

**In the
Supreme Court of the United States**

MICHELE BUCKNER, WARDEN,

Petitioner,

v.

ROBERT W. ALLEN,

Respondent.

**On Petition for a Writ of Certiorari
to the Missouri Court of Appeals**

BRIEF IN OPPOSITION

CRAIG A. JOHNSTON
Assistant State Public
Defender
1000 West Nifong
Building 7, Suite 1000
Columbia, MO 65203

STUART BANNER
Counsel of Record
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-8506
banner@law.ucla.edu

QUESTION PRESENTED

Whether the Missouri Court of Appeals erred in determining that respondent, who was sentenced long before *Miller v. Alabama*, 567 U.S. 460 (2012), should be resentenced on one of three counts to comply with *Miller*.

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STATEMENT

In the 1980s, respondent Robert Allen was convicted of two counts of murder and one count of armed criminal action, for an incident that took place when he was 16 years old. Pet. App. 1a. He received three consecutive life sentences. *Id.* at 1a-2a. The sentence on the first murder count specified that he would be ineligible for parole for 50 years. *Id.* at 1a. At the time, this was a mandatory sentence; by statute, the sentencer was not allowed to take his youth into account. *Id.* at 2a. His convictions and sentences were affirmed on direct appeal. *State v. Allen*, 710 S.W.2d 912 (Mo. Ct. App. 1986).

Many years later, this Court held that the Eighth Amendment prohibits mandatory life without parole for juvenile homicide offenders, *Miller v. Alabama*, 567 U.S. 460 (2012), and that this principle applies retroactively on state collateral review, *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). Allen promptly sought state habeas relief on the ground that his sentence on the first murder count—mandatory life without parole eligibility for 50 years—was inconsistent with the Eighth Amendment.

The Missouri Court of Appeals granted habeas relief. *Id.* at 1a-11a. The court observed that Allen was not challenging his sentences on the second and third counts, nor the fact that his sentences were imposed consecutively. *Id.* at 7a. He merely challenged his sentence on the first count. *Id.* The court noted that “Petitioner has an actual LWOP 50 sentence that is separate and distinct from any of his additional sentences.” *Id.*

The Court of Appeals further observed that when Allen was sentenced, “the LWOP 50 sentence was mandatory.” *Id.* at 8a. At that time, “there was no room for consideration” of whether this sentence was “just and appropriate considering his youth, maturity, and the other *Miller* factors.” *Id.* at 8a (internal quotation marks omitted).

The Court of Appeals accordingly remanded the case to the trial court for resentencing on the first count in accordance with *Miller*. *Id.* at 9a-10a. The Missouri Supreme Court denied review. *Id.* at 17a.

Resentencing has not yet taken place.

REASONS FOR DENYING THE PETITION

Certiorari should be denied for three reasons. The Court lacks jurisdiction. Even if jurisdiction were present, this case would be a terrible vehicle for addressing the question presented. And there is no lower court conflict on the issue that is present in this case.

I. The Court lacks jurisdiction.

The Court lacks jurisdiction. There is not yet a final judgment from the state courts, because Allen has not yet been sentenced.

The Court has jurisdiction only over “[f]inal judgments” in cases arising from state courts. 28 U.S.C. § 1257(a). “The final judgment against a defendant in a criminal proceeding is the sentence.” Stephen M. Shapiro et al., *Supreme Court Practice* 172 (10th ed. 2013). See, e.g., *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 54 (1989) (“[F]inality in the context of a criminal prosecution is defined by a judgment of conviction and the imposition of a sentence.”); *Ber-*

man v. United States, 302 U.S. 211, 212 (1937) (“Final judgment in a criminal case means sentence. The sentence is the judgment.”). When Allen is resentenced, the judgment of the state courts will be final. At that time, should Missouri once again seek certiorari, the Court would have jurisdiction.

The wisdom of this statutory command is particularly evident here. At resentencing, Allen may very well receive the same sentence he received originally. If so, there would be no reason for the Court to hear this case.

II. This case would be a terrible vehicle.

Even if jurisdiction were present, this case would be a terrible vehicle for addressing the question presented.

To begin with, this case does not even implicate three of the four lower court conflicts alleged in the certiorari petition. *See* Pet. 19-27. This case does not involve any question about whether the Eighth Amendment forbids discretionary sentences of life without parole for juveniles, *id.* at 19-21, because Robert Allen received a *mandatory* sentence, in a proceeding at which the sentencer was barred from considering his youth.¹ Nor does this case involve any question about whether consecutive term-of-years sentences should be aggregated when analyzing a sentence under *Miller*, *id.* at 22-24, because Allen sought habeas relief only with respect to a single

¹ Because Allen received a mandatory sentence, this case is not affected by *Mathena v. Malvo*, No. 18-217 (argument set for Oct. 16, 2019), which involves whether *Miller* and *Montgomery* apply to discretionary sentences as well as mandatory sentences.

sentence on a single count. He did not challenge his other two life sentences, which remain in effect. Nor does this case involve any question of calculating the age at which parole eligibility must begin, *id.* at 24-27, because the court below did not rest its decision on any such consideration. A decision in this case could not resolve any of these asserted lower court conflicts.

Moreover, a decision in this case could not even affect any other Missouri defendants. Allen was sentenced under a statute that was repealed *in 1984*. Mo. Rev. Stat. § 565.008 (1978), repealed by L. 1983, S.B. No. 276, § 1; *see State ex rel. Carr v. Wallace*, 527 S.W.3d 55, 61 n.6 (2017) (describing the repeal). When *Miller* was decided there were only a few people left in Missouri who had been sentenced as juveniles under the statute. We believe that they have all now been resentenced in proceedings that comply with *Miller*. (Missouri agrees, Pet. 29, that “Mr. Allen is the last” inmate in the state to be resentenced following *Miller*.) There are no defendants left in the state who could be affected by a decision in this case, other than Allen himself.

As for Allen himself, he is still serving two consecutive life sentences on counts that are unaffected by the decision below. He has already been in prison for 35 years. Nothing that will happen at resentencing could possibly change any of that. If the question presented in the certiorari petition is important, it will arise in many more cases, and it will matter more in virtually all of them.

Missouri errs in claiming, Pet. 29, that the Court will have no opportunity to address the question presented in future cases. If Missouri is correct that the

lower courts are divided, defendants will surely continue to raise the issue in cases arising on direct appeal from states that take Missouri's preferred view.

III. There is no lower court conflict.

Of the four lower court conflicts alleged in the certiorari petition, only one is actually implicated by the facts of this case—whether the holding of *Miller* applies to a mandatory prison sentence on a single count under which the prisoner will not be eligible for parole during his expected lifetime. Pet. 21-22. On this issue, however, the lower court decisions cited in the petition do not conflict. None of the cited cases holds that *Miller* is inapplicable in this situation.

The certiorari petition errs in citing four cases that ostensibly found *Miller* inapplicable to a single mandatory sentence. *See id.* at 22. Neither *United States v. Walton*, 537 F. Appx. 430 (5th Cir. 2013), nor *United States v. Jefferson*, 816 F.3d 1016 (8th Cir. 2016), involved a *mandatory* sentence. Rather, in each case the court determined that the sentencer appropriately considered the offender's youth and individual characteristics, as required by *Miller*. *Walton*, 537 F. Appx. at 433, 437; *Jefferson*, 816 F.3d at 1020. Neither *Vasquez v. Commonwealth*, 781 S.E.2d 920 (Va. 2016), nor *Proctor v. Kelley*, 562 S.W.3d 837 (Ark. 2018), involved a *single* sentence. Rather, each case involved multiple sentences on multiple counts that aggregated to a long term of parole ineligibility, and both courts relied on that fact to uphold the sentences. *Vasquez*, 781 S.E.2d at 926; *Proctor*, 562 S.W.3d at 841.

Missouri has not cited any case that conflicts with the decision below. This case presents no occasion for the Court to resolve any lower court conflicts.

The absence of a conflict on this issue is hardly surprising, because the decision below is clearly correct. A state cannot evade *Miller* simply by substituting “mandatory X years without parole” for “mandatory life without parole,” where X is a number so large that it amounts to life as a practical matter.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CRAIG A. JOHNSTON
Assistant State Public
Defender
1000 West Nifong
Building 7, Suite 1000
Columbia, MO 65203

STUART BANNER
Counsel of Record
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-8506
banner@law.ucla.edu