out the death penalty, [a lack of individualization] would be strictly forbidden. And once again, *Graham* indicates that a similar rule [to capital cases] should apply when a juvenile confronts a sentence of life (and death) in prison."). There can be no serious contention that the sentencing hearings at issue

in these cases provided the type of individualized consideration – with regard to the fundamental differences between all children and adults, the characteristics of the particular defendants, or both – contemplated by the Supreme Court of the United States.

For these reasons, new sentencing hearings are required in all cases where juveniles were sentenced to life without parole before the Supreme Court's decision in *Miller*. The Attorney General may argue that whether resentencing is required should be decided on a case by case basis in the post-conviction context. Such a proposal, if made, should be rejected. As set forth above, given the divergence between pre-*Miller* sentencing practices in South Carolina and the post-*Miller* legal regime now in place for juvenile sentencing proceedings where life without parole is a potential punishment, it is apparent that the deviation from constitutionally required norms was ubiquitous. Requiring petitioners to run the post-conviction gauntlet before receiving the new sentencing hearing to which they are all clearly entitled would do nothing but waste time and scarce judicial, prosecutorial, and defense resources.

C. What procedures are required where life imprisonment without the possibility of parole is a sentencing option?

Should this Court conclude, contrary to petitioner's argument in II.A., *supra*, that juveniles may, in some "uncommon" circumstances, be sentenced to life without parole, *see Miller*, 132 S.Ct. 2469 (reserving question of whether life without parole is ever a permissible sentence for a juvenile), it must establish the procedures under which such uncommon circumstances are to be identified. *Miller* is clear that "similar rules [to capital cases] must apply when a juvenile confronts a sentence of life (and death in prison"). *Id.* at 2468.

1. The sentencing proceeding.

First, because life without parole sentences for juveniles are rarely appropriate, and presumptively disproportionate under the Eighth Amendment, it is necessary to narrow the category of juvenile homicides that are eligible for such sentences. To avoid arbitrariness and caprice, the Eighth Amendment requires a sentencing scheme for the most severe penalty to "genuinely narrow the class of persons eligible for [the most severe punishment] and [to] reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)).[14] This Court can either import the aggravating factors that the legislature has determined distinguish death-eligible homicides by adults from ordinary homicides, or hold that no juvenile can be sentenced to life without parole in South Carolina until the legislature passes a statute enumerating the aggravating factors appropriate to distinguish the few juvenile murderers eligible for life without parole from the many not eligible. Moreover, the State also must show that the homicide itself is one that is eligible for the most severe penalty, either because the defendant himself killed, or because his "participation [wa]s major and [his] mental state was one of reckless indifference to the value of human life." *Tison v. Arizona*, 481 U.S. 137, 152 (1987).

Additionally, because "juvenile life sentences [are] analogous to capital punishment" for adults, *Graham* at 2038-39 (Roberts, C.J., concurring in judgment), the Eighth Amendment also

[14] *See also* West's Ann. Cal. Penal Code § 190.5 (permitting the impositions of a life sentence upon a juvenile upon jury determination of an aggravating circumstance); West's Ann. Ind. Code § 35-50-2-9 (requiring proof beyond a reasonable doubt of at least one aggravating circumstance before imposition of a sentence of life without parole); *State v. Pierre*, 584 A.2d 618, 620 (Me. 1990) (life sentence permissible only in the presence of enumerated aggravating circumstances); West's Gen. Laws R.I. Ann. § 12-19.2-4 (requiring at least one enumerated aggravating circumstance before the imposition of a sentence of life without parole).

demands "individualized sentencing," *Miller*, 132 S.Ct. at 2468. Thus, a juvenile eligible for a sentence of life without parole, like an adult facing capital charges, must be given the opportunity to show "the the diverse frailties of humankind." *Woodson*, 428 U.S. at 304. When an adult faces a capital sentence, the "sentencer ... may not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a [lesser] sentence ...." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). So too, when a juvenile faces a life without parole sentence,

> *Miller* indicates, at the very least, one must consider a juvenile's age at the offense, his diminished culpability and heightened capacity for change, the circumstances of the crime, the extent of his participation in the crime, his family, home, and neighborhood environment, his emotional maturity and development, the extent that familial and/or peer pressure may have affected him, his past exposure to violence, his drug and alcohol history, his ability to deal with the police, ... his mental health history, and his potential for rehabilitation.

Com. v. Knox, 50 A.3d 749, 768 (Pa. Super. 2012); *see also Conley v. State*, 2012 WL 3570390 (Ind.) (Before court imposes a sentence of life without parole, it must find that the State has proven the existence of an alleged aggravator beyond a reasonable doubt and must find that "any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances"); *State v. Lockheart*, 820 N.W.2d 769, 2012 WL 2814378, at *4 (Iowa App. July 11, 2012) (quoting *Miller*, 132 S.Ct. at 2475) (vacating mandatory life without parole sentence for juvenile and remanding "for individualized resentencing in accordance with the process articulated in *Miller*, whereby the sentencing court shall 'have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.'"); *Pierre*, 584 A.2d at 620 ("[E]ven when the presence of aggravating circumstances permit the imposition of a life sentence, the court must consider

whether mitigating factors require a lesser sentence"); Nev. Rev. Stat. 175.552 ("During the [sentencing] hearing [after conviction of murder], evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to the sentence, whether or not the evidence is ordinarily admissible."); 21 Okl. St. Ann § 701.10 (upon conviction of first degree murder, defendant may present mitigation evidence to determine whether he should be sentenced to life or life without parole); West's Gen. Laws R.I. Ann.§ 12-19.2-4 (sentencer is required to "consider evidence regarding the nature and circumstances of the offense and the personal history, character, record, and propensities of the defendant" prior to imposing a sentence of life without parole). At least one of those frailties – mental retardation – would doubly diminish a juvenile defendant's culpability, and render him categorically ineligible for a sentence of life without parole, just as it renders an adult ineligible for the death penalty. *Atkins v. Virginia*, 536 U.S. 304 (2002).

2. Preparation for the sentencing hearing.

Because the efforts associated with investigating, preparing and presenting evidence at a sentencing hearing for a juvenile facing life without parole are similar to those necessary for a capital case involving an adult defendant, this Court should require timely notice of the solicitor's intention to seek such a sentence. *See* S.C. Code Ann. § 16-3-26A (requiring notice of intent to seek death at least 30 days prior to the start of trial); *see also* MD Code Ann., Criminal Law, § 2-203 (requiring 30 day notice of intent to seek sentence of life without parole prior to start of trial). For the same reason, this Court should also require the appointment of two appropriately qualified attorneys to assist juvenile defendants in all cases for which life without parole is a possible sentence. *See* S.C. Code Ann. § 16-3-26 B(1) (requiring appointment of two attorneys, and specifying their

qualifications). Additionally, the ordinary caps on funding that apply to noncapital cases should not be applicable in these cases. Rather, the separate provisions for the appointment and compensation of counsel and for the investigative and expert services applicable in capital cases should be imported into juvenile proceedings where a life without parole sentence is or might be sought. *See* S.C. Code Ann. § 16-3-26 B(2)-H (describing procedures for and caps upon obtaining funding for counsel and for expert and investigative services in capital cases).

3. Selection of the sentencer.

With respect to an adult defendant's eligibility for a death sentence, it is clear that the Sixth and Eighth Amendments require a jury determination. *Ring v. Arizona*, 536 U.S. 584 (2002). It follows that to remain consistent with the Supreme Court's mandate that "similar rules [to capital cases] should apply when a juvenile confronts a sentence of life (and death) in prison," *Miller*, 132 S.Ct. at 2468, a juvenile's eligibility for a sentence of life without parole must also be determined by a jury. Although selection of life without parole could constitutionally be performed by a judge, South Carolina law already reflects a legislative preference for jury determination of both eligibility and selection in capital cases. *See* S.C. Code Ann. § 16-3-20. It is thus likely that the legislature would choose to vest juries with responsibility for both the eligibility and selection decisions in juvenile life without parole cases as well. In any event, until the legislature acts, it is up to this Court to determine whether to assign both determinations to juries, or to divide them in a manner consistent with *Ring*.

4. Appellate review of juvenile sentences of life without parole.

This Court should automatically review all juvenile life without parole sentences for

proportionality just as it does with adult death sentences. *See* S.C. Code Ann. § 16-3-25(C)(3) (2003) (providing that Supreme Court shall determine whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant"); *see also State v. Brown*, 898 A.2d 69, 86 (R.I. 2006) ("In reviewing a sentence of life imprisonment without parole, it is incumbent upon [the Supreme] Court to exercise independent judgment and discretion in deciding the appropriateness of the sentence."). Some of the cases joined in this petition, either because of the facts of the petitioner's participation in the crime, or because of facts already known about the petitioner, seem obviously disproportionate. Full investigation and presentation of mitigating evidence will likely reveal proportionality concerns in additional cases.

Finally, an overwhelming proportion of juvenile recipients of life without parole sentences are members of racial minorities.[15] This Court should therefore review all cases in which such a sentence is imposed on a juvenile to guard against – and to deter – the expression of racial bias. *See* S.C. Code Ann. § 16-3-25C (2) (requiring Supreme Court to determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor ....").

[15]There are currently 36 individuals serving life without parole sentences in South Carolina for crimes committed as juveniles. Minorities comprise a disproportionate share of this population: whereas 25% (a total of 9) of the juvenile LWOP population is white, 75% (a total of 27) belong to a racial or ethnic minority group. Such racial disparity is even more pronounced amongst African Americans, who compromise 66% (a total of 24) of South Carolina's juvenile LWOP population. It is important to note that the racial disparities found at the state level in South Carolina are a reflection of the racial disparities found at the national level. For example, in 2009, African Americans compromised 56.1% of the nation's juvenile LWOP population, and more than 60% of the juvenile LWOP population in 17 states. *See* Ashley Nellis & Ryan S. King, *The Sentencing Project, No Exit: The Expanding Use of Life Sentences in America* 23 (2009). These numbers, though striking, are not surprising when one considers the fact that African American youth are more likely to become involved in the juvenile justice system than white youth, and that their overrepresentation in the system increases at each stage of the process – from arrest to disposition. *See* National Council on Crime and Delinquency, *And Justice for Some: Differential Treatment of Youth of Color in the Justice System* 4 (2007).

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to consider and resolve the important constitutional questions presented in this petition.

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By:

October 29, 2012.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION

Tyrone Aiken, Matthew Clark, Eric Graham, Bradford M. Haigler, Angelo Ham, J'Corey S. Hull-Kilgore, Damian Inman, Roger Legette, Terriel Mack, Jennifer L. McSharry, Wallace Priester, Davon Reed, Dondre M. Scott, Edgar L. Thomas, James Vang, et al, *Petitioners*

v

William R. Byars, Jr., Director, South Carolina Department of Corrections, and **Alan Wilson,** Attorney General of South Carolina, *Respondents.*

CERTIFICATE OF SERVICE

I, Jill Rider, hereby certify that the Petition for Writ of Certiorari has been served upon counsel for the respondents by placing one (1) copy of same in the United States Mail, first class postage pre-paid, and addressed as follows:

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This the 29th day of October, 2012 in Columbia, South Carolina.

Jill A. Rider

JILL RIDER