No. 18-5634

==========

IN THE
Supreme Court of the United States

---------- ♦ ----------

KIPLAND PHILLIP KINKEL,
Petitioner,

v.

GARRETT LANEY, SUPERINTENDENT,
OREGON STATE CORRECTIONAL INSTITUTION,
Respondent.

---------- ♦ ----------

On Writ Of Certiorari
To The Supreme Court Of Oregon

---------- ♦ ----------

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Thaddeus A. Betz*
*Counsel of Record for *Petitioner*
155 NW Hawthorne Ave.
Bend, OR 97703
Telephone: (541) 389-6964
Email: thadbetz@gmail.com

Marsha L. Levick
Riya Saha Shah
JUVENILE LAW CENTER
1315 Walnut Street, 4th Floor
Philadelphia, PA 19107
Telephone: (215) 625-0551
Facsimile: (215) 625-2808
Email: mlevick@jlc.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

REPLY TO BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

In its Brief in Opposition to Petition for Certiorari, the State asserts that the Oregon Supreme Court correctly held that petitioner's crimes "reflected 'irreparable corruption rather than the transience of youth'" and therefore his sentence of 112 years was valid. (Resp't's Br. in Opp'n 1.) The Oregon Supreme Court's decision misunderstands this Court's prior decisions establishing that it must be rare and uncommon to sentence a juvenile to life in prison without the possibility of parole. A juvenile's sentence must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Miller v. Alabama*, 567 U.S. 460, 479 (2012) (quoting *Graham v. Florida*, 560 U.S. 48, 75 (2010)). In the rare circumstance that the sentencer determines that a life without parole sentence is appropriate, it must find that the child "exhibits such irretrievable depravity that rehabilitation is impossible" and demonstrates "irreparable corruption." *Montgomery v. Louisiana*, __ U.S. __, 136 S. Ct. 718, 733-734 (2016).

The sentencing court did not find Petitioner to be irreparably corrupt. The court never determined that he was outside the bounds of rehabilitation. Rather, the court found that he suffered from a treatable mental illness that led to his commission of the crime. Based on this fact alone, the Oregon Supreme Court concluded that this Court's decisions in *Roper, Miller,* and *Graham* were irrelevant. The transiency of youth, the court held, was inconsistent with Petitioner's condition. *Kinkel v. Persson*, 417 P.3d 401, 416 (Or. 2018).

Because Petitioner was sentenced in 1999, years before this Court set the established rules for juvenile sentencing, it obviously did not consider the proper Eighth Amendment considerations in its judgment. Quite plainly, the sentencing court did not contemplate if "the juvenile offender before it is a child 'whose crimes reflect transient immaturity' or is one of 'those rare children whose crimes reflect irreparable corruption' for whom a life without parole sentence may be appropriate." *Tatum v. Arizona*, __ U.S. ___, 137 S. Ct. 11, 13 (2016) (Sotomayor, J., concurring) (mem.) (citing *Montgomery*, 136 S. Ct at 734). *Miller* and its progeny require a "sentencer" to make these factual determinations, not a reviewing court. *Id*.

The Oregon Supreme Court, in reviewing Petitioner's 1999 sentencing, did not dismiss his claim on state law grounds, nor did the court remand Petitioner's case for a resentencing in light of the profound changes to Eighth Amendment jurisprudence and considerations. *Kinkel*, 417 P.3d at 416. Rather, the court addressed the merits of whether Petitioner was irreparably corrupt under the Eighth Amendment. Finding that he was, the reviewing Oregon Supreme Court emphasized that Petitioner's psychological condition was "unrelated to his youth." *Id*. Respondent's assertion that Petitioner failed to raise the first and third questions ignores the fact that Petitioner had no opportunity to raise those issues. The Oregon Supreme Court resolved Petitioner's claim based on an interpretation of *Roper, Miller,* and *Graham* for mentally ill children. The opinion miscasts both the nature of mental illness and the prognosis for those suffering from mental illness—thereby turning a traditional *mitigating* factor into an aggravator justifying death by incarceration.

Petitioner's case presents the question of whether children who are afflicted with a treatable mental illness are—by virtue of that illness—excluded from the rules announced in *Graham* and *Miller*.

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE OREGON SUPREME COURT USED MENTAL ILLNESS AS A PROXY FOR "IRREPARABLE CORRUPTION," IN CONTRAVENTION OF THIS COURT'S HOLDINGS

A. Petitioner's Psychotic Disorder Was Treatable And Not Evidence Of Irretrievable Depravity Or Irreparable Corruption

Petitioner suffers from a psychotic disorder. *Kinkel*, 417 P.3d at 404; (App. 3A-5A.) Although he has since spent decades in remission, at age 15, he experienced command hallucinations, which led him to commit the crimes for which he was later sentenced. (App. 6A, 10A, 16A.) Petitioner was so young at the time of his sentencing (November of 1999) for these offenses that the psychologist who evaluated him stated that a definitive diagnosis could only be "determined over time" as his symptoms may evolve with age. (App. 4A.)[1] At Petitioner's only sentencing proceeding, which took place more than a decade before this Court's decisions in *Miller* and *Montgomery*, one psychologist explained that Petitioner would go through a variety of treatment

[1] Q: Is it common for some individuals to phase between one diagnosis and another?
A: Yes, especially at young ages. I think, again, its recognized that diagnosing adolescents is a tricky proposition. They're much harder to be definitive about, and sometimes their diagnoses merge and blend over time. Usually, it all coalesces by the time someone is about 25. (App. 4A:17-24 (excerpt from Dr. Orin Bolstad's testimony)).
Dr. William Sack also testified.
Q: Is it your experience generally that it's easy to diagnose fifteen- and sixteen-year-olds?
A: No. Fifteen- and sixteen-year-olds are in the process of—they're in a developmental process, and they are an emerging adult, and so symptom pictures can change. And they are not a fixed—that's why we avoid—we tend to avoid making personality diagnoses with adolescents because they don't yet have a formed personality. So teenagers are emerging adults, but their symptom profiles can change as they continue to develop. (App. 15A:14-23.)

programs and also concluded that a determination of Petitioner's rehabilitation would be "irresponsible" because no one "is really capable of making that kind of prediction." (App. 7A:11-19.) At the same time, the doctor concluded that there were a number of reasons to be optimistic about Petitioner's prognosis including that "the nature of his delusions is still immature." (App. 9A:17-23.) Another psychologist testified that Petitioner's illness "responds better to treatment and has a better prognosis in general than the other forms of schizophrenia," (App. 17A), and that Petitioner could be "safely returned to the community." (App. 18A.) There was no testimony presented to the sentencer that Petitioner's condition was disconnected from his still developing adolescence or that his more severe symptoms would be fixed or permanent.

Experts who testified at Petitioner's 1999 sentencing agreed that his condition was treatable, but not necessarily curable. *Kinkel*, 417 P.3d at 405. In rejecting Petitioner's Eighth Amendment claim, the Oregon Supreme Court reasoned that "there is no cure for [petitioner's] condition." *Id*. at 406 (alteration in original). This simple phraseology glosses over the research on juvenile mental illness which finds that symptoms of mental illness are hardly fixed or immutable. Rather, scientific literature reveals that the traits of mentally ill children change over time. A 1994 meta-analysis examining 100 years of schizophrenic patients concludes that 40% improve in just 5.6 years. James D. Hegarty, et al., *One Hundred Years of Schizophrenia: A Meta-Analysis of the Outcome Literature*, 151 AM. J. PSYCHIATRY 1409, 1409 (1994). *See also* PAULIINA JUOLA, OUTCOMES & THEIR PREDICTORS IN

SCHIZOPHRENIA IN THE NORTHERN FINLAND BIRTH COHORT 1966 36, 44 (2015), http://jultika.oulu.fi/files/isbn9789526207728.pdf. Another study suggests that "around 50% of people with the illness meet objective criteria for recovery for periods of time during their lives, with the periods increasing in frequency and duration once past middle age." Alan S. Bellack, *Scientific & Consumer Models of Recovery in Schizophrenia: Concordance, Contrasts, & Implications*, 32 SCHIZOPHRENIA BULL. 432, 440 (2006), *available at* https://academic.oup.com/schizophreniabulletin/article/32/3/432/1908737. In some instances, these improvements persist without medication and therefore "[t]here is increasing recognition that recovery is not only possible, but that it may even be common."[2] *Id.* at 432.

Critically, for Eighth Amendment considerations, "much of the pernicious effect of schizophrenia is manifested early in the course of illness, followed by a plateau, and then gradual improvement for many patients." *Bellack, supra*, at 437. Furthermore, research indicates that the mere experience of mental illness as a juvenile can simply delay the transition from youth to adulthood. Joann Elizabeth Leavey, *Youth Experiences of Living with Mental Health Problems: Emergency, Loss, Adaptation & Recovery (ELAR)*, 24 CANADIAN J. MENTAL HEALTH 109, 109, 122 (2005); M. DAVIS ET AL., BECOMING AN ADULT: CHALLENGES FOR THOSE WITH MENTAL

[2] "Studies vary in specific criteria, measures, samples, and time frame, but overall 20–70% of people with careful research diagnoses appear to have a good outcome, with substantial reduction of symptoms and good quality of life and role function over extended periods of time. The modal percentage with good outcomes is in the range of 50%." *Bellack, supra*, at 437.

HEALTH CONDITIONS, RESEARCH BRIEF 3 (2011). In essence, the symptoms of mental illness such as schizophrenia are transitory over time with many patients experiencing substantial improvement as they age. Rather than being divorced from adolescence, as the Oregon Supreme Court proclaimed, the symptoms of a psychotic illness are often connected to maturation and brain development.

Dr. Konkol, a pediatric neurologist, provided an optimistic prognosis for Petitioner. (App. 12A-13A.) Dr. Orin Bolstad, cited by the Majority, concluded that Petitioner, once treated, "can be pretty normal." (App. 8A:13-17.) Dr. William Saks even offered that, so long as medication and counseling conditions were met, he would be "happy to have [Petitioner] as my next-door neighbor." (App. 18A:3-10.) Uniformly, the experts who testified at Petitioner's 1999 sentencing expected that he would not be a risk to the public and would recover from the worst aspects of his illness. In other words, there was no evidence that Petitioner falls into the "rarest" of juveniles who are "permanent[ly] incorrigib[le]." *Montgomery*, 136 S. Ct. at 734.

B. The Oregon Supreme Court's Decision Vitiates This Court's Eighth Amendment Analysis In *Miller* And *Montgomery*

Approximately 50-75 percent of youth in the juvenile justice system suffer from a mental health disorder. Lee A. Underwood & Aryssa Washington, *Mental Illness & Juvenile Offenders*, INT'L J. ENVTL. RES. PUB. HEALTH, Feb. 2016 at 1, 2-3.[3] Psychotic disorders are among the most common types of mental illnesses found in young people with juvenile criminal convictions. *Id.* at 3. While one in five youth experience a severe mental illness, only a small fraction go on to experience that illness as an

[3] *Available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4772248/pdf/ijerph-13-00228.pdf.

adult. *Kinkel*, 417 P.3d at 421 (Egan, J., dissenting) (citing National Institute of Health, *Transforming the understanding and treatment of mental illnesses* (November 2017), https://www.nimh.nih.gov/health/statistics/mental-illness.shtml (accessed May 3, 2018). Additionally, mental illness has long been recognized as a mitigating factor. *Rompilla v. Beard*, 545 U.S. 374, 390-91 (2005) (reversing a death penalty sentence for counsels' failure to look at defendant's prior conviction file in which "they would have found a range of mitigation leads" including test results describing defendant's mental health as "pointing to schizophrenia and other disorders" which "would have unquestionably gone further to build a mitigation case"); *Porter v. McCollum*, 558 U.S. 30, 39-40 (2009) (per curiam) (reversing a death penalty sentence for failure to "conduct a thorough investigation of the defendant's background" to assess all potential mitigating factors, including "evidence of [the defendant's] mental health or mental impairment"); *United States v. Jones*, 352 F. Supp. 2d 22, 25-26 (D. Me. 2005) (imposing a reduced sentence based on defendant's history of mental illness); *United States v. Pallowick*, 364 F. Supp. 2d 923, 928 (E.D. Wis. 2005) (determining mental illness was a mitigating factor in sentencing and finding that "courts regularly have held that depression and anxiety may cause a substantially reduced mental capacity, supporting mitigation of punishment for crime." *See United States v. Shore,* 143 F. Supp. 2d 74, 83-84 (D. Mass. 2001) (collecting cases); *see also United States v. Perry,* No. 98-4265, 1999 WL 95531, at *1 (4th Cir. Feb. 17, 1999) (per curiam); *United States v. Woodworth,* 5 F. Supp. 2d 644, 647-48 (N.D. Ind. 1998); *United States v.*

Brown, No. 96-CR-451, 1997 WL 786643, at *5 (N.D. Ill. Dec. 18, 1997); *United States v. Herbert,* 902 F. Supp. 827, 829-30 (N.D. Ill. 1995). This holds true in cases following this Court's decision in *Miller v. Alabama*. *People v. Gipson*, 34 N.E.3d 560, 582 (Ill. App. Ct. 2015); *see also People v. Horta*, 67 N.E.3d 994, 1012-1013 (Ill. App. Ct. 2016) (explaining that the *Gipson* court found "compelling factors in mitigation" to include "defendant's mental illness). Prevailing jurisprudence views the presence of a mental illness as a condition that makes someone less culpable, not more.

Simply put, a mentally ill youthful offender cannot, based solely on his mental illness, be designated " the rare [and uncommon] juvenile offender" for whom a life without parole sentence would be constitutional. *Montgomery*, 136 S. Ct. at 733-34. If that were true, then a substantial portion of juveniles could be sentenced to die in prison. *Miller* and *Montgomery* counsel otherwise. Yet, the Oregon Supreme Court's decision would turn Miller on its head—permitting a great number of juveniles to be sentenced to life without parole, while the more rare, and more culpable, mentally healthy offender would be eligible for release.

II. STATE LAW DOES NOT BAR RELIEF

Respondent further opposes *certiorari* by arguing that Oregon Revised Statute 138.550(2) bars post-conviction relief on any ground that was raised "in the direct appellate review proceeding." (Resp't's Br. in Opp'n 16-17 (citing Or. Rev. Stat. § 138.550(2))). Petitioner did indeed raise an Eighth Amendment claim on direct review. It was rejected in 2002, ten years before *Miller* was decided. The State's argument fails. First, the requirements of *Miller* were not, and could not, have been

addressed on direct appellate review, as they did not yet exist. Second, the Oregon Supreme Court addressed the merits of Petitioner's arguments, not the procedural bars that were extensively briefed by Respondent. *Kinkel*, 417 P.3d at 407. Third, the Oregon Supreme Court has already accepted another case for review addressing the very issues that Respondent would have this Court understand to be settled. *See White v. Premo,* Nos. S065188, S065223 (Or. pet. for review allowed Oct. 4, 2018), *available at* https://www.courts.oregon.gov/news/Lists/ArticleNews/Attachments/992/9023fc25635e634fa888c1763bbb745d-Oct%205%20-%20Media%20Release%20conference%20results.pdf. Plainly, Petitioner is asking this Court to review the merits of what a lower court addressed.

III. THE FIRST AND THIRD QUESTIONS ARE PROPERLY PRESENTED

Respondent contends that Petitioner did not raise the first and third questions presented to this Court. As discussed above, Petitioner was denied post-conviction relief in the circuit court and in the Court of Appeals on procedural grounds. *Kinkel,* 417 P.3d at 406-07. On review in the Oregon Supreme Court, the issues presented were whether Petitioner was procedurally barred from reaching the federal claim and, if not, whether his sentence violated the Eighth Amendment. *Id*. at 407. The Oregon Supreme Court did not address the procedural issues, but instead concluded that Petitioner's Eighth Amendment challenge "fails on the merits." *Id*. The Oregon Supreme Court's conclusion—that Petitioner's mental illness excluded him from the sentencing limitations in *Roper, Miller,* and *Graham*, *id*. at 416,—resolved the case on the merits, even though the merits were never briefed or argued by any of the

parties in those proceedings. The Oregon Supreme Court's ruling is unprecedented.[4] Petitioner has never been provided any opportunity to address that conclusion or present his *Miller* claim. This Court's rules regarding the granting of *certiorari* permit review where "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court." SUPREME COURT RULE 10(c). Therefore, the issues are properly presented to this Court.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the Petition for *Certiorari*.

Respectfully Submitted,

Thaddeus A. Betz*
**Counsel of Record*
155 NW Hawthorne Ave.
Bend, OR 97703
Telephone: (541) 389-6964
Email: thadbetz@gmail.com

Marsha L. Levick
Riya Saha Shah
JUVENILE LAW CENTER
1315 Walnut St., 4th Floor
Philadelphia, PA 19107
(215) 625-0551
mlevick@jlc.org

November 20, 2018

[4] Respondent's argument that Petitioner has failed to show a circuit split on this issue is answered by pointing out that Petitioner is unaware of any court, state or federal, making a similar holding.