No. 17-

IN THE
Supreme Court of the United States

LARRY W. NEWTON, PETITIONER,

v.

STATE OF INDIANA, RESPONDENT.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Indiana

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, in 1995, entered a plea agreement whereby, in exchange for pleading guilty and accepting a sentence of life without parole, the State agreed not to seek to execute him for his juvenile offense. After the sea change in this Court's jurisprudence regarding non-parolable sentences for juveniles, Mr. Newton sought post-conviction review. However, the court below held that because the sentencing court had discretion to reject the plea agreement, *Miller*'s protections did not adhere and, therefore, he was not entitled to an evidentiary hearing regarding his eligibility for that punishment.

This case presents the following questions:

I. Whether *Miller v. Alabama*, 567 U.S. 460 (2012) applies to discretionary sentences of life without parole imposed for juvenile offenses, as sixteen states have held, or whether it is limited to mandatory sentences of life without parole, as ten others have found.

II. Whether an evidentiary hearing is required to assess whether juveniles sentenced before *Miller* are irreparably corrupt.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Larry W. Newton respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Indiana.

OPINIONS BELOW

The order of the Supreme Court of Indiana summarily denying review is unpublished. Pet. App. 106a. The opinion of the Court of Appeals of Indiana is published and is reported at 83 N.E.3d 726. Pet. App. 1a-39a. The Circuit Court's decision is not published. Pet. App. 40a-105a.

JURISDICTION

The Supreme Court of Indiana entered its order on December 19, 2017. On March 8, 2018, Justice Kagan granted an extension of time to file this Petition until May 3, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a).

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

Petitioner pleaded guilty "in exchange for the State agreeing to dismiss its request for the death penalty." Pet. App. 10a-11a. At the age of seventeen, he had been charged, along with two older co-defendants, with the murder of a college student, after one of the co-defendants had been kicked out of a party on Ball State University's campus. Pet. App. 2a-3a. Following a failed attempt to rob the victim, the three co-defendants took him to an alley, and

Petitioner shot him in the back of the head. Pet. App. 3a.

The state initially sought the death penalty. Pet. App. 4a. After the trial court denied Petitioner's motion to dismiss the state's request for the death penalty, Petitioner entered an agreement to plead guilty in exchange for the state declining to seek death. Pet. App. 5a. By the terms of the plea agreement, if the trial court accepted it, then it would be requited to impose life without the possibility of parole. Pet. App. 28a. Although the trial court would have had authority to sentence Petitioner to 45 to 60 years, the agreed upon terms of the plea required . Ind. Code § 35-50-2-3 (a).

Before deciding whether to accept the agreement, the sentencing court reviewed a "mitigation timeline" submitted by defense counsel as well as testimony from Petitioner's mother that Petitioner had been "sexually molested by a relative from roughly 'first through the third grade'" and that he had been "physically abused by his stepfather." She admitted that starting at age 12, Petitioner would "run away" from home for "weeks at a time" and that she on occasion "*encouraged this behavior*." Pet. App. 28a (emphasis added). The court also heard evidence about the offense from a police detective and heard evidence from one of Petitioner's peers as well as those related to the victim. Pet. App. 29a-30a.

Both counsel for the State and for Petitioner presented evidence in service of the same goal: having the court accept the plea agreement condemning Petitioner to serve the rest of his life in prison in exchange for the State foregoing a death sentence. After hearing this evidence and argument,

the court accepted the agreement, and imposed life without possibility of parole for Petitioner's juvenile offense ("JLWOP"). Pet. App. 34a.

In doing so, the sentencing court made a number of findings. Considering Petitioner's youth, the court concluded:

> It's particularly troubling that one so young can commit such a vicious and unprovoked attack. . . When I see such a total disregard for human life at such a young age it is . . . to me indicative that if placed in a similar situation as this, you would respond in a similar manner.

Pet. App. 31a.

The sentencing court also concluded that because Petitioner had a history of acting "both impulsively and unfortunately without regard for harm to any other people," that "rehabilitation [was not] a strong possibility." Pet. App. 32a. The court characterized Petitioner as "filled with hate, and a person who is genuinely evil, and . . . beyond rehabilitation." Pet. App. 33a. Finally, the court concluded that the heinousness and the deliberateness of the homicide was sufficiently aggravated to support the sentence requested by the parties. Pet. App. 34a.

Petitioner did not initially appeal. "Because of a combination of procedural errors, some of which rest with [Petitioner's] lawyers," his request for a belated appeal was dismissed. *State v. Newton*, 894 N.E.2d 192, 195 (Ind. 2008) (Rucker, J., dissenting). After procedural history not here relevant, and after this Court decided *Miller v. Alabama*, Petitioner filed a petition for post-conviction relief with the trial court

claiming that his sentence violated the Eighth Amendment. Pet. App. 7a. On December 7, 2016, that court denied relief. Pet. App. 8a.

Petitioner appealed. On appeal, the State argued that Mr. Newton had waived any review of his sentence by virtue of having entered a plea agreement (even though that agreement was premised on avoiding execution). Pet. App. 10a. Although it agreed the State's argument, the Court of Appeals explicitly excused that waiver in light of "the important interest at stake here – the possibility that [Petitioner's] sentence of LWOP violates the Eighth Amendment's prohibition of cruel and unusual punishment." Pet. App. 13a-14a. For that reason, the court below exercised its "appellate discretion and address[ed] the merits of the issue." Pet. App. 14a.

Addressing the merits, the Court of Appeals held that because Petitioner's "sentence here is not 'mandatory' within the meaning of *Miller*," it was constitutional. Pet. App. 27a. Moreover, the court held in the alternative, that even if *Miller* applied Petitioner "nonetheless [could not] demonstrate his sentence violates the Eighth Amendment because his sentencing court refused to accept his plea agreement calling for LWOP until it had given thorough consideration to whether the evidence demonstrated an LWOP sentence was proper for [Petitioner]." Pet. App. 27a.

In so holding, the court emphasized both the aspects of Petitioner's youth considered by the sentencing court. Pet. App. 31a-34a, 37a. The court below did not address Petitioner's argument that the reliability of the sentencing proceeding was undermined by the lack of adversarial presentation

of evidence, *i.e.* that both parties were presenting evidence towards the shared goal of a JLWOP sentence.

The court also explained that a resentencing hearing was unnecessary for the assessment of Petitioner's claim that he "has in fact made progress towards rehabilitating himself while in prison." Pet. App. 36a. In post-conviction, Petitioner had presented evidence from a former warden regarding his gains while in prison. The post-conviction court excluded writings Petitioner completed in the "Shakespeare for Offenders program, and letters written to [Petitioner] from various individuals who were positively influenced by [his] work." Pet. App. 36a. The court below held this evidence was properly excluded because no post-*Miller* evidentiary hearing was required at all. Pet. App. 36a-37a. Finally, the court noted that it believed JLWOP in Indiana was rare within the meaning of *Miller* because it was only aware of four persons serving such a sentence. Pet. App. 37a.

Petitioner timely sought review from the Indiana Supreme Court. On December 19, 2017, that court declined to hear his case. Pet. App. 106a. Justice Kagan granted Petitioner's request for an extension to file this Petition until May 3, 2018.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. THE PRESENCE OF SENTENCING DISCRETION DOES NOT OBVIATE *MILLER*'S CATEGORICAL PROTECTIONS.

Miller v. Alabama announced a categorical rule: only the rare juvenile offender who is irreparably

corrupt may be sentenced to life without the possibility of parole. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 726 (2016). The Court in *Miller* not only imposed a flat prohibition against the mandatory imposition of such sentences, it also emphasized the necessity of procedural protections. *See Montgomery*, 136 S. Ct. at 735 (noting *Miller* provided a categorical prohibition "attended by a procedure that enables a prisoner to show that he falls within the category of persons whom the law may no longer punish."). However, states remain closely split on whether *Miller* places any further limits on the imposition of life without the possibility of parole on juveniles as long as there is some discretion at sentencing.

Especially in light of *Montgomery*, discretion, while necessary, is not alone sufficient to meet *Miller*'s mandates. Rejecting the discretionary versus mandatory distinction is logical: because *Miller* establishes a categorical exclusion from punishment, courts and sentencers must consider whether the juvenile offender is in the excluded category, regardless of whether the sentence had been or will be imposed via discretion or absolute mandate.

Here, however, the court below insisted that because the sentencing court, in 1995 had discretion to impose a sentence less that life without possibility of parole (or death), *Miller* does not apply. Pet. App. 27a.

A. The States Are Split Over Whether The Presence Of Sentencing Discretion Renders *Miller*'s Protections Irrelevant.

The states are split over whether sentencing discretion in and of itself satisfies the requirements of *Miller*. Although *Montgomery*'s elaboration of *Miller* clearly implied that *Miller* applies to discretionary sentencing regimes, some states, such as Indiana, have reached the opposite conclusion, even after *Montgomery*. When it held that *Miller* applied retroactively, *Montgomery* clarified that *Miller* was a categorical rule "attended by a procedure that enables a prisoner to show that he falls within the category of persons whom the law may no longer punish" *Montgomery*, 136 S. Ct. at 735. For that reason, it should have resolved any lingering ambiguity about whether *Miller* does nothing more than prohibit mandatory sentences. However, because the Court has only undertaken full review of states with mandatory regimes, some uncertainty persists, even after *Montgomery*.

That ambiguity means that several states – including Indiana – have held that *Miller* does not apply where the sentence at issue involved at least some form of sentencing discretion. Pet. App. 23a (citing *Conley v. State*, 972 N.E.2d 864, 879 (Ind. 2012)); *State v. Charles*, 892 N.W.2d 915, 920 (S.D. 2017), *cert. denied*, No. 17-6005 (Oct. 30, 2017); *Jones v. Commonwealth*, 795 S.E.2d 705, 711 (Va. 2017); *Bell v. State*, 522 S.W.3d 788 (Ark. 2017);

State v. Houston, 353 P. 3d 55 (Utah 2015); *State v. Williams*, 862 N.W. 2d 701 (Minn. 2015); *State v. Nathan*, 522 S.W.3d 881 (Mo. 2017); *see also State v. Redman*, No. 13–0225, 2014 WL 1272553 (W. Va. 2014); *Castillo v. McDaniel*, No. 62188, 2015 WL 667917 (Nev. Feb. 12, 2015); *State v. Roy*, No. 0503015173, 2017 Del. Super. LEXIS 124 (Del. Mar. 13, 2017) *affirmed by* 2018 Del. LEXIS 56 (Del. Feb. 6, 2018).

Here, the sentencing discretion was not paradigmatic. Rather, the sentencing court merely had the discretion to accept or reject a binding plea agreement requiring JLWOP. That modicum of discretion led the court below to conclude that this Court's protections in *Miller* were met.

The court reached that conclusion for two reasons. First, it claimed it was bound by existing precedent, which held that *Miller* "deal[t] solely with the issue of mandatory sentencing schemes." *Conley*, 972 N.E.2d at 879. The Supreme Court of Indiana had previously concluded that "its holding that an LWOP sentence in Indiana is not unconstitutional 'was not altered by *Miller*'" because Indiana's sentencing statute provides for discretion. Pet. App. 23a (quoting *Conley*, 972 N.E.2d at 879). Thus, the court below concluded that, as a matter of *stare decisis*, as long as Petitioner's sentence was imposed pursuant to some discretion, it is constitutional. Pet. App. 26a-27a; *see also Marsillett v. State*, 495 N.E.2d 699, 704 (Ind. 1986) ("Important policy considerations militate in favor of continuity and predictability in the law.").

Second, the court below reasoned that the particular circumstances that resulted in

petitioner's sentence, which involved nominal discretion, rendered it constitutional. That is, "where a juvenile defendant agrees to serve LWOP pursuant to a plea agreement that is accepted by a trial court," the sentence is not "'mandatory' within the meaning of *Miller*." Pet. App. 27a. Because the sentencing court had discretion to reject the agreement, the court below concluded *Miller* simply had no application.

Although the court concluded that it was only addressing the "narrow circumstance" of a plea agreement, its reasoning was premised on the presence of discretion. It thus implicates the full split of authority between a minority of jurisdictions that have concluded that *Miller* offers no further protections for juveniles sentenced to life without the possibility of parole as long as an original sentencing court has even nominal discretion (*see supra*), and a majority of jurisdictions that have held that even where a sentencing court has discretion, the sentencing court must meet *Miller*'s mandates.[1] *Commonwealth v. Batts*, 163 A.3d 410, 435 (Pa. 2017); *Garcia v. State*, 903 N.W.2d 503, 509 (N.D. 2017); *Steilman v. Michael*, 407 P.3d 313, 318-19 (Mont. 2017); *State v. Zuber*, 152 A.3d 197, 211-12 (N.J. 2017); *People v. Holman*, 91 N.E.3d 849, 861 (Ill. 2017); *Johnson v. State*, 395 P.3d 1246, 1258 (Idaho 2017); *State v. Valencia*, 386 P.3d 392,

[1] Even among these jurisdictions, some states continue to seek this Court's intervention to resurrect a distinction based on the presence of discretion. *See, e.g.*, Petition for Writ of Certiorari, *Idaho v. Windom*, 138 S.Ct. 977 (2017) (No. 17-560).

395 (Ariz. 2016); *Landrum v. State*, 192 So. 3d 459, 466-67 (Fla. 2016); *Luna v. State*, 387 P.3d 956, 961 (Okla. Crim. App. 2016); *State v. Riley*, 110 A.3d 1205, 1213 (Conn. 2015); *State v. Seats*, 865 N.W. 2d 545, 558 (Iowa 2015); *People v. Gutierrez*, 324 P.3d 245, 249 (Cal. 2014); *Aiken v. Byars*, 765 S.E.2d 572, 577 (S.C. 2014) *cert. denied*, 135 S.Ct. 2379 (U.S. June 1, 2015) (No. 14-1021); *Veal v. State*, 784 S.E.2d 403, 410 (Ga. 2016); *Parker v. State*, 119 So. 3d 987, 995 (Miss. 2013); *State v. Long*, 8 N.E.3d 890, 896 (Ohio 2014); *see also State v. Ramos*, 387 P.3d 650 (Wash. 2017), *as amended* (Feb. 22, 2017), *reconsideration denied* (Feb. 23, 2017), *cert. denied*, 138 S. Ct. 467 (2017).

Arizona is representative in its approach to this issue:

> *Miller*, as interpreted by the majority in *Montgomery*, did not adopt merely a procedural rule requiring individualized sentencing (as distinct from mandatory sentences of life without parole), but instead recognized that sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption.

Valencia, 386 P.3d at 395 (internal quotations omitted). These jurisdictions agree that the primary question under the Eighth Amendment is substantive: whether a defendant is eligible for JLWOP.

Granting this Petition will provide the Court with an opportunity to resolve this conflict.

B. Discretion, Particularly In Pre-*Miller* Proceedings, Without More, Is Inadequate To Ensure *Miller*'s Categorical Protections.

Before sentencing a juvenile to die in prison, "*Miller* requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence." *Montgomery*, 136 S. Ct. 718, 734 (citing *Miller*, 132 S. Ct. at 2471). These requirements on their own undermine the notion that the mere presence of discretion by the sentencing court is sufficient to meet these mandates.

The proceedings here took place before *Roper*. Petitioner entered a plea specifically to avoid a death sentence. He is now burdened with a likely illegal sentence of life without the possibility of parole. *Montgomery*, 136 S. Ct. at 726 ("a lifetime in prison is a disproportionate sentence for all but the rarest of children"). Although there was some discretion to reject or accept that plea, the decision about whether to do so was not the product of adversarial testing: both parties presented evidence in support of a sentence of JLWOP.

Moreover, it is implausible to suggest both that the sentencing judge in 1995 meaningfully addressed all of the considerations *Miller* requires, including whether he is among the rare juvenile offenders who are irreparably corrupt, and that the judge properly gave youth its proper mitigating weight. The dramatic change since 1995 in our understanding of adolescent development and neuroscience – the very developments which have

shaped this Court's juvenile Eighth Amendment jurisprudence – alone should give cause for concern about the reliability of the sentencing proceeding. *See, e.g.*, Rebecca Helm, et al., *Too Young to Plead? Risk, Rationality, and Plea Bargaining's Innocence Problem in Adolescents*, 10 Psychology, Public Policy, and Law 1037 (2017). However, as discussed *infra*, the sentencing judge's comments, repeatedly using youth as an *aggravating* circumstance should remove any doubt.

Critically, whatever discretion the sentencing court had was limited by the context in which it operated: pre-*Miller* and pursuant to a presentation by both sides in favor of JLWOP. That court did *not* address whether Petitioner was categorically eligible for his sentence.

Reliably ensuring *Miller*'s guarantees entails more than the mere existence of some discretion on the part of the sentencer. Granting review will provide the Court with an opportunity to ensure the reliability required before imposing the harshest sentence under law.

II. AN EVIDENTIARY HEARING IS REQUIRED TO FAIRLY ASSESS WHETHER A JUVENILE OFFENDER IS IRREPARABLY CORRUPT.

In the decision below, Indiana joined a minority of jurisdictions that deny juveniles sentenced to life without the possibility of parole before *Miller* any subsequent opportunity to present evidence that they are ineligible for that sentence. This holding deepens a conflict both on whether juveniles sentenced before *Miller* are entitled to an evidentiary hearing on that question and, relatedly,

on whether, before imposing a sentence of life without parole for a juvenile offense, the sentencer must find that the juvenile is irreparably corrupt.

Reliable consideration of whether a defendant is eligible for JLWOP requires post-*Miller* presentation of evidence concerning eligibility. States are properly given wide latitude to determine how to enforce *Miller*'s protections, but fundamental fairness requires a hearing to assess whether the juvenile is ineligible for JLWOP, a sentence, for juvenile defendants, that is equivalent to the death penalty. *Miller*, 567 U.S. at 461 ("*Graham [v. Florida*, 560 U.S. 48 (2010)] further likened life without parole for juveniles to the death penalty.").

A. The Decision Below Implicates Two Related Splits Of Authority.

Miller categorically excluded all but the "rare" juvenile offender who is "irreparably corrupt" from the sentence of life without the possibility of parole. *Miller*, 567 U.S. at 479-80. That is, "*Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." *Montgomery*, 136 S. Ct. at 734.

However, state supreme courts remain split on two important questions about how this line must be drawn. First, state high courts are divided on what findings *Miller* requires a sentencer to make before imposing a sentence of life without the possibility of parole. Seven state supreme courts have held that an affirmative finding of irreparable corruption is required. *See Batts*, 163 A.3d. at 435; *Landrum*, 192 So.3d at 470; *Luna*, 387 P.3d at 963;

Veal, 784 S.E.2d 411-12; *Holman*, 91 N.E.3d 851; *State v. Montgomery*, 194 So.3d 606, 607 (La. 2016); *Sen v. State*, 301 P.3d 106, 127 (Wyo. 2013).

Based on *Montgomery*'s clear holding that the *Miller* rule is a substantive one – *i.e.* that *Miller* excluded a class of juveniles from punishment – these states require an affirmative eligibility finding before a court may impose LWOP. To determine on which side of the line a given juvenile falls, these courts have held that a sentencer must make a finding that either that the juvenile's crime reflects transient immaturity (as almost all such crimes do) or that it is the product of irreparable corruption.

Indiana, on the other hand, has joined five other states and the Seventh Circuit in deeming such a finding unnecessary. *See* Pet. App. 27a; *see also State v. Ramos*, 387 P.3d 650, 659, 665-66 (Wash. 2017) *as amended* 2017 Wash. LEXIS 225 (Feb. 22, 2017); *Valencia*, 386 P.3d at 395-96; *Brown v. State*, No. W2015–00887–CCA–R3–PC, 2016 Tenn. Crim. App. LEXIS 281, at *19, *21 (Tenn. Crim. App. Apr. 15, 2016), *appeal denied* 2016 Tenn. LEXIS 621 (Aug. 19, 2016) *cert. denied* 137 S. Ct. 1331 (2017); *Davis v. State*, 234 So. 3d 440, 442 (Miss. App. 2017) *cert. denied* No. 2016-CT-00638-SCT, 2018 WL 711462 (Miss. Jan. 11, 2018); *see also Kelly v. Brown*, 851 F.3d 686, 687-88 (7th Cir. 2017) ("all [a juvenile is] entitled to under *Miller*" is for the sentencing court to have "considerable leeway" and to have "considered his age when deciding on the appropriate term.").

Specifically, the court below held that Petitioner's 1995 plea colloquy was sufficient to satisfy the requirements of *Miller*. Pet. App. 35a (noting that *Montgomery* did not "impose a strict

procedural requirement on courts in sentencing, such as requiring trial courts 'to make a finding of fact regarding a child's incorrigibility.'" (quoting *Montgomery*, 136 S. Ct. at 735)). That holding explicitly encompasses the premise that *Miller* does not require a finding of irreparable corruption. *Id.*

The opinion below also implicates a second split among state supreme courts: Whether, after *Miller*, persons serving sentences of life without the possibility of parole for juvenile offenses must have at least one opportunity to present evidence concerning their eligibility for that sentence.

At least nine states have concluded that any juvenile offender sentenced to life imprisonment without the possibility of parole prior to *Miller* is entitled to have that sentence reconsidered at a post-*Miller* evidentiary hearing. *See People v. Gutierrez*, 324 P.3d 245, 249-50 (Cal. 2014);[2] *Batts*, 163 A.2d at 435; *Landrum*, 192 So.3d at 470; *Valencia*, 386 P.3d at 393; *Veal*, 784 S.E.2d at 405 ; *State v. James*, 786 S.E.2d 73, 79-80 (N.C. App. 2016), *review allowed*, 797 S.E.2d 6 (N.C. 2017); *Aiken*, 765 S.E.2d at 577 ("*Miller* does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered"); *Luna*, 387 P.3d 956, 958 (Okla. Ct. Crim. App.

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[2] California no longer authorizes JLWOP sentences. JLWOP is available in name only for murders that were the product of torture or where the victim is a law enforcement officer. Cal. Penal Code § 1170. However, all juveniles are parole eligible under recently enacted legislation. Cal. Penal Code §§ 3051, 4801. (2015).

2016); Wash. Rev. Code § 10.95.035 (2015).[3] Three of these states – California, Florida, and Pennsylvania – are responsible for nearly 1,000 of the estimated 2,589 pre-*Miller* JLWOP sentences. *See* Human Rights Watch, State Distribution of Estimated 2,589 Juvenile Offenders Serving Juvenile Life Without Parole *available at* https://tinyurl.com/y94bd9bu.

Indiana is among the five jurisdictions that do not allow juveniles under a pre-*Miller* sentence any further opportunity to present evidence that they are not eligible for the punishment, notwithstanding the decisions in *Miller* and *Montgomery*. *See* Pet. App. 34a-35a; *Johnson*, 395 P.3d at 1258-59; *Garcia*, 903 N.W.2d 512-13;[4] *Holman*, 91 N.E.3d 851; *Kelly*, 851 F.3d at 687-88; *see also id.* (Posner, J., dissenting) ("We should allow him to pursue his *Miller* claim in the district court, which should conduct a hearing to determine whether he is or is not incorrigible."). These states countenance cold-record review to determine whether a pre-*Miller* sentencing complies with *Miller*'s mandates.

Granting review will allow the Court to resolve these interrelated divides within the lower courts.

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[3] Washington State is somewhat unique in that there the legislature, rather than the judiciary, determined that re-sentencing was required.

[4] North Dakota has, however, banned imposition of JLWOP prospectively. *See* N.D. Cent. Code § 12.1-32 (2017).. Only one inmate is serving such a sentence there. Juvenile Sentencing Project, *November 2017 Snapshot*.

B. Because *Miller* Fundamentally Changed How Sentencers Must Consider Youth, Juveniles Ought To Have At Least One Opportunity To Present Evidence Of Their Ineligibility For A Sentence Of Life Without The Possibility Of Parole.

The state of Indiana has denied juveniles serving JLWOP sentences imposed before *Miller* an opportunity to present evidence that they are ineligible for their sentence. Pet. App. 35a-36a. To be fairly applied, defendants sentenced prior to *Miller* must receive an evidentiary hearing.

Miller, together with *Roper v. Simmons*, 543 U.S. 551 (2002) and *Graham v. Florida*, 560 U.S. 48 (2010), fundamentally altered the proper judicial assessment of youth and the stakes attendant to it. *Roper* categorically excludes children from capital punishment because "juveniles cannot with reliability be classified among the worst offenders" on account of traits inherent to childhood: impulsivity, vulnerability to peer influence, and a unique capacity for change. 543 U.S. at 569-70. *Graham* excludes them from life without the possibility of parole for nonhomicide offenses because those characteristics render that punishment disproportionate for all such offenses. 560 U.S. at 69. And, of course, *Miller* banned that punishment for all but the rare juvenile homicide offender who is irreparably corrupt. *See Miller*, 567 U.S. at 579-80.

The Court faced a similar situation in the context of categorical exemptions from the death penalty. In *Bobby v. Bies*, 556 U.S. 825 (2009), the Court held

that Double Jeopardy was no bar to re-litigating whether a capitally charged defendant was intellectually disabled. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court barred executing the intellectually disabled. Mr. Bies, in his pre-*Atkins*, trial was found by a jury to be intellectually disabled and was nonetheless sentenced to death. *See Bies*, 556 U.S. at 827-28.

In *Bies*, the Court concluded that the jury's finding of intellectual disability was no bar to execution. The jury's prior contrary finding was not dispositive because the conclusion that Mr. Bies was intellectually disabled was not an "ultimate fact" necessary to the disposition of the case prior to *Atkins*. *Id.* at 835-36 (quoting *Ashe v. Swenson*, 397 U.S. 436, 443 (1970)). *Atkins* "substantially altered" the legal landscape upon which the parties litigated, converting intellectual disability from a double-edged sword – evidence that could help or hurt either party – into an exclusively defensive weapon. *Id.* at 837.

Just as *Atkins* did with intellectual disability, beyond creating categorical exemptions from punishment based on youth, *Roper*, *Graham*, and *Miller* fundamentally altered the manner in which youth must be considered by sentencers. Before these decisions, youth was regularly used as an *aggravating* factor. For example, in *Roper*, the prosecutor argued that the defendant's age was a reason to impose a death sentence: "Age, he says. Think about age. Seventeen years old. Isn't that scary. Doesn't that scare you? Mitigating? Quite the contrary, I submit." 543 U.S. at 558.

Youth was deployed similarly as an aggravating factor in Mr. Newton's case. However, here, it was not the prosecutor who used youth as an aggravating circumstance at sentencing. It was the sentencing judge.

When considering whether to accept the plea agreement, the sentencing court considered Petitioner's "impulsivity" and the senselessness of the acts as aggravation. Moreover, the sentencing court concluded that petitioner's age made the offenses "particularly troubling" and, therefore, aggravated. Pet. App. 31a-34a. Of course these characteristics – impulsivity, senseless disregard of others, and youth itself – are, after *Miller*, properly considered mitigating. They are attendant to youthfulness and, therefore, make it particularly difficult to differentiate the irreparably corrupt youth from the ones those "whose crime reflects unfortunate yet transient immaturity" inherent to youth. *Roper*, 543 U.S. at 573.

Even if the sentencing court here had not used Petitioner's age against him in such a way, the

fundamental change in doctrine after *Miller* would warrant reopening the sentencing to allow the parties to present evidence relevant to the newly dispositive question: Whether Mr. Newton's offense reflects transient immaturity or, instead, whether he is among the rare juvenile offenders who is irreparably corrupt. *See, e.g.*, *Luna*, 387 P.3d at 962 ("When the Constitution prohibits a particular form of punishment for a class of persons, an affected defendant is entitled to a meaningful procedure through which he can show that he belongs to the protected class." (quotation omitted)).

Put another way, "There is nothing novel about the fact that our youth commit murders and mayhem. But the legal lens through which we view their sentencing has changed." *Long*, 8 N.E.3d at 899 (O'Connor, C.J., concurring). Like *Atkins* and intellectual disability, *Miller* changed the analysis for the mitigating value of youth.

This Court should grant review and ensure every juvenile sentenced to LWOP prior to *Miller* receives an opportunity to demonstrate that they are not among the very narrow class to whom such sentences may constitutionally be applied.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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