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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Robert Hood, Circuit Court Judge

Appellate Case No. 2020-000188

ANTHONY A. JONES, II.....Petitioner,

v.

STATE OF SOUTH CAROLINA.....Respondent.

BRIEF OF AMICI CURIAE ROOT & REBOUND, JUVENILE DEFENDER ADVOCATE, DR. KATE KLEINFELTER, JUSTICE 360, AND CORNELL LAW SCHOOL JUVENILE JUSTICE CLINIC IN SUPPORT OF PETITIONER ANTHONY A. JONES, II

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STATEMENT OF INTEREST OF AMICI CURIAE

Root & Rebound ("R&R") is a statewide legal aid organization and criminal system reform advocate that provides direct services to incarcerated people and people with criminal records. R&R's mission is to restore power and resources to the families and communities most harmed by mass incarceration through legal advocacy, public education, policy reform and litigation—a model rooted in the needs and expertise of people who are directly impacted. R&R regularly represents and advises individuals facing collateral consequences arising from adult convictions, including individuals who were tried as adults for offenses allegedly committed when they were children. As such, R&R has developed a particular concern for juvenile justice practices in South Carolina that result in lengthy, de facto life sentences for too many of our incarcerated clients.

Dr. Kate Kleinfelter is a Licensed Clinical Psychologist who has been working with South Carolina's youth and families for over 30 years. She obtained her Bachelor's Degree in psychology at Clemson University, and received her Ph.D. in clinical-community psychology at The University of South Carolina. She has co-authored journal articles involving legal decision-making and has presented on various clinical and psycholegal topics at annual conferences. Dr. Kleinfelter currently is in private practice, with a primary focus on evidence-based forensic consultation and evaluation for juvenile attorneys. Prior to this position, she was a psychologist at the South Carolina Department of Juvenile Justice (DJJ), where among other duties she conducted transfer evaluations and helped spearhead a workgroup to incorporate best practices into the transfer evaluation process.

This brief is also submitted on behalf of Dr. Aleksandra Chauhan, the Juvenile Defender Advocate. Working at the South Carolina Commission on Indigent Defense, the Juvenile Defender Advocate provides resources and training to all juvenile defenders in the state. The Juvenile

Defender Advocate's main goals are to mitigate the risk of juvenile re-offending and ultimately to enhance public safety by developing and implementing strategies to enhance juvenile representation in South Carolina; to ensure that youth involved with the juvenile justice system have fair and equal access to high-quality legal representation; and to ensure that children involved with the juvenile justice system have access to resources that address the collateral consequences of justice system involvement. The Juvenile Defender Advocate is an expert in children's rights, has years of experience of children's representation in South Carolina, and is a national and international speaker and trainer on issues related to trauma, school-to-prison pipeline, reentry, racial and ethnic disparities, and waiver hearings. She has an interest in all children being treated fairly and without any discrimination.

Justice 360 is a nonprofit organization based in Columbia, South Carolina, whose mission is to promote fair and just process for people accused of serious offenses. As part of that mission, Justice 360 attorneys represent juvenile clients in criminal proceedings in South Carolina and have been involved in litigation and criminal justice reform efforts on behalf of juvenile clients since the Supreme Court of the United States's decision in *Miller v. Alabama*.

The Cornell Juvenile Justice Project is an outgrowth of the Cornell Death Penalty Project, which is a program housed at Cornell Law School in Ithaca, New York. Over the last twenty years, the Death Penalty and Juvenile Justice Projects have been actively involved in academic research, legislative reform efforts, and individual case representation in South Carolina and other jurisdictions. Justice 360 and the Cornell Juvenile Justice Project have a strong interest in promoting a legal system in South Carolina that takes account of academic and scientific research regarding juvenile development and protects the interests of juvenile offenders in the State.

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ISSUE PRESENTED

1. Whether the automatic waiver provision of section 63-19-20 of the South Carolina Code (2010) is unconstitutional.

INTRODUCTION AND SUMMARY OF ARGUMENT

From 2010 to 2018, section 63-19-20 of the South Carolina Code (2010) provided that children aged sixteen years or older, charged with certain enumerated offenses, were automatically waived from Family Court to the Court of General Sessions (hereinafter "General Sessions") and therefore treated as adults. For these children, a *charging determination*, made by law enforcement, dictated the severity of punishment they faced and precluded them from accessing Family Court treatments and diversion programs. South Carolina is one of a shrinking number of states that still has such an automatic waiver statute on the books,[1] and such an outdated understanding of "x plus y equals adult" cannot withstand Eighth Amendment scrutiny under more recent case law.

Children fall within the jurisdiction of Family Court unless they are waived into General Sessions under one of a myriad of waiver statutes, all but one of which require a petition and the possibility of a hearing. If a child is seventeen years of age or older and charged with an offense which, if committed by an adult, would be one of the following offenses, then a Family Court may, in its discretion, waive the child's case to General Sessions:

- A misdemeanor. S.C. CODE ANN. § 63-19-1210 (4).
- A Class E or F felony as defined in section 16-1-20. S.C. CODE ANN. § 63-19-1210 (4).
- A felony which provides for a maximum term of imprisonment of ten years or less. S.C. CODE ANN. § 63-19-1210 (4).

[1] *See* Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NAT'L CONF. STATE LEGISLATURES (Apr. 8, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx (providing information on states' trend away from automatic waiver statutes).

If a child is fourteen, fifteen, or sixteen years of age and charged with an offense which, if committed by an adult, would be one of the following offenses, then Family Court may waive the child's case to General Sessions:

- A Class A, B, C, or D felony as defined in section 63-1-20 of the South Carolina. Code. S.C. CODE ANN. § 63-19-1210 (5).
- A felony which provides for a maximum sentence of fifteen years or more imprisonment. S.C. CODE ANN. § 63-19-1210 (5).
- An offense that provides for a sentence of ten years or more imprisonment, when the child has previously been adjudicated delinquent in Family Court or convicted in General Sessions for two prior offenses which, if committed by an adult, provide for a term of imprisonment of ten years or more. S.C. CODE ANN. § 63-19-1210 (10).[2]

A child of any age charged with murder or criminal sexual conduct may be transferred from Family Court to General Sessions at the Family Court's discretion, upon timely written request. S.C. CODE ANN. § 63-19-1210 (6). If the child is fourteen years of age or older and charged with one of the following offenses, then Family Court may also transfer the child's case to General Sessions:

- Unlawfully carrying a weapon on school property under section 16-23-430 of the South Carolina Code. S.C. CODE ANN. § 63-19-1210 (9).
- Unlawfully carrying a handgun in a vehicle under section 16-23-20 of the South Carolina Code. S.C. CODE ANN. § 63-19-1210 (9).
- Unlawfully distributing a controlled substance within proximity of school under section 33-53-445 of the South Carolina Code. S.C. CODE ANN. § 63-19-1210 (9).

Each of these waiver provisions has something in common: the Family Court has discretion to keep the child in Family Court, thereby treating them as a child.[3]

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[2] According to section 63-19-1210 (10), an adjudication or conviction is considered a second adjudication or conviction for the purposes of transferring the case from Family Court to General Sessions if the date of the commission of the second offense was subsequent to the imposition of the sentence for the first offense.

[3] To be sure, the procedures used in waiver hearings in South Carolina have not kept up with the developing case law and understanding of child psychology, and Family Courts still use the out-dated factors from *Kent v. United States*. *See Kent v. United States*, 383 U.S. 541, 566-68 (1966) (stating the eight so-called *Kent* factors). The South Carolina Joint Citizens and Legislative Committee on Children recently proposed different waiver factors that would focus on issues relevant to child development, rather than "the nature of the offense committed, the child's record, and judicial economy." THE JOINT CITIZENS AND LEGISLATIVE COMMITTEE ON CHILDREN, COMMITTEE ON CHILDREN 2022

Viewed in this context, the automatic waiver provision of section 63-19-20 of the South Carolina Code is an outlier that precludes consideration of a child's youthfulness from the very outset of the case. Depending on the conduct alleged, but not even close to proven, a child's case may not commence in Family Court but will rather start in General Sessions. *See State v. Graham*, 532 S.E.2d 262, 263 (2000) (describing when sixteen-year-olds "can be charged in circuit court without first bringing the charges in family court and obtaining transfers.*")*. Under current state law, a child seventeen years of age who is charged with a Class A, B, C, or D felony, as per section 16-1-20 of the South Carolina Code, or a felony which provides for a maximum term of imprisonment of fifteen years or more, may be remanded to the Family Court. S.C. CODE ANN. § 63-19-20 (1).[4] But previously, a child need only have been sixteen years of age to be automatically waived. For example, in the instant case, Mr. Jones was charged with burglary in the first degree, which carried a prison sentence of fifteen years to life, and armed robbery, which carried a prison sentence of ten to thirty years. R. p. 8, line 18-p. 9, line 5. Based on these charges and his age, Mr. Jones's case began in General Sessions. *See* R. p. 22, lines 2-15. Therefore, from the beginning to the end of the criminal proceedings, Mr. Jones was considered an adult under the law because his case was automatically waived to General Sessions.[5]

ANNUAL REPORT 19-20 (2022), https://www.sccommitteeonchildren.org/_files/ugd/587cb7_284c59b42cf640a4944b8a3cd737a8ea.pdf.

[4] Prior to July 1, 2019, only a person less than sixteen years of age who was charged with a Class A, B, C, or D felony or a felony which provides for a maximum term of imprisonment of fifteen years or more could be remanded to Family Court. S.C. CODE ANN. § 63-19-20 (1) (1976) (amended 2016).

[5] To give Mr. Jones a true life sentence on his conviction of Burglary in the First Degree, the Court would then have to consider his youthfulness. *Aiken v. Byars*, 765 S.E.2d 572, 578 (2014) ("*Miller* [*v. Alabama, 567 U.S. 460*] requires that before a life without parole sentence is imposed upon a juvenile offender, he must receive an individualized hearing where the mitigating hallmark features of youth are fully explored.")

The sentencing and programmatic consequences of being sent to General Sessions are absolutely devastating for children—both psychologically and legally. *See infra* Part I-II. Automatic waiver without consideration of a child's youthfulness, at least under South Carolina's bifurcated General Sessions-Family Court system, violates the developing proportionality standard under the Eighth Amendment of the United States Constitution, and the more textually expansive corresponding provision of the South Carolina Constitution. *See infra* Part III. Moreover, racially disparate inputs generate racially disparate outputs.[6] Black children are disproportionately waived in comparison to other children, revealing that Black children are disproportionately treated as adults.[7] Without any intervening discretion to rectify arrest charges, Black children that are already adultified in the eyes of law enforcement are too-often stripped of any opportunity to be treated as children. *See infra* Part IV. Because the automatic waiver process is inextricably linked to the resulting punishment under South Carolina law, failure to incorporate a developing sense of the culpability of youth in that waiver process cannot accord with modern Eighth Amendment jurisprudence, and section 63-19-20 cannot stand.

[6] *See* Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L. J. 2218, 2224 ("[A] racially unjust past will necessarily produce racially unequal outputs. To adapt a computer-science idiom, "bias in, bias out.")

[7] JEREE MICHELE THOMAS & MEL WILSON, THE COLOR OF YOUTH TRANSFERRED TO THE ADULT CRIMINAL JUSTICE SYSTEM: POLICY AND PRACTICE RECOMMENDATIONS 2 (National Association of Social Workers, 2017), http://www.campaignforyouthjustice.org/images/pdf/Social_Justice_Brief_Youth_Transfers.Revised_copy_09-18-2018.pdf (stating that Black youth are disproportionately waived to adult court, being 14 percent of the national youth population in 2015 but 47.3 percent of the youth waived to adult court).

ARGUMENT

I. Children prosecuted in General Sessions under the automatic waiver provision are subject to much more severe sentencing outcomes and collateral consequences than those allowed to proceed in Family Court, without the benefit of any consideration of their youth prior to waiver.

General Sessions and Family Court are distinctly different forums. Family Court is designed around the scientifically established fact that children are less culpable for their actions and more amenable to change.[8] A child who goes through Family Court will, if found guilty, receive an adjudication that does not follow them on their public record. *See infra* Part I (B). They may be diverted from the South Carolina Department of Juvenile Justice (DJJ) to more appropriate, rehabilitory programming in recognition of their immaturity. *See infra* Part II (B). Rather than focus on rehabilitation, General Sessions and the South Carolina Department of Corrections (SCDC) are designed to isolate and deter convicted persons from further criminal activity.[9] Barring expungement eligibility, an adult conviction is a permanent blight on one's record that brings a host of collateral consequences. *See infra* Part I (A). Moreover, a child prosecuted in General Sessions is subject to the same mandatory minimums and extreme sentencing schemes as adults. *See infra* Part I (A). Whereas waiver can potentially be an appropriate tool after thoughtful consideration, automatic waiver schemes such as that under section 63-19-20 of the South Carolina

[8] *See* Children's Law Center, Quick Reference Guide to Juvenile Court in South Carolina 3 (University of South Carolina School of Law, 2019 ed. 2019), https://www.sc.edu/study/colleges_schools/law/centers/childrens_law/docs_general/jj_quick_reference_guide_for_judges_attorneys.pdf ("Children have special needs and are treated differently than adults by the court system.") [hereinafter CLS Quick Reference Guide].

[9] *See* SCDC | South Carolina Department of Corrections, https://www.doc.sc.gov/index.html (last visited Apr. 6, 2022) ("The mission of the South Carolina Department of Corrections is: Safety--we will protect the public, our employees, and our inmates. Service--we will provide rehabilitation and self-improvement opportunities for inmates. Stewardship--we will promote professional excellence, fiscal responsibility, and self-sufficiency.")

Code disallow individual consideration of the child and directly expose them to extreme, adult consequences.

A. Children waived to General Sessions are subject to mandatory minimums, convictions, and strikes.

Mandatory Minimums

Children waived to General Sessions may be subject to lengthy mandatory minimum sentences that they would otherwise not face if prosecuted in Family Court. Under section 63-19-20 (1), two categories of enumerated offenses result in automatic waiver for children of a certain age from Family Court to General Sessions: (1) felonies that carry a mandatory minimum sentence of at least fifteen years in prison, and (2) Class A, B, C and D felonies, which carry high maximum penalties. The first category ensures that children of a certain age, who would face such a mandatory minimum if an adult, necessarily will receive at least that sentence if convicted. In Mr. Jones's case, his trial attorney was constrained to argue for the mandatory minimum of 15 years, when he could have argued for a much lighter sentence in Family Court under the indeterminate sentencing scheme. R. p. 24, lines 20-24; *see also* S.C. CODE ANN. § 63-19-1410 (5) (2008).

Making matters worse, mandatory minimums have increased for adults in South Carolina without carve-outs for children tried in General Sessions after waiver. It does not matter that, when raising the penalties for certain offenses, state legislators are not likely thinking about children that find themselves in adult court. Coupled with decreases in parole opportunities as part of truth in sentencing efforts, children who are automatically waived to General Sessions face de facto life sentences in prison *before* anyone has considered their youth.

During the 1980s and 1990s, while the General Assembly was increasing waiver options to send more children to adult court, it also adopted increasingly punitive mandatory minimum sentences. In 1985, the General Assembly increased the time a child (or an adult) convicted of

murder in General Sessions had to serve before they were parole eligible from 10 years to 20 years. S.C. CODE ANN. § 16-3-20 (A) (1985) (codifying Act No. 104, § 1). In 1986, it again delayed parole eligibility for murder to 30 years. S.C. CODE ANN. § 16-3-20 (A) (1986) (codifying Act No. 462, § 27). By 1996, the General Assembly had eliminated parole eligibility for individuals convicted of murder. *See* S.C. CODE ANN. § 16-3-20 (1996) (codifying Senate Bill No. 250). In sharp contrast, a child who is adjudicated guilty of a murder charge in Family Court faces an indeterminate sentence and will necessarily receive less time than the adult mandatory minimum, as they cannot be detained past their twenty-second birthday. *See* S.C. CODE ANN. § 63-19-1410 (5) (2008). By predicating the sentencing outcome on the waiver decision, South Carolina incurs a constitutional responsibility to allow for consideration of youthfulness in the automatic waiver process.

The second category of enumerated offenses which results in automatic waiver, Class A, B, C, or D felonies, carries high maximum penalties upon conviction. This long list of offenses, as outlined in sections 16-1-90 (A)–(D) (2010), includes relatively commonly charged crimes, such as Attempted Murder (Class A), Arson in the Second Degree (Class B), Aggravated Assault and Battery (Class C), Burglary Second (Class D), and Common Law Robbery (Class D). Even some first-time drug offenses result in automatic waiver, such as Trafficking in ice, crank, crack cocaine 28 grams or more but less than 100 grams First offense (Class B), S.C. CODE ANN. § 16-1-90 (B), and Distribution, manufacture, sale, or possession of crack cocaine within proximity of a school First offense (Class D). S.C. CODE ANN. § 16-1-90 (D). These felonies' maximum penalties break down as follows:

1) Class A Felonies – Maximum of 30 years according to section 16-1-20 (A)(1);
2) Class B Felonies – Maximum of 25 years according to section 16-1-20 (A)(2);
3) Class C Felonies – Maximum of 20 years according to section 16-1-20 (A)(3); and

4) Class D Felonies – Maximum of 15 years according to section 16-1-20 (A)(4).

High maximum sentences skew sentencing outcomes upwards, even if the offense is not eligible for a mandatory minimum. *See, e.g., Apprendi v. New Jersey,* 530 U.S. 466, 486 (2000) (emphasizing the constitutional relevance of exposure to higher maximum sentences).

Convictions

Beyond exposure to mandatory minimums and high maximum sentence penalties, children prosecuted in General Sessions may receive a conviction which will interfere with their welfare for the rest of their lives. For example, a student who has a felony conviction is barred from receiving state-based financial aid and grants.[10] A person who applies for a public housing program can be denied admission due to their criminal record. 24 C.F.R. § 960.204 (a) (2012); *see also* 24 C.F.R. § 960.204 (c). By the same token, a person applying for housing and intending to live with a family member who has a criminal record can be denied public housing. *Id.* In amici Root & Rebound's experience, private landlords in South Carolina regularly deny tenants' applications based on a background check—particularly if they have a felony conviction, such as those to which automatic waiver would apply. In addition, a South Carolinian with a drug-related felony conviction is automatically ineligible for SNAP and TANF for life.[11] Employers in South Carolina may deny job applicants after inquiring into their convictions.[12] A person who has a conviction stemming from childhood conduct faces many challenges to their livelihood for the rest of their

[10] S.C. Appleseed Legal Justice Center, Collateral Consequences of Criminal Convictions 22 (2013), https://www.scjustice.org/wp-content/uploads/2013/05/collateral_consequences_guide_april-2013-edits.pdf [hereinafter S.C. Collateral Consequences Report].

[11] Maggie McCarty et al., Drug Testing and Crime-Related Restrictions in TANF, SNAP, and Housing Assistance 9, 13 (Cong. Rsch. Serv., 2012), https://sgp.fas.org/crs/misc/R42394.pdf.

[12] *See* S.C. Collateral Consequences Report, *supra* note 10, at 10 ("South Carolina does not have a state law that limits employer inquiry into a job applicant's prior arrests or convictions.").

life, especially in the realm of housing, economic welfare, and career pathways, simply because they were convicted of a crime in General Sessions.[13] Adult felony convictions, even when incurred as a child, carry lifelong consequences.

Three Strikes

Moreover, a child who receives a conviction may be subject to South Carolina's three-strikes law and, in turn, some of the State's most severe sentencing penalties. *See generally* S.C. CODE ANN. § 17-25-45 (2015). The law provides no exception: a person must be sentenced to a term of imprisonment for life without the possibility for parole if (a) as a child, they were convicted of a most serious crime or two serious crimes and are later convicted of a most serious offense, or (b) as a child, they were convicted of two serious or most serious crimes and are later convicted of a serious offense. *See* S.C. CODE ANN. §§ 17-25-45 (A)–(B)(4). In the instant case, the trial court recognized that Mr. Jones may be subject to the three-strikes law. R. p. 15, lines 5-13. The court asked Mr. Jones's attorney whether the defendant "[understood] that his sentence [could] be treated like a strike" and that he could "face a[] LWOP . . . [and receive] a life sentence potentially worst case scenario," if he opted to proceed separately on his charges in the two different counties. R. p. 14, line 25-p. 15, line 13. This means that, in the future, if Mr. Jones receives another conviction, he could be sentenced to a term of life imprisonment, all because he was automatically transferred to General Sessions for an act he committed as a child. *See* S.C. CODE ANN. §§ 17-25-45 (A)(1)(a), (B)(4), (C)(1)–(2).

B. Children prosecuted in Family Court are subject to individualized sentences, adjudications, and no strikes.

As compared with convictions, adjudications result in more personalized, reasonable sentences for children, better future prospects for being an engaged, contributing member of

[13] *See generally* S.C. COLLATERAL CONSEQUENCES REPORT, *supra* note 10.

society, and grace if the child errs again as an adult. Each of these attributes of an adjudication is consistent with the developmental differences between children and adults and reflects the stronger possibility for their rehabilitation and desistance.

Individualized Sentences

Children prosecuted in Family Court are subject to sentences that the court finds appropriate based on their youthful characteristics, not mandatory minimum sentences of imprisonment. *See* S.C. Code Ann. §§ 63-19-1410 (A)(1)-(6). After being adjudicated delinquent by a Family Court, a child is often ordered to undergo a Post-Adjudicatory Comprehensive Evaluation in order to identify the youth's rehabilitative needs and help prevent recidivism. *See* S.C. Code Ann. § 63-19-1410 (A)(2). Through evaluation, the Family Court gathers information about the child and the child's surroundings, background, and circumstances to consider during sentencing.[14] The information collected includes psychological, social, and educational assessments, data gathered from interviews with the child and the child's parents or guardian, information gathered from the child's teachers and school officials, an overview of the child's school and court records, and recommendations regarding treatment and services that would benefit the child.[15] *See* S.C. Code Ann. § 63-19-1410 (A)(2). With regard to the child's family, the assessment will cover "the strengths and weaknesses of the family, problems interfering with the functioning of the family and with the best interests of the child, and recommendations for a comprehensive service plan to strengthen the family and assist in resolving these problems." S.C.

[14] CLS Quick Reference Guide, *supra* note 8, at 7.

[15] *Id.* at 7-8.

CODE ANN. § 63-19-1410 (A)(2). The evaluation may also include a psychiatric assessment.[16] *See* S.C. CODE ANN. § 63-19-1410 (A)(1). During the sentencing hearing, the Family Court will consider the child's best interest and protection of the community to determine what sentence is most appropriate.[17] *See* S.C. CODE ANN. § 63-19-1410 (A)(2); *see also In the Interest of Stephen W.*, 761 S.E.2d 231, 234 (2014) (citation omitted) (stating that "the best interest of the child is the paramount consideration" of Family Courts). In making this sentencing determination, the court reviews any evaluation reports, along with the seriousness of the offense committed, school records, the child's behavior at home, and the child's prior court history.[18] It is only with the abundance of specific information that a Family Court will sentence a child. In considering a child's full background before sentencing them, the Family Court ensures that the sentence is in the child's best interests.

Adjudications

Children who are found guilty in Family Court receive an adjudication, which is distinct from a conviction. *See* S.C. CODE ANN. § 63-19-1410 (C) (stating that "[n]o adjudication by the court of the status of a child is a conviction"). Unlike a conviction, an adjudication does not become part of the public record, *see* S.C. CODE ANN. § 63-19-2030 (B) (2008), and is therefore not recorded on an individual's Record of Arrests and Prosecutions (RAP sheet), or on their National Crime Information Center background check. As such, an adjudication is highly unlikely to ever prevent a child from later finding employment or housing because it will not appear on a

[16] *Id.* at 7.

[17] *Id.* at 8.

[18] *Id.*

background search, and will not prompt a necessary "yes" answer to common application questions regarding criminal backgrounds.

Additionally, children who are adjudicated do not lose the same rights as those who are convicted. For example, at the state level, a child who receives an adult conviction for a crime punishable by one year or more is disqualified from serving on a jury unless they receive a pardon or amnesty from the Probation, Parole, and Pardon Board, S.C. CODE ANN. §§ 14-7-810 (1) (1986), 24-21-920 (1962), and is disqualified from serving in popular office unless fifteen years have passed since the completion of their sentence, or they have been pardoned. S.C. CONST. art. VI § 1. But a child who is adjudicated delinquent for the same offense retains their civil rights. *See* S.C. CODE ANN. § 63-19-1410 (C) (stating that an adjudication does not "operate to impose civil disabilities ordinarily resulting from conviction"). Further rights are implicated at the federal level for any child convicted of a crime punishable by one year or more, even if it is not classified as a felony under South Carolina law.[19] With their privacy and civil rights still intact, children who receive an adjudication can still pursue their educational and occupational goals without serious impediment.

No Strikes

Finally, a child adjudicated delinquent need not worry about the adjudication later triggering one of South Carolina's most severe punishments. Our three strikes law clarifies that only convictions can increase the severity of a person's future sentence resulting from a conviction.

[19] Similar to South Carolina law, federal law states that a child convicted of a crime punishable by one year or more in prison loses their right to serve on a federal jury if their "civil rights have not been restored." 28 U.S.C. § 1865(b)(5) (2008). Other federal rights implicated include, but are not limited to, the right to serve in the military and the right to hold federal office or employment. *See, generally,* DEP'T OF JUST., FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION (2006), https://www.justice.gov/sites/default/files/pardon/legacy/2006/11/13/collateral_consequences.pdf.

See S.C. CODE ANN. §§ 17-25-45 (A)(1)-(C)(3). While a judge may consider an adjudication when imposing any future sentence, *Hayden v. State*, 322 S.E.2d 14, 15 (1984), an adjudication does not automatically compel a sentence of life without parole like a conviction could. Indeed, an adjudication cannot be used as an offense triggering a sentence of life without parole. *State v. Standard*, 569 S.E.2d 325, 328 (2002) (citing *State v. Ellis*, 547 S.E.2d 490, 491 (2001)). Though convictions can compel a future sentence of life imprisonment without parole if notice is served by the solicitor, adjudications from Family Courts cannot later compel such a severe sentence.

C. When children are automatically waived to General Sessions, they incur the serious risks of all consequences associated with a conviction before any consideration of their youth.

A child who is automatically waived to General Sessions faces almost entirely the same risks as an adult who walks into General Sessions on the exact same charge. Effectively, the child is presumed to be an adult without proof that they should be treated as such. *See infra* Part II (B). The risks are not intangible or remote, but rather include concrete sentencing consequences if found guilty: mandatory minimum sentences designed for adults and an accumulation of strikes meant to capture adult recidivist behavior. And whether or not the child ever reoffends, a conviction based on a mistake they make as a teenager triggers significant collateral consequences, including barriers to education, employment, and housing, and loss of certain basic civil rights. *See supra* Part I (A). At that point, barring a motion to remand to Family Court, General Sessions judges cannot intervene to rectify the adultification of the child, even if the charging determination was out of proportion with the alleged criminal conduct. Therefore, these concrete sentencing outcomes mandate juvenile consideration *prior to* waiver, because a child retains an interest in the possibility of an adjudication unless and until a court has considered whether adult treatment is more appropriate.

II. Family Courts and the Department of Juvenile Justice are especially concerned with the welfare of children and the provision of child-specific rehabilitative services.

Family Courts and DJJ share a primary mission to serve and rehabilitate children, and are intentionally designed to meet children's specific needs in a way that adult systems simply are not. *See* S.C. CODE ANN. § 63-19-1410 (A)(2) ("[T]he [Family] [C]ourt shall . . . adopt a plan as part of its order that will best meet the needs and the best interest of the child.") Family Court judges develop a particular expertise in the best interest of children by presiding over both juvenile criminal cases and family law cases. *See* S.C. CODE ANN. § 63-3-510 (A)(1)-(4) (2019) (outlining Family Courts' original jurisdiction). DJJ is statutorily mandated to provide specific institutional services to children, such as evaluations of each child committed to its custody to place them in the most suitable environment, and community services, such as diversion programs that give Family Courts options other than carceral detention. *See generally* S.C. CODE ANN. § 63-19-360 (2008) (outlining institutional services that DJJ must provide); *see also* S.C. CODE ANN. § 63-19-350 (1)-(15) (2018) (outlining fifteen community services that DJJ must provide). As a result, the resources and options available to children who remain in Family Court are greater than for those children sent to General Sessions.

A. Family Courts and DJJ are required to prioritize the welfare of children.

Family Courts are specially authorized to adjudicate criminal cases involving children. S.C. CODE ANN. § 63-3-510 (A)(1)-(4). These proceedings occur without a jury and outside the view of the general public, S.C. CODE ANN. § 63-3-590 (2008), in effect maximizing the child's anonymity. Children are accorded the same rights in Family Court criminal proceedings as are adults where required by law, and where not required by law, as consistent with the best interests of the child. S.C. CODE ANN. § 63-3-590. Throughout the duration of each case, Family Courts must prioritize the best interests of the involved children—an expertise which Family Courts develop by presiding

over various types of family law cases. *See, e.g., Stephen W.*, 761 S.E.2d at 234 (citation omitted) (explaining that "the best interest of the child is the paramount consideration" of Family Courts); *see also Harris v. Harris*, 415 S.E.2d 391, 393 (1992) (the State acts to "protect[] and safeguard[] the welfare of its children."). The State's dedication to the best interest of children comes down to its vital interest in its youth—"for in them is the hope of the future." *State v. Cagle*, 96 S.E. 291, 292 (1918).

DJJ is similarly designed to improve the welfare of children in the state. The mission of DJJ is to "protect the public and reclaim children through prevention, community services, education, and rehabilitative services in the least restrictive environment."[20] DJJ roots itself in restorative justice, seeking to promote accountability, repair damage done to victims and the community, and provide quality programming and services that "reform and empower youth to become productive citizens."[21] All children committed to DJJ must be examined and evaluated before being assigned to a particular facility. S.C. CODE ANN. § 63-19-360 (3). Based on a complete social, physical, psychological, and mental examination of the child, and an investigation and consideration of family, community environment, and background facts that might relate to the child's delinquency, DJJ determines which correctional or custodial care facility would be most appropriate. S.C. CODE ANN. §§ 63-19-360 (3)(a)–(c). When available and appropriate, DJJ aims to place children in an approved home, program, or facility other than a secure juvenile detention facility. S.C. CODE ANN. § 63-19-820 (A). An example of an alternative program is AMIKids

[20] SOUTH CAROLINA DEPARTMENT OF JUVENILE JUSTICE, DATA RESOURCE GUIDE 2018-2019 5 (2019), https://djj.sc.gov/sites/default/files/Documents/Resource%20Guide%202019-Final%20Draft.pdf [hereinafter "DJJ DATA RESOURCE GUIDE '18-'19"].

[21] *Id.* Programs and rehabilitative opportunities offered to youth will be expounded upon in Part I (C).

Piedmont, a wilderness camp where male children receive educational, vocational, outdoors, and Restorative Independent Living Skills classes intended to modify behavior.[22] Moreover, DJJ's latest resource guide states that its proposed regionalization plan will allow youth to be housed closer to their home communities with the goals of strengthening family and community connections and to "holistically rehabilitate youth and their families."[23] From the outset of its involvement, DJJ is supposed to provide resources and opportunities to further the welfare and rehabilitation of children.

B. General Sessions is not equipped to prioritize the welfare of children.

General Sessions is constructed to address the penal needs of the adult community. Indeed, even a child is treated as an adult in General Sessions. *See State v. Corey D.*, 529 S.E.2d 20, 27 (2000) (citation omitted) (stating "[a]lthough it may seem illogical that respondent will be treated as a child in family court for . . . charges, while being treated as an adult in general sessions court for . . . charges, it is beyond the Court's power to effect a change in the statutes enacted by the Legislature."). Treatment of children as adults in General Sessions is based on an outdated idea that youthfulness should be disregarded. *See Sanders v. State*, 314 S.E.2d 319, 321 (1984) (citing *In the Interest of Shaw*, 265 S.E.2d 522, 526 (1980) ("The best interests of the public or of the juvenile may require that the juvenile be held accountable as an adult for his criminal conduct."); *but see Aiken v. Byars*, 754 S.E.2d 572, 575-76 (2014) (The rule [expounded in *Miller v. Alabama*, 567 U.S. 460, 489 (2012)] plainly excludes a certain class of defendants—juveniles—from specific punishment . . . absent individualized considerations of youth. Failing to apply the *Miller* rule . . . risks subjecting defendants to a legally invalid punishment."). The focus of General Sessions being

[22] *Id.* at 27.

[23] *Id.* at 2.

on adults negates any possibility that such courts can simultaneously consider the youthfulness of a child.

The instant case illustrates how General Sessions judges cannot factor the youthfulness of a child into their consideration. The court, in speaking to Mr. Jones, noted, "[Y]ou're young. The law says you are a man. You are really a child . . . . This is a bitter pill to swallow. When I first saw this [case] and I first saw your age my first question was why there wasn't a recommendation of something else that would have allowed you the benefit of a [Youthful Offender Act][24] sentence." R. p. 25, lines 18-19; R. p. 26, lines 2-7. The court then proceeded to sentence Mr. Jones to the minimum mandatory sentence available, fifteen years incarceration, without consideration for his youthfulness. R. p. 27, lines 7-25. Mr. Jones's counsel did ask for the "mercy" of the court in sentencing due to Mr. Jones's "youthful indiscretions." R. p. 25, lines 6-9. Despite counsel's effort to keep in mind Mr. Jones's youthfulness, the court was bound by the adult criminal procedure, which left no space for youthful qualities to be considered during sentencing. This is a specific example of a general phenomenon where General Sessions judges encountering children accused of crimes are unable to consider the youthfulness of a child in their sentencing decisions. As a result of these statutory schemes, General Sessions judges are unable to prioritize the welfare of children.

[24] Under the Youthful Offender Act, if a child is deemed a "youthful offender" under section 24-19-10, and convicted of a crime, a court may either suspend the sentence and place the child on probation, sentence the child indefinitely (but not for more than six years) to the custody of the Department of Corrections for treatment and supervision, or sentence the child under any applicable penalty provision if the court finds that the child will not derive benefit from treatment. S.C. CODE ANN. §§ 24-19-50 (1), (3)–(4).

C. The Family Court system is better able to address underlying mental health disorders than the General Sessions system because these disorders present uniquely in children.

System-involved children are more likely to have mental health challenges that either stem from their experience within the legal system, or their personal backgrounds before entering the legal system. A meta-analysis of the best studies on mental health in the juvenile justice system found that as many as 70 percent of youths involved in the juvenile justice system have a mental health condition.[25] These numbers run in stark contrast to the general population of youth, where an estimated 9 to 22 percent of youth have a mental health disorder.[26] To compound the problem, estimates of up to 79 percent of juvenile justice-involved youth have more than one mental health condition.[27] In addition, detained youth are at substantially higher risk than youth in the community to have witnessed or been victimized by violence, with high rates of polyvictimization,[28] often resulting in complex trauma.

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[25] Gina M. Vincent et al, *Sex and Race Differences in Mental Health Symptoms in Juvenile Justice: The MAYSI-2 National Meta-Analysis*, 47 J. Am. Acad. Child Adolesc. Psychiatry 282, 283 (2008).

[26] Dev. Servs. Grp., Inc., Intersection Between Mental Health and the Juvenile Justice System 2-3 (2017), https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/intsection_between_mental_health_and_the_juvenile_justice_system.pdf (citing Carol A. Schubert & Edward P. Mulvey, *Behavioral Health Problems, Treatment, and Outcomes in Serious Youthful Offenders*, Juv. Just. Bull., June 2014, at 1, 3; Carol A. Schubert et al., *Influence of Mental Health and Substance Use Problems and Criminogenic Risk on Outcomes in Serious Juvenile Offenders*, 50 J. Am. Acad. Child Adolesc. Psychiatry 925, 925 (2011)).

[27] *Id.* at 3 (citing Jennie L. Shufelt & Joseph J. Cocozza, *Youth with Mental Health Disorders in the Juvenile Justice System: Results from a Multi-State Prevalence Study*, Nat'l Ctr. for Mental Health and Juv. Just. Rsch. and Program Brief, June 2006, at 1, 3, https://sites.unicef.org/tdad/usmentalhealthprevalence06.pdf).

[28] *See* Karen M. Abram et al., *Posttraumatic stress disorder and trauma in youth in juvenile detention*, 61 Archives Gen. Psychiatry 403, 405 (stating that, in the sample, 92.5 percent of detained children had experienced at least 1 trauma and 84 percent had experienced more than 1 trauma); *see also* Jenifer Wood et al., *Violence Exposure and PTSD Among Delinquent Girls*, 6 J. Aggression, Maltreatment & Trauma 109, 122 ("The incarcerated [girls'] interviewed for the present study described high levels of multiple forms of victimization, within their families of origin, in their relationships with boyfriends, and on the streets.").

Compounding general issues of mental health for system-involved children, Black and Latino children are about half as likely as their White counterparts to get mental healthcare prior to incarceration, despite having similar rates of mental health problems as White children.[29] It is noted that income and insurance status do not account for these racial and ethnic disparities in access to care.[30] As a group, their substance abuse treatment rates are exceptionally low, compared with their very high arrest rates for drug-related offenses.[31] Many Black and Latino youth entering the juvenile justice system have untreated mental health problems.[32]

For developmental reasons, mental health disorders can manifest in children in ways that are different from what is seen in adults. For example, children are more likely to act out their feelings than adults, due to their relatively higher impetuosity[33] and lesser ability to identify internal feeling states verbally.[34] In the latest edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), criteria for depression in children specifically includes "irritable

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[29] Lyndonna Marrast, *Racial and Ethnic Disparities in Mental Health Care for Children and Young Adults: A National Study*, 46 INT'L J. HEALTH SERVS. 810, 813, 818 ("M]inority children made about half as many mental health visits as white children . . . . [T]he prevalence of most psychiatric conditions is thought to be similar for the three racial and ethnic groups.").

[30] *Id.* at 818 ("Black and Latino children and young adults receive markedly less outpatient mental health and substance abuse care than their non-minority counterparts, differences that persisted in analyses that controlled for other demographic differences, mental health impairment, income, and health insurance.").

[31] *Id.* at 819 ("Minority youth also receive more punishment and less treatment than non- minorities for substance abuse . . . .").

[32] *Id.* ("We found particularly low mental health utilization rates among the groups at highest risk for incarceration: black and Hispanic young men. . . . [M]any [incarcerated children and young people] had serious, under-treated mental illness prior to their arrest.").

[33] Laurence Steinberg, *Adolescent Development and Juvenile Justice*, ANN. REV. CLIN. PSYCH 459, 470 ("[I]mpulsivity, as a general trait, declines linearly . . . .").

[34] THE CTR. ON THE SOC. AND EMOTIONAL FOUNDS. FOR EARLY LEARNING, TEACHING YOUR CHILD TO: IDENTIFY AND EXPRESS EMOTIONS 2 (n.d.), http://csefel.vanderbilt.edu/documents/teaching_emotions.pdf (Young children deal with many of the same emotions adults do. . . . [B]ut they often do not have the words to talk about how they are feeling. Instead, they sometimes act out these emotions in very physical and inappropriate ways.

mood," which often is mistaken as a behavioral problem, whereas such criteria and behavior do not apply to adults with depression.[35] As another example, while children with Attention-Deficit/Hyperactivity Disorder (ADHD) exhibit greater behavioral over-activity, this level of activity transforms in adolescence into restlessness and impatience, and then tends to diminish in adulthood.[36] The variety of differences in the mental health of children and adults demonstrates the importance of system-involved children having access to juvenile mental health specialists and appearing before judges who understand that need. Family Courts are able to provide just that, both before prosecution really begins and once prosecution initiates. This is due to the courts' familiarity with children and their behaviors, *see supra* Part II (A), and DJJ's understanding of children, *see supra* Part II (A), and its expansive programming catering to mental health needs for children. On the other hand, General Sessions court officials are much less familiar with children's developmental and mental health needs *see supra* Part II (B).

D. DJJ provides rehabilitative services specific to the needs of children.

Children may receive a wide-range of services, depending in part on their charges, juvenile justice history, and child/family needs. On the front-end of the juvenile justice system, Family Courts are able to provide the child with needed mental health or other resources, often in lieu of prosecution. This is commonly known as diversion programming, which seeks to minimize the harmful consequences that have been found to arise when a child becomes involved in the legal system. Especially with initial offenses, the solicitor may agree to recommend that the Family

[35] Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 160; 163 (5th ed. 2013) ("DSM-5") ("The essential feature of a major depressive episode is a period of at least 2 weeks during which there is either depressed mood or the loss of interest or pleasure in nearly all activities . . . . In children and adolescents, the mood may be irritable rather than sad.").

[36] According to the DSM-5 description of ADHD, "In preschool, the main manifestation is hyperactivity . . . During adolescence, signs of hyperactivity . . . may be confined to fidgetiness or an inner feeling of jitteriness, restlessness, or impatience. In adulthood . . . hyperactivity has diminished . . . ." *See id.* at 62.

Court divert a child to a program that meets their mental health needs, and can prevent recidivism.[37] S.C. CODE ANN. § 63-19-1010 (A)–(B). For example, the solicitor may agree that the child should receive intensive family services (IFS) instead of prosecution.[38] IFS can be offered to children for either diversion or post-adjudication services. IFS involves rehabilitative behavioral health services, including individual therapy, family therapy, and crisis intervention services in the child's home for several hours each week.[39] As another alternative, the solicitor may recommend or require certain wrap-around services (WRAP) in combination with DJJ supervision.[40] WRAP services may include behavior modification delivered in the home and school settings, and transportation to required appointments.[41] WRAP services are also available to children for either diversion or post-adjudication.

Certain categories of children are afforded special opportunities for rehabilitation, as well. For instance, a child who is charged with a non-violent, first time offense may engage in a 90-day Community Juvenile Arbitration Program.[42] It is through this program that trained volunteers help children develop common-sense solutions to the harm they committed.[43] For children deemed to

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[37] *See* DJJ DATA RESOURCE GUIDE '18-'19, *supra* note 20, at 7 ("A Solicitor may choose to divert a youth to a community program . . . .").

[38] *Prevention & Diversion Programs (in Alphabetical Order)*, S.C. DEP'T JUV. JUST, https://djj.sc.gov/programs-and-services/prevention-diversion-programs-alphabetical-order (last visited Apr. 7, 2022) [hereinafter *Diversion Programs*].

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*; OFFICE OF COMMUNITY JUSTICE, COMMUNITY JUVENILE/YOUTH ARBITRATION PROGRAM 1 (South Carolina Department of Juvenile Justice) https://djj.sc.gov/sites/default/files/Documents/SCDJJ%20Arbitration%20Fact%20Sheet.pdf.

be a higher risk, DJJ offers intensive supervision for children on probation or returning to their communities.[44] Children supervised on probation or parole, children under contract, and Juvenile Arbitration participants are eligible for Earn & Return.[45] Earn & Return provides children who have committed a crime the opportunity to earn money through their own work to repair the harm they have caused to the victim and community through restitution.[46]

Other diversion or post-adjudication programming may include the assignment of an auxiliary probation officer who can provide one-on-one contact and help reduce the child's likelihood of recidivating.[47] Young boys may become involved in Boy's Council, a strength-based group program aimed to challenge stereotypes and unsafe attitudes about masculinity and to build community, solidarity, and personal responsibility among children.[48] Girls may participate in Girl's Circle, an evidence-based weekly program for girls ages nine to eighteen to foster self-esteem, which helps participants maintain an authentic connection with peers and adults in their community, counter trends toward self-doubt, and allow for genuine self-expression through verbal sharing and creative activity.[49] Clinicians, trained by Clemson specialists,[50] facilitate these

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[44] *Diversion Programs*, *supra* note 38.

[45] Office of Community Justice, Community Juvenile/Youth Arbitration Program 1 (South Carolina Department of Juvenile Justice) https://djj.sc.gov/sites/default/files/Documents/SCDJJ%20Arbitration%20Fact%20Sheet.pdf.

[46] *Id.*; *see also Diversion Programs*, *supra* note 38.

[47] *Diversion Programs*, *supra* note 38.

[48] *Id.*

[49] *Id.*

[50] *See Girls Circle Training*, Clemson University, https://calendar.clemson.edu/event/girls_circle_training#.YhmHRS-B1QJ (last visited Apr. 8, 2022) (containing the information for a facilitator's training).

groups, designed to address issues[51] specific to adolescent girls' needs.[52] Children may participate in CHOICES, a curriculum developed for young people to teach children how to increase positive behaviors and avoid criminal behaviors through a restorative justice framework.[53] Similarly rooted in restorative justice, Restoring Carolina through Youth Service gives children the opportunity to take part in community service projects at various locations, like nursing homes, schools, and public gardens.[54] DJJ offers a prevention and intervention initiative called Think Twice, which offers at-risk youth and their guardians information on the consequences of youth crime, its impact on victims, and its impact on children to divert them from DJJ and towards positive and informed decision-making.[55] Finally, children who have been adjudicated delinquent for the first time may participate in a program called Family Solutions.[56] This initiative is a 10-week family-centered intervention program aimed at the needs common to youth and their families.[57] Children may complete Family Solutions by court order.[58]

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[51] Topics of discussion include friendship, body image, female identity, stereotypes, trusting self and others, aggression and dating violence, diversity and cultural heritage, relationships, substance abuse, risky behaviors, goal setting, and self care. *Diversion Programs*, *supra* note 38.

[52] *Id.*

[53] *Id.*; *see also* South Carolina Department of Juvenile Justice, CHOICES (2016), https://djj.sc.gov/sites/default/files/Documents/Choices%20Fact%20Sheet.pdf.

[54] *Id.*; *see also* South Carolina Department of Juvenile Justice, Restoring Carolina through Youth Service (2016), https://djj.sc.gov/sites/default/files/Documents/Restoring-Carolina.pdf.

[55] *Diversion Programs*, *supra* note 38.

[56] *Id.*

[57] *Id.*

[58] *Id.*

The above-described programs may also be required for children admitted into a Juvenile Pretrial Intervention Program.[59] At the solicitor's discretion, some children may avoid an adjudication entirely by successfully completing programmatic requirements.[60] This is yet another way in which DJJ's services support and enable the diversion of children from further involvement in the juvenile justice system.

Of course, not all children are or will be eligible for diversion programs. For children who are adjudicated delinquent, this past year DJJ committed to a major effort to minimize child incarceration rates in South Carolina. As part of this effort, they initiated powerful community-based programming that has some of the strongest evidence base for preventing recidivism.[61] Included are two programs called multisystemic therapy (MST) and functional family therapy (FFT).[62] MST, which was originally developed in South Carolina,[63] is designed to help adolescents

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[59] *See, e.g.*, JUVENILE PRE-TRIAL INTERVENTION, https://www.solicitor4.com/juvenile-pre-trial-intervention-jpti/ (last visited Apr. 7, 2022); PRE-TRIAL INTERVENTION (PTI), https://solicitor11.sc.gov/diversion-programs/PTI (last visited Apr. 7, 2022).

[60] *See, e.g.*, JUVENILE PRETRIAL INTERVENTION PROGRAM, http://files.florenceco.org/public/Solicitor/arbitration/JPTI_Brochure.pdf (last visited Apr. 8, 2022).

[61] *See* EVIDENCE BASED ASSOCIATES, *South Carolina: Description*, https://evidencebasedassociates.com/south-carolina/ (last visited Mar. 28, 2022) ("South Carolina Department of Juvenile Justice (SC DJJ) created the "Leveraging Effective Alternatives to Placement" (LEAP) project, which will include implementation of eight community-based, evidence-based programs (EBPS) in four regions of the state. . . . This evidence-based initiative will begin in the fall of 2021 . . . . Establishing enhanced and comprehensive community-based services is essential to increase the number of South Carolina's youth that are in school, living at home, and staying out of trouble.").

[62] *The South Carolina Department of Juvenile Justice Awards Contract to Evidence-Based Associated to Oversee Implementation of Evidence-Based Programs Statewide*, CISION PR NEWSWIRE (Oct 5, 2021, 8:43 AM), https://www.prnewswire.com/news-releases/the-south-carolina-department-of-juvenile-justice-awards-contract-to-evidence-based-associates-to-oversee-implementation-of-evidence-based-programs-statewide-301391957.html, ([Evidence-Based Associates] will provide community-based, scientifically-proven interventions, such as Multisystemic Therapy (MST) and Functional Family Therapy (FFT), that will focus on incorporating all aspects of a youth's ecology in order to demonstrate the most successful outcomes. Both programs reduce the risk to commit or re-commit an offense, making a difference for adolescents in South Carolina.").

[63] MST Services Headquarters, *Multisystemic Therapy: An Overview*, SOUTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES 3, https://msp.scdhhs.gov/pcsc/sites/default/files/MST-%20Boggs%20%28002%29.pdf (last visited Mar. 28, 2022).

ages twelve to seventeen who have exhibited serious clinical problems such as drug use, violence, and severe delinquent behavior.[64] It is a home-based model of service delivery, which reduces barriers that keep families from accessing services.[65] MST aims to assess the origins of adolescent behavioral problems and change the youth's ecology to increase prosocial behavior[66] and reduce recidivism.[67] It does this through (1) intensive therapist-family involvement[68] and (2) therapist-child work pertaining to all realms of the child's life, including their school, their job, and their community.[69] While the average treatment occurs over four months, there is no exact length of service.[70] Staff to client ratio is kept low to ensure that multiple therapist-family contacts can occur in a week.[71] Results regarding recidivism are very promising.[72] Over nearly 14 years of studies,

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[64] *Multisystemic Therapy (MST)*, YOUTH.GOV, https://youth.gov/content/multisystemic-therapy-mst (last visited Apr. 7, 2022) [hereinafter *Youth.Gov MST*].

[65] *Id.*

[66] *See CDC Promising Practices: Multisystemic Therapy (MST) for Juvenile Offenders*, CONDUENT, https://cdc.thehcn.net/promisepractice/index/view?pid=691#:~:text=At%2013.7%20years%20of%20follow,%3D%2018.5%2C%20p%20%3C%200.0001 (last visited Apr. 7, 2022) ("Multisystemic Therapy (MST) for juvenile offenders addresses the multidimensional nature of behavior problems in troubled youth. Treatment focuses on those factors in each youth's social network that are contributing to his or her antisocial behavior.") [hereinafter *CDC MST*].

[67] Ashli J. Sheidow & Michael R. McCart, *Multisystemic Therapy for Emerging Adults with Serious Mental Illness and Justice Involvement*, 23 COGN. AND BEHAV. PRAC. 356, 356 (2016).

[68] *See CDC MST*, *supra* note 66.

[69] *See* Sheidow & McCart, *supra* note 67, at 357 (discussing how MST aims to support positive functioning in school, work, independent living, and relationships).

[70] *Youth.Gov MST*, *supra* note 64 ("The average treatment occurs over approximately 4 months, although there is no definite length of service.")

[71] *See id.* ("Therapists have small caseloads of four to six families . . . are available 24 hours a day, 7 days a week; and provide services at times convenient to the family."); *see also Youth.Gov MST*, *supra* note 64 ("[M]ultiple therapist-family contacts occur[] each week.").

[72] *CDC MST*, *supra* note 66 ("Recidivism rates were significantly less for MST-treated youth.")

youth participating in MST have had 54% fewer arrests compared with a control group,[73] and over a 22 year period, MST youth have had over 75% fewer violent and nonviolent felony arrests, compared with control groups.[74] MST also has kept a significant number of youth in their own homes,[75] and has even reduced children's PTSD symptoms.[76] There are documented cost-benefits for states as well.[77]

Another community-based program with a strong evidence base that DJJ has initiated is Functional Family Therapy.[78] FFT is similarly intensive, and involves a family-focused

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[73] Cindy M. Schaeffer & Charles M. Borduin, *Long-Term Follow-Up to a Randomized Clinical Trial of Multisystemic Therapy with Serious and Violent Juvenile Offenders*, 73 J. Consult. & Clin. Psych 445, 445 ("MST participants had 54% fewer arrests [than members of the control group.]")

[74] Aaron M. Sawyer & Charles M. Borduin, *Effects of Multisystemic Therapy Through Midlife: A 21.9-Year Follow-Up to a Randomized Clinical Trial With Serious and Violent Juvenile Offenders*, 79 J. Consult. & Clin. Psych 643, 649 (2011) ("The results indicated that MST participants were significantly less likely to be arrested for felony crimes . . . within 21.9 years of treatment termination. More specifically, MST participants' odds of recidivism for violent and nonviolent felonies, respectively, were one quarter and a half those [in the control group.]")

[75] *See, e.g.,* Scott W. Henggeler et al., *Family Preservation Using Multisystemic Therapy: An Effective Alternative to Incarcerating Serious Juvenile Offenders*, 60 J. Consult. & Clin. Psych 953, 956 (1992) ("Youths who received MST spent an average of 73 fewer days incarcerated . . . .")

[76] Cynthia Cupit Swenson et al, *Multisystemic Therapy for Child Abuse and Neglect: A Randomized Effectiveness Trial*, 24 J. Family Psych. 497, 503 (2010).

[77] Steve Aos et al., The Comparative Costs and Benefits of Programs to Reduce Crime 17-18 (Washington State Institute for Public Policy, version 4.0 2001), https://www.wsipp.wa.gov/ReportFile/756/Wsipp_The-Comparative-Costs-and-Benefits-of-Programs-to-Reduce-Crime-v-4-0_Full-Report.pdf ("Based on the Institute's estimates, a typical average cost per MST participant is about $4,743. Overall, taxpayers gain approximately $31,661 in subsequent criminal justice cost savings for each program participant. Adding the benefits that accrue to crime victims increases the expected net present value to $131,918 per participant, which is equivalent to a benefit-to-cost ratio of $28.33 for every dollar spent.")

[78] *The South Carolina Department of Juvenile Justice Awards Contract to Evidence-Based Associated to Oversee Implementation of Evidence-Based Programs Statewide*, Cision PR Newswire (Oct 5, 2021, 8:43 AM), https://www.prnewswire.com/news-releases/the-south-carolina-department-of-juvenile-justice-awards-contract-to-evidence-based-associates-to-oversee-implementation-of-evidence-based-programs-statewide-301391957.html, ([Evidence-Based Associates] will provide community-based, scientifically-proven interventions, such as Multisystemic Therapy (MST) and Functional Family Therapy (FFT) . . . . Both programs reduce the risk to commit or re-commit an offense, making a difference for adolescents in South Carolina.").

intervention for at-risk, delinquent youth, between eleven and eighteen years of age.[79] Like MST, FFT is home-based and treatment takes about three to four months to complete over the course of between eighteen and thirty sessions.[80] Studies have found FFT to be successful in reducing felony and violent crimes in young people[81] and in reducing risk behavior while improving functioning across key life domains.[82] The successful results of FFT, like MST, indicate that DJJ has found a highly productive and successful way to rehabilitate and provide for children without needlessly incarcerating them: recidivism among those who participated in FFT was reduced to numbers between twenty-eight percent to fifty percent in comparison to control groups.[83] In South Carolina, FFT is used as a program for lower-risk youth than the youth participating in MST.[84] DJJ recognizes that MST and FFT have the ability to address the root causes of delinquency through a trauma-informed approach.[85] Such programs operate through local, community-based service providers and aim to serve at least 500 youth per calendar year total..[86]

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[79] Dan Edwards, Introduction to FFT, MST, and Other Top-Tier, "Well-Supported" Evidence-Based Programs 5 (Evidence-Based Associates & South Carolina State Legislature, n.d.), https://www.scstatehouse.gov/CommitteeInfo/RaiseTheAgeSelectCommittee/10-22-19%20Meeting/Introduction%20to%20EBPs%20(Edwards%20EBA)%202019.pdf.

[80] *Id.*

[81] Thomas L. Sexton & Charles W. Turner, *The Effectiveness of Functional Family Therapy for Youth With Behavioral Problems in a Community Practice Setting*, 24 J. Family Psych 339, 346 (2010) ("The results indicate that . . . FFT resulted in a significant 34.9% and 30% (respectfully) reduction in felony and violent crimes [among children] . . . .").

[82] Katarzyna Celinska et al., *An Outcome-based Evaluation of Functional Family Therapy for Youth with Behavioral Problems*, 2 Off. Juv. Just. and Delinq. Prev. J. Juv. Just., Spring 2013, at 1, 29.

[83] Edwards, *supra* note 79, at 5.

[84] *Compare id.* at 4 ("Multisystemic Therapy . . . [t]argets serious, chronic and violent delinquents . . . ", with *id.* at 5 ("Functional Family Therapy . . . [t]argets delinquent youth . . . .").

[85] *Id.* at 10.

[86] *House Ways & Means FY 2021-2022 Budget Hearing: Hearing on Budget Before the Subcomm. on Law Enf. and Crim. Just. of the H. Comm. on Ways and Means*, 2021 Leg., 123rd Sess. (S.C. 2021) (request for budget to

For children who are adjudicated delinquent for more serious charges or repeated offenses, Family Courts may decide to admit a child to one of many DJJ residential programs dedicated to addressing underlying mental health and/or behavioral disorders, instead of committing the child to a secure detention facility. *See* S.C. CODE ANN. § 63-19-1410 (A)(2). Boys may go to Camp Aspen or Camp Ghigau, therapeutic wilderness programs, or Camp Sand Hills, a wilderness camp that organizes individualized treatment plans for system-involved boys in a therapeutic setting.[87] Staff at Camp Sand Hills are equipped to address mental health and behavioral issues through a multi-faceted approach and seek to maintain a high level of motivation, participation, and cooperation within the treatment process for children.[88] Alternatively, boys may be admitted to Georgetown Marine Institute, which administers rehabilitative psychosocial therapy, restorative independent living skills, and one-on-one counseling sessions.[89] For girls, Family Courts and DJJ may offer the Clemson Youth Development Center, which provides behavioral, emotional, educational, vocational interventions, and specialized programming with individual and group therapies.[90]

Some children who commit more serious offenses, or have a repeated pattern of offenses along with histories of less-restrictive programming, may be committed to the Broad River Road

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implement four regional MST and FFT teams throughout the state), https://www.scstatehouse.gov/CommitteeInfo/Ways&MeansMeetingHandouts/Law%20Enforcement/Department%20of%20Juvenile%20Justice%20FY%2021-22%20Budget%20Presentation.pdf.

[87] DJJ DATA RESOURCE GUIDE '18-'19, *supra* note 20, at 25, 28, 31.

[88] *Id.* at 31.

[89] *Id.* at 34.

[90] *Id.* at 26.

Complex (BRRC), which is the child equivalent of an adult prison.[91] However, unlike an adult prison, BRRC is designed to meet children's specific developmental needs.[92] Children placed in the custody of DJJ receive rehabilitative services such as access to developmentally appropriate schooling,[93] section 63-19-1620, the opportunity to earn a Beginner's Permit,[94] frequent access to a psychologist and social worker for mental health counseling and family contact,[95] a wide variety of vocational training opportunities,[96] the possibility to join the Junior Reserve Officers' Training Corps (JROTC),[97] and access to various recreational and religious services.[98] Clinical staff at BRRC have received specialized training in evidence-based programs that are especially relevant to the children they serve.[99] Two such programs are Trauma-Focused Cognitive-Behavioral

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[91] *See Facilities*, S.C. DEP'T JUV. JUST., https://djj.sc.gov/facilities (last visited Apr. 8, 2022) ("The Broad River Road Complex in Columbia, South Carolina is the agency's long-term commitment facility.").

[92] *See id.* ("The more than 200-acre complex offers programs for boys and girls of all backgrounds and needs, including programs for kids with special needs, youth sex offenders, and those struggling with substance abuse. . . . DJJ's fully accredited school district provides continued education for youth, preparing students for post-secondary education. The Empowerment & Enrichment Academy of South Carolina (formerly Birchwood School) is where boys and girls attend middle and high school. "Birchwood" opened in 1975.")

[93] *See SCDJJ School District*, SOUTH CAROLINA DEP'T JUV. JUST., https://djj.sc.gov/SCDJJ-school-district (last visited Apr. 8, 2022) [hereinafter *DJJ School District*].

[94] *DJJ Youth Earn Beginner's Permits from DMV*, S.C. DEP'T JUV. JUST., (June 18, 2019), https://djj.sc.gov/news/2019-06/djj-youth-earn-beginners-permits-dmv.

[95] *See Organizational Structure*, S.C. DEP'T JUV. JUST., https://djj.sc.gov/agency/organizational-structure (last visited Apr. 8, 2022).

[96] DJJ currently offers a Young Craftsman Program, Upholstery Program, welding class, and many off-campus opportunities. *Career Readiness*, S.C. DEP'T JUV. JUST., https://djj.sc.gov/career-readiness (last visited Apr. 8, 2022).

[97] *DJJ School District*, supra note 93.

[98] *See The Agency*, S.C. DEP'T JUV. JUST., https://djj.sc.gov/agency (last visited Apr. 8, 2022) ("[DJJ] provides . . . recreational services tailored to the individual needs of each young person under agency supervision."); *see also Get Involved*, S.C. DEP'T JUV. JUST., https://djj.sc.gov/get-involved (last visited Apr. 8, 2022) ("[DJJ] formed the . . . "Youth Faith Alliance" – a network of churches and organizations . . . provid[ing] Safe Harbor, prayer, donations and other services to youth, families and our Agency.").

[99] *See, e.g.*, SOUTH CAROLINA DEPARTMENT OF JUVENILE JUSTICE, BROAD RIVER ROAD COMPLEX (BRRC) IMPROVEMENTS 1-2 (2016),

Therapy (TF-CBT),[100] which addresses childhood trauma in the context of family support,[101] and Aggression Replacement Training (ART),[102] which targets social skills, anger control, and moral reasoning.[103]

Children placed at BRRC are required to continue their middle school and high school education and often obtain their GEDs.[104] *See* S.C. Code Ann. §§ 63-19-380 (A), (C) (2008), 63-19-1620 (2008). DJJ's Birchwood School also offers children Career and Technology Education (CATE) and individualized post-secondary opportunities.[105] Detained children reportedly have access to a media center, career development center, and guidance counselors.[106] In Fiscal Year

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https://www.scstatehouse.gov/CommitteeInfo/SenateSpecialStudyCommitteeOnDJJ/November12016Meeting/BRRC%20Improvements%2010-25-2016.pdf ("The National Institute of Corrections trained staff to be professional security auditors. Security staff have been trained in Stress Prevention Management, Motivational Interviewing, Crisis Intervention, Juvenile Behavior Management and Trauma Sensitivity. . . . DJJ is implementing two interventions that have been proven effective in rehabilitating juvenile offenders, Aggression Replacement Training (ART) and Cognitive Behavioral Therapy (CBT). ART is classified as a model program by the Office of Juvenile Justice and Delinquency Prevention (OJJDP) and recognized by the National Gang Center as an effective gang prevention and intervention program.") [hereinafter BRRC Programs]

[100] *Id.* at 2 ("DJJ is implementing . . . Cognitive Behavior Therapy . . . .").

[101] *See* Judith A. Cohen & Anthony P. Mannarino, *Trauma-focused Cognitive Behavior Therapy for Traumatized Children and Families*, 24 Child & Adolesc. Psychiatric Clin. of North Am. 557, 561 (2015). ("TF-CBT is a collaborative child-parent, trauma-focused treatment.").

[102] BRRC Programs, *supra* note 99, at 2 ("DJJ is implementing . . . Aggression Replacement Training (ART) . . . .").
A Director at BRRC also informed amici that they are presently using ART.

[103] *See* Aggression Replacement Training, Research Press Publishers, https://aggressionreplacementtraining.com (last visited Apr. 8, 2022).

[104] *Empowerment & Enrichment Academy of South Carolina*, S.C. Dep't Juv. Just., https://djj.sc.gov/SCDJJ-school-district/empowerment-enrichment-academy (last visited Apr. 8, 2022).

[105] South Carolina Department of Juvenile Justice, 2019 Agency Report Card 13 (2019), https://djj.sc.gov/sites/default/files/Documents/Report%20Cards/2019%20Report%20Card.pdf [hereinafter DJJ Report Card]; *see also DJJ School District*, *supra* note 93.

[106] *DJJ School District*, *supra* note 93.

2018–2019, 103 children in a DJJ facility earned either their high school diploma or GED.[107] In addition, within DJJ institutions, children can take part in programs designed for those with special needs, sexual offending behaviors, and substance abuse issues.[108]

General Sessions courts across South Carolina and SCDC do not have the type of youth-oriented mental health and recidivism prevention programming that is available in the Family Court and DJJ systems. While many circuits across the state offer Pretrial Intervention Programs in General Sessions, through which participants may receive individual and group counseling referrals, participants must be eighteen years or older, meaning that children cannot participate.[109] While SCDC has a behavioral health program, which can be individualized, the program focuses primarily on substance abuse issues.[110] Moreover, there is no indication that any part of the program has been created for children specifically not convicted under YOA.[111] Although General Sessions courts and SCDC provide some programs to people with mental health issues, such programs are not designed for or available to children. For that matter, SCDC's lack of adequate mental health coverage has been deemed unconstitutional, *see T.R. v. S.C. Dep't of Corr.*, No. 2005-CP-40-2925 (Ct. Com. Pl. 5th Cir. Jan. 8, 2014) (unpublished), while mental health coverage of all youth committed to BRRC is at a very low ratio of one clinical staff person for every 2.82

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[107] DJJ Report Card, *supra* note 105, at 13.

[108] DJJ Data Resource Guide '18-'19, *supra* note 20, at 20.

[109] *See, e.g.*, Pre-Trial Intervention Program, https://www.scsolicitor5.org/diversion-programs/pre-trial-intervention-program/ (last visited Apr. 8, 2022).

[110] *See* Division of Behavioral Health and Substance Abuse Services, https://www.doc.sc.gov/programs/substance.html (last visited Apr. 8, 2022).

[111] *See id.*

children.[112] Given the aforementioned data, it is easy to see how children sentenced to adult prisons are significantly more likely to develop psychiatric and trauma-related disorders than youth who remain in youth facilities.[113]

E. SCDC does not provide rehabilitative services specific to children or to children who are transitioning to adulthood.

SCDC consists of adult facilities that are not designed to house children. But, given the waiver process, SCDC is responsible for the incarceration of many children, as well as adults who were children at the time of their offense. Both of these populations have different rehabilitative needs than adults who committed their offense as adults; as discussed *infra* Part III (A), children commit criminal offenses for different developmental reasons than adults do. Moreover, SCDC policies do not provide for programming specifically designed to ensure that incarcerated children prosecuted as adults are prepared to transition into adulthood upon release, nor does it provide rehabilitative services specific to those children committed to SCDC. When considering the wealth of evidence-based programming available through Family Court and DJJ, discussed *supra* Part II (D), SCDC pales in comparison.

Take, for example, the minimal and ineffective educational programming available to young people in SCDC. By policy, SCDC requires incarcerated people who test below an eighth grade education level to attend mandatory educational programming.[114] Young straight time

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[112] A director at BRRC informed amici that, as of April 3, 2022, there were 48 children at BRRC, and 19 clinical staff.

[113] *See* Jason J. Washburn et al., *Detained Youth Processed in Juvenile and Adult Court: Psychiatric Disorders and Mental Health Needs*, JUV. JUST. BULL., June 2014, at 9 ("[T]he odds of having a psychiatric disorder were greater among . . . youth sentenced to [adult] prison than those who received less severe sentences.").

[114] S.C. DEP'T OF CORR., PS-08.01, MANDATORY EDUCATIONAL ATTENDANCE PROGRAM (2011).

incarcerated people who are under 21 years of age who have not earned a high school diploma or passed the GED are required to attend educational programs,[115] but unlike at DJJ, these SCDC programs are not designed to meet the age-appropriate learning needs of adolescent inmates, making it very difficult for them to progress academically. In Fiscal Year (FY) 2018-2019, only 360 incarcerated people,[116] out of the average daily incarcerated population of 19,559[117] received a GED or high school diploma. Even where there do seem to be some opportunities available to children, SCDC fails to deliver.

Not only do SCDC policies fail to cater to children, the realities in SCDC also neglect children and their rehabilitation. Only a few years ago it was reported that SCDC continues to "struggle[] to meet its basic goal of rehabilitation."[118] And even when new programs have been championed, incarcerated people have been unable to attend the programs because officers have been unavailable to escort them to class.[119] As noted previously, *see supra* Part II (D), SCDC even lacks the ability to cover the most severely mentally ill prisoners. The adult court and correctional systems in South Carolina have consistently demonstrated their inability to provide appropriate resources and support to children and adults who committed an offense as children.

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[115] *Id.*

[116] South Carolina Department of Corrections, Fiscal Year 2018–2019 Agency Accountability Report 15 (2019), https://www.doc.sc.gov/research/AccountabilityReportFY2019.pdf.

[117] South Carolina Department of Corrections, Average Daily Inmate Population Fiscal Years 1970 - 2021 (2021), https://www.doc.sc.gov/research/SystemOverview/Avg_pop_FY_1970-2021.pdf.

[118] Emily Bohatch, *Facing dire challenges, can SCDC get ambivalent State House to throw it a lifeline?*, The State, (Apr. 16, 2019), https://www.thestate.com/news/special-reports/article227089334.html.

[119] *Id.*

F. Compared with children who are kept in the juvenile system, children who are transferred to the adult correctional system are profoundly more likely to be victims of assault and to commit suicide.

Aside from the lack of rehabilitative services designed for children in General Sessions and SCDC, and the lack of access to developmentally appropriate mental health services, incarceration at SCDC produces additional harms specific to children's physical and mental health. Relative to peers sent to juvenile facilities, children who are sentenced as adults are twice as likely to be assaulted by a correctional officer, five times as likely to be sexually assaulted, and eight times as likely to commit suicide.[120] Nationally, children who are incarcerated in adult facilities are thirty-six times more likely to commit suicide than those in juvenile facilities.[121] Despite these alarming statistics, SCDC has demonstrated that it is unable to address the basic mental health needs of its adult prisoners, let alone the special needs of children who are in the adolescent phase of development or are transitioning to adulthood.

III. To accord with the Eighth Amendment of the United States Constitution and Article 15 of the South Carolina Constitution, South Carolina's waiver scheme must allow for the consideration of factors of youthfulness outlined in *Graham*, *Miller,* and *Aiken* before permitting a child to be prosecuted in General Sessions.

The Eighth Amendment prohibition against excessive and cruel and unusual punishments and the South Carolina Constitution's ban on cruel or unusual punishments both derive from the idea that a punishment imposed should be proportional to blameworthiness. *See Kennedy v.*

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[120] Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. Pers. & Soc. Psych. 526, 526 (citing Christopher Hartney & Fabiana Silva, And Justice for Some: Differential Treatment of Youth of Color in the Justice System (2007), https://www.evidentchange.org/sites/default/files/publication_pdf/justice-for-some.pdf and Malcom C. Young & Jenni Gainsborough, Prosecuting Juveniles in Adult Court: An Assessment of Trends and Consequences (2000)).

[121] Chelsea Ellen Heaney, *Youthfulness Matters: A Call to Modernize Juvenile Waiver Statutes*, 43 Hastings Const. L. Q. 389, 415 (2016).

Louisiana, 554 U.S. 407, 419 (2008) (stating that the Eighth Amendment "flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.'") (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)); *see also State v. Wilson*, 413 S.E.2d 19, 27 (1992) (insisting that there is a constitutional obligation to consider whether the punishment imposed and defendant's blameworthiness are proportional).

Punishment is therefore unconstitutional if there is either a general societal consensus against its imposition or if its imposition affronts "the basic concept of human dignity at the core of the Amendment" because it is disproportionate to the offender's moral culpability. *Gregg v. Georgia*, 428 U.S. 153, 182 (1976) (plurality opinion). Each of these Eighth Amendment principles draws its meaning from "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

The Supreme Court of the United States, acting on those core Eighth Amendment principles, has dramatically altered the legal framework governing the treatment of children in the criminal legal system over the last thirty years. At the heart of the Court's sentencing decisions regarding children is one immutable principle: "children are constitutionally different from adults." *Miller*, 567 U.S. at 471. The evolution of this principle illustrates how the United States Supreme Court and the Supreme Court of South Carolina have embraced society's evolving standards of decency with respect to the importance of youth in sentencing and criminal law more generally.

In the context of cruel and/or unusual punishments, South Carolina's automatic waiver provision is unconstitutional because it ensures much more severe consequences for a child before their youth is ever considered. Of course, any sentencing judge in General Sessions must weigh the *Miller* factors before imposing a sentence of life without parole for a child. *See id.* at 489 ("[A]

judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles."). But by the time a child's case reaches that judge, the judge's hands are tied to a dramatic extent. Compare this untenable situation with the discretionary waiver statutes, under which a Family Court judge has the discretion to keep the child in the juvenile system and issue a much shorter sentence.

A. Under the Eighth Amendment, children must be treated as constitutionally different from adults.

Common sense, neuroscience, and social science have firmly established that, for sentencing purposes, children are constitutionally different from adults. *Aiken*, 765 S.E.2d at 576 (citing *Miller*, 567 U.S. at 471). This fundamental difference between children and adults stems from the distinctive attributes of youth, which render children less morally culpable than adults and more capable of reformation than adults, thereby diminishing the penological justifications for imposing severe sentences on children. *Miller*, 567 U.S. at 472. Deterrence is limited because "'the same characteristics that render juveniles less culpable than adults'—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment." *Id.* (quoting *Graham v. Florida*, 560 U.S. 48, 72 (2010)). Retribution, which relates to an offender's blameworthiness, is likewise limited because children as a class are less culpable than adults. *Id*. An argument for incapacitation, rather than rehabilitation, does not stand either; a finding of "incorrigibility" is "inconsistent" with youth. *Id.* at 472-73 (quoting *Graham*, 560 U.S. at 72-73).

This Court has recognized that, in light of our understanding of youthfulness, *Miller* requires that "courts fully explore the impact of a defendant's juvenility on the sentence rendered." *Aiken*, 765 S.E.2d at 577. This means that sentencing authorities must consider how children are different from adults in their decision-making process. *Aiken*, 765 S.E.2d at 577 (citing *Miller*, 567 U.S. at 480). This Court has specified certain factors that a sentencing court must consider with

regard to youthfulness: (1) the chronological age of the child and the hallmark features of youth; (2) the family and home environment surrounding the child; (3) the circumstances surrounding the offense, including the extent of the child's participation in the offense and how family and peers influenced them; (4) the incompetencies associated with youth; and (5) the possibility of rehabilitation. *Aiken*, 765 S.E.2d at 577 (citing *Miller*, 567 U.S. at 477-78). As the Supreme Court has stated, "[F]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult." *Graham*, 560 U.S. at 68 (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)). But automatic waiver binds judges from considering youthfulness at perhaps the most meaningful moment: before the child is ever waived and exposed to adult consequences.

1. Sentencing courts must consider the chronological age of the child and the hallmark features of youth.

The age of a person being sentenced for a crime must be considered during sentencing. *Miller*, 567 U.S. at 473-74 (quoting *Graham*, 560 U.S. at 76). Indeed, the Supreme Court of the United States has stated that the chronological age of a minor is a relevant factor "of great weight." *Miller*, 567 U.S. at 476 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982)). Age places children in a "significantly different category from . . . defendants . . . who[] committed their crimes as adults." *Graham*, 560 U.S. at 91 (Roberts, J., concurrence). This is because youth is "more than a chronological fact." *Miller*, 567 U.S. at 476 (citing *Eddings*, 455 U.S. at 115). Indeed, as compared to adults, children have underdeveloped brains,[122] are immature,[123] have transient

[122] *See* Laurence Steinberg, *Commentary: A behavioral scientist looks at the science of adolescent brain development*, 72 BRAIN & COGN. 160, 161 (2010) ("[E]vidence continues to accumulate that brain maturation continues throughout adolescence . . . .").

[123] *See* Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANNU. REV. CLIN. PSYCH. 459, 468 (2009) ("[Y]outhful decision making may still differ from that of adults due to psychosocial immaturity.")

characteristics,[124] and lack responsibility.[125] *See Miller*, 567 U.S. at 461, 471-72 (quoting *Roper*, 543 U.S. at 569-70) (acknowledging children's immaturity, undeveloped sense of responsibility, and capacity for change, and recognizing that parts of the brain involved in behavior control mature through adolescence); *see also Jones v. Mississippi*, 141 S. Ct. 1307, 1325-6 (2021) (reiterating the "transient immaturity" of youth described in *Miller*). These aforementioned characteristics are known to be hallmark features of youth.[126] Each of these features are significant to sentencing because they impact how a child might act in a variety of situations, which bears on their culpability for criminal acts.

First and foremost, children's brains are not fully developed, rendering them psychologically immature. This is because the prefrontal lobes of youth, which are responsible for abilities such as risk assessment, impulse control, moral judgment, decision making, consideration of future consequences, and evaluation of reward and punishment are less developed than those of adults.[127] *See Graham*, 560 U.S. at 68 (stating that parts of the brain involved in behavior control continue to mature throughout adolescence). In essence, children's characters are "not as well formed." *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 569. Because youth have less developed frontal lobes, they rely more heavily on the amygdala and other parts of the instinct-

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[124] *See, e.g.*, *id.* at 470 "[I]mpulsivity, as a general trait, declines linearly between adolescence and adulthood.")

[125] *See* Center for Law, Brain & Behavior at Massachusetts General Hospital, White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys and Policy Makers 41 (2022), https://clbb.mgh.harvard.edu/wp-content/uploads/CLBB-White-Paper-on-the-Science-of-Late-Adolescence-3.pdf (stating that adolescents can increase their personal responsibility through relationships with young and older adults) [hereinafter "White Paper"].

[126] *See id.* at 8.

[127] *See* Steinberg, *supra* note 123, at 466 (explaining that, because of changes happening in the prefrontal cortex throughout adolescence, there are improvements in "response inhibition, planning, weighting of risks and rewards, and the simultaneous consideration of multiple source of information.").

driven limbic system to make decisions than adults do.[128] The amygdala, located deep within the temporal lobe, is one area of the brain associated with strong negative emotions, including impulsive[129] and aggressive behavior.[130] From an evolutionary perspective, the amygdala was vital in order to detect danger and produce rapid protective responses without conscious participation.[131] Adolescents are more likely to act on an urge and less likely to think twice, change their minds, or pause to consider the consequences of their actions.[132]

Youthful psychological immaturity facilitates recklessness, impulsivity, and risk-taking, especially in emotional contexts.[133] *See Miller v. Alabama*, 567 U.S. 460, 471 (2012) (citing *Roper*, 543 U.S. at 569). Enhanced risk-taking is developmentally normative, making it quite common in children.[134] Scientific literature clarifies that the majority of adolescent males engage in criminal behavior.[135] In addition, in 2019, nearly one in four high school age children reported having been

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[128] *See* UNDERSTANDING THE TEEN BRAIN, https://www.stanfordchildrens.org/en/topic/default?id=understanding-the-teen-brain-1-3051 (stating that before adulthood, while connections between the emotional and rational parts of the brain are still developing, people process information with the amygdala more than the prefrontal cortex).

[129] Ausaf A. Bari et al., *Amygdala Structural Connectivity is Associated with Impulsive Choice and Difficulty Quitting Smoking*, FRONT. BEHAV. SCI., Jul. 2020, at 1, 8.

[130] *See* Katja Bertsch et al., *Understanding Brain Mechanisms of Reactive Aggression*, 22 CURRENT PSYCHIATRY REPS. 80, 81, Nov. 2020, at 1, 8 ("[A]mygdala activity was positively associated with aggression . . . .").

[131] *See* Goran Šimić et al., *Review: Understanding Emotions: Origins and Roles of the Amygdala*, BIOMOLECULES, May 2021, at 1, 30 ("The amygdala is the key structure in preparing an organism to react to danger or engage in a fight-or-flight response. . . . [I]ts role in the detection of fear is primarily and evolutionarily the most important.").

[132] *See* WHITE PAPER, *supra* note 125, at 11 ("Adolescents exhibit increased impulsivity . . . as compared to adults.").

[133] *See id.* at 12 ("[A]dolescents[‘] . . . self-control abilities are vulnerable to disruption from emotional cues . . . ").

[134] *Id.* at 11.

[135] Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCH. REV. 674, 685 ("In contrast with the rare life-course-persistent type, adolescence-limited delinquency is ubiquitous. Several studies have shown that about one third of males are arrested during their lifetime for a serious criminal offense, whereas fully four fifths of males have police contact for some minor infringement . . . . Most of these police contacts are made during the adolescent years. Indeed, numerous rigorous self-report studies have now documented that it is statistically aberrant to refrain from crime during adolescence.").

involved in at least one fight within the last twelve months.[136] Yet, not all children who engage in fighting are arrested; the 'delinquent' adolescent may simply be the one who gets caught,[137] especially in lower-income neighborhoods and communities of color where there tends to be increased police surveillance. *See United States v. Curry*, 965 F.3d 313, 338 n.2 (4th Cir. 2020) (Wynn, J., concurring) (expressing concern about the potential expansion of the Fourth Amendment exigency doctrine in "disadvantaged communities" with a higher police presence). Moreover, enhanced risk-taking can be adaptive for youth;[138] for instance, it can facilitate their new intellectual pursuits or friendships.[139] But in emotional contexts, and especially in the presence of peers, childrens' psychological immaturity is more likely to result in recklessness, impulsivity, and risk-taking, as compared to more neutral conditions where children have time to think through a problem.[140] This more impulsive behavior may come about because children are highly sensitive to emotional situations and, in the heat of the moment, may lose self-control.[141] The developmental phase of adolescence reflects the transient immaturity of youth, in which for a period of years, risk-taking, recklessness, and impulsivity can outweigh logical decision-making and responsibility.

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[136] Physical Fights on School Property and Anywhere, Nat'l Ctr. for Edu. Stats., https://nces.ed.gov/programs/coe/indicator/a12#suggested-citation (last visited Apr. 8, 2022).

[137] *See* Thomas Grisso, Forensic Evaluation of Juveniles (1998).

[138] White Paper, *supra* note 125, at 11.

[139] Common risky activities among youth include reckless driving, unprotected sex, and unintentional injuries. *See* Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 Dev. Rev. 78 (2008)).

[140] White Paper, *supra* note 125, at 13.

[141] *Id*.

Unfortunately, intellectual abilities and psychological maturation tend to be conflated, which detracts from fully understanding children's decision-making processes. Around sixteen years of age, basic intellectual abilities in adolescents reach adult levels.[142] But children's intellectual skills mature long before psychosocial capacities, which continue to develop well into the young adult years.[143] Most children do have an understanding of right versus wrong, but they are overwhelmed by other influences, such as social-emotional contexts and a greater sensitivity to rewards and peer influence, particularly when making decisions in emotionally charged situations, or the heat of the moment.[144] It is the psychological immaturity of a child which facilitates their undertaking of risky activities and behaviors. It is a phase of life that they will outgrow.

The hallmark features of youth—an underdeveloped brain, immaturity, lack of responsibility, and a character or personality which is not yet fully formed—make it difficult, even for expert psychologists, to determine whether a child's criminal conduct stems from their youthfulness or, in the rarest of cases, irreparable corruption. *Graham*, 560 U.S. at 68 (citing *Roper*, 543 U.S. at 573). Indeed, there is no scientifically reliable method to predict that a child is permanently incorrigible.[145] Because juvenile offenders cannot reliably be classified among the worst offenders, *Graham*, 560 U.S. at 68 (citing *Roper*, 543 U.S. at 569), their transgression is not

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[142] *Id*.

[143] *Id*.

[144] *See id*. at 13-15; *see also* Daniel Romer et al., *Can Adolescents Learn Self-Control? Delay of Gratification in the Development of Control Over Risk-Taking*, 11 PREVENTION SCI. 319, 319–330 (2010) (finding that adolescents prioritize immediate gratification more so than long-term consequences, and that ability to delay gratification improves between ages 14–22).

[145] WHITE PAPER, *supra* note 125, at 6.

"as morally reprehensible as that of an adult." *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988). This lessened culpability is pertinent to and must be considered in sentencing determinations.

2. Sentencing courts must account for the family and home environment surrounding the child.

The Supreme Court of the United States has recognized that children are largely unable to change their living situation, and that such a factor is also relevant at sentencing. *See Miller*, 567 U.S. at 471 (2012) (citing *Roper*, 543 U.S. at 570) (noting that youth "'have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings[]" in the context of sentencing). For instance, the Court has recognized that a child's family background and immersion in violence bear on their culpability for an offense. *See Miller*, 567 U.S. at 478 ("All these circumstances go to [the child's] culpability for the offense. . . . And so too does [the child's] family background and immersion in violence. Both his mother and grandmother had previously shot other individuals. . . . At the least, a sentencer should look at such fact . . . ."). Research indicates that youth who experience adversity[146] in their home and family environment are more likely to be involved in the criminal legal system.[147] While adversity results in increased risk of poor outcomes, it does not guarantee poor outcomes—children are remediable, especially if a child is removed from the adversity[148] or receives evidence-based care to address prior trauma.

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[146] Adversity can come in many forms, such as psychological trauma, violence, racism, neglect and maltreatment. *Id*. at 18.

[147] *Id*.

[148] *Id*. (citing Emmy Werner, *What Can We Learn about Resilience from Large-Scale Longitudinal Studies?*, Handbook of Resilience in Children 87-102 (S. Goldstein & R. B. Brook ed., 2013); Caitlin Cowan et al., *The Lasting Impact of Early-Life Adversity on Individuals and Their Descendants: Potential Mechanisms and Hope for Intervention* 15 Genes, Brain, & Behav. 155, 155-168 (2015)).

Children exposed to trauma in their home or family environment may face adverse effects in their brain development. According to Ford, Fraliegh, and Connor (2010), traumatic experiences overwhelm the (still developing) executive functioning capacities of the brain, causing impairment in the mediation of thoughts, behaviors, and emotions.[149] If the trauma persists over time, the adolescent's resources become depleted and they will use any means to avoid being revictimized, such as aggression.[150] Studies using PET scans and functional MRIs show that trauma can change the chemistry and structure of the brain, specifically the limbic system, or the source of emotion.[151] Youth who experience significant trauma develop into a state of near-constant "fight-or-flight," where they become hypervigilant and over-react to situations because their brain has learned to be constantly self-protective.[152] This defense mechanism can result in problems with self-regulation, distorted thoughts, lack of impulse control, and other factors that can increase delinquent behavior.[153] Greater exposure to traumatic events in childhood has been linked to an increase in delinquent behavior. For example, one Florida study found that children who experience "three or more types of trauma" are "1.7 to 3 times as likely to have a [Violent Felony Arrest] as youth who

[149] Julian D. Ford et al., C*hild Abuse and Aggression Among Seriously Emotionally Disturbed Children*, 39 J. CLIN. CHILD & ADOLESC. PSYCH. 1, 25-34 (2010).

[150] *See id.* at 30 ("[T]raumatic stress disorders may manifest in the form of reactive aggression that is a self-protective attempt to anticipate and prevent or counteract further victimization.").

[151] *See, e.g.,* Ryan J. Herringa, *Trauma, PTSD, and the Developing Brain*, 19 Current Psych. Rep., 10, 69 (2017); DePrince, A. P., Weinzierl, K. M., & Combs, M. D., *Executive function performance and trauma exposure in a community sample of children*, 33 CHILD ABUSE & NEGLECT 6, 353–361 (2009); Polak, A. R., Witteveen, A. B., Reitsma, J. B., & Olff, M., *The role of executive function in posttraumatic stress disorder: A systematic review*, 141 J. AFFECTIVE DISORDERS 1, 11–21 (2012).

[152] *Id*.

[153] Ford, et. al., *supra* note 149.

experience[] only one traumatic event."[154] With each additional traumatic experience, children's chances of being arrested for a violent felony were found to increase by 11%.[155]

At the same time, as compared with adults, children are much less able to control or escape from their environment. Children are dependent on adults and as such do not have the same options as adults do, to remove themselves from violent or other trauma-inducing living situations or events. In turn, they are much less responsible for the psychological toll their family or home environments may take on them. Given the critical impact of a child's environment and any traumatic events on their development, the practical impossibility for many children to remove themselves from their own homes is particularly relevant to any juvenile sentencing decision.

3. Sentencing courts must consider peer and family influence on the child, as can be demonstrated in part by the circumstances of the offense and the child's level of participation.

Children are uniquely susceptible to peer and familial influence, which impacts their decision-making, impulse control, participation in any risk-taking activities, and, by extension, their culpability.[156] Children are more likely than adults to take risks in the presence of peers, compared to when they are alone or in the presence of an adult.[157] Brain imaging studies have shown that this is because peer presence, for children in the adolescent stage of development, enhances responses in a brain region called the striatum, which is significant for motivation and

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[154] Micah E. Johnson, *Trauma, Race, and Risk for Violent Felony Arrests Among Florida Juvenile Offenders*, 64 Crime Delinq. 11, 1437-1457 (2018).

[155] *Id*.

[156] White Paper, *supra* note 125, at 24.

[157] *Id*. (citing Karol Silva et al., *Adolescents in Peer Groups Make More Prudent Decisions When a Slightly Older Adult is Present*, 27 Psych. Sci.322 (2016); Raymond Bingham et al, *Peer Pressure Norms and Pressure: Experimental Effects on Simulated Driving Among Teenage Males*, 41 Traffic Psych. & Behav. 124, 124-137 (2016)).

reward processing.[158] Therefore, even when a child objectively recognizes that a behavior is risky, their sensitivity to the rewards of peer relationships and any sense that such risky behavior will further their relationships may influence their choices.[159] Relatedly, adolescents are more distressed than adults when excluded by peers. Such findings are related to adults' greater development and use of a brain region called the right ventrolateral prefrontal cortex, which helps reduce stress when one is socially excluded from a group.[160]

In sum, because children are sensitive to peer and family influence, they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. *See Miller*, 567 U.S. at 471 (citation omitted) (stating that youth are "'more vulnerable . . . to negative influences and outside pressures,' including from their family and peers" in the context of children being constitutionally different from adults at sentencing). Even the mere presence of peers, with no pressure at all, results in children taking greater risks.[161] Fully mature adults, however, do not engage in the same risk-taking behavior in the presence of peers.

This factor also recognizes that the influence of a child's peers or family on their involvement in a crime may be apparent from the circumstances of the crime or the child's level of participation. Examples of such considerations may include whether or not the child acted alone or with a group of friends, or under the influence of an older peer, adult, or other authority figure.

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[158] Dustin Albert, Jason Chein, and Laurence Steinberg, *The teenage brain: Peer influences on adolescent decision making*, 22 *Current Directions in Psych. Sci.,* 2, 114-120 (2013).

[159] *See id*.

[160] *See* Catherine L. Sebastian, et al., *Developmental influences on the neural bases of responses to social rejection: implications of social neuroscience for education*, 57 NEUROIMAGE 3 (2011).

[161] *See* Margo Gardner and Laurence Steinberg, *Peer influence on risk taking, risk preference, and risky decision making in adolescence and adulthood: an experimental study*, 41 DEV. PSYCH. 4, 625-35 (2005).

4. Sentencing courts must be attentive to the incompetencies of children.

This Court has stated that the factors that a sentencing court must consider with regard to children include the "incompetencies associated with youth." *Aiken*, 765 S.E.2d at 577 (quoting *Miller*, 567 U.S. at 477. The Supreme Court of the United States provided examples of such incompetencies: inability to interact with police officers or prosecutors (including on a plea agreement) or incapacity to assist counsel. *Miller*, 567 U.S. at 477-78 (citing *Graham*, 560 U.S. at 78 and *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011)). In other words, incompetency here refers to children's limited knowledge of the criminal legal system and the roles of institutional actors within it. *Graham*, 560 U.S. at 78. Consideration of this factor allows a sentencing judge to reflect on the ways in which a child may be in a poorer position based on cognitive and volitional difficulties interacting with law enforcement and other system actors over the course of the case.

A child's understanding of legal proceedings is especially important because they are more easily moved by adult influence and coercion than their adult counterparts.[162] This fact impacts how late adolescents interact with the legal system, including decisions made during plea bargaining and their ability to meaningfully assist their defense attorneys.[163]

Children's likelihood to prioritize immediate outcomes over long-term consequences directly impacts how they interpret Miranda rights and make plea decisions, and even makes them more likely to falsely confess.[164] Research has linked age-related temporal discounting to the development of the prefrontal cortex, which progresses throughout adolescence.[165] To render this

[162] WHITE PAPER, *supra* note 125, at 27.

[163] *Id*.

[164] *Id*. at 28.

[165] Laurence Steinberg and Jason Chein, *Multiple Accounts of Adolescent Impulsivity*, 112 PROC. NAT. ACAD. SCI. 8807, 8807-8808 (2015).

temporal discounting clear, take the following example of how a police interrogation might go for an adolescent: An officer tells the youth that they will be permitted to go home if they just "tell the truth" or "help them understand their involvement" in an alleged offense; the adolescent perceives the ability to go home as an immediate reward, and may face increased pressure to render true and false confessions.[166] Factoring in racial profiling and cultural stereotypes of Black criminality, adolescents who are Black are more likely to have had negative experiences with law enforcement and expect to be treated unfairly from the points of questioning, to arrest, to interrogation, which can impact the decisions they make.[167]

Adolescents' general incompetence with regard to legal proceedings is heightened by their increased vulnerability to false memory formation as compared with adults.[168] Children's higher likelihood of forming false memories has implications for statements made during interrogation, especially when inaccurate information is intentionally or inadvertently stated or implied by investigators.[169] This connects directly to children's susceptibility to peer influence: friendship closeness can predict the willingness of a child to take the blame for a friend and conjure false memories to support such a false confession.[170]

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[166] WHITE PAPER, *supra* note 125, at 28.

[167] *See generally* Cynthia Najdowski, et al., *Stereotype Threat and Racial Differences in Citizens' Experiences of Police Encounters*, 39 L. & HUM. BEHAV. 463 (2015).

[168] WHITE PAPER, *supra* note 125, at 33.

[169] *Id*.

[170] *See* Jennifer Willard and Carly Burger, *Willingness to Falsely Take Blame Among Friends: Closeness, Reporting Wrongdoing, and Identity*, 39 DEVIANT BEHAV. 981 (2018).

5. Sentencing courts must be aware of the possibility of rehabilitation.

As the Supreme Court of the United States has noted, the frequency of criminal reoffending tapers off in early adulthood.[171] *See Miller v. Alabama*, 567 U.S. 460, 471-72 (2012) (citations omitted) ("[W]e cited studies showing that '[o]nly a relatively small proportion of adolescents 'who engage in illegal activity' 'develop entrenched patterns of problem behavior.' . . . [T]ransient rashness, proclivity for risk, and inability to assess consequences…enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'"). Indeed, even most of the adolescents who are deeply entangled in the criminal legal system and/or commit violent acts are likely to self-desist, or age out, of crime without the need for punitive intervention.[172] A strong body of research demonstrates that committing a violent crime before age 20 is not a strong predictor of a persistent criminal trajectory.[173] In one of the largest studies of children who committed serious offenses, "Pathways to Desistance," more than one thousand children were tracked over a seven year period, and the majority of them, especially those who received some kind of support services, did not reoffend; those who did re-offend were found to have committed relatively minor offenses.[174] Social science experts generally agree that one must start with the presumption that children are not at high risk to reoffend in adulthood.[175]

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[171] WHITE PAPER, *supra* note 125, at 37.

[172] *Id*.

[173] *Id*.

[174] Edward P. Mulvey, Carol A. Schubert, and Alex Piquero, *Pathways to Desistance - Final Technical Report*, 4; 7; 12 (2014), https://www.ojp.gov/pdffiles1/nij/grants/244689.pdf.

[175] Thomas Grisso, *Guidance for Improving Forensic Reports: A Review of Common Errors*, 2 OPEN ACCESS J. FORENSIC PSYCH. (2010).

Children desist with age in large part because adolescence provides a period of increased plasticity in which brain development facilitates change, adaptation, and learning in response to experience.[176] Throughout adolescence, as the connections between brain regions become more refined, and the part of the brain responsible for thoughtful decision-making improves, many factors related to juvenile crime (e.g., enhanced risk-taking; reward-sensitivity; peer influence) greatly diminish.[177] As the brain matures, children's desistence to crime improves.[178] Research indicates that adolescent misconduct generally reflects the "transient immaturity of youth."[179]

[176] WHITE PAPER, *supra* note 125, at 36.

[177] *Id*. at 39.

[178] *Id*.

[179] *Id*. at 40.

B. Like other states with a disjunctive prohibition on cruel *or* unusual punishments, South Carolina similarly incurs a broader responsibility to consider youthfulness than may exist under the Eighth Amendment.

This case also presents an opportunity to expound upon protections for children under the South Carolina Constitution. The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. In interpreting the scope of this amendment, the United States Supreme Court has looked to the original meaning of the phrase "cruel and unusual" and concluded that at the time the amendment was ratified, the phrase was "directed against punishments . . . disproportionate to the offense involved." *Gregg v. Georgia*, 428 U.S. 153, 169 (1976). Because the concept of "disproportionate punishment" is not "static," the Court's analysis under the Eighth Amendment requires an assessment of moral culpability in light of "the evolving standards of decency that mark the progress of a maturing society." *Id.* at 172–73 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).[180] This standard and the United States Supreme Court opinions applying it "set[] the floor for individual rights while the state constitution establishes the ceiling." *State v. Forrester*, 343 S.C. 637, 643–44, 541 S.E.2d 837, 840 (2001).

[180] The United States Supreme Court has repeatedly held that various forms of punishment that are disproportionate to the nature of the alleged offense violate the Eighth Amendment's evolving standards requirement. For example, in *Weems v. United States*, the Court looked to the history of the Eighth Amendment and the legislative debate that preceded its enactment and in light of that, held that a punishment of twelve years in irons at hard labor was unconstitutionally excessive for the crime of falsifying public records. 217 U.S. 349 (1910). In *Trop v. Dulles*, the Court held that the Army could not, consistent with the Eighth Amendment, expatriate a person convicted of desertion because to do so would subject the person to a punishment "decried by civilized people. 356 U.S. at 100–01. And in *Robinson v. California*, the Court invalidated a Los Angeles statute that criminalized narcotics addiction because "in the light of contemporary knowledge," the statute impermissibly punished innocent conduct in violation of evolving standards. 370 U.S. 660, 666 (1962); *see also Manning v. Caldwell*, 930 F.3d 264 (4th Cir. 2019) (en banc) (invalidating a municipal ordinance that criminalized possession or consumption of alcohol by a person declared a "habitual drunkard").

South Carolina courts follow a similar mode of analysis when interpreting the state constitution. Where the language in the South Carolina Constitution differs from the language in the federal constitution, the court's task is to determine whether the state constitution "provide[s] greater protection than the federal Constitution." *Id.* at 644, 541 S.E.2d at 840. The first step is for the court to consider any textual differences between the two documents and clues from state legislative history. S*ee id.* at 644–47, 541 S.E.2d at 840–42. The next step is to survey parallel language in other states' constitutions. Finally, the court should consider whether any newly proposed interpretation of the state constitution is consistent with past precedent. *Id.* at 645–48, 541 S.E.2d at 841–42. Applying that methodology here, it is clear that the language of Article I, Section 15 of the South Carolina Constitution sweeps more broadly than the language in the Eighth Amendment and that as a matter of state constitutional law, the waiver process is unconstitutional because it subjects children to disproportionate punishment.

1. The relevant text of the South Carolina Constitution is broader than that of the U.S. Constitution.

Article I, Section 15 of South Carolina's Constitution provides, in relevant part: "Excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, *nor* corporal, *nor* unusual punishment be inflicted, nor shall witnesses be unreasonably detained." S.C. CONST. art. I § 15 (emphasis added); *cf.* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). As a matter of plain language interpretation, the differences between the South Carolina and federal constitutions are significant. First, the state constitution uses a disjunctive framing, while the federal constitution is conjunctive, indicating that in South Carolina a punishment need only be cruel *or* unusual, not both, to be unconstitutional. *See Jennings v. Jennings*, 401 S.C. 1, 11–12, 736 S.E.2d 242, 247 (2012) (Toal, C.J., concurring). Grammatically, then, as a matter of state law "[t]he prohibition of

punishment that is unusual but not necessarily cruel carries an implication that unusually excessive imprisonment is included in that prohibition." *Bullock*, 485 N.W.2d at 872.

The conclusion that Article I, Section 15 sweeps more broadly than the Eighth Amendment is reinforced by the fact that the South Carolina Constitution includes three distinct categories of punishment that the drafters understood to be unconstitutional: cruel punishment; corporal punishment; and unusual punishment. This drafting form is unique among the constitutions in all American jurisdictions, including those that prohibit cruel or unusual punishments.[181] The choice to list punishments, one more specific and two more general, all separated by disjunctives, is a textual indication that the drafters contemplated the prohibition of three distinct categories and that the prohibitions should therefore be read broadly. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 225 (2008) (rejecting the narrowing principles of *ejusdem generis* and *noscitur a sociis* as applied to a statutory phrase that "is disjunctive, with one specific and one general category" and concluding that, as a textual matter, the contested phrase had to be broadly construed).

[181] *Compare* S.C. CONST. art. I, § 15 ("nor shall cruel, nor corporal, nor unusual punishment be inflicted") *with*, *e.g.*, Ala. CONST. art. I, § 15 ("excessive fines shall not be imposed nor cruel or unusual punishment inflicted"); Ark. CONST. art. II, § 9 ("nor shall cruel or unusual punishments be inflicted"); Cal. CONST. art. I, § 6 ("nor shall cruel or unusual punishments be inflicted"); Haw. CONST. art. I §, 12 ("nor cruel or unusual punishment [shall be] inflicted"); Kan. CONST. Bill of Rights § 9 ("nor cruel or unusual punishment [shall be] inflicted"); La. CONST. art. 1, § 20 ("No law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment."); Me. CONST. art. I § 9 ("nor [shall] cruel nor unusual punishments [be] inflicted"); Md. CONST. art. 9002, § 25 ("nor [shall] cruel nor unusual punishment [be] inflicted"); Mass. CONST. Pt. 1, art. 26 ("No magistrate or court of law shall . . . inflict cruel or unusual punishments."); Mich. CONST. art. I, § 16 ("cruel or unusual punishment shall not be inflicted"); Minn. CONST. art. I, § 5 ("nor [shall] cruel or unusual punishments [be] inflicted"); Miss. CONST. art. III, § 28 ("Cruel or unusual punishment shall not be inflicted."); Nev. CONST. art. I, § 6 ("nor shall cruel or unusual punishments be inflicted"); N.H. CONST. art. I, § 33 ("No magistrate or court of law shall . . . inflict cruel or unusual punishments."); N.C. CONST. art. I, § 27 ("nor [shall] cruel or unusual punishments [be] inflicted"); N.D. CONST. art. I, § 11 ("nor shall cruel or unusual punishments be inflicted"); Okla. CONST. art. II, § 9 ("nor [shall] cruel or unusual punishments [be] inflicted"); Tex. CONST. art. I, § 13 ("nor [shall] cruel or unusual punishment [be] inflicted"); Wyo. CONST. art. 1, § 14 ("nor shall cruel or unusual punishment be inflicted").

Despite some contravening caselaw, the available legislative history confirms this reading of the constitution. In *State v. Wilson*, 306 S.C. 498, 512, 413 S.E.2d 19, 27 (1992), the South Carolina Supreme Court indicated the analysis regarding whether a punishment is cruel or unusual is the same as that employed in the federal context. However, legislative history proves otherwise. In the late 1960s, the General Assembly formed a Committee, which decided to amend the Constitution of 1895 by, *inter alia*, substituting the disjunctive "nor" in Article I, Section 15 for the conjunctive "and." Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895, at 10 (June 1969) [hereinafter Final Report].[182] They compared the South Carolina Constitution to the Model Constitution[183] and explicitly decided "to accept the recommendation of the Model, but to make two additions: retain the restriction on using corporal punishment and retain the protection for witnesses." Book I, Proceedings of the Committee to Make a Study of the Constitution of South Carolina, 1895, at 11 (Aug. 25, 1966–Dec. 29, 1967); *see also* Final Report at 19 (noting the Committee's intent to "modernize the language "in Article I § 15). The Committee's decisions to adopt the Model Constitution and to include a separate prohibition on corporal punishment are significant because from the early 1960s, when the Model

[182] The precursor to the cruel punishment provision first appeared in the South Carolina constitution in 1790, which provided that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." S.C. CONST. art. IX, § 4 (1790); *see also id.* (1861) (same); S.C. CONST. art. IX, § 5 (1865) (same). Then, in 1895 White Democrats called a constitutional convention to rewrite the reconstruction-era constitution in an effort to disenfranchise newly freed African Americans. *See* D. D. Wallace, *The South Carolina Constitutional Convention of 1895*, 4 Sewanee Rev. 348, 350–51 (1896) (explaining that the purpose of the 1895 convention was "to take time by the forelock, and disenfranchise the negro before the next election"); *see also* Journal of Proceedings, South Carolina Constitutional Convention, at 443–44 (1895) (statement of B.R. Tillman) (describing the 1895 convention as directed at rewriting a constitution that placed white men "under the rule of our ex-slaves").

[183] The Model Constitution was an effort to offer states a plan of government premised on civic responsibility and based on a review of the language in state constitutions in effect at the time of its drafting. *See* Introduction *in* Model State Constitution (6th ed. 1963). The cruel and unusual prohibition in the Model provided: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted." *Id.* at 33, section 1.06(b). At the time the Model Constitution was drafted in 1963, all states other than Illinois and Connecticut had prohibitions on cruel or unusual punishment in their constitutions. *Id.* at 34.

Constitution was drafted, to the late 1960s, when the South Carolina amendments were drafted, there was a nationwide expansion of rights for criminal defendants, and especially criminal defendants and children in state court proceedings. *See*, *e.g.*, *In re Gault*, 387 U.S. 1 (1967) (extending due process to juvenile proceedings); *Ker v. California*, 374 U.S. 23 (1963) (incorporating the Fourth Amendment); *Robinson*, 370 U.S. 660 (incorporating the Eighth Amendment). Thus, the drafters of Article I, Section 15 intentionally adopted a constitution with more robust protections for criminal defendants. The drafters' decision to retain the specific prohibition against corporal punishment, which goes further than the Eighth Amendment and the Model Constitution, is another indication of the same legislative intent. Moreover, this inference is reinforced by other amendments the Committee undertook at the same time, which the Supreme Court of South Carolina has interpreted as "offering a higher level of . . . protection" than the federal constitution. *See Forrester*, 343 S.C. at 647, 541 S.E.2d at 842. In sum, the amendments that gave rise to the current form of Article I, Section 15 were part of a sweeping set of reforms intended to liberalize the 1895 Constitution and expand protections for criminal defendants.

2. Other states whose constitutions have disjunctive Punishment Clauses have interpreted their constitutions as requiring a more robust proportionality review than what the Eighth Amendment demands.

Eighteen states other than South Carolina use "or" or "nor" instead of "and" in their constitutional prohibitions on forms of punishment. Of those 18, courts in seven states have interpreted their constitutions as requiring a more searching proportionality review than the Eighth Amendment.[184] *See Anderson*, 493 P.2d at 884–87 (California); *State v. Baxley*, 656 So.2d 973,

[184] Courts in the following states have not expressly ruled on the question of whether their constitutions are co-extensive with or more protective than the Eighth Amendment: Alabama; Arkansas; Hawai'i; Maryland; Mississippi; Nevada; North Dakota; and Oklahoma. Courts in the following states have held that their constitutions are coextensive with the Eighth Amendment: Kansas, *State v. Scott*, 961 P.2d 667, 670 (Kan. 1998); North Carolina, *State v. Green*, 502 S.E.2d 819, 828 (N.C. 1998); and Texas, *Reyes v. State*, 557 S.W.3d 624, 631 (Tex. Ct. App.

977 (La. 1995); *State v. Dobbins*, 215 A.3d 769, 784 (Me. 2019); *Diatchenko v. Dist. Att'y for Suffolk Dist.*, 1 N.E.3d 270, 283 (Mass. 2013); *Bullock*, 485 N.W.2d at 872 (Michigan); *State v. Vang*, 847 N.W. 2d 248, 263 (Minn. 2014); *Johnson v. State*, 61 P.3d 1234, 1249 (Wyo. 2003); *see also State v. Bassett*, 428 P.3d 343, 349 (Wash. 2018) (explaining that the Washington Constitution is more protective than the Eighth Amendment because the Washington Constitution "prohibits conduct that is merely cruel; it does not require that the conduct be both cruel and unusual" (internal quotation omitted)); *State v. Enderson*, 804 A.2d 448, 454–55 (N.H. 2002) (acknowledging that the state constitution is at least as protective as the Eighth Amendment).

Nationwide, the consensus view is that when a state's constitution prohibits cruel *or* unusual punishment, the state constitution requires a more searching proportionality review. In practice, this has involved comparing the sentence at issue with sentences imposed on similarly situated individuals, and in a different context, the Supreme Court of South Carolina has implicitly endorsed this kind of proportionality review. *See State v. Dickerson*, 395 S.C. 101, 125 n.8, 716 S.E.2d 895, 908 n.8 (2011) (expressing concern with proportionality review in capital cases that is limited to a review of similar sentences, not similar defendants); *see also*, *e.g.*, *Baxley*, 656 So.2d at 977; *Bullock*, 485 N.W.2d at 873; *Vang*, 847 N.W.2d at 263. Moreover, when the South Carolina Supreme Court previously expanded the rights of children beyond the federal constitutional floor, the critical vote came from a member of the Court who explicitly relied on this language in the state constitution. *See Aiken*, 765 S.E.2d at 578 (Pleicones, J., concurring) (noting that "the

March 29, 2017). Only three of the 18 states—Kansas, North Carolina, and Texas—have expressly held that the disjunctive phrasing does not extend further than the Eighth Amendment. *But see Medley v. N.C. Dep't of Corr.*, 412 S.E.2d 654, 659–60 (N.C. 1992) (Martin, J., concurring) ("The disjunctive term 'or' in the State Constitution expresses a prohibition on punishments more inclusive than the Eighth Amendment."). Moreover, even in states that use the conjunctive form, legislative history supports the idea that the disjunctive form sweeps more broadly. For example, when Florida amended its constitution in 1998 to expressly preserve capital punishment, legislators also changed the word "or" into the word "and" because, they explained, that amendment "raise[d] the bar on the part of a defendant by requiring proof of both prohibitions rather than one or the other." Commentary to 1998 Amend., Fla. Const. art. 1 § 17.

majority exceeds the scope of current Eighth Amendment jurisprudence in ordering relief under *Miller*" but that "I would reach the same result under S.C. Const. art. 1, § 15"); *see also Brown v. State*, 10 N.E.3d 1, 4, 8 (Ind. 2014) (downwardly revising a child's aggregate sentence of 150 years because under the Indiana Constitution, the sentence was "inappropriate" and disproportionate); *State v. Sweet*, 879 N.W.2d 811, 839 (Iowa 2016) (categorically barring life without parole for children under the Iowa Constitution); *State v. Lyle*, 854 N.W.2d 378, 400–01 (Iowa 2014) (holding that "all mandatory minimum sentences of imprisonment for youthful offenders are unconstitutional" under the Iowa Constitution); *Diatchenko*, 1 N.E.3d at 283–84 (holding that under the Massachusetts Constitution, a sentence of life without parole for a child "is disproportionate not with respect to the offense itself, but with regard to the particular offender"); *Bassett*, 428 P.3d at 351–52 (holding that life without parole is unconstitutional for children under the Washington Constitution, which uses "nor").

Under a more searching proportionality review, and considering what we now know about the concrete developmental differences between adults and children, an automatic waiver system that subjects children to adult sentences and ramifications without any prior consideration of their youthfulness is at least cruel, and therefore violative of the South Carolina Constitution.

C. Automatic waiver to General Sessions based on an age of 16 or 17 and the seriousness of the offense is not justifiable under the Eighth Amendment of the United States Constitution or under Article 15 of the South Carolina Constitution.

As discussed *infra* Section I, South Carolina's automatic waiver provision is triggered by a combination of the age of the child and the seriousness of the offense. At the time of Jones's case, the age for automatic waiver was 16; after Raise the Age, it is now 17. Still, though, automatic waiver treats children who cannot join the military or pierce their ears without permission as though they are fully-fledged adults, responsible for their own decisions. Moreover, it creates a

bifurcated system by which 17-year-old children who are charged with certain felonies are adults, but same-age children charged with lesser felonies or misdemeanors may stay in Family Court. In effect, the science of child development is applied to some, but not all children.

South Carolina's bifurcated system in which some 17-year-olds are handled as adults and others are considered juveniles does not comport with the science or what we know about felony-level adolescent offenders. Multiple federal juvenile policy briefs and supreme court decisions have offered new insight into the potential for adolescent offenders to grow and change—and have also warned of serious negative consequences for children and communities, of sending minors through an adult criminal system.

In fact, following the supreme court decisions which recognized the "transient immaturity of youth," states have begun trending toward extending the Miller findings even late adolescence (ages 18–21). Children in this age group still do not have a fully operating neurological system and they engage in risky behaviors that are more comparable to younger adolescents than adults. It is not until young adulthood (ages 23–25) that the brain has fully matured and that judgment and decision-making improves. Peers become less salient or influential as autonomy increases. Decision-making becomes more reasoned, with greater focus on long-term consequences for choices and behavior. The ability to self-regulate emotions and behavior begins to stabilize.

Both courts and state legislatures have grappled in recent years with how best to address a developing understanding of where adolescence and adulthood meet, and have been trending towards broader protections for 18- through 21-year-olds.[185] Needless to say, South Carolina's

[185] State courts have responded to a developing understanding of adolescence by considering youthfulness even in cases of individuals 18 years or older. *See, e.g., Matter of Monschke*, 482 P.3d 276, 286, 288 (2021) (finding that "objective scientific differences between 18- to 20-year-olds . . . on the one hand, and persons with fully developed brains on the other hand, to be constitutionally significant" and vacating mandatory life without parole sentences for two appellants who were 18 years old at the time of their crimes). Examples of state legislative actions to reflect

automatic waiver statute based on an age of 16 at the time of Jones's case, or even 17 now, is not reflective of any modern scientific understanding of adolescent development.

Like turning 16 or 17 years old, the seriousness of a child's offense is similarly not a talismanic factor that makes a legal difference as to their culpability. Again, the constitutionally relevant developmental differences between children and adults do not apply only in misdemeanor cases, or only non-violent cases; they persist across offense-type. *See Miller*, 567 U.S. at 461 ("*Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes."); *see also State v. Null*, 836 N.W.2d 41 (Iowa 2013) (applying *Miller* when considering a 52.5 year sentence for a 16 year old convicted of second degree murder and first-degree robbery, and "not[ing] that *Miller* emphasizes that nothing said in *Roper*, *Graham*, or *Miller* is 'crime-specific.'") (quoting *Miller*, 567 U.S. at 461). Because sixteen and seventeen-year-olds still have diminished culpability, even if they commit a Class A felony under South Carolina law, the two variables of age and seriousness of the offense are constitutionally insufficient to automatically subject them to adult punishments without consideration of other juvenile factors.

IV. South Carolina's use of the automatic waiver perpetuates unjustifiable racial disparities in violation of the Eighth Amendment of the United States Constitution, and Article 15 of the South Carolina Constitution.

Generating during the moral panic around an increase in crime committed by children in the late 1980s and early 1990s, waiver provisions such as section 63-19-20 of the South Carolina Code were "driven by exaggerated public fears . . . reinforced by illegitimate racial attitudes."[186]

modern scientific findings include Vermont's expansion of its juvenile court jurisdiction to include 18 year olds, https://www.wbur.org/news/2019/10/03/juvenile-court-age-vermont-massachusetts, and Massachusetts' creation of special Emerging Adult courts, https://www.masslive.com/news/2021/06/a-second-chance-emerging-adult-court-of-hope-offers-fresh-start.html.

[186] Heaney, *supra* note 121, at 405 (quoting Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 Tex. L. Rev. 799, 800 (2003)).

Spurred on by a researcher who has since recanted, the public braced itself for a supposed wave of "Superpredators"—violent youth who would perpetrate crimes and be a menace to public safety, and who were assumed to be predominately Black and Brown based on racist stereotypes.[187] Unsurprisingly, it is now impossible to disentangle automatic waiver provisions from their racist roots and racially disparate outcomes. Almost two-thirds of children that go through adult court nationally are Black, and Black children are "nine times more likely than white youth to receive an adult prison sentence."[188] Due to a lack of centralized data or even localized tracking of juvenile waivers in South Carolina, far worse waiver outcomes for Black and Brown children in this state have likely escaped public scrutiny.[189] Despite a lack of localized waiver tracking, there is data demonstrating that, between 2015–2019, South Carolina experienced a substantial increase in the racial disparity between Black and White children placed in juvenile facilities, outpacing all other states with such data.[190] As of 2019, Black children were five times more likely than White children to be detained or committed in juvenile facilities in South Carolina.[191]

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[187] James C. Howell, *Superpredators and other myths about juvenile delinquency*, PREVENTING & REDUCING JUV. DELINQ.: A COMPREHENSIVE FRAMEWORK, 3-16 (SAGE Pub., Inc., 2009).

[188] Heaney, *supra* note 121, at 401.

[189] Amici submitted Freedom of Information Act requests to four Judicial Circuit Solicitor's Offices in preparation for this brief, requesting waiver-related data to include race. Each and every Solicitor's Office responded that they could not provide such data.

[190] THE SENTENCING PROJECT, BLACK DISPARITIES IN YOUTH INCARCERATION, (2021), https://www.sentencingproject.org/wp-content/uploads/2017/09/Black-Disparities-in-Youth-Incarceration.pdf.

[191] *Id*.

A. Automatic waiver results in Black and Brown children being disproportionately prosecuted in General Sessions, while their White counterparts remain in Family Court.

Striking racial disparities necessarily extend beyond juvenile placement in DJJ to the waiver context. Amici are only aware of two White children that have been waived to General Sessions in recent years.[192] Automatic waiver almost exclusively applies to Black and Brown children, who are more likely to be charged with a higher initial offense that renders them subject to the statute.

South Carolina's automatic waiver provision is particularly infirm because of race-based policing in our state, which begins in early childhood and extends throughout the school system: Black and Latino children are more likely to be suspended from school, arrested, incarcerated, and waived to adult court, than are their White counterparts.[193] Recall that law enforcement's initial charging decision determines whether a sixteen-year-old, or now seventeen-year-old, necessarily begins in General Sessions under automatic waiver. Without an opportunity for the judiciary to intervene and screen out Black children that would otherwise be automatically waived, we should expect that Black children will disproportionately find themselves in the adult system. A recent study found that 77.4% of youth arrested in Charleston were Black, even though Black people comprise only 21.7% of Charleston's population.[194] That means that Black youth were arrested at 10.38 times the rate of their White peers.[195] Charleston does not stand alone. Statewide, from

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[192] This number is based on interactions and requests for information from DJJ, available upon request.

[193] *See* ProPublica, Miseducation: South Carolina, https://projects.propublica.org/miseducation/state/SC.

[194] *Building a Safe and Just Charleston: From Eliminating Racist Policing to Investing in Life Affirming Services*, People's Budget Coalition 4, (2021) https://img1.wsimg.com/blobby/go/facb9db4-a1a8-4b3b-80c7-bf8ea2ba9426/Building%20a%20Safe%20and%20Just%20Charleston-0001.pdf.

[195] *Id*. at 5.

2018–2019, Black children comprised almost two-thirds of youth that were detained pretrial and approximately sixty percent of children with disposition commitments.[196] South Carolina's juvenile system has a striking racial disparity problem, and it is unsurprising that those disparities persist in waiver cases. In that same timeframe, eight children were transferred to General Sessions: six were Black, one was Hispanic, and one was White.[197]

Over-policing of Black communities is undoubtedly fueling disparate outcomes. But when discussing the juvenile system, we can also point to a specific phenomenon by which White people tend to overestimate the age and maturity of Black children. In *The Essence of Innocence*, researchers found that "perceptions of innocence began to diverge at age 10," after which age "the perceived innocence of Black children is equal to or less than the perceived innocence of non-Black children in the next oldest cohort."[198] The cohorts spanned four years—an incredible amount of time in terms of childhood development, making the finding that much more dramatic. Overall, "Black felony suspects were seen as 4.53 years older than they actually were."[199] Other research indicates that Black youth are more likely to be mistakenly viewed as older beginning at age ten.[200]

Theoretically, an automatic waiver statute based on age and offense should remove the opportunity for racially disparate outcomes by stripping away discretion. But the reality is that

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[196] This data was obtained from the South Carolina Department of Public Safety (DPS) for years 2018–2019, and is available upon request. Based on the DPS data, minority youth make up 43% of youth under 18 in South Carolina. Of the 13,591 cases referred to DJJ in 2019, 60% of them were for minority youth.

[197] *Id*.

[198] Goff, et al., s*upra* note 120, at 529.

[199] *Id*. at 532.

[200] WHITE PAPER, *supra* note 125, at 22 (citing Regina Miranda et al., *Perceived Discrimination, Ruminative Subtypes, and Risk for Depressive Symptoms in Emerging Adulthood*, 19 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 395 (2013)).

charging decisions are infected with racial bias,[201] and more Black children are charged with felony offenses than their counterparts. South Carolina's automatic waiver provision ensures that many Black children of a certain age are treated as adults, without the opportunity to ever set foot in Family Court. Black youth are nine times more likely than White youth to receive an adult prison sentence.[202] To compound disparities even further, research shows that for certain violent charges tried in adult court, youth are far more likely than their adult counterparts to receive guilty verdicts and harsher sentences.[203] Unsurprisingly, then, "Black male transferred juveniles" have been found to be the "most disadvantaged subgroup of criminal defendants" in regards to two key outcomes: prison sentences and length of jail sentences.[204] Taken together, automatic waiver mainly impacts Black children—especially boys—who then face disproportionately severe sentences in General Sessions, all without consideration of their youthfulness.

B. A system that increases penal consequences for racial minorities violates the Eighth Amendment protection against cruel and unusual punishment.

More commonly approached as an equal protection concern under the Fourteenth Amendment, a bifurcated criminal system that tends to sentence Black and Brown children as

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[201] Najdowski, et al., *supra* note 167.

[202] Melissa Sickmund, Anthony Sladky, and Wei Kang, *Easy Access to Juvenile Court Statistics: 1985-2017*, Off. Juv. Just. and Delinq. Prev. (last visited Apr. 8, 2022), https://www.ojjdp.gov/ojstatbb/ezajcs/. Delinquency Cases were filtered by race and selection criteria included Disposition (Waived). Youth population estimates are derived from Methods: "Population at risk of juvenile court handling in 2017." Additional calculations were conducted by the Children's Defense Fund.

[203] Patrick Griffin, Sean Addie, Benhamin Adams, and Kathy Firestine, *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, U.S. Dep't Just. Off. Just. Programs, Off. Juv. Just. & Delinq. Prev. (Sep. 2010); *see also* Aaron Kupchik, Jeffrey Fagan & Akiva Liberman, *Punishment, Proportionality, and Jurisdictional Transfer of Adolescent Offenders: A Test of the Leniency Gap Hypothesis*, 14 Stan. L. & Pol'y Rev. 57, 82 (2003); *see also* Megan C. Kurlychek & Brian D. Johnson, *The Juvenile Penalty: A Comparison of Juvenile and Young Adult Sentencing Outcomes in Criminal Court*, 42 Criminology 485, 491 (2004); David L. Myers, *Adult Crime, Adult Time: Punishing Violent Youth in the Adult Criminal Justice System*, 1 Youth Violence & Juv. Just. 173, 173 (2003).

[204] Peter S. Lehmann, *Sentencing Other People's Children: The Intersection of Race, Gender, and Juvenility in the Adult Criminal Court*, 41 J. Crime & Just. 553, 567 (2018).

adults also implicates the Eighth Amendment of the United States Constitution and the corresponding South Carolina constitutional provision. As described *supra* in Part I, children sent to adult court due to automatic waiver face longer sentences, including inescapable mandatory minimums. If waiver applies almost exclusively to Black children, then it is simply another means by which South Carolina treats Black children as adults without consideration of their immaturity or life circumstances. A two-track criminal legal system that allows White children to benefit from diversion, programming, and guidelines-based sentences, while their Black peers face mandatory minimums in General Sessions, is both cruel and unusual. Even if this Court does not believe that such a scheme is unusual in the United States, depriving the child of a chance at proceeding in Family Court based on a racially biased charging system is cruel under the South Carolina Constitution.

Conclusion

Mr. Jones's case presents a unique opportunity for this Court to rectify an ongoing, routine violation of children's constitutional rights: the automatic waiver to General Sessions based on a charging decision and birthday, in spite of concrete, scientific evidence that even a seventeen-year-old charged with a serious crime has diminished culpability. As written, section 63-19-20 cannot withstand scrutiny under the Eighth Amendment of the United States Constitution, let alone under the broader Article 15 of the South Carolina Constitution. Until all children charged with crimes in South Carolina have the possibility of remaining in Family Court, where they may receive an adjudication and indeterminate sentence, we can also expect that Black children will continue to be disproportionately adultified within our criminal legal system. Amici respectfully request that

this Court grant Mr. Jones relief in this case and hold that South Carolina's automatic waiver provision is unconstitutional.*

* Amici extend a special thank you to Harvard Law student Samantha Perri (expected JD '23) and soon-to-be law student Leah Smith for their substantial contributions to this Brief.

Respectfully Submitted,

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