No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JERMONTAE MOSS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Jermontae Moss was sentenced to life without parole for a felony murder that occurred when he was seventeen years old. Though Jermontae was a child, the judge refused to consider that the violence that permeated his family's home could have mitigated his role in the offense. The judge stated, "[I]nstead of being a mitigating factor in sentencing, an argument could be made that this is further indication that Defendant is now irretrievably corrupt." Appendix F at 8. On appeal, the Supreme Court of Georgia affirmed the sentence of life without parole.

State's Trial Exhibit No. 66 (showing Jermontae on the night of his arrest)

The Eighth Amendment requires courts to consider "the mitigating qualities of youth" prior to imposing life without parole on a child. *See Miller v. Alabama*, 567 U.S. 460, 476 (2012); *Jones v. Mississippi*, 141 S. Ct. 1307 (2021). As this Court has explained, a child's youth can be understood only in the context of his "background and mental and emotional development." *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982). The question presented in this case is:

> Does a court violate *Miller* when it refuses to consider childhood trauma as mitigating when sentencing a child to life without parole?

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PETITION FOR WRIT OF CERTIORARI

Jermontae Moss respectfully petitions this Court for a writ of certiorari to review the opinion of the Supreme Court of Georgia, which affirmed his life without parole sentence even though the sentencing judge refused to consider Jermontae's childhood trauma as mitigating and instead found it aggravating.

PROCEEDINGS BELOW

The order of the Supreme Court of Georgia granting Jermontae Moss's motion to stay the remittitur pending this Petition for Certiorari is attached as Appendix A. The decision of the Supreme Court of Georgia affirming the Georgia Superior Court's order sentencing Jermontae to life without parole is reported at *Moss v. State*, 856 S.E.2d 280 (Ga. 2021), and is attached as Appendix B. The transcript from the original sentencing hearing is attached as Appendix C. The Motion for New Trial Transcript is attached as Appendix D. The resentencing transcript and the order of the Houston County Superior Court imposing life without parole are attached as Appendices E and F, respectively.

JURISDICTION

The Supreme Court of Georgia affirmed the lower court's sentence of life without parole, *see* Appendix B, but stayed the remittitur pending the filing of a petition for writ of certiorari, *see* Appendix A. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment prohibits cruel and unusual punishment. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

Consistent with the growing trend, a Black child was sentenced to life without parole in Georgia for nonintentional murder, and that sentence was upheld. Of all children serving life without parole in Georgia, 91% are, like Jermontae, children of color.[1]

Violent fights between his parents defined Jermontae Moss's childhood. Appendix D at 58-59. At only five years old, Jermontae watched as his father repeatedly bludgeoned his mother with a kitchen knife and "almost killed" her. Appendix D at 58-59. After witnessing his father try to kill his mother, "little Jermontae . . . [j]ust lost it." Appendix D at 59. His mother observed that Jermontae "was never hisself again after that." Appendix D at 59. He became quiet, jittery, withdrawn, nervous. Appendix D at 59.

[1] *See* Georgia Department of Corrections, "Find an Offender," http://www.dcor.stage.ga.us/GDC/Offender/Query (last accessed August 11, 2021).

Notwithstanding his traumatic upbringing, Jermontae persevered. In elementary school, he did "pretty good" academically, his mother recalled. Appendix D at 59. Eventually, he even got his G.E.D. Appendix C at 425.

As he grew older, he was a loving son and a particularly doting uncle to his niece. Appendix D at 60. Jermontae's sister had a child when she was very young, and Jermontae "took to her as a father figure." Appendix D at 60. Jermontae would do "[e]verything that a father would do . . . [b]athe her, clothe her, comfort her, get up at night with her, change her diapers, feed her, comfort her any kind of way he could." Appendix D at 60. According to his mother, Jermontae "was closer . . . to my granddaughter than the mom was." Appendix D at 60.

This caretaking role was not unusual. Rather, Jermontae interacted with kids often, and he was "very gentle with them and very good with them." Appendix D at 60. Jermontae even aspired to join the United States Navy. Appendix C at 426.

Still, his mother knew Jermontae's trauma: "[A]ny child that would witness something as violent as what he witnessed, I'm sure it would bother them." Appendix D at 61. She tried counseling. Appendix D at 60. But without the appropriate tools to cope, Jermontae began to act out. Plagued by poverty, overwhelmed by familial responsibilities, and unable to process repeated childhood trauma, the trend continued. Five months after his seventeenth birthday, on September 22, 2011, Jermontae was arrested and charged with felony murder. *See Moss v. State*, 856 S.E.2d 280, 282 n.1 (Ga. 2021). This was not an intentional

murder, nor even a malice murder, but instead felony murder, in which the death occurred during the commission of a felony. *Id.*

At his original sentencing hearing, Jermontae publicly apologized. "I would like to ask for mercy, and I would like to apologize to the family for the life that was taken away from them." Appendix C at 426. The sentencing judge discounted his apology, remarking that age seventeen was *too late* to turn things around. "I have a difficult time in looking at what you say about turning your life around. I think it's a little bit late to be turning it around." Appendix C at 438. The judge then sentenced Jermontae to life without parole.

Approximately seven years after the first sentencing, Jermontae was granted a new sentencing hearing pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012). This resentencing was heard by a new judge, who had not presided over the trial or original sentencing. Appendix E at 6. At that hearing, resentencing counsel described Jermontae's conduct during the intervening years. Jermontae had been raped by a corrections officer, Appendix D at 75, a fact for which the resentencing judge faulted *Jermontae*, Appendix E at 7. Jermontae's behavior otherwise was model. As resentencing counsel summarized, "[W]hile we heard a lot about who Jermontae was when he was 16 and 17 . . . I haven't heard anything about what's happened in these past seven years. Has he been violent in prison? Has he been hurting people? Are there incidents that they can point to? No." Appendix D at 66. The resentencing judge nonetheless sentenced Jermontae to life without parole. Appendices E, F.

With his words, the resentencing judge regurgitated the rule from *Miller* that children "are different, and . . . those differences counsel against irrevocably sentencing them to a lifetime in prison." Appendix F at 4 (quoting *Miller*, 567 U.S. at 480). With his actions, however, the judge paid mere lip service to this Court's commands, concluding that evidence that by definition is mitigating instead constituted aggravation against Jermontae. Appendix F at 8. In his resentencing order, the judge found as follows:

> It very well may be true that Defendant had a rough upbringing and was permanently scarred by observing the violent act committed by his own father against his own mother. However, instead of being a mitigating factor in sentencing, an argument could be made that this is further indication that Defendant is now irretrievably corrupt. While the Court would not like to think in these terms, *Miller* and *Montgomery* require this consideration. Has defendant's upbringing, the disadvantages he experienced, the violence he observed, the negative influences he has had in his life, the searing of his conscience, have all these things carried him beyond restoration?

Appendix F at 8.

As the order demonstrates, the sentencing judge did not just fail to consider Jermontae's childhood experiences and trauma as mitigating, but further cited *Miller* and *Montgomery* as *requiring* him to conclude that a brutal, disadvantaged, and "permanently scarr[ing]" upbringing left Jermontae "beyond restoration." Stated differently, childhood trauma that was beyond Jermontae's control automatically rendered him—in the judge's eyes—someone beyond redemption who must die in prison. Thus, the sentencing court turned on its head the principle that "criminal procedure laws that fail to take defendants' youthfulness into account at

all would be flawed," *Miller*, 567 U.S. at 473-74 (quoting *Graham v. Florida*, 560 U.S. 48, 76 (2010)), and instead used Jermontae's traumatic youth against him, in an attempt to *justify* life without parole.

The Supreme Court of Georgia affirmed the judgment of the lower court. *Moss*, 856 S.E.2d at 289. In so doing, it squarely rejected Jermontae's Eighth Amendment challenge, holding that the "express determinations contained in the trial court's order" did not violate *Miller*. *Id.* at 288. But those "express determinations" included the finding that Jermontae's "upbringing, the disadvantages he experienced, the violence he observed, [and] the negative influences he has had in his life" justified a sentence of life without parole. Appendix F at 8.

No Georgia court has ever meaningfully considered the mitigating force of Jermontae's traumatic upbringing. This Petition follows.

REASONS FOR GRANTING THE WRIT

"[J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing." *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982). This Court has developed standards to protect children from the fates that adults face for equivalent crimes. *See Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012); *Montgomery v. Louisiana*, 577 U.S. 190 (2016).

A sentencer that imposes life without parole on a child while disregarding the child's "mental and emotional development" during his youth effectively renders the sentence a mandatory one. This Court cautioned in *Miller* that "removing youth from the balance . . . subject[s] a juvenile to the same life-without-parole sentence applicable to an adult." *Miller*, 567 U.S. at 474. Reiterating the "foundational principle" underlying *Roper* and *Graham*, that "imposition of a State's most severe penalties on [children] cannot proceed as though they were not children," the Court made consideration of youth a requirement at sentencing. *Id.* By refusing to consider Jermontae's traumatic youth as mitigating, and instead using it against him in aggravation, the sentencing court violated the most basic principles underlying this Court's child sentencing jurisprudence. And state and national statistics reveal that lower courts—particularly Georgia's courts—have repeatedly discounted the mitigating factor of youth in disproportionately ordering Black children to die in prison.

I. The Sentencing Court Violated *Miller* by Failing to Consider Youthful Trauma in Mitigation When Sentencing Jermontae Moss to Life Without Parole.

Georgia deprived Jermontae of the most basic of constitutional protections enshrined in *Miller v. Alabama*. The state courts disregarded *Miller*'s mandate that children convicted of homicide are entitled to consideration of their youth as a mitigating factor. *Miller*, 567 U.S. at 483 ("[Y]outh matters for purposes of meting out the law's most serious punishments."). In so doing, the state courts failed to

ensure that meaningful consideration was given to Jermontae's childhood experiences before sentencing him to life without parole.

The resentencing judge's reasoning strongly resembled that of the lower court in *Eddings*, which this Court reversed. *Eddings*, 455 U.S. at 115. In *Eddings*, the Court invalidated the death sentence for a child because the judge did not consider evidence of his neglectful and violent family background and his mental and emotional development. *Id.* This Court had "no doubt" that given the child's youth, such trauma was "relevant *mitigating* evidence," and refused to countenance a sentencing proceeding at which the evidence was discarded, and the child effectively treated as an adult. *Id.* (emphasis added).

Here, too, evidence of the domestic violence and tumultuous family relationships Jermontae experienced during his youth are particularly relevant mitigating evidence. Youth "is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Id.* To cast those realities of youth aside, let alone use them against Jermontae as the court did in this case, is unconstitutional. *See* Appendices E, F.

In using Jermontae's traumatic youth against him, the resentencing judge misunderstood the principles underlying *Miller* that made mandatory life without parole sentences unconstitutional for children. *Miller*, 567 U.S. at 476 ("In light of *Graham*'s reasoning, these decisions too show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders. Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's

age and the wealth of characteristics and circumstances attendant to it."). A court cannot consider youth as mitigating if it views childhood trauma as aggravating. Nor can a court meaningfully weigh the mitigating characteristics and circumstances attendant to a child's youth if it believes childhood trauma to be aggravating. Thus, a court that treats childhood trauma as aggravating and as justifying life without parole, as was done here, violates *Miller* and its progeny.

In *Jones v. Mississippi*, this Court presumed that "if the sentencer has discretion to consider the defendant's youth, the sentencer necessarily *will* consider the defendant's youth, especially if defense counsel advances an argument based on the defendant's youth." *Jones v. Mississippi*, 141 S. Ct. 1307, 1319 (2021). The Court thought it "all but impossible for a sentencer to avoid considering that *mitigating* factor." *Id.* (emphasis added). But that is precisely what the judge did in this case, by his own admission, opining that Jermontae's "rough upbringing . . . permanently scarred" him and, "instead of being a mitigating factor in sentencing, an argument could be made that this is further indication that [he] is now irretrievably corrupt." Appendix F at 8. Contrary to this Court's expectation in *Jones*, the sentencing court felt that the "disadvantages he experienced, the violence he observed, [and] the negative influences he has had in his life" left Jermontae permanently incorrigible. Appendix F at 8.

This Court's existing jurisprudence should have prevented the unconstitutional result in Jermontae's case. Childhood trauma is a mitigating part of youth. Yet here, the judge found youthful trauma that was beyond Jermontae's

control to be aggravating, and thus used the critical mitigation of youth against him, in direct contravention of *Eddings* and *Miller* and the notion that youth matters in mitigation. The judgment below is therefore ripe for summary reversal.

II. Without this Court's Intervention, Georgia Courts Will Continue to Misunderstand and Misapply *Miller*, With the Result that Children of Color Disproportionately Are Sentenced to Life Without Parole.

Jermontae's case exemplifies why this Court's intervention is necessary to prevent more children from being unconstitutionally sentenced to life without parole. The Court in *Jones* cited *Miller*'s discretionary sentencing procedure as the reason for "numerous sentences less than life without parole for defendants who otherwise would have received mandatory life-without-parole sentences." *Jones*, 141 S. Ct. at 1322. However, the Campaign for Fair Sentencing of Youth ("CFSY") reports that "the proportion of Black children sentenced to JLWOP has increased in new cases post-*Miller*."[2] CFSY points to "uneven implementation of *Miller and Montgomery*" as the reason for the disproportionate impact of life without parole sentencing on Black children.[3] Broad discretionary power and ambiguity in *Miller*'s authoritativeness enable judges to disparately view Black children as more irredeemable than children of other races, and to sentence them to the harshest punishments available.[4] To prevent sentencers from undermining *Miller* and

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[2] The Campaign for Fair Sentencing of Youth, "National Trends in Sentencing Children to Life Without Parole," (February 2021), *available at* https://cfsy.org/wp-content/uploads/CFSY-National-Trends-Fact-Sheet.pdf.

[3] *Id.*

[4] The Campaign for Fair Sentencing of Youth, "*Montgomery v. Louisiana* Anniversary," (2020), *available at* https://cfsy.org/wp-content/uploads/Montgomery-Anniversary-1.24.pdf. (recognizing "a high risk that resentencings to life without parole will be arbitrary, based more on the jurisdiction

systematically imposing *de facto* mandatory life without parole sentences, this Court should summarily reverse.[5]

Increasing Racial Disparities. In Georgia, 91% of the children who are serving life without parole are non-white.[6] While Georgia is not the only state with these racial disparities, it reports higher disparities than elsewhere. According to the Sentencing Project, "Racial disparities plague the imposition of JLWOP sentences. Sixty-two percent of people serving JLWOP, among those for whom racial data are available, are African American."[7] Nationally, "the rate for [B]lack youth sentenced to life without parole exceeds that of white youth in every state with juvenile life without parole, and the per capita rate of African American youths serving life-without-parole sentences is 6.6 per 10,000 youths, almost four times the national average of 1.8, and 10 times the per capita rate of 0.6 for white youth."[8]

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and the idiosyncrasies of individual judges than on whether the individual is capable of positive change").

[5] "[T]he high court's acknowledgment that adolescent brain development is relevant to sentence severity has largely gone unheeded by state courts." Brad Taylor, *Return to Rehabilitation: Illinois' Evolving Juvenile Sentencing Practices in Light of* Miller v. Alabama, 43 S. Ill. U. L.J. 403, 416 (2019).

[6] Georgia Department of Corrections, "Find an Offender," http://www.dcor.stage.ga.us/GDC/Offender/Query (last accessed August 11, 2021).

[7] Josh Rovner, "Juvenile Life Without Parole: An Overview," The Sentencing Project (May 24, 2021), *available at* https://www.sentencingproject.org/publications/juvenile-life-without-parole/. In addition, "While 23% of juvenile arrests for murder involve an African American suspected of killing a white person, 42% of JLWOP sentences are for an African American convicted of this crime. White juvenile offenders with African American victims are only about half as likely (3.6%) to receive a JLWOP sentence as their proportion of arrests for killing an African American (6.4%)." *Id.*

[8] Michael L. Perlin & Alison J. Lynch, *"Some Mother's Child Has Gone Astray": Neuroscientific Approaches to a Therapeutic Jurisprudence Model of Juvenile Sentencing*, 59 Fam. Ct. Rev. 478, 481 (July 2021).

If Georgia's courts continue to misapply *Miller* like the courts below in this case did, these racial disparities will continue to exacerbate. Dissenting in *Jones*, Justice Sotomayor warned of this truth:

> The harm from these sentences will not fall equally. The racial disparities in juvenile LWOP are stark: 70 percent of all youths sentenced to LWOP are children of color . . . The trend has worsened since *Miller v. Alabama*: 72 percent of children sentenced to LWOP after *Miller* were Black, compared to 61 percent of children sentenced before *Miller*.

Jones, 141 S. Ct. at 1334 n.2 (internal citations omitted).

Increasing Life Without Parole Sentences for Children. In Georgia, courts have not slowed in delivering children life without parole sentences.[9] Indeed, 86% of the children serving life without parole were sentenced *after Miller* was decided.[10] And only one of the children sentenced after *Miller* has been a white child.[11] If these sentencing patterns continue, the consequences will continue to disproportionately and most harshly impact Black children.

Decreasing Support for Life Without Parole for Children Nationwide. State and federal legislation evidences the country's movement away from sentencing children to life without parole. While only five states banned life without parole sentences for children when *Miller* was decided in 2012, thirty-one

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[9] "Some states—including Georgia, Louisiana, Ohio, and Michigan—have continued to sentence children to life without parole in new cases at a rate that far outpaces the rest of the country, and in contravention of the constitutional mandate established in *Miller* and *Montgomery* that the sentence be uncommon." The Campaign for Fair Sentencing of Youth, "*Montgomery v. Louisiana* Anniversary," (2020), *available at* https://cfsy.org/wp-content/uploads/Montgomery-Anniversary-1.24.pdf.

[10] Georgia Department of Corrections, "Find an Offender," http://www.dcor.stage.ga.us/GDC/Offender/Query (last accessed August 11, 2021).

[11] *Id.*

states and the District of Columbia today have abolished life without parole for children or have no children serving life without parole sentences.[12] In *Graham*, this Court "prohibited life-without-parole terms for juveniles committing nonhomicide offenses even though 39 jurisdictions *permitted* that sentence." *Miller*, 567 U.S. at 483 (emphasis added). The national consensus against sentencing children to death in prison underscores the necessity that life without parole sentences be imposed reliably in the minority of states that maintain the practice.[13]

In addition, the *Roper* Court found it "significant" that five additional states had abandoned the death penalty for children in the fifteen intervening years since it previously addressed the constitutionality of the practice. *Roper*, 543 U.S. at 565. Twenty states plus the District of Columbia—over four times the change in *Roper*—have abolished life without parole for children in just the nine years since *Miller*.[14] "It is not so much the number of these States that is significant, but the consistency of the direction of change." *Atkins v. Virginia*, 536 U.S. 304, 315 (2002).[15] In light

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[12] The Campaign for Fair Sentencing of Youth, "States that Ban Life Without Parole for Children," (2021), *available at* https://cfsy.org/media-resources/states-that-ban-juvenile-life-without-parole/.

[13] In *Atkins v. Virginia*, 536 U.S. 304, 313 (2002), the Court held that sentencing a person with intellectual disability to death violated the Eighth Amendment, observing that thirty states outlawed the practice. *See Roper*, 543 U.S. at 564. A few years later, the Court banned the death penalty for children, observing that thirty States expressly rejected it or banned it in practice. *Roper*, 543 U.S. at 552, 564. Thus, a greater number of states have abandoned life without parole for children by law or practice than the number of states this Court cited in justifying the abolishment of the death penalty for children or those with intellectual disability.

[14] The Campaign for Fair Sentencing of Youth, "National Trends in Sentencing Children to Life Without Parole," (February 2021), *available at* https://cfsy.org/wp-content/uploads/CFSY-National-Trends-Fact-Sheet.pdf.; *see also* Equal Justice Initiative, "Maryland Bans Life Without Parole for Children," (Apr. 12, 2021), *available at* https://eji.org/news/maryland-bans-life-without-parole-for-children/.

[15] Federal legislation corroborates the trend. The First Step Implementation Act of 2021 is a bill with *bipartisan* sponsorship in the Senate that would authorize judges to reconsider the sentences of

of the significant trend and clear consensus against sentencing children to die in prison, summary reversal in this case is appropriate where the judge failed to meaningfully consider the mitigating impact of childhood trauma while imposing a sentence that the majority of states reject.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari or, in the alternative, summarily reverse Jermontae Moss's life without parole sentence.

Respectfully submitted,

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people serving lengthy federal sentences for crimes they committed while under the age of eighteen. First Step Implementation Act of 2021, S. 1014, 117th Cong. (2021).

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with Supreme Court Rule 29, on August 12, 2021, I served a copy of the foregoing and the appendices via first-class mail, postage prepaid, upon counsel for the Respondent:

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