

In the Supreme Court of the United States

RAFAEL SANTOS, PETITIONER,

v.

ILLINOIS, RESPONDENT.

**On Petition for a Writ of Certiorari
to the Illinois Appellate Court**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Eighth Amendment categorically bars sentencing a juvenile homicide offender to life without parole, or to a term of years that is the functional equivalent of life without parole.

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INTRODUCTION

The Eighth Amendment bars mandatory sentences of life without the possibility of parole for juveniles convicted of homicide and requires that the sentencer “have the opportunity to consider mitigating circumstances before imposing” life imprisonment. *Miller v. Alabama*, 567 U.S. 460, 489 (2012). *Miller*’s individualized sentencing requirement functions as a substantive guarantee that only those juvenile offenders whose crimes reflect irreparable corruption receive life imprisonment. *Montgomery v. Louisiana*, 136 S. Ct. 718, 734–36 (2016).

The sole question presented is whether the Eighth Amendment categorically bars sentencing a juvenile homicide offender to life without parole, or to a term of years that is the functional equivalent of life without parole. However, the petition discusses three additional issues related to *Miller*: (1) whether *Miller*’s individualized sentencing requirement applies to a term of years that is functionally equivalent to life without parole, *i.e.*, a *de facto* life-without-parole sentence; (2) whether a sentencer must consider, or make factual findings on, the factors outlined in *Miller* before sentencing a juvenile homicide offender to life imprisonment;¹ and (3) whether the state court properly applied *Miller* when sentencing petitioner. Pet. 16–28.

¹ As the petition does, lower courts often describe this latter issue as asking whether *Miller* applies to discretionary as well as mandatory life-without-parole sentences.

This Court lacks appellate jurisdiction for two independent reasons. First, petitioner never raised the question presented to the state courts. Second, the Illinois Appellate Court's holding that petitioner waived any Eighth Amendment claim is a state-law ground of decision that independently and adequately supports the court's judgment.

Lack of jurisdiction aside, review is unwarranted because lower courts are not split on the question presented, Sup. Ct. R. 10(b), and just last year, this Court reiterated that life imprisonment is constitutionally permitted for some juvenile homicide offenders, *Montgomery*, 136 S. Ct. at 734. Moreover, petitioner's additional *Miller*-related arguments are not fairly included in the question presented. Even if they were, this Court's review would be unwarranted because (1) the Illinois Supreme Court recently interpreted *Miller* in a manner that affords petitioner further state-court review of his sentence, see *People v. Holman*, __ N.E.3d __, 2017 IL 120655 (Sept. 21, 2017); *People v. Reyes*, 63 N.E.3d 884 (Ill. 2016), and (2) petitioner, with the assistance of counsel, is pursuing his *Miller*-related arguments in state postconviction proceedings.

JURISDICTION

Contrary to petitioner's assertion, Pet. 1, and as discussed below in the Reasons for Denying the Petition, this Court lacks jurisdiction under 28 U.S.C. § 1257(a).

STATEMENT

I. Trial and sentencing

1. In 2007, when he was 17 years old, petitioner shot and killed Isidro Duran, who was selling ice cream from a pushcart. Pet. App. D at 2. After a man and his two-year-old daughter bought ice cream, petitioner and his co-offenders, Michael Jennings and Justin Dismuke, approached Duran. *Ibid.* Petitioner showed his gun and demanded money. *Ibid.* As Duran turned to run away, petitioner shot him in the back four times, then fled. *Id.* at 2-3. When questioned by police shortly after the murder, petitioner initially denied being present at the scene, then claimed that Jennings was the shooter, and finally admitted that he shot Duran in the back as Duran ran away. *Id.* at 2.

2. Petitioner testified at his 2012 trial that Dismuke shot Duran three or four times. *Ibid.* Rejecting that testimony, the jury convicted petitioner of first degree murder and further found that he personally discharged a firearm that proximately caused Duran's death. *Ibid.*; Pet. 12.

3. Petitioner faced a sentencing range of 20 to 60 years, see 730 Ill. Comp. Stat. 5/5-8-1(a)(1)(a) (2006), plus a mandatory enhancement of 25 years to life for personally discharging the firearm that proximately caused Duran's death, 730 Ill. Comp. Stat. 5/5-8-1(a)(1)(d)(iii) (2006).² Before imposing a sentence, the trial court

² Illinois has eliminated parole and defendants convicted of first degree murder are ineligible to earn good-conduct credit to reduce their sentences. 730 Ill. Comp. Stat. 5/3-6-3(a)(2)(i) (2006).

held a hearing, at which the court was required to consider, among other things, a written presentence investigation report and other “evidence and information offered by the parties in aggravation and mitigation.” 730 Ill. Comp. Stat. 5/5-3-1, 5-4-1(a) (2006); see 730 Ill. Comp. Stat. 5/5-3-2(a)(1), (6) (2006) (presentence report must include “defendant’s history of delinquency or criminality, physical and mental history and condition, family situation and background, economic status, education, occupation and personal habits,” as well as “any other matters that the investigatory officer deems relevant or the court directs to be included”); see also *People v. Ward*, 499 N.E.2d 422, 426 (Ill. 1986) (sentencing court must consider every relevant aspect of defendant’s life).

Petitioner’s presentence report discussed the statutory factors, including his age, juvenile delinquency history, troubled childhood and family background, and behavioral, educational, and mental health history. Presentence Rpt. At petitioner’s sentencing hearing, the court received testimony from (1) Duran’s family members concerning the impact of Duran’s death on them; (2) petitioner’s sister regarding his unstable family and living situation; and (3) a pastor describing petitioner’s participation in bible studies during pre-trial custody. R2037–2073. The court also received petitioner’s certificates of achievement for various prison programs. Def. Sent. Exhs. In allocution, petitioner apologized to the victim’s family, emphasized that he was “a young man” at the time of the crime, described how he had changed since the crime, and stated his goals for the future.

R2073–2078. The prosecutor argued in favor of a minimum sentence of 85 years based on the seriousness and callousness of petitioner’s crime, his juvenile delinquency history, and his failure to comply with a prior juvenile parole order.

R2078–2089. Petitioner’s counsel argued for the minimum sentence, emphasizing that petitioner was young and immature at the time of the crime and had grown since then. R2089–2093.

Before imposing sentence, the trial court reviewed the presentence report and considered the evidence presented at trial and sentencing, arguments of counsel, aggravating and mitigating factors, and petitioner’s statement in allocution.

R2093–2094. The court took into account petitioner’s age and rehabilitative potential, observing that although petitioner had made some efforts toward rehabilitation, he had yet to take responsibility for the severity of his actions.

R2093–2098. Balancing petitioner’s efforts at rehabilitation against other factors—including the “inexplicable” and dangerous nature of petitioner’s crime, his untruthful trial testimony, and juvenile delinquency history—the court sentenced petitioner to 45 years for the murder, plus the mandatory minimum 25-year firearm enhancement, for a total of 70 years in prison. *Ibid.*

The court denied petitioner’s ensuing motion to reconsider sentence, explaining:

I have considered and reconsidered the sentence and reconsidered it. It was a heavy sentence. I am so sorry I felt obligated to impose it. I did take into heavy serious consideration what appears to be the rehabilitative potential of [petitioner] in fashioning the sentence,

unfortunately. I wish I could grant the motion, but I can't. The sentence is an appropriate sentence.

R2113.

II. Direct appeal

4. Petitioner appealed his sentence to the Illinois Appellate Court. In its statement of “Issues Presented for Review,” petitioner’s opening brief listed two issues: (1) whether his *de facto* life-without-parole sentence violates due process and *Miller*; and (2) whether his sentence was “an abuse of discretion” because the court failed to consider his young age at the time of the crime, his nonviolent criminal history, and his rehabilitative potential. Pet. App. Br. 1.³ But the argument section discussed only the second issue. *Id.* at 13; Pet. App. D at 5–6. Accordingly, the State expressly limited its argument to that issue. State’s App. Br. 5 & n.1. Petitioner’s reply brief clarified that he was raising only the state-law abuse-of-discretion issue. Pet. App. Reply Br. 1–7 & n.1; Pet. App. D at 5–6. The Illinois Appellate Court affirmed petitioner’s sentence, holding that the trial court had not abused its discretion in sentencing petitioner. Pet. App. A at 2.

Petitioner’s counsel then filed a petition for leave to appeal (PLA) to the Illinois Supreme Court, arguing that *Miller* applies to *de facto* life sentences and

³ Respondent has chosen not to file a voluminous appendix including the state court briefs and petitions referenced in this statement. Should the Court want copies of any or all of these documents, respondent’s counsel will provide them in a supplemental appendix.

that the trial court failed to apply *Miller* when sentencing him. First PLA at 2. In May 2015, the Illinois Supreme Court denied the PLA. Pet. App. B.

5. In September 2015, the Illinois Supreme Court granted a discretionary appeal in a different case, *People v. Reyes*, to address whether *Miller* applies to a mandatory term of years that amounts to life in prison without the possibility of parole. *People v. Reyes*, 39 N.E.3d 1009 (Ill. 2015) (Table). In July 2016, after discretionary review had been granted in *Reyes*, petitioner filed *pro se* a motion for leave to file a motion to reconsider the denial of his PLA. While that motion was pending, in September 2016, agreeing with the State’s concession that *Miller* “applies to a mandatory term of years that ‘indisputably amount[s]’ to life imprisonment without the possibility of parole for a single offense or for offenses committed in a single course of conduct,” the Illinois Supreme Court held that “sentencing a juvenile offender to a mandatory term of years that is the functional equivalent of life without the possibility of parole” violates the Eighth Amendment. *Reyes*, 63 N.E.3d at 887–888. In November 2016, petitioner’s counsel sought leave to file a motion to reconsider the denial of petitioner’s PLA in light of the decision in *Reyes*. Pet. 14-15. The next month, the Illinois Supreme Court granted petitioner’s motions, recalled the mandate, vacated the Illinois Appellate Court’s judgment, and directed the appellate court to reconsider in light of *Reyes*. Pet. App. C.

6. Upon reconsideration, the Illinois Appellate Court again affirmed petitioner’s sentence. Pet. App. D at 5–6. First, the court held that petitioner had

explicitly “waived any claim that his sentence violates the [E]ighth [A]mendment” because his opening brief made no argument on that issue and his reply brief confirmed that he was not raising it. *Ibid.* Second, even had petitioner not expressly waived the claim, relief was unwarranted because petitioner’s “quite arguably” *de facto* life-without-parole sentence was not mandatory and thus was not barred by *Miller* or *Reyes*. *Ibid.*

Petitioner sought rehearing, arguing that (1) he had not waived his Eighth Amendment claim because his abuse-of-discretion argument had “incorporated discussion of and reliance on” this Court’s Eighth Amendment precedent; and (2) his sentence was unconstitutional under *Miller* and *Montgomery*. Pet. 15. The Illinois Appellate Court denied rehearing. Pet. App. E. On May 24, 2017, the Illinois Supreme Court denied petitioner’s ensuing PLA. Pet. App. F. Petitioner’s certiorari petition seeks review of the Illinois Appellate Court’s decision.

III. Postconviction proceedings

7. In March 2016, before the Illinois Supreme Court directed the Illinois Appellate Court to reconsider in light of *Reyes*, petitioner filed a *pro se* postconviction petition in the state trial court, see 725 Ill. Comp. Stat. 5/122-1, *et seq.*, asserting, in relevant part, that his sentence violates the Eighth

Amendment. Postconviction Pet. at 2, 5–10. The trial court appointed counsel, and the petition remains pending in that court.⁴

REASONS FOR DENYING THE PETITION

I. This Court lacks appellate jurisdiction.

For two independent reasons, this Court lacks appellate jurisdiction. First, petitioner never asserted below, as he does in his question presented, that the Eighth Amendment bars life without parole or a term of years that is the functional equivalent of life without parole for a juvenile homicide offender. Rather, petitioner’s state-court pleadings argued only that (1) his 70-year sentence is functionally equivalent to life without parole, see, *e.g.*, Second PLA at 14–15; Reh’g Pet. 5; and (2) the trial court failed to comply with *Miller* when it imposed that term. See, *e.g.*, Second PLA at 3–4 (asking Illinois Supreme Court to resolve whether the “*Miller/Montgomery/Reyes* line of cases appl[ies] to discretionary *de facto* life sentences, to make a more firm statement as to what constitutes a *de facto* life sentence, and to resolve [the state appellate court] conflict . . . regarding the application of the *Miller/Reyes* doctrine to cases in which a discretionary *de facto* life sentence was imposed”); *id.* at 17–18 (faulting trial court for not properly applying

⁴ At a status hearing on October 19, 2017, petitioner’s attorney informed the state trial court that he is reviewing the case and needs additional time to file an amended postconviction petition. The next status hearing is scheduled for December 7, 2017. The docket for the Circuit Court of Winnebago County, Illinois, is available at <<http://www.cc.co.winnebago.il.us/access-court-records/>>.

Miller and *Montgomery*, and not “finding that [he] was ‘irreparably corrupt’” before sentencing him); Reh’g Pet. 4–5 (same).

Whether the trial court properly applied *Miller* presents an issue that is factually, legally, and analytically distinct from the question petitioner presents here: whether the Eighth Amendment bars a court from imposing *de facto* life without parole on a juvenile homicide offender. See *Graham v. Florida*, 560 U.S. 48, 59–62 (2010) (discussing categorical ban analysis). Indeed, because petitioner did not present it, the Illinois Appellate Court did not address, let alone decide, this latter question. Thus, this Court is without jurisdiction to consider it. 28 U.S.C. § 1257(a); *Illinois v. Gates*, 462 U.S. 213, 217–219 (1983) (collecting cases holding that this Court lacks jurisdiction to decide federal questions “not pressed or passed upon” in state court);⁵ see *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1652 n.4 (2017) (noting that this Court is a “court of review, not first view”).

Second, the Illinois Appellate Court disposed of any Eighth Amendment claim petitioner may have asserted on the adequate and independent state-law ground of waiver. See Pet. App. D at 5–6 (finding that petitioner “specifically waived any claim that his sentence violates the [E]ighth [A]mendment” because he

⁵ “Notwithstanding the long line of cases clearly stating that the presentation requirement is jurisdictional, a handful of exceptions (discussed in *Gates*, 462 U.S. at 219) have previously led [this Court] to conclude that this is ‘an unsettled question.’” *Howell v. Mississippi*, 543 U.S. 440, 445–446 (2005) (citations omitted). Even if the “not pressed or passed upon below” rule is not jurisdictional but purely prudential, petitioner offers no reason to depart from it here. *Id.*; *Yee v. City of Escondido*, 503 U.S. 519, 532 (1992); *Gates*, 462 U.S. at 217–222.

made no argument on that claim); see also Pet. App. Br. 1, 13; Pet. App. Reply Br. 1–7 & n.1; cf. Ill. Sup. Ct. R. 341(h)(7) (appellant’s brief must contain argument section, “which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on”; “[p]oints not argued are waived”). Thus, this Court lacks jurisdiction to review the state court’s judgment. *Michigan v. Long*, 463 U.S. 1032, 1040–1041 (1983) (no appellate jurisdiction where “state court decision indicates clearly and expressly that it is alternatively based on” adequate and independent state grounds).

II. Certiorari is unwarranted on the question presented because lower courts are not split on the question and this Court’s precedent contradicts petitioner’s position.

There is no split of authority on the question presented that would justify certiorari. Although two states have categorically barred life without parole for juvenile homicide offenders, they have done so only under their state constitutions. See *State v. Sweet*, 879 N.W.2d 811, 839 (Iowa 2016); *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270, 282–285 (Mass. 2013). No court has held that the federal Constitution prescribes the categorical ban petitioner seeks. In the absence of a split, certiorari is unwarranted.

Nor does this Court’s precedent support a categorical ban on life without parole for all juvenile homicide offenders. As this Court recently held, the Eighth Amendment precludes life without parole only for “juvenile offenders whose crimes reflect the transient immaturity of youth.” *Montgomery*, 136 S. Ct. at 734 (citation omitted). Although most juveniles will likely fall within that category, the Eighth

Amendment permits life without parole for “the rare juvenile offender whose crime reflects irreparable corruption.” *Id.* (quotation marks and citations omitted).

This Court reiterated this distinction just last year and left it to the States to implement the rule. *Id.* at 735. Petitioner provides no good cause to depart from this recent precedent. And his assertion that it is “nearly impossible” to implement the rule is wholly unsupported. Pet. 23. Thus, certiorari should be denied.

III. The question presented does not fairly include the additional issues discussed in the petition, and even if it does, this Court’s review is unwarranted.

The petition discusses two additional legal issues related to *Miller*:

(1) whether *Miller* applies to a term of years that is functionally equivalent to life without parole; and (2) whether a sentencer must consider, or make factual findings on, the factors outlined in *Miller* before imposing life imprisonment on a juvenile homicide offender. Pet. 16–28. The petition also asks whether the state court properly applied *Miller* when sentencing petitioner. *Ibid.*

Jurisdiction aside, petitioner has not sought certiorari on these questions. See Pet. i. Nor are they fairly included in his question presented. In any event, this Court’s review is unwarranted.

A. The question presented does not fairly include the additional issues.

Under Rule 14.1(a), the certiorari petition’s first page must state the questions presented for review. Only the questions presented and those fairly included therein will be considered by the Court. Sup. Ct. R. 14.1(a); *Wood v. Allen*,

558 U.S. 290, 304 (2010) (refusing to consider argument included in petition’s text but not in question presented, even though it was “related to” or “complementary to” the question presented). Here, the sole question presented is whether “the discretionary imposition of a sentence functionally equivalent to life imprisonment without the possibility of parole upon a child convicted of homicide violate[s] the Eighth and Fourteenth Amendments.” Pet. i. This question does not fairly include the additional issues, raised in the petition’s text, concerning *Miller*’s scope and application. See *Wood*, 558 U.S. at 304.

Rather, the supplemental arguments seek relief on narrower grounds and their resolution depends on different facts and legal analyses. For example, whether the rule announced in *Miller* applies to *de facto* life-without-parole sentences presents an analytically distinct issue from whether the Eighth Amendment altogether bars life without parole or its functional equivalent for juvenile homicide offenders. Compare, *e.g.*, *Graham*, 560 U.S. at 59–62 (categorical ban analysis), *with Reyes*, 63 N.E.3d at 887–888 (evaluating whether *Miller* applies to mandatory *de facto* life without parole). This Court can answer the latter question without addressing the former; indeed, an affirmative answer to the question presented would obviate any need to address the additional issues. Cf. *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 579 n.4 (2008) (where “question presented cannot genuinely be answered without addressing the subsidiary question, . . . the latter question is ‘fairly included’ within the former”). Thus, the

additional issues are not fairly included in the question presented and should not be considered as grounds for granting certiorari. See *Wood*, 558 U.S. at 304.

B. Even if the question presented fairly includes the additional issues, this Court’s review is unwarranted.

For three main reasons, this case is unworthy of this Court’s review. First, recent developments in Illinois law have altered the legal landscape and make this Court’s review unnecessary. In September 2016, the Illinois Supreme Court held that “sentencing a juvenile offender to a mandatory term of years that is the functional equivalent of life without the possibility of parole” violates the Eighth Amendment. *Reyes*, 63 N.E.3d at 888. One year later—after petitioner filed this petition—the Illinois Supreme Court held that “*Miller* applies to discretionary sentences of life without parole for juvenile defendants,” and that courts must consider youth, its attendant characteristics, and other mitigating factors listed in *Miller* before sentencing a juvenile to life imprisonment. *Holman*, 2017 IL 120655, ¶¶ 40, 44–46. Thus, the Illinois Supreme Court has since answered the petition’s legal questions concerning *Miller*’s scope and, in doing so, expressly aligned Illinois with states that “have read *Miller* more broadly” and in favor of juvenile defendants. See *Holman*, 2017 IL 120655, ¶¶ 41–46. Moreover, after petitioner was sentenced, the Illinois legislature created a juvenile sentencing scheme that requires courts to consider the *Miller* factors and eliminates the mandatory firearm enhancements for juvenile offenders. 730 Ill. Comp. Stat. 5/5-4.5-105 (2016). Given

these legal changes, it is unnecessary to grant review in this case to address any alleged split between Illinois and other States concerning *Miller*'s scope.

Second, petitioner's fact-specific argument that the trial court improperly applied *Miller* at sentencing does not alone present a compelling legal question that would justify review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *Cavazos v. Smith*, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting) ("Error correction is 'outside the mainstream of the Court's functions.'") (quoting E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, *Supreme Court Practice* § 5.12(c)(3), p. 351 (9th ed. 2007)).

Finally, the unique posture of this case makes it unnecessary for this Court to review the Illinois Appellate Court's unpublished, non-precedential decision, see Ill. Sup. Ct. R. 23(e). The Illinois Appellate Court addressed only one of the three additional *Miller*-related issues that petitioner raises. On that issue it determined that, waiver aside, petitioner's *Miller* claim failed because his sentence was discretionary, not mandatory. Pet. App. D at 6. But while this certiorari petition was pending, the Illinois Supreme Court held that *Miller* does apply to discretionary life-without-parole sentences. *Holman*, 2017 IL 120655, ¶¶ 40, 44–46. Meanwhile, petitioner filed a state postconviction petition raising the additional *Miller*-related issues. That petition remains pending. Once his appointed counsel amends the petition, the state courts will presumably address petitioner's

arguments under *Holman*. Thus, because petitioner may yet obtain the relief he requests in state court, this case is unworthy of this Court's review at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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