No. 17-1510

IN THE

# Supreme Court of the United States

ROBERT VEAL,

*Petitioner*,

*v.*

THE STATE OF GEORGIA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

## REPLY BRIEF OF PETITIONER


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## INTRODUCTION

It is not often that a Brief in Opposition ("Br.") concedes that the state supreme courts and federal courts of appeals are deeply and intractably divided over the question presented. *See* Br. 13-14.

Respondent makes that concession here out of necessity: The split is too stark and too expansive to deny. Seven state supreme courts and three federal courts of appeals hold that the Eighth Amendment protections articulated in *Miller v. Alabama*, 567 U.S. 460 (2012), apply where a juvenile homicide offender receives an aggregate sentence that—while not formally designated "life without parole" ("LWOP")—nonetheless renders the juvenile ineligible for parole within his expected lifetime. Those protections require courts to consider "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" before imposing such a sentence. *Id.* at 480; *see also Montgomery v. Louisiana*, 136 S. Ct. 718, 724 (2016) (LWOP is constitutionally permissible only for "the rare juvenile offender whose crime reflects irreparable corruption").

Meanwhile, seven other state supreme courts and two federal courts of appeals hold the opposite. In the decision below, the Georgia Supreme Court expressly acknowledged the split and announced that it was joining those courts holding *Miller* and *Montgomery* inapplicable to aggregate sentences that amount to "de facto" LWOP.

Making this case even more unusual, Respondent further acknowledges that the petition here satisfies

the basic vehicle requirements for resolving this conflict: The question presented was preserved and passed on below, and is the sole basis for the Georgia Supreme Court's decision. *See* Br. 6-8.

Respondent nonetheless opposes review, weakly suggesting that this is "not an ideal vehicle," Br. 11, for reasons that quickly fall apart upon inspection. Respondent also notes the numerous previous petitions raising the question presented, but all of those petitions had one or more serious vehicle problems not present here. This case stands out as presenting an unusually clean and uncomplicated posture for the Court to resolve the conflict among the lower courts.

Respondent ends by arguing at length that the decision below is correct. Of course, numerous state supreme courts and federal courts of appeals disagree, and for good reason: As a practical matter, an aggregate sentence that exceeds a juvenile's life expectancy is no different from the formal LWOP sentence at issue in *Miller*. But whatever the answer to the question presented, there is no denying that the chaos plaguing the lower courts is of national importance and cannot continue. Until this Court resolves the conflict, the Eighth Amendment protections afforded to juvenile offenders—protections that quite literally determine whether or not the juvenile spends his entire life in prison—will continue to dramatically vary for no reason other than the juvenile's location. This case presents the right vehicle at the right time for the Court's intervention.

## I. The Question Presented Has Irreconcilably Divided The State Supreme Courts And Federal Courts Of Appeals.

The split over the question presented is deep, widely acknowledged, and well beyond the point of resolution without this Court's review.

Seven state supreme courts and three federal circuits have held that *Miller* applies not only to formal juvenile LWOP sentences, but also to aggregate sentences that render the juvenile ineligible for parole within his expected lifespan and thus amount to de facto LWOP. These courts hold that the Eighth Amendment requires sentencing courts to consider a juvenile homicide offender's "youth and attendant characteristics," *Miller*, 567 U.S. at 483, and to make an incorrigibility determination before imposing de facto LWOP. *See State v. Zuber*, 152 A.3d 197 (N.J. 2017); *State v. Ramos*, 387 P.3d 650 (Wash. 2017); *Sam v. State*, 401 P.3d 834 (Wyo. 2017); *People v. Reyes*, 63 N.E.3d 884 (Ill. 2016); *State v. Riley*, 110 A.3d 1205 (Conn. 2015); *State v. Pearson*, 836 N.W.2d 88 (Iowa 2013); *People v. Caballero*, 282 P.3d 291 (Cal. 2012); *see also United States v. Grant*, 887 F.3d 131 (3d Cir. 2018); *Budder v. Addison*, 851 F.3d 1047 (10th Cir. 2017); *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016).

Meanwhile, seven other state supreme courts and two federal circuits hold the opposite: that *Miller* does not extend to de facto LWOP sentences. *See State v. Russell*, 908 N.W.2d 669 (Neb. 2018); *Kinkel v. Persson*, 417 P.3d 401 (Or. 2018); *Veal v. State*, 810 S.E.2d 127 (Ga. 2018); *State v. Nathan*, 522 S.W.3d

881 (Mo. 2017); *Lucero v. People*, 394 P.3d 1128 (Colo. 2017); *State v. Ali*, 895 N.W.2d 237 (Minn. 2017); *Conley v. State*, 972 N.E.2d 864 (Ind. 2012); *see also United States v. Walton*, 537 F. App'x 430 (5th Cir. 2013); *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012).

In the decision below, the Georgia Supreme Court described the split and then explained it was joining the latter side—the "other state and federal courts [that] have determined that *Miller* and *Montgomery* do not apply to cases that … involve sentences that … are the functional equivalent to a life sentence without the opportunity for parole." Pet. App. 4-5.

Courts across the country have similarly recognized the conflict of authority. *See, e.g.*, *Kinkel*, 417 P.3d at 412 ("[C]ourts have divided over whether and how *Miller* … appl[ies] to aggregate sentences for multiple crimes."); *Ali*, 895 N.W.2d at 245 (Courts "have split on the issue of whether the *Miller*/*Montgomery* rule applies to consecutive sentences that are, in the aggregate, the 'functional equivalent' of" LWOP); *Ramos*, 387 P.3d at 660 (same); *Nathan*, 522 S.W.3d at 885 (same). Respondent acknowledges the split as well. Br. 13-14.

Respondent also correctly notes (Br. 12-13) there is a very closely related split over whether *Graham v. Florida*'s categorical ban on LWOP for non-homicide juvenile offenders applies to de facto LWOP sentences. 560 U.S. 48 (2010); c*ompare State v. Moore*, 76 N.E.3d 1127 (Ohio 2016); *Henry v. State*, 175 So. 3d 675 (Fla. 2015); *State v. Boston*, 363 P.3d 453 (Nev. 2015); *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013) *with Willbanks v. Dep't of Corr.*, 522 S.W.3d 238 (Mo.

2017); *Vasquez v. Commonwealth*, 781 S.E.2d 920 (Va. 2016); *State v. Brown*, 118 So. 3d 332 (La. 2013). As amici explain, the threshold question whether aggregate sentences that amount to de facto LWOP are covered "is the same" in both *Graham* and *Miller* cases, although the result that flows from coverage differs. Phillips Black Inc. & Fair Punishment Project Br. 9 n.4. For this reason, the lower courts view the resolution of that question in the *Graham* context as dispositive in the *Miller* context, and vice versa. *See, e.g.*, *Pearson*, 836 N.W.2d at 96; *Zuber*, 152 A.3d at 213.

Including the *Graham* cases, ten state supreme courts and four federal courts of appeals hold that de facto LWOP sentences trigger the same Eighth Amendment protections for juvenile offenders as formal LWOP sentences, while ten state supreme courts and two federal courts of appeals hold the opposite.

However you cut it, the division of authority over the question presented is extraordinary. And there is no doubt that the consequences of this chaos are profound. Across the country, juvenile offenders are subject to wildly different sentencing protections that determine whether they will spend the rest of their lives in prison. It is hard to imagine an issue crying out more loudly for this Court's resolution.

## II. This Case Is An Ideal Vehicle For Resolving The Question Presented.

Respondent acknowledges the expansive division of authority over the question presented, Br. 13-14, and does not dispute its national importance or the

necessity of this Court's review. Respondent also concedes this case satisfies the basic vehicle requirements: The question was preserved and passed upon below, and it was the sole basis for the Georgia Supreme Court's decision, which rests exclusively on federal constitutional grounds. Br. 6-8.

Respondent nonetheless urges the Court to deny review on the theory that this case is "not an ideal vehicle" and because the Court previously denied petitions raising the question presented. Br. 11-21. Both arguments lack merit.

**A.** Respondent offers three reasons this case is "not an ideal vehicle" for resolving the question presented, Br. 11, all of which are easily dismissed.

First, Respondent contends this case is "not ideal" because Petitioner's conviction involved "multiple criminal transactions against multiple victims." Br. 17. This is nonsense. The factual scenario here—a crime spree over "[s]everal hours" on a single night, *Veal v. State*, 784 S.E.2d 403, 405-06 (Ga. 2016)—is entirely typical of the cases underlying the split, *e.g.*, *Pearson*, 836 N.W.2d at 89-90 ("robbery spree" included "two separate homes on Thanksgiving night in 2010"); *Zuber*, 152 A.3d at 202-03 (consolidated cases; one defendant committed "two separate gang rapes," other committed "four armed robberies" from "evening … [to] early morning"); *Moore*, 76 N.E.3d at 1129 ("criminal rampage of escalating depravity [in one] evening[,]" including robbery of two victims and separate kidnapping and rape). *Graham* itself involved

this scenario. *See* 560 U.S. at 54-55 (two armed robberies with multiple victims committed in a single night).

The question dividing the lower courts is simply whether the Eighth Amendment protections articulated in *Miller* apply when a court imposes an aggregate sentence in a single prosecution that renders a juvenile offender ineligible for parole within his expected lifetime. By definition, an *aggregate* sentence arises from multiple crimes, and as just noted, very frequently involves a series of crimes over the course of a few hours.[1] If anything, the common crime spree scenario presented here makes this case a particularly good vehicle for resolving the split.

Second, Respondent observes that this case does not pose the "difficult line-drawing problems" involved in assessing when a sentence amounts to de facto LWOP. Br. 18 & n.5. Respondent is correct there is no dispute that Petitioner's sentence renders him ineligible for parole within his expected lifetime. But that makes this case an especially good vehicle for review. The Court can simply resolve the issue underlying the split—whether the Eighth Amendment protections in *Miller* apply to de facto LWOP sentences—without delving into murkier questions about

[1] Georgia's standard for charging multiple crimes in a single prosecution parallels other states' standards. *See* Ga. Code Ann. § 16-1-7; *Dingler v. State*, 211 S.E.2d 752, 753 (Ga. 1975) (adopting ABA standards); *see also* Wayne R. LaFave, et al., *Joinder: related offenses*, 5 Crim. Proc. § 17.1(a) (4th ed.).

what length of punishment or age of parole eligibility qualifies.

Third, Respondent notes (Br. 20-21) that the trial court might, on remand from this Court, find Petitioner "incorrigible" and impose the same sentence. Of course, this Court regularly grants review in cases where the resolution of the question presented results in a remand where the lower court may well reach the same result for different reasons. Indeed, that was the exact posture in *Montgomery*, where the Court ultimately remanded because while "perhaps it c[ould] be established" that Montgomery was an "exceptional" offender for whom LWOP is constitutionally permissible, he "must be given the opportunity to show [his] crime did not reflect irreparable corruption." 136 S. Ct. at 736.

Respondent's remand argument also misunderstands the constitutional right at stake. As Respondent acknowledges, Petitioner is currently serving a de facto LWOP sentence even though no court has ever conducted an "individualized determination regarding the appropriateness of [Veal's] sentence pursuant to *Miller*." Pet. App. 2. This is not simply a procedural defect. *Montgomery* explains that the imposition of LWOP without proper consideration of the juvenile's age and attendant circumstances is a substantive violation of the Eighth Amendment. 136 S. Ct. at 735. Without this Court's intervention, that substantive violation will persist the rest of Petitioner's life, regardless of what the trial court might hypothetically determine if it conducted a *Miller* inquiry.

**B.** Respondent next suggests (Br. 14-15) that "[n]otwithstanding th[e] conflict of authority among lower courts," the Court should deny review of the question presented because it has done so before.

As an initial matter, the numerous petitions raising this issue serve only to underscore its significance and the necessity of this Court's review. More importantly, all of the prior petitions that Respondent cites had one or more serious vehicle problems not present here. Many sought review of decisions that rested on adequate and independent state-law grounds,[2] involved habeas issues clouding merits review,[3] or had waiver problems.[4] Several arose from cases where courts expressly acknowledged that the defendants could be parole-eligible during their lifetimes,[5] or involved serious questions whether they

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[2] *See* Br. in Opp. to Cert., *Bostic v. Dunbar*, No. 17-912, 2017 WL 8234659, at *19-22 (U.S. Mar. 15, 2018); *Zuber*, 152 A.3d at 206, 211.

[3] *See Bostic*, 2017 WL 8234659 at *19-22; *Budder*, 851 F.3d at 1060; *Starks v. Easterling*, 659 F. App'x 277, 280 (6th Cir. 2016); *Demirdjian v. Gipson*, 832 F.3d 1060, 1076 (9th Cir. 2016); *Bunch*, 685 F.3d at 550.

[4] *Walton*, 537 F. App'x at 444 n.4.

[5] *See Steilman v. Michael*, 407 P.3d 313, 320 (Mont. 2017); *Contreras v. Davis*, 716 F. App'x 160, 163 (4th Cir. 2017); *Zuber*, 152 A.3d at 213; *Sam*, 401 P.3d at 859-60; *Sen v. State*, 390 P.3d 769, 777 (Wyo. 2017); *Johnson v. Commonwealth*, 793 S.E.2d 326, 331 (Va. 2016); *State v. Garza*, 888 N.W.2d 526, 535-36 (Neb. 2016); *Henry*, 175 So. 3d at 680; *People v. Sanchez*, No. B230260, 2013 WL 3209690, at *6 (Cal. Ct. App. June 25, 2013).

could.[6] Others would have required resolution of entirely different and separate questions,[7] or sought review of interlocutory decisions remanding for *Miller*-compliant resentencing.[8] And in many, courts had considered some or all of the *Miller* factors while imposing an arguably de facto LWOP sentence—meaning that whether *Miller* applies beyond formal LWOP sentences was not the sole, dispositive issue.[9] The fact that no such vehicle problem exists here makes this a unique opportunity for the Court to resolve the intractable conflict.[10]

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[6] *See* Br. in Opp. to Cert. at 11-14, *Lucero v. Colorado*, No. 17-5677 (U.S. Nov. 20, 2017); *Vasquez*, 781 S.E.2d at 931 (Mims, J., concurring).

[7] *See* Br. in Opp. to Cert., *Willbanks v. Dep't of Corr.*, No. 17-165, 2017 WL 3701804, at *26-33 (U.S. Aug. 22, 2017).

[8] *See Zuber*, 152 A.3d at 216; *Riley*, 110 A.3d at 1217-18; *Henry*, 175 So. 3d at 680.

[9] *See Contreras*, 716 F. App'x at 163; *Sen*, 390 P.3d at 775; *Sam*, 401 P.3d at 860; *Ramos*, 387 P.3d at 656; *Ali*, 895 N.W.2d at 241; *Lucero*, Br. in Opp. at 16; Br. in Opp. to Cert. at 1, *Ohio v. Moore*, No. 16-1167 (U.S. May 26, 2017); *State v. Castaneda*, 889 N.W.2d 87, 95, 97 (Neb. 2017); *Garza*, 888 N.W.2d at 537.

[10] Petitioner is aware of five other pending petitions raising *Graham* and *Miller* issues. Three were distributed for the long conference without a call for a response (unlike this petition). *Kinkel v. Laney*, No. 18-5634 (U.S. filed Aug. 8, 2018); *Flowers v. Minnesota*, No. 17-9574 (U.S. filed June 22, 2018); *Russell v. Nebraska*, No. 17-9579 (U.S. filed June 22, 2018). One involves the distinct questions of what factfinding must accompany literal juvenile LWOP sentences and whether such sentences are categorically prohibited. *See Davis v. Mississippi*, No. 17-1343 (U.S. filed Mar. 23, 2018). The fourth is not yet fully briefed. *See Taylor v. Indiana*, No. 18-81 (U.S. filed July 16, 2018). Should the

Finally, the Court may also have denied prior petitions to allow further percolation following *Montgomery*. But now, two Terms later, the time has come to resolve the mature split, which has progressively deepened. Twelve courts have weighed in on the question presented since 2017, including five just this year. Five held that *Graham* and *Miller/Montgomery* apply to de facto juvenile LWOP sentences, while seven (including the decision below) held that they do not. *See supra* 3-5. Plainly there is no hope of the conflict dissipating without a ruling from this Court.

## III. The Decision Below Is Wrong.

Ultimately, Respondent's opposition reduces to the contention that the decision below is correct. Br. 21-28. Of course, seven state supreme courts and three federal courts of appeals disagree, and for good reason. As a practical matter, an aggregate sentence that provides for the possibility of parole only at a point beyond a juvenile's life expectancy is no different from a sentence that is formally denominated "life without parole." Such a lengthy aggregate "sentence 'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the juvenile convict], he will remain in prison for the rest of his days.'" *Reyes*, 63 N.E.3d at 888 (quoting *Graham*, 560 U.S. at 70). That is exactly the result that *Graham*, *Miller*, and *Montgomery* held unconstitutional. *See* Phillips Black Inc.

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Court grant certiorari in another case raising *Graham* and *Miller* issues, it should hold this case accordingly.

& Fair Punishment Project Br. 9; Juvenile Law Center, et al. Br. 7.

Regardless, there is no dispute that this question is in urgent need of resolution by this Court. It is "foundational … that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children," *Miller*, 567 U.S. at 474, yet in Georgia and numerous jurisdictions across the country that is precisely what occurs, so long as the life sentence is not formally designated "life without parole." Meanwhile, in a dozen other jurisdictions, juvenile offenders enjoy dramatically different Eighth Amendment protections for no reason other than their location. This chaos cannot continue. The Court should step in now, and this case presents an unusually strong vehicle for it to do so.

## CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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