No. 18-6782

IN THE
SUPREME COURT OF THE UNITED STATES

TIA MARIE-MITCHELL SKINNER,
Petitioner,

V.

STATE OF MICHIGAN
Respondent.

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

REPLY BRIEF FOR THE PETITIONER

Kimberly Thomas (P66643)
Counsel of Record
University of Michigan Juvenile Justice Clinic
701 S. State St.
Ann Arbor, MI 48109
(734) 647-4054; (734) 763-1193
kithomas@umich.edu; jjc-admin@umich.edu

Attorney for Petitioner

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Nothing in the Brief in Opposition rebuts that this petition for certiorari raises two important constitutional questions, one under the Sixth Amendment *Apprendi* line of cases and one under the Eighth Amendment and *Miller*, both unambiguously ruled on by a state court of last resort. *See* Resp. Br. 4.

First, the Michigan statute implementing *Miller*, Mich. Comp. L. section 769.25, preconditions juvenile life without parole sentences on constitutionally barred judicial fact finding. This Court's intervention is necessary to ensure that state *Miller*-statutes that govern this harshest possible punishment comply with Sixth and Fourteenth Amendment protections.

Second, the Michigan Supreme Court decision below is the latest in a series of state courts of last resort that have split on the meaning of the Eighth Amendment as stated in *Miller* and *Montgomery*. Pet. 17–18 (collecting cases); *Miller v. Alabama*, 567 U.S. 460 (2012); *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016). The Brief in Opposition does not and cannot dispute this deep split of authority on an important constitutional question. *See* Resp. Br. 22. The Brief in Opposition's assertion that this Eighth Amendment split of authority is one on which this Court should tolerate a "diversity of state approaches" is nonsensical on a question of federal constitutional law. Resp. Br. 22, 27.

Finally, this Reply briefly addresses the recent grant of *certiorari* in *Malvo v. Mathena*, 893 F.3d 265 (4th Cir. 2018), *cert. granted*, 87 U.S.L.W. 3062 (U.S. Mar. 18, 2019) (No. 18-217).

ARGUMENT

I. Michigan's *Miller* statute violates the Sixth Amendment and this case presents the best possible vehicle for deciding this question.

Respondent does not dispute that this Petition raises a question of Sixth and Fourteenth Amendment law that was squarely decided by a state court of last resort. *See* Resp. Br. 15–18.

Respondent urges avoidance, noting that "each state has approached *Miller*-compliant sentencing of juveniles differently," such that "it is logical to conclude" that the differences are tolerable. *See* Resp. Br. 17–18. As stated in the Petition, Pet. 12–14, the Respondent is correct that "[a]t this time" the state courts that have heard this issue are not split. Resp. Br. 16. The question cleanly presented by the case below is representative of several other state statutes;[1] this Court should address the compliance of these with *Apprendi*, especially in light of this Court's insistence on the jury right when a defendant faces the most extreme sentence possible. *Apprendi v. New Jersey*, 530 U.S. 466, 481-90 (2000); *see also Ring v. Arizona*, 536 U.S. 584, 601–03 (2002); *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016).

Further, the fact that some states implemented *Miller* differently is not a reason for tolerating an unconstitutional application here. Respondent defends the merits of the Michigan Supreme Court's decision on essentially two grounds in its Brief in Opposition. Resp. Br. 18–22. First, the Respondent contends that no judicial

[1] *See* Sarah French Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*, 56 B.C. L. Rev. 553, 586–92 (2015) (stating that statutes in Florida, Nebraska, North Carolina, Pennsylvania, South Dakota, Utah, and Washington also precondition juvenile life without parole sentences on judicial fact finding).

fact finding takes place in a Michigan *Miller* hearing. Resp. Br. 18–20. Second, Respondent maintains that even if Mich. Comp. L. section 769.25 requires judicial findings, these serve only to mitigate the available punishment. Resp. Br. 20–21.

As to the first issue: The Respondent maintains—in its Sixth Amendment section—that under section 769.25 "no 'fact' must be found." Resp. Br. 20 (referring, instead, to a "judicial sentencing determination" that "involves the evaluation of an array of *circumstances* and *considerations*") (emphasis added). This language quibbling is exactly the kind of argument that has been repeatedly rejected by this Court. It makes no Sixth Amendment difference whether the State and the statute choose to refer to the judge's determination as a "consideration," as a "procedural precondition," or as "Mary Jane": it is a finding "essential to imposition of the level of punishment" and therefore "must be found by the jury beyond a reasonable doubt." *Ring*, 536 U.S. at 610 (Scalia, J., concurring). Further, this Court has previously made clear that determining whether aggravating factors render an offender eligible for a heightened punishment "is a purely factual determination," and not "a judgment call." *See Kansas v. Carr*, 136 S. Ct. 633, 642 (2016); *compare* Resp. Br. 27–28 (acknowledging that to comply with *Miller*, Mich. Comp. L. section 769.25 "*requires . . . findings* as to *aggravating* and mitigating factors" before the life without parole penalty can be imposed) (emphasis added), *with* Resp. Br. 19, 26 (insisting that these findings, required to render the punishment available, are merely a "judicial consideration" and that "whether a juvenile is 'irreparably corrupt' is not a factual finding.").

Respondent's second defense on the merits is that this judicial finding serves only to mitigate available punishment. *See* Resp. Br. 18–19. Respondent contends that the life without parole sentence is available on the jury's verdict alone and *Miller* only requires the judge to consider mitigating factors. Resp. Br. 19–21. That is not what our statute states. Under Mich. Comp. L. section 769.25, even after a jury reaches a guilty verdict, a life without parole penalty is *only* available after: the prosecuting attorney files a motion "specify[ing] the grounds" for seeking a life without parole sentence, Mich. Comp. L. section 769.25(3); the juvenile "file[s] a response to the prosecution's motion," Mich. Comp. L. section 769.25(5); the sentencing court conducts an evidentiary hearing on the adversarial motion, Mich. Comp. L. section 769.25(6); and the judge specifies "the *aggravating* and mitigating" grounds for finding the juvenile's eligibility for the sentence, Mich. Comp. L. section 769.25(7) (emphasis added). The Respondent explains the purpose of the statute is to promote "judicial economy" by allowing *Miller* to not apply in every juvenile first-degree murder case, rather "only those where the prosecutor files a motion seeking the maximum available penalty." Resp. Br. 12. Plainly, the jury's verdict *alone* does not allow a life without parole sentence; instead a government motion with aggravating reasons, an evidentiary hearing on that motion, and judicial findings are first required. *See* Resp. Br. 12 (noting the section 769.25 process is a "precondition" to the punishment's availability). Those findings "alter[] the legally prescribed punishment so as to aggravate it," and therefore "must be submitted to the jury." *Alleyne* v. *United States*, 570 U.S. 99, 114–15 (2003).

Because Mich. Comp. L. section 769.25 mandates judicial fact finding as a "precondition" to the maximum penalty's availability, it violates the Sixth and Fourteenth Amendments. This issue is ripe for this Court's review.

II. Nothing in the Brief in Opposition contradicts the deep and clear division of state high court published authority over the Eighth Amendment question presented, the error of the Michigan Supreme Court below, or the need for this Court's review.

A. When state courts of last resort differ as to the meaning of what is constitutionally required under the Eighth Amendment, this Court's review is both warranted and crucially important.

This Court's review is warranted when state courts of last resort conflict with each other. *See, e.g.*, *McCoy v. Louisiana*, 138 S. Ct. 1500, 1507 (2018) ("We granted certiorari in view of a division of opinion among state courts of last resort . . . ."); *see also* S. Ct. R. 10(b). It is likewise warranted when a state court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(c). Review on the second question presented in this case is not only warranted but crucially important and nothing in the Brief in Opposition diminishes the need for resolution.

There is a conflict between state courts of last resort on what is constitutionally required under *Miller*'s Eighth Amendment requirements when sentencing a juvenile to life without the possibility of parole. Respondent's Brief in Opposition does not grapple with or address any of the other state high court cases that create this constitutional split. *See* Resp. Br. 22–24. Instead, Respondent attempts to avoid the split by classifying these decisions as a demonstrating a

"difference in approach among various states," Resp. Br. 27, and a "diversity of state approaches," Resp. Br. 22, as if the question presented was one of state interpretation of a state procedural rule instead of a federal constitutional question.

The unresolved split is undoubtedly a question of Eighth Amendment law. Seven state courts of last resort have held that the Eighth Amendment requires a narrowing finding, such as permanent incorrigibility or irreparable corruption, before a juvenile may constitutionally be sentenced to life without parole. Florida's highest court held that "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.'" *Landrum v. State*, 192 So. 3d 459, 468 (Fla. 2016). The Supreme Court of Georgia reversed a trial court's imposition of a life without parole sentence on a juvenile—made in the interval between *Miller* and *Montgomery*—because the sentencer had not made a "specific determination that [the defendant] is irreparably corrupt." *Veal v. State*, 784 S.E.2d 403, 410 (Ga. 2016), *cert. denied*, 139 S. Ct. 320 (2018). The Supreme Court of Illinois held 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." *People v. Holman*, 91 N.E.3d 849, 863 (Ill. 2017), *cert denied*, 138 S. Ct. 937 (2018). In its pre-*Montgomery* decision, the Supreme Court of Iowa held that the trial court can only

impose life without parole if it finds "the juvenile is irreparably corrupt, beyond rehabilitation, and thus unfit ever to reenter society." *State v. Seats*, 865 N.W.2d 545, 555–56 (Iowa 2015).[2] Oklahoma's court of last resort requires a finding that the juvenile is "irreparably corrupt and permanently incorrigible" before the youth can be sentenced to life without parole. *Luna v. State*, 387 P.3d 956, 958, 963 (Okla. Crim. App. 2016) (discussing *Miller* and *Montgomery* "as a framework for our federal constitutional analysis"). Pennsylvania's court of last resort stated that "[u]nder *Miller* and *Montgomery*, a sentencing court has no discretion to sentence a juvenile offender to life without parole unless it finds that the defendant is one of the 'rare' and 'uncommon' children possessing the above-stated characteristics, permitting its imposition." *Commonwealth v. Batts*, 163 A.3d 410, 433, 435 (Pa. 2017). In *Davis v. State*, the Supreme Court of Wyoming held that before a juvenile could be sentenced to life without parole, "*Miller* and *Montgomery* require a sentencing court to make a finding that . . . the juvenile offender's crime reflects irreparable corruption resulting in permanent incorrigibility, rather than transient immaturity." 415 P.3d 666, 695 (Wyo. 2018).

In *People v. Skinner*, the Michigan Supreme Court "h[e]ld that *Miller* does not require trial courts to make a finding of fact regarding a child's incorrigibility" before a juvenile can be sentenced to life without parole. Pet. App. 14a. In addition to the Michigan Supreme Court, four state courts of last resort have examined the Eighth Amendment compliance of their state sentencing provisions and held that,

[2] *See also State v. Sweet*, 879 N.W.2d 811, 833 (Iowa 2016) (banning life without parole for juveniles under the Iowa constitution).

as a federal constitutional matter, no additional finding of irreparable corruption or permanent incorrigibility is required in order to impose life without parole on a juvenile. Mississippi's highest court found that the Eighth Amendment did not "require trial courts to make a finding of fact regarding a child's incorrigibility." *Chandler v. State*, 242 So.3d 65, 68–69 (Miss. 2018), *cert. denied*, 139 S. Ct. 790 (2019). The Supreme Court of Arizona held that a failure of sentencing courts to "expressly determine whether the juvenile defendants' crimes reflected 'irreparable corruption'" was not unconstitutional and therefore did not entitle defendants to post-conviction relief. *State v. Valencia*, 386 P.3d 392, 393 (Ariz. 2016) *cert. denied*, 138 S. Ct. 467 (2017). Washington's court of last resort rejected the view that the Eighth Amendment required the sentencing court to "make an explicit finding that the juvenile's homicide offenses reflect irreparable corruption before imposing life without parole." *State v. Ramos*, 387 P.3d 650, 665 (Wash. 2017), *cert. denied*, 138 S. Ct. 467 (2017).[3] The Supreme Court of Idaho held that a finding of permanent incorrigibility is not required under the Eighth Amendment. *Johnson v. State*, 395 P.3d 1246, 1258 (Idaho 2017) *cert. denied*, 138 S. Ct. 470 (2017).

Respondent argues that this Court's recent denial of certiorari in *Beckman v. Florida* "confirmed" a "legitimate diversity of state approaches" to sentencing schemes. Resp. Br. 22–24; *Beckman v. Florida*, 230 So. 3d 77 (Fla. Dist. Ct. App. 2017), *cert. denied*, 2019 WL 659895 (U.S. Feb. 19, 2019) (No. 18-6185). Respondent errs by trying to conjure an inference from the *Beckman* certiorari denial. There is

[3] *But see State v. Bassett*, 429 P.3d 343 (Wash. 2018) (determining that the state constitution required a categorical ban on life without parole sentences for juveniles).

nothing new to learn when this Court denies certiorari, because "it is elementary, of course, that a denial of a petition for certiorari decides nothing." *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 411 (1973). "This Court has said again and again and again that [denial of certiorari] has no legal significance whatever bearing on the merits of the claim. The denial means that this Court has refused to take the case. It means nothing else." *Darr v. Burford*, 339 U.S. 200, 226 (1950). Additionally, Respondent inappropriately makes an Eighth Amendment inference about the *Beckman* denial, Resp. Br. 22–24, when the only question presented in that case was a *Sixth Amendment* question. Petition for Writ of Certiorari at i, *Beckman v. Florida*, 230 So. 3d 77 (Fla. Dist. Ct. App. 2017), *petition for cert. filed*, No. 18-6185 (U.S. Sept. 27, 2018).

The Court should grant this petition for certiorari because this case is an excellent vehicle to decide a matter of constitutional law. Moreover, because this is a state court decision, granting certiorari to resolve a conflict among the states as to what the Eighth Amendment requires would be particularly important. *See* Jeffrey S. Sutton & Brittany Jones, Essay, *The Certiorari Process and State Court Decisions*, 131 Harv. L. Rev. F. 167, 176–78 (2018) (arguing that the Supreme Court ought to pay more attention to state courts of last resort especially in criminal cases because "[a]ny justification for disparate treatment of two criminal defendants raising potentially identical claims under the same U.S. Constitution escapes us").

B. This Court recently granted certiorari in *Malvo v. Mathena*. The issues presented in this case are distinct from those in *Malvo* and this case remains an excellent vehicle to resolve the constitutional split identified in this Petition.

On March 18, 2019, this Court granted certiorari in *Malvo v. Mathena*, 893 F.3d 265 (4th Cir. 2018), *cert. granted*, 87 U.S.L.W. 3062 (U.S. Mar. 18, 2019) (No. 18-217). In that case, the question presented is:

> Did the Fourth Circuit err in concluding—in direct conflict with Virginia's highest court and other courts—that a decision of this Court (*Montgomery*) addressing whether a new constitutional rule announced in an earlier decision (*Miller*) applies retroactively on collateral review may properly be interpreted as modifying and substantively expanding the very rule whose retroactivity was in question?

Petition for Writ of Certiorari at i, *Malvo v. Mathena*, 893 F.3d 265 (4th Cir. 2018), *petition for cert. filed*, No. 18-217 (U.S. Aug. 16, 2018).

Unlike *Malvo*, the present case raises an Eighth Amendment issue decided by a state supreme court on a direct appeal of a post-*Miller* sentence. As such, it has none of the unique procedural issues present in *Malvo*. In *Malvo*, the case arises in federal court on a habeas petition seeking a new state sentencing hearing under *Miller* and *Montgomery*. The instant petition does not raise issues regarding federal habeas review, or the interplay between state and federal courts. Nor does it raise issues about *Teague* retroactivity. *See Teague v. Lane*, 489 U.S. 288 (1989).

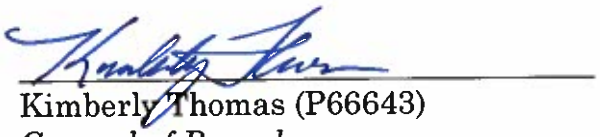
These differences highlight that *Skinner* remains an excellent vehicle for resolving the questions presented in the petition. This Court should grant the petition for a writ of certiorari. If the issues decided in *Malvo* overlap and this Court does not grant certiorari in this case, the Court should hold this case in abeyance

pending the *Malvo* decision and remand to the state court for consideration in light of *Malvo*.

CONCLUSION

The petition for a writ of certiorari should be granted for the reasons in the petition and this pleading or, in the alternative, this Court should grant, vacate, and reverse the lower court decision, or hold in abeyance pending *Malvo*.

Respectfully submitted,



Kimberly Thomas (P66643)
Counsel of Record
University of Michigan Law School
Juvenile Justice Clinic
701 S. State St.
Ann Arbor, MI 48109
734-763-1193
kithomas@umich.edu
jjc-admin@umich.edu