No. 17-1510

In The Supreme Court of the United States

ROBERT VEAL,

Petitioner,

v.

GEORGIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION

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QUESTION PRESENTED

When petitioner was 17½ years old, he was convicted of 13 criminal offenses committed in two separate criminal transactions, including murder, rape, aggravated sodomy, kidnapping, and five counts of armed robbery. The trial court ultimately imposed multiple sentences for those crimes, including eight life sentences, and exercised its discretion to impose them consecutively. Under Georgia law, that set of sentences requires petitioner to serve 60 years before parole consideration. The question presented is:

Do *Miller v. Alabama*'s limits on sentencing a juvenile offender to life without parole for a murder conviction apply to petitioner's "aggregate" sentence imposed for a murder conviction and numerous others, even if no single sentence for a single offense would otherwise implicate *Miller*?

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The Georgia Supreme Court's decision affirming the petitioner's sentences is reported at 810 S.E.2d 127 (Ga. 2018).

JURISDICTION

The decision below was entered on February 5, 2018. The petition for certiorari was filed on May 3, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

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

STATEMENT

1. On the evening of November 22, 2010, Lisa McGraw and her boyfriend, Charles Boyer, were walking back to her apartment complex in the Virginia Highlands neighborhood of Atlanta, Georgia, after a trip to a convenience store. *Veal v. State*, 784 S.E.2d 403, 405 (Ga. 2016) ("*Veal I*"). Boyer realized he had

forgotten something in his car, so he returned to retrieve it. *Id.*

Meanwhile, petitioner Robert Veal, then 17½ years old, and two fellow members of the Jack Boys gang, Tamario Wise and Raphael Cross, had set out "with the intent of finding people to rob." *Id.* at 405–06. Prior to that evening, members of the Jack Boys gang had been involved in several armed robberies in Atlanta. *Id.* at 406. On that night, as they were driving through Virginia Highlands in a dark-colored SUV, they came upon McGraw and Boyer, and then got out of their vehicle. *Id.* at 405–06. One of the men put a gun to McGraw's head, and the men ordered the couple to hand over their keys and then walk to McGraw's apartment. *Id.* at 405. McGraw gave the assailants her purse and the couple tried to flee. *Id.* McGraw was able to escape safely, but Boyer was not; he was shot multiple times and died. *Id.* at 405–06. Boyer's injuries "were consistent with his being in a struggle and trying to block a gun from shooting at him and then being shot again while trying to free himself." *Id.* at 406. The assailants fled the scene. *Id.*

Several hours later, John Davis was walking outside of his apartment in the Grant Park neighborhood, a few miles away from Virginia Highlands. *Id.* Veal and the same Jack Boys gang members pulled up to Davis in a gold Toyota sedan (they had switched vehicles after killing Boyer). *Id*. The men "confronted Davis and ordered him at gunpoint to go to his apartment." *Id.* All four men—Davis and the three assailants—entered Davis's apartment, where they found Davis's

roommate, C.T., in bed with her boyfriend, Joseph Oliver. *Id.* The men brought Davis and Oliver to separate rooms and bound each with cords as they lay face down. *Id.*; Trial Transcript, Oct. 4, 2012 ("T"), at 979–80, 1066–67, 1071, *Veal I*, 784 S.E.2d 403 (No. S15A1721). They forced C.T. to take off her clothes at gunpoint. T.1090. After one man sexually assaulted her, the men moved C.T. down the hall to Davis's bedroom, where two of the assailants took turns raping and sodomizing her. *Veal I*, 784 S.E.2d at 406; *see also* T.1091–95. Before leaving, the men ordered C.T. to lay down on the floor and hogtied her with an electrical cord. T.988, 1095. Veal's DNA was recovered from C.T.'s rape kit. *Veal I*, 784 S.E.2d at 406.

2. Veal and Wise were tried in 2012 on numerous charges stemming from each of the two incidents. *Id.* at 405 n.1. Veal "did not dispute his guilt of the charges related to the Grant Park crimes (to which he was linked by his DNA)." *Id.* at 406. Evidence linking Veal to the crimes that night included numerous recovered stolen items; eyewitness testimony from the victims, the third assailant, and other witnesses; Veal's DNA from C.T.'s rape kit; additional evidence connecting the gang to several other armed robberies that had occurred in Atlanta prior to the November 22 crimes; and text messages sent among the assailants that revealed efforts to wipe down a black SUV (which had been stolen and later abandoned) to remove fingerprints. *Id.*

A jury found Veal guilty of 17 counts. In connection with the Virginia Highlands robbery, he was found guilty of seven counts: malice murder, felony murder,

possession of a firearm during commission of a felony, two counts of armed robbery, aggravated assault with a deadly weapon, and participation in criminal street gang activity. *See id.* at 405 n.1; Record on Appeal ("R") at 135–36, 155–58, 169, *Veal I*, 784 S.E.2d 403 (No. S15A1721). In connection with the Grant Park robbery, he was found guilty of 10 counts: rape, aggravated sodomy, three counts of armed robbery, aggravated assault with a deadly weapon, kidnapping, kidnapping with bodily injury, false imprisonment, and participation in criminal street gang activity. *See Veal I*, 784 S.E.2d at 405 n.1; R.158–61, 136–37, 171–72.

3. Veal did not offer any new evidence at sentencing, but his counsel argued for mitigation of punishment. *Veal I*, 784 S.E.2d at 408. Counsel emphasized that, at the time of the crimes, Veal was "very young. . . . He was 17." *Id.* Counsel asked the court to "show some mercy" because Veal was not a "lost cause," and contended that, "given some time, . . . he is going to be a changed person at some point." *Id.* Counsel explained that, "[a]t 17, . . . you think differently than when you are 40. And . . . when he gets to be an older man, Judge, he is going to wake up and realize that." *Id.* Noting that the State was going to ask for a sentence of life without parole, Counsel contended: "[I]t's going to be a waste of a life, . . . because I don't believe that he is going to be the kind of person that would do that for his entire life, these kind[s] of crimes." *Id.* The State asked for a sentence of life without parole for the malice murder conviction, noting that the court had

heard from "many, many victims," and that it was a "brutal case." *Id.* at 408–09.

After hearing these arguments, the trial court stated that, "based on the evidence . . . it's the intent of the court that the defendant be sentenced to the maximum." *Id.* at 409. After merging several counts for sentencing purposes, the court sentenced Veal to life in prison without parole for the murder conviction; six consecutive life sentences for the convictions for rape, aggravated sodomy, and four convictions for armed robbery; and 60 consecutive years for the remaining convictions. *Id.* at 405 n.1, 409; R.169–72.

Two years later, with new counsel, Veal filed an amended motion for new trial, contending for the first time that his sentence of life without parole for his murder conviction violated the Eighth Amendment based on *Miller v. Alabama*, 567 U.S. 460 (2012). *Veal I*, 784 S.E.2d at 409. Veal's counsel argued that the trial court had not made "specific findings of fact" at sentencing in support of the life-without-parole sentence and asked for a new sentencing hearing. *Id.* The court denied the motion, explaining: "As the Court indicated at th[e] time [of sentencing], its sentence was based upon the evidence in the case which included [Veal's] involvement in several savage and barbaric crimes and also included evidence of [Veal's] age." *Id.*

4. On appeal, the Georgia Supreme Court vacated Veal's sentence of life without parole for his murder conviction. *Id.* at 412. The court noted that it might have affirmed the trial court's ruling on Veal's *Miller*

claim had the appeal been decided before *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). *Veal* I, 784 S.E.2d at 409–10. But the court explained that, after *Montgomery*, it understood *Miller* to require sentencing courts to make a "distinct determination on the record" that a juvenile murderer "is irreparably corrupt or permanently incorrigible" before imposing a sentence of life without parole, which the court determined the sentencing court had not done. *Id.* at 412. The court vacated Veal's life-without-parole sentence for his murder conviction and remanded for resentencing. *Id.*

5. At the sentencing hearing on remand, the State did not again seek a life-without-parole sentence for Veal's murder conviction. *Veal v. State*, 810 S.E.2d 127, 128 (2018) ("*Veal II*"). It instead recommended that the court impose two additional consecutive life sentences—one for murder and one for an armed robbery count that the trial court had erroneously merged with the murder conviction, *see Veal I*, 784 S.E.2d at 407–08—in addition to the six consecutive life sentences the trial court had already imposed. *Veal II*, 810 S.E.2d at 128.

Veal contended that the recommended sentence would be the "functional equivalent of life without the possibility of parole." Resentencing Transcript, Jan. 30, 2017 ("RT"), at 7, *Veal II*, 810 S.E.2d 127 (No. S17A1758). He pointed out that, under Georgia law, the State's recommendation that Veal serve consecutive life sentences would require that he serve at least 60 years in prison before being eligible for parole, and he introduced life-expectancy tables to support the

assertion that his earliest date of parole eligibility, when he would be 77 years old, would exceed his life expectancy of 72 by five years. RT.5–8; *see* O.C.G.A. § 42-9-39(c). Veal urged the court to instead impose a life sentence for the murder conviction and to make all other life sentences run concurrently so that Veal's earliest date of parole eligibility for those life sentences would be after 30 years served, *see* RT.9–11, when Veal would be 47. Despite conceding that Veal had "committ[ed] really, horrendous acts," Veal's counsel nevertheless contended that Veal was "not the worst of the worst" and argued that the court should avoid sentencing Veal to consecutive life sentences, which counsel argued would amount to "an unconstitutional sentence." *Id.* at 11.

The trial court imposed the State's recommended sentences, which amounted to eight consecutive life sentences plus 60 years. *Veal II*, 810 S.E.2d at 128. The sentences included, for the Virginia Highlands convictions, three life sentences for the murder and two armed robberies, plus a total of 20 years for participation in criminal street gang activity and possession of a firearm during the commission of a felony. R.155–58, 300. They also included, for the Grant Park convictions, five life sentences for the rape, aggravated sodomy, and three armed robberies, plus a total of 40 years for kidnapping, false imprisonment, and participation in criminal street gang activity. R.158–60, 300–01.[1] Based

[1] Four counts were ultimately merged for purposes of sentencing. One of Veal's counts of aggravated assault with a deadly weapon merged with his murder conviction, and the other merged

on these revised sentences, Veal will not be eligible for parole until he serves 60 years in prison. *See* O.C.G.A. § 42-9-39(c) ("When a person receives consecutive life sentences as the result of offenses occurring in the same series of acts and any one of the life sentences is imposed for the crime of murder, such person shall serve consecutive 30 year periods for each such sentence, up to a maximum of 60 years, before being eligible for parole consideration.").

6. On appeal, Veal argued that his revised sentence violated the Eighth Amendment under *Miller v. Alabama*. *See Veal II*, 810 S.E.2d at 128. The Georgia Supreme Court rejected that argument, explaining that "neither *Miller* nor *Montgomery* addressed the imposition of aggregate life-with-parole sentences for multiple convictions or whether sentences other than [life without parole] require a specific determination that the sentence is appropriate given the offender's youth and its attendant characteristics, and the nature of the crimes." *Id.* at 128–29. The court thus affirmed Veal's revised sentence. *Id.* at 129.

REASONS FOR DENYING THE PETITION

In *Graham v. Florida*, *Miller v. Alabama*, and *Montgomery v. Louisiana*, this Court held that certain categorical rules limit whether and when a state may

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with one of his armed robbery convictions; Veal's felony murder count merged with his murder conviction; and the count of kidnapping with bodily injury merged with his rape conviction. R.300–01; *see generally Drinkard v. Walker*, 636 S.E.2d 530, 531–32 (Ga. 2006).

impose a sentence of life without parole on a juvenile offender. *Graham* bars imposing that sentence on a juvenile offender for a nonhomicide crime; *Miller* bars imposing that sentence on a juvenile offender for murder without an individualized sentencing determination; and *Montgomery* indicated that such a sentence may be imposed on only a small class of "incorrigible" juvenile offenders.

In the wake of those decisions, lower courts are divided on whether and how to apply their categorical rules to sentences other than an actual "life-without-parole" sentence imposed for a single conviction. Among other things, courts have differed on whether *Graham* or *Miller* apply to "aggregate" sentences—that is, do those decisions only bar or limit imposing a life-without-parole sentence for a single crime, or do they also limit whether and when a state may impose a set of consecutive sentences for multiple crimes if, in the aggregate, those sentences mean a juvenile offender will not have an opportunity for release within the offender's life expectancy? Nonetheless, this Court has denied numerous recent petitions asking the Court to resolve such questions.

And for a number of reasons, this case is not the right vehicle for resolving any conflicts of authority about how to apply *Graham* or *Miller*.

First, the facts of this case are such that this Court could decide it without resolving or even providing significant guidance on those questions. Most of those cases have involved aggregate sentences imposed for single criminal transactions, often involving single

victims. By contrast, the aggregate sentence in this case was imposed for 13 convictions including murder, rape, and several armed robberies, committed in two separate criminal transactions. Factors that *Graham* and *Miller* indicated could justify imposing even an actual life-without-parole sentence on a juvenile offender—heightened moral culpability and stronger interests in retribution and deterrence—approach their apex when a juvenile offender commits a string of serious crimes. Thus, regardless of whether or how *Graham*'s and *Miller*'s reasons for their categorical limits might extend to some aggregate sentences, there are compelling justifications rooted in the reasoning of those decisions that point to not applying their categorical rules in this case. The possibility that this Court could decide this case on that narrow, fact-specific basis means a decision in this case may not provide much guidance on whether *Graham*'s or *Miller*'s limits apply to aggregate sentences more generally. If this Court wishes to resolve the lower courts' conflicting approaches to applying *Graham* and *Miller*, it should wait for a case that necessarily requires it do so.

Second, the question petitioner asks this Court to answer may well lack practical import in this case. Even if this Court were to conclude that *Miller* applies to Veal's aggregate sentence, Veal may well receive the same sentences on remand. *Miller* and *Montgomery* permit even actual life-without-parole sentences for juveniles whose crimes reflect lasting "incorrigibility," and the trial court could well determine that the

number, severity, repetition, and intentional nature of Veal's crimes support his aggregate sentence even under that standard.

Third, the Georgia Supreme Court correctly determined that the sentences in this case do not implicate *Miller*'s categorical limits. Although the moral culpability of juvenile offenders remains diminished compared to adult offenders, that culpability is higher when juvenile offenders commit a murder in addition to multiple other serious and violent crimes. When considered in conjunction with the state's substantial interests in imposing more severe sanctions—both to express condemnation for each of several serious crimes and to deter escalation and repetition of criminal activity—the justifications for applying *Miller*'s rule fall away.

I. This case is not an ideal vehicle for resolving the conflicts of authority about how to apply *Graham* or *Miller*.

A. Lower courts are divided on whether or how to apply *Graham* or *Miller* to aggregate sentences.

In a series of recent decisions, this Court interpreted the Eighth Amendment's prohibition against "cruel and unusual punishments" to limit when a juvenile offender may be sentenced to life without parole. A state may not impose a sentence of life without parole on a juvenile offender for committing a crime other than murder. *Graham v. Florida*, 560 U.S. 48, 82 (2010).

That sentence may not be made mandatory for juvenile offenders even for murder. *Miller v. Alabama*, 567 U.S. 460, 465 (2012). And in *Montgomery*, the Court indicated that under *Miller*, a sentence of life without parole must be reserved for "the rare juvenile offender whose crime reflects irreparable corruption." *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (quoting *Miller*, 567 U.S. at 479–80).

This Court's analyses in *Graham*, *Miller*, and *Montgomery* focused on a single sentence arising out of a single conviction. *See Graham*, 560 U.S. at 57 (reviewing life-without-parole sentence for armed burglary); *Miller*, 567 U.S. at 466, 469 (reviewing mandatory life-without-parole sentence for capital murder for one defendant and for murder in the course of arson for the other); *Montgomery*, 136 S. Ct. at 725–26 (reviewing mandatory life-without-parole sentence for murder). But in other cases, numerous crimes are committed, charged, and sentenced together. And sometimes in those cases, consecutive sentences accumulate to the point where parole consideration may occur near or even past a juvenile offender's life expectancy. This has prompted the question: Do *Graham* or *Miller* also limit when states may impose such "aggregate" sentences that exceed a juvenile offender's life expectancy, even if no single sentence for a single offense amounts to a sentence that might otherwise trigger *Graham* or *Miller*?

Lower courts have differed on that question in the *Miller* context.[2] In cases like this one, where the juvenile offender's convictions include a murder, some state supreme courts have held that imposing multiple sentences that together push eligibility for release near or beyond the juvenile offender's life expectancy does not trigger *Miller*'s restrictions on life-without-parole sentences. *Lucero v. People*, 394 P.3d 1128, 1133 (Colo. 2017), *cert. denied*, 138 S. Ct. 641 (2018); *State v. Ali*, 895 N.W.2d 237, 244–46 (Minn. 2017), *cert. denied*, 138 S. Ct. 640 (2018); *State v. Nathan*, 522 S.W.3d 881, 892 (Mo. 2017).[3] Several other courts have concluded otherwise, reasoning that *Miller* limits imposing a set of consecutive sentences that together approach or exceed an offender's life expectancy because such sentences in the aggregate amount to a "de facto" life-without-parole sentence. *See State v. Zuber*, 152 A.3d 197, 212–13 (N.J. 2017), *cert. denied*, 138 S. Ct. 152 (2017); *State v. Ramos*, 387 P.3d 650, 659–60 (Wash. 2017), *cert. denied*, 138 S. Ct. 467 (2017); *State v. Riley*,

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[2] Courts have differed on that question in the *Graham* context too. *See, e.g.*, *McCullough v. State*, 168 A.3d 1045, 1053–65 (Md. Ct. Spec. App. 2017) (collecting cases), *cert. granted*, 171 A.3d 612 (Md. 2017). Veal does not ask this Court to resolve that conflict of authority, and this case is not an appropriate vehicle for doing so anyway; this Court has already acknowledged that states have broader sentencing discretion when murder convictions are involved, *see Miller*, 567 U.S. at 480.

[3] *See also Kinkel v. Persson*, 417 P.3d 401, 413 (Or. 2018) (suggesting that imposing lengthy aggregate sentence based on convictions for four murders and 26 attempted murders would not implicate *Miller* in light of the greater "moral culpability and consequential harm" involved, but declining to decide the case on that basis because the sentence comported with *Miller* in any event).

110 A.3d 1205, 1206 (Conn. 2015), *cert. denied*, 136 S. Ct. 1361 (2016); *Bear Cloud v. State*, 334 P.3d 132, 141–42 (Wyo. 2014); *cf. State v. Null*, 836 N.W.2d 41, 70–71, 73 (Iowa 2013) (applying *Miller* to aggregate sentence of 52.5 years before parole consideration but expressly resolving case under state constitution); *see also McKinley v. Butler*, 809 F.3d 908, 909, 911 (7th Cir. 2016) (*Miller* triggered by two consecutive 50-year sentences without early release for murder and a firearm enhancement); *People v. Reyes*, 63 N.E.3d 884, 886, 888 (Ill. 2016) (*Miller* triggered by six consecutive sentences for: murder (20 years), two counts of attempted murder (six years each), and three firearm enhancements (25, 20, and 20 years)).

Notwithstanding this conflict of authority among lower courts, this Court has often and recently denied petitions that presented similar questions about whether or how *Miller* (or *Graham*) apply to aggregate sentences. *See, e.g.*, *Steilman v. Michael*, No. 17-8145, 138 S. Ct. 1999 (cert. denied May 14, 2018); *Wyoming v. Sam*, No. 17-952, 138 S. Ct. 1988 (cert. denied May 14, 2018); *Bostic v. Dunbar*, No. 17-912, 138 S. Ct. 1593 (cert. denied Apr. 23, 2018); *Ali v. Minnesota*, No. 17-5578, 138 S. Ct. 640 (cert. denied Jan. 8, 2018); *Lucero v. Colorado*, No. 17-5677, 138 S. Ct. 641 (cert. denied Jan. 8, 2018); *Byrd v. Budder*, No. 17-405, 138 S. Ct. 475 (cert. denied Nov. 27, 2017); *Ramos v. Washington*, No. 16-9363, 138 S. Ct. 467 (cert. denied Nov. 27, 2017); *Castaneda v. Nebraska*, No. 16-9041, 138 S. Ct. 83 (cert. denied Oct. 2, 2017); *Garza v. Nebraska*, No. 16-9040, 138 S. Ct. 83 (cert. denied Oct. 2, 2017); *New Jersey v.*

Zuber, No. 1496, 138 S. Ct. 152 (cert. denied Oct. 2, 2017); *Ohio v. Moore*, No. 16-1167, 138 S. Ct. 62 (cert. denied Oct. 2, 2017); *Sen v. Wyoming*, No. 17-5187, 138 S. Ct. 225 (cert. denied Oct. 2, 2017); *Willbanks v. Mo. Dep't of Corr.*, No. 17-165, 138 S. Ct. 304 (cert. denied Oct. 2, 2017); *Vasquez v. Virginia*, No. 16-5579, 137 S. Ct. 568 (cert. denied Dec. 5, 2016); *Florida v. Henry*, No. 15-871, 136 S. Ct. 1455 (cert. denied Mar. 21, 2016); *Connecticut v. Riley*, No. 14-1472, 136 S. Ct. 1361 (cert. denied Mar. 7, 2016); *Sanchez v. California*, No. 13-7431, 134 S. Ct. 950 (cert. denied Jan. 13, 2014); *Bunch v. Bobby*, No. 12-558, 133 S. Ct. 1996 (cert. denied Apr. 22, 2013); *see also*, *e.g.*, *Contreras v. Davis*, No. 17-8472, 138 S. Ct. 2012 (cert. denied May 14, 2018); *Johnson v. Virginia*, No. 17-326, 138 S. Ct. 643 (cert. denied Jan. 8, 2018); *Demirdjian v. Gipson*, No. 16-1290, 138 S. Ct. 71 (cert. denied Oct. 2, 2017) (AEDPA review); *Starks v. Easterling*, No. 16-6994, 137 S. Ct. 819 (cert. denied Jan. 17, 2017) (AEDPA review); *Walton v. United States*, No. 13-7111, 134 S. Ct. 712 (cert. denied Dec. 2, 2013) (plain error review).

B. Deciding this case would not necessarily resolve the conflicts of authority about how to apply *Graham* or *Miller* to aggregate sentences.

The arguments for not applying *Graham*'s or *Miller*'s categorical sentencing restrictions to aggregate sentences reach their apex in a case with facts like this one. Under the reasoning advanced in *Graham* and *Miller*, the question whether to apply such rules to

aggregate sentences imposed on juvenile offenders generally will turn on the nature of the crimes at issue; states have relatively stronger justifications for imposing more severe sentences as the seriousness of an offender's crimes increases in terms of moral depravity and consequential harm. *See infra* section II (citing *Graham*, 560 U.S. at 69, 71; *Miller*, 567 U.S. at 473). When, as here, a juvenile offender makes repeated decisions to engage in serious and violent criminal conduct against multiple victims, the case for affording states the discretion to impose a lengthy set of consecutive sentences is compelling. *Id.*

This case is therefore not the ideal vehicle for answering any recurring questions about whether and how *Miller* applies to aggregate sentences. In most of the cases comprising the splits about how to apply *Miller* to aggregate sentences, a juvenile offender has engaged in a single criminal transaction, often against a single victim, and the offender is sentenced for multiple offenses arising out of that same transaction.[4] There are strong arguments against extending *Graham*'s or *Miller*'s categorical rules even to aggregate sentences in those kinds of cases in light of the offenders' increased moral culpability and the states' increased interests in retribution and deterrence. *See infra* section II. But the Court would not have to decide

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[4] *See, e.g.*, *McKinley*, 809 F.3d at 909; *Davis v. State*, 415 P.3d 666, 671, 676 (Wyo. 2018); *Steilman v. Michael*, 407 P.3d 313, 315–16 (Mont. 2017); *People v. Franklin*, 370 P.3d 1053, 1054 (Cal. 2016); *State v. Garza*, 888 N.W.2d 526, 528–29, 533 (Neb. 2016); *Null*, 836 N.W.2d at 45.

whether those rules apply in those cases to reject extending them to this one. Instead, this Court could determine that whether or not *Graham* or *Miller* might apply to aggregate sentences in some instances, those cases do not restrict a state from imposing a set of consecutive sentences for the particularly egregious set of crimes committed in this case.

In other words, this case presents this Court with a strong basis for deciding it in a way that would not provide guidance in the mine run of aggregate-sentencing cases that have to this point comprised the splits about how to apply *Graham* or *Miller*. Granting certiorari and deciding this case may resolve whether *Miller* applies to a lengthy aggregate sentence imposed for multiple crimes (including murder) committed in multiple criminal transactions against multiple victims, but the State is aware of only one other lower court that has dealt with that narrower question, *see Zuber*, 152 A.3d at 201, 203–04, 212 (holding that *Miller* applied to aggregate sentence requiring 68 years before parole eligibility, imposed for felony murder and three armed robberies committed during multiple incidents). Because most of the cases that have led lower courts to diverge on whether and how to apply *Graham* or *Miller* did not involve an aggregate sentence in this kind of factual context, a decision that *Miller* does not apply in this case would not help resolve those deeper splits.

Such a decision likely would also leave other lingering questions unresolved. Most notably, petitioner's broad question presented would remain unanswered.

That question essentially asks whether *Miller* applies to "de facto" life-without-parole sentences. Pet. i. But given the facts of this case, the Court need not decide whether *Miller* might apply to sentences other than actual life-without-parole sentences to decline to extend it to the set of sentences here. Similarly, the Court could assume away questions about how many years until parole eligibility a term-of-years sentence or set of sentences must run to amount to a "de facto" life-without-parole sentence.[5] The Court could conclude that even assuming *Miller* applies to sentences other than actual life-without-parole sentences and Veal's aggregate sentence is long enough to count as "de facto" life without parole, the facts of this case provide a strong basis for nonetheless declining to extend *Miller*'s restrictions to the sentences at issue.

In sum, if this Court is interested in resolving any of the deeper splits about how to apply *Graham* and

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[5] These questions, which would arise only if *Miller* were to apply to sentences other than actual life-without-parole sentences, pose difficult line-drawing problems. *See Moore v. Biter*, 742 F.3d 917, 922 (9th Cir. 2014) (O'Scannlain, J., dissenting from denial of rehearing en banc) ("At what number of years would the Eighth Amendment become implicated in the sentencing of a juvenile: twenty, thirty, forty, fifty, some lesser or greater number? Would gain time be taken into account? Could the number vary from offender to offender based on race, gender, socioeconomic class or other criteria? Does the number of crimes matter?" (citation omitted)). *Compare, e.g.*, *State v. Smith*, 892 N.W.2d 52, 66 (Neb. 2017) (parole eligibility at age 62 provides meaningful opportunity for release); *with Sam v. State*, 401 P.3d 834, 860 (Wyo. 2017) (no meaningful opportunity for release where juvenile offender would be parole eligible at age 61).

Miller, it should wait for a case that requires a decision that will resolve them.

Finally, if the Court wishes to set an outer limit on the aggregate sentences to which *Miller* applies, this could be an acceptable vehicle for that purpose. The multiple transactions, multiple victims, and numerous serious crimes involved in this case make it an easier one in which to draw a clear boundary past which *Miller*'s restrictions do not apply. But if the Court believes that is an appropriate line to draw, the Georgia Supreme Court already reached the correct result in this case, because it declined to apply *Miller*. The better course would be to wait for a case in which another court has concluded that *Miller* does apply in similar circumstances. *See, e.g.*, *Zuber*, 152 A.3d at 212.[6]

C. Questions about *Miller*'s reach lack practical import in this case.

Miller and *Montgomery* did not ban sentencing juvenile offenders who commit murder to life without parole. Rather, *Miller* permits states to impose that sentence on a juvenile offender as long as the sentence

[6] The State is aware of two other pending petitions for certiorari asking the Court to address how to apply *Graham* and *Miller* to sentences other than actual life-without-parole sentences. *See Flowers v. Minnesota*, No. 17-9574 (whether *Miller* applies to consecutive life sentences with parole eligibility after 60 years); *Taylor v. Indiana*, No. 18-81 (whether *Miller* applies to 80-year term imposed for single homicide offense with parole eligibility after 58 years).

is not mandatory, because a mandatory sentence would preclude the sentencer from considering the juvenile offender's "youth and attendant characteristics." *Miller*, 567 U.S. at 483. And *Montgomery* later indicated that a life-without-parole sentence must be reserved for juvenile offenders whose crimes reflect "permanent incorrigibility" or "irreparable corruption." *Montgomery*, 136 S. Ct. at 734.

Even assuming *Miller*'s requirements were to apply to Veal's aggregate sentence, the trial court would have a sound basis for concluding that this sentence does not violate those requirements. Veal's aggregate sentence is not a mandatory sentence because the trial court had discretion to impose a set of concurrent sentences that would have provided a parole opportunity after as few as 35 years.[7] The trial court instead sentenced Veal to consecutive life sentences—which made Veal eligible for parole after 60 years served, *see* O.C.G.A. § 42-9-39(c). Given the number, severity, repetition, and intentional nature of Veal's crimes, on a remand the trial court could well conclude that they reflect the kind of lasting "incorrigibility" that

[7] *See* O.C.G.A. § 16-5-1(e)(1) (providing life as minimum sentence for murder); *id.* § 17-10-6.1(a)(1) & (c)(1) (authorizing release eligibility only after serving at least 30 years of life sentence imposed for first conviction for murder); *id.* § 17-10-10(a) ("[S]entences shall be served concurrently unless otherwise expressly provided."); *Busch v. State*, 523 S.E.2d 21, 24 (Ga. 1999) (explaining that a five-year sentence for firearm-possession offense specifically must run consecutively to the underlying felony).

supports a life-without-parole sentence for a juvenile offender under *Miller*.

The upshot is that the question the petition asks this Court to answer—whether *Miller* applies to "de facto" life-without-parole sentences—may well lack practical import in this case. Even if this Court were to conclude that Veal's aggregate sentence is a "de facto" life-without-parole sentence to which *Miller*'s restrictions apply, Veal may well receive the same sentences on remand. This Court should wait for a case to answer questions about *Miller*'s applicability where the Court's answers are more likely to be outcome determinative.

II. The Georgia Supreme Court correctly concluded that the sentences imposed in this case do not implicate *Miller*.

Like a handful of prior cases involving the death penalty, *Graham* and *Miller* introduced categorical rules that preclude or restrict particular sentences for certain classes of offenses or defendants. *See Graham*, 560 U.S. at 60–61; *Miller*, 567 U.S. at 470. The Court largely grounded those rules in a calculus that took account of (1) the "moral culpability" of the offenders as a class in light of their characteristics and the nature of the crime at issue; (2) the severity of the sentencing practice; and (3) the "penological goals" that could be served by it. *See Graham*, 560 U.S. at 67–74.

In *Graham*, that calculus led the Court to bar life-without-parole sentences for juvenile offenders for any

crime other than murder. *Id.* at 74. The Court reasoned that various attributes of youth make juvenile offenders less culpable than adults, and "[nonhomicide] crimes differ from homicide crimes in a moral sense." *Id.* at 68–69.

Miller announced a different rule for murder. Acknowledging that *Graham* "took care to distinguish [nonhomicide] offenses from murder, based on both moral culpability and consequential harm," *Miller* permitted the same sentence *Graham* banned, as long as the sentence is imposed after individualized sentencing that takes account of the offender's youth and attendant characteristics. 567 U.S. at 473, 479–80, 489.

Taken together, *Graham* and *Miller* show that when considering whether to impose a categorical sentencing rule, the nature of the crimes at issue matters. Although the nature of the offender (a juvenile) and the severity of the punishment (life without parole) held constant from *Graham* to *Miller*, the calculus changed because the crime was more serious. Greater moral depravity and consequential harm to the victims and the public means the offender is more culpable and the State's interest in imposing punishments strong enough to serve its penological goals increases. *See Graham*, 560 U.S. at 69, 71; *Miller*, 567 U.S. at 473. And under the rubric of these decisions, as moral culpability increases and penological justifications for a particular punishment strengthen, the case for a categorical rule against that punishment weakens.

That logic cuts against reflexively extending *Graham*'s or *Miller*'s categorical rules to an aggregate sentence imposed to punish a juvenile offender for multiple serious crimes. It can hardly be disputed that—all else equal—offenders who commit multiple serious crimes are more culpable than those who commit just one. *See Jones v. Thomas*, 491 U.S. 376, 387 (1989) (recognizing that "consecutive terms . . . are typically reserved for more culpable offenders"); *Nathan*, 522 S.W.3d at 892 ("[M]ultiple violent crimes deserve multiple punishments."); *McCullough v. State*, 168 A.3d 1045, 1067 (Md. Ct. Spec. App. 2017) (A juvenile offender "who commits multiple nonhomicide crimes against multiple victims, causing injury to each victim, is more culpable than one who commits the same injury-producing crime against one victim."). Penological justifications strengthen too. Multiple crimes usually means more harm to both the victims and to the public. A state therefore has an interest in imposing more severe sanctions in retribution "to express its condemnation of the crime and to seek restoration of the [greater] moral imbalance caused by the offense." *Graham*, 560 U.S. at 71; *see also Rummel v. Estelle*, 445 U.S. 263, 276 (1980) (state may "deal[] in a harsher manner with those who" engage in "repeated criminal acts"). And imposing consecutive sentences for multiple crimes is also a critical deterrent against escalation and repetition of criminal activity. *See, e.g.*, *United States v. Buffman*, 464 F. App'x 548, 549 (7th Cir. 2012) ("[I]f the sentence for [one crime] were concurrent with the sentence for [another crime], then there would be neither deterrence nor punishment for the extra danger

created."); *United States v. Reibel*, 688 F.3d 868, 871 (7th Cir. 2012) ("[I]f the punishment for robbery were the same as that for murder, then robbers would have an incentive to murder any witnesses to their robberies."). These factors, each common to cases involving multiple serious crimes, make applying *Graham*'s and *Miller*'s categorical rules to "aggregate" sentences imposed for multiple crimes harder to justify than applying them to life-without-parole sentences for single crimes. *See Kinkel*, 417 P.3d at 413.

Indeed, applying *Graham*'s or *Miller*'s categorical rules irrespective of the number or severity of a juvenile offender's crimes would subvert these substantial penological interests. If those rules restricted aggregate sentences, it would eliminate a state's ability to fit the punishment to the crime—both for retribution and deterrence—in cases where offenders have committed the most serious crimes. And perversely, the more crimes a juvenile offender committed, the *less* punishment he could receive for each crime. Giving volume discounts is no way to set up an effective sentencing regime, yet applying *Graham* or *Miller* to aggregate sentences could require just that. *See, e.g.*, *Lucero*, 394 P.3d at 1133 (declining to apply *Graham* or *Miller* to an aggregate sentence in part because it would permit a juvenile offender to "generate an Eighth Amendment disproportionality claim simply [by] engag[ing] in repeated criminal activity").

There are other reasons to reject *Graham*'s and *Miller*'s rules for aggregate sentences, too. For one thing, such sentences are not "unusual." U.S. Const.

amend. VIII. To the contrary, imposing lengthy consecutive sentences for juvenile offenders who commit multiple crimes appears to be common, at least judging by the large number of recent appellate decisions addressing whether *Graham* or *Miller* apply to lengthy aggregate sentences. *See Graham*, 560 U.S. at 67 (giving "great weight" to the fact that actual use of life-without-parole sentences for juvenile nonhomicide offenders appeared to be "exceedingly rare").

For another, applying *Graham* or *Miller* to aggregate sentences departs from how courts have traditionally applied the Eighth Amendment's proportionality principle: offense by offense. That is, courts ordinarily look to see whether each sentence is proportional to the crime for which it was imposed, not whether the cumulative effect of those sentences is proportional to the overall set of convictions. For instance, in *O'Neil v. Vermont*, 144 U.S. 323 (1892), this Court quoted at length from a state supreme court decision rejecting a defendant's argument that an aggregate sentence imposed for multiple offenses was "excessive" or "oppressive." *Id.* at 331. The court explained that if the defendant had "subjected himself to a severe penalty, it [was] simply because he ha[d] committed a great many such offenses." *Id.* What might have been an "unreasonably severe" sentence for a single offense did not pose a constitutional problem in light of "the number of offences which [he] ha[d] committed." *Id.* ("It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary, on the ground that he had committed so many

burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life."). Many courts have since relied on *O'Neil* in rejecting similar challenges. *See, e.g.*, *Hawkins v. Hargett*, 200 F.3d 1279, 1280, 1285 & n.5 (10th Cir. 1999) (upholding 100-year aggregate sentence imposed on juvenile offender for commission of numerous violent crimes against a single victim during a single criminal transaction because "[t]he Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence for multiple crimes"); *Ali*, 895 N.W.2d at 246 (holding that *Miller* does not apply to consecutive sentences); *see also*, *e.g.*, *Pearson v. Ramos*, 237 F.3d 881, 886 (7th Cir. 2001) ("Every disciplinary sanction, like every sentence, must be treated separately, not cumulatively, for purposes of determining whether it is cruel and unusual. Any other rule would permit a defendant, at the end of a long criminal career, to ask a court to tack together all his criminal punishments and decide whether, had they been a single punishment, they (it) would have been cruel and unusual."); *State v. Berger*, 134 P.3d 378, 379–80, 383–84, 388 (Ariz. 2006) (upholding 200-year aggregate sentence without parole, comprised of 20 ten-year sentences running consecutively, for sexual-exploitation-of-a-minor convictions).

These arguments counsel against applying *Graham*'s or *Miller*'s rules—which focused on life-without-parole sentences imposed for single crimes—to aggregate sentences imposed for multiple serious crimes. And these arguments apply with special force when it

comes to sentences imposed for a set of crimes like the one in this case. Veal committed two armed robberies and a murder against two victims in one neighborhood, then switched vehicles and—several hours later and several miles away in a different neighborhood—committed more armed robberies and a brutal rape with his fellow gang members. *Miller* and *Montgomery* already acknowledged that a state may justify imposing an actual life-without-parole sentence on a juvenile offender for murder. When a juvenile offender commits numerous other violent crimes in addition to a murder in multiple separate criminal transactions and causes grave harm to multiple victims, his moral culpability and the justifications for imposing lengthy consecutive sentences are magnified. Juvenile offender or not, there is no sound basis in such cases for imposing a categorical rule that prevents a state from imposing consecutive sentences proportional to the grievous harms involved.

CONCLUSION

For the reasons set out above, this Court should deny the petition.

Respectfully submitted.

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