No. 18-98

IN THE
Supreme Court of the United States

JERRARD T. COOK,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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1. On the first question presented—whether the Eighth Amendment requires a finding of permanent incorrigibility—Mississippi does not dispute that there is a deep and intractable split of authority. In fact, Mississippi admits that very point in its Brief in Opposition in another pending case. *See* Br. in Opp'n, *Chandler v. Mississippi*, No. 18-203, at 9-10.

Mississippi instead asserts that the first question presented "was not properly raised on appeal" in the state courts. Br. in Opp'n 6. Alternatively, Mississippi asserts that the trial court's findings were sufficient to impose a life-without-parole sentence because the court stated that it did "not find any significant possibility of rehabilitation." Br. in Opp'n 9-13, Pet. App. 31a. Both assertions are incorrect.

a. Petitioner raised, and the Mississippi Court of Appeals squarely decided, the first question presented and thus it is preserved for this Court's review. Petitioner's brief in the state court of appeals expressly argued that his sentence must be reversed because this Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), "requires the sentencing authority to determine whether [a] juvenile is *irreparably corrupt*" before imposing a life-without-parole sentence. Petitioner's Miss. Ct. App. Br. at 17 (citing *Miller*, 567 U.S. at 479-480).[1] The court of appeals clearly addressed—and rejected—this argument when it held: "[I]n *Montgomery*, the [Supreme] Court specifically stated that *'Miller* did

[1] The Mississippi Court of Appeals orders and briefs in this case are available on the court's website through a general docket search at https://courts.ms.gov/ at case number 2016-CT-00687-COA.

not require trial courts to make a finding of fact regarding a child's incorrigibility' and that *'Miller* did not impose a formal factfinding requirement.'" Pet. App. 22a (quoting *Montgomery v. Louisiana*, 136 S. Ct. 718, 735 (2016)). Instead, the court held that *Miller* simply "identif[ied] some factors that the judge is supposed to consider in reaching a sentencing decision." Pet. App. 16a.[2]

Notably, the Mississippi Court of Appeals has acknowledged that it addressed and resolved the first question presented when it decided this case. In *Jones v. State*, a juvenile homicide offender argued that his life-without-parole sentence must be "reverse[d] because the sentencing judge did not make a specific 'finding' that he is irretrievably depraved, irreparably corrupt, or permanently incorrigible." 2017 WL 6387457, at *5 (Miss. Ct. App. Dec. 14, 2017). The

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[2] Petitioner also pressed the issue again in the court of appeals in his motion for rehearing, arguing:

> The essential question is whether the trial court determined that Mr. Cook "is irreparably corrupt or permanently incorrigible, as necessary to put him in the narrow class of juvenile murderers for whom an LWOP sentence is proportional under the Eighth Amendment as interpreted in *Miller* as refined in *Montgomery*." *Veal v. State*, 784 S.E. 2d 403, 412 (Ga. 2016). Because the circuit court did not conclude that Mr. Cook is "the rare juvenile" for whom "rehabilitation is *impossible*," [*Montgomery*, 136 S. Ct. at 733] (emphasis added), this Court should grant rehearing and vacate his life-without-parole sentence.

Petitioner's Miss. Ct. App. Mot. for Rehearing at 2. Moreover, as Mississippi acknowledges, Petitioner raised the issue for a third time in the state courts through the petition for *certiorari* he filed in the Mississippi Supreme Court. *See* Br. in Opp'n at 7. *See also* Petitioner's Miss. Sup. Ct. Pet. 9-10.

court of appeals rejected the argument based on its prior holding in this case:

> As this Court explained in *Cook*, "[i]n *Montgomery*, the Court specifically stated that '*Miller* did not require trial courts to make a finding of fact regard a child's incorrigibility' and that '*Miller* did not impose a formal factfinding requirement.'" *Cook*, 2017 WL 342877, at *8 (¶ 39) (quoting *Montgomery*, 136 S. Ct. at 735). The sentencing judge must consider the factors discussed in *Miller*, and the judge must "apply [those] factors in a non-arbitrary fashion." *Id*. at *6 (¶ 27). However, the sentencing judge is not required to make any specific "finding of fact."

Id. (footnote omitted).[3]

b. Mississippi also asserts that the trial court's findings were sufficient to impose a life-without-parole sentence because the court stated that it did "not find any significant possibility of rehabilitation." Br. in Opp'n 9-13, Pet. App. 31a. But that statement clearly falls short of a finding that Cook is "the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is *impossible* and life without parole is justified." *Montgomery,* 136 S. Ct. at 733 (emphasis added). Indeed, even Mississippi appears to recognize as much. *See* Br. in Opp'n at 12 (stating that "[t]he court found no evidence supporting Cook's rehabilitation," but also acknowledging that

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[3] *See also Wharton v. State*, 2018 WL 4708220, at *3 (Miss. Ct. App. Oct. 2, 2018) (citing *Cook v. State*, 242 So.3d 865, 876 (Miss. Ct. App. 2017) for the proposition that "in *Montgomery*, the Court specifically stated that '*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility'").

the court "did not find that Cook's crime reflected irreparable corruption or permanent incorrigibility"); *id*. at 13 (acknowledging that "[t]he court did not make an express finding that Cook was irreparably corrupt and unfit to reenter society").

In short, this case squarely presents the issue that divides the lower courts—whether a finding of permanent incorrigibility is required—and thus it provides an excellent vehicle to decide that issue.

2. Petitioner recognizes, however, that because the state supreme court denied review in this case but addressed the required finding question in a reasoned decision in *Chandler v. State*, 242 So.3d 65 (Miss. 2018), *Chandler* may provide an even better vehicle to decide the issue. The Court may therefore wish to hold this case pending its disposition of the petition for *certiorari* in *Chandler*.

The Court may also wish to consider holding the petition pending the disposition of *Mathena v. Malvo*, No. 18-217. In that case, the Fourth Circuit held that "a sentencing judge … violates *Miller*'s rule any time it imposes a discretionary life-without-parole sentence on a juvenile homicide offender without first concluding that the offender's 'crimes reflect permanent incorrigibility.'" *Malvo v. Mathena*, 893 F.3d 265, 274 (4th Cir. 2018) (quoting *Montgomery*, 136 S. Ct. at 734). *See also id*. at 275 (holding that "Malvo's sentencing proceedings in the Chesapeake City Circuit Court did not satisfy the requirements of the Eighth Amendment as articulated in *Miller* and *Montgomery*" because "the Chesapeake City jury was never charged with finding whether Malvo's crimes reflected irreparable corruption or permanent incorrigibility, a determination that is now a

prerequisite to imposing a life-without-parole sentence on a juvenile homicide offender").

3. Mississippi's arguments against granting review on the second question presented—whether the Eighth Amendment categorically prohibits sentencing juveniles to life without the possibility of parole—are unpersuasive.

First, Respondent incorrectly asserts that this Court's jurisprudence permits juvenile life without parole sentences. See Br. in Opp'n 14-15. In fact, *Miller* explicitly did "not consider" whether the Eighth Amendment categorically bars such sentences, 567 U.S. at 479, nor did the Court have occasion to revisit that question in *Montgomery*, 136 S. Ct. at 735.

Mississippi does not, and could not, dispute that a quickly growing majority of jurisdictions in the United States have eliminated, or nearly eliminated, juvenile life without parole. *See* Pet. 26-28. Indeed, since our petition was filed in this Court, Washington State became the twenty-third state to categorically ban this sentencing practice. As the Washington Supreme Court explained in banning the sentence categorically under its state constitution, "the direction of change in this country is unmistakably and steadily moving toward abandoning the practice of putting child offenders in prison for their entire lives." *State v. Bassett*, 428 P.3d 343, 352 (Wash. 2018). All told, juvenile life-without-parole sentences are now extinct, or nearly so, in 35 jurisdictions. *See* Pet. 26-28.

Mississippi hypothesizes that the decline in life without parole sentences for juveniles "is likely a Court-imposed trend." Br. in Opp'n 16. However, Respondent neither supports that assertion nor explains how a trend that consists largely of state

legislative changes, *see* Pet. 26-27, could be "Court-imposed," Br. in Opp'n 16. Because Mississippi appears to concede the trend and offer nothing more than speculation as to its source, now is an appropriate time for the Court to determine whether the Eighth Amendment, interpreted in light of evolving standards of decency, prohibits life without parole sentences for juveniles.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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