No. 10-9647

In The
Supreme Court of the United States

KUNTRELL JACKSON,

Petitioner,

v.

RAY HOBBS, Director, Arkansas Department of Correction,

Respondent.

On Writ Of Certiorari To The Arkansas Supreme Court

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Do the Eighth and Fourteenth Amendments to the United States Constitution prohibit the imposition of a life-without-parole sentence on a 14-year-old-homicide offender?

2. Do the Eighth and Fourteenth Amendments to the United States Constitution prohibit the imposition of a life-without-parole sentence on a 14-year-old-homicide offender who was not the triggerman or shown to have intended the killing, but who acted with reckless indifference to human life?

3. Do the Eighth and Fourteenth Amendments to the United States Constitution prohibit the imposition of a mandatory life-without-parole sentence on a 14-year-old-homicide offender?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

On the night of November 18, 1999, Laurie Troup was shot and killed during a robbery at the Movie Magic video store where she worked in Blytheville, Arkansas. Petitioner, along with his cousin Travis Booker and friend Derrick Shields, robbed the store at around 8:00 p.m. (Trial Record ("TR") 196-98, 224-34, 287-88, 296-97)[1] Both petitioner and Shields were 14 years old, and Booker had turned 15 the previous day. (TR 280; State Exh. 2, Juvenile Transfer Hearing Record ("JTHR") 34-35, 62; State Exh. 4 at 1, 13, JTHR 35-36, 64)[2]

At the time of the robbery, petitioner and Booker knew Shields had a sawed-off, .410 shotgun hidden in the sleeve of his coat. (TR 228, 235, 286-87, 289, 292) When the three arrived at the video store, Shields and Booker walked inside and approached the counter, while petitioner remained outside by the open door in a position where he could see and hear Shields, Booker, and Troup. (TR 289-90) He saw Shields point the shotgun at Troup and heard him demand money from her several times. (TR 290, 294-95; State Exh. 3 at 6, TR 253-54, 364) When Troup denied having any money, petitioner entered the store, walked to the counter, and said, "We ain't

[1] The trial record is on permanent file with the clerk of the Arkansas Supreme Court as *Jackson v. State*, No. CR 04-45.

[2] The juvenile-transfer record is on permanent file with the clerk of the Arkansas Supreme Court as *Jackson v. State*, No. CA 02-535.

playin'." (TR 226-27, 296) Shields demanded money again, and when Troup mentioned calling the police, Shields shot her in the head, killing her. (TR 231-32) Petitioner, Shields, and Booker immediately fled to petitioner's house without taking any money. (TR 232, 297)

At petitioner's house, the three discussed not saying anything to anyone about the crime. (TR 297) Petitioner, however, subsequently implicated himself in statements he made at school. (TR 265-66, 283-85) Additionally, a search of Shields's bedroom in connection with another offense turned up evidence of an unrelated robbery plan, which led to further investigation of the Movie Magic crimes. *Shields v. State*, 357 Ark. 283, 285-86, 166 S.W.3d 28, 30-31 (2004).

In March 2001, police questioned petitioner, who was then confined in the serious-offender program of the Arkansas Division of Youth Services. (TR 32, 40-41; State Exh. 5, JTHR 37, 65) Following questioning, police arrested petitioner for the Movie Magic crimes and transported him to the Mississippi County Detention Center. (TR 32, 35, 41-43) Petitioner was charged as an adult with being an accomplice to the crimes of capital murder and aggravated robbery. (JA 42-43) As authorized by Ark. Code Ann. § 9-27-318 (Supp. 1999), he filed a motion to transfer his case to the juvenile division of circuit court, and sought a forensic psychological evaluation. (JTHR 12-15)

Evidence presented at the hearing on petitioner's transfer motion included his juvenile-arrest history,

which dated back to June 1995, before petitioner was 10 years old, and which ended in 2000, with petitioner's placement in the serious-offender program. (State Exh. 5, JTHR 37-39, 65) Additionally, petitioner presented the report of his forensic psychological evaluation. It reflected a diagnosis of, among other things, "Conduct Disorder, Childhood-Onset," and concluded that petitioner was capable of understanding the charges, could assist his attorneys in his defense, and had been capable of conforming his conduct to the requirements of the law at the time of the crime. (Def. Exh. 1, JTHR 70-71, 87)

The evidence also showed that, while in the Mississippi County jail awaiting trial on the capital-murder and aggravated-robbery charges, petitioner escaped. (State Exh. 7, JTHR 48, 67) According to a report prepared after petitioner's capture, petitioner explained that he had switched identities with another inmate, Travis Anderson, who was scheduled to be released from the jail that day. When a jailer came to process Anderson for release, petitioner – having donned Anderson's clothing – pretended to be Anderson, signed his release papers, left the jail, and caught a ride to another town. (State Exh. 7 at 4-5, JTHR 48, 67)

The court denied petitioner's motion to transfer, relying on petitioner's history of juvenile adjudications and antisocial behavior and emphasizing the serious nature of the offenses – particularly the fact that someone's life had been taken, that the crime involved a firearm, and that the underlying purpose

of the crime was pecuniary gain. (JTHR 24-26, 76-77, 79) The Arkansas Court of Appeals affirmed, *Jackson v. State*, No. CA 02-535, 2003 WL 193412 (Ark. App. Jan. 29, 2003) (unpublished), and the case proceeded to trial. There, the jury rejected petitioner's affirmative defense pursuant to Ark. Code Ann. § 5-10-101(b) (Repl. 1997), that, as a nontriggerman, he did not in any way "solicit, command, induce, procure, counsel, or aid in [the] commission[ ]" of the homicidal act, and convicted him of capital murder and aggravated robbery. (TR 13-14, 356-57) The court "merged" the aggravated-robbery conviction with the capital-murder conviction and imposed a sentence of life imprisonment without parole for capital murder pursuant to Ark. Code Ann. § 5-10-101(c) (Repl. 1997). (TR 357-59)

On direct appeal, petitioner challenged the sufficiency of the evidence, contending that he had not participated in the robbery or the shooting to an extent sufficient to support a finding of guilt. The Arkansas Supreme Court affirmed his conviction, finding substantial evidence to support the jury's determination that petitioner aided the aggravated robbery and the homicide. *Jackson v. State*, 359 Ark. 87, 90-92, 194 S.W.3d 757, 759-60 (2004). The court noted, in particular, that the jury had been free to accept Booker's account that petitioner said, "We ain't playin'" just before Troup was shot. *Id.*, 359 Ark. at 91-92, 194 S.W.3d at 760. The court concluded this evidence was sufficient to show petitioner, in fact, aided in the robbery and homicide. *Id.*, 359 Ark. at 92, 194 S.W.3d at 760.

Petitioner did not seek ordinary post-conviction relief, but in 2008, he filed a petition in circuit court seeking the extraordinary remedy of habeas corpus. (JA 5-40) Relying largely on *Roper v. Simmons*, 543 U.S. 551 (2005), petitioner asserted, first, that the Eighth Amendment prohibits a sentence of life imprisonment without parole for someone who was 14 years old at the time of the offense. (JA 11-26) Second, he asserted that the mandatory nature of his sentence to life without parole violated the Eighth Amendment because it did not allow a process for consideration of mitigating evidence. (JA 26-37) The State filed a motion to dismiss, claiming the petition did not state grounds for relief cognizable in state-habeas proceedings. (Habeas Record ("HR") 105-09) The circuit court agreed and dismissed the petition. (JA 72-76)

Petitioner appealed, and while his appeal was pending, this Court decided *Graham v. Florida*, 130 S. Ct. 2011 (2010). Following full briefing by the parties, the Arkansas Supreme Court affirmed the circuit court's decision granting the State's motion to dismiss. (JA 77-82) The court recited its familiar rule that, while detention for an illegal period of time is precisely what a writ of habeas corpus is meant to correct, if a sentence is within the limits set by the state legislature, it will not be considered illegal for purposes of issuing the remedy of habeas corpus. (JA 78-79) The court concluded that petitioner's sentence was within the limits set by the legislature and,

therefore, was not an illegal sentence for purposes of state habeas-corpus relief. (JA 80)

The court went on, however, to consider petitioner's argument that the logic of *Graham* and *Roper* invalidated his sentence to life imprisonment without parole for capital murder. (JA 80-82) The court concluded that the holdings in *Roper* and *Graham* did not extend to such sentences. (JA 81-82) It affirmed the lower court's judgment, stating petitioner had "failed to allege or show that the original commitment was invalid on its face or that the original sentencing court lacked jurisdiction to enter the sentence." (JA 82) One justice concurred in the decision, and two dissented. (JA 82-89) Following the decision affirming the denial of habeas relief, petitioner filed a petition for a writ of certiorari, which this Court granted.

SUMMARY OF THE ARGUMENT

Petitioner's sentence of life imprisonment without parole for the crime of capital murder, though severe, does not violate the Eighth Amendment. This Court has recognized that murder is the worst of crimes and that even the most serious violent crime short of it cannot be compared with the unjustified taking of human life. It is, of course, a fundamental precept of justice that punishment for a crime should be graduated and proportioned to the offense. Consequently, legislatures are entitled to conclude that those who commit homicide are deserving of the most

serious forms of punishment, including life imprisonment without parole. This Court's decisions in *Graham* and *Roper* are entirely consistent with that principle, and they do not warrant a categorical rule foreclosing a sentence of life without parole for a juvenile who has committed capital murder.

While *Graham* and *Roper* recognize that, relative to adult offenders, juvenile offenders are not as culpable and, therefore, may not be sentenced to death for the crime of homicide and life without parole for nonhomicide crimes, both cases also recognize that, relative to other youths who offend, juvenile-homicide offenders are the most culpable and may receive the penultimate punishment of life without parole. This view is shared by an overwhelming majority of state legislatures and the federal government, which authorize the imposition of life without parole upon 14-year-old-homicide offenders such as petitioner. This view also is reflected in the nation's sentencing practices, which give no indication of a downward trend in the imposition of life-without-parole sentences on juvenile-homicide offenders and which show the proportion of such sentences imposed on 14-year-old-homicide offenders is exponentially greater than the proportion that demonstrated rarity of the sentence in *Graham*.

Petitioner's effort to downplay the highly culpable nature assigned to his crime by the nation's legislatures and by this Court is misguided. As petitioner would have it, he gets the benefit of *Graham*'s categorical ban on sentences of life without parole

regardless of the crimes he has committed because the diminished culpability recognized by *Graham* and *Roper* is not crime specific. While juveniles' culpability might be diminished relative to adults who commit the same crimes, *Graham* and *Roper* did not hold that the culpability of juvenile offenders is static and equal. Rather, they establish that while a juvenile-homicide offender cannot be sentenced to death, that offender can still warrant greater punishment than a juvenile-nonhomicide offender. Thus, the gravity of petitioner's crime remains central to the Eighth Amendment analysis, and *Graham* does not require that the potential juveniles might have to grow and change categorically outweighs the known severity and irrevocability of death that they have inflicted on their victims and the substantial justifications that exist for a sentence of life without parole in those circumstances.

That life without parole allegedly was the only sentence petitioner could receive upon conviction also does not render his sentence unconstitutional, assuming the issue squarely is before the Court. Outside of the death-penalty context, this Court has never required discretionary sentencing, and the logic of *Graham* and *Roper* does not warrant the drastic measure of mandating that the states provide it in juvenile-homicide cases. While *Graham* and *Roper* hold that youth is relevant in the Eighth Amendment context, they expressly note that a discretionary-sentencing scheme would be inadequate to redress the constitutional concerns in those contexts. Petitioner

has offered no reason for the Court to reassess that conclusion here.

Moreover, such a sentencing scheme is not necessary in order to account for the relevance of youth recognized in *Graham* and *Roper*. The absence of a discretionary-sentencing scheme does not foreclose consideration of youth in juvenile-homicide cases involving potential life-without-parole sentences, as youth otherwise is and can be considered. Pre-conviction, juveniles' special status is taken into account in a variety of settings, with consideration being given to juveniles' youth and level of culpability. And post-conviction, youth and other allegedly mitigating evidence can be taken into account as part of the threshold consideration in a gross-disproportionality analysis, which allows for consideration of characteristics of individual offenders, including their culpability. Because the criminal-justice system already provides for adequate consideration of juvenile-homicide offenders' youth, the Court need not use the Eighth Amendment to impose discretionary-sentencing schemes on the states.

Finally, petitioner's sentence is not rendered disproportionate by virtue of the fact that he was not the triggerman, as he would be a death-eligible offender if he were an adult under this Court's precedents. His major participation in an aggravated robbery, combined with his reckless indifference to the victim's life, render him highly culpable and, but for his youth, could subject him to the death penalty. As a highly culpable juvenile-homicide offender,

petitioner is not entitled to the twice diminished moral culpability that *Graham* offers to nonhomicide offenders, and he constitutionally can be subject to life imprisonment without the possibility of parole.

ARGUMENT

This Court has long recognized that states have "the primary responsibility for defining crimes against state law, fixing punishments for the commission of these crimes, and establishing procedures for criminal trials." *Payne v. Tennessee*, 501 U.S. 808, 824 (1991). For this reason, "[r]eviewing courts . . . grant substantial deference to the . . . punishments for crimes" set by state legislatures. *Solem v. Helm*, 463 U.S. 277, 290 (1983). The Eighth Amendment overrides those legislative determinations, however, in those rare instances when "a punishment is [so] 'excessive'" that it "makes no measurable contribution to acceptable goals of punishment" or it "is grossly out of proportion to the severity of the crime." *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion). The punishment imposed on petitioner – life without the possibility of parole for the offense of felony murder – does not fall within those narrow categories.

To be sure, in *Graham* the Court held that a life-without-parole sentence imposed on a juvenile who committed armed burglary was grossly disproportionate. But this case differs from *Graham* in two

fundamental respects. First, even the most "serious violent offenses against the individual . . . cannot be compared to murder in their severity and irrevocability." *Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008) (citation and quotations omitted). A juvenile murderer is therefore far more culpable than a juvenile who commits a nonhomicide offense and deserves a greater punishment. Second, for that reason, not only is there no societal consensus *against* the imposition of life-without-parole sentences on juvenile murderers, there is a consensus *in support of* such sentences. Thirty-nine jurisdictions authorize the imposition of such sentences; and two-thirds of them mandate it. And whereas only a tiny fraction of juveniles who committed nonhomicide offenses had been sentenced to life without parole, the same cannot be said of juvenile murderers. In light of the substantial differences between this case and *Graham*, a categorical ban is not warranted here.

I. The Eighth Amendment Does Not Impose A Categorical Ban On The Imposition Of Life Without Parole On Juvenile-Homicide Offenders.

Murder is "the worst of crimes." *Kennedy*, 554 U.S. at 447. Indeed, most serious violent crime cannot, "in terms of moral depravity and of the injury to the person and the public[,]" even be "compare[d] with murder, which . . . involve[s] the unjustified taking of human life." *Coker*, 433 U.S. at 598 (plurality opinion). Given the "severity and irrevocability" of

murder, *Kennedy*, 554 U.S. at 438 (citation and quotations omitted), 14-year-olds who commit that offense are sometimes sentenced to life without parole, "the second most severe penalty permitted by law." *Graham*, 130 S. Ct. at 2027 (citation and quotations omitted). The Eighth Amendment – even as construed in this Court's decisions limiting sentences states can impose on juveniles – does not prohibit that practice.

In *Roper*, when striking down the death penalty for juveniles, the Court placed its imprimatur on such life-without-parole sentences by "noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person[ ]" and confirming that "the State can exact forfeiture of some of the most basic liberties[ ]" when a juvenile "commits a heinous crime." 543 U.S. at 572, 573-74. *Graham* also expresses tacit approval of life-without-parole sentences for juvenile-homicide offenders, as it points up the distinction between juveniles who murder and those who do not, with the latter's crimes differing from the former's "in a moral sense." 130 S. Ct. at 2027; *see also id.*, at 2041 (Roberts, C.J., concurring in the judgment) (noting Court's "apparent" support of life without parole for juvenile-homicide offenders); *id.*, at 2055 (Thomas, J., dissenting) (observing that holding left "intact" laws permitting life-without-parole sentences for juvenile-homicide offenders).

Whether the Eighth Amendment categorically bans the imposition of life-without-parole sentences on 14-year-old murderers depends on "the evolving

standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). Those standards necessarily take into consideration the severity of the crime of murder, which influences both parts of the analysis the Court has developed to assess whether a type of punishment is categorically banned under the Eighth Amendment. The Court first "considers objective indicia of society's standards, as expressed in legislative enactments and state practice to determine whether there is a societal consensus against the sentencing practice at issue." *Graham*, 130 S. Ct. at 2022 (citation and quotations omitted). Then, the Court exercises its "independent judgment" to determine whether a particular sentencing practice is unconstitutional. *Id.*, at 2022. A categorical ban on the imposition of life-without-parole sentences upon 14-year-old-homicide offenders is not warranted under either step of the analysis.

A. Petitioner has not met his heavy burden of establishing a societal consensus against the imposition of life without parole on 14-year-old-homicide offenders.

1. Legislation

"[L]egislation enacted by the country's legislatures[,]" which provides the "clearest and most reliable objective evidence of contemporary values[,]" *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (citation and quotations omitted), establishes overwhelmingly

the societal consensus in favor of life-without-parole sentences for 14-year-old-homicide offenders. Thirty-eight of the 50 states authorize the imposition of life without parole upon 14-year-old-homicide offenders.[3] The federal government also authorizes life imprisonment without the possibility of parole for juvenile-homicide offenders beginning at the age of 13. *See* 18 U.S.C. §§ 1111, 5032 (2006). In addition to homicide generally, at least 32 states and the federal government authorize life without parole for nontriggerman-juvenile-felony murderers, while at least 31 states and the federal government authorize life without parole for 14-year-old felony murderers. *See* Appendices A & B, *infra*. Finally, the federal government and 26 of the 38 states that authorize life-without-

[3] Petitioner states that 39 states authorize life without parole for 14-year-old murderers. *See* Pet. Br. at Appendices A & B. The State has excluded New Mexico from its count. The number 38 does not include, however, an additional five states that authorize life without parole for older juveniles who petitioner apparently also would like to sweep into his proposed categorical rule. *See* Tex. Penal Code § 12.31 (Vernon 2011); Tex. Fam. Code §§ 51.02(2), 54.02 (Vernon Supp. 2011); *id.*, at § 51.04(a) (Vernon 2008) (authorizing, with one exception, life without parole for 17-year-olds); N.Y. Penal Law Ann. § 30.00 (West 2009), *id.*, at § 60.06 (West Supp. 2012) (authorizing life without parole for first-degree murderers 16 and older); La. Stat. Ann. §§ 14:30(C), 14:30.1(B) (West Supp. 2012); La. Child. Code Ann., arts. 305, 857(A) & (B) (West Supp. 2012) (authorizing life without parole for juveniles 15 and older convicted of certain enumerated felonies); Ind. Code § 35-50-2-3 (Lexis Repl. 2009) (authorizing life without parole for murderers 16 and older); Cal. Penal Code § 190.5(b) (West 2008) (authorizing life without parole for first-degree murderers 16 and older).

parole sentences for 14-year-olds *mandate* it in some circumstances, meaning that it is the *only* punishment authorized for those offenses. *See* Appendix C, *infra*.

The recent vintage of many of the laws authorizing sentences of life without parole for 14-year-old-homicide offenders further supports the national legislative consensus in favor of them, for this Court has looked to "the direction of change[ ]" when assessing whether a consensus exists. *Roper*, 543 U.S. at 566 (citation and quotations omitted). Many of the state laws authorizing – indeed, requiring – life-without-parole sentences for juvenile murderers were passed in the mid-1990s. *See* "Juvenile Justice: A Century of Change," at 19 (U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, Dec. 1999). And there is no evidence of a mounting retreat. In fact, in 2011, the Iowa legislature reaffirmed that life without parole is the only sentence available for 14-year-old first-degree felony murderers. Iowa Acts 2011 S.F. 533 § 147 (effective Jul. 27, 2011; amending Iowa Code § 902.1); *see also* 2011 Nevada Laws Ch. 12 (A.B. 134) (effective Mar. 30, 2011; amending Nev. Rev. Stat. § 176.025) (amending statute to conform with *Graham* and affirming availability of life without parole for juveniles); 2006 Va. Acts, chs. 36, 733 (effective Jul. 1, 2006; amending Va. Code Ann. § 18.2-10) (amending statute to conform with *Roper* and reaffirming that life without parole is mandatory for juveniles). All told, there is a clear national legislative consensus

authorizing life without parole for 14-year-old-homicide offenders, including for the specific class in which petitioner falls.

Petitioner's effort to discount this overwhelming consensus is flawed. He first argues that the imposition of life without parole is merely "adventitious," Pet. Br. at 44, that there is no evidence that state legislatures actually mean to allow life-without-parole sentences to be imposed upon juveniles who commit homicides, but he is wrong. The statutory authorization of an adult sentence upon a juvenile should, alone, be enough to settle the question against him in light of this Court's oft-repeated observation that, when enacting legislation, it is presumed that "elected representatives . . . know the law" and thus not only know what they are authorizing, but also the existing backdrop against which they are doing it. *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) (referring to members of Congress); *see also Albernaz v. United States*, 450 U.S. 333, 342 (1981) (opining that "[i]t is not a function of this Court to presume that Congress was unaware of what it accomplished[ ]") (citation and quotations omitted); *but see Graham*, 130 S. Ct. at 2026 (observing that "statutory eligibility" of life-without-parole sentence for a juvenile-nonhomicide offender "does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration[ ]").

Perhaps more importantly, it simply is not the case, as petitioner asserts, that life without parole is

merely "theoretical[ly] availab[le]" or that the legislatures that authorize it are not aware, with the exception of Massachusetts, that they are doing so. Pet. Br. at 47. As the State already has noted, life without parole is the *only* penalty the federal government and 26 states authorize for certain homicide offenses committed by certain 14-year-olds, hardly rendering it merely theoretically available. Moreover, in a number of states, legislators have expressed their awareness of subjecting 14-year-olds to life without parole. Arkansas, for example, expressly provides that juveniles who are designated extended-juvenile-jurisdiction offenders – those who are subject to both juvenile disposition and an adult sentence – are subject to "the full range of adult sentencing[,]" with the sentence not to exceed 40 years, except for juveniles adjudicated delinquent for capital and first-degree murder. Ark. Code Ann. § 9-27-507(b)(2)(A)(i) & (ii) (Repl. 2009). Those offenders can be sentenced "for any term, up to and including life[,]" *id.*, at § 9-27-507(b)(2)(A)(ii), except that, unlike juvenile offenders who are sentenced like adults, they are "subject to parole[ ]" for those offenses. *Id.*, at § 9-27-510(c)(1)(B); *see also* Ark. Code Ann. § 16-93-607(c)(1) (Supp. 2011). The legislature's authorization of life imprisonment with parole for certain juveniles originally adjudicated delinquent in juvenile proceedings makes clear its understanding that those convicted as

adults in the first instance are subject to the full range of punishment to which adults are subject.[4]

Other jurisdictions that petitioner either has not cited or has cited in a footnote as "arguably authoriz[ing] life without parole[,]" Pet. Br. at 46 n.54, also make clear their legislatures' awareness of subjecting juveniles to life imprisonment without the possibility of parole. North Carolina, for example, provides that a person who commits murder in the first degree and "who was under 18 years of age at the time of the murder shall be punished with imprisonment in the State's prison for life without parole." N.C. Gen. Stat. § 14-17 (West Supp. 2010). Similarly, Wyoming authorizes the punishment of death, life imprisonment without parole, or life imprisonment "according to law[ ]" for first-degree murder, "except that no person shall be subject to the penalty of death for any murder committed before the defendant attained the age of eighteen (18) years." Wyo. Stat. Ann. § 6-2-101(b) (Lexis 2011); *see also*, *e.g.*, Md. Code Ann. Crim. Law § 2-202(b)(2) (West 2002) (providing that a defendant under 18 shall not be sentenced to death, but to life without parole or life imprisonment for first-degree murder); Mo. Rev.

[4] The statutory provisions governing extended-juvenile-jurisdiction offenders were in effect at the time petitioner committed his crimes. They were enacted in 1999, in the wake of 1998 shootings at an Arkansas middle school, where an 11-year-old and a 13-year-old killed five and injured 10 others. *See Golden v. State*, 341 Ark. 656, 658, 21 S.W.3d 801, 801-02 (2000); Ark. Acts 1999, No. 1192, §§ 7, 10.

Stat. § 565.020(2) (1999) (authorizing life without parole or death for first-degree murder, except not for the latter when the defendant is under 16); *cf.* Cal. Penal Code § 190.5(b) (West 2008) (authorizing life without parole for juveniles 16 years old and older found guilty of first-degree murder). In short, the consensus that life without parole is a permissible sentence for a juvenile-homicide offender is not an "unconsidered consequence" of juvenile-transfer statutes, as petitioner would have it. Pet. Br. at 43.

2. Sentencing Practices

Actual sentencing practices are in accord with the legislative consensus. Petitioner asserts that there are "about 79 persons" serving life-without-parole sentences for offenses they committed at the age of 13 or 14. Pet. Br. at 47.[5] Taking petitioner's

[5] There is reason to doubt the accuracy of this number, if for no other reason than that petitioner does not attempt to identify the number of offenders from any particular jurisdiction since the release of the study self-published by his attorneys, dated January 2008. *Id.*, at 47 n.57; *see also* Equal Justice Initiative, "Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison," at 20 (2008). At least for Arkansas, petitioner appears to have the number wrong, as the study states that there are four offenders, with his brief and that of the petitioner in *Miller v. Alabama*, No. 10-9646, identifying two more. *See* Pet. Br. at 47 n.57 & 49 n.62; Miller Pet. Br. at 24 n.31. The State has been informed by its corrections officials that there are at least seven homicide offenders in Arkansas serving life sentences for offenses committed when they were 14 years old: John McNeely, John Ponder, Willie Mitchell, Cedric Harris,

(Continued on following page)

number of 79 at face value, it does not support his argument of constitutionally disproportionate rarity. The relatively low incidence of 14-year-old-homicide offenders serving life-without-parole sentences reflects the low incidence of 14-year-old-homicide offenders generally, not an unwillingness to impose life sentences on them. As petitioner himself admits, "[h]omicides by young teens are themselves infrequent[,]" with young adolescents representing "only a tiny fraction of the total number of homicide arrests every year." Pet. Br. at 5, 54 (footnote omitted from latter). Indeed, his own numbers demonstrate that, thankfully, 14-year-olds rarely are even arrested for homicides, much less prosecuted for them either through juvenile or adult court. *Id.*, at 54 n.67 (noting that of 8,667 murder or non-negligent homicide arrestees in 2010, 73 or .8% were 14 years old or younger); *id.*, at 57 n.75 (reciting that of 19,941 murder or non-negligent homicide arrestees in 1992, 304 or 1.6% were 14 years old or younger). The State has not found evidence to contradict petitioner's assertion of the rarity of homicides committed by 14-year-olds.

Brandon Isbell, petitioner, and petitioner's triggerman, Derrick Shields. Petitioner's counsel have stated that they "extensive[ly]" searched for evidence of all relevant offenders. Pet. Br. at 47 n.57. The State does not dispute this. Their deficient effort in Arkansas, however, merely points up the difficulty in ascertaining an accurate number and the harder still enterprise of deciding whether to base a constitutional rule upon it.

Whatever the exact rate of commission of homicides by 14-year-olds, the proportion of life-without-parole sentences imposed upon such offenders is exponentially greater than the proportion the Court concluded demonstrated rarity in *Graham*. There, the Court looked to "the base number of certain types of offenses[,]" for which juveniles were arrested in 2007 – a total of 380,480 arrests. *Id.*, at 2025. Against this total of 380,480 arrests, the Court concluded that, "in proportion to the opportunities for its imposition[,]" the 123 such sentences that had been imposed were rare. *Id.*, at 2025. Here, there were 73 arrests of 14-year-olds or younger for murder and non-negligent homicide in 2010, and there are 79 homicide offenders serving such sentences. In stark contrast to *Graham*, the relatively small number of 14-year-olds sentenced to life without parole for homicide merely mirrors the small number of them who commit those crimes in the first instance.

An added contrast to *Graham* is the fact that, among the jurisdictions authorizing sentences of life without parole for 14-year-old-homicide offenders, a greater number of jurisdictions impose them for homicide than did for nonhomicide in *Graham*. Here, petitioner asserts that the 14-year-old-homicide offenders currently imprisoned for life without parole are distributed among 18 states. Pet. Br. at 49. That number represents a 64% increase in the number of states imposing sentences of life without parole in homicide cases over the 11 jurisdictions that imposed such sentences on nonhomicide offenders in *Graham*.

130 S. Ct. at 2024. The significance of that increase is heightened when one considers that a greater number of states impose the penalty for a fewer number of more serious offenders.

Petitioner's bare citation to 79 offenders also does not show that life-without-parole sentences are imposed less frequently on juvenile murderers than they are upon adult murderers. Despite having the burden of proving the absence of a national consensus, *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989), petitioner cites to no statistics showing what percentages of juveniles who are prosecuted as adults and are convicted of homicide offenses actually receive life-without-parole sentences. He similarly does not provide statistics as to how often life without parole is imposed upon adults convicted of homicide, so that a meaningful determination could be made as to whether 14-year-olds receive life without parole at a significantly lower rate than similarly situated adults. And a report petitioner cites in his brief, Pet. Br. at 62, states that "in eleven out of the seventeen years between 1985 and 2001, youth convicted of murder in the United States were *more* likely to enter prison with a life without parole sentence than adult murder offenders." Amnesty Int'l & Human Rights Watch, "The Rest of Their Lives: Life Without Parole for Child Offenders in the United States" 2 (2005) (emphasis in original). Petitioner therefore has presented no factual basis upon which to allege a societal

reluctance to impose the sentence against 14-year-olds.[6]

Nor does the evidence of 79 offenders demonstrate a downward trend in the imposition of life-without-parole sentences that might suggest contemporary society has eschewed the practice. Relying on a study published by the Equal Justice Initiative in January 2008, petitioner asserts that, as of that date, 73 offenders were serving life without parole for offenses they committed when they were 13 or 14. *See* Pet. Br. at 47 n.57. As of the date of the filing of his brief, he states that there are some 79, "plus or minus

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[6] Petitioner undoubtedly is correct when he states that 79 offenders represents an "*accumulation*" of sentences over many years, Pet. Br. at 48 & n.58 (emphasis in original), but the statement is misleading to the extent that it implies that the sentence of life without parole has been available for 14-year-olds since 1971 in the 39 jurisdictions in which it currently is available, providing those jurisdictions with "extensive[ ]" opportunities to impose it. *Id.*, at 52. Ohio, for example, did not authorize 14-year-olds to be subject to adult conviction for capital murder until 1996. *See* Ohio Rev. Code Ann. § 2151.26 (Supp. 1996) (currently codified at Ohio Rev. Code Ann. § 2151.10 (Repl. 2011)); *see also*, *e.g.*, Mich. Comp. Laws §§ 712A.4(1) and 764.1f (West 1997) (authorizing automatic waiver for 14-year-olds who commit certain serious violent felonies, including first-degree murder, effective January 1, 1997) (currently codified at Mich. Comp. Laws §§ 712A.4(1) (West 2002) and 764.1f (West 2000)). Moreover, petitioner's own argument contradicts this implication, as he asserts that "fears of a massive increase in violent juvenile crime" in the 1990s "stimulated many of the legal changes that removed young adolescents from juvenile courts and exposed them to sentences of life without parole." Pet. Br. at 54.

one or two[,]" due to "some" receiving relief from their sentences, while "some new sentences" also have been imposed. *Id.* Assuming that as few as two offenders obtained relief and accounting for the two Arkansas offenders originally not included, there appears to be a net gain of six offenders since January 2008 by petitioner's own count. As this Court has noted when discussing legislative trends in this context, "it is not so much the number of these States that is significant, but the consistency of the direction of change[ ]" in assessing the absence of consensus. *Roper*, 543 U.S. at 566 (citation and quotations omitted). So, too, with actual sentencing practices. *See*, *e.g.*, *id.*, 543 U.S. at 564-65 (relying on fact that only three juveniles executed in 10 years as evidence of lack of consensus); *Atkins*, 536 U.S. at 316 (relying on fact that only five states had executed mentally retarded offenders in past 13 years). The statistics here show no consistent change in direction against the challenged practice, only its continued acceptance.

As his final argument concerning consensus, petitioner cites to international law as evidence of the "global consensus" against the practice of imposing life without parole on juveniles. Pet. Br. at 50 (quoting *Graham*, 130 S. Ct. at 2033). While the Court admittedly has looked to international law and the laws of other nations to "confirm[ ]" its "own conclusions" as to the meaning of the Eighth Amendment, *Roper*, 543 U.S. at 578, it has not viewed "those norms a[s] binding or controlling[.]" *Graham*, 130 S. Ct. at 2034. Thus, the alleged international consensus upon

which petitioner relies plays no role in deciding whether there is a "national consensus[ ]" in this country against the practice. *Id.*, at 2023. As the State has explained, there is not, and the Court need not look to international law to dispel that view. Petitioner has not demonstrated a national consensus against the imposition of life without parole on 14-year-old-homicide offenders, despite his "heavy burden" to do so. *Stanford*, 492 U.S. at 373 (citation and quotations omitted).

B. The Court should not disregard the judgment of the citizenry and its legislatures to conclude that life without parole is an impermissible punishment for 14-year-olds who have committed the worst offense.

Once the Court receives "essential instruction[ ]" on the objective indicia of national consensus, *Roper*, 543 U.S. at 564, it determines whether, in the exercise of its independent judgment, "there is reason to disagree with the judgment reached by the citizenry and its legislators[ ]" concerning the propriety of a particular punishment. *Atkins*, 536 U.S. at 313. Here, there is no reason for the Court to disregard the judgment of the citizenry and its legislators that life without the possibility of parole is a permissible sentence for 14-year-old-juvenile murderers. Society is justified in sentencing them to the penultimate punishment for their commission of the worst crime.

1. Proportionality

Petitioner does not seriously dispute the assessment of both the nation's legislatures and the Court that juvenile-homicide offenders have committed the worst crime, but instead attempts to temper its significance by arguing that the diminished culpability of juveniles that this Court recognized in *Roper* and *Graham* is not crime specific. By doing so, petitioner essentially argues that consideration of the crimes he has committed is irrelevant to his excessive-sentence claim. That contention is untenable for the offenses committed lie at the heart of any such claim. In *Robinson v. California*, 370 U.S. 660, 667 (1962), the Court made clear that a claim that a sentence is constitutionally excessive cannot be evaluated merely by freestanding consideration of its length. Rather, the validity of a sentence must be assessed in relation to the offenses for which it was imposed. *Id.*, 370 U.S. at 667.

Stated differently, "the Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic precept of justice that punishment for a crime should be graduated and proportioned *to the offense*." *Kennedy*, 554 U.S. at 419 (emphasis added; citation and quotations omitted). For that reason, the Court has "never invalidated a penalty mandated by a legislature based only on the length of sentence[.]" *Harmelin v. Michigan*, 501 U.S. 957, 1006-07 (1991) (Kennedy, J., concurring in part and concurring in the judgment); *see also Solem*, 463 U.S. at 288-90 (holding that "a criminal sentence

must be proportionate *to the crime* for which the defendant has been convicted[ ]") (emphasis added). Whatever else *Graham* and *Roper* may stand for, they do not jettison the overriding conception that forms the basis of an Eighth Amendment excessive-sentence claim: "that punishment . . . should be graduated and proportioned to [the] offense." *Graham*, 130 S. Ct. at 2021 (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)); *Roper*, 543 U.S. at 560 (same). Although he understandably wishes it were not so, the offense that petitioner committed is an integral part of his claim of excessiveness.

2. Culpability

Petitioner's claim that juveniles have lessened culpability as a rule and thus cannot be sentenced to life without parole no matter what crime they have committed places more weight on *Graham* and *Roper* than they can bear. Despite their adoption of categorical bans on certain kinds of punishments due to the reduced culpability of juveniles, *Graham* and *Roper* are consistent with this Court's long-term recognition that the unjustified killing of another human being is not comparable to other offenses. Although *Graham* prohibits the imposition of a sentence of life without parole upon juveniles who do not kill and *Roper* prohibits the imposition of the death penalty on juveniles who do, both adhere to this Court's understanding that homicide is the worst possible crime that a person can commit, deserving of, at the very least, the penultimate punishment. Consistently with

this Court's cases, legislatures are entitled to conclude that one category of offenses is worse than all the others – unjustified homicide – and can exact a higher, although not the ultimate, price for its commission, even in the case of juveniles. *Cf.*, *e.g.*, *Ewing v. California*, 538 U.S. 11, 28 (2003) (plurality opinion) (observing that "[i]t is enough that the [s]tate . . . ha[d] a reasonable basis for believing" the challenged sentence "advances the goals of its criminal justice system in any substantial way[ ]") (citation and quotations omitted).

Interjecting scientific studies into the calculus does not render life imprisonment without the possibility of parole disproportionate for juvenile-homicide offenders. The State does not dispute the general proposition advocated by petitioner, buttressed by his reliance on numerous studies and accepted by the Court in both *Roper* and *Graham*, that juveniles, as a general matter, are less culpable than are adults. It does not even dispute the additional propositions that juveniles, as a general matter, tend to engage in risky behavior, are sensation seeking, and are impulsive, or that "it is statistically aberrant for boys to refrain from minor criminal behavior" during young adolescence. Pet. Br. at 24. These propositions, however, do not answer the question at hand. Despite their tendency to be impulsive, engage in risky behavior, or be sensation seeking, most juveniles do not commit violent crimes and only a minute fraction of them commit murder. Indeed, by petitioner's own admission, engaging in violent crime and committing felony

murder are statistically aberrant (not to mention societally aberrant). States should not be precluded from treating any of those specific statistically aberrant situations differently based upon generalizations about the typical adolescent. The Eighth Amendment does not require this when the juvenile has taken a life.

Not content to rely only on scientific evidence, petitioner asserts that juveniles' lack of maturity also is "obvious to parents, teachers, and any adult who reflects back on his or her own teenage years[.]" Pet. Br. at 18. Thus, petitioner essentially claims that it is "self-evident" that juveniles are inherently less culpable and that there is a "societal understanding" concerning this that this Court must enforce. What petitioner's argument fails to consider is that legislators – who surely are aware of this societal understanding – nonetheless also concluded that, despite their youth, at least some juveniles are sufficiently precocious in their criminality to warrant the exceptional punishment of life without the possibility of parole. This Court must give deference to that legislative choice. *See Solem*, 463 U.S. at 290.

Laws prohibiting juveniles from voting, serving on juries, marrying, and the like and those affording them heightened protection, which petitioner invokes, are not in tension with the legislative decision that particular juveniles are sufficiently mature in their criminality. The same legislators who enacted laws barring juveniles from certain activities and affording them heightened protection also have made juvenile

murderers subject to life-without-parole sentences, and there is no reason to focus on the former group of laws to the exclusion of the latter. Even leaving this aside, however, the fact that juveniles as a class may be viewed as unsuited to vote, serve on a jury, or drive – with an individualized inquiry not worth the societal cost in those contexts – does not conflict with determinations that certain juveniles should be subjected to adult punishments, commensurate with the harm they have caused to both society and victims.

Moreover, even if laws concerning juveniles were in tension with one another, petitioner does not explain why the legislative consensus of generalized diminished culpability in the civil context must trump the legislative consensus of nondiminished culpability for the crime of murder in the criminal context, much less why it is of constitutional import. As the plurality noted in *Stanford*, the level of maturity needed "to drive carefully, to drink responsibly, or to vote intelligently[ ]" simply is not comparable to the level of maturity needed "to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards." 492 U.S. at 374. As it is, legislatures are no doubt aware of these competing concerns, and their striking of a balance in the way that they conclude best protects both juveniles and adults surely cannot be deemed disproportionate in the constitutional sense. *See*, *e.g.*, *Ewing*, 538 U.S. at 28 (plurality opinion).

3. Penological Justifications

Turning to penological considerations, petitioner relies chiefly on *Graham*, 130 S. Ct. at 2028-30, to argue that juveniles' potential for growth and reformation outweighs any other justification there might be for their serving life-without-parole sentences. Pet. Br. at 40-41. Petitioner again has placed too much weight on *Graham*. *Graham*'s rejection of various penological justifications for life-without-parole sentences expressly was premised on the fact that Graham had not committed murder. *Id.*, 130 S. Ct. at 2028-30. Here, of course, petitioner has. Thus, *Graham* does not require, as petitioner would have it, that the *potential* juveniles might have as a general matter to grow and change outweighs, in every single instance, the *known* "severity and irrevocability[ ]" of death that they have inflicted on their victims. *Kennedy*, 554 U.S. at 438 (citation and quotations omitted).

In the case of a homicide offender, a life-without-parole sentence is not "grossly disproportionate in light of the justification[s] offered[ ]" for it, particularly in light of the deference normally accorded legislatures to choose among those justifications. *Graham*, 130 S. Ct. at 2029. Retribution is a legitimate reason to severely punish a murderer – one who has committed the worst crime and is highly culpable. The community is entitled "to express [its] moral outrage[,]" "right the balance for the wrong to the victim," *Roper*, 543 U.S. at 571, and "preserv[e] the possibility that [the offender] and the system will find

ways to allow him to understand the enormity of his offense[,]" *Kennedy*, 554 U.S. at 447, with a life-without-parole sentence. Here, in contrast to the nonhomicide offenders at issue in *Graham*, 130 S. Ct. at 2028, retribution *does* "justify imposing the second most severe penalty" on a juvenile-homicide offender.

Both *Graham* and *Roper* recognized that deterrence can have some effect on juveniles, even if it does not have as much as in the case of adults. In *Roper*, in particular, the Court observed that "[t]o the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction[.]" 543 U.S. at 572. The crime deterred here is murder, and thus even minimal effectiveness is not trivial. And while petitioner asserts that deterrence has limited value because "far-future consequences are less meaningful" to adolescents, Pet. Br. at 36, the argument proves too much, as it would require the invalidation of any lengthy sentence for a 14-year-old offender, a result that *Graham* does not require. 130 S. Ct. at 2030, 2034 (allowing imposition of life sentence and possibility of imprisonment for life for juvenile-nonhomicide offenders). As it is, the small number of 14-year-old murderers suggests that the severe consequences attendant to committing murder has a general deterrent effect.

Finally, states should not be barred from concluding that a person such as petitioner, who has proven his willingness to commit an offense that only the

smallest fraction of both his peers (and adults for that matter) are willing to commit, is a threat to the community, warranting his exclusion from it. Petitioner protests that there is no foolproof way to determine whether juveniles such as himself will reoffend due to their undeveloped characters, and thus that incapacitation is not a permissible penological goal. Pet. Br. at 41 n.49. Insofar as the State is aware, there is no way to predict accurately whether *any* offender, juvenile or adult, is likely to reoffend. *See*, *e.g.*, Wagdy Loza, "Predicting Violent and Nonviolent Recidivism of Incarcerated Male Offenders," 8 Aggressive and Violent Behavior 175, 176 (2003). Incapacitation guarantees, however, that an offender will not reoffend, and states are entitled to choose that guarantee. In sum, society is entitled to conclude that those such as petitioner who have committed "the worst of crimes[,]" *Kennedy*, 554 U.S. at 447, can be treated, on at least some occasions, as the next-to-worst offenders.

4. Petitioner's Proposed Rule

Having focused much of his argument and all of his rarity data on 13- and 14-year-olds, petitioner nonetheless ends his argument with a muddled prayer for relief, alternatively suggesting that a categorical ban on life-without-parole sentences "could properly be drawn" at 18, "between 14 and 15[,]" or "between 15 and 16." Pet. Br. at 61-62. The Court should not entertain drawing the line at any age other than 14, if for no other reason than that

petitioner intentionally limited the questions presented in his certiorari petition to 14-year-olds. Supreme Court Rule 14.1(a) provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Here, the petition for writ of certiorari raised three questions, all of which pertained to 14-year-old-homicide offenders. Petition for Writ of Certiorari at i. Not only were the questions limited to 14-year-olds, but the petition itself criticized the Arkansas Supreme Court for "mischaracteriz[ing] the central issue in this case. [Petitioner]'s Eighth Amendment claim pertains only to whether fourteen-year-old children must be exempted from the penultimate punishment[.]" *Id.*, at 17 (citation omitted).

The availability of life imprisonment without parole for 15-, 16-, and 17-year-olds cannot "fairly" be said to be included in questions intentionally narrowly drawn to apply only to 14-year-olds, and thus there is a "heavy presumption" against the Court's consideration of the former. *Yee v. Escondido*, 503 U.S. 519, 537 (1992). Although this presumption can be overcome in "the most exceptional cases[,]" *id.*, at 535 (citation and quotation omitted), this is not one of them, given that petitioner was 14 years old at the time he committed his offenses, that, by his own admission, he has not presented proof of an alleged lack of consensus for anyone other than 14-year-olds, *see* Pet. Br. at 62 (noting the lack of "precise data regarding the comparable figure[s] for older adolescents[ ]"), and that the Court as a general matter is

not well equipped to divine a line from the three alternatives he has set before it. *See*, *e.g.*, *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (plurality opinion) (refusing to "draw a line" for death penalty at 18 when question presented was whether it could be imposed on a 15-year-old because Court's task was "to decide the case before us[ ]").

Having failed to make the case to ban life-without-parole sentences for 14-year-old-homicide offenders, petitioner makes an even less convincing argument with regard to older juvenile offenders. Other than pointing out that such offenders are not adults in many contexts, he presents no evidence of legislative consensus or sentencing practices, yet those provide the Court with the "essential instruction" for it to exercise its independent judgment. There is, of course, no legislative consensus, in light of the overwhelming majority of jurisdictions that authorize life without parole even for 14-year-olds. And, what little evidence there is available shows that the imposition of life-without-parole sentences on juvenile-homicide offenders as a class is not rare by any measure. According to Human Rights Watch, as of October 2009, before *Graham* was decided, there were 2,589 offenders nationwide serving life without parole for offenses committed when they were juveniles. Human Rights Watch, "State Distribution of Youth Offenders Serving Juvenile Life Without Parole (JLWOP)" (Oct. 2009), available at http://www.hrw.org/news/2009/10/02/state-distribution-juvenile-offenders-serving-juvenile-life-without-parole (accessed Jan. 26,

2012). *Graham* identified approximately 123 of those as nonhomicide offenders. 130 S. Ct. at 2024. There are thus over 2,400 juvenile-homicide offenders serving life without parole – easily enough to show the absence of a societal consensus against that punishment. Even if this Court were to conclude – wrongly, the State submits – that the Eighth Amendment prohibits the states from sentencing 14-year-old murderers to life without parole, petitioner manifestly has failed to meet his burden of showing that states may not impose that sentence upon 15-, 16-, and 17-year-old murderers.

II. The Allegedly Mandatory Nature Of Petitioner's Sentence Does Not Render It Constitutionally Disproportionate, Assuming That The Court Addresses The Issue.

Although it is one of his three questions presented, petitioner does not address his alternative claim that his life-without-parole sentence is unconstitutional because it allegedly was mandatory. Because petitioner's brief fails to address the claim, it is abandoned and the Court should not consider it. *See*, *e.g.*, *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 527 (1994). This claim also fails because petitioner's sentence was not mandatory. Under Arkansas law, offenders are sentenced in accordance with statutes in effect at the time that they committed their crimes. *E.g.*, *State v. Stephenson*, 340 Ark. 229, 232, 9 S.W.3d 495, 496 (2000). When petitioner committed his crimes, Ark. Code Ann. § 12-28-403(b)(1)

(Repl. 1999) (repealed by Ark. Acts 2001, No. 559, § 4) authorized "the sentencing authority" to sentence "a youthful male offender" under 18 to the Department of Correction, suspend the sentence, and commit the youth to the appropriate division of the Department of Human Services. If the youth successfully completed the training-school program, the youth could be returned to court and placed on probation. *Id.*, at (b)(2). On its face, this provision applied to "[a]ll youthful male offenders[,]" *id.*, at (a), meaning that it was available to offenders such as petitioner.

A similar provision is in effect now, having been enacted in 2001, when the other provision was repealed. *See* Ark. Acts 2001, No. 559, § 8. The new provision excludes juveniles such as petitioner who previously have been sent on more than one occasion to the Division of Youth Services of the Department of Human Services. Ark. Code Ann. § 5-4-104(f)(1) (Supp. 2011). The legislature's reenactment of the provision in 2001 makes clear its continued endorsement of that discretion, albeit not as broad as it once was. Because petitioner's sentence was not mandatory and the provision that made it discretionary was based upon the consideration of his age, the Court should not address his claim that his sentence is unconstitutional due to its allegedly being mandatory.

Should the Court nevertheless decide to treat the claim petitioner's counsel raises in the Brief for Petitioner in *Miller v. Alabama*, No. 10-9646, at 21-29, as being raised here, the claim fails. As an initial matter, petitioner provides no data whatsoever

indicating how many juveniles have been sentenced to a term of years when sentencers have been given the choice between such a sentence and life despite his bold assertion that they "almost always" choose the former. Miller Pet. Br. at 25. Yet, that is the data he needs to establish that life without parole is not imposed "proportion[ally] to the opportunities for its imposition[.]" *Graham*, 130 S. Ct. at 2025. The claim fares no better on the merits. Relying on *Graham* and *Roper*, petitioner contends that his sentence is constitutionally disproportionate because it was the only sentence available for his crime of capital murder, and thus was not imposed after the sentencer was permitted to consider whether his youth justified imposing some unspecified lesser sentence. Miller Pet. Br. at 26-27. He proposes that *Graham* and *Roper* mandate, as a constitutional matter, that states provide for consideration of aggravating and mitigating circumstances in "a discretionary sentencing procedure" before a sentence of life without parole may be imposed on a juvenile-homicide offender. Miller Pet. Br. at 26-28. This argument is misguided.[7]

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[7] As part of this claim, petitioner states that his older co-defendants received lesser sentences, despite facts demonstrating that they were equally or more culpable, and asks the Court to draw the inference that he was punished more harshly due to his age. Miller Pet. Br. at 28 n.34. He is wrong. The triggerman in petitioner's case, Derrick Shields, who also was 14 at the time of the crimes, is serving life without parole for his capital-murder conviction. *Shields*, 357 Ark. at 285, 166 S.W.3d at 30. Petitioner's first cousin, Travis Booker, who turned 15 one day

(Continued on following page)

Outside of the death-penalty context, this Court has never required individualized sentencing. Indeed, in *Harmelin*, the Court expressly refused to extend individualized sentencing beyond death-penalty cases. The Court explained that consideration of aggravating and mitigating factors is required in death-penalty cases "because of the qualitative difference between death and all other penalties." 501 U.S. at 995. For that reason, the Court held, "a sentence which is not otherwise cruel and unusual [does not] become[ ] so simply because it is 'mandatory.'" *Id.* *Graham* and *Roper* provide no basis for disregarding *Harmelin*'s drawing the line for individualized sentencing at death-penalty cases.

And while petitioner limits his argument on this point to mandatory life-without-parole-homicide offenders, it is hard to discern a limiting principle to his claim. If *Roper* and *Graham* mean, as he says, that juveniles *always* are less culpable than adults, Miller Pet. Br. at 26, then they never should be required to serve the same sentence as an adult for the same crime or at least not the same mandatory one, irrespective of what the sentence is. Surely the Eighth Amendment does not require this.

Requiring the states to engage in individualized sentencing outside of death-penalty cases would not

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before their crimes, was sentenced to 35 years' imprisonment, which he is still serving, after accepting a plea deal and testifying against petitioner. (TR 236-37)

only be an extraordinary departure from precedent and longstanding tradition, it also would be contrary to the very decisions upon which petitioner rests his claim, *Graham* and *Roper*. In both decisions, the Court rejected the states' contention that case-by-case sentencing adequately addressed the Court's constitutional concerns. Instead, the Court held that individual sentencers are unable accurately to account for youth when imposing death on murderers or life without parole on nonmurderers. *Graham*, 130 S. Ct. at 2031-32; *Roper*, 543 U.S. at 572-73. Although he relies on *Graham* and *Roper*, petitioner has offered no reason for the Court to conclude that individualized sentencing would be of greater utility here than it was in those cases.

To mandate such a sentencing scheme, moreover, is unnecessary to account for the relevance of youth recognized in *Graham* and *Roper*. Although youth need not be assessed by a sentencer at the time that a sentence of life without parole is imposed on a juvenile murderer, youth otherwise is and can be considered in the process. Pre-conviction, juveniles' special status is taken into account both by the federal government and the majority of the states. *See generally* Patrick Griffin et al., "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting," at 4-7, National Report Series Bulletin (U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, Sept. 2011). Under Arkansas law, for example, prosecutors have the discretion to prosecute 14-year-olds as adults when they are alleged to have

committed the following seven offenses: capital and first-degree murder, kidnapping, aggravated robbery, rape, first-degree battery, and terroristic act. Ark. Code Ann. § 9-27-318(c)(2) (Repl. 2009). Even then, the juvenile can move to have the case transferred to juvenile court, with the juvenile's level of culpability being one of the considerations, *id.*, at § 9-27-318(e) and (g)(4), and can appeal the lower court's refusal to transfer the case, *id.*, at § 9-27-318(*l*), just as petitioner did here. Before petitioner's case went to trial, there was a focused and detailed examination of the impact of his youth, providing far greater consideration of it than other defendants normally would get of evidence that might mitigate their culpability. And while the Court in *Graham* found the existence of such statutes insufficient to override the concerns that prompted it to impose a categorical ban on sentencing juvenile-nonhomicide offenders to life without parole, 130 S. Ct. at 2031, those statutes are directly relevant to – and strongly militate against – petitioner's request that the Court create a new constitutional rule requiring individualized sentencing during which the offender's youth is taken into account.

Youth also can be taken into account post-conviction. Even though life imprisonment without the possibility of parole is not a categorically disproportionate sentence for juvenile-homicide offenders, as it was in *Graham*, juvenile-homicide offenders remain free to argue, on a case-by-case basis, that their sentences are grossly disproportionate under

the narrow-proportionality principle traditionally applied to noncapital sentences. *See*, *e.g.*, *Ewing*, 538 U.S. at 20 (plurality opinion); *Solem*, 463 U.S. at 288-90. That analysis begins with a threshold consideration of the gravity of the offense and the severity of the sentence, followed by a subsequent comparative analysis if that threshold judgment leads to an inference of gross disproportionality. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment); *see also Ewing*, 538 U.S. at 23-24 (plurality opinion) (treating Justice Kennedy's opinion in *Harmelin* as controlling). If that subsequent comparative analysis validates the threshold judgment, an Eighth Amendment challenge will prevail. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment).

Youth and other allegedly mitigating evidence can be taken into account as part of the threshold consideration when applying the gross-disproportionality analysis, just as the Court has considered other characteristics of individual offenders when applying the test, including "the culpability of the offender." *Solem*, 463 U.S. at 292; *see also*, *e.g.*, *Graham*, 130 S. Ct. at 2039-40 (Roberts, C.J., concurring in the judgment); *Ewing*, 538 U.S. at 29-30 (plurality opinion) (considering "long history of felony recidivism"). While the Court has stated that "successful challenges" to noncapital sentences will be "exceedingly rare[]" under the gross-disproportionality test, *Rummel v. Estelle*, 445 U.S. 263, 272 (1980), that is as it should be in light of this Court's stated refusal

to "sit as a 'superlegislature' to second-guess" the states' "difficult policy choices" in this area. *Ewing*, 538 U.S. at 28 (plurality opinion). Because the criminal-justice system already provides for adequate consideration of juvenile-homicide-offenders' youth, the Court need not use the Eighth Amendment to impose on the states, for the first time, individualized sentencing schemes to duplicate that effort.

III. Petitioner's Sentence Of Life Imprisonment Without Parole Is Not Disproportionate For His Commission Of A Homicide Even Though He Was Not The Triggerman.

Petitioner's sentence is not rendered constitutionally disproportionate by virtue of the fact that he was not the triggerman, as he has not established a national consensus against imposing life without parole on such 14-year-old-felony murderers, *see* Appendices A & B, *infra*, and petitioner would be a death-eligible offender if he were an adult under this Court's precedents. In *Enmund v. Florida*, 458 U.S. 783, 801 (1982), the Court held that the death penalty could not be imposed upon an offender consistently with the Eighth Amendment absent proof that the offender "killed[,] . . . attempted to kill, [or] intended or contemplated that life would be taken[.]" Following that decision, in *Tison v. Arizona*, 481 U.S. 137, 158 (1987), the Court held that a nontriggerman felony murderer could receive the death penalty consistently with *Enmund* when the evidence showed the offender's "major participation in the felony committed, combined with reckless indifference to human

life[.]" 481 U.S. at 158. Those findings were established there by evidence of the Tison brothers' active involvement in the underlying felonies, physical presence during the activity culminating in the murders, and their subsequent flight. *Id.*, at 158; *cf. also Graham*, 130 S. Ct. at 2027 (stating that those who do not kill, intend to kill, or "foresee that life will be taken" are not murderers).

Petitioner falls on the *Tison* side of the culpability line and could be subject to the death penalty had he been an adult. For that reason, he should be subject to life without the possibility for parole as a juvenile. He planned to rob a video store knowing one of his confederates had a shotgun and, when that confederate was leveling the shotgun at the store clerk who was hesitating to comply with demands for money, he entered the store to impress upon her that "We ain't playin'." And, after she was shot in the head, he did nothing to help, but instead fled with his two confederates. Such behavior is "every bit as shocking to the moral sense as an intent to kill." *Tison*, 481 U.S. at 157 (citation and quotations omitted). As a highly culpable juvenile-homicide offender, *see id.*, 481 U.S. at 157-58, petitioner is not entitled to the twice diminished moral culpability that *Graham* offers to such nonhomicide offenders, and he constitutionally can be subject to life imprisonment without the possibility of parole.

Petitioner does not appear to dispute that his participation in the robbery of the video store and Troup's death normally would put him high on the

culpability scale, but asserts that because "[j]uveniles as a group, and especially young adolescents like [him], have a significantly impaired ability to anticipate future consequences[,]" he is entitled to *Graham*'s twice diminished culpability rule. Pet. Br. at 65. He is wrong. Although couched as a punishment argument, petitioner's claim really appears to be that juveniles cannot be guilty of felony murder, which, the parties agree, is predicated on the foreseeability of violent injury to persons. The ability of the states to make such behavior by 14-year-olds criminal, however, cannot seriously be disputed, given the states' primary authority to define crimes. *See*, *e.g.*, *Payne*, 501 U.S. at 824.

Further, petitioner's own statement to the victim contradicts his claim that juveniles such as himself are incapable of knowing the dangers their actions pose. His threatening Troup that "We ain't playin'" demonstrates clearly that he appreciated the dangerous circumstance she was in and the consequences for her lack of cooperation and wanted to make sure that she, too, understood that. In the end, petitioner gets diminished culpability for his youth only once – a diminished culpability that makes him ineligible for the death penalty. Even *Graham* does not count that twice. The Eighth Amendment does not prohibit the State from sentencing petitioner to life without the possibility of parole for his having actively participated in an aggravated robbery during which someone was killed, and his claim to the contrary should be rejected.

CONCLUSION

The judgment of the Supreme Court of Arkansas should be affirmed.

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APPENDIX A

Jurisdictions that Authorize Life Without Parole for Nontriggerman-Juvenile-Felony Murderers

1.	Alabama	Ala. Code §§ 12-15-203, 13A-6-2(a)(3) & (c) (Michie Supp. 2011)
2.	Arizona	Ariz. Rev. Stat. § 13-501(B) (West Supp. 2011); Ariz. Rev. Stat. §§ 13-752, 13-1105(A)(2) & (D) (West 2010)
3.	Arkansas	Ark. Code Ann. § 5-10-101(a)(1) & (c)(1) (Supp. 2011); Ark. Code Ann. § 9-27-318(c) (Repl. 2009)
4.	California	Cal. Penal Code § 189 (West Supp. 2012); Cal. Penal Code §§ 190.2(a)(17), (c), & (d), 190.5(b) (West 2008)
5.	Delaware	10 Del. Code § 1010 (Michie Supp. 2010); 11 Del. Code §§ 636, 4209 (Michie Repl. 2007 & Supp. 2010); *Comer v. State*, 977 A.2d 334, 343-44 (Del. Supr. 2009) (addressing nontriggerman)
6.	Florida	F.S.A. § 777.011 (West 2010); F.S.A. § 985.56 (West 2006); F.S.A. §§ 775.082, 782.04 (West Supp. 2012); *Hodge v. State*, 970 So. 2d 923, 926-27 (Fla. App. 4 Dist. 2008)

7.	Georgia	Ga. Code Ann. § 15-11-28(b)(2) (Lexis Supp. 2011); Ga. Code Ann. §§ 16-2-20, 16-5-1 (Lexis 2011)
8.	Idaho	Idaho Code §§ 18-4003(d), 18-4004 (Michie 2004); Idaho Code § 20-509(1)(a) & (3) (Michie Supp. 2011); *State v. Pina*, 149 Idaho 140, 146-47, 233 P.3d 71, 77-78 (2010) (overruled on other grounds) (addressing nontriggerman)
9.	Illinois	705 Ill. Comp. Stat. § 405/5-130(4) (West Supp. 2011); 730 Ill. Comp. Stat. § 5/5-8-1(West Supp. 2011); 720 Ill. Comp. Stat. § 5/9-1(a)(3) (West Supp. 2011); 720 Ill. Comp. Stat. §§ 5/2-8, 5/5-1 (West 2002); 720 Ill. Comp. Stat. § 5/5-2 (West Supp. 2011)
10.	Indiana	Ind. Code §§ 35-41-2-4, 35-42-1-1, 35-50-2-3(b)(2) (Repl. 2009); *Williams v. State*, 706 N.E.2d 149, 157 (Ind. 1999) (addressing nontriggerman)
11.	Iowa	Iowa Code §§ 232.45(6), 702.11, 707.2(2) (West Supp. 2011); Iowa Code § 703.1 (West 2003); Iowa Code § 902.1 (West 2003) (amended by Iowa Acts 2011 S.F. 533 § 147, eff. July 27, 2011)

12.	Louisiana	La. Child. Code Ann., art. 857(A) (Supp. 2012); La. Rev. Stat. § 14:24 (2007); La. Rev. Stat. § 14:30.1(A)(2) & (B) (Supp. 2012); *State v. Wiley*, 880 So. 2d 854, 863-65 (La. App. 5 Cir. 2004) (addressing nontriggerman)
13.	Maryland	Md. Code Ann. Cts. & Jud. Pro. § 3-8A-03(d) (West Supp. 2008); Md. Code Ann. Cts. & Jud. Pro. § 3-8A-06(a)(2) (West 2002); Md. Code Ann. Crim. Law § 2-201(a)(4) & (b)(1) (West 2002); *Watkins v. State*, 357 Md. 258, 267, 744 A.2d 1, 6 (Md. 2000) (addressing nontriggerman)
14.	Massachusetts	Mass. Gen. Laws Ch. 119 § 74 (West 2008); Mass Gen. Laws Ch. 265 §§ 1, 2 (West 2008); *Taylor v. Comm.*, 447 Mass. 49, 54-55, 849 N.E.2d 192, 196-97 (Mass. 2006) (addressing nontriggerman)
15.	Michigan	Mich. Comp. Laws § 712A.4 (West 2002); Mich. Comp. Laws §§ 750.316, 791.234(6) (West Supp. 2011); *People v. Flowers*, 191 Mich. App. 169, 178-80, 477 N.W.2d 473, 478-79 (Mich. App. 1991) (addressing nontriggerman)

16.	Mississippi	Miss. Code Ann. § 43-21-151(1)(a) & (3) (Lexis Supp. 2011); Miss. Code Ann. §§ 97-1-3, 97-3-19(2)(e), 97-3-21 (Lexis 2006); *Scarborough v. State*, 956 So. 2d 382, 385-87 (Miss. App. 2007) (addressing nontriggerman)
17.	Nebraska	Neb. Rev. Stat. §§ 28-105, 29-2204 (Lexis Supp. 2011); Neb. Rev. Stat. § 28-303 (Lexis Repl. 2009); Neb. Rev. Stat. §§ 43-247, 43-276 (Lexis Repl. 2011); *State v. Aldaco*, 271 Neb. 160, 169-70, 710 N.W.2d 101, 109-10 (2006) (addressing nontriggerman)
18.	Nevada	Nev. Rev. Stat. §§ 62B.330(3)(a), 200.030 (West Supp. 2011); Nev. Rev. Stat. § 195.020 (West 2000)
19.	New Hampshire	N.H. Rev. Stat. §§ 626:8, 628:1, 630:1-a (Repl. 2007)
20.	North Carolina	N.C. Gen. Stat. § 14-5.2 (West 2000); N.C. Gen. Stat. § 14-17 (West Supp. 2010); N.C. Gen. Stat. § 7B-2200 (West 2004); *State v. Roseborough*, 344 N.C. 121, 128, 472 S.E.2d 763, 767-68 (1996) (addressing nontriggerman)
21.	North Dakota	N.D. Cent. Code §§ 12.1-04-01, 12.1-16-01, 12.1-32-01 (Michie Repl. 1997); N.D. Cent. Code § 27-20-34 (Michie Supp. 2011)

22.	Ohio	Ohio Rev. Code Ann. § 2152.10 (Repl. 2011); Ohio Rev. Code Ann. §§ 2903.01, 2903.02, 2929.02 (Repl. 2010); *State v. Greer*, 39 Ohio St. 3d 236, 247, 530 N.E.2d 382, 396-97 (1988) (addressing nontriggerman)
23.	Oklahoma	Okla. Stat. Title 21 §§ 701.7(B), 701.9 (West Supp. 2012); Okla. Stat. Title 10A §§ 2-5-101, 2-5-205, 2-5-208 (West 2009)
24.	Pennsylvania	18 Pa. C.S.A. §§ 306, 2502 (1998); 18 Pa. C.S.A. § 1102 (Supp. 2011); 61 Pa. C.S.A. § 6137(a) (Supp. 2011); 42 Pa. C.S.A. § 6355(a) & (e) (2000)
25.	Rhode Island	R.I. Gen. Stat. §§ 11-1-3, 11-23-2, 14-1-7 (Lexis 2002); R.I. Gen. Stat. § 11-23-1 (Lexis Supp. 2011); *In re Leon*, 122 R.I. 548, 554-55, 410 A.2d 121, 125 (1980) (addressing nontriggerman)
26.	South Carolina	S.C. Code Ann. §§ 16-1-40, 16-3-10 (West 2003); S.C. Code Ann. § 63-19-1210(5) (West 2010); S.C. Code Ann. § 16-3-20 (West Supp. 2011); *State v. Avery*, 333 S.C. 284, 294, 509 S.E.2d 476, 481 (1998) (addressing nontriggerman)

27.	South Dakota	S.D. Codified Laws §§ 22-3-1, 22-3-3, 22-6-1, 22-16-4, 22-16-12 (West 2006); S.D. Codified Laws §§ 24-15-4, 26-11-4 (West 2004)
28.	Tennessee	Tenn. Code Ann. § 37-1-134 (Lexis Supp. 2011); Tenn. Code Ann. § 39-13-202 (Lexis Repl. 2010); *State v. Hinton*, 42 S.W.3d 113, 119 (Tenn. Crim. App. 2000) (addressing nontriggerman)
29.	Vermont	Vt. Stat. Ann. Title 13 §§ 3, 2301, 2303 (Lexis 2009); Vt. Stat. Ann. Title 33 §§ 5102(2)(C), 5204 (Lexis Supp. 2011)
30.	Washington	Rev. Code Wash. Ann. § 9A.32.030 (2009); Rev. Code Wash. Ann. §§ 10.95.020(11), 10.95.030, 13.40.110(1) (Supp. 2012)
31.	West Virginia	W. Va. Code § 49-5-10(d)(1) (Lexis Repl. 2004); W. Va. Code §§ 61-2-1, 61-11-7, 62-3-15 (Lexis Repl. 2005)
32.	Wyoming	Wyo. Stat. Ann. §§ 6-1-201, 6-2-101, 14-6-203 (Lexis 2011); *Jansen v. State*, 892 P.2d 1131, 1134 (Wyo. 1995) (addressing nontriggerman)

33.	Federal	18 U.S.C. §§ 1111, 5032 (2006); *United States v. Garcia-Ortiz*, 528 F.3d 74, 81-82 (1st Cir. 2008) (addressing nontriggerman)

APPENDIX B

Jurisdictions that Authorize Life Without Parole for 14-Year-Old Felony Murderers

1.	Alabama	Ala. Code §§ 12-15-203, 13A-6-2(a)(3) & (c) (Michie Supp. 2011)
2.	Arizona	Ariz. Rev. Stat. § 13-501(B) (West Supp. 2011); Ariz. Rev. Stat. § 13-752 (West 2010); Ariz. Rev. Stat. §13-1105(A)(2) & (D) (West 2010)
3.	Arkansas	Ark. Code Ann. § 9-27-318(c) (Repl. 2009); Ark. Code Ann. § 5-10-101(a)(1)& (c)(1) (Supp. 2011)
4.	Delaware	10 Del. Code § 1010 (Michie Supp. 2010); 11 Del. Code §§ 636, 4209 (Michie Repl. 2007 & Supp. 2010)
5.	Florida	F.S.A. § 985.56 (West 2006); F.S.A. §§ 775.082, 782.04 (West Supp. 2012);
6.	Georgia	Ga. Code Ann. § 15-11-28(b)(2) (Lexis Supp. 2011); Ga. Code Ann. §§ 16-3-1, 16-5-1 (Lexis 2011)
7.	Idaho	Idaho Code §§ 18-4003(d), 18-4004 (Michie 2004); Idaho Code § 20-509(1)(a) & (3) (Michie Supp. 2011)

8.	Illinois	730 Ill. Comp. Stat. § 5/5-8-1 (West Supp. 2011); 705 Ill. Comp. Stat. § 405/5-130(4)(c)(ii) (West Supp. 2011); 720 Ill. Comp. Stat. §5/9-1(a)(3) (West Supp. 2011); *People v. Cooks*, 271 Ill. App. 3d 25,40-42, 648 N.E.2d 190, 200-01 (Ill. App. 1 Dist. 1995)
9.	Iowa	Iowa Code §§ 232.45(6), 702.11, 707.2(2) (West Supp. 2011); Iowa Code § 902.1 (West 2003) (amended by Iowa Acts 2011 S.F. 533 § 147, eff. July 27, 2011)
10.	Maryland	Md. Code Ann. Cts. & Jud. Pro. § 3-8A-03(d) (West Supp. 2008); Md. Code Ann. Cts. & Jud. Pro. § 3-8A-06(a)(2) (West 2002); Md. Code Ann. Crim. Law § 2-201(a)(4) & (b)(1) (West 2002)
11.	Massachusetts	Mass. Gen. Laws Ch. 119 § 74 (West 2008); Mass Gen. Laws Ch. 265 §§ 1 & 2 (West 2008)
12.	Michigan	Mich. Comp. Laws § 712A.4 (West 2002); Mich. Comp. Laws § 750.316, 791.234(6) (West Supp. 2011)
13.	Mississippi	Miss. Code Ann. § 43-21-151(1)(a) & (3) (Lexis Supp. 2011); Miss. Code Ann. §§ 97-3-19(2)(e), 97-3-21 (Lexis 2006)

14.	Nebraska	Neb. Rev. Stat. §§ 28-105, 29-2204 (Lexis Supp. 2011); Neb. Rev. Stat. § 28-303 (Lexis Repl. 2009); Neb. Rev. Stat. §§ 43-247, 43-276 (Lexis Repl. 2011)
15.	Nevada	Nev. Rev. Stat. §§ 62B.330(3)(a), 200.030 (West Supp. 2011)
16.	New Hampshire	N.H. Rev. Stat. §§ 628:1, 630:1-a (Repl. 2007)
17.	North Carolina	N.C. Gen. Stat. § 14-17 (West Supp. 2010); N.C. Gen. Stat. § 7B-2200 (West 2004)
18.	North Dakota	N.D. Cent. Code §§ 12.1-04-01, 12.1-16-01, 12.1-32-01 (Michie Repl. 1997); N.D. Cent. Code § 27-20-34 (Michie Supp. 2011)
19.	Ohio	Ohio Rev. Code Ann. § 2152.10 (Repl. 2011); Ohio Rev. Code Ann. §§ 2903.01, 2903.02, 2929.02 (Repl. 2010)
20.	Oklahoma	Okla. Stat. Title 21 §§ 701.7(B), 701.9 (West Supp. 2012); Okla. Stat. Title 10A §§ 2-5-101, 2-5-205, 2-5-208 (West 2009)
21.	Pennsylvania	18 Pa. C.S.A. § 1102 (Supp. 2011); 18 Pa. C.S.A. § 2502 (1998); 61 Pa. C.S.A. § 6137(a) (Supp. 2011); 42 Pa. C.S.A. § 6355(a) & (e) (2000)

22.	Rhode Island	R.I. Gen. Stat. §§ 11-23-2, 14-1-7 (Lexis 2002); R.I. Gen. Stat. § 11-23-1 (Lexis Supp. 2011)
23.	South Carolina	S.C. Code Ann. § 63-19-1210(5) (West 2010); S.C. Code Ann. § 16-3-10 (West 2003); S.C. Code Ann. § 16-3-20 (West Supp. 2011)
24.	South Dakota	S.D. Codified Laws §§ 22-3-1, 22-6-1, 22-16-4, 22-16-12 (West 2006); S.D. Codified Laws §§ 24-15-4, 26-11-4 (West 2004)
25.	Tennessee	Tenn. Code Ann. § 37-1-134 (Lexis Supp. 2011); Tenn. Code Ann. § 39-13-202 (Lexis Repl. 2010)
26.	Utah	Utah Code Ann. §§ 76-3-206, 76-3-207.7, 76-5-202(1)(d), 78A-6-602 (Supp. 2011)
27.	Vermont	Vt. Stat. Ann. Title 13 §§ 2301, 2303 (Lexis 2009); Vt. Stat. Ann. Title 33 §§ 5102(2)(C), 5204 (Lexis Supp. 2011)
28.	Virginia	Va. Code Ann. § 16.1-269.1 (Repl. 2010); Va. Code Ann. §§ 18.2-31(4), 19.2-264.4 (Supp. 2011)
29.	Washington	Rev. Code Wash. Ann. §§10.95.020(11), 10.95.030, 13.40.110(1) (Supp. 2012)

30.	West Virginia	W. Va. Code § 49-5-10(d)(1) (Lexis Repl. 2004); W. Va. Code §§ 61-2-1, 62-3-15 (Lexis Repl. 2005)
31.	Wyoming	Wyo. Stat. Ann. §§ 6-2-101, 14-6-203 (Lexis 2011)
32.	Federal	18 U.S.C. §§ 1111, 5032 (2006)

APPENDIX C

Jurisdictions with Mandatory Sentence of Life Without Parole for 14-Year-Olds for at Least One Homicide Offense

1.	Alabama	Ala. Code §§ 12-15-203, 13A-6-2(c) (Michie Supp. 2011)
2.	Arizona	Ariz. Rev. Stat. § 41-1604.09(I) (West 2011); Ariz. Rev. Stat. § 13-501(B) (West Supp. 2011); Ariz. Rev. Stat. § 13-1105(A)(2) & (D) (West 2010)
3.	Arkansas	Ark. Code Ann. § 5-10-101(c)(1) (Supp. 2011); Ark. Code Ann. § 5-4-104(f) (Supp. 2011); Ark. Code Ann. § 9-27-318(c) (Repl. 2009)
4.	Connecticut	Conn. Gen. Stat. Ann. §§ 46b-127, 53a-35a (Supp. 2011); Conn. Gen. Stat. Ann. § 53a-54b (2007)
5.	Delaware	10 Del. Code § 1010 (Michie Supp. 2010); 11 Del. Code § 4209 (Michie Repl. 2007 & Supp. 2010)
6.	Florida	F.S.A. § 985.56 (West 2006); F.S.A. § 775.082 (West Supp. 2012)
7.	Hawaii	Haw. Rev. Stat. § 571-22(b) & (d) (2006); Haw. Rev. Stat. § 706-656 (Supp. 2008)
8.	Idaho	Idaho Code § 18-4004 (Michie 2004); Idaho Code § 20-509(1) (Michie Supp. 2011)

9.	Illinois	730 Ill. Comp. Stat. § 5/5-8-1 (West Supp. 2011); 705 Ill. Comp. Stat. § 405/5-130(4)(a) (West Supp. 2011)
10.	Iowa	Iowa Code § 232.45 (West Supp. 2011); Iowa Code § 902.1 (West 2003) (amended by Iowa Acts 2011 S.F. 533 § 147, eff. July 27, 2011)
11.	Massachusetts	Mass. Gen. Laws Ch. 119 § 74 (West 2008); Mass. Gen. Laws Ch. 265 § 2 (West 2008)
12.	Michigan	Mich. Comp. Laws §§ 712A.2, 712A.4 (West 2002); Mich. Comp. Laws § 791.234(6) (West Supp. 2011)
13.	Minnesota	Minn. Stat. Ann. § 260B.125 (West Supp. 2012); Minn. Stat. Ann. § 609.106(Subd. 2) (West 2009)
14.	Mississippi	Miss. Code Ann. § 43-21-151(1)(a) & (3) (Lexis Supp. 2011); Miss. Code Ann. § 97-3-21 (Lexis 2006); Miss. Code Ann. § 99-19-101 (Lexis 2007); Miss. Code Ann. § 47-7-3(1)(f) (Lexis 2011)
15.	Missouri	Mo. Rev. Stat. § 211.071 (2010); Mo. Rev. Stat. § 565.020 (1999)
16.	Nebraska	Neb. Rev. Stat. §§ 28-105, 28-303 (Lexis Repl. 2009); Neb. Rev. Stat. § 29-2204 (Lexis Supp. 2011); Neb. Rev. Stat. § 43-247 (Lexis Repl. 2011)

17.	New Hampshire	N.H. Rev. Stat. §§ 628:1(II), 630:1-a(III) (Repl. 2007)
18.	New Jersey	N.J. Stat. Ann. § 2C:11-3(b) (Supp. 2011); N.J. Stat. Ann. § 2A:4A-26 (2011)
19.	North Carolina	N.C. Gen. Stat. § 14-17 (West Supp. 2010); N.C. Gen. Stat. § 7B-2200 (West 2004)
20.	Ohio	Ohio Rev. Code Ann. § 2152.10 (Repl. 2011); Ohio Rev. Code Ann. §§ 2929.02(B)(3), 2929.03(E)(2) (Repl. 2010)
21.	Pennsylvania	18 Pa. C.S.A. § 1102 (Supp. 2011); 61 Pa. C.S.A. § 6137(a) (Supp. 2011); 42 Pa. C.S.A. § 6355(a) & (e) (2000)
22.	South Dakota	S.D. Codified Laws §§ 22-6-1, 22-16-12 (West 2006); S.D. Codified Laws §§ 24-15-4, 26-11-4 (West 2004)
23.	Vermont	Vt. Stat. Ann. Title 13 § 2311(c) (Lexis 2009); Vt. Stat. Ann. Title 33 §§ 5102(2)(C), 5204 (Lexis Supp. 2011)
24.	Virginia	Va. Code Ann. § 16.1-269.1 (Repl. 2010); Va. Code Ann. § 18.2-10 (Repl. 2009); Va. Code Ann. § 19.2-264.4 (Supp. 2011)
25.	Washington	Rev. Code Wash. Ann. §§ 10.95.030, 13.40.110(1) (Supp. 2012)

26.	Wyoming	Wyo. Stat. Ann. §§ 6-2-101, 6-10-301(c), 14-6-203 (Lexis 2011)
27.	Federal	18 U.S.C. §§ 1111, 5032 (2006)