NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

TONY SPARKS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for A Writ of Certiorari
To the Fifth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit erred in concluding that the U.S. Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), which was made retroactive in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), does not extend to sentences imposed upon juvenile offenders that are less than LWOP?

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PETITION FOR WRIT OF CERTIORARI

Tony Sparks, an inmate currently incarcerated at USP – Canaan in Waymart, Pennsylvania, by and through his attorney of record David K. Sergi, respectfully petitions this Court for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals.

OPINION BELOW

On October 24, 2019, the Fifth Circuit Court of Appeals affirmed Petitioner's sentence entered in the United States District Court for the Western District of Texas, Waco Division, (*Sparks v. United States*, No. 2018 U.S. Dist. LEXIS 46485 (W.D. Tex. 2018)), reported as *United States v. Sparks*, 941 F.3d 748 (5th Cir. 2019). Both judgments are attached and included within the Appendix.

STATEMENT OF JURISDICTION

The Fifth Circuit Court of Appeals entered judgment on October 24, 2019. This Court's jurisdiction is invoked under 28 U.S.C. §1254.

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 OF THE CASE

Factual Background

On June 21, 1999, Christopher Vialva, Christopher Lewis, Brandon Bernard, and Appellant abducted Todd and Stacie Bagley from a convenience store in Killeen, under the guise of needing a ride, which the Bagleys offered to provide. Once they were in the car, they proceeded to take Todd's wallet, Stacie's purse and the Bagleys' jewelry. Vialva demanded the pin numbers for the Bagleys' ATM cards, and then forced the Bagleys into the trunk of their car.

After locking the Bagleys in the trunk, Vialva drove around for several hours, attempting to obtain money from various ATMs. The group purchased food with money they had taken from the Bagleys and attempted to pawn Stacie's wedding ring. While locked in the trunk, the Bagleys spoke with Lewis and Appellant through the rear panel of the car.

At some point, Appellant told Vialva he no longer wanted to go through with the crime, and that he wanted to be taken home. After dropping off Appellant at his home, Bernard and Brown set off to purchase fuel to burn the Bagleys' car.

Vialva, Bernard, Lewis and Brown drove to an isolated spot on the Fort Hood military reservation. After Vialva parked the Bagleys' car on top of a little hill, Brown and Bernard proceeded to pour lighter fluid throughout the interior of the car. At this point, Vialva shot both of the Bagleys in the head and Bernard set the car on fire.

Local law enforcement officers, informed of a fire, arrived at the scene while the assailants were trying to push the car out of the ditch, which had become stuck when they attempted to leave. When the bodies were discovered in the trunk of the Bagleys' burning car, the four were arrested. Two weeks later, Appellant was arrested at his home.

Vialva and Bernard were subsequently tried and convicted of first-degree murder and sentenced to death. Lewis and Brown pleaded guilty to second-degree murder and were both sentenced to 248 months imprisonment. On April 17, 2000, Appellant was convicted upon his guilty plea to aiding and abetting a carjacking resulting in the death of two individuals. On March 22, 2001, Appellant was sentenced to life in prison without the possibility of parole.

Appellate Proceedings

Appellant's sentence was affirmed on direct appeal by this Court in 2001. On May 17, 2011, Appellant filed a §2255 petition based on the U.S. Supreme Court's decision in *Graham v. Florida*,[1] which was ultimately denied in 2013.

On November 18, 2016, and with authorization from the Fifth Circuit, Appellant filed an unopposed §2255 petition based on the Supreme Court's decision in *Miller v. Alabama*,[2] On January 17, 2017, Appellant and the Government filed a joint motion requesting resentencing in light of *Miller*, which the district court granted. Appellant's resentencing hearing took place in Austin before Judge Yeakel, on five days throughout February 2018. Judge Yeakel announced his decision in open court on March 19, 2018. Appellant was sentenced to 420 months imprisonment, with credit for time in custody beginning August 2, 1999.

REASONS FOR GRANTING THE WRIT

There is a divergence of opinion among the Circuit Courts of Appeal regarding whether or not the *Miller* rule and the *Miller* factors are to be applied to juvenile sentences of less than life without parole. Contrary to other circuits, the Fourth Circuit in *Malvo v. Mathena*[3] recently

[1] 560 U.S. 48 (2010).
[2] 567 U.S. 460 (2012).
[3] 893 F.3d 265 (4th Cir. 2018).

held that *Montgomery* expanded *Miller* to cover discretionary LWOP sentences. This Court has granted certiorari in that case.[4]

This Case is The Proper Vehicle For The Supreme Court to Answer The Question of Whether *Miller* Is Limited to LWOP Juvenile Sentences

Over the last decade, this Court has shaped the law as it pertains to juveniles and various forms of life without parole sentences. It seems only logical that the Court would seize this opportunity to unify the standards among the states and the federal circuits for evaluating such claims under *Miller* and the cases to follow, namely, *Montgomery.*

The posture of this case, and the Court's recent grant of certiorari in *Mathena v. Malvo,*[5] implicate the concerns for comity and federalism inherent in federal habeas review of a state and federal court decisions. This petition therefore affords the Court a unique opportunity to rule on the question of whether *Miller* extends to juveniles with non-LWOP sentences. The Fifth Circuit Court of Appeals answered this question in the negative; it is for this reason, Petitioner now seeks certiorari with this Court.

U.S. Supreme Court Juvenile Sentencing Jurisprudence

It has been uniform and constant in the federal judicial tradition "for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."[6] Underlying this tradition is the principle that "the punishment should fit the offender and not merely the crime."[7] "For the determination of sentences, justice generally requires consideration

[4] 139 S. Ct. 1317 (2019) (mem.).
[5] 139 S. Ct. 1317 (2019) (mem.).
[6] *Koon v. United States*, 518 U.S. 81, 113 (1996).
[7] *Williams v. New York*, 337 U.S. 241, 246 (1949); see also, *Pennsylvania ex rel. Sullivan v. Ashe,* 302 U.S. 51, 55 (1937).

of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender."[8]

Federal court opinions subsequent to *Booker*[9] make clear that although a sentencing court must "give respectful consideration to the Guidelines, Booker permits the court to tailor the sentence in light of other statutory concerns as well."[10] Accordingly, although the "Guidelines should be the starting point and the initial benchmark," district courts may impose sentences within statutory limits based on appropriate consideration of all of the factors listed in § 3553(a), subject to appellate review for "reasonableness."[11] This sentencing framework applies both at a defendant's initial sentencing and at any subsequent resentencing after a sentence has been set aside on appeal.[12]

In the years after Petitioner's sentencing, this Court issued a series of decisions holding that the Eighth Amendment restricts States' ability to impose the most severe sentences on juvenile offenders. In 2005, in *Roper v. Simmons*,[13] the Court held that juveniles cannot constitutionally be sentenced to death. The Court noted "[t]hree general differences between juveniles ... and adults": first, a "'lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults'"; second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures"; and, third, "the character of a juvenile is not as well formed as that of an adult."[14] While the Court recognized that juveniles can commit heinous crimes, "[t]he reality that

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[8] *Pennsylvania ex rel. Sullivan,* at 55.
[9] *United States v. Booker*, 543 U.S. 220 (2005).
[10] *Kimbrough v. United States*, 552 U.S. 85, 101 (2007).
[11] *United States v. Gall,* 552 U.S. 38, 49-51 (2007).
[12] See, 18 U.S.C. § 3742(g) ("A district court to which a case is remanded ... shall resentence a defendant in accordance with section 3553"); see also, *Dillon v. United States*, 560 U.S. 817 (2010).
[13] 543 U.S. 551.
[14] *Id*. at 569-570.

juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."[15]

In 2010, in *Graham v. Florida*,[16] the Court held that juveniles cannot constitutionally be sentenced to life without parole for non-homicide offenses. The Court reiterated that "[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults."[17] In 2012, *Miller v. Alabama*,[18] held that the Eighth Amendment also restricts States' ability to impose life without parole on juvenile homicide offenders. The Court drew on "two strands of precedent."[19] First, it relied on eases like *Roper* and *Graham* establishing that "children are constitutionally different from adults for purposes of sentencing" and that the "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes."[20] Second, it relied on cases requiring that sentencers consider mitigating factors-including youth-before imposing the death penalty.[21] Together, those decisions led the Court to conclude that sentencers must "tak[e] account of an offender's age and the wealth of characteristics and circumstances attendant to it" before imposing life without parole on juveniles.[22]

The Court therefore held that "the Eighth Amendment forbids a sentencing scheme," like the ones before it, "that mandates life in prison without possibility of parole for juvenile offenders."[23] "By making youth (and all that accompanies it) irrelevant to imposition of that

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[15] *Id*. at 570 .
[16] 560 U.S. 48.
[17] *Id*. at 68 ; see also *id*. at 91-92 (Roberts, C.J., concurring in the judgment) (noting "the general presumption of diminished culpability" for "juvenile offenders").
[18] 567 U.S. 460.
[19] *Id*. at 470.
[20] *Id*. at 471-472.
[21] *Id*. at 475-476.
[22] *Id*. at 476 .
[23] *Miller*, 567 U.S. at 479.

harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment."[24] The Court stated that although it was not banning life-without-parole sentences for juveniles outright, "we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."[25] Accordingly, "we require [sentencers] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[26]

In 2016, in *Montgomery v. Louisiana*,[27] the Court held that *Miller* 's rule applies retroactively to cases on collateral review. Under this Court's retroactivity precedent, a new rule is retroactive if, as relevant here, it is a "substantive" constitutional rule that "'prohibit[s] a certain category of punishment for a class of defendants because of their status or offense.'"[28] While procedural rules "are designed to enhance the accuracy of a conviction or sentence by regulating 'the manner of determining the defendant's culpability,'" substantive rules "set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose."

Under *Miller*, the factors to be considered by the sentencing court prior to any determination that life without parole is an appropriate sentence for a juvenile offender, include the following: (1) the juvenile offender's "chronological age and its hallmark features --- among them, immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) "the family and home environment that surrounds him from which he cannot usually extricate himself, no matter how brutal or dysfunction"; (3) "the circumstances of the homicide offense, including the

[24] *Id.*
[25] *Id.*
[26] *Id.* at 480.
[27] 136 S.Ct. 718.
[28] *Id.* at 729.

extent of his participation in the conduct and the way that familial and peer pressures may have affected him"; (4) whether he "might have been charged and convicted of a lesser offense if not for incompetency associated with youth, for example, his inability to deal with police officers or prosecutors or his incapacity to assist his own attorneys"; and (5) the possibility of the offender's rehabilitation.[29] It is the case that a juvenile life without parole sentence will be imposed only with the "rarest of offenders…whose crimes reflect permanent incorrigibility."[30]

Poor decision-making, impulsivity, and lack of control, are hallmarks of youth. Cases such as *Roper*,[31] *Miller*, and *Graham*, and the plethora of cases to follow recognize these very facts. A certain degree of planning does not does not automatically preclude conduct from being the product of impulsivity or rashness, the type of which Miller recognized. Or as *Miller* describes it, "…immaturity, impetuosity, and failure to appreciate risks and consequences."[32] This is immutable fact of youth and is not negated by the cognitive ability to "plan" a crime. Juveniles by their very nature possess these characteristics.

A Circuit Split Exists Concerning the Full Implications of Miller After the Fourth Circuit's Decision in *Malvo*

The Fifth Circuit Court of Appeals based its decision in Petitioner's case, in large part, on its contention that "…Miller has no relevance to sentences less than LWOP."[33] In *Sparks* the Fifth Circuit continued, "[T]his means that sentences *with* the possibility of parole or early release do not implicate *Miller*.[34] However, this far from clear among various circuits and state courts. In that very paragraph, the *Sparks* opinion cites as support the case of *Bowling v. Dir., Va. Dep't of*

[29] *Miller*, 567 U.S. at 477-78.
[30] See, *Montgomery*, 136 S.Ct. at 734-35.
[31] *Roper v. Simmons,* 543 U.S. 551 (2005).
[32] *Miller*, 567 U.S. 477-78.
[33] *Sparks*, 941 F.3d at 754. (citing *United States v. Walton*, 537 F. App'x 430, 437 (5th Cir. 2013)(per curiam).
[34] *Id.* at 754.

Corr.,[35] that while affirming the district court's denial of relief on the grounds that the appellant actually had the possibility of parole, it made clear:

> "Indeed, our sister circuits, deciding cases in the wake of *Miller*, have not yet agreed on whether, before sentencing a juvenile to a de facto life without parole sentence, sentencing courts must "take into account how children are different. Some circuit courts have applied juvenile-specific Eighth Amendment protections to sentences that amount to the practical equivalent of life without parole."[36]

This only serves to show the variation and differing methods of analysis in the context of juvenile sentencing in the wake of *Miller* and *Montgomery*, the Fourth Circuit Court of Appeals citing cases from the Third, Sixth, Seventh, Eighth, and Ninth Circuits, to make its point.[37]

In *Goins v. Smith*,[38] the Fourth Circuit considered whether an aggregate term of years or consecutive sentence would violate the dictates of *Miller.* The court concluded that it did not. However, two things are significant about the decision. First, it was decided before the U.S. Supreme Court's decision in *Montgomery.* As such, its utility is limited by that fact. Secondly, once again it is acknowledged that much confusion exists among the various courts, this time concerning the applicability and extent of this Court's holding in *Graham.*[39] The *Goins* opinion continued by stating:

> This conclusion is further supported by the fact that courts across the country are split over whether *Graham* bars a court from sentencing a juvenile nonhomicide offender to consecutive, fixed terms resulting in an aggregate sentence that exceeds the defendant's life expectancy. Some courts have held that such a sentence is a de facto life without parole sentence and therefore violates the spirit, if not the letter, of *Graham. See, e.g., People v. J.I.A.*, 196 Cal. App. 4th 393, 127 Cal. Rptr.3d 141, 149 (2011); Other courts, however, have rejected the de facto life sentence argument, holding that *Graham* only applies to juvenile nonhomicide

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[35] 920 F.3d 192 (4th Cir. 2019).
[36] *Id.* at 198-99.
[37] *United States v. Grant*, 887 F.3d 131, 144 (3d Cir. 2018); *Bunch v. Smith*, 685 F.3d 546, 550 (6th Cir. 2012); *McKinley v. Butler*, 809 F.3d 908, 913-14 (7th Cir. 2016); *United States v. Jefferson*, 816 F.3d 1016, 1019 (8th Cir. 2016 ; *Moore v. Biter*, 725 F.3d 1184, 1191-92 (9th Cir. 2013).
[38] 556 F. App'x 434 (6th Cir. 2014).
[39] *Id.* at 439.

> offenders expressly sentenced to "life without parole." *See, e.g., Henry v. State*, 82 So.3d 1084, 1089 (Fla. Ct. App. 2012); *State v. Kasic*, 228 Ariz. 228, 265 P.3d 410, 415 (App. 2011). This split demonstrates that Bunch's expansive reading of *Graham* is not clearly established. Perhaps the Supreme Court, or another federal court on direct review, will decide that very lengthy, consecutive, fixed-term sentences for juvenile nonhomicide offenders violate the Eighth Amendment. But until the Supreme Court rules to that effect, Bunch's sentence does not violate clearly established federal law.[40]

The *Sparks* opinion also cited *United States v. Morgan*,[41] and *United States v. Lopez*[42] as further evidence Miller does not implicate these cases as they do not involve LWOP sentences. However, what they do is show a significant degree of confusion and split among the various courts concerning the scope and applicability of *Miller*, particularly in light of *Montgomery.*

What is of particular significance is this Court's decision to grant certiorari in *Mathena v. Malvo*. In 2004, a Virginia jury convicted Malvo of capital murder for crimes he committed in 2002, when he was 17 years old. Malvo was sentenced to two terms of life imprisonment without parole. In another case, Malvo pleaded guilty to one count of capital murder and one count of attempted capital murder. He was sentenced to two additional terms of life imprisonment without parole.

Under Virginia law in 2004, a defendant convicted of capital murder could be sentenced to either death or life imprisonment without parole if the defendant was at least 16 years old at the time of his or her crime. In the next ten years, this Court would issue decisions in *Roper, Graham, Miller,* and *Montgomery.*

After the U.S. Supreme Court decided *Miller*, Malvo filed applications for writs of habeas corpus in the United States District Court for the Eastern District of Virginia. The district court

[40] *Id.* at 439.
[41] 727 F. App'x 994 (11th Cir. 2018).
[42] 860 F.3d 201 (4th Cir. 2017).

dismissed both applications, ruling *Miller* was not "retroactively applicable to cases on collateral review." Of course, this Court in 2016 ruled exactly the opposite in *Montgomery* holding that "*Miller* announced a substantive rule that is retroactive in cases on collateral review."

On May 26, 2017, the district court granted Malvo's applications and vacated his four sentences, remanding the sentences to the Chesapeake City Circuit Court and the Spotsylvania County Circuit Court for sentencing. On appeal, the Fourth Circuit affirmed the district court's ruling to vacate the four terms of life imprisonment and remand the cases for resentencing. The State would later appeal, giving rise to this Court's grant of certiorari in *Mathena v. Malvo.*

In Petitioner's case, The district court erred in its application of the *Miller* factors. The court's sentencing determination failed to place sufficient weight in the several of the factors, but specifically, the last factor requiring consideration of Petitioner's potential for rehabilitation. The court clearly erred when it placed greater weight on the *Miller* factors dealing with factual conclusions pertaining to events and the Appellant in 1999, as opposed to sentencing Appellant as "he currently stood before the court on the day of sentencing."[43] The Fifth Circuit erred when it affirm the judgment and sentence of the district court after it failed to give proper consideration to the various factors as mandated by *Miller.*

If the events since Petitioner's sentencing in early 2018 have shown anything, it is that there is a source of confusion among the state courts and federal circuit courts of appeal regarding the applicability of *Miller* to discretionary and non-LWOP sentencing of juveniles. Sound reasoning leads only to the conclusion that this is why the Court granted certiorari in *Mathena v. Malvo.* Countless similarly situated impacted individuals eagerly await this Court to impart guidance on its inferior courts, so that justice may be done.

[43] *Pepper v. United States,* 562 U.S. 476, 492 (2011).

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, David K. Sergi attorney for the petitioner, do swear or declare that on the 22nd day of January 2020, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Solicitor General
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I declare under penalty of perjury that the foregoing is true and correct.

_/s/ David K. Sergi_____
DAVID K. SERGI

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains **3,333** words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

/s/ David K. Sergi
David K. Sergi
SERGI & ASSOCIATES, P.C.
Dated: January 22, 2020