

No. \_\_\_\_\_

\_\_\_\_\_  
IN THE  
SUPREME COURT OF THE UNITED STATES  
\_\_\_\_\_

\_\_\_\_\_  
~~Kipland Phillip Kinkel~~ — PETITIONER  
(Your Name)

VS.

Rob Persson, Superintendent  
~~Oregon State Correctional Inst.~~ — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

\_\_\_\_\_  
Supreme Court of Oregon  
\_\_\_\_\_  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

\_\_\_\_\_  
Kipland Phillip Kinkel  
\_\_\_\_\_  
(Your Name)

SID #12975669, Oregon State Correctional Inst.  
3405 Deer Park Drive SE  
\_\_\_\_\_  
(Address)

\_\_\_\_\_  
Salem, Oregon 97310  
\_\_\_\_\_  
(City, State, Zip Code)

\_\_\_\_\_  
N/A  
\_\_\_\_\_  
(Phone Number)

## QUESTION(S) PRESENTED

In *Graham v. Florida*, this Court held that the Eighth Amendment prohibited the imposition of life without parole on a juvenile for non-homicide offense. 560 U.S. 48 (2010). In *Miller v. Alabama*, this Court held that mandatory sentences of life without parole imposed on a juvenile homicide offender violate the Eighth Amendment. 132 S. Ct. 24455, 2469 (2012). In *Montgomery v. Louisiana*, the Court reiterated that if the judge has discretion to impose such a sentence under state law, the Eighth Amendment requires a sentencing judge to find that a crime reflects “permanent incorrigibility” or “irreparable corruption” before imposing that sentence. 136 S. Ct. 718 (2016) (citing *Miller*, 132 S. Ct. at 2469). Following *Montgomery*, this Court granted the writ of certiorari, vacated the judgment, and remanded a series of cases to the state court for further consideration in light of *Montgomery*. See, e.g., *Tatum v. Arizona*, 137 S. Ct. 11 (2016); *Arias v. Arizona*, 137 S. Ct. 370 (2016); *Adams v. Alabama*, 136 S. Ct. 1796 (2016).

Here, in 1989, when Mr. Kinkel was a 15 year old juvenile suffering from an untreated mental illness, he shot his parents and, the next day, travel to school, where he killed two students and injured 26 others. After he pleaded guilty, the trial court sentenced him to consecutive mandatory minimums totaling nearly 112 years. Mr. Kinkel filed a successive state post-conviction challenging his sentence based on *Graham* and *Miller*, but was denied relief on procedural grounds. He was never provided an opportunity to demonstrate that he was not “irreparably corrupt” or “permanently incorrigible” as required in *Montgomery*. The Oregon Supreme Court accepted review and affirmed the lower court’s decision on different grounds: that *Miller* did not apply to Mr. Kinkel due to his aggregate sentence and because his treatable, but not curable mental illness, rendered him “irreparably corrupt” under *Miller*’s standard.

This case thus presents the following questions:

1. Does a treatable, but not curable, mental illness constitute “irreparable corruption” under *Miller v. Alabama* and *Montgomery v. Louisiana*?
2. Do *Graham v. Florida*, *Miller v. Alabama*, and *Montgomery v. Louisiana* apply to a juvenile under the age of 18 sentenced to 112 years in prison?
3. Is a juvenile under the age of 18 entitled to a meaningful opportunity under *Miller v. Alabama* and *Montgomery v. Louisiana* to present evidence showing they are not “irreparably corrupt” or “permanently incorrigible” before the state can impose a sentence of life without the possibility of parole?

## LIST OF PARTIES

- All parties appear in the caption of the case on the cover page.
- All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

**TABLE OF CONTENTS**

OPINIONS BELOW..... 1  
JURISDICTION.....  
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....  
STATEMENT OF THE CASE .....  
REASONS FOR GRANTING THE WRIT .....  
CONCLUSION.....

**INDEX TO APPENDICES**

APPENDIX A      Kinkel v. Persson, 363 Or 1 (2018)  
APPENDIX B      Kinkel v. Persson, 276 Or App 427 (2016)  
APPENDIX C      Kinkel v. Persson, Marion County Circuit Court Case No. 13C13698  
APPENDIX D  
APPENDIX E  
APPENDIX F

**TABLE OF AUTHORITIES CITED**

CASES

PAGE NUMBER

STATUTES AND RULES

OTHER

IN THE  
SUPREME COURT OF THE UNITED STATES  
  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix \_\_\_\_\_ to the petition and is

- reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

- reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

- reported at Kinkel v. Persson, 363 Or 1 (2018); or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the Oregon Court of Appeals court appears at Appendix B to the petition and is

- reported at Kinkel v. Persson, 276 Or App 427 (2016); or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was May 10, 2018.  
A copy of that decision appears at Appendix \_\_\_\_\_.

A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eighth Amendment to the U.S. Constitution:

“Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.”

Fourteenth Amendment to the U.S. Constitution:

“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”



## STATEMENT OF THE CASE

While delusional and hallucinating from mental illness with features of paranoid schizophrenia, schizo-affective disorder (a combination of schizophrenia and depression) and bipolar disorder, Petitioner murdered his parents. The next day, he went to Thurston High School, where he was a freshman, and killed two students and shot several others. After being arrested, he injured a police officer with a knife.

Mr. Kinkel pled guilty to four counts of murder and 25 counts of attempted murder, and pled no contest to one count of attempted murder. The court imposed 25-year prison terms for each of the murder convictions and 90-month terms for each of the convictions for attempted murder. The court ordered him to serve the incarceration terms for the murders concurrently and ordered him to serve the remaining prison terms partially consecutively, for a total incarceration term of 1,340 months.

On March 27, 2013, Mr. Kinkel filed a second petition for post-conviction relief. In that petition, which initiated the present case, he asserted that his cumulative sentence violated Mr. Kinkel's rights against Cruel and Unusual Punishments, which are proscribed by the Eighth and Fourteenth Amendments to the United States Constitution. *Kinkel v.* This time, he alleged:

“On June 25, 2012, the United States Supreme Court issued its opinion in *Miller v. Alabama*, \_\_\_ US \_\_\_, 132 S Ct 2455, 183 L Ed 2d 407 (2012), in which it held that the Eighth Amendment to the United States Constitution precludes mandatory imprisonment for life for a juvenile convicted of murder.”

*Kinkel v. Persson*, Marion County case no. 13C13698, Petition for Post-Conviction Relief, ¶ 10.

Mr. Kinkel and Defendant filed competing motions for summary judgment. The circuit court granted Defendant's motion, denied Mr. Kinkel's motion and entered judgment in favor of Defendant. Mr. Kinkel appealed. *Citing Moore v. Biter*, 725 F3d 1184 (9th Cir 2013), *rehearing denied* 742 F3d 917 (2014), Mr. Kinkel argued that his cumulative sentence was the functional

equivalent of the true life sentences that the United States Supreme Court had held were unconstitutional in *Miller v. Alabama*, 132 S. Ct. 2455 and *Graham v. Florida*, 560 US 48 (2010), and that the rule announced in *Graham* applies retroactively. Defendant argued the opposite on both issues.

Oral argument was conducted in the Court of Appeals on September 15, 2015. On January 25, 2016, while the case was still under advisement, the United States Supreme Court issued its opinion in *Montgomery v. Louisiana*, 136 S Ct 718 (2016), in which it held that the rule of *Miller* applied retroactively, no matter when the conviction occurred. In doing so, the court explained that “a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced.” *Montgomery*, 136 S Ct at 731. The court went on to hold that, “If a State may not constitutionally insist that a prisoner remain in jail on federal habeas review, it may not constitutionally insist on the same result in its own post conviction proceedings. *Id.*”

The Court of Appeals did not address Petitioner’s substantive argument under the Eighth Amendment and dispensed with Petitioner’s procedural argument in a footnote:

“We do not interpret *Montgomery* to preclude operation of ORS 138.510(3) or ORS 138.550 (2) and (3). Therefore, *Montgomery* does not affect our conclusion, discussed below, that petitioner’s successive petition is procedurally barred by ORS 138.550.”

*Kinkel III*, 276 Or App at 438.

Mr. Kinkel then sought and the Oregon Supreme Court accepted his petition for review, and both Mr. Kinkel and defendants addressed the procedural issues resolved in the lower court. On May 10, 2018, the Oregon Supreme Court affirmed the lower court’s decision but on completely different grounds. Relying on *dicta* from *O’Neil v. Vermont*, 144 US 323 (1892), the Court first concluded that Mr. Kinkel did not receive the benefit of either *Graham* or *Miller*

because he was sentenced to multiple convictions and the life without parole sentences in those cases were based upon a single conviction. *Kinkel*, 363 Or. at 22-23. Alternatively, the Court concluded that Mr. Kinkel was “irreparably corrupt” because he suffered from a treatable, but not curable mental illness”

“We recognize that the psychological problems that motivated petitioner's crimes are a two-edged sword. On one hand, the trial court's findings establish that petitioner's crimes stem from fixed psychological problems that will not diminish as petitioner ages. On the other hand, those problems diminish his moral culpability in the same way that any and every defendant whose crimes reflect deep-seated psychological problems can claim diminished moral culpability. However, because petitioner's psychological problems diminish his culpability for reasons that are unrelated to his youth, they are independent of and separate from the concerns that animated the Court's Eighth Amendment holdings in *Roper*, *Miller*, and *Graham*. Put differently, while petitioner's psychological problems are relevant mitigating evidence, which the sentencing court considered, they are not the sort of concerns that led to the categorical sentencing limitations announced in *Roper*, *Miller*, and *Graham*.”

*Kinkel*, 363 Or at 29.

The dissent concluded differently finding that “[t]here [was] no evidence admitted for the truth of the matter asserted that petitioner's crimes are the result of an irretrievable depravity.

*Kinkel* 363 Or at 36 (Egan, J., dissenting). Instead, the dissent explained

“Petitioner’s crimes do not reflect irreparable corruption and do not exhibit such irretrievable depravity that life in prison without the possibility of release is constitutionally justified. There is no question that petitioner's crimes were horrendous. Any legal conclusion about petitioner or his sentence does not require this, or any, court to diminish or ignore the immense pain, suffering, and loss of life that petitioner inflicted. Petitioner killed four people. He attempted to kill 26 more people. His crimes took place over a period of less than 24 hours. His crimes were the heartbreaking culmination of three years of intermittently building psychosis. His crimes were the product of a 15-year-old boy with a mental disorder. In total, those statements do not demonstrate irreparable corruption. Rather, they demonstrate a brief but horrible psychotic break with horrific consequences.”

*Id.* 35–36.

## REASONS FOR GRANTING THE PETITION

Before receiving a nearly 112-year sentence, the sentencing judge did not find that Mr. Kinkel's crimes or person reflects "permanent incorrigibility" or irreparable corruption." This Court's decision in *Montgomery* confirms that such a finding from a sentencing judge is a constitutional requirement under *Miller* for imposing a life-without-parole sentence on a juvenile. *See* 136 S. Ct. at 734. The trial court similarly did not make either finding in denying Mr. Kinkel post-conviction relief. Yet, the Oregon Supreme Court for the first time and without providing Mr. Kinkel any opportunity to demonstrate how he had matured and reformed, as *Montgomery* required, concluded that he "irreparably corrupt" because he suffered from a treatable, but not curable mental illness. The Oregon Supreme Court thus decided an important federal question in a way that conflicts with this Court's decision in *Montgomery*. Rule 10(b). The Oregon Supreme Court's decision is also inconsistent with this Court's decision in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), where in this Court recognized that a mentally ill children are not to be treated more harshly because of their mental condition, but rather less severely. Rule 10(b). Directing the court below to reconsider its treatment of Mr. Kinkel's *Graham* and *Miller* claim in light of *Montgomery* would give Mr. Kinkel the meaningful opportunity to demonstrate that he is not one of the rarest juveniles deserving of a sentence of life without the possibility of parole. Depriving Mr. Kinkel that opportunity violates his due process rights under the Eighth and Fourteenth Amendments to the United States Constitution. Rule 10(b)(c).

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Kip Krutw

Date: August 7, 2016