No. 07-8436

In the
Supreme Court of the United States

CHRISTOPHER PITTMAN, *PETITIONER*,

v.

SOUTH CAROLINA, *RESPONDENT*.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

WAS THERE AN EIGHTH AMENDMENT VIOLATION IN THIS CASE, WHERE NEITHER LEGISLATION NOR ACTUAL PRACTICE SHOW A NATIONAL CONSENSUS OR TREND OF SOCIETAL DISAPPROVAL AGAINST A LONG TERM SENTENCE ON A TWELVE YEAR OLD, AND THE CIRCUMSTANCES OF THIS CRIME AND PETITIONER'S CULPABILITY DO NOT MAKE THE RESULT CONSTITUTIONALLY DISPROPORTIONATE?

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RESPONDENT'S STATEMENT OF THE CASE

A. Procedural History

Petitioner was arrested on November 29th, 2001 for two counts of murder. Following evaluation, a waiver hearing was held on June 25th, 2003. **{R. 512-58}**. An order waiving Petitioner to General Sessions Court was issued on June 27th, 2003. **{R. 20-22}**. Petitioner was then indicted.

Trial took place from January 31st to February 15th, 2005. The jury found Petitioner guilty on February 15th, 2005, and Petitioner received the minimum sentence of two concurrent terms of thirty years. **{R. 3867}**.

Petitioner subsequently filed various written motions for a new trial, and post-trial hearings were held on February 18th, 2005, and March 1st, 2005. These motions were denied. **{R. 43-66}**.

After briefing, oral argument was held before the South Carolina Supreme Court on October 5th, 2006. The South Carolina Supreme Court affirmed the convictions and sentences by opinion dated October 5th, 2006. A petition for rehearing was denied.

B. Trial Evidence

A few minutes before midnight, the fire department responded to a fire at the home of Joe and Joy Pittman. **{R. 1256-66; 1283-86}**. Officers found two charred bodies on a mattress. **{R. 1264-66; 1300-13; 1616-19; 1915-19}**.

Petitioner's grandfather Joe was found on his back across the foot of the bed, shot through his open mouth. **{R. 1318-19; 1845; 1949-69}**. Joy was face down, struck the left side of her head. **{R. 1318-19; 1845; 1949-69}**.

As morning broke Petitioner was found by two hunters on rural property, claiming he and his family had been attacked by a "black man". **{R. 1365-69; 1380; 1405-10}**. At a fire station, **{R. 1380-82; 1410-13}** Petitioner repeated the story to officers. **{R. 1426-30}**.

While authorities searched the woods, Petitioner gave a written statement in which he described his day in detail. **{R. 1487-94}**. Petitioner heard footsteps on the porch, and a man come into the house. He also heard the "rattle" of his shotgun, which he had left on the couch. **{R. 1494-95}**.

Petitioner claimed he ran outside and hid, before hearing four gunshots. A man came outside and found him. **{R. 1495-96}**. The man took guns and ammunition from the safe; then he and Petitioner left. **{R. 1495-96}**. Eventually, the man got the truck stuck. Petitioner started running, and the man shot at him twice. **{R. 1496}**. Petitioner eventually then went back to the truck where he found his rifle and money. **{R. 1496-97}**. Petitioner also drew two detailed sketches of his grandparents' house and property to illustrate his story to police. **{R. 1498-1504; 1511-19}**.

Meanwhile, investigators examined the truck. The driver's seat was pulled up as far as it could go. Inside were a gas can, a .410 shotgun, ammunition, coins, and a knife. The .410 had Petitioner's fingerprints on it. **{R. 1628-33; 1828-30; 1852-61; 1932-36}**. A

footprint consistent with Petitioner's shoe was on the driver's door. **{R. 1850-56; 1861-64}**.

Faced with this evidence, Petitioner confessed. **{R. 1541-46; 1645-71}**. Petitioner stated that his grandparents had to come to school the afternoon before because he choked a second grader. Petitioner was sent home, and once there Petitioner and his grandparents talked for an hour. **{R. 1546}**. Around 10:00 that night, Petitioner came out of his room and his grandfather used the paddle. **{R. 1546-47}**.

Petitioner then waited about ten minutes after his grandparents went to bed, and got his shotgun. Saying he "didn't really care", Petitioner shot his grandparents four times. **{R. 1547}**.

Petitioner then lit candles he placed on the floor in the house. He put paper or cigarette lighter refiller around the base of the candles. He got money, guns, the truck's keys the gas can, and his dog – and escaped in the truck. **{R. 1548}**.

Petitioner concluded by saying, "I'm not sorry. They deserved it. They hit me with a paddle." **{R. 1549-50}**.

The assistant principal confirmed that Petitioner was in trouble for choking another child. **{R. 1698-09}**.

What followed was a battle between expert and lay witnesses for the State and the defense as the effect of the anti-depressant Zoloft. Leaving out a detailed description, the State's main retained expert testified there was no credible evidence Petitioner was manic,

psychotic, or lacking in competence. **{R. 2035-98}**. The court examiner agreed. **{R. 3267-3440}**. The defense's main retained psychiatrist testified that in her opinion Petitioner did not know right from wrong because he was suffering from mania induced by the consumption of Zoloft. **{R. 2556-2752}**. Other experts agreed with the defense or generally described the possible effects of Zoloft.

C. The federal issue at trial

In a pre-trial filing, Petitioner reviewed Atkins, and pointed to scientific evidence that the frontal lobes, which are significant to inhibition, are still in the process of maturing during adolescence. **{R. 270-96}**. The issue was argued to the trial court at a pre-trial hearing. **{R. 584-90}**. The judge found that any Eighth Amendment issue was premature prior to issuance of sentence. **{R. 40-41}**.

After verdict, Petitioner moved for a new trial based in part on the Eighth Amendment **{R. 3851-53}**. Petitioner filed a post-trial motion. **{R. 335}**. Arguments were held the very day this Court issued Roper v. Simmons, 543 U.S. 551 (2005), **{R. 4127-73}**, and Petitioner filed additional written arguments. **{R. 483-98}**.

On April 11th, 2005, the trial court rejected Petitioner's Eighth Amendment issue. Pointing to caselaw from South Carolina other jurisdictions upholding such sentences, the judge pointed out that Roper upheld the LWOP sentence for the juvenile who had originally been sentenced to death. **{R. 43}**.

D. Resolution on direct appeal

As one of eleven issues on direct appeal, Petitioner argued that his sentence of thirty years was excessive. He relied on a newspaper article about whether sixteen year olds were too young to drive, which contained color scans showing the development of an adolescent's brain. Petitioner contended these pictures showed lack of development in the area that controls impulse. Arguing a "symbiotic and synergistic relationship between developing science and 'evolving notions of common decency'", Petitioner also pointed to Roper as evidence that the sentence violated the Eighth Amendment. Petitioner also asserted the punishment was excessive based on his age, alleged limited development, lack of a prior record, and alleged influence of Zoloft.

The South Carolina Supreme Court rejected Petitioner's contentions about brain development, noting that nature of the criminal acts including Petitioner's escape plan and cover story "stand in stark contrast to the general nature of the scientific evidence presented". **{24a}**.

The court also was unpersuaded by Petitioner's claim that he is one of the youngest ever convicted in adult court, noting that the Eighth Amendment is concerned with punishment, not forum, and listing a number of cases that in any event had found no issue with long or life sentences given to juveniles. **{24a-25a}**.

Finally, the court found no disproportionality between the "brutal double murder" and Petitioner's sentence, noting that any limited culpability was more than counterbalanced by the harm caused. **{25a-26a}**.

Petitioner filed a petition for rehearing, although not on Eighth Amendment grounds. The state supreme court denied it.

ARGUMENT

I. THERE WAS NO EIGHTH AMENDMENT VIOLATION IN THIS CASE, WHERE NEITHER LEGISLATION NOR ACTUAL PRACTICE SHOW A NATIONAL CONSENSUS OR TREND OF SOCIETAL DISAPPROVAL AGAINST A LONG TERM SENTENCE ON A TWELVE YEAR OLD, AND THE CIRCUMSTANCES OF THIS CRIME AND PETITIONER'S CULPABILITY DO NOT MAKE THE RESULT CONSTITUTIONALLY DISPROPORTIONATE.

Petitioner makes two contentions: (1) that his minimum concurrent sentences of thirty years are constitutionally disproportionate; and (2) that the Eighth Amendment demands consideration of his youth in sentencing. He also asserts that the legislative intent is insufficiently unclear as to whether such punishment is authorized.

A. General Principles

"Outside the context of capital punishment, successful challenges to the proportionality of particular sentences [are] exceedingly rare." Rummel v. Estelle, 445 U.S. 263, 272 (1980). An excessiveness claim is judged by currently prevailing standards of decency, the clearest and most reliable of which is legislative enactments. Atkins v. Virginia, 536 U.S. 304 (2002).

Solem v. Helm, 463 U.S. 277 (1983) set forth a three-part test for proportionality: (1) the gravity of the offense and the harshness of the penalty, (2) comparison of other sentences imposed for other crimes in the same jurisdiction, and (3) comparison of sentences imposed for that crime in other jurisdictions.

However, the validity of this test was called into question by Harmelin v. Michigan, 501 U.S. 957 (1991). Justice Scalia and Chief Justice Rehnquist opined that there was no proportionality test for noncapital offenses under the Eighth Amendment; Justices Kennedy, O'Connor, and Souter would only move to the second and third prongs for "extreme sentences that are 'grossly disproportionate' to the crime". Harmelin, 501 U.S. at 1001. Justices White, Blackmun, Stevens, and Marshall would have retained the three-part Solem test. Id. at 1009. Lower courts consider Justice Kennedy's opinion the holding of the case. See, e,g. United States v. Bland, 961 F.2d 123, 128-29 (9th Cir. 1992).

Justice Kennedy in Harmelin noted the Eighth Amendment proportionality principle has four principles -"the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors." Harmelin, 501 U.S. at 997 (Kennedy, J., concurring)). Marked divergence in theories and length in sentencing are inevitable and beneficial consequence of the federal system. Id.

Finally, the constitution contemplates that this Court will bring its independent judgment to bear. Atkins v. Virginia, 536 U.S. 304 (2002).

Of course, the Solem test does not expressly refer to consideration of the offenders age, and a number of courts have therefore held that age should not be considered in a proportionality analysis. Valenzuela v. People, 856 P.2d 805 (Colo. 1993); State v. Massey, 803 P.2d 340 (Wash. Ct. App. 1990). Other courts have concluded the opposite. Phillips v. State, 807 So.2d 713 (Fla. Dist. Ct. App. 2002); State v. Moore, 906 P.2d 150 (Idaho Ct. App. 1995). If age is not considered, a definite term of 30 years would not be disproportionate for a double murder. Rummel v. Estelle, 445 U.S. 263 (1980) (life sentence on non-violent recidivist sustained).

Moreover, Justices of this Court have concluded that a proportionality analysis does not apply to sentences less than death, Harmelin, *supra* (Scalia, J.), and one circuit has concluded that there is no proportionality analysis for sentences less than death or life without parole (LWOP). United States v. Francois, 889 F.2d 1341, 1343 (4th Cir. 1989). Obviously these viewpoints would preclude a constitutional violation.

Assuming for purposes of this brief that age is a consideration and a proportionality analysis is appropriate for definite term sentences, the Eighth Amendment was still not violated.

B. The modern trend towards increased punishment for violent juvenile offenders.

At common law, the gatekeeper for an offender's entry into the criminal justice system was simply criminal responsibility – regardless whether one was insane or young, he or she could not suffer prosecution

unless he or she knew right from wrong at the commission of the offense. Sanford J. Fox, Responsibility in the Juvenile Court, 11 Wm. & Mary L. Rev. 659 (1970). The common law of infancy provides: (1) a *conclusive* presumption of lack of criminal responsibility for one under 7 years of age; (2) a *rebuttable* presumption of lack of criminal responsibility for one from 7 to 14 years; and, of course, (3) a rebuttable presumption of responsibility for one over 14. State v. Blanden, 177 S.C. 1, 180 S.E. 681 (1935) (to rebut the presumption, the youth must meet the M'Naughten test); Fox, *supra*, at 660. Thus, at common law, once a juvenile was found to be criminally responsible, he or she was prosecuted as any adult and subject to the same penalties.

Beginning in 1899 in Illinois and followed to some degree in every jurisdiction thereafter, state legislatures as a matter of policy began to create alternative justice systems to juveniles that for the most part focused on rehabilitation and less on the harsher punishment given to adults. See Wayne A. Logan, Proportionality and Punishment: Imposing Life Without Parole, 33 Wake Forest L. Rev. 681, 685 & 685 n.11 (1998); The Honorable Luis G. Perez, Juvenile Courts in the U.S., Issues of Democracy Vol. 8, No. 1 (May 2003) (http://usinfo.state.gov/journals/itdhr/0503/ijde/ijde0503.htm).

However, through the last two decades of the 20th century, increased violent juvenile crime and inability of the existing juvenile justice system to handle these offenders led state legislatures throughout the nation to strengthen punishment and expand the instances in which a juvenile could be tried in normal criminal court.

Logan, *supra* at 685 (noting that as juvenile "superpredators" have become a problem, juvenile justice has experienced a "sea change", with greater reliance on waiver or transfer into normal court); Perez, *supra* (noting the perceived leniency of the juvenile system on violent offenders and the concern of placing them with status offenders has led to a public "backlash"); American Bar Association, Youth in the Criminal Justice System: Guildelines for Policymakers and Practitioners, abanet.org.crimjust/pubs/reports/introduction.html (2004) ("[s]ince 1991 almost every state has widened the scope of youth" who are prosecuted in "adult" court). See also Johnson, Kevin, "Police Tie Jump in Crime to Juveniles", USA Today, July 13, 2006 (noting the jump in the nation's violent crime rate is tied to an increasing number of juvenile offenders). See, e.g. People v. Lopez, 103 P.3d 270 (Cal. 2005) (discussing California's Proposition 21, passed in 2000. The findings and declarations of 21 note that while crime is decreasing juvenile crime is rising; the juvenile system was adopted at a time when the crimes are petty and is not capable of handling violent crimes; and juvenile resources are disproportionately spent on violent offenders with little hope of rehabilitation).

Indeed, this Court in Roper v. Simmons, 543 U.S. 551, 566 (2005), noted the "particular trend in recent years toward cracking down on juvenile crime". See also Hawkins v. Hargett, 200 F.3d 1279, 1285 (10th Cir. 1999) (noting the trend is that "modern society apparently condones the severe punishment of individuals who commit serious crimes at young ages").

South Carolina is one such state, having passed in 1996 an Act substantially revising the treatment of

juveniles, and expanding the manner and circumstances in which those younger would be transferred to the normal criminal courts. See S.C. Code Ann. § 20-7-7605 (Supp. 2007); 1996 S.C. Acts 383.

It is important to remember that the legislative change for more resolution of juvenile cases in the normal criminal justice system is not just driven by a desire for sufficient punishment as opposed to rehabilitation, which is often the focus of policy arguments made by those opposed to adult punishment for juveniles. Change was also driven by society's concern with incapacitation – the protection of society by the removal of particularly vicious and violent juvenile offenders from the streets, and frustration with the existing juvenile justice system's inability to provide sufficient protection. See California's Proposition 21, *supra* (making findings along these lines). Equally important is deterrence, and removing the notion among some violent juveniles that they will be immune from significant punishment. Whatever may be said about the mitigating fact of an offender's youthful age, the fact remains that the violent offender committed a horrible crime, and a legislature might reasonably conclude that society's interest in protecting itself from such an offender overrides undue consideration to the offender's youth. See Ewing v. California, 538 U.S. 11 (2003) (Constitution "does not mandate adoption of any one penological theory").

Moreover, as a number of courts have held, there is no right to adjudication in the juvenile system or guarantee of special treatment. Accordingly, Petitioner cannot assert the Eighth Amendment constitutionally requires disposition of his case in what is an adjunct to

the normal criminal justice system that only exists as a matter of legislative policy. Moreover, while Petitioner did challenge his criminal responsibility at trial with a claim of involuntary intoxication, the jury found otherwise and of course any issue relating specifically to Petitioner's criminal responsibility is not before this Court on certiorari. As a criminally responsible person, Petitioner was properly entered through the gateway into the normal criminal justice system, regardless of his age.

Petitioner's claim therefore must succeed solely on his contention that a definite term sentence of 30 years is cruel and unusual as applied to a juvenile who was twelve at the time of the crime. Any policy discussions as to the benefits of retaining Petitioner in the juvenile justice system, or of the value of rehabilitation as opposed to the harsher resolution in the normal criminal justice system, are irrelevant to the issue on appeal.

C. State legislation shows no national consensus or even a consistent direction of change against imposition of a minimum definite term sentence on a 12 year old for a double murder.

There is simply no identifiable national consensus against imposition of the minimum adult sentence on a 12 year old for a double murder, and, indeed, as noted before as to modern trend in juvenile justice, if anything the consistency of the direction of change has been to *increase* the availability of adult punishment for even younger and younger juveniles, not *decrease* it.

Roper canvassed the laws of various States looking for the preferred "objective evidence" of a national consensus. Moreover: "It is not so much the number of these States that is significant, but the consistency of the direction of change." Atkins, 536 U.S. at 315. This is because there is nothing wrong under the Constitution with a minority view – there must be at a minimum such a significant change regarding a rule that it confirms development of a national consensus. To merely count states and hold anything in the minority to be barred would just as erroneously make the Eighth Amendment impermissibly static as it would be to hold that all punishments allowed in 1791 are permissible today. See generally Roper, 543 U.S. at 1207 (beyond dispute that the Eighth Amendment is not a "static command" limited to what was acceptable in 1791) (O'Connor, J., dissenting).

With these considerations, Petitioner cannot show a national consensus. First, every state in the Union provides at least some mechanism for the imposition of adult sentences on a juvenile offender for at least some sort of crime. See Juvenile Offenders and Victims: 2006 National Report, Chapter 4, p. 111 (U.S. DOJ Office of Juvenile Justice and Delinquency Programs). This alone makes Petitioner's position very difficult.

The next point is that the minimum age for transfer or exclusion – if there even is one – varies greatly from state to state. With respect to at least one crime, some states have no minimum age, some have 10 as the minimum, some have 12 as the minimum, some have 13 as the minimum, some have 14 as the minimum, some have 15 as the minimum, and some have 16 as a minimum. Juvenile Offenders and Victims: 2006

National Report, Chapter 4, pp. 112-14 (U.S. DOJ Office of Juvenile Justice and Delinquency Programs). This variation alone is hardly indicative of such an undeniable national consensus that this Court is constrained to override the state legislature and find 12 to be categorically under the Eighth Amendment's floor.

Indeed, most states have different minimum ages depending on the crime. Typically, the minimum age is either lower or not specified the more severe the crime – with the lowest minimum ages being for murder. Juvenile Offenders and Victims: 2006 National Report, Chapter 4 pp. 112-14 (U.S. DOJ Office of Juvenile Justice and Delinquency Programs). Petitioner cannot claim the existence of an overriding national consensus against adult murder penalties for a 12 year old, when in almost all jurisdictions the greater the severity of the class of crime – the younger the child who can face adult disposition.

Among those jurisdictions including South Carolina, some 21 jurisdictions do not specify a minimum age for transfer of a juvenile charged with murder; 2 jurisdictions set the minimum age at 10 years old, and 3 jurisdictions set the age at 12 years old. Juvenile Offenders and Victims: 2006 National Report, Chapter 4 pp. 112-14 (U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Programs).[1] Thus, in some 25 jurisdictions

[1] The National Report includes Arizona, Georgia, and the District of Columbia among those with no age specified; however, it appears from review that adult punishment for murder would not be warranted in those jurisdictions. The Report does not include Montana, which sets the age at 12 for murder. Mont. Code Ann. § 41-5-206(1)(a)(ii). In Appendix 21, Petitioner asserts Missouri has

it is statutorily possible for 12 year olds to be transferred. If 13 year olds are added, the number jumps to 31 jurisdictions. Add 14 year olds and the number is 49. Id.

If this was not enough, there is not even the trend away from serious adult criminal liability for juvenile offenders – indeed, there is just the opposite, as discussed before in the review of developments in juvenile justice. Inasmuch as Roper overcame the fact that a sizeable number of jurisdictions still allowed the juvenile death penalty because the consistent direction of change had been to abolish it since this Court's previous pronouncement on that issue, 543 U.S. at 565, here we have just the opposite – the consistent change present now for almost thirty years has been to expand resolution of juvenile cases in the normal criminal courts, and there is no identifiable or significant trend back the other way despite a number of highly publicized cases throughout the nation involving younger and younger offenders receiving harsh sentences.

This trend is confirmed by the overwhelming weight of caselaw. It appears cases in the past twenty years have universally rejected Eighth Amendment claims made by juveniles. Hawkins v. Hargett, 200 F.3d

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no specified age, when in fact it sets 12 as the minimum. Mo. Rev. Stat. § 211.071.1. Regardless, Petitioner and Respondent agree that there are 25 states in which a 12 year old could be tried as an adult for murder, with the ones with minimum ages specified: Alaska, Colorado (12), Delaware, Florida, Hawaii, Idaho, Indiana, Kansas (10), Maine, Maryland, Missouri (12), Montana (12), Nebraska, Nevada, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Washington, West Virginia, Wisconsin, Vermont (10).

1279, 1285 (10th Cir. 1999) (consecutive sentences totaling more than 100 years given to 13 year old did not violate the Eighth Amendment; while age is relevant, the crime was particularly serious, the defendant had the availability of parole and credits, all of the sentences were within the range set by the legislature; moreover, there is no societal consensus against long term sentences on a 13 year old, and indeed modern society condones such punishments); Rice v. Cooper, 148 F.3d 747 (7th Cir. 1998) (while natural life sentence on 16 year for arson that killed four people might be severe, it was not unconstitutionally severe or disproportionate); Harris v. Wright, 93 F.3d 581 (9th Cir. 1996) (rejecting claim that sentence of LWOP imposed on 15 year old violated the Eighth Amendment, by reasoning that where there were at least 21 states in which a sentence of LWOP could be imposed on a 15 year old, appellant's attempt to show a nation consensus "doesn't come close", and no gross disproportionality of imposition of LWOP despite age since LWOP is not in a "unique constitutional category" like death); Rodriguez v. Peters, 63 F.3d 546 (7th Cir. 1995) (15 year old given natural life sentence; it was not an Eighth Amendment violation where defendant got mandatory life sentence without presentation of mitigating evidence, since a life sentence is not qualitatively the same as death and the same considerations do not apply; in world where juveniles are committing violent crimes with increasing frequency, the state legislature responded to society's anger with tougher penalties, and court will not override that judgment); Friday v. Pitcher, 200 F.Supp.2d 725 (E.D. Mich. 2002) (sentence of 25-65 given to 16 year old not grossly disproportionate; where petitioner committed callous crime and sentence was within statutory limits); Foster v. Withrow, 159 F.Supp.2d 629 (E.D. Mich. 2001)

(sentence of LWOP given to 16 year old for murder did not violate the Eighth Amendment; at least 21 states allow LWOP on 16 year olds, which precludes a finding of a strong legislative consensus; and LWOP is not grossly disproportionate a sentence for first degree murder), affirmed, 42 Fed. Appx. 701 (6th Cir. 2001); State v. Ross, 804 P.2d 112 (Ariz. Ct. App. 1990) (sentence of 25 years given to 14 year old for abduction and extended rape not cruel and unusual and does not shock the conscience of society; severe punishments for crimes against children have been previously sustained); People v. Her, No. C051473, 2007 W.L. 4217445 (Cal. Ct. App. 2007) (unpublished) (LWOP sentence on criminally sophisticated 15 year old for premeditated murder to promote activities of a street gang was not cruel and unusual; death penalty jurisprudence in Roper and international treaties was inapplicable); People v. Ortiz, 67 Cal.Rptr.2d 126 (Cal. Ct. App. 1997) (sentence of 26 years to life given to 14 year old for murder was not cruel and unusual given the callous crime, lack of remorse, and lack of rehabilitative prospects); People v. Guinn, 33 Cal.Rptr.2d 791 (Cal. Ct. App. 1994) (LWOP given to juvenile for murder not violative of the Eighth Amendment; legislature in 1990 had enacted provision to require LWOP sentence for 16 and 17 year olds in response to increasingly vicious juvenile offenders, and circumstances of crime made such punishment appropriate); Valenzuela v. People, 856 P.2d 805 (Colo. 1993) (age is an irrelevant consideration in an Eighth Amendment proportionality analysis, and automatic life sentence on juvenile for murder was not unconstitutional); People v. Moya, 899 P.2d 212 (Colo. Ct. App. 1994) (life sentence given to juvenile for murder did not violate the Eighth Amendment; defendant's age is irrelevant to a proportionality analysis, and defendant

had already been through a waiver process that considered his age but found him amenable to trial as an adult; additionally, crime showed "extreme violence"); State v. Wonnum, I.D. No. 0505004361, 2006 W.L. 2808148 (Del Super. 2006) (unpublished) (life sentence given to 17 year old juvenile for murder did not violate state or federal prohibition against cruel and unusual punishment); Tate v. State, 864 So.2d 44 (Fla. Dist. Ct. App. 2003) (finding no Eighth Amendment violation from imposition of LWOP sentence on 12 year old for murder of 6 year old; recognizing that life sentences on juveniles are not uncommon in Florida courts, and concluding that no sentence of imprisonment would be grossly disproportionate to the crime of first degree murder); Phillips v. State, 807 So.2d 713 (Fla. Dist. Ct. App. 2002) (sentence of LWOP imposed on 14 year old for murder of 8 year old not violative of the Eighth Amendment; where much deference must be given to the legislature in setting prison terms, the legislature affixed the second most severe sentence to the most severe crime, no sentence of imprisonment can be disproportionate to first degree murder, and while age should be considered, the factor of age is outweighed by the harm inflicted); Blackshear v. State, 771 So.2d 1199 (Fla. Dist Ct. App. 2000) (no Eighth Amendment violation in revoking probation and imposing 3 life sentences given for crimes committed at age 13); State v. Shanahan, 994 P.2d 1059 (Idaho Ct. App. 1999) (sentence of life given to 15 year old did not violate the Eighth Amendment; given premeditated and cold-blooded nature of execution style slaying; sentences are not out of proportion to the gravity of the offenses and would not shock the conscience of reasonable people); State v. Moore, 906 P.2d 150 (Idaho Ct. App. 1995) (sentence of 25 years to life given to juvenile not

cruel and unusual punishment; even though it was appropriate to consider the age of the defendant, the sentence was not grossly disproportionate given the horrible circumstances of the crime, including lack of provocation and murder of an officer); People v. Miller, 781 N.E.2d 300 (Ill. 2002) (in case where 15 year old was convicted based on accomplice liability of two counts of murder, agreeing with trial judge application of statute requiring LWOP sentence due to multiple murders to this defendant who only was a lookout to violate state constitutional proportionality principle, but affirming judge's decision to sentence defendant to 50 years); People v. Cooks, 648 N.E.2d 190 (Ill. Ct. App. 1995) (mandatory life sentence given to 14 year old for double murder did not violate Eighth Amendment; there is no problem with mandatory life sentences even though they do not consider the individual offender, the legislature clearly provides for adult disposition of 13 and 14 year olds charged with murder, and the circumstances of the crime were particularly brutal); State v. Walker, 843 P.2d 203 (Kan. 1992) (imposition of life sentence on defendant barely 14 year old for aggravated kidnapping and arson did not constitute cruel and unusual punishment; where defendant was actively involved in the offenses); State v. Pilcher, 655 So.2d 636 (La. Ct. App. 1995) (consecutive LWOP sentences given to 15 year old for double murder was not cruel, unusual, or excessive; given the brutal circumstances of the crime the sentences were not grossly disproportionate, and separation of this defendant from society for life was reasonable); People v. Clore, No. 228439, 2001 W.L. 789536 (Mich. Ct. App. Jan. 16th, 2001) (unpublished) (arson sentence of 14 year old to 1 to 20 years in adult prison was not cruel and unusual; court has already found that LWOP sentences for minors are not

unconstitutional); People v. Bentley, No. 214170, 2000 W.L. 33519653 (Mich. Ct. App. April 11th, 2000) (unpublished) (LWOP on 14 year old for murder did not violate state or federal prohibition against cruel and unusual punishment; it could not seriously be contended a life sentence was grossly disproportionate to the crime of murder, and 13 other states allow mandatory, nonparolable life sentences on minors); People v. Launsbury, 551 N.W.2d 460 (Mich. Ct. App. 1996) (LWOP sentence given to 16 year old for murder was not an Eighth Amendment violation, given the severity of first degree murder, the fact that other states also allow LWOP sentences for minors, there is no constitutional right to be treated as a juvenile, and the legislature has specifically provided for waiver to adult court); State v. Chambers, 589 N.W.2d 466 (Minn. 1999) (finding no violation of the Eighth Amendment from imposition of LWOP sentence on 17 year old for murdering a law enforcement officer, and noting that in 1993 the state legislature amended the law to provide automatic jurisdiction in adult court for 16 and 17s years olds charged with 1st degree murder); State v. Mitchell, 577 N.W.2d 481 (Minn. 1998) (30 year sentence given to 15 year old for murder did not violate the prohibition against cruel and unusual punishment; legislative change and public concern with increasing juvenile violent crime show increasing tolerance for harsh penalties given to juveniles, and the split of the states on the availability of such a sentence on juveniles shows it is not unusual); Radcliff v. State, 736 So.2d 1081 (Miss. Ct. App. 1999) (sentence of 30 years for rape on 16 year old did not essentially amount to a life sentence for purposes of defendant's Eighth Amendment claim); Naovarath v. State, 779 P.2d 944 (Nev. 1989) (concluding that "as 'just deserts' for killing his sexual

assailant, life without possibility of parole is excessive punishment for this 13-year-old boy"; but ordering life with possibility of parole as the sentence); State v. Ira, 43 P.3d 359 (N.M. Ct. App. 2002) (sentence of over 91 years given to 15 year old for multiple sex crimes and other charges did not violate the Eighth Amendment; sentence was not grossly disproportionate given the brutality and repetition of the crime; contemporary standards and concerns about juvenile crime support more severe punishment; likelihood of rehabilitation was almost nonexistent; although sentence was long, it was intended to protect the public; finally, noting that many states including New Mexico in 1993 revised their juvenile laws to addressed the "epidemic of violent juvenile criminals"); Matter of Ernesto M, Jr., 915 P.2d 318 (N.M. Ct. App. 1996) (sentence of 30 years on juvenile for brutal rape of store clerk not cruel and unusual punishment, given the circumstances of the crime, the defendant's enjoyment of it, and the defendant's belief he was immune to prosecution given his age); State v. Green, 502 S.E.2d 819 (N.C. 1998) (imposition of LWOP on 13 year old convicted of first degree sex crime did not violate the Eighth Amendment; court pointed out that in May 1994 the state legislature lowered the age of transfer from 14 to 13 and this was reasonable given public concern over the large increase in arrests and convictions of juveniles for violent crime in the prior ten years; court also recounted the policy discussion leading to the new rules in which it was expressed that the then-existing juvenile system was outdated and insufficiently punitive to handle violent crimes, and noted that a sizeable but growing minority would allow such adult punishment for a sex crime; court also rejected claim the sentence was grossly disproportionate given young age, since the

circumstances of the crime were hardly characteristic of a child; finally, court rejected claim that sentence was excessive because he should be "treated" rather than "punished", by noting the Eighth Amendment does not require adoption of any one particular penological theory); State v. Garcia, 561 N.W.2d 599 (N.D. 1997) (holding a LWOP murder sentence for a 16-year-old did not violate Eighth Amendment; death penalty is even authorized for such an age, and in any event the death penalty jurisprudence is inapplicable to this noncapital sentence); State v. Bunch, No. 06 MA 106, 2007 W.L. 4696832 (Ohio Ct. App. Dec. 21, 2007) (sentence of 89 years on juvenile for rape, kidnapping, and other charges did not violate the Eighth Amendment, Roper is applicable to death cases and indeed its language supports the deterrent effect a life sentence would have on a juvenile as well as its availability as an alternative to death); Commonwealth v. Carter, 855 A.2d 885 (Pa. Super. Ct. 2004) (LWOP sentence imposed on 16 year old for murder did not violate the Eighth Amendment; legislature has made reasonable judgment that juvenile murderer is in need of adult discipline and restraint, and since there is no substantive due process for a juvenile to be tried as an adult, there can be no Eighth Amendment violation from such a juvenile to be sentenced as an adult as well); State v. Standard, 569 S.E.2d 325 (S.C. 2002) (no Eighth Amendment violation in using crime committed at age 16 as triggering offense for LWOP sentence under "two strikes" law; death penalty jurisprudence is difference and inapplicable, and the trend in the nation has been to strengthen the punishments given to juvenile offenders due to increased instances of violent crime); State v. Avery, 649 S.E.2d 102 (S.C. Ct. App. 2007) (transfer of jurisdiction to adult court of 14 year old for murder and carjacking did not

violate the Eighth Amendment; death penalty jurisprudence in Roper is inapplicable to case where LWOP was a possible penalty, and in any event defendant was sentenced to 35 years, not LWOP); State v. Jensen, 579 N.W.2d 613 (S.D. 1998) (LWOP sentence given to 14 year old who murdered cab driver was not grossly disproportionate; crime was extremely cold and calculating and there was little evidence of remorse); State v. Powell, 34 S.W.3d 484 (Tenn. Crim. App. 2000) (in case involving a number of codefendants including a 14 year old who were sentenced to LWOP on the abduction and murder of most of a family, noting that the state court had earlier decided that a sentence of LWOP imposed on a juvenile does not violate the state and constitutional prohibitions on cruel and unusual punishment); Laird v. State, 933 S.W.2d 707 (Tex. Ct. App. 1996) (mandatory life sentence for juvenile convicted of capital murder not cruel and unusual); State v. Speer, 890 S.W.2d 87 (Tex. Ct. App. 1994) (mandatory life sentence for 16 year old not cruel and unusual, given that defendant is parole eligible and could have faced the death penalty if he were eight months older); State v. Russell, 791 P.2d 188 (Utah 1990) (concurrent 15 year mandatory minimum sentences imposed on 15 year old did not constitute cruel and unusual punishment; death penalty jurisprudence was inapplicable; juvenile was certified to stand trial as an adult; and the sentences do not shock "the moral sense of all reasonable men" given the brutality of the crime); State v. Loukaitis, No. 17007-1-III, 1999 W.L. 1044203 (Wash. Ct. App. Nov. 16, 1999) (14 year old given life without parole for murdering a teacher and two students and wounding another; Eighth Amendment proportionality analysis does not involve consideration of the defendant's age but only the offense and the sentence; once the court declines juvenile

resolution the juvenile tried as an adult can be sentenced as one); State v. Massey, 803 P.2d 340 (Wash. Ct. App. 1990) (sentence of LWOP given to 13 yo for murder did not violate the Eighth Amendment; age is not a consideration as only a balance between the crime and the punishment are to be considered, and LWOP is clearly acceptable for murder; regardless, Petitioner's age was considered by the juvenile court, which ultimately declined him for resolution there given the insufficiency of the penalties); In re Boot, 925 P.2d 964 (Wash. 1996) (noting statutory change in 1994 that gave exclusive jurisdiction to adult court for certain offenses committed by 16 and 17 years olds, and Eighth Amendment is not violated if such juveniles are tried in adult court and subjected to adult sentences); State v. Stevenson, 780 P.2d 873 (Wash. Ct. App. 1989) (mandatory life sentence given to 16 year old was not cruel and unusual or excessive; death penalty jurisprudence is inapplicable, and defendant was convicted of three vicious crimes against which society has the right to protect itself); State v. Armstead, No. 00-1072-CR, 630 N.W.2d 275 (Wis. Ct. App. May 22, 2001) (unpublished) (sentence for murder of 13 year to life imprisonment did not violate the Eighth Amendment; the trend in other jurisdictions has been to strengthen punishment for juveniles based on the increased incidence of violent crime by children, and the Wisconsin legislature in 1996 also specifically strengthened the laws because of this increased crime and the inability of the existing juvenile laws to deal with it).

Roper does not change this overwhelming result, as it specifically states that "because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force." 543 U.S. at 568.

"Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished . . .by . . . youth". Roper, 543 U.S. at 571. If the rationale is that the inherent limitations of juveniles categorically exclude them from eligibility for a punishment reserved only for the absolute worst of adult murderers, the point fails if expanded to mere term sentences. Perhaps most importantly, the majority in Roper points out that any deterrent effect of the death penalty on juveniles is more than adequately handled by the possibility of life without parole, which "is itself a severe sanction, in particular for a young person". Roper, 543 U.S. at 568-72. Roper's approval of life without parole as an acceptable alternative deterrent for juveniles would be nonsensical if this Court viewed it as disproportionate.

D. Petitioner's contention that the limited practice of trying 12 year olds as adults creates an universal Eighth Amendment maxim is not supported.

Perhaps recognizing the status of state legislation and the trends in juvenile justice over recent years, Petitioner attempts to claim that regardless of these factors the actual practice of sentencing 12 year olds as adults is so rare as to reflect societal disapproval. Indeed, he attempts to contend there are no other cases like his. The facts do not bear this out.

First, though, it is important to note that a focus on age 12 alone is inappropriate. The proper focus should be on those 7 to 14 years of age who would be in that common law category setting forth a rebuttable presumption of incapacity, since the common law has a

long history in treating this category as one. Sanford J. Fox, Responsibility in the Juvenile Court, 11 Wm. & Mary L. Rev. 659 (1970). Petitioner offers no valid rationale for excluding other older members of a class long established in the law.

A non-exhaustive survey of caselaw and the internet looking for those 14 years old and younger, involving similar levels of violence and individual culpability as present in Petitioner's case, reveals adult dispositions with severe sentences in quite a number of cases over the past twenty years – including four other 12 year olds.[2] See Hawkins v. Hargett, 200 F.3d 1279, 1285 (10th Cir. 1999) (consecutive sentences totaling more than 100 years given to 13 year old); State v. Ross, 804 P.2d 112 (Ariz. Ct. App. 1990) (sentence of 25 years given to 14 year old); Celaya v. Schriro, No. CIV-01-622-TUC-DCB (D. Ariz.) (federal habeas action now pending in Arizona in which 14 year was given life); People v. Ortiz, 67 Cal.Rptr.2d 126 (Cal. Ct. App. 1997) (sentence of 26 years to life given to 14 year old for murder); People v. Yoakum, 2007 W.L. 2178457 (Cal.App. 2 Dist. Jul 31, 2007) (NO. B190194) (115 years given to 14 year old); Tate v. State, 864 So.2d 44 (Fla.

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[2] This list from a caselaw and internet search includes 36 cases of juvenile sentences to long or life sentences, including eighteen 14 year olds, fourteen 13 year olds, and four 12 year olds (Lionel Tate, Alex King, Evan Savoie, and Jake Eakin). Importantly, it should be noted that Petitioner is simply wrong when he asserts in his Appendix 21 that there no other 12 year olds serving sentences as long as Petitioner – Tate is serving such a sentence of 30 years after initially being sentenced to LWOP, Savoie is serving a sentence almost as long at 26 years, and King and Eakin are serving lesser but yet long term sentences only because of plea deals.

Dist. Ct. App. 2003) (LWOP sentence on 12 year old for murder of 6 year old)[3]; Brazill v. State, 845 So.2d 282 (Fla. Dist. Ct. App. 2003) (13 year old sentenced to 28 years for murdering teacher); Phillips v. State, 807 So.2d 713 (Fla. Dist. Ct. App. 2002) (LWOP imposed on 14 year old for murder of 8 year old); Blackshear v. State, 771 So.2d 1199 (Fla. Dist Ct. App. 2000) (revoking probation and imposing 3 life sentences given for crimes committed at age 13); Manuel v. State, 629 So.2d 1052 (Fla. Dist. Ct. App. 1993) (13 year old gets life sentence, but court remands to see if counsel should have objected to prior convictions used on "scoresheet"); People v. Cooks, 648 N.E.2d 190 (Ill. Ct. App. 1995) (mandatory life sentence given to 14 year old for double murder); State v. Walker, 843 P.2d 203 (Kan. 1992) (imposition of life sentence on defendant barely 14 year old for aggravated kidnapping and arson); People v. Clore, No. 228439, 2001 W.L. 789536 (Mich. Ct. App. Jan. 16th, 2001) (unpublished) (arson sentence of 14 year old to 1 to 20 years in adult prison); People v. Bentley, No. 214170, 2000 W.L.

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[3] While Petitioner recognizes that Lionel Tate received a LWOP sentence for a crime committed at age 12, he asserts this is without consequence because the sentence was overturned based on "due process grounds relating directly to his extremely young age". **{Petition p.16n.5}**. This is misleading inasmuch as it implies that the Florida District Court of Appeal reversed because of the harsh sentence given to a 12 year old. The Florida court only held that the trial court should have an ordered a competency evaluation, and the court specifically rejected a claim that the *life without parole* sentence given to Tate violated the Eighth Amendment. Tate ultimately accepted a plea bargain that allowed him out on probation, but his subsequent armed robbery landed him back in prison where he is now serving a thirty year sentence for the murder committed at 12 and a ten year sentence for robbery. Sampson, Hannah, "Lionel Tate pleads no contest to pizza holdup", Miami Herald, (Feb. 20, 2008).

33519653 (Mich. Ct. App. April 11th, 2000) (unpublished) (mandatory nonparolable life sentence on 14 year old for murder); Edmonds v. State, 955 So.2d 787 (Miss. 2007) (granting new trial based on evidentiary errors for 13 year old sentenced to life for murder; retrial pending); Swinford v. State, 653 So.2d 912, 918 (Miss.1995) (upholding trial court's sentence of life for 14-year-old who aided and abetted murder); State v. Spina, 982 P.2d 421 (Mont. 1999) (sentence of 20 years on 14 year old for murder); People v. Smith, 635 N.Y.S.2d 824 (N.Y. App. Div. 1995) (upholding sentence of 9 years to life for 13 year old convicted of murdering 4 year old); Naovarath v. State, 779 P.2d 944 (Nev. 1989) (life with possibility of parole as the sentence for 13 year old); State v. Green, 502 S.E.2d 819 (N.C. 1998) (imposition of LWOP on 13 year old convicted of first degree sex crime); State v. Avery, 649 S.E.2d 102 (S.C. Ct. App. 2007) (14 year old tried for murder and carjacking and sentenced to 35 years); State v. Charles, 628 NW2d 734 (S.D. 2001) (14 year old sentenced to life for murder); State v. Jensen, 579 N.W.2d 613 (S.D. 1998) (LWOP sentence given to 14 year old who murdered cab driver); State v. Powell, 34 S.W.3d 484 (Tenn. Crim. App. 2000) (in case involving a number of codefendants including a 14 year old who were sentenced to LWOP); State v. Loukaitis, No. 17007-1-III, 1999 W.L. 1044203 (Wash. Ct. App. Nov. 16, 1999) (14 year old given life without parole for murdering a teacher and two students and wounding another); State v. Bourgeois, 945 P.2d 1120 (1997) (14 year old given LWOP sentence for murder); State v. Massey, 803 P.2d 340 (Wash. Ct. App. 1990) (sentence of LWOP given to 13 yo for murder); State v. Armstead, No. 00-1072-CR, 630 N.W.2d 275 (Wis. Ct. App. May 22, 2001) (unpublished) (sentence for murder of 13 year to life imprisonment). See also Canady, Dana, "Florida Boys

Admit They Killed Their Father; Shorter Term is Set", N.Y. Times, November 15th, 2002 (recounting disposition of Alex and Derek King, who were 12 and 13 when they committed murder; jury verdicts of second degree murder in adult court were thrown out by judge, and defendants agreed to plea deals for eight and seven years in prison without parole respectively); Hasbun, Andrew, "Teen Convicted of Murdering Pizza Deliveryman", July 26th, 2005) (http://www.wlbt.com/global/story.asp?s=5203035) (recounting story of Demarious Banyard, sentenced to life for murder committed at age 13); Johnson, Kevin, "Cities Grapple with Crime with Kids", USA Today, July 12, 2006 (noting Evan Savioe received 26 years for murdering at age 12 his friend); Lehr, Jeff, "Prosecutors: Thomas White Received Effective Counsel", The Joplin Globe, February 9th, 2008 (recounting pending appeal of decision to try then 13 year old Thomas White as an adult for allegedly bringing assault weapon to school and attempting to shoot principal); Mansfield, Duncan, "Boy Agrees to 45 Years in School Killing", Wash. Post, April 10th, 2007 (recounting plea deal of then 14 year old Kenneth Bartley to 45 years for school shootings); Martin, Jonathan, "Youth confesses to role in murder; 14-year sentence surprises courtroom", The Seattle Times, April 29th, 2005 (recounting story of Jake Eakin and Evan Savioe, two youths tried as adults for the murder of a friend committed when both were 12 years old); "Pensacola teen who killed friend in fight gets 45 years", March 24, 2005 (http://www.staugustine.com /stories/032605/sta_2975162.shtml) (recounting story of Christine Rogers, tried as an adult and sentenced to 45 years for murder committed at age 13).

There is no doubt, and thankfully so, that long adult sentences for those 14 and younger are not common – and particularly so for those aged 12. However, Petitioner's reliance at faceless statistics of those youths transferred for crimes against the person is decidedly unhelpful because the statistics cannot show the extreme violence, societal harm, and individual culpability that all exist in the cases when those 14 and younger are sent to the normal criminal system. Simply because the combination of factors justifying adult punishment for those so young – resolved in this case at the transfer hearing by the family court – does not happen often, does not mean that when it does the Eighth Amendment forbids a sentence that appropriately addresses society's need for retribution, incapacitation, and deterrence. Society's gradual retreat from the outdated juvenile justice system of the 20th century has to start somewhere, and just because the vanguard cases are few does nothing to show lack of societal acceptance. If anything, the lack of legislative rollback or extreme public outcry after these well-publicized cases is consistent with the trend that modern society is showing a greater acceptance of harsh punishments for those so young – not less.

E. Given the circumstances of this crime and Petitioner's culpability, it cannot be said that there was constitutional disproportionality.

Given the lack of a national consensus or societal trend away from treating younger juveniles as adults for violent crimes, it cannot be said that Petitioner's minimum sentence of concurrent thirty year terms was grossly disproportionate. Petitioner admitted waiting

until his victims were asleep, shooting them while they lay helpless and unaware in their bed. He then took guns and money, leaving only after setting small fires that would not engulf the house and attract attention until he had made his escape. He initially told detailed lies of an intruder to cover his crime. He was found competent to stand trial, and waived up to normal court after a transfer hearing that took into account an evaluation by an expert, testimony about the crime, and the Kent factors. In these circumstances, Petitioner displayed a level of culpability that belies his young age, and his minimum sentence is not grossly disproportionate to the murder of two elderly people as they lay in their bed.

F. Petitioner's contentions as to the consideration of Petitioner's age and the alleged lack of legislative intent were not preserved, but in any event meritless.

Petitioner finally makes two additional contentions: first, that the Eighth Amendment was violated by the court's inability to consider his age and move below the mandatory minimum, and second, that the legislative intent was not clear enough as to whether it was intended a 12 year old to face such punishment.

Neither one of these issues were raised to the state supreme court on direct appeal in the context of an Eighth Amendment violation; as such, they are not preserved. *See Bailey v. Anderson*, 326 U.S. 203 (1945) (state appellate court must actually consider point not raised to trial court in order for United States Supreme Court to have jurisdiction).

Regardless, they are meritless. Petitioner's age was considered by the family court as part of a waiver hearing that included expert evaluation, live testimony, and application of the Kent factors. Moreover, the judge obviously considered Petitioner's age in imposing two minimum sentences concurrently.

As to the statute, Subsection (4) of the transfer statute, 20-7-7605, allows transfer "if a child sixteen years of age or older" is charged with a Class E or F felony (emphasis added). Subsection (5) of the transfer statute allows transfer "if a child fourteen or fifteen years of age" is charged with a Class A, B, C or D felony (emphasis added). Subsection (6), the murder provision, does not mention any ages, but refers to "the" child. S.C. Code Ann. § 20-7-7605(6) (Supp. 2005) (emphasis added). Petitioner reads too much into the mere placement of "a" or "the", especially where the statute clearly reduces the age as the severity of the offenses increases. Moreover, as to Petitioner's arguments as to "blended" sentences, Petitioner was retained in juvenile detention until he turned seventeen.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should decline to grant the writ of certiorari.

Respectfully submitted,

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