STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	THIRD JUDICIAL CIRCUIT
	)	
COUNTY OF CLARENDON	)	
	)	
State of South Carolina	)	
	)	
vs.	)	
	)	
George Stinney, Jr.,	)	
Defendant/Petitioner	)	
_____	)	

***AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT/PETITIONER**

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INTEREST OF AMICUS CURIAE

Founded in 2007, the Civil Rights and Restorative Justice Project of the Northeastern University School of Law conducts research and supports policy initiatives on racial violence in the United States between 1935 and 1965, and other miscarriages of justice of that period. The Project offers research support to members of a diverse community – prosecutors, lawmakers, victims of violence – that is seeking to redress these past harms through legal proceedings, law reform, and private investigations. CRRJ assists these constituencies to assess and develop a range of policy approaches, including criminal prosecutions, truth and reconciliation proceedings, and legislative remedies. CRRJ's research aims to develop reliable data with which to analyze racial violence. The two components of CRRJ's program are research and remediation. Scholars from a range of disciplines – including law, journalism, history, sociology, and political science – are engaged in CRRJ's empirical research. The remediation program assesses and supports measures to redress miscarriages of justice, including judicial remedies,

truth and reconciliation proceedings, state pardons, and apologies by state and private entities who bear responsibility for the harms.

In this brief the Civil Rights and Restorative Justice Project will address the propriety of granting posthumous relief in a capital case to redress grave miscarriages of justice. In response to the suggestion of this Court, this *amicus curiae* brief will also address the constitutional protections to which this defendant/petitioner was entitled at the time of his trial, including the right to effective counsel, to a fairly selected jury, and not to incriminate himself.

TABLE OF AUTHORITIES

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STATEMENT OF FACTS

On June 16, 1944, merely two months after his sentencing, the youngest boy in United States history was executed. His name was George Stinney, Jr., and he was a fourteen-year-old seventh grade student.[1] Today, he is recorded, and falsely remembered, as one of the ten most homicidal children in American history.[2]

Stinney was apprehended by police on March 24, 1944 on suspicion of murdering two young white girls, Betty June Binnicker, age eleven,[3] and Mary Emma Thames, age seven,[4] in Alcolu, South Carolina.[5] Exactly one month after his arrest, on April 24, 1944 a jury was selected and, that same day, Stinney was tried for the murder of Betty June Binnicker.[6] After ten minutes of deliberations, the all white jury found Stinney guilty of murder.[7] The trial and the sentencing were concluded in a day.[8] Although Stinney had a statutorily protected right to an appeal, his attorney never sought one, nor did he request a stay of execution.[9]

In 1944, Stinney and his family lived in Alcolu, a small town in Clarendon County.[10] Stinney, who was so slight of size that he looked like a "tiny child," was well behaved and a

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[1] Stinney Trial Record (hereinafter ST), McLeod Notes; Stinney Hearing Stipulated Documents (hereinafter SH), Ruffner aff.)
[2] *Ten of the Most Homicidal Children in History* http://rawjustice.com/2010/09/04/10-of-the-most-homicidal-children-in-history/ (accessed February 3, 2013).
[3] ST, A.C. Bozard Statement
[4] *Id.*
[5] Stinney Filed Stipulations and Consent Order ("Stinney Stipulations"), ¶2.
[6] Stinney Stipulations, ¶¶11-12.
[7] *Id.* at ¶¶13, 14 (Stinney was never tried for the murder of Mary Emma Thames); *see also* ST, Binnicker Indictment.
[8] Stinney Stipulations at ¶9-12.
[9] *Id.* at ¶13.
[10] SH, Charles Stinney Deposition, 5; SH, Charles Stinney Affidavit, ¶4.

good student.[11] The eldest of the Stinneys' children, he lived with his mother, father, two brothers and two sisters.[12] His father, George Stinney Sr., worked for the Alderman Lumber Company, which owned tenant houses and rented to the family.[13] The family kept a cow called Lizzy, and Stinney's chores included milking and grazing Lizzy.[14]

On Friday, March 24, 1944, Stinney came home from school and took his nine-year-old[15] sister, Amie Lou, with him out to the field to milk and graze Lizzy.[16] The field was between the house and the railroad tracks that separated the white and black communities of Alcolu, and it was visible from the Stinney home.[17] Two girls, pushing their bikes,[18] approached Stinney and his sister.[19] The girls asked the brother and sister if they knew where they could find maypop flowers.[20] The Stinney children said they did not know where the flowers could be found, and that was the end of the exchange.[21] Amie Lou (Stinney) Ruffner later recalled that it was strange to see the white girls there because whites did not normally venture over to the black side of town.[22] Ami Lou Stinney remembers that a woman known as Mrs. Daisy was looking out at the field from her window, but, thinking little of the exchange with the girls on their bikes, she

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[11] SH, Charles Stinney Depo., 12; Hunter Affidavit, ¶5 (Stinney was "short, skinny and frail-looking").
[12] SH, Charles Stinney Affidavit, ¶4; SH, Charles Stinney Depo., 6; SH, Amie Stinney Affidavit, 1.
[13] SH, Charles Stinney Depo., 5; SH, Charles Stinney Affidavit, ¶¶3-4.
[14] SH, Charles Stinney Affidavit, ¶5; SH, Charles Stinney Depo., 10.
[15] Charles Stinney Depo., 19.
[16] SH, Charles Stinney Affidavit, ¶5; Charles Stinney Depo., 10; Amie Stinney Affidavit, 1.
[17] SH, Charles Stinney Affidavit, ¶¶4-5; Charles Stinney Depo., 5, 10-11, 30; Amie Stinney Affidavit, 1.
[18] The record is unclear whether there was one bicycle or two. The notes of the Solicitor, Frank A. McLeod, mention a "bicycle," while Ruffner, Stinney's sister, recalls there were "bicycles." ST, McLeod notes; SH, Ruffner Affidavit.
[19] SH, Charles Stinney Depo., 18; Amie Stinney Affidavit, 1.
[20] SH, Amie Stinney Affidavit, 1; SH Wilford Johnny Hunter Affidavit ("Hunter Affidavit"), ¶6.
[21] SH, Charles Stinney Depo., 18; SH, Hunter Affidavit, ¶6, Amie Stinney Affidavit, 1.
[22] SH, Amie Stinney Ruffler Affidavit, 1.

waved at Mrs. Daisy and then turned to leave.[23] Amie Lou and Stinney returned home, brought Lizzy to her shed, ate dinner and started their schoolwork.[24] Charles Stinney, who was twelve at time of the incident,[25] recalled that when his brother and sister returned home they looked no different from when they had left: their clothes were not disheveled or bloody, nor was there any evidence of a struggle.[26] Later that evening, the family attended a neighbor's party.[27] There they learned that the two girls from the field had not returned to their homes.[28]

Stinney's father joined a search party that night to locate the two girls.[29] However, it was not until the next morning, on March 25, 1944, that the girls' bodies were located.[30] A search team that included Francis Batson, George Burke and Sam Perry, all civilians, located the bodies.[31] As Batson recalled in 2013, the girls were lying on their backs in a ditch with a bicycle on top of them; the bicycle handlebars were found in some brush away from the ditch.[32] Batson moved the bodies in an effort to see if the girls were alive, but they were both dead.[33] Deputy Sheriff Newman responded to the scene.[34] When he arrived, the bodies had been moved, one on each side of the ditch.[35] There was a bicycle next to Betty June Binnicker, and a bicycle wheel that had been detached from its frame was discovered in the ditch.[36]

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[23] SH, Amie Stinney Affidavit, 1.
[24] SH, Amie Stinney Affidavit, 1.
[25] SH, Charles Stinney Affidavit, ¶3; Charles Stinney Depo., 32.
[26] SH, Charles Stinney Depo., 16, 19, 28.
[27]SH, Charles Stinney Affidavit, ¶6; Charles Stinney Depo., 17,20.
[28] SH, Charles Stinney Depo., 17, 20.
[29] SH, Charles Stinney Depo., 17.
[30] SH, Francis Batson Affidavit ("Batson Affidavit"), ¶¶3, 5; ST, Newman report.
[31] SH, Batson Affidavit, ¶4.
[32] *Id.* at ¶5.
[33] *See id.* at ¶¶6, 8.
[34] Stinney Stipulations, ¶1.
[35] Batson Affidavit, ¶¶6, 8; Stinney Stipulations, ¶1.
[36] Stinney Stipulations, ¶¶1, 18.

Stinney was apprehended on March 25, shortly after the bodies were found.[37] The police also detained Stinney's half brother, Johnny Green, but he was later released.[38] Law enforcement officers searched the three-room Stinney home in vain for evidence after detaining Stinney.[39] None of the family members were interviewed that day, or at any time, by law enforcement, although at least two of them, George's brother Charles and his sister Amie Lou, could have provided highly relevant, exculpatory evidence.[40]

Later that evening, the managers of the Alderman Lumber Company fired Stinney's father and ordered the family to leave their home immediately.[41] In fear for their safety, the Stinney family fled that night to Pinewood in Sumter County, where Stinney's grandmother lived.[42] Stinney's parents were not able to visit him between the time he was apprehended on March 25, and his trial and conviction on April 24, 1944.[43] None of the child's relatives attended the trial. Stinney's father returned to Alcolu only once – to collect their belongings - after the family fled.[44]

On March 29, 1944, following a coroner's inquest, an arrest warrant was issued for George Stinney.[45] Sam Perry, one of the men who discovered the girls' bodies, served as a juror

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[37] While the parties in the proceedings before this Court stipulated that Stinney was detained on Friday, March 24 (Stinney Stipulations, ¶2), it seems more likely that he was detained on Saturday, March 25. The family, including Stinney, went to a party on the evening of March 24 (SH, Charles Stinney Depo.., p. 17), and the sheriff's contemporaneous report puts the date of Stinney's detention at Saturday, March 25. (ST, Newman report). *See also* Charles Stinney Affidavit, 33 (crime happened on a Friday and bodies found on Saturday morning).
[38] SH, Charles Stinney Affidavit, ¶7; Charles Stinney Depo., 22-23.
[39] SH, Charles Stinney Depo., 27-28.
[40] SH, Charles Stinney Depo., 37.
[41] SH, Charles Stinney Affidavit, ¶7; Charles Stinney Depo., 24-25, 35.
[42] SH, Charles Stinney Affidavit, ¶7; Charles Stinney Depo., 24-25, 35.
[43] SH, Francis Batson Affidavit; SH, Charles Stinney Depo., 23-24; SH, Charles Stinney Affidavit, ¶ ¶7-8.
[44] SH, Charles Stinney Depo., 26.
[45] Stinney Stipulations, ¶6; ST, Stinney arrest warrant.

on the coroner's inquest.[46] George Burke, also one of the men who found the girls, served as the foreman of the coroner's jury.[47] Burke is listed as a member of the grand jury for the term of the Stinney indictment, and he is also listed as a witness on the Stinney indictment form.[48]

An "iron rod" was identified as the murder weapon in the Stinney indictment,[49] and the report of law enforcement officer H.S. Newman[50] mentions a "piece of iron, about fifteen inches long."[51] According to H.S. Newman's notes, Stinney "made a confession" and described the murder weapon:

> On information I received I arrested a boy by the name of George Stiney (*sic*), he then made a confession and told me where a piece of iron about 15 inches long were (*sic),* he said he put it in a ditch about 6 feet from the bicycle wheel which was lying in the ditch. The piece of iron were (*sic)* found in water where he said it were (*sic*) at.[52]

While H.S. Newman is listed as a witness on the Stinney indictment form,[53] there is nothing in the record to indicate that a written confession, or written statement of any kind, was ever admitted into evidence, or what admissions of the defendant were considered by the jury.[54]

Olin D. Johnston, then the governor of South Carolina, also referred to Stinney's "confession" in letters responding to individuals seeking clemency for the youth.[55] Governor Johnston wrote that he learned about the confession from the "officer who made the arrest," presumably H.S. Newman[56]:

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[46] Stinney Stipulations, ¶5; SH, Batson Affidavit, ¶4.
[47] Stinney Stipulations, ¶5; SH, Batson Affidavit, ¶4.
[48] Stinney Stipulations, ¶¶3-4; ST, Binnicker Indictment (although Burke's name appears to have been crossed out).
[49] ST, Binnicker Indictment.
[50] The record does not reveal what police agency H.S. Newman was associated with.
[51] Stinney Stipulations, ¶¶8, 19-20.
[52] ST, H.S. Newman Report.
[53] ST, Stinney Indictment.
[54] Stinney Stipulations, ¶16.
[55] SH, Letter from Olin D. Johnston, Governor of South Carolina, to V.M Ford (June 14, 1944).
[56] ST, Arrest Warrant (Officer H.S Newman is the arresting officer on the arrest warrant).

> . . .Stinney killed the smaller girl to rape the larger one. Then he killed the larger girl and raped her dead body. Twenty minutes later he returned and attempted to rape her again but her body was too cold.[57]

C.R.F. Baker, M.D. and A.C. Bozard, M.D., examined the victims on March 25 at 2 p.m. The physicians reported that both girls' hymens appeared to be intact, and that the older girl had a "slight edema of external genitalia and a slight bruise on the right side of genitalia . . . no other bruises on the body."[58] They further reported that the victims suffered blows that "look as if they had been caused by blows from a round instrument about the size of the head of a hammer," and that the two of the wounds suffered by Binnicker "punched definite holes in the skull."[59]

Wilford "Johnny" Hunter, a detainee who was in jail with Stinney, following his trial but before his execution,[60] provided an affidavit on December 10, 2013. Hunter averred that Stinney told him that he did not kill the girls but that he was forced to say that he did.[61] Stinney told Hunter he met the girls briefly when they were searching for flowers in the field.[62]

Stinney was executed two and a half months after his arrest.[63]

ARGUMENT

SUMMARY OF THE ARGUMENT

The prosecution of George Stinney constituted a grave miscarriage of justice, causing great suffering for his family, including his surviving brother and sister, whose testimony this Court has heard. Stinney's shocking treatment was inconsistent with the most fundamental

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[57] SH, Letter from Johnston to Ford, *supra*.
[58] ST, Bozard Report.
[59] *Id*.
[60] SH, Hunter Affidavit, ¶1.
[61] *Id.* at ¶5.
[62] *Id.* at ¶6.
[63] ST, Declaration of Execution, .

notions of due process, including but certainly not limited to the right to effective assistance of counsel. At the trial, no exculpatory witnesses were called, although they existed; Stinney's "confession" was wrongfully admitted; and at least one of the fact witnesses sat in judgment of Stinney on both the coroner's jury and the grand jury. His lawyer failed to preserve his right to appeal his conviction and death sentence. A fourteen-year-old boy was deprived of legal protections to which his youth entitled him at the time of the proceedings. Case law clearly establishes that the Clarendon County grand and petit juries that sat in Stinney's case were drawn in violation of the defendant's equal protection and due process rights. These and other serious errors deprived Stinney of the due process protections to which he was entitled under United States Constitution and the laws and Constitution of the State of South Carolina.

This Court has the power to grant posthumous relief, and should do so in this case. Where the equities strongly favor correcting the record, courts have granted such relief. There are several reasons why in this particularly compelling case, a writ of *coram nobis* is the appropriate remedy to redress the miscarriage of justice. Racial bias in Clarendon County in 1944 impermissibly tainted the proceedings against Stinney, and courts have a special duty to make corrections where they can do so when race is shown to have played a significant role in a jury's verdict. Moreover, extraordinary relief is warranted in light of Stinney's youth. The Supreme Court has established that, as applied to juveniles, capital punishment constitutes cruel and unusual punishment. And where Stinney's case was never subjected to appellate review, it is particularly appropriate for this Court to grant relief to correct the errors at trial.

Hence, for reasons more fully explained herein, this Court should grant to the defendant George Stinney a writ of *coram nobis* declaring him to be not guilty of the crime for which he was convicted and executed.

I. DEFENDANT GEORGE STINNEY WAS DENIED FUNDAMENTAL DUE PROCESS.

There is compelling evidence that George Stinney was innocent of the crimes for which he was executed in 1944. The prosecutor relied, almost exclusively, on one piece of evidence to obtain a conviction in this capital case: the unrecorded, unsigned "confession" of a 14-year-old child who was deprived of counsel and parental guidance, and whose defense lawyer shockingly failed to call exculpating witnesses or to preserve his right of appeal.

The Supreme Court has often underscored that the purpose of procedural protections are to prevent wrongful convictions:

> Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

Brinegar v. United States, 338 U.S. 160, 174 (1949). And the South Carolina Supreme Court has also long maintained that legal punishment can "only be secured after a trial surrounded by every statutory and constitutional safeguard." *State v. Maes*, 127 S.C. 397, 397 (1924).

Both the United States Supreme Court and the South Carolina Supreme Court have stressed that procedural safeguards are especially critical in capital cases. "It is by now axiomatic... that the unique, irrevocable nature of the death penalty necessitates safeguards not required for other punishments." *Whitmore v. Arkansas*, 495 U.S. 149, 167 (1990). Indeed:

> Under the Eighth Amendment, the death penalty has been treated differently from all other punishments. Among the most important and consistent themes in this Court's death penalty jurisprudence is the need for special care and deliberation in decisions that may lead to the imposition of that sanction. The Court has accordingly imposed a series of unique substantive and procedural restrictions designed to ensure that capital punishment is not imposed without the serious and calm reflection that ought to precede any decision

of such gravity and finality.

Id. at 167-68. The South Carolina Supreme Court has echoed this sentiment, noting that "greater protection is afforded in capital cases due to the unique character of the death penalty." *State v. Stewart*, 288 S.C. 232, 235 (1986). Moreover, "justice demands and conscience dictates that the irretrievable extinguishment of human life by the state be preceded by a conscionable effort to be thorough, fair and reasonably certain adequate measures are maintained and observed." *State v. Torrence*, 305 S.C. 45, 73 (1991)(Finney, A.J., *dissenting*).

At the time of Stinney's trial, the longstanding doctrine of *in favorem vitae* ("in favor of life") was firmly entrenched in South Carolina jurisprudence.[64] Under *in favorem vitae,* first recognized in 1794, South Carolina courts were obligated to "review the entire record [in a capital case] for legal error, and assume error when unobjected-to but technically improper arguments, evidence, jury charges, *etc.* [were] asserted by the defendant on appeal in a demand for reversal or a new trial." *Torrence*, 305 S.C. at 60-61 (1991) (Toal, J., *concurring*); *see also State v. Simmons*, 208 S.C. 538, 544 (1946)(reversing the defendant's conviction, reasoning that: "[i]n a capital case... the Court is conscious of its duty to search the record *in favorem vitae*, and to give the defendant the benefit of any errors in the conduct of the trial which affect the merits of the cause, even though they may not be sufficiently covered by the exceptions"); *State v. Osborne*, 200 S.C. 504, 517 (1942)(reversing conviction where the defendant failed to make a timely request for more detailed jury instructions, reasoning that the procedural rule could "properly be relaxed *in favorem vitae*"); *State v. Scott*, 209 S.C. 61, 65 (1946)(reversing defendant's conviction, reasoning that: "in view of the fact that this is a capital case, we have felt it to be our duty *in favorem vitae* to closely scrutinize the entire record for the purpose of

[64] John H. Blume, *An Introduction to Post-Conviction Remedies, Practice and Procedure in South Carolina*, 45 S.C. L. Rev. 235, 246 n.89 (1994).

determining whether all of the rights of the accused were protected on his trial").

In sum, then, South Carolina courts have long held that capital cases warrant special treatment of the courts, and that procedural rules should be construed liberally to protect against the possibility of error in such cases. This court's consideration of George Stinney's motion for a writ of *coram nobis* should be governed by the doctrine of *in favorem vitae*, which applied to capital cases at the time of his conviction in 1944.

A. GEORGE STINNEY WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, AS THAT RIGHT WAS APPLIED AT THE TIME OF HIS TRIAL.

The South Carolina Code of Criminal Procedure in 1942 provided that "[t]he accused shall, at his trial, be allowed to be heard by counsel [and] may defend himself . . ."[65]

Stinney's lawyer made crucial errors that deprived him of his right to effective assistance of counsel. First, Stinney's lawyer allowed this capital case to go to trial a mere month after Stinney's arrest; nor did he seek a change of venue even though, given the history of the county, Stinney could well have been lynched in Clarendon County. It also appears that the attorney did not seek a preliminary hearing, although the defendant was entitled to one.[66] Furthermore, the attorney did not challenge the grand and petit jury selection procedures, though he could have made out a *prima facie* case of unconstitutional discrimination. He did not object to the appointment of one of the men who found the victims' bodies as foreman of the coroner's jury and a member of the indicting grand jury. He also seemingly failed to challenge the prosecution's admission of his client's confession. The attorney did not interview or call any exculpating witnesses, although Stinney had a very strong alibi. Nor did he seek a stay of

[65] S.C. Code, ch. 62, §996 (1942) (available at https://archive.org/details/codeoflawsofsout01unse).
[66] "S.C. Code, *supra* ch. 58, §935."

execution. And, sealing this child's fate for posterity, he did not preserve his right to appeal, thereby depriving him of the benefits of South Carolina's *in favorem vitae* rule.

The Supreme Court has long recognized that a defendant in a capital case must be afforded counsel. *Powell v. Alabama*, 287 U.S. 45, 66 (1932). The Court has also made clear that a defendant's Sixth Amendment right to counsel is violated unless that counsel is *effective*: the "right to have the *effective assistance* of counsel [is] guaranteed by the Sixth Amendment." *Glasser v. United States*, 315 U.S. 60, 76 (1942)(emphasis added). Moreover, the Supreme Court has stressed that the "[Fourteenth] Amendment is violated... when a defendant is forced by a state to trial in such a way as to deprive him of the *effective assistance* of counsel." *Hawk v. Olson*, 326 U.S. 271, 276 (1945) (emphasis added)(citations omitted); *see also Reece v. State of Ga.,* 350 U.S. 85, 90 (1955) ("[t]he *effective assistance* of counsel in… a [capital] case is a constitutional requirement of due process")(emphasis added). In sum, the Supreme Court has repeatedly emphasized that "[e]ssential fairness is lacking if an accused cannot put his case effectively in court." *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 279 (1942); *see also Powell*, 287 U.S. at 70 ("the assistance of counsel was recognized [by the framers of the Sixth Amendment] as essential to any fair trial of a case against a prisoner"); *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) ("the right to counsel is the right to the *effective assistance* of counsel") (emphasis added)(citations omitted); *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986)("[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have")(*quoting with approval* Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 8 (1956)).

Whether effective assistance was rendered depends, first, on whether the representation was deficient as measured by the standard of reasonableness at the time of the representation, including the "prevailing professional norms," and second, on whether the result would have been different *but for* ineffective assistance. *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984); *see also Watson v. State,* 287 S.C. 356, 357-58 (1985); *Cherry v. State*, 300 S.C. 115, 117 (1989). This "*Strickland* test provides sufficient guidance for resolving *virtually all* ineffective-assistance-of-counsel claims," and is therefore applicable in the case at bar. *Frazer v. S. Carolina*, 430 F.3d 696, 714 (4th Cir. 2005) (emphasis added). [67]

In 1941, the South Carolina high court observed that "it is the duty of the Court, whether requested or not, to assign counsel for a capital defendant as a necessary requisite of due process of law, and that that duty is not discharged by an assignment at such time or under such circumstances as to preclude the *giving of effective aid* in the preparation and trial of the case." *State v. Grant*, 199 S.C. 412, 19 S.E.2d 638, 640 (1941), overruled on other grounds, *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Indeed, by the 1940s, the standards for effective counsel were easily discernable from the case law. *See, e.g., Cummings v. Tweed*, 195 S.C. 173, 187 (1940) (defense counsel "should ever be mindful of their grave responsibility"); *Powell*, 287 U.S. at 53 ("designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard"); *State v. Cash*, 138 S.C. 167 (1927)(failure to grant adequate time to sum up deemed error in a capital case); *Glasser v. United States*, 315 U.S. 60, 70 (1942) (case remanded where counsel simultaneously represented conflicting interests); *White v. Ragen*, 324 U.S. 760, 764 (1945) ("it is a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive

him of the effective aid and assistance of counsel"); *Hawk*, U.S. at 274 (denial at his trial of an opportunity to examine the charge, subpoena witnesses, consult counsel and prepare a defense constituted denial of effective assistance of counsel).

Stinney's family could not afford to hire a lawyer.[68] His appointed attorney failed to interview Stinney family members to secure exculpatory testimony, and, so far as appears from the available record, presented no case in defense.[69] As in *Powell*, the defendant here was "young, ignorant, illiterate, surrounded by hostile sentiment, . . ., charged with an atrocious crime regarded with especial horror in the community where [was] to be tried. . . ." and hurried to trial. *Powell,* 287 U.S. at 58.

As the Supreme Court has repeatedly made clear, "[t]he defendant needs counsel and counsel needs time." *Hawk*, 326 U.S. at 278. The Court reversed the conviction in *Powell* where counsel was appointed on the eve of trial: "a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob." *Powell*, 287 U.S. at 58. While Stinney's counsel, who had about a month from arrest to trial, was afforded a somewhat longer period to prepare for trial than counsel for the defendants in *Powell*, the case proceeded with such haste – jury selection, trial, and capital sentence in one day - as to virtually guarantee a conviction.

i. **The failure of Stinney's counsel to call exculpatory witnesses rendered his assistance ineffective.**

At the time of Stinney's trial, the South Carolina Code of Criminal Procedure provided

[68] SH, Charles Stinney Depo., 24.
[69] SH, Charles Stinney Depo., 24, 37.

that "[t]he accused shall, at his trial, . . . have the right to produce witnesses and proofs in his favor . . ."[70] Indeed, South Carolina has long recognized that it is a "fundamental principle of our criminal jurisprudence that an accused is entitled 'to be fully heard in his defense.'" *State v. Lyle*, 125 S.C. 406, 436 (1923), *quoting* Const. 1895, Art. 1, § 18; Section 82, Code Crim. Proc. It followed that "[t]he defendant was entitled as a matter of substantial right to introduce evidence tending to prove any essential point of an effective alibi." *Id* at 437. In *Lyle*, the court reversed the defendant's conviction for check forgery, holding that it was prejudicial error for the trial court to limit the number of alibi witnesses the defendant could call.[71]

Defense counsel in a criminal case has an obligation to undertake a reasonable investigation, which requires that "at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts." *Ard v. Catoe*, 372 S.C. 318, 331-32 (2007); *see also Strickland*, 466 U.S. at 691 ("the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case"). Moreover, such a duty "to investigate a potential witness is even more critical when the witness might provide an alibi." *Walker v. State*, 397 S.C. 226, 235 (Ct. App. 2012).

To be sure, had counsel investigated and made an informed decision not to call particular witnesses, no ineffective claim could be made out. *Strickland*, 466 U.S. at 690 ("strategic choices made *after* thorough investigation of law and facts relevant to plausible options are virtually unchallengeable") (emphasis added); *see also Bunch v. Thompson*, 949 F.2d 1354, 1365 (4th Cir. 1991) (reasonable basis for strategic decisions not to call other potential witnesses found where

[70] S.C. Code, *supra*, ch. 62, §996 (1942).
[71] *Id*

counsel interviewed all potential witnesses who had been called to their attention). However, where, as here, no such investigation took place, counsel's failure to call the witnesses renders him ineffective. *Walker v. State*, 397 S.C. at 236 (failure to interview defendant's girlfriend as an alibi witness was deficient performance); *Huffington v. Nuth*, 140 F.3d 572, 580 (4th Cir.), *cert. denied*, 525 U.S. 981 (1998) (deficient performance where counsel failed to contact and interview important prospective witnesses); *Griffin v. Warden*, Maryland Corr. Adjustment Ctr., 970 F.2d 1355, 1358 (4th Cir. 1992) (failure to contact defendant's alibi witnesses in robbery case was deficient performance).

George Stinney's brother, Charles, and his sister, Amie Lou, with their parents, were chased out of the county on the day of Stinney's arrest, and, fearful for their lives, they never returned.[72] Neither of these witnesses was questioned by law enforcement, or by Stinney's attorney, nor, having been forced to flee, were they able to testify at trial, although their testimony would manifestly have cast serious doubt on the government's weak case against Stinney.[73]

ii. Stinney's counsel's failure to file an appeal rendered him ineffective.

The South Carolina Supreme Court has long underscored that post-conviction safeguards, including the right to appeal a conviction, are elements of due process. "[W]here a person is brought before a trial justice for trial, . . . he is entitled to a jury if demanded, and. . . the testimony of the witnesses must be taken down in writing and subscribed by them, and . . .upon conviction there is a right of appeal to the Circuit Court." *City Council of Charleston v. Brown*,

[72] SH Charles Stinney Affidavit, ¶7; Charles Stinney Depo., 24-25, 35.
[73] SH, Charles Stinney Depo., 37.

42 S.C. 184, 188 (1894).[74] The *Brown* court observed that "in every instance where [a lower] court is specially provided for, the framers of the Constitution again provided in express terms for the right of appeal." *Id.*

In 1938, the United State Supreme Court held that a reviewing court should "'indulge every reasonable presumption against waiver' of fundamental rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). "[W]e 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Id.* A finding that the defendant knowingly waived certain fundamental rights, the Court reasoned, required a careful analysis of the circumstances of the case, including the "background, experience, and conduct of the accused." *Id.*

The strong "presumption against waiver" led the United States Supreme Court to hold, in 1967, that a defense counsel's "role as advocate requires that he support his client's appeal to the best of his ability." *Anders v. California*, 386 U.S. 738, 744, (1967). South Carolina's high court echoed this teaching in *White v. State*, wherein it held that it is the duty of defense counsel to be "certain that the defendant [is] fully aware of his [appellate] rights." 263 S.C. 110, 118 (1974). In the absence of a knowing waiver, defense counsel must perfect an appeal or comply with the procedure mandated in *Anders v. State of California*. *Smith v. State,* 309 S.C. 413, 416 (1992); *Anders v. State of California*, 386 US 738 (1967). Stinney's lawyer's failure to file an appeal, which would have automatically stayed his execution,[75] deprived him of the benefit of South Carolina's *in favorem vitae* rule on appeal.

B. GEORGE STINNEY WAS DEPRIVED OF HIS RIGHT TO A JURY OF

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[75] "In criminal cases, service of notice of appeal in accordance with law, shall operate as a stay of the execution of the sentence, until the appeal is finally disposed of." S.C. Code, ch. 64, § 1031 (1942) (available at https://archive.org/details/codeoflawsofsout01unse).

HIS PEERS.

The rule prohibiting discrimination in grand and petit jury selection was well settled when this case was tried in 1944. Of course, *Strauder v. West Virginia,* 100 U.S. 303 (1879) established, sixty years before Stinney's trial that *de jure* jury discrimination violated a defendant's right to equal protection. And in 1940, the United States Supreme Court condemned the grand jury selection system of a Texas county that was race-neutral on its face but administered in a discriminatory fashion. Finding probative evidence of discrimination in the disparity between the county's black population and the low numbers of African Americans called to serve, the Court observed that "chance and accident alone could hardly have brought about the listing for grand jury service of so few negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service." *Smith v. Texas,* 311 U.S. 128, 131 (1940). Thereafter, the Court held that "a purpose to discriminate" is required in a jury discrimination case, and "may be proved by systematic exclusion of eligible men of the prescribed race or by unequal application of the law to such an extent as to show intentional discrimination." *Akins v. Texas,* 325 U.S. 398, 403 (1945) (conviction upheld where no purposeful discrimination found).

The South Carolina high court applied the teachings of *Smith* and *Akins* in an attempted rape case where a black defendant was sentenced to 25 years. *State v. Middleton*, 207 S.C. 478 (1946). The *Middleton* court found wanting the defendant's evidence of discrimination, but conceded that a fourteenth amendment jury discrimination claim could be made out on a showing of purposeful discrimination, and that, as in *Smith*, a racial disparity between the eligible population and the list of eligible potential jurors could be evidence of invidious purpose. *Middleton*, 207 S.C. at 495 (1946). *See also State v. Grant,* 199 S.C. 412, 436 (1941) (sustaining

a sentence of death in an intent to rape case, and, applying *Smith v. Texas,* finding no evidence of illegal exclusion from jury service). That a showing of disparity shifts the burden to the state to demonstrate that the selection system is fairly administered was made clear in *State v. Waitus*, 224 S.C. 12 (1953). There South Carolina reversed a murder conviction where the defendant made out a *prima facie* case of discrimination on a showing that for twelve years in the trial county and four years in the indicting county, no African-American had sat on a jury. Citing *Norris v. Alabama,* 294 U.S. 587 (1935), the court held that "where it is shown that notwithstanding the fact that a substantial proportion of those eligible for jury duty are Negroes, no Negro has been drawn for jury service over a long period of years, a strong prima facie case of racial discrimination is shown." *Waitus,* 224 SC 12 at 20.

Indicted by an all-white grand jury and convicted by an all-white petit jury, George Stinney had a viable jury challenge, but his lawyer failed to make it at trial, and deprived him of the right to press such a challenge on appeal. Between 1935 and 1961, in Clarendon County no African-American had ever served on a grand or petit jury, although in 1940 almost three-quarters of the county's residents were African American.[76] In *State v. Fleming*, 243 S.C. 265 (1963), the state high court reviewed jury discrimination evidence presented by the defendant at his trial. While upholding the conviction, the court considered evidence presented to a trial judge in a different Clarendon County case in 1961, where, on a motion to quash an indictment, the challenger proved a "systematic exclusion of [African-Americans] from the grand jury [in Clarendon County]." The jury commissioner for the county testified that between 1935 and 1962

[76] In 1940, Clarendon County was 72% black. "Historical, Demographic, Economic, and Social Data: The Untied States, 1790-1970," prepared by the Inter-University Consortium for Political and Social Research (ICPSR), August 2001. Its total population in 1940 was 35,100. South Carolina Statistical Abstract, Population of South Carolina Counties (1940-2010 Censuses), available at http://abstract.sc.gov/chapter14/pop4.php.

no black had ever served on a Clarendon County grand jury, and that no black had been called to serve on a petit jury in the county between 1935 and 1960. *Fleming,* 243 SC at 270.

In sum, George Stinney could have established a *prima facie* case of unconstitutional jury discrimination as to his indicting and trial juries under federal and state law as it stood in 1944. At a minimum, he could have proven that no black had been selected for service on a Clarendon County jury from 1935 to 1944, for the jury commissioner who testified in the 1961 case where the trial court quashed an indictment was serving in the same position in 1944. The failure of his lawyer to protect Stinney's equal protection right to grand and petit juries from which African-Americans were not systematically excluded was, as South Carolina courts had by then repeatedly proclaimed, reversible error. *See State v. Grant, supra.* at 432 (upholding conviction but adopting trial court opinion, which relied on *Pierre v. Louisiana,* 306 U.S. 354, 361 (1939) for the proposition that disparate impact can prove systematic and purposeful exclusion from grand jury service). Moreover, in accordance with the principle of *in favorem vitae,* in this case the jury challenge could have been made on appeal even if it was not preserved at trial. *See also Goldsby v. Harpole,* 249 F.2d 417 (5th Cir. 1957)(granting *habeas* relief of unpreserved jury discrimination challenge where petitioner "an ignorant layman, had not had an adequate opportunity for counseling. . .sufficient to enable him intelligently and deliberately to understand and approve . . . defensive constitutional objections to the composition of the grand and petit jury."); *Seals v. Wiman,* 304 F. 2d 53 (5th Cir. 1957)(granting *habeas* where no exception was made at trial and observing that " as Judges of a Circuit comprising six states of the deep South, we think that is our duty to take judicial notice that lawyers . . . rarely, almost to the point of never, raise the issue of systematic exclusion of Negroes from juries.")

C. THE ADMISSION OF HIS ALLEGED CONFESSION DEPRIVED GEORGE STINNEY OF DUE PROCESS.

Whether a confession was voluntary and therefore admissible against a criminal defendant was, prior to the *Miranda* rule, a fact-specific inquiry, and the state had the burden of proof. Here, the facts cannot be read to support a finding of voluntariness. George Stinney was interrogated on March 25, within hours after the bodies of the two victims were found, by Officer H.S. Newman, who noted that the fourteen-year-old Stinney "made a confession and told me where a piece of iron about 15 inches long were (*sic*)."[77] The child's parents were prevented from being there during the questioning, no lawyer had yet been appointed to represent him, and Newman had no warrant for his arrest. Nothing in the record establishes that the "confession" was reduced to a writing, read to Stinney and signed by him, nor is there any evidence that there was a hearing on the voluntariness of the statement.

While the *Miranda* rule did not apply in 1944, *Johnson v. New Jersey,* 384 U.S. 719 (1966) (holding that *Miranda v. Arizona,* 384 U.S. 436 (1966) applies only prospectively), the applicable South Carolina rule in Stinney's case, derived from its Constitution and statutory law, was that "a confession is not admissible unless it is voluntary, and the question whether it is voluntary must be determined, in the first instance, by the presiding judge, but the jury must be the final arbiters of such fact." *State v. Miller,* 211 S.C. 306 (1947), collecting cases at 313. *See also State v. Brown,* 212 S.C. 237 (1948).

The case before this Court is not unlike *Haley v. Ohio,* 332 U.S. 596 (1948), where the Supreme Court overturned the conviction of a fifteen-year-old for murder because his conviction was "wrung from a child by means which the law should not sanction." 332 U.S. at 601. While, unlike the case at bar, the police interrogated the defendant in *Haley* over a period of days during

[77] ST, H.S. Newman Report.

which he was held incommunicado, the Court also deemed it important to the determination of voluntariness that he was interrogated with "no friend or counsel to advise him." *Id.* The Court remarked that it was not sufficient to show the child was advised of his right to remain silent because one could not assume that "a boy of fifteen, without aid of counsel, would have a full appreciation of that advice. . . We cannot indulge those assumptions." *Id.* At fourteen, Stinney was "an easy victim of the law." *Id.* at 599.

D. THE PRESENCE OF WITNESSES IN THE MURDER CASE ON THE CORONER'S JURY AND THE GRAND JURY DEPRIVED GEORGE STINNEY OF A FAIR TRIAL.

The record in this case establishes that one of the men who located the bodies of the two victims may also have served as foreman of the coroner's inquest and on the grand jury in this case.[78] The parties' stipulations are to the effect that George W. Burke "was listed as a member of the grand jury" and as a witness on the indictment form,[79] and as the foreman of the coroner's inquest.[80] The affidavit of Francis Batson states that Burke was a member of the search party that found the girls.[81] Sam Perry, who served on the coroner's jury,[82] was also named by Batson as part of the search party.

As is more fully briefed by the defendant in this matter, South Carolina has long recognized the prejudicial effect of allowing jurors to serve on multiple decision-making bodies during a criminal proceeding. "It is not good practice to allow a juror to sit as a petit juror in any case where he has been on the grand jury that returned the bill of indictment, or a coroner's jury,

[78] Stinney Stipulations, para. 3-5;
[79] The indictment form records the name of George Burke as a witness, but the name appears to be crossed out. ST, Indictment.
[80] ST Coroners' Inquests *in re* Betty Jane Binnicker and Mary Emma Thames
[81] SH, Batson Affidavit, para. 4.
[82] ST, Coroner's Inquests into the death of Betty Jane Binnicker and Mary Emma Thames.

where the return is that the deceased came to his death by the party on trial . . .” *State v. Burton,* 111 S.C. 526, 547 (1919).

II. THIS COURT HAS THE POWER TO GRANT POSTHUMOUS RELIEF.

A. THIS COURT IS WARRANTED IN GRANTING A WRIT OF CORAM NOBIS TO ADDRESS THE MISCARRIAGE OF JUSTICE IN THIS CASE.

The defendant petitions for *coram nobis* relief, to wit, an order vacating the conviction. The parties have submitted their arguments on the applicability of the ancient writ to these facts; the focus of *amicus curia* is on whether this Court has the power to grant such relief even though the defendant has been executed.

As the US Supreme Court has reminded us, it is “an unalterable fact that our judicial system, like the human beings who administer it, is fallible.” *Herrera v. Collins,* 506 U.S. 390, 415 (1993). Even in death penalty cases that meet due process standards, the principle of finality must yield where there is evidence that the defendant was innocent. As Justice Stevens has observed, a capital defendant “who possesses new evidence conclusively and definitively proving, beyond any scintilla of doubt, that he is an innocent man,” surely could not “be put to death nonetheless.”[83] *In re Davis*, 557 U.S. 952, 954 (2009). Not only was the trial of George Stinney rife with due process violations, but also this Court now has convincing evidence that he was most likely innocent of the crime. Without posthumous remedies for the wrongfully executed, courts cannot redress the stigma, dishonor, and emotional trauma associated with wrongful conviction. In capital cases, courts must fulfill the uniquely juridical function of correcting harmful errors; the communities and families touched by the case as well as the larger

[83] In re Davis, 557 U.S. 952, 954 (2009)

public have a right to know whether the defendant was wrongfully convicted and executed.[84]

The infamy of those convicted of particularly atrocious murders, such as that in this case, lives on in history long after they die.[85] The end of their lives does not bring with it an end to their notoriety. One searching for this defendant's name on the internet will quickly learn that, to this day, he carries the moniker, one of the "ten most homicidal children" in American history[86] Stinney's family was banished from their town and never returned, so fearful were they for their safety. Their community and extended family shunned them. His sister and brother have spent their lives regretting that they could not do more for their brother. Although they believed he was innocent because they knew of his whereabouts and witnessed his behavior on the day of the murder, they have had to bear a tarnished name and reputation for seven decades. As the defendant's brother, Charles Stinney attested:

> I wish that I could have come forward much sooner; however, George's conviction and execution were something that my family believed could happen to any of us in the family. Therefore, we made a decision for the safety of the family to leave it be. I am now seventy-eight (78) years old and live in New York. I am asking that this matter be reopened and investigated and for the State of South Carolina to seek justice, give mercy and do what is right in God's eyes.[87]

Posthumous relief is designed to remedy the harms associated with the stigma of conviction, the horror of execution, and the "range of appropriate negative responses [of the public to a heinous

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[84] *See* Samuel Wiseman, *Innocence After Death*, 60 Case W. Res. L. Rev. 687, 687 (2010).
[85] *See* Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy,* 95 J. Crim. L. & Criminology 587, 588 (2005) ("those who are innocent and sentenced to death suffer the additional devastation of being blamed for a terrible crime; their names, families, and entire lives are forever tainted by such ignominy, quite apart from the death of their bodies").
[86] *Ten of the Most Homicidal Children in History* http://rawjustice.com/2010/09/04/10-of-the-most-homicidal-children-in-history/ (accessed February 3, 2013).
[87] SH Affidavit of Bishop Charles Stinney, para. 10.

crime] triggered by a wrongful action."[88]

B. RELIEF SHOULD BE PROVIDED BY THE COURT WHERE THE ERRORS OCCURRED.

The court that convicted the defendant is in the best position to grant posthumous relief. Indeed, "it is well established that the power is inherent in every court to correct its own records in order that they may truly show its past proceedings." *Moss v. United States*, 72 F.2d 30, 31 (4th Cir. 1934)[89]

It often takes decades for evidence of innocence to come to light, particularly in cases where, like this one, racial animus corrupted the judicial process. Many recent cases from sister jurisdictions underscore the propriety and obligation to review such proceedings and take corrective action. For example, in a Mississippi case a trial court ordered relief to redress a racially tainted conviction years after the defendant's death. In 1961, Clyde Kennard was twice falsely accused and convicted, once on traffic violations and a second time on a burglary charge, in order to sully his reputation, and to discourage him from seeking to gain admission to the segregated Mississippi Southern College. Kennard was imprisoned on the burglary charge and sentenced to seven years in prison. He was released before completing his sentence, and in 1963 he died. In 1991, a journalist at Jackson's *Clarion-Ledger* obtained evidence that Kennard had been framed.[90] In 2006, Kennard's family sought exoneration from the Forrest County, Mississippi circuit court; the petitioners asked the court to declare Kennard to be innocent and

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[88] Meir Dan-Cohen, "Revising the Past: On the Metaphysics of Repentance, Forgiveness, and Pardon," in *Forgiveness, Mercy, And Clemency* 117, 117 (Austin Sarat & Nasser Hussain eds., 2007).

[90] Pardon Docket No. 06-0005, Memorandum In Support Of Application For Clemency Of Clyde Kennard, 3, available at http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/documents/msKennardPetition.pdf; *see also* Mitchell, Jerry. "Witness: Man Innocent in '60 burglary" *Clarion Ledger* January 1, 2006.

his conviction null and void. "This Court is the Court in which Clyde Kennard was convicted. It is the appropriate forum to address this issue," asserted the Kennard petitioners.[91] The court granted the petition and exonerated Kennard "[i]n order to correct an injustice."[92]

Posthumous exonerations, particularly in homicides, inform the public and the family of the victim that the wrong person was convicted, alert them that the person who actually committed the crime must still be held accountable, and reassure them that justice was finally served.[93] Frank Lee Smith was posthumously exonerated by a Florida court in 2000 when DNA evidence cleared him of the murder of an eight-year-old girl. *Florida v. Smith*, No. 85-4654 CF10A (Fla. Cir. Ct. Dec. 22, 2000). The exoneration of Smith helped lead to the girl's true killer.[94] Timothy Cole, an African American, was in 1986 convicted by a Texas court of raping a white woman and sentenced to twenty-five years. Cole died in prison in 1999. Another man confessed to the rape and in 2009 DNA evidence established Cole's innocence. Cole's conviction was vacated in 2009, ten years after his death and he was exonerated.[95] The court gave a careful account of the procedural and investigative errors that resulted in the conviction of

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[91] Clyde Kennard Petition for Exoneration, Cause No. 5833 (Forest County Circuit, Mississippi),¶7, available at http://nuweb9.neu.edu/civilrights/wp-content/uploads/Kennard_Petition_for_Exoneration.pdf

[92] Judgment of Exoneration and Declaration of Innocence, State of MS v. Clyde Kennard http://nuweb9.neu.edu/civilrights/wp-content/uploads/Kennard_Exoneration_Opinion.pdf

[93] Posthumous pardons are another available remedy for wrongful conviction. Over eighty years after they were wrongfully convicted in 1931 of allegedly raping two white women in Alabama, the Scottsboro boys received posthumous pardons from the Alabama Board of Pardons and Paroles. "Alabama Pardons 3 'Scottsboro Boys' After 80 Years." NY Times November 21, 2013. However posthumous pardons are not a declaration of innocence and many therefore consider this remedy insufficient. See Samuel Wiseman, *Innocence After Death*, 60 Case W. Res. L. Rev. 687, 706 (2010); Ashley M. Steiner, Comment: Remission of Guilt or Removal of Punishment? The Effects of a Presidential Pardon, 46 Emory L.J. 959, 959 (1997), citing Burdick v. United States, 236 U.S. 79, 94 (1915).

[94] Samuel Wiseman, *Innocence After Death,* 60 Case W. Res. L. Rev. 687, 701 (2010).

[95] In re A Court of Inquiry, No. D1-DC 08-100-051 (299th Dist. Ct., Travis County, Tex. Apr. 7, 2009), available at http://ipoftexas.org/wordpress/wp-content/uploads/2009/05/cole-opinion-040720091.pdf.

the wrong man, and recommended legislative reforms to prevent wrongful convictions.[96]

As reflected in the Smith and Cole cases, the fact that decades may have passed between the wrongful conviction and request for exoneration is no bar to judicial action in a homicide case, nor is the death of the convicted individual. Bobby Ray Dixon and Phillip Bivens, two black men, were exonerated in 2010, thirty years after they were convicted and sentenced to life imprisonment for the rape and murder of a white woman in Mississippi in 1979. A third man convicted of the same crime, *Ruffin v. State*, 447 So. 2d 113 (Miss. 1984), Larry Ruffin, died in prison in 2002. DNA evidence cleared all three defendants of the crimes, and in 2010 a Forrest County circuit court judge vacated the convictions of Dixon and Bivens and convened a grand jury. The grand jury declined to indict Dixon and Ruffin, and in 2011, the circuit court judge ruled that Larry Ruffin, the defendant who had passed away in prison in 2002, "is officially exonerated and declared innocent of the crime of capital murder for which he was convicted in 1980 in Forrest County. . .[T]hat conviction is null and void."[97]

Curtis Moore, a black man, was exonerated 35 years he was convicted of raping and murdering a white woman in Virginia in 1975. Moore, who had a mental disability, had falsely confessed to the crime. After exhausting his state appeals the Fourth Circuit granted a writ of habeas corpus.[98] The state court granted a new trial and then, on the prosecutor's motion, dismissed the case. Moore was officially exonerated through DNA evidence after his death in 2008.[99] Two defendants convicted of murder in 1968 in Massachusetts, Henry Tameleo and Louis Greco, were posthumously exonerated after an investigation over thirty years later

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[97] *See* http://www.innocenceproject.org/Content/Bobby_Ray_Dixon.php; http://www.innocenceproject.org/Content/Larry_Ruffin.php

[99] http://www.innocenceproject.org/Content/Curtis_Jasper_Moore.php

revealed their innocence and widespread FBI corruption in the case. Tameleo died in prison in 1985 and Greco died in 1995. In 2004, the office of the district attorney that tried the cases dismissed the charges against Greco, and in 2007 it dismissed those against Tameleo.[100]

South Carolina courts have on at least two occasions granted post-conviction relief that has led to exoneration. Perry Mitchell, a black man, was accused of raping a white woman in 1984 in Lexington. Armed with exonerating DNA evidence, Mitchell filed an application for post-conviction relief in 1996. The trial court granted Mitchell a new trial, and in 1998 the state dismissed the case. Mitchell was thereby exonerated almost fourteen years after his conviction. *Moore v. Ballone*, 658 F.2d 218 (4th Cir. 1981). Daniel McNair was convicted in 1986 of murdering his wife in Lancaster. McNair filed a motion for a new trial based on newly discovered medical evidence that his wife did not actually die from a beating. In 2000, the court granted McNair's motion for a new trial. The prosecution immediately dismissed the charges and McNair was released from prison.[101]

In a third case, a federal judge directed a South Carolina court to grant a new trial and an exoneration followed. In 2001, Cory Credell was tried and convicted of an Orangeburg murder based on lineup identification testimony. His inexperienced defense attorney had never tried a criminal case, had failed to offer alibi testimony in the defendant's behalf, and was unfamiliar with key rules of criminal procedure. Credell's motion for a new trial was initially denied by the trial court, but after habeas review the state court granted the motion. *Credell v. Bodison*, 818 F. Supp. 2d 928 (D.S.C. 2011). The federal court noted that defense counsel's "striking ignorance of state evidence law profoundly affected the course of the trial" and that her failure to seek exclusion of her client's background information was "profoundly prejudicial" and "destroyed

[100] http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3435
[101] http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4211

any suggestion of a meaningful defense." *Id.* The prosecution dismissed the case in 2012. Credell had spent ten years in prison for the murder.[102]

These many examples make clear that where there has been a serious miscarriage of justice, a remedy should come from the court that tried the original case. Passage of time and even the death of the convicted individual are not a bar to relief.

III. POSTHUMOUS RELIEF IS PARTICULARLY WARRANTED IN AN EXTRAORDINARY CASE SUCH AS THIS ONE

A. THE PROCEEDINGS AGAINST STINNEY WERE PERMEATED WITH THE RACIAL BIAS THAT CHARACTERIZED SOUTH CAROLINA'S CRIMINAL JUSTICE SYSTEM AT THAT TIME, RENDERING HIS CONVICTION AND EXECUTION UNSOUND

It is common knowledge that, when George Stinney's trial took place, race, far above any other factor, determined outcomes in the criminal justice system of South Carolina. Although there was a decline in extra-judicial killings by the 1940s, the high incidence of racial lynching lay bare the state's violent subjugation of African-Americans from the end of Reconstruction until the 1940s. Sadly, lynching was, for decades prior to 1944, deemed to be the requisite response to breaches of the social order, particularly assaults on white females by black males. Between 1882 and 1947, about 159 persons, 155 of whom were black, were lynched in South Carolina.[103] In the Third Circuit, comprising Clarendon, Lee, Sumter and Williamsburg counties, ten men were lynched between 1883 and 1914. *All were black.*[104] Although in South Carolina as elsewhere, lynching was at some point replaced by courtroom proceedings, these trials, aimed at forestalling mob violence, were, like Stinney's, often hastily conducted, truncated and followed

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[102] http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3976

[103] Jessie P. Guzman & W. Hardin Hughes, *Lynching-Crime* in NEGRO YEAR BOOK: A REVIEW OF EVENTS AFFECTING NEGRO LIFE 1944-1946, 302-311 (National Humanities Center, 2007).

[104] Elizabeth Hines and Eliza Steelwater, *Download HAL Excel File*, PROJECT HAL; HISTORICAL AMERICAN LYNCHING DATA COLLECTING PROJECT, http://people.uncw.edu/hinese/HAL/HAL%20Web%20Page.htm.

by quick executions.[105] Courts "punished with a disregard for evidence and a ferocity only a step removed from the so-called justice imposed by mobs."[106]

Indeed, students of capital punishment have argued that "the death penalty is a direct descendant of lynching and other forms of racial violence and racial oppression in America."[107] Certainly the national demographics of legal executions resembled those of lynching. Between 1930 and 1967, 455 men were executed for rape, 405 (89%) of whom were black.[108] Of the 3,859 persons executed in the United States, between 1930 and 1967, 2,066 (53%) were black in the United States.[109] As late as 1965, a Florida commission considering the abolition of capital punishment concluded that the death penalty operated to "prevent outraged citizens from taking the law into their own hands."[110]

As with every other state in the Nation, at the time of Stinney's execution South Carolina's relationship with the death penalty was totally defined by race.[111] Between 1915 and 1927, fifty-three African-Americans were executed in South Carolina, constituting 88% percent

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[105] The Supreme Court considered the influence of mobs on judicial proceedings in *Frank v. Mangum*, 237 U.S. 309 (1915) and *Moore et al v. Dempsey,* 261 U.S. 86 (1923). See also Michael J. Klarman, "*Powell v. Alabama:* The Supreme Court Confronts 'Legal Lynchings,'" in Carol S. Steiker, ed., Criminal Procedure Stories (St. Paul, Minn.: Thompson/West, 2006).
[106] W. Fitzhugh Brundage, LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 180-1930, University of Illinois Press, 1993, p. 7.
[107] Stephen B. Bright, *Discrimination, Death, and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty,* 35 Santa Clara Law Review 433,439 (1995).
[108] Michael Meltsner, Cruel and Unusual: The Supreme Court and Capital Punishment (Random House 1973) p. 75.
[109]Margaret Vandiver, Lethal Punishment: Lynchings and Legal Executions in the South, Rutgers University Press, 2006, p. 10.
[110] Special Commission for the Study of Abolition of Death Penalty in Capital Cases, *Report of the Special Commission* (Tallahassee: State of Florida, 1963-65), 25. (cited in Vandiver, p. 13).
[111] *Executions in the U.S. 1608-2002: The ESPY File* (downloadable at http://www.deathpenaltyinfo.rg/executions-us-1608-2002-espy-file) (last visited January 26, 2014).

of the total executions in the state.[112] And between 1940 and 1950, South Carolina executed fifty-three black people, representing 85.5% of the total executions in the state.[113] Five of these of these cases were from this Circuit: two from Clarendon County (including Stinney), two from Sumter County, and one from Williamsburg County. These five defendants were black.[114]

In South Carolina death cases, this unyielding discrimination against black men was even more pronounced when the capital charge was rape or attempted rape.[115] "For nearly half a century, when rape and 'assault with intent to ravish' were punishable by death, the state avenged the sullied virtues of white women only. [South Carolina] never executed anyone for raping or assaulting a black woman."[116] One study on the administration of the death penalty in South Carolina examined cases where African American men were convicted of raping white women between 1930 and 1968.[117] From 1940 to 1950, the period closest to George Stinney's

[112] H.C. Brearley, The Negro and Homicide, 9 Soc. F. 247, 252 (1930-31).
[113] *Executions in the U.S. 1608-2002: The ESPY File* (downloadable at http://www.deathpenaltyinfo.rg/executions-us-1608-2002-espy-file) (last visited January 26, 2014).
[114] Juan Ignacio Blanco, *U.S.A Convictions 1607-1976*, accessible at http://deathpenaltyusa.org/usa1/state/south_carolina3.htm (last visited January 26, 2014).
[115] On the racial disparity in capital sentencing for rape of white victims by blacks see Furman v. Georgia, 408 U.S. 238 (1972)(Marshall, J., concurring); Maxwell v. Bishop, 398 F. 2d 138, 145 (8th Cir. 1968), vacated, 398 U.S. 262 (1970).
[116] Margaret N. O'Shea, "Race plays into death penalty use" Augusta Chronicle, Sunday, November 14, 1999 (accessible at http://old.chronicle.augusta.com/stories/1999/11/14/met_274268.shtml) (last visited January 28, 2014).
[117] John H. Blume et. al., When Lightning Strikes Back: South Carolina's Return to the Unconstitutional, Standardless Capital Sentencing Regime of the Pre-Furman Era, 4 Charleston L. Rev. 479, 504 (2010) (citing Bureau of Prisons, U.S. Dep't of Justice, Bulletin No. 45, National Prisoner Statistics: Capital Punishment 1930-1968, at 7 tbl.1 (1969)).

case, twenty men were executed for rape; fifteen of them were African American.[118] Moreover, *only* African American men were executed for attempted rape.[119]

Nor were South Carolina's youth facing death spared from the unrelenting impact of their race on the justice they received. Between 1865 and 1986, South Carolina executed eleven juveniles under the age of eighteen, ten of whom were black.[120] White juveniles convicted of murder received the benefits to which youth entitled them. For example, just prior to Stinney's execution, South Carolina sentenced a sixteen-year-old Parris Island boy convicted of rape and murder to life in prison.[121]

In 1930, one South Carolina-based social scientist reported that, "[i]n [South Carolina]…Negroes charged with murder or manslaughter in the circuit courts are twice as liable to conviction as are the whites so charged. This difference is due, doubtless, to such factors as race prejudice by white jurors and court officials and the Negro's low economic status, which prevents him from securing 'good' criminal lawyers for his defense."[122]

Three death cases in South Carolina trial courts from 1938 to 1946 reveal much about the capital punishment that blacks in the state faced.[123] All three men were threatened by lynch mobs after their arrest, faced all-white juries,[124] and were represented by inexperienced

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[118] Executions in the U.S. 1608-2002: The ESPY File(downloadable at http://www.deathpenaltyinfo.org/executions-us-1608-2002-espy-file) (last visited January 26, 2014).
[119] Id.
[120] Victor L. Streib, The Death Penalty for Juveniles, 204 (1987).
[121] David Bruck, Executing Teen Killers Again: The 14 Year-Old, Who in Many Ways Was too Small for the Chair, *Washington Post,* Sept. 15, 1985, DO1.
[122] H.C. Brearley, The Negro and Homicide, 9 Soc. F. 247, 252 (1930-31).
[123] David Bruck, The Four Men Strom Thurmond Sent to the Chair, The Washington Post, April 26, 1981, Sunday, Final Edition, ¶ 2
[124] Id.

lawyers.[125] In the first case, George Thomas was indicted for the rape of a white woman in 1940 in Georgetown.[126] Immediately after Thomas' arrest, three hundred angry white men armed with rifles and shotguns gathered at the jail.[127] The environment was so charged that the National Guard mounted a machine gun on a second-story balcony to maintain order.[128] Vigilantes roamed black neighborhoods, forcing residents to stay indoors.[129] For his own protection, the defendant was moved on back roads to the state penitentiary in Columbia.[130] Nevertheless, when Thomas' NAACP-retained attorney requested a change of venue, citing the mob violence and a threat to his own life, the trial court denied the motion.[131] Although Thomas' wife, son, and seven witnesses corroborated his alibi, the all-white jury deliberated for little more than an hour before finding him guilty of rape without recommendation of mercy.[132] Thomas' attorney appealed the conviction, asserting that denial of the change of venue violated the defendant's rights. Although Thomas' counsel's life had been threatened, and Thomas himself had nearly been lynched, faced a packed courtroom, and required a special detachment of thirty-five highway patrolmen for his protection, the conviction affirmed the conviction. *State v. Thomas,* 198 S.C. 519 (1942). Thomas was executed in February 1940.[133]

Sammie Osborne was sentenced to death in 1941 in Barnwell County, South Carolina.[134] Osborne had been indicted for the murder of the white farmer for whom he was employed as a

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[125] David Bruck, The Four Men Strom Thurmond Sent to the Chair, The Washington Post, April 26, 1981, Sunday, Final Edition, ¶ 2, ¶ 10, ¶ 30.
[126] Id. at ¶ 5.
[127] Id.
[128] Id. at ¶ 6.
[129] Id. at ¶ 7.
[130] Id.

[131] Id. at ¶ 10.
[132] Bruck, *supra* note 4, at ¶ 14.
[133] Bruck supra note 4, at ¶ 16.
[134] Id. at ¶ 18, 31.

sharecropper.[135] To avoid the mob gathering to punish Osborne, his father drove him fifty miles to the Columbia state penitentiary and turned him in.[136] Again, despite an overflowing crowd at the courthouse, the trial court denied Osborne's counsel's request for change of venue.[137] Osborne claimed he had acted in self-defense, shooting the farmer after being attacked while sleeping by the armed man, but the jury found him guilty with no recommendation of mercy.[138] Osborne's attorney sought to change the venue because, he claimed, Osborne could not receive a fair trial in Barnwell County, but the judge denied it.[139] *State v. Osborne*, 200 S.C. 504, 21 S.E.2d 178, 179 (1942) (overruled by *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). On appeal, the South Carolina Supreme Court found no error in the refusal to change the venue, but the court reversed because the jury instructions were flawed. *Osborne,* 200 S.C. at 181.[140] On retrial, after deliberating fifteen minutes, another all-white jury found Osborne guilty. The defendant was executed in November 1943.[141] Nearly forty years later, the prosecutor in the Osborne case, Solomon Blatt, mused to a researcher that he sometimes wondered whether Osborne had in fact been innocent.[142]

In 1940, George Abney was indicted for the murder of his employer's wife, a white woman. Abney was tried two days later, sentenced to death the following day, and executed forty-three days later.[143] Casting a dark shadow over his case was the prospect of a lynching. Billy Coleman, the inexperienced lawyer who represented Abney, later recalled to a reporter that

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[135] Id. at ¶ 18.
[136] Id. at ¶ 26.
[137] Id. at ¶ 28.
[138] Id. at ¶ 31.

[141] Id. at ¶ 35.
[142] Id. at ¶ 39.
[143] Id. at ¶ 40.

although he wanted to tell the all-white jury that the employer's wife had provoked Abney, he could not make this defense because "back in 1940, you couldn't say that. It would have been dangerous to say anything like that…It was just lynching time. That's the way the public felt."[144] Coleman further remarked, "[a]bout the only way I could make myself feel good about it, is that if he hadn't gotten the chair he'd have gotten lynched. My neighbors were coming to me and saying, 'You going to defend that n. . .r?' That crowd was about ready to do some lynching."[145] Coleman failed to notice an appeal in the case.[146]

Even decades after Stinney's trial, research showed that white jurors in South Carolina were significantly more likely to distort evidence to find a black defendant guilty, and to punish him more harshly where the victim was white.[147] In a 1983 study, one researcher found that South Carolina prosecutors operating under a post-*Furman* capital punishment statute were more likely to seek the death penalty when the victim was white. "This differential treatment by race cannot be accounted for by the type of homicide committed or other possible aggravating factors," the researcher concluded. "[O]f several explanatory variables, the victim's race is the most important predictor of the prosecutor's decision."[148]

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[144] Id. at ¶ 44.
[145] Id. at ¶ 46
[146] Id.
[147] *See, e.g.,* Mariana Miller & Jay Hewitt, *Conviction of a Defendant as a Function of Juror-Victim Racial Similarity,* 105 J.Soc.Psych. 159, 160 (1978)(65% of white mock jurors voted to convict when the victim was white, compared to 32% when victim was black); Kitty Klein & Blanche Chrech, *Rape, Rape, and Bias: Distortion of Prior Odds and Meaning Changes,* 3 Basic & Applied Soc. Psych. 21, 28 (1982) (defendants convicted of raping white victims sentenced more harshly than defendants convicted of raping black victims.)
[148] Raymond Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina,* 74 Journal of Criminal Law and Criminology 784 (1983).

The foregoing statistics and studies make clear that the nature of the crime and his race virtually ensured that young Stinney would be convicted and sentenced to death, no matter what the evidence proved.

Clarendon County, where this crime occurred, was no different from the rest of the state in its harsh enforcement of racial supremacy in the 1940s. In 1940, the county was 72% black and 90% rural.[149] Poverty defined the lives of most blacks in the county. In the early 1940s, blacks associated with the NAACP sought to improve their position. The first order of business for the chapter, which was formally chartered in 1943, was to bring an end to the all-white South Carolina democratic primary.[150] Blacks had no political voice in Clarendon or elsewhere in the state; in 1940, less than 1% of voting age blacks were registered to vote in the state. In the late 1940s, Clarendon activists famously took on the county establishment by demanding adequate transportation to the all-black schools. This activity led to the path-breaking case of *Briggs v. Elliot,* 342 U.S. 350 (1952), which was the first of five cases that would become *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.* 347 U.S. 483 (1954). Challenging segregation in the Summerton schools, the plaintiffs in *Briggs* were not able to persuade the district court panel of three judges to require school desegregation, but the court did order elimination of inequities in the racially segregated system. Notwithstanding the Supreme Court's decision in *Brown,* schools in Clarendon County remained effectively segregated until 1965, when Harvey Gantt

[149] "Historical, Demographic, Economic, and Social Data: The United States, 1790-1970," prepared by the Inter-University Consortium for Political and Social Research (ICPSR), August 2001.

[150] *See* Orville Vernon Burton, Beatrice Burton, and Simon Appleford, *Seeds in Unlikely Soil: The Briggs v. Elliott School Segregation Case*, in Winfred B. Moore, Jr. and Orville Vernon Burton, eds, Toward the Meeting of the Waters: Currents in the Civil Rights Movement of South Carolina during the Twentieth Century, University of South Carolina Press, 2008.

successfully sued Clemson College for refusing him admission. *Gantt v. Clemson Agricultural College*, 320 F.2d. 611 (4th Cir. 1963), *cert. denied*, 375 U.S. 814 (1963).

Courts bear a particular responsibility to effectuate remedies when, as in the case at bar, racism improperly affects the operation of the criminal justice system, because "[c]ourts that have historically allowed racial, economic, political and other improper considerations to influence their decisions cannot easily shed a legal culture developed over decades."[151] The Supreme Court has repeatedly emphasized that, where a remedy exists, courts can ill-afford to ignore equal protection violations in the criminal justice system. "[B]ecause of the risk that the factor of race may enter the criminal justice process, we have engaged in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system." *McKleskey v. Kemp,* 481 U.S. 279, 309 (1987), citing *Batson v. Kentucky,* 476 U.S. 79, 85 (1986); *see also, Holland v. Illinois,* 493 U.S. 474, 504 n. 2 (1990)(describing as "earnest" the Court's commitment to eliminating racial bias in the criminal system.)

Efforts to insulate trial verdicts from such biases date back to the early years of the twentieth century and have persisted in southern courts - and prominently those of this state - for over a hundred years. *See, e.g.*, *Moulton v. State,* 199 Ala. 411, 454 (1917) (reversing murder conviction on grounds that trial court erred when it permitted prosecutor to appeal to race, including that he hoped "the day will never come in this country when the heel of the Ethiopian will be on the neck of the Caucasian"); *Harris v. State,* 209 Miss. 141, 149 (1950) (reversing denial of new trial by trial court where, among other issues, the prosecutor "went too far" by calling the defendant a "black gorilla"); *State v. Waitus*, 224 S.C. 12, 21 (1953) (reversing

[151] Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions About the role of the Judiciary,* 14 Ga.St.U.L.Rev. 817, 817 (1998).

murder conviction based on *prima facie* case of racial discrimination in the selection of grand and petit jury established by the fact that no African American had been called to serve on petit jury in the county for at least twelve years); *State v. Davis*, 138 S.C. 532 (1927) (reversal and remand for change of venue and new trial where it was found that "in the interest of justice, and in order that the defendant might be tried in an atmosphere free from prejudice" the defendant should have been granted a change of venue).

In sum, although race once deeply compromised the central mission of this state's criminal justice system, its courts responded, albeit not with the regularity or alacrity that one assessing their decisions today might have wished for. In any event, as the exoneration cases described herein make plain, it is today widely acknowledged that now is the time for our country's public institutions – especially its courts - to redress these horrific harms of the Jim Crow era, while the affected family members can benefit from public recognition of the truth in these cases that have caused them so much pain over so many years.

B. STINNEY'S YOUTH AT THE TIME OF HIS EXECUTION IS GROUNDS FOR EXTRAORDINARY RELIEF, EVEN SEVENTY YEARS LATER.

Developments in the law of capital punishment since Stinney's execution highlight the unique injustice of this case and the importance of taking corrective action years later. The United States Supreme Court has banned the death penalty and severely restricted sentences of life without parole for juveniles who committed the underlying crime when they were under the age of eighteen. *Thompson v. Oklahoma*_, 487 U.S. 815 (1988) (setting 16 as the minimum age in capital case); *Roper v. Simmons*, 543 U.S. 551, 572-73 (2005) (death penalty for juveniles violates eighth amendment under an "evolving standards of decency" analysis); *Graham v. Florida*, 560 U.S. 48 (2010)(barring on eighth amendment grounds life without parole juvenile sentences for non-homicidal crimes); *Miller v. Alabama*, 132 S.Ct. 2455 (2012)(barring life

without parole sentences for juveniles convicted of murder). While the Supreme Court has not yet ruled on the matter, the holding in *Roper* has been given retroactive effect. *See Little v. Dretke*, 407 F.Supp.2d 819, 824 (W. D. Tex. 2005); *Baez Arroyo v. Dretke*, 362 F.Supp.2d 859, 883 (W.D. Tex. 2005); *Schafer v. Clark*, 2009 WL 3157453 (2009); *In re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011). Certainly no juvenile who fell within the scope of Roper was executed after the decision came down. *Roper*, *Graham*, and *Miller* illustrate the emergence of a "kids are different jurisprudence."[152]

C. POSTHUMOUS RELIEF IS ESPECIALLY APPROPRIATE WHERE THERE WAS NO APPEAL OF THE CONVICTION, AND WHERE THIS IS THE ONLY REVIEW AVAILABLE IN THIS CAPITAL CASE.

When it reinstated the death penalty in 1972, the Supreme Court stressed the importance of appellate review, noting that one of the primary reasons Georgia's post-*Furman* statutory scheme was adequate was because it provided for the automatic appeal of all death sentences to the state supreme court. *Gregg v. Georgia*, 428 U.S. 153, 198, 96 S. Ct. 2909, 2937, 49 L. Ed. 2d 859 (1976). Today, appeals are automatic upon imposition of a death sentence.[153] Because Stinney's counsel to file an appeal, in violation of Stinney's due process right, the only remaining path to review the conviction of this fourteen-year-old child lies with this Court.

CONCLUSION

For the reasons set forth herein, *amicus* urge this Court to grant the relief sought by this defendant/petitioner.

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[152] *See generally* Mary Berkheiser (FNd1), Death Is Not So Different After All: Graham v. Florida and the Court's "Kids Are Different" Eighth Amendment Jurisprudence, 36 Vt. L. Rev. 1 (2011); *Miller*, 132 S. Ct. at 2464 ("*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing").

[153] Charles S. Lanier, James R. Acker, Capital Punishment, the Moratorium Movement, and Empirical Questions Looking Beyond Innocence, Race, and Bad Lawyering in Death Penalty Cases, 10 Psychol. Pub. Pol'y & L. 577, 585 (2004)

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Date: February 21, 2014