No. _____

In the Supreme Court of the United States

ROBERT VEAL,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Applying *Miller* and *Montgomery* in his first appeal, the Georgia Supreme Court vacated Petitioner's life without parole sentence and remanded for findings of "irreparable corruption" or "permanent incorrigibility" —even noting that Petitioner was convicted only as an aider-and-abetter. Circumventing the mandate, the trial court imposed eight consecutive life sentences plus sixty years, placing Petitioner's first opportunity for release beyond his natural life expectancy. Petitioner again appealed. The Georgia Supreme Court affirmed looking for guidance from this Court.

Does the Eighth Amendment require trial courts to consider a juvenile's youth and attendant circumstances before imposing a de facto life without parole sentence?

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The February 5, 2018 opinion in the Georgia Supreme Court is reported at 810 S.E.2d 127 (Ga. 2018) (App. 1). The February 20, 2018 order in the Georgia Supreme Court is unreported. (App. 7).

JURISDICTION

The Georgia Supreme Court issued its decision on February 5, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Eighth Amendment to the Constitution provides:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

This case illustrates an important, well-known circuit conflict concerning the Eighth Amendment's limitation on life-without-parole sentences for juvenile homicide offenders. Together, *Miller v. Alabama*, 567 U.S. 460 (2012) *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), established a substantive constitutional principle that bars life without parole for all but the rarest of juvenile homicide offenders, reserving it only for those whose crimes reflect "permanent incorrigibility" or "irreparable corruption." *Montgomery*, 136 S. Ct. at 726, 734; *see also Miller*, 576 U.S. at 473. This requires sentencing courts to consider a juvenile's age and attendant circumstances before

sentencing them to die in prison. *See Montgomery*, 136 S. Ct. at 734.

But the rule formulated by *Miller* and *Montgomery* left questions regarding long, aggregate sentences ("de facto life-without-parole sentences") unanswered. That is the core of the question presented in this case: Does the Eighth Amendment require trial courts to consider a juvenile's youth and attendant circumstances before imposing a de facto life without parole sentence on juvenile homicide offenders? Federal and state courts have already considered the issue, and no consensus has been reached.

Petitioner is a juvenile who was sentenced to a de facto life without parole sentence for malice murder. On direct review, the Georgia Supreme Court concluded that neither *Miller* nor *Montgomery* applied to de facto life without parole sentences. *See Veal v. State*, 810 S.E.2d 127 (Ga. 2018) ("*Veal II*"). This upheld Petitioner's sentence of eight consecutive life sentences, plus an additional 60 years. *See id.* Because that ruling conflicts with decisions from federal and state courts, and because this case provides an optimal vehicle to address the lingering issues concerning the extent of the Eighth Amendment's limitation on life without parole sentences for juvenile offenders, this petition for certiorari should be granted.

A. Background

For sentencing purposes, this court has determined juvenile offenders rest on a different constitutional footing than adults. *See Roper v. Simmons*, 543 U.S. 569 (2004); *Graham v. Florida,* 560 U.S. 68 (2010); *Miller,* 567 U.S. at 471; *Montgomery*, 136 S. Ct. at 733. Specifically, under the Eighth Amendment, this Court has fashioned constitutional limitations on a state's ability to impose certain criminal sentences on juvenile offenders.

In *Roper*, this Court concluded that the Eighth Amendment categorically bars courts from imposing the death penalty on juvenile offenders. *See Roper*, 543 U.S. at 570. From the majority's view, the "character of a juvenile is not as well formed as that of an adult." *See id.* at 570. And since juveniles have this "diminished culpability," *id.* 571, the penological justifications "for the death penalty apply with lesser force than to adults," *id.*, making it a disproportionate punishment that violates the Eighth Amendment. *See id.*

Then in *Graham*, this Court established another categorical bar on juvenile punishments, as it determined that the Eight Amendment prohibits life without parole sentences for non-homicide offenses. *See Graham*, 560 U.S. at 68. Relying on *Roper,* the Court noted that "life without parole sentences share some characteristics with death sentences," *id*. at 69, and are "an especially harsh punishment for a juvenile." *Id*. Once again, because of a child's diminished culpability, the penological justifications—*i.e.* retribution, deterrence, incapacitation, and rehabilitation—for

imposing life without parole were not served. *See id.* at 71.

Two years later, this Court addressed life without parole sentences for homicide offenses, *see Miller*, 576 U.S. at 460, and held that the Eighth Amendment forbids "*mandatory* life without parole [sentences] for those under the age of 18 at the time of their crimes." *Id.* at 465 (emphasis added). The Court further clarified *Miller*'s holding in *Montgomery*. In *Montgomery*, the Court acknowledged that "*Miller* announced a substantive rule of constitutional law," *id.* at 734, rendering life without parole sentences unconstitutional for "children whose crimes reflect transient immaturity." *Id.* at 735. Such a heavy-handed sentence is reserved only for that narrow class of juveniles whose crimes reflect "permanent incorrigibility," *id.*, or "irreparable corruption." *Id.* at 726. So to implement *Miller*'s substantive end, sentencing courts must determine whether a juvenile offender is irreparably corrupt or permanently incorrigible before imposing a life without parole sentence. *See id.* at 735 – 736.

In sum, sentencing courts may impose life-without-parole on a juvenile homicide offender when the child's crimes reflect permanent incorrigibility or irreparable corruption. But Petitioner's case arises from a question left open by *Miller* and *Montgomery*: namely, whether the Eighth Amendment requires sentencing courts to find a juvenile to be irreparably corrupt or permanently incorrigible before imposing a de facto life without parole sentence.

B. Facts and Procedural History

On January 11, 2011, Petitioner, a 17-year-old, was indicted for multiple offenses, including one count of malice murder. *See Veal v. State*, 784 S.E.2d 403, n.1 (Ga. 2016) ("*Veal I*"). Just over a year later, a jury found both Petitioner and his co-defendant guilty on the murder charge. *See id.* The trial judge then sentenced him to life without parole for malice murder. *See id.* (Petitioner was also sentenced to six consecutive life-with-parole sentences, plus 60 years for additional offenses.) *See id.*

On direct review, relying on *Miller* and *Montgomery*, the Georgia Supreme Court vacated Petitioner's life without parole sentence and remanded the case for resentencing. *See id.* at 405. Specifically, the Georgia Supreme Court concluded that *"Miller* announced a substantive rule of constitutional law," *see id*. at 411 (citing *Montgomery*, 136 S. Ct. at 736), that bars life without parole sentences for the "*vast majority* of juvenile offenders." *See id.* (citing *Montgomery*, 136 S. Ct. at 736) (emphasis added). Before imposing such a heavy-handed sanction, the Court concluded, courts must determine whether the individual is either "irreparably corrupt," *see id.* at 412, or "permanently incorrigible." *See id.* In Petitioner's case, the sentencing court failed to do so and hence violated the Eighth Amendment. *See id.*

On remand, rather than determine whether Petitioner was irreparably corrupt or permanently incorrigible, the sentencing court instead imposed two consecutive life-*with*-parole sentences (a total sentence of eight consecutive life sentences plus 60 years). *See Veal II*, 810 S.E.2d 127, 128; *See also* Sent'g. Tr. 4. But

under O.C.G.A. § 42-9-39(c), prisoners serving multiple life *with* parole sentences must serve 60 years before becoming parole eligible. *See* O.C.G.A. § 42-9-39(c); *see also* Appellants Br. 7. As a result, Petitioner must serve 60 years in prison before receiving his first parole opportunity, *see* Appellants Br. 7, 11, which places his parole eligibility outside of his life-expectancy window. Petitioner then appealed once more.

On his second appeal, Petitioner again challenged his sentence on Eighth Amendment grounds. *See Veal II*, 810 S.E.2d 127, 128. Specifically, because O.C.G.A. § 42-9-39(c)'s mandate requires prisoners to serve 60 years in prison before receiving a parole opportunity, Petitioner's sentence constituted a de facto life without parole sentence, *see id.* at *2 – 3; therefore, as *Montgomery* requires, the sentencing court must determine whether he is irreparably corrupt or permanently incorrigible. *See id.*

This time, however, the Georgia Supreme Court unanimously rejected Petitioner's claim. *See id.* at *1. The Court upheld the sentencing court's punishment because this Court "ha[d] not expanded [the] mandate," *see id.* at *4, established by *Miller* and *Montgomery*. *See id.* While the state supreme court acknowledged the split across varying states and federal circuits, it declined to apply *Miller* and *Montgomery*'s rationale to Petitioner's second appeal. *See id.*

REASONS FOR GRANTING THE PETITION

The Georgia Supreme Court's decision concerning *Miller* and *Montgomery*'s relationship to de facto life without parole sentences conflicts with decisions from at least seven states and one federal circuit court of appeals. These conflicts create significant disharmony on important issues of federal constitutional law and juvenile rights. Because this case provides a suitable vehicle to address this conflict, the petition for certiorari should be granted.

A. The decision below regarding *Miller* conflicts with the decision from other state and federal circuits.

1. Split Among State Courts

In *Miller*, this Court established a standard to guide sentencing courts in situations where juvenile offenders are given lengthy criminal sentences. Justice Kagan stated that "children are constitutionally different from adults for the purposes of sentencing." *Miller,* 567 U.S. at 471. Under that rationale, the Court declared the "imposition of the State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Id.* at 474.

Given a juvenile's inherent differences, the Court indicated that "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* at 489. When courts lack the ability to consider the mitigating factors associated with adolescence, imposing a sentence that spans a juvenile offender's natural life violates the Eighth Amendment. *See id.*

Today, lower courts are divided on the question of whether *Miller* extends to sentences that are functionally equivalent to life without parole. Seven of sixteen state supreme courts have read *Miller* in a way that protects juveniles from sentences which, in effect, deprive them of liberty for the rest of their lives. The remaining state supreme courts have determined *Miller* does not bar de facto life without parole sentences, and thus it offers juveniles no protection from multiple, consecutive sentences that span their entire lives.

For instance, the Washington Supreme Court found that *Miller* applies to de facto life without parole sentences, which places limits on the amount of time a juvenile spends behind bars. *State v. Ramos*, 187 Wn.2d 420, 437 (Wash. 2017) ("Miller does apply to juvenile homicide offenders facing de facto life-without-parole sentences.") Likewise, Wyoming declared that de facto life without parole sentences fall within *Miller*'s purview. *See Cloud v. State*, 334 P.3d 132, 142 (Wyo. 2014) ("To do otherwise would be to ignore the reality that lengthy aggregate sentences have the effect of mandating that a juvenile die in prison") (internal quotations omitted).

Iowa also applied *Miller* to situations where juveniles will likely still be alive at the conclusion of his or her prison sentence. *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) ("[W]e believe that while a minimum of 52.5 years imprisonment is not technically a life-without-parole sentence, such a lengthy sentence imposed upon a juveniles is sufficient to trigger *Miller* type protections.")

But other states have answered this question differently. Minnesota, for example, refused to expand the protections *Miller* afforded to juvenile offenders. *State v. Mahdi Hassan Ali*, 895 N.W.2d 237, 246 (Minn. 2017) ("[H]ere, we simply hold that absent further guidance from the [Supreme Court of the United States], we will not extend the *Miller*/*Montgomery* rule . . . especially when the Court has not held that *Miller*/*Montgomery* rule applies to sentences other than life imprisonment without the possibility of parole.")

Colorado also refused to recognize de facto life without parole sentences as violative of *Miller*. *See Lucero v. People*, 394 P.3d 1128, 1130 (Colo. 2017) ("[N]either *Graham* nor *Miller* applied to an aggregate term-of-years sentence . . . [l]ife without parole is a specific sentence, distinct from sentences to terms of years.") Colorado's approach illustrates the divide in interpretation: First, it illustrates how states understand *Miller*'s protections. And second, it illustrates how states apply *Miller*'s reasoning in a way that permits de facto life without parole sentences.

In *Lucero*, the Supreme Court of Colorado held that life without parole sentences and lengthy term-of-years sentences were separate things. *See id.* But in a spirited concurrence, Justice Gabriel believed that court interpreted *Miller*'s mandate too narrowly. *Id.* at 1135 ("[T]he majority has misperceived and unduly limited the reach of *Graham* and *Miller*. I would conclude, instead, that *Graham* and *Miller* apply to de facto [life without parole] sentences.") (Gabriel, J., concurring).

Indiana also refused to apply *Miller* to sentences that effectively ensure a juvenile offender will die in prison. *See Conley v. State*, 972 N.E.2d 864, 879 (Ind. 2012). More pointedly, its current position is that *Miller* is not implicated when trial courts impose a life without parole sentence. Rather, *Miller* only applies when the sentence is part of a mandatory sentencing scheme. *See id.*

Perhaps further guidance from this court would be unnecessary if the divide between states had not also created a split between federal circuits.

2. Split Among Federal Courts

In the federal sphere, the Seventh Circuit declared that *Miller* applies to de facto life without parole sentences. *See, e.g., McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016), *but see Croft v. Williams*, 773 F.3d 170 (7th Cir. 2014). As a matter of logic, the court believed "the 'children are different' passage . . . from *Miller v. Alabama* cannot logically be limited to de jure life sentences." *Id.* at 911. Accordingly, trial courts must consider a juvenile's age and attendant circumstances before imposing a de facto life without parole sentence.

The Ninth Circuit entertained the idea of applying *Miller* to de facto life without parole sentences, but it refused to follow the Seventh Circuit because of its inability to determine how long a sentence must be before it equates to life without parole. *See Demirdjian v. Gipson*, 832 F.3d 1060 (9th Cir. 2016). In *Demirdjian*, the Ninth Circuit was unconvinced that the petitioner's sentence was long enough to be a functional death warrant. *See id.* ("So too here: because Demirdjian will be eligible for parole when he is 66

years old, his sentence arguably does not share any characteristics with death sentences.") (internal quotation marks omitted). So ultimately the court left questions regarding de facto life without parole sentences unanswered.

Other circuits, in contrast, determined that *Miller* is inapplicable and thus find themselves at odds with the Seventh Circuit's ruling regarding *Miller* protections. The Fifth Circuit is unwilling to alter the way it applies the *Miller* doctrine until this Court itself addresses the issue. *United States v. Walton*, 537 Fed. Appx. 430 (5th Cir. 2013) ("Walton attempts to raise novel constitutional arguments that would require the extension of precedent."). From such statements, it is clear that lower courts need guidance from this Court to clarify the implications and limitations of the *Miller* rationale.[1]

The Sixth Circuit's ruling also contradicts the Seventh Circuit's, as it has refused to extend *Miller*'s rationale. *See Starks v. Easterling*, 659 Fed. Appx. 277 (6th Cir. 2016). In *Starks*, the Sixth Circuit noted this Court's "growing unease with draconian sentences imposed upon juveniles." *Id.* But Judge Norris, writing for the majority, stated that "it is not our role to predict future outcomes." *Id.* Once again, it seems lower courts

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[1] The Fifth Circuit does not stand alone in its decision to reserve decisions to expand precedent to this Court. *See Veal II*, 810 S.E.2d 127, 129 (Because the Supreme Court [of the United States] has not expanded its mandate that the Eight Amendment's prohibition of cruel and unusual punishment as it applies to juvenile offenders requires a sentencer to consider a juvenile's youth and its attendant characteristics before imposing a sentence other than [life without parole], this Court will not do so.")

will leave questions regarding *Miller*'s rationale to this Court. *See id.* ("Because the Supreme Court [of the United States] has not yet explicitly held that the Eight Amendment extends to juvenile sentence that are the functional equivalent of life, and given the fact that lower courts are divided about the scope of *Miller*, we hold that the Tennessee court's decisions were not contrary to . . . clearly established federal law as defined by the Supreme Court [of the United States].")

The split between state supreme courts, and federal circuits, demonstrates the critical need for this Court to intervene and clarify the scope of *Miller*.

B. This case is an ideal vehicle for resolving the issue.

This is the right case for the Court to clarify whether *Miller* applies to sentences that are tantamount to life without parole.

The question was properly raised and is clearly presented in this case. The Georgia Supreme Court's resolution of the question was the sole basis for its decision.

In Petitioner's first appeal, the court vacated his life without parole sentence based on the holdings of *Miller* and *Montgomery*. *Veal*, 784 S.E.2d at 504. The case was remanded to the trial court for resentencing in accordance with *Miller* and *Montgomery*.

At resentencing, the trial court imposed a sentence of eight consecutive life sentences plus 60 years. Petitioner argued that this was a de facto life without parole sentence because it placed his first opportunity for release beyond his natural life expectancy. This

sentence gave rise to Petitioner's second appeal to the Georgia Supreme Court, and the case at hand.

The Georgia Supreme Court rejected Petitioner's challenge to the sentence imposed on remand because "the Supreme Court [of the United States] has not expanded its mandate that the Eighth Amendment's prohibition of cruel and unusual punishment as it applies to juvenile offenders requires a sentence to consider a juvenile's youth and its attendant characteristics before imposing a sentence other than LWOP." *Veal II*, 810 S.E.2d 127, 129. Therefore, the court refused to apply *Miller* to appellant's sentence. This case is an ideal vehicle for resolving issues regarding the scope of *Miller*.

The inconsistency among courts in applying *Miller* is outcome determinative. Had this trial occurred in the jurisdiction of Washington, Wyoming or Iowa, the sentence would have been evaluated as a life without parole sentence under *Miller*.

This Court should grant Certiorari to clarify that *Miller* applies not only to sentences that are life without parole in form, but also to sentences that are functionally equivalent to life without parole sentences.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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