No. 17-1511

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

In 1995, Mr. Newton, in exchange for the State's agreement no longer to seek the death penalty, pleaded guilty to a sentence of life without the possibility of parole for a murder he committed as a juvenile. In 2012, the Court in *Miller v. Alabama* categorically excluded all but the rare juvenile offender who is irreparably corrupt from eligibility for that sentence. 567 U.S. 460 (2012). In 2016, the Court in *Montgomery v. Louisiana* held that *Miller* was retroactive precisely because it was a categorical protection. 136 S. Ct. 718 (2016). That holding should have also made clear that a court must find a defendant categorically eligible for the sentence in order for it to be imposed, but there is a substantial and growing split of authority on this question,[1] a point uncontested by the Respondent.

Below, the Indiana courts plainly addressed the merits of the constitutional claims about Newton's sentence. The court rested its decision on two bases: first, that the discretion of the sentencing court rendered *Miller* inapposite, and second, in the alternative, that *Miller* provided merely a set of procedural, rather than categorical, protections, which were satisfied in Newton's 1995 plea proceeding.

In light of the merits determination below, this Court plainly has jurisdiction. The lower court's rea-

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[1] Although the Petition outlines the split of state authorities (Pet.13-16), since its filing, a split of the circuits has also emerged. *See Malvo v. Mathena*, 893 F.3d 265, 275 (4th Cir. 2018); *United States v. Briones*, 890 F.3d 811, 818 (9th Cir. 2018).

soning directly implicates the questions presented, which reflect substantial splits of authority on questions affecting the severest sanction a juvenile can face.

ARGUMENT

I. THE COURT HAS JURISDICTION TO ADDRESS THE QUESTIONS PRESENTED.

Respondent argues that Newton waived his right to challenge his sentence by pleading guilty to avoid a death sentence, establishing an adequate and independent state ground barring relief. Opp. 7-10, 15-16. However, the merits ruling by the last state court to be presented with Newton's Eighth Amendment claims "removes any bar to federal review that might otherwise be available." *Yist v. Nunnemaker*, 501 U.S. 797, 801 (1991).

In claiming that Newton's guilty plea bars this Court's review of his questions presented, Respondent ignores that the court below court expressly held any waiver did not bar review, noting the "interest at stake" and that Newton's sentence previously had not received appellate scrutiny. Pet. App. 13a. The court below noted its decision to "address the merits of the [Eighth Amendment issues]." Pet. App. 14a. Having held any waiver inapplicable, the court below (at some length) addressed Newton's Eighth Amendment claims. Pet. App. 14a-38a. For that reason, they are properly before the Court. *See Yist*, 501 U.S. at 801.

The state court decision includes no plain statement that it resolved the case on a procedural bar. Moreover, because the court below addressed the merits of the constitutional questions, any ambigui-

ty is resolved in favor of jurisdiction. *See Harris v. Reed*, 489 U.S. 255, 261 (1989) ("[I]f 'it fairly appears that the state court rested its decision primarily on federal law,' this Court may reach the federal question on review unless the state court's opinion contains a 'plain statement that its decision rests upon adequate and independent state grounds.'" (quoting *Michigan v. Long*, 463 U.S. 1032, 1042 (1983))). Because the state court provided merits review, the federalism underpinnings of the adequate and independent state grounds doctrine fall by the wayside. *Id.* at 265 n.12.

This merits ruling on the constitutional questions in this case distinguishes the state court decisions discussed by Respondent, all of which decline to address the constitutional questions presented. Opp. 7-9 (collecting cases). It also distinguishes the circumstances outlined in Justice Thomas's concurrence with denial of certiorari in *Jones v. Virginia*. Brief in Op. 7, 9-10 (citing *Jones*, 136 S. Ct. 1358 (2016)). Beyond the lack of precedential force of such a denial, *Teague v. Lane*, 489 U.S. 288, 296 (1989), this is a case where the court below *has* addressed the constitutional questions and elected to hold any waiver inapposite. For these reasons, *Brady v. United States*, 397 U.S. 742 (1970), the other federal authority relied upon by Respondent, has no bearing here.

No adequate and independent state ground bars review, and the Court has jurisdiction to consider the questions presented.

II. THE RESOLUTION OF THE ISSUES BELOW MAKES THIS CASE A STRONG VEHICLE FOR ADDRESSING THE QUESTIONS PRESENTED.

Moreover, the state court's manner of resolving the Eighth Amendment claims before it makes this case a strong vehicle for addressing the questions presented. On this point, Respondent raises two primary arguments in opposition: (1) that the court below did not rest its decision on the presence of discretion alone and, relatedly, (2) that the process by which the pre-*Miller* sentencing court considered whether to accept the plea agreement was sufficient to meet *Miller*'s mandates. The first argument misconstrues the decision below and ignores the scope of review requested here. The second argument morphs *Miller* into a procedural rule instead of a categorical protection.

Respondent's complaints about this case as a vehicle are not well founded. As Respondent notes, the court below did not create a categorical rule regarding discretion. Opp. 16-17. But it did not have to because the Supreme Court of Indiana already had done so in a case upon which the court below repeatedly relied when affirming Newton's sentence. Pet. App. 15a, 21a-23a, 37a (citing *Conley v. State*, 972 N.E.2d 864 (Ind. 2012)). The issue of whether a post-*Miller* hearing on a juvenile's eligibility for life without parole is required derives directly from the lower court's insistence that the 1995 plea hearing was sufficient to meet *Miller*'s mandates and implicate an uncontested split of authority, making it appropriate for resolution in this Court. Pet. App. 27a-36a.

Respondent's argument that the lower court's narrowly framed holding should now shield Newton's claims from review are unavailing. "Having raised a[n] [Eighth Amendment] claim in the state courts," Newton can "formulate[] any argument [he] like[s] in support of that claim here." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). He can "frame the question [presented] as broadly or as narrowly as he sees fit." *Id.*; *see also Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

A. Courts, Including The Court Below At Respondent's Urging, Rely On Sentencing Discretion To Exclude Juveniles From *Miller*'s Protections.

The Indiana courts, including the court below, have continued to distinguish *Miller* based on the presence of sentencing discretion. Pet. App. 26a, 38a. Respondent's arguments to the contrary are belied by the record and flatly contradicted by its own briefing.

Respondent urges this Court to decline review of Newton's case because "there is no reason for the Court to address the principal question posed in this petition: whether a sentencing court's discretion to impose or not to impose a juvenile LWOP sentence is sufficient to satisfy the Eight Amendment." Opp. 10. Respondent asserts that Newton has overstated the disagreement among those states whose high courts have found that a sentencing court's discretion, in itself, is sufficient to satisfy the mandates of *Miller*, and those that have found the Eighth Amendment requires more: "[h]alf the cases Newton cites to establish the alleged lower-court conflict

preceded the Court's 2016 decision in *Montgomery* and are therefore irrelevant for the purpose of identifying a current conflict among the lower courts." Opp. 11.

This suggestion is belied by the many extant authorities making such a distinction. Pet. 7-10 (collecting cases).[2] As Respondent notes, some of these authorities pre-date the decision in *Montgomery*. However, those are not the entirety of the set of cases creating the conflict, and even those cases provide persuasive authorities for the jurisdictions still countenancing such sentences.

Moreover, Respondent's argument ignores that one of those very cases—*State v. Conley*[3]—was the relevant, binding precedent relied on *in this case*. The court below, relying on *Conley*, found that because "Newton would have had an opportunity to present evidence of mitigating factors at his sentencing hearing prior to the court imposing the LWOP sentence . . . [w]e agree with the State that Newton's sentence here is not 'mandatory' within the meaning of *Miller*." (internal citations omitted). Pet. App. 27a.

Although it framed its ultimate holding as narrowly tailored to the circumstances of Newton's case—*i.e.* one in which a juvenile defendant's sentence was the product of a plea agreement—the

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[2] Despite Respondent's complaint that some of the lower court authorities cited by Newton did not directly hold that *Miller* was inapplicable to all but mandatory sentences of life without the possibility of parole, the reasoning of those authorities did, in fact, rely on artificial distinctions between discretionary and mandatory sentencing regimes in order to deny petitioners relief that they were properly due under *Miller*.

[3] 972 N.E.2d 864 (Ind. 2012).

court's reasoning that *Miller* and *Montgomery* had been satisfied was very squarely grounded in the fact that a sentence other than life without the possibility of parole would have been theoretically possible.

Respondent's claims that it would be unreasonable to rely on sentencing discretion to distinguish this case are also remarkable in light its arguments below. In fact, an entire subsection of Respondent's appellate brief bore the caption: "Petitioner was not subjected to a mandatory LWOP sentence in violation of *Miller*," and urged an interpretation of the Eighth Amendment in which *Miller* is only "violated when a sentencing court . . . has no discretion under the law to impose a sentence other than LWOP." Br. in Opp. to Transfer, 8-9. Respondent distinguished Newton's case from *Miller* based on the discretion the court had to reject the plea agreement. *Id.* Respondent's present claims that there is "no reason to think courts . . . will contravene *Montgomery*" by relying on the presence of sentencing discretion, Opp. 11, are betrayed by its own briefing below.[4]

Beyond Respondent's faulty factual premise, the limited discretion relied upon here makes the case a good vehicle for definitely establishing that the

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[4] Lawyers representing other states have been raising similar arguments, even after *Montgomery*. *See, e.g.*, *Malvo*, 893 F.3d at 273 ("First, the Warden contends that because the *Miller* rule is limited to *mandatory* sentences of life imprisonment without parole . . ."). The Supreme Court of Indiana, in another recent case involving life without the possibility of parole for a juvenile offense, held that *Miller* does not apply to a term-of-years sentence that exceeds normal human life expectancy, further undermining Respondent's suggestion that after *Montgomery*, Indiana courts are robustly applying *Miller*'s mandates. *See Taylor v. State*, 86 N.E.3d 157,167 n.1 (Ind. 2017) *pet'n for cert. pending* No. 18-81 (July 16, 2018).

presence of discretion does not render *Miller*'s mandates inapplicable. That is, as the parties agreed below and as the below court found, once an Indiana trial court "accepts a plea agreement, 'it is strictly bound by its sentencing provision and is precluded from imposing any sentence other than required by the plea agreement.'" Pet. App. 26a (quoting *Jackson v. State*, 968 N.E.2d 328, 332 (Ind. Ct. App. 2012)). The fact that the court below found this narrow discretion sufficient to render *Miller* inapplicable makes this case a cleaner and more powerful vehicle for addressing Newton's first question presented than those where the sentencing court's discretion might have been broader.

Accepting review will provide the Court with an opportunity to address whether the presence of discretion to impose some other sentence, however minimal, renders *Miller* inapposite.

B. *Miller* Established A Categorical Exclusion From Punishment.

Respondent further argues that because the pre-*Miller* sentencing court effectively found Newton irreparably corrupt, review is not warranted. To the contrary, it is this finding that squarely implicates the question presented, which asks whether a sentencing court can ever have reliably ruled on a juvenile's *eligibility* for life without the possibility of parole before *Miller* was decided.

In answering in the affirmative, the court below fundamentally misapplied *Miller*. Repeatedly, the court relied on the procedural protections outlined in *Miller* and concluded that court considered the required factors. *See, e.g.*, Pet. App. 28a ("At the sentencing hearing, the trial court heard evidence

on mitigating factors and specifically made findings regarding Newton's youth and his prospect of rehabilitation prior to accepting the plea agreement."). In light of the intervening sea change regarding how youth should be considered, both jurisprudentially and scientifically, it is unlikely that the 1995 hearing—held at the height of the "superpredator" panic[5]—appropriately considered youth within the meaning of *Miller*, a case decided decades later.[6] Because the jurisprudence on the significance of youth was "substantially altered" by *Miller*, a new hearing on the propriety of the sentence is required. *Bobby v. Bies*, 556 U.S. 825, 837 (2009); Pet. 17-18.

However, Respondent, along with the court below, made an even more fundamental mistake in finding the prior plea proceeding satisfied *Miller*. "*Miller* established more than a set of factors for a sentencer's consideration. *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. By turning *Miller* into a mere laundry list of factors to consider, the court below eviscerated the categorical protection at its core.

Respondent has not suggested that the split of state authorities relevant to this question is anything other than a strong reason to grant review.

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[5] *See* John Diloulio, Jr., *The Coming of the Super-Predators*, Wkly. Standard (Nov. 27, 1995); *see also* Equal Justice Initiative, *The Superpredator Myth 20 Years Later* (Apr. 7, 2014) available at https://tinyurl.com/ybqloop8.

[6] By way of example, it is hard to imagine trial counsel now arguing, as Newton's lawyer did in 1995, that "[i]t's ridiculous to say that someone doesn't appreciate the seriousness of what he's done because he's only 14 or 15." Tr. 112.

(Pet. 15-16). Moreover, since the filing of the Petition, a split among the federal circuits on the same question has emerged, further strengthening the case for the Court's intervention.

The Fourth Circuit recently reversed a juvenile's sentence of life without the possibility of parole because the "jury was never charged with finding whether [the defendant's] crimes reflected irreparable corruption or permanent incorrigibility, a determination that is now a prerequisite to imposing a life-without-parole sentence on a juvenile homicide offender." *Malvo*, 893 F.3d at 275. That is, because the sentencer did not address categorical eligibility, reversal was required. On the other hand, the Ninth Circuit recently held, over a dissent, that consideration of *Miller*'s "factors" is sufficient, even if there has been no finding on eligibility for the sentence. *See Briones*, 890 F.3d at 818; *id.* at 822 (O'Scannlain, J., dissenting) ("But the Supreme Court made clear in *Montgomery* that *Miller* stood for more. Beyond procedural boxes to check, *Miller* recognized a substantive limitation on who could receive a life sentence."). This split of authority warrants the Court's intervention.

A hearing on categorical eligibility for a sentence of life without the possibility of parole should be required in light of *Miller*'s categorical exemption of most juveniles from that punishment. Even if a pre-*Miller* sentencing court properly considered the *Miller* factors, it is implausible in the extreme that its findings could meaningfully reflect the categorical protections that *Miller* provides.

The *Montgomery* Court's discussion of evidence of rehabilitation and the fact that the decision below expressly excluded that type of evidence as irrele-

vant further illustrates the importance of a post-*Miller* hearing on a juvenile offender's eligibility for life without the possibility of parole. In *Montgomery*, the Court noted that post-sentencing behavior is "an example of one kind of evidence that prisoners might use to demonstrate rehabilitation." 136 S. Ct. at 736. There the Court considered the petitioner's having established an inmate boxing team, worked in the prison's silkscreen department, and served as a role model to other inmates as evidence relevant to the question of whether a juvenile offender should be eligible for life without the possibility of parole. *Id.*

Conversely, here, the state court affirmed the exclusion of similar evidence as irrelevant because "the trial court complied with the procedural safeguards mandated by *Miller* and *Montgomery* before imposing LWOP on Newton." Pet. App. 36a-37a n.12. Thus, the court below misconstrued *Miller* as providing merely procedural protections and allowed the court below to forgo the question of eligibility for that sentence in the first instance. Moreover, the evidence presented after *Miller* was disregarded for the same reason: if *Miller* provides merely a procedural rule about certain factors, then consideration of categorical eligibility is not required.

Granting review will provide the Court with an opportunity to ensure that courts address a juvenile's categorical eligibility for life without the possibility of parole before imposing such a sentence.

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Sentencing a juvenile to die in prison is a serious matter: "[I]t means denial of hope; . . . it means that whatever the future might hold in store for the mind and spirit of the convict, he will remain in prison for

the rest of his days." *Graham v. Florida*, 560 U.S. 48, 69-70 (2010). In upholding Newton's 1995 sentence, the Indiana courts have undermined the categorical exclusion from that punishment to which all but the rarest of juvenile offender is entitled.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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