No. 17-1343

IN THE
Supreme Court of the United States

SHAWN LABARRON DAVIS,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent does not dispute that the first question presented—whether the Eighth Amendment requires a finding of permanent incorrigibility—is an issue of pressing national importance. Pet. 8–21, 23–24. Respondent instead asserts a series of procedural and vehicle arguments, none of which have merit.

The trial court failed to make a finding of permanent incorrigibility. At every possible juncture, Davis preserved the argument that the absence of such a finding rendered his sentence invalid. State courts of last resort are intractably divided on this issue—and a federal circuit split has emerged since the petition was filed. The disagreement is not a creature of state law, as Respondent would have it, but the product of irreconcilable interpretations of this Court's Eighth Amendment jurisprudence.

As for the second question presented—whether the Eighth Amendment categorically bars juvenile life without parole sentences—Respondent does not dispute that there is a clear trend across the country to prohibit such sentences and that the punishment has been nearly or completely eliminated in 34 jurisdictions. Pet. 25–27; Am. Br. of Fair Punishment Project at 3–16. In light of that objective evidence, the Court should grant review to determine whether our society's standards of decency have evolved to prohibit the sentence.

I. The Court should grant review on the first question presented.

A. Davis preserved the argument that the Eighth Amendment requires a finding of permanent incorrigibility.

Davis properly advanced the argument that a finding of permanent incorrigibility is required by the Eighth Amendment. He did so explicitly and at every possible juncture.

1. After the trial court failed to make a finding of permanent incorrigibility, Pet. App. 11a–16a, Davis asserted in his brief to the Mississippi Court of Appeals that the lack of such a finding rendered the life without parole sentence invalid. First, Davis noted that "[t]he [trial] court's analysis does not include any finding [that] with Davis, rehabilitation was impossible." Pet. Miss. Ct. App. Br. 19–20. Davis then argued:

> The trial court failed to make a finding that Davis was "irreparably corrupt" or "permanently incorrigible," a necessary requirement for him to be placed in the narrow class of juvenile [murderers] from whom a life without parole sentence would be proportional under the Eighth Amendment. For this reason, the Court should remand this case to the trial court for re-sentencing under the proper considerations of the *Miller* factors.

Id. Petitioner supported this argument by citing *Veal v. State*, where the Supreme Court of Georgia reversed a life-without-parole sentence because "[t]he trial court did not … make any sort of distinct determination on the record that [the juvenile

defendant] is irreparably corrupt or permanently incorrigible." 784 S.E.2d 403, 412 (Ga. 2016). In his appellate brief, Davis clearly urged the Court of Appeals of Mississippi to adopt the rule of *Veal* and impose a finding requirement as a prerequisite to sentencing a juvenile to life without parole. Pet. Miss. Ct. App. Br. 19–20.

2. Davis asserted the argument again in his reply brief in the Mississippi Court of Appeals: "In this case, the trial court made no finding that Davis was among the rare class of juveniles 'whose crime reflect irreparable corruption.' The failure to answer this question is reversible." Pet. Miss Ct. App. Reply Br. 2 (quoting *Miller v. Alabama*, 567 U.S. 460, 476–480 (2012)).

3. Davis made the argument again in his rehearing petition:

> Rehearing is required because the Court affirmed the trial court's failure to make an on-the-record finding that Davis was one of the rare juvenile offenders whose crimes reflect irreparable corruption. A distinct determination on the record that Davis was irreparably corrupt or permanently incorrigible was necessary in order to place him in the narrow class of juvenile murderers for whom a life-without-parole ("LWOP") sentence is proportional under the Eighth Amendment. Because the trial court did not (and could not) make such a determination on the record, Davis's life-without-parole sentence should have been vacated.

Pet. Miss. Ct. App. Reh'g Pet. 2 (citing *Veal*, 784 S.E.2d at 412).

4. Davis made the argument yet a fourth time when he petitioned for certiorari in the Supreme Court of Mississippi. Pet. Miss. Sup. Ct. Pet. 5–7.

B. This case is a strong vehicle to consider whether a finding of permanent incorrigibility is required.

Respondent's primary vehicle argument is that the trial court did in fact make a finding of permanent incorrigibility. That argument is wrong. The trial judge's statement that Davis's release "would constitute a danger to the public in general and especially to vulnerable citizens in particular," Pet. App. 15a–16a, is hardly equivalent to finding that Davis was among "the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016).[1]

The Fourth Circuit's recent decision in *Malvo v. Mathena* is instructive on this point. The jury found "'unanimously and beyond a reasonable doubt after consideration of [the juvenile defendant's] history and background that there [was] a probability that he would commit criminal acts of violence that constitute a continuing serious threat to society.'" No. 17-6746, 2018 WL 3058931, at *3 (4th Cir. June 21, 2018). The court rejected the State's argument that this finding

[1] Respondent also states that the trial court considered the fact that Davis had just turned sixteen at the time of the offense. Br. in Opp. 4. In fact, the trial court mentioned Davis's age only in reciting the procedural history of the case. Tr. 122. After completing the procedural history, the trial court then asked both sides whether they wished to offer anything further for the court to consider in sentencing. *Id.* at 123. Only then did the trial court state its rationale for the sentence—with no mention of Davis's age. Pet. App. 11a–16a.

was equivalent to a finding of permanent incorrigibility. *Id.* at *7–8.

C. Federal circuits and state courts of last resort are divided on whether a finding of permanent incorrigibility is required.

Respondent's attempt to make the split of authority disappear is founded on the assumption that the trial court made a finding that Davis was among the rare group of juvenile homicide offenders whose crimes reflect permanent incorrigibility. Br. in Opp. 10–14. That view is incorrect—the trial court made no such finding, as stated above. *See supra* § I.B. The lack of such a finding would constitute reversible error in the Fourth Circuit and the highest courts of seven states.

1. Since the petition was filed, a circuit split has emerged between the Ninth and Fourth Circuits on whether a finding of permanent incorrigibility is required to sentence a juvenile to life without parole.

a. The Fourth Circuit recently imposed a finding requirement, holding that "a sentencing judge … violates *Miller*'s rule any time it imposes a discretionary life-without-parole sentence on a juvenile homicide offender without first concluding that the offender's 'crimes reflect permanent incorrigibility,' as distinct from 'the transient immaturity of youth.'" *Malvo*, 2018 WL 3058931, at *7. "[I]rreparable corruption or permanent incorrigibility," the court stated, is "a determination that is now a prerequisite to imposing a life-without-parole sentence on a juvenile homicide offender." *Id.* at *8. As a result, the court affirmed the district court's ruling granting a writ of habeas corpus, vacating a juvenile life sentence without the

possibility of parole, and ordering the state trial court to hold a resentencing "to determine … whether [the defendant] qualifies as one of the rare juvenile offenders who may, consistent with the Eighth Amendment, be sentenced to life without the possibility of parole because his 'crimes reflect permanent incorrigibility.'" *Id*. at *1 (quoting *Montgomery*, 136 S. Ct. at 734).

b. The Ninth Circuit, however, rejected a finding requirement in *United States v. Briones*, where "[t]he gist of [the defendant's] appeal" included the argument that "the district court failed to make an explicit finding that Briones was 'incorrigible.'" 890 F.3d 811, 818 (9th Cir. 2018). Relying on *Montgomery*'s factfinding dictum, the Ninth Circuit stated that "[n]othing in the *Miller* case suggests that the sentencing judge use any particular verbiage or recite any magic phrase." *Id*. at 819 (citing *Montgomery*, 136 S. Ct. at 735).

Judge O'Scannlain concurred in part and dissented in part, faulting the district court for imposing a life sentence "[w]ithout any evident ruling on th[e] question" of permanent incorrigibility. *Id*. at 822–23 (O'Scannlain, J., concurring in part and dissenting in part). Judge O'Scannlain opined that "[p]erhaps … the district court *could have* determined that … Briones is permanently incorrigible … [,] [b]ut the transcript does not indicate that the district court made such determination." *Id*. at 824 (emphasis added). Thus, he would have "remand[ed] for the limited purpose of permitting the district court properly to perform the analysis required by *Miller* and *Montgomery*." *Id.* at 822.

2. In addition to the split in federal authority, state courts of last resort remain divided. Respondent does not dispute that four state supreme courts reject a finding requirement. *See* Pet. 16–18. Seven state courts of last resort require such a finding.

a. *Veal v. State* requires "a distinct determination on the record that [a juvenile defendant] is irreparably corrupt or permanently incorrigible" before a life without parole sentence may be imposed. 784 S.E.2d 403, 412 (Ga. 2016).

b. *Luna v. State* ordered the sentencing court "to determine whether the crime reflects [the defendant's] transient immaturity, or an irreparable corruption and permanent incorrigibility warranting the extreme sanction of life imprisonment without parole." 387 P.3d 956, 963 (Okla. Ct. Crim. App. 2016).[2]

c. *People v. Holman* holds that "[u]nder *Miller* and *Montgomery*, a juvenile defendant may be sentenced to life imprisonment without parole, but only if the trial court determines that the defendant's conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation." 91 N.E. 3d 849, 863 (Ill. 2017).

d. *State v. Seats* holds that a trial court can impose a sentence of life without parole only if it finds "the juvenile is irreparably corrupt, beyond

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[2] *See also Stevens v. State*, No. PC-2017-219, __ P.3d.__, 2018 WL 2171002, at *8 (Okla. Ct. Crim. App. May 10, 2018) (stating that the sentencer must "find[] that the defendant is irreparably corrupt and permanently incorrigible").

rehabilitation, and thus unfit ever to reenter society[.]" 865 N.W.2d 545, 558 (Iowa 2015).

e. *Commonwealth v. Batts* holds that for a sentence of life without parole to be proportional as applied to a juvenile murderer, the sentencing court must first find, based on competent evidence, that the offender is entirely unable to change[,] … that there is no possibility that the offender could be rehabilitated at any point later in his life, … and that the crime committed reflects the juvenile's true and unchangeable personality and character. 163 A.3d 410, 433, 435 (Pa. 2017).

f. In *Landrum v. State*, the trial court "did not consider whether the crime itself reflected 'transient immaturity' rather than 'irreparable corruption.'" 192 So. 3d 459, 468 (Fla. 2016). The state supreme court remanded the case for a new sentencing because "the Eighth Amendment requires that sentencing of juvenile offenders be individualized in order to separate the 'rare' juvenile offender whose crime reflects 'irreparable corruption,' from the juvenile offender whose crime reflects 'transient immaturity.'" *Id.* at 466 (citing *Montgomery*, 136 S. Ct. at 734).

g. *Sen v. State* requires the trial court to "set forth specific findings supporting a distinction between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" 301 P.3d 106, 127 (Wyo. 2013); *see also Davis v. State*, 415 P.3d 666, 684 (Wyo. 2018) ("[I]f the sentencing court sentences a juvenile offender to life …, it must make a finding that in light of all the *Miller* factors, the juvenile offender's crime reflects irreparable

corruption resulting in permanent incorrigibility, rather than transient immaturity.").

D. The permanent incorrigibility question is an issue of federal law.

Because the Fourth and Ninth Circuits now disagree as to whether federal law requires a finding of permanent incorrigibility, *see supra* § II.C., little remains of Respondent's argument that the division of authority does not involve a federal question.

1. The seven state court decisions described above, *see supra* § I.C., also impose a finding requirement as a matter of federal law, not state law. Pet. 21.[3] These state courts hold that the finding requirement is mandated by this Court's Eighth Amendment jurisprudence on juvenile life without parole sentences. *Veal* holds that under *Montgomery*'s "explication of *Miller*," the sentencer must "determine whether a particular defendant falls into this almost-all juvenile murderer category for which [life without parole] sentences are banned." 784 S.E. 2d at 411 (emphasis omitted). *Luna* derives the finding requirement from *Miller* and *Montgomery* as well. 387 P.3d at 961–64. In fact, Judge Hudson accused the majority of "wrongly expand[ing] the requirements of *Miller* and *Montgomery*" by insisting on a finding of permanent incorrigibility. 387 P.3d at 965 (Hudson, J., concurring in part and dissenting in part). In *Holman* the court stated, "[u]nder *Miller* and *Montgomery*, a juvenile defendant may be sentenced to life imprisonment without parole, but only if the

[3] The one possible exception, as the petition noted, is Pennsylvania, where the decision is ambiguous as to the source of the finding requirement. Pet. 15–16; *Batts*, 163 A.3d at 433.

trial court determines that the defendant's conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation." 91 N.E. 3d at 863. In *Seats*, the court stated—in a section captioned "Application of Supreme Court Jurisprudence to Seats"—that on remand, the defendant could not be sentenced to life without parole unless the trial court "finds this is the rare and uncommon case requiring it to sentence [the defendant] to life in prison without the possibility of parole[.]" 865 N.W.2d at 557, 558. The analysis of the defendant's sentence in *Landrum* relied almost entirely on *Miller* and *Montgomery*, 192 So. 3d at 467–469, and *Sen* quoted directly from *Miller* in ordering the trial court to make findings to determine permanent incorrigibility, 301 P.3d at 127.[4]

2. Respondent's view that the permanent incorrigibility argument is not a question of federal law, Br. in Op. 9–10, boils down to a merits argument that the state supreme courts that impose a finding requirement under federal law have interpreted this Court's jurisprudence incorrectly. But Respondent cannot make this division over federal law disappear simply by asserting that the courts on one side of the split have misinterpreted this Court's precedent. After all, "when … a state court decision fairly appears to rest primarily on federal law, … [this Court] will accept as the most reasonable explanation that the state court decided the case the way it did

[4] *See also Davis*, 415 P.3d at 683 (concluding that the federal "constitutional standard cannot be satisfied unless the sentencing court determines that, in light of all the *Miller* factors, the juvenile offender's crime reflects irreparable corruption resulting in permanent incorrigibility, rather than transient immaturity").

because it believed that federal law required it to do so." *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983). The disagreement among state courts of last resort as to what federal law requires is a reason to grant review, not a reason to deny it.

II. The Court should grant review on the second question presented.

1. Respondent does not dispute that this case presents a clean vehicle to consider whether the Eighth Amendment categorically forbids life without parole sentences for juvenile offenders. Respondent also does not dispute petitioner's showing that juvenile life without parole has become more and more unusual in the past six years and that the practice has been nearly or completely eliminated in 34 jurisdictions. Pet. 25–27; Am. Br. of Fair Punishment Project at 3–16. Nor does Respondent dispute that a categorical prohibition is necessary to prevent an "unacceptable likelihood" that redeemable juveniles will be sentenced to life without parole, a risk that supported a categorical bar on life without parole sentences for juveniles convicted of non-homicide offenses in *Graham v. Florida*, 560 U.S. 48, 78 (2010). *See* Pet. 27–28.

2. Respondent's arguments against granting review are unpersuasive.

a. Respondent incorrectly asserts that this Court's jurisprudence permits juvenile life without parole sentences. *See* Br. in Opp. 15. In fact, *Miller* explicitly did "not consider" whether the Eighth Amendment categorically bars such sentences, 567 U.S. at 479, nor did the Court have occasion to revisit that question in *Montgomery*, 136 S. Ct. at 735.

b. In any case, the very idea of evolving standards of decency assumes that cases that reflect the standard of decency at one time will be overruled when the standard evolves. *Roper v. Simmons*, 543 U.S. 551, 567, 578 (2005) (prohibiting death penalty for juveniles and overruling *Stanford v. Kentucky*, 492 U.S. 361 (1989), in light of evolving standards of decency); *Atkins v. Virginia*, 536 U.S. 304, 314–17 (2002) (prohibiting death penalty for individuals with mental retardation and overruling *Penry v. Lynaugh*, 492 U.S. 302 (1989), in light of evolving standards of decency).

c. Respondent hypothesizes that the decline in life without parole sentences for juveniles "is likely a Court-imposed trend." Br. in Opp. 17. Respondent neither supports that assertion nor explains how a trend that consists largely of state legislative changes, Pet App. 25–27, can be "Court-imposed," Br. in Opp. 17. Because respondents appear to concede the trend and offer nothing more than speculation as to its source, now is an appropriate time for the Court to determine whether the Eighth Amendment, interpreted in light of evolving standards of decency, prohibits life without parole sentences for juveniles.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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