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

BRIEF OF *AMICUS* INDIANA PUBLIC DEFENDER COUNCIL, JUVENILE DEFENSE PROJECT IN SUPPORT OF PETITIONER LARRY W. NEWTON

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BRIEF OF *AMICUS CURIAE*[1]

INTEREST OF *AMICUS*

Amicus curiae—Indiana Public Defender Council (IPDC) is a judicial branch state agency mandated by the Indiana Legislature to "maintain liaison contact with . . . all branches of local, state, and federal government that will benefit criminal defense as a part of the fair administration of justice in Indiana." Ind. Code § 33-40-4-5. Its membership consists of all public defenders, contractual pauper counsel, and attorneys regularly appointed to represent indigent defendants pursuant to a uniform system of periodic appointments or who are on the list of attorneys maintained by the Indiana Public Defender Commission who are qualified and willing to be appointed in death penalty cases. IPDC is currently supervising the grant funded Juvenile Defense Project, which has set goals and objectives that include creating a system of comprehensive and thorough legal advocacy which recognizes juvenile defense as a specialization.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Juvenile Life Without Parole (JLWOP) is the most serious sentence that a person who commits any offense prior to the age of 18 can receive, and is tantamount to the death penalty. Because of the severity of

[1] *Amicus* certifies that no party or party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. All counsel of record received timely notice of *Amicus*' intent to file this brief more than 10 days prior to its due date and all parties consented to filing of this brief.

this sentence, the Eighth Amendment prohibits application of that sentence upon a juvenile unless a hearing that comports with *Miller v. Alabama*, 567 U.S. 460 (2012), is held. This requirement is a substantive constitutional rule, and is retroactively applicable to collateral attacks of sentences. *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016).

As Newton addresses in his Petition for a Writ of Certiorari, he did not receive an opportunity to present evidence that he was not irreparably corrupt. His goal at his sentencing hearing, which occurred prior to *Roper v. Simmons*, 543 U.S. 551 (2005), was to prevent his death at the hands of the state, a fate that we now know is cruel and unusual punishment for youth such as Newton. As a result, the evidence he presented was intended to achieve life without parole.

Due to the threat of capital punishment, not only was the evidence offered by Newton intended to achieve life without parole, but also the function of Newton's advocate was to obtain this harsh result. *Amicus* IPDC JDP contends that the role of counsel in addressing *Miller* considerations is important and cannot be overlooked. Where, as here, counsel was forced by threat of death penalty to advocate **for** JLWOP, Newton did not receive the advocacy that all persons deserve through an adversarial process.

ARGUMENT

JUVENILES DESERVE A CONTESTED ADVERSARIAL PROCEEDING TO DETERMINE WHETHER THEY ARE PERMANENTLY BEYOND REDEMPTION.

In *Miller*, the High Court rejected mandatory life-without parole sentencing schemes for juveniles because it:

> Precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including in plea agreement) or his incapacity to assist his own attorneys.

Miller, 567 U.S. at 477-78. *Montgomery* further explained, *Miller* "mandates [] that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." 136 S. Ct. at 734. When doing so, the

Montgomery Court went to great lengths to explain that *Miller's* requirements are a substantive rule of constitutional law that sets forth a constitutional guarantee that goes "far beyond the manner of determining a defendant's sentence." *Id*. at 732.

The Indiana Court of Appeals, however, explained that these considerations did not apply to Newton because he had waived his Eighth Amendment claim by pleading guilty in exchange for the benefit of not being subjected to potential execution. *Newton v. State*, 83 N.E.3d 726, 732-34 (Ind. Ct. App. 2017), *trans. denied*. Guilty plea or not, *Amicus* contends that a judicial determination of the propriety of JLWOP should be made in every case. It would be contrary to the solemn meaning of cruel and unusual punishment if one could simply waive the right to be free from cruel and unusual treatment. "The Eighth Amendment requires that the awesome power to punish is 'exercised within the limits of civilized standards,' and permitting waiver of the Eighth Amendment ban on cruel and unusual punishments would harm society and weaken the Eighth Amendment." Jeffrey Kirchmeier, *Let's Make a Deal: Waiving the Eighth Amendment by Selecting Cruel and Unusual Punishment*, 32 Conn. L. Rev. 615, 651-52 (2000). This should especially be true where the choice to accept JLWOP came under threat from what we now recognize to be cruel and unusual punishment.

Be that as it may, the Indiana Court of Appeals went on to address the issue which it explained had been waived—whether Newton received an adequate consideration of age and its attendant characteristics at his sentencing hearing—and found that he did.

IPDC JDP contends that due to the context of the sentencing hearing, Newton could not have received adequate consideration of whether JLWOP should be imposed. Specifically, IPDC JPD writes to address the important role of advocacy by constitutionally mandated counsel prior to the determination of whether a child deserves the imposition of a life in prison.

First, it is important to remember the gravity of this consideration. "Life-without-parole terms [] 'share some characteristics with death sentences that are shared by no other sentences. Imprisoning an offender until he dies alters the remainder of his life 'by a forfeiture that is irrevocable.'" *Miller*, 567 U.S. at 474-75 (internal citation omitted). Further, life without parole "'means a denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the recipient], he will remain in prison for the rest of his days.'" *Graham v. Florida*, 560 U.S. 48, 70 (2011). It is clear that in light of the severity of the punishment, the defendant deserves a strongly delivered case arguing that JLWOP is not appropriate for whatever reasons might apply.

Moreover, because of the prohibition of the death penalty for all persons who commit their offense prior to the age of 18 (*Roper v. Simmons*, 543 U.S. 551 (2005)), JLWOP is now the most serious penalty that can be levied upon a child. As a result, there is never any advantage for any attorney to agree to life without parole for any child. For that reason, and because JLWOP is an irrevocable forfeiture which shares the characteristics of the death penalty, the phase of trial wherein the considerations of *Miller* are addressed for

a juvenile is comparable to the penalty phase of a capital trial for an adult.

In commentary to the American Bar Association's "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases," it is explained that: "Due to the extraordinary and irrevocable nature of the penalty, at every stage of the proceedings counsel must make 'extraordinary efforts on behalf of the accused.'" American Bar Association (2003) "ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases," 31 Hofstra L. Rev. 913, 923. In regard to the penalty phase of a death penalty trial, "defense counsel must both rebut the prosecution's case in favor of the death penalty and affirmatively present the best possible case in favor of a sentence other than death." *Id*. at 926. Likewise, during the inquiry required by *Miller,* defense counsel should always seek to rebut the prosecutor's case in favor of JLWOP and affirmatively present the best case in favor of a sentence other than JLWOP. To allow less would deny the gravity of that punishment which renders it cruel and unusual for most.

Here, however, Newton received no such strong advocacy; he received quite the contrary. Due to the threat of the death penalty, Newton's attorney actually advocated **for** the imposition of JLWOP. As the Indiana Court of Appeals noted, although his attorney offered several mitigating factors—for example that Newton was being used by another individual who was actually the one responsible for the crime, or that Newton experienced a horrible childhood, a victim of both abuse and neglect—his counsel argued "it does not mean that [Newton] should get anything less than

life without parole." *Newton*, 83 N.E.3d at 741. Consequently, Newton's advocate, actually made the case for JLWOP, flipping the notion of zealous representation on its head. His attorney offered the very facts that would typically be offered to reject imposition of JLWOP, but then directly undermined the impact of those facts for that purpose. This cannot satisfy the requirements of *Miller* or of the right to counsel, or serve as an adequate protection against imposition of cruel and unusual punishment.

Because mitigating facts were actually presented to the court, it may be tempting to ignore the goals of counsel by offering those facts, and manner in which they were couched. This is seemingly what the Indiana Court of Appeals has done. The sentencing court was exposed to the mitigating facts, what does it matter how or why they were offered? But if that were true, that would mean that concepts such as advocacy and persuasion are meaningless, and books such as Scalia and Garner's "Making Your Case: The Art of Persuading Judges" (2008) are not worth the time it takes to read them. The only meaning to a lawyer's trade would be to make sure that the judge received a detailed list of the facts—she will know what to do with them. This cannot be true; advocacy and persuasion matters.

With that said, although the focus of this proceeding is whether Newton received Eight Amendment protections required by *Miller*, it is worth mentioning that the lack of adversarial testing of those required considerations calls into question whether Newton received his Sixth Amendment right to counsel. "[T]he adversarial process protected by the Sixth

Amendment requires the accused to have 'counsel acting in the role of an advocate.'" *United States v. Cronic*, 466 U.S. 648, 657 (1984) (quoting *Anders v. California,* 386 U.S. 738, 743 (1967). "When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Cronic*, 466 U.S. at 656-57. Moreover, since the consideration of whether Newton deserved JLWOP lost its adversarial character, the fundamental fairness of the proceeding is in doubt. The right to "effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Id*. at 658.

In summary, because JLWOP is a 'forfeiture that is irrevocable', and because the consideration of youth and its attendant characteristics is required as a substantive rule to prevent the imposition of cruel and unusual punishment, every individual subjected to that sanction deserves the advocacy of counsel presenting the best case available against the imposition of that punishment. Adversarial testing of the correctness of that most severe punishment helps render confidence in the fairness of the proceeding. Here, Newton received no such advocacy, and for that reason did not receive an adequate consideration of his youth and attendant circumstances.

CONCLUSION

The Court should grant the petition for certiorari and reverse the decision of the Indiana Court of Appeals.

Respectfully submitted,

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