No.

IN THE

SUPREME COURT OF THE UNITED STATES

CURTIS CROFT, Petitioner,
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Appellate Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

JAMES E. CHADD
State Appellate Defender

PATRICIA MYSZA
Deputy Defender

KATHLEEN M. FLYNN
Supervisor
Counsel of Record
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stDistrict@osad.state.il.us

COUNSEL FOR PETITIONER

Of Counsel:
Manuel S. Serritos
Assistant Appellate Defender

QUESTIONS PRESENTED FOR REVIEW

Whether Illinois has misused the broad discretion allowed the states by endorsing a deferential, exclusive "backwards-looking" examination of the "cold record" to determine compliance with *Miller v. Alabama*, 132 S. Ct. 2455 (2012), where the juvenile was sentenced to life imprisonment without the possibility of parole (LWOP) long before *Miller* was decided. *People v. Croft*, 2018 IL App (1st) 150043, ¶23, *citing People v. Holman*, 2017 IL 120655, ¶47.

Consequently, the following questions arise from Illinois' sentencing framework:

I. Whether, before sentencing a juvenile to life without the possibility of parole, must the sentencer find that the juvenile is irreparably corrupt.

II. Whether, in light of the split of authority among the states, *Miller* compliance requires, before the imposition of LWOP that the juvenile defendant be entitled to an opportunity to present evidence that he or she is not irreparably corrupt.

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Cases:

Page

Constitutional and Statutory Provisions:

State Cases:

Statutes:

Other:

No.

IN THE

SUPREME COURT OF THE UNITED STATES

CURTIS CROFT, Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Appellate Court Of Illinois

The petitioner, Curtis Croft, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The decision of the Illinois Appellate Court (Appendix A) is reported at 2018 IL App (1st) 1150043, – N.E.3d – , and is published. The order of the Illinois Supreme Court denying leave to appeal (Appendix B) is reported at 98 N.E.3d 28 (Ill., May 30, 2018).

JURISDICTION

On February 20, 2018, the Appellate Court of Illinois issued its decision. No petition for rehearing was filed. The Illinois Supreme Court denied a timely-filed petition for leave to appeal on May 30, 2018. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eighth Amendment to the United States Constitution

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

Fourteenth Amendment to the United States Constitution

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

730 ILL. COMP. STAT. 5/5-4.5-105 (2016)

(a) On or after the effective date of this amendatory Act of the 99th General Assembly, when a person commits an offense and the person is under 18 years of age at the time of the commission of the offense, the court, at the sentencing hearing conducted under Section 5-4-1, shall consider the following additional factors in mitigation in determining the appropriate sentence:

(1) the person's age, impetuosity, and level of maturity at the time of the offense, including the ability to consider risks and consequences of behavior, and the presence of cognitive or developmental disability, or both, if any;

(2) whether the person was subjected to outside pressure, including peer pressure, familial pressure, or negative influences;

(3) the person's family, home environment, educational and social background, including any history of parental neglect, physical abuse, or other childhood trauma;

(4) the person's potential for rehabilitation or evidence of rehabilitation, or both; family, home environment, educational and social background, including any history of parental neglect, physical abuse, or other childhood trauma;

(5) the circumstances of the offense;

(6) the person's degree of participation and specific role in the offense, including the level of planning by the defendant before the offense;

(7) whether the person was able to meaningfully participate in his or her defense;

(8) the person's prior juvenile or criminal history; and

(9) any other information the court finds relevant and reliable, including an expression of remorse, if appropriate. However, if the person, on advice of counsel chooses not to make a statement, the court shall not consider a lack of an expression of remorse as an aggravating factor.

STATEMENT OF THE CASE

After a bench trial, Curtis Croft was convicted of first degree murder, aggravated criminal sexual assault, and aggravated kidnaping and received, respectively, concurrent sentences of life without the possibility of parole (LWOP), 45 years, and 10 years imprisonment.

Croft's Trial

On July 13, 1986, the body of 16-year old Kim Boyd was discovered in an alley. Boyd's body had a number of bruises and abrasions consistent with being struck by a car, but death was attributed to stab wounds. (Tr. R. 1207-1216).[1] Curtis Croft, who was 17 years at the time, was charged with a number of offenses, including first-degree murder, arising from Boyd's death. Demetrius Henderson, Kevin Campbell and Alonzo Woodward were also charged. (Tr. C. 29-52; Tr. R. 707-11). The cases were severed, but the defendants were tried simultaneously.

The crimes against Boyd came about at the end of a party at Croft's home where a number of youths had gathered. The youths testified that after a time some of them had forced sex with Boyd, including Henderson and Croft. (Tr. R. 1511-16, 1531-32). Later, Henderson stated that they would have to kill Boyd. Croft blindfolded her and led her out to the rear of the house. (Tr. R. 1525-29). Henderson and Croft drove off and, while other youths followed, they eventually lost Henderson's car. (Tr. R. 1530-31).

---

[1]References to the trial record are denoted as follows: TR. C. refers to the common law record (one volume); TR. R. refers to the three-volume report of proceedings; and TR. S. refers to the supplemental report of proceedings for the trial date of May 13, 1987.

On July 17, 1986, Croft told police that Henderson had killed Boyd. (Tr. R. 1479-80). Croft stated that Henderson and other youths had forced sex with Boyd, but he did not. (Tr. R. 1482, 1490). He told the police that after the assaults, Henderson blindfolded Boyd and placed her into the trunk of his car, with Croft acting as a lookout. (Tr. R. 1484). Croft suggested that they feed Boyd, calm her down and take her home, but Henderson insisted that he had to kill her. (Tr. R. 1485). At an alley, Henderson and Croft removed Boyd from the trunk, walked her fifteen feet down the alley, and laid her down. Henderson and Croft returned to the car and Henderson ran over her about five times. (Tr. R. 1486). Henderson got out and stabbed her with a knife. Henderson and Croft then returned to Croft's house. (Tr. R. 1487). Croft gave substantially the same statement to a prosecutor the next day. (Tr. R. 1809-1819).

At trial, Croft denied that he had sexual intercourse with Boyd, but said he was present in the room while others did. (Tr. R. 2020, 2034-50). He also testified that in driving from his home before Henderson killed Boyd, Croft exited the car and left Henderson alone. After a short walk, Croft returned to where the car had been parked, but Henderson's car was gone. Croft met up with Henderson at the corner and saw that Boyd was no longer in the car. (Tr. R. 2023, 2051). Croft denied being present when Boyd was run over and stabbed. (Tr. R. 2027-28).

Croft was found guilty of first degree murder, aggravated criminal sexual assault, and aggravated kidnaping and received, respectively, concurrent terms of life without the possibility of parole, 45 years, and 10 years. On direct appeal, Croft's sentence was reversed and the cause remanded for re-sentencing because co-

defendant Henderson's confession was improperly admitted against him at his original sentence hearing. *People v. Croft*, 570 N.E.2d 507, 515 (Ill. App. 1991).

At the re-sentencing held on May 7, 1992, one mitigation witness was called on Croft's behalf, Gordon McLean, Youth Guidance Director at the Cook County Jail. McLean testified that he had known Croft one year and found him to be a conscientious student. McLean also talked to Croft's former employer and learned that Croft was hard-working, dependable, and friendly. (Tr. R. 2186-2187). In allocution, Croft expressed his remorse for the decedent and to her family. (No. 1-92-2163, R. B28). He stated that he exercised "very poor judgment" in associating with certain people. (No. 1-92-2163, R. B28).

In pertinent part, without mention of Croft's youth, the trial court offered the following comments:

> The defendant talks about mistak[es] in judgment. This is not a case of passive presence, negative acquiescence, mistaken judgment, [no] participation. . . .
>
> * * * * *
>
> The evidence in this case seems to me to be about a person who was really cold-hearted, almost inhuman in his participation in this brutal, heinous, evil doing. One of the most brutal crimes I have ever seen. . . .
>
> About 40 stab wounds, gang rape, driving over this young girl in a car, after having her in the trunk. One can almost not imagine any [worse] facts. . . .
>
> And this defendant cannot simply say, gee I'm terribly sorry this all happened.
>
> There [are] certain crimes that there are no second chances. There [is] no one free bite. There are no forgiveness, saying I'm sorry, expressing regret. . . .
>
> There was . . . participation in one of the [most] brutal crimes that I've heard about. And for that a great penalty must be paid.
>
> * * * * *
>
> So, considering the presentence report, [the arguments and testimony and evidence, and the statutory factors], the

> crime and the criminal, the crime being about as heinous a murder as one can imagine, and by a person who because of the nature of the crime, one can only determine to have evil intentions and to be absolutely heartless, merciless . . . during the killing and torture of this young girl.
>
> * * * * *
>
> And the defendant's light at the end of the tunnel will have to, in my judgment rely on some future governor taking a look at his actions and deeds, which speak louder than words in the penal system, after a period of years and then determine whether or not the defendant is deserving of executive clemency, of mercy. That will be the light at the end of the tunnel, as far as I'm concerned. And it is not unrealistic for the defendant.

(No. 1-92-2163, R. B39-41).

In the appeal following re-sentencing, the appellate court affirmed the natural life sentence and the sentence for aggravated kidnaping, but reduced the sentence for the sexual assault to 30 years. *People v. Croft*, No. 1-92-2163 (July 29, 1994), unpublished Rule 23 Order.

Croft's Post-Conviction *Miller* Challenges

In Croft's first *Miller*-based challenge, the Illinois appellate court rejected his claim because, at the time, *Miller* only applied to mandatory life sentences for juveniles, not discretionary sentences. *People v. Croft*, 6 N.E.3d 739, 744 (Ill. App. 2013). While his first challenge was pending, Croft filed a *pro se* motion for leave to file successive post-conviction petition. (C. 26-39). The trial court dismissed the petition, citing *res judicata*. (C. 106-107).

On appeal, Croft argued, *inter alia*, that *Miller* required Croft's natural life sentence be vacated and his case remanded for a new sentencing hearing. In a published decision, the appellate court held that there were no

procedural bars to consideration of Croft's claim. *People v. Croft*, 2018 IL App (1st) 150043, – N.E. 3d –, ¶20. The appellate court found that, in Illinois, the determination of *Miller* compliance was based on the framework provided by the Illinois Supreme Court in *People v. Holman*, 91 N.E.3d 849 (Ill. 2017). *Holman* held where revisiting a discretionary sentence of life without parole for a juvenile defendant, in order to determine if the sentence is constitutional, a court must look at the cold record to detemrine if the trial court considered evidence of youth and its attendant circumstances at the defendant's original sentencing hearing. *Holman*, ¶47. Specifically, the reviewing court is to determine whether the trial court (here, 25 years ago) considered the following factors:

> (1) the juvenile defendant's chronological age at the time of the offense and any evidence of his particular immaturity, impetuosity, and failure to appreciate risks and consequences; (2) the juvenile defendant's family and home environment; (3) the juvenile defendant's degree of participation in the homicide and any evidence of familial or peer pressures that may have affected him; (4) the juvenile defendant's incompetence, including his inability to deal with police officers or prosecutors and his incapacity to assist his own attorneys; and (5) the juvenile defendant's prospects for rehabilitation.
>
> *Croft*, ¶21, *quoting Holman*, ¶46.

Based on *Holman*, the appellate court rejected the defendant's position that he was entitled to the opportunity to present new evidence, resting on a decision by this Court to find that "good conduct while imprisoned cannot undercut" the origin sentencing imposition. *Croft*, ¶23, *citing Holman*, ¶47, *citing Graham*, 560 U.S. at 73. Further, *Croft* did not require that the cold record reflect that the sentencing court actually made a finding that the

juvenile was permanently incorrigible. Instead, the *Croft* court applied factors announced in *Holman* and concluded that Curtis Croft's sentencing hearing passed constitutional muster. *Croft*, ¶¶24-31.

In the appellate court's view, the *Holman* factors were found in the instant cold record where the trial court knew from the pre-sentence investigation report that Croft was 17 years old and had heard evidence in mitigation, including his employment history. Further, the testimony of McLean, the youth guidance director, did not portray Croft as immature, impetuous, or unable to appreciate risks and consequences. *Croft*, ¶¶24-25. In sum, the appellate court stated, "we cannot say that [Croft's] sentencing hearing was constitutionally defective." *Croft*, 2018 IL App (1st) 150043, ¶32.

Finally, the appellate court concluded:

> We acknowledge that a different sentencing court could have reached a different sentence based on the evidence presented at [Croft's] resentencing hearing. But nothing in *Miller* or *Holman* suggests that we are free to substitute our judgment for that of the sentencing court. . . . We find that [Croft's] resentencing hearing complied with *Miller*, *Holman*, and a contemporary understanding of the eighth amendment.

Croft, 2018 IL App (1st) 150043, ¶33.

No petition for rehearing was filed. On May 30, 2018, the Illinois Supreme Court denied Croft's petition for leave to appeal. *People v. Croft*, 98 N.E.3d 28 (Ill. 2018).

REASONS FOR GRANTING CERTIORARI

Curtis Croft was sentenced in 1992 as a juvenile to a life term of imprisonment without the possibility of parole (LWOP). Croft's sentence has been affirmed despite the fact that there was no finding of irreparable corruption, as required by *Miller v. Alabama* and *Montgomery v. Louisiana*. Instead, in rejecting Croft's *Miller* claim, the Illinois appellate court hewed to the sentencing framework found in the Illinois Supreme Court's *People v. Holman* for *Miller* compliance. Therefore, for the following reasons, Croft asks for examination of the Illinois sentencing scheme to those juveniles sentenced long before *Miller*.

One. This Court should grant certiorari to determine whether a deferential, exclusively backwards-looking, cold record review of a long-ago sentencing hearing comports with the Eighth Amendment's evolving standards of decency, where the record does not reflect an explicit finding of irreparable corruption.

Two. This Court should grant certiorari to resolve the split of authority over whether juvenile defendants sentenced to LWOP prior to *Miller* must have an opportunity to present evidence concerning their eligibility for that sentence. *Montgomery* contemplated that such hearings would occur, and many states have met that expectation. However, Illinois has not only joined the jurisdictions that do not guarantee such a hearing, but it has explicitly rejected this opportunity for juvenile defendants like Croft.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Certiorari to Determine Whether a Deferential, Exclusively "Backwards-Looking" "Cold Record" Review of a Long-Ago Sentencing Hearing Comports with the Eighth Amendment's Evolving Standards of Decency, Where the Record Does Not Reflect a Finding of Irreparable Corruption as Required by *Miller v. Alabama.*

Curtis Croft raised a constitutional challenge to his natural life term of imprisonment without the possibility of parole under the precepts found in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). Croft's challenge was rejected, however, by the Illinois appellate court based on its adoption of "the framework" set forth in *People v. Holman*, 91 N.E.3d 849 (Ill. 2017). *People v. Croft*, 2018 IL App (1st) 150043, ¶¶24-31.

In *Holman*, the Illinois Supreme Court established critical factors that must be satisfied to sustain a LWOP sentence for a juvenile defendant. *Holman* considered these factors to be gleaned from *Miller* and *Montgomery*:

> (1) the juvenile defendant's chronological age at the time of the offense and any evidence of his particular immaturity, impetuosity, and failure to appreciate risks and consequences; (2) the juvenile defendant's family and home environment; (3) the juvenile defendant's degree of participation in the homicide and any evidence of familial or peer pressures that may have affected him; (4) the juvenile defendant's incompetence, including his inability to deal with police officers or prosecutors and his incapacity to assist his own attorneys; and (5) the juvenile defendant's prospects for rehabilitation.
>
> *Holman*, ¶46 (*quoted in Croft*, ¶21).

Under this approach, no explicit finding by the sentencer concerning the defendant's youth and its attendant characteristics is necessary if the sentencer considered these factors. *Holman*, ¶46.

Holman and its application in *Croft* represents a break with *Miller* by endorsing a deferential "backward-looking" review of the cold record, with mere reliance on a checklist of mitigating factors. *Croft*, ¶21, *quoting Holman*, ¶46. This approach prevents a juvenile sentenced before *Miller* from presenting additional evidence that his conduct was a product of transient immaturity.

In so doing, *Holman* altogether diminishes the thrust of *Miller*. In Croft's case, in its reliance on the *Holman* approach, the Illinois appellate court substituted adherence to a checklist for a finding of permanent incorrigibility, a finding which stands at the heart of *Miller/Montgomery*'s Eighth Amendment guarantees: "Children are constitutionally different from adults for purposes of sentencing." *Miller*, 132 S. Ct. at 2464.

This Court has determined that the Eighth Amendment provides several categorical exclusions from punishment for juvenile offenders. Juveniles are not eligible for the death penalty. *Roper v. Simmons*, 543 U.S. 551, 578-579 (2005). Juveniles who have not committed murder are not eligible for life without the possibility of parole. *Graham v. Florida*, 560 U.S. 48, 82 (2010). Most relevant here, all but the "rare" juvenile homicide offender who is "irreparably corrupt" is ineligible to be irrevocably sentenced to die in prison. *Miller*, 132 S. Ct. at 2469. Thus, "*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.

Here, Croft was afforded only incomplete *Miller* review of his LWOP sentence. Croft was wrongly prevented from presenting new evidence relevant to his position that the charged conduct was a product of transient immaturity. The application of the *Holman* rubric to Croft's case, in the absence of a specific on-the-record finding of permanent incorrigibility by the original sentencer, does not comply with the rule of *Miller-Montgomery*, particularly where there was no authentic consideration of youth and its attendant characteristics found in the cold record at bar. Finally, the reviewing court's reliance on a deferential standard of review was yet another layer that prevented true review of Croft's sentencing claim under the Eighth Amendment.

Holman's exclusive reliance on cold-record review and its preclusion of new evidence is based on a misreading of _Graham_

Croft has asked Illinois for a new sentencing hearing, at which the "specific attributes of youth" may properly be considered, as is constitutionally required. The Illinois appellate court, based on a deferential, retrospective review of Croft's 1992 sentencing hearing, held that the sentencer satisfied *Miller*'s requirement of consideration of his youth and its attendant characteristics because the court was aware of Croft's chronological age and heard evidence at that hearing that reflected a work history and revealed no deficiencies in his upbringing. *Croft*, ¶25. The appellate court further found *Miller* compliance where Croft was purportedly given the

opportunity to present evidence in mitigation. *Croft*, ¶¶24-26.

In arriving at its ruling, *Croft* relied on *Holman*'s starting point: "a backwards-looking" review of the record, which specifically rules out examination of any current evidence and rejects any opportunity for the petitioner to present relevant, new evidence. *Croft*, ¶23, *citing Holman*, ¶47. *Holman* observed:

> As *Graham* instructed, "[e]ven if the State's judgment that [the defendant] was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset." [*quoting Graham*, 560 U.S. at 73.] Bad conduct while imprisoned cannot buttress a finding of incorrigibility. Similarly, good conduct while imprisoned cannot undercut such a finding. In revisiting a juvenile defendant's life without parole sentence, *the only evidence that matters is evidence of the defendant's youth and its attendant characteristics at the time of sentencing.*
>
> *Holman*, ¶47 (emphasis added).

However, *Holman* provides a flawed reading of *Graham* and takes language drawn from that case out of context. At issue in *Graham* was whether a LWOP sentence may properly be imposed for a non-homicide conviction. There was a question whether that defendant posed "an immediate risk." *Graham*, 560 U.S. at 73. *Graham* acknowledged that the defendant "deserved to be separated from society," but rejected LWOP as unreasonable – "it does not follow that he would be a risk to society for the rest of his life." *Graham*, 560 U.S. at 73.

Graham went on to note that even if the prosecution argued that the defendant was incorrigible and later corroborated that with prison misbehavior, his "sentence was still disproportionate because that judgment

was made at the outset." *Graham*, 560 U.S. at 73. In other words, *Graham* indicated that in evaluating whether a sentence is disproportionate, it is the initial finding that is at issue – later evidence cannot be relied on to determine the appropriateness of the initial sentencing determination. *Holman*, in a twist of logic, turns *Graham*'s finding on its head and erects a significant bar for juveniles sentenced pre-*Miller* from presenting new evidence to challenge the permanently incorrigible finding.

***Holman* denies meaningful opportunity to present relevant evidence that the juvenile's charged conduct was a product of transient immaturity and that he had the potential for rehabilitation, *i.e.*, he was not permanently incorrigible.**

Holman's interpretation of *Graham* is unreasonable for three reasons. One, at issue in *Graham* was a challenge to the order imposing LWOP following a probation violation, which was a claim that this Court eventually agreed with. *Graham* held that the Eighth Amendment "prohibit[s] States from making the judgment at the outset that those offenders never will be fit to enter society." *Graham*, 560 U.S. at 75. *Graham* rejected a rush-to-judgment approach and indicated that "the State must . . . give defendants like Graham *some meaningful opportunity* to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S at 75 (emphasis added).

Two, *Holman's* approach is unfounded because *Miller* and *Montgomery* are replete with indications that this Court has assumed states would insist on the existence of a hearing to vindicate the rights in question. In response to the states' fear that *Miller* frequently requires sentencing re-litigation, this

Court in *Montgomery* stated that an alternative remedy for a *Miller* violation would be to give defendant parole. Under such a system, consideration would permit "release . . . to those who demonstrate the truth of *Miller*'s central intuition – that children who commit even heinous crimes are capable of change." *Montgomery*, 136 S. Ct. at 736.

As *Montgomery* explained, "prisoners must be given the opportunity to show their crime did not reflect irreparable corruption." 136 S. Ct. at 736-37. This Court described a hearing as "necessary" to "give effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Id.*, at 735. This Court noted that defendant's proffered post-sentencing conduct indicating rehabilitation as "relevant . . . [and] an example of one kind of evidence that prisoners might use to demonstrate rehabilitation," *Id.*, at 736. Therefore, *Miller* and *Montgomery* assume those serving LWOP sentences imposed before *Miller* would receive a hearing.

Three, at its foundation, *Holman* is illogical, dehumanizing and antithetical to the Eighth Amendment's "evolving standards of decency." If a defendant has been a model inmate after years of imprisonment and has accomplished laudable achievements during this time, these matters "are relevant" and are "an example of . . . evidence that . . . demonstrate rehabilitation." *Montgomery*, 136 S. Ct. at 736. This stands as starkly logical since it is far more probative to examine the offender's last 20 years than his first 17 years as a child. *Holman*'s view that "good conduct while

imprisoned cannot undercut" a finding of incorrigibility (*Holman*, ¶47) cannot be reconciled with *Montgomery*.

The *Croft-Holman* approach suspends a living person with unceasing rehabilitative potential in amber forever. *Croft*, in accepting *Holman*'s approach, noted that Croft had the "opportunity to present evidence to show" that he was not incorrigible. *Croft*, 2018 IL App (1st) 150043, ¶24. However, Croft's re-sentencing hearing occurred 20 years before *Miller*, prior to the emergence of the scientific and psychological evidence that *Miller* relied on for its finding that children are unlike adults for sentencing purposes. It strains credulity to suggest that defense counsel in May 1992 would have sufficient prescience to anticipate *Miller*'s 2012 sea change in substantive law.

The Inadequacy of *Holman*'s Checklist Factors Approach

In addition to its misinterpretation of controlling precedent, the *Holman* approach provides no actual *Miller* compliance where it substitutes a checklist framework without requiring the *Miller/Montgomery* finding of permanent incorrigiblity. Although *Holman* acknowledges that, to sustain such a sentence, there should be a determination that "the defendant's conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption" (*Holman*, ¶46), the Illinois Supreme Court held that such a determination may be gleaned from the sentencing court's reference to:

> (1) the juvenile defendant's chronological age at the time of the offense and any evidence of his particular immaturity, impetuosity, and

> failure to appreciate risks and consequences; (2) the juvenile defendant's family and home environment; (3) the juvenile defendant's degree of participation in the homicide and any evidence of familial or peer pressures that may have affected him; (4) the juvenile defendant's incompetence, including his inability to deal with police officers or prosecutors and his incapacity to assist his own attorneys; and (5) the juvenile defendant's prospects for rehabilitation.
>
> *Holman*, ¶46.

In Croft's case, the trial court made no mention of Croft's youth anywhere in the sentencing rationale (*Croft*, ¶9), where there was only a nominal mention in the pre-sentence report (*Croft*, ¶24). Nor did the court reference *any* of the attendant characteristics of youth which this Court has discussed at length. *See Miller*, 132 S. Ct. at 2471. The appellate court noted that the trial court "knew that [Croft] was 17 at the time of the offense." *Croft*, ¶24. However, mere awareness of chronological age, in 1992, is insufficient to demonstrate that the sentencer took into account "[the] hallmark features [of youth] – among them, immaturity, impetuosity, and failure to appreciate risks and consequences." *Miller*, 132 S. Ct. at 2468.

Justices Sotomayor and Ginsberg noted in their concurrence in *Adams v. Alabama*, 136 S. Ct. 1796, 1800-1801 (2016), in the "pre-*Miller* era," youth was just a consideration among many at a sentencing hearing – it was not a dispositive, "standalone mitigating factor" as it is now required. *Croft*'s finding of constitutional compliance with "*Miller, Holman,* and *a contemporary understanding of the eighth amendment*" (*Croft*, ¶33 (emphasis added)), is a conspicuous contradiction to the Eighth Amendment's "evolving standards of decency," because it requires assigning 2018 sensibilities to

Croft's 1992 re-sentencing hearing. *Miller*, 132 S. Ct. at 2463.

Further, the record demonstrates that the sentencing court relied largely on the serious nature of the offense, describing it as: "One of the most brutal crimes I have ever seen. . . .One can almost not imagine any [worse] facts." (No. 1-92-2163, R. B39-41); *see also Croft*, ¶9. This reliance on the severity of the offense to impose LWOP was clearly error. To find permanent incorrigibility based on the offense alone is inimical to the *Miller* precepts. Indeed, in its first case recognizing that children are categorically less culpable than adults, this Court explicitly held that juveniles may not be sentenced to death no matter how serious their crimes. *Roper v. Simmons*, 543 U.S. 551, 568 (2005) ("The death penalty may not be imposed on certain classes of offenders, such as juveniles under 16 . . . no matter how heinous the crime"). Indeed, the Court has made "repeated exhortation that the gruesomeness of a crime is not sufficient to demonstrate that a juvenile offender is beyond redemption." *Adams*, 136 S. Ct. at 1800 (Sotomayor, J., concurring), *citing Roper*, 543 U.S. at 570, 573; *Miller*, 132 S. Ct. at 2475.

Furthermore, the appellate court's rejection of Croft's *Miller* claim rests on the premise that he forfeited this "opportunity" by not advancing supportive mitigating evidence on the matters enumerated in the checklist, for instance, Croft's susceptibility to influence from Demetrius Henderson, his older co-defendant. *Croft*, ¶¶26-27. *Holman* offers the illusory notion that, in 1992, Croft would have anticipated the significance of this "peer pressure" factor, and had available the scientific evidence concerning brain

development and social and psychological research relied on by *Miller* in 2012. *Holman* insinuates *de facto* presumption in favor of LWOP terms for juvenile offenders since it places the onus on the defendant to marshal evidence that his conduct did not signal that he was permanently incorrigible. This burden-shifting has no support in *Miller* nor *Montgomery*, and violates the Eighth Amendment interests that these cases serve.

Holman notes that "*Miller* did not impose a formal fact-finding requirement." *Holman*, 2017 IL 120655, ¶39, *quoting Montgomery*, 136 S. Ct. at 735. This judicial deference stands in the way of a thorough examination of each juvenile offender's history and prospects for rehabilitation. The appellate court here observed:

> *We acknowledge that a different sentencing court could have reached a different sentence based on the evidence presented at* [Croft's] *resentencing hearing*. But nothing in *Miller* or *Holman* suggests that we are free to substitute our judgment for that of the sentencing court.
>
> *Croft*, 2018 IL App (1st) 150043, ¶33 (emphasis added).

There is no discussion of *Miller*'s key principles in context with the *Holman* factors. *See Holman*, 2017 IL 120655, ¶¶46-50. *Holman* only offers an *ipso facto* approach to the issue, *i.e.*, if the reviewing court finds the *Holman* factors tangentially referenced or alluded to at the sentencing hearing, then there is *Miller* compliance. *Croft*, ¶21. This view distorts *Miller*.

The finding of incorrigibility is *Miller*'s *sine qua non*. *Miller*, 132 S. Ct. at 2469; *Montgomery*, 136 S. Ct. at 734. Yet, *Croft* offers nothing that reflects the primacy of this finding in its test for *Miller* compliance. Of course, where

the sentencing proceeding pre-dates *Miller*, as here, it necessarily will not include a finding about which side of the line the juvenile resides; either among the great majority of juveniles whose offense reflects transient immaturity or the rare juvenile offender who is irreparably corrupt.

Illinois' approach, as evinced by *Croft* and *Holman*, adopting factors that suggest compliance without marrying *Miller*'s fundamental precepts, does not demonstrate actual abidance with *Miller*. Michigan, for example, provides uncluttered, more comprehensive *Miller* guidance:

> The cautionary language employed by the [United States Supreme Court] must be honored. . . . [W]hen sentencing a juvenile offender, a trial court must begin with the understanding that in all but the rarest of circumstances, a life-without-parole sentence will be disproportionate for the juvenile offender at issue. For that reason, a sentencing court must begin its analysis with the understanding that life without parole is, unequivocally, appropriate only in rare cases. Sentencing courts are to do more than pay mere lip service to the demands of *Miller*. A sentencing court must operate under the understanding that life without parole is, more often than not, not just inappropriate, but a violation of the juvenile's constitutional rights.
>
> *People v. Hyatt*, 891 N.W.2d 549, 574 (Mich. App. 2016).

Furthermore, *Hyatt* explicitly warned against sole reliance on "factors."

> *Miller* and *Montgomery make clear that sentencing a juvenile to life without parole is more than a simple consideration of a set of factors. . .* . [T]o give any meaning to *Miller*'s discussions about proportionality and the mitigating circumstances associated with youth, a sentencing court must heed *Miller*'s discussion of how rarely a life-without-parole sentence will be proportionate. In order to warrant the imposition of a life-without-parole sentence, *the juvenile must be*, as *Miller* unequivocally stated, *the truly rare individual who is incapable of reform*.
>
> *Hyatt*, 891 N.W.2d at 579 (emphasis added).

In other words, *principles,* not factors, best serve compliance with *Miller*.

The primacy of principles over factors is found in the concurrences of Justice Sotomayor. In her concurrence in *Tatum*, Justice Sotomayor stated:

> [B]efore the imposition of a sentence of life without parole[, the Eighth Amendment] requires that a sentencer decide whether 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*, 137 S. Ct. 11, 13 (2016) (Sotomayor, J., concurring) (internal quotes omitted).

See also Adams v. Alabama, 136 S.Ct. at 1800 (Sotomayor, J., concurring) ("[t]here is no indication that, when the factfinders . . . considered petitioners' youth, they even asked the question *Miller* required them not only to answer, but to answer correctly: whether petitioners' crimes reflected 'transient immaturity' or 'irreparable corruption,' "). Here, in Croft's case, the sentencer omitted all mention of his age, only dwelling on the seriousness of the murder and making an oblique acknowledgment of Croft's sentencing report which had a reference to his age. *Croft*, ¶¶11, 24.

Summary

Croft, embracing the *Holman* test, offers juvenile offenders a watered-down version of *Miller*, *i.e.*, review that lends lip service without authentic assessment of their *Miller* claim. In adhering to *Holman*'s checklist over the precepts espoused in *Miller* and *Montgomery*, Illinois has devalued the critical instructions from those cases.

Recently, Pope Francis recognized the evolution of Catholic doctrine as rejecting the death penalty under all circumstances. Condemning a juvenile

defendant to die behind bars must be subjected to similar scrutiny. The rationale for the Church's position was an "increasing awareness that the dignity of the person is not lost even after the commission of very serious crimes" and rejection of a sanction that "definitively deprive[s] the guilty of the possibility of redemption." Catechism Number 2267, The Death Penalty (new revision) (Summary of Bulletin, Holy See Press Office). http://press.vatican.va/content/salastampa/en/bollettino/pubblico/2018/08/02/180802a.html (last accessed 08/06/2018). Illinois' *Miller* compliance framework does not satisfy Eighth Amendment guarantees and deprives defendants of the opportunity to present evidence that they are not permanently incorrigible and not without the possibility of redemption.

Granting review of Croft's case will provide the Court with an opportunity to resolve the question of whether a finding that a juvenile is eligible for the sentence of life without the possibility of parole requires making the distinction that the juvenile is irreparably corrupt.

II. This Court Should Grant Certiorari To Clarify Whether A Juvenile Sentenced To Life Without Parole Before *Miller* Is Entitled To An Opportunity To Present Evidence of Ineligibility For That Sentence.

Relying on *People v. Holman*, 91 N.E.3d 849 (Ill. 2017), the *Croft* decision confirms that Illinois has joined a minority of jurisdictions that deny juveniles sentenced to life without the possibility of parole prior to *Miller* an opportunity to present evidence that they are ineligible for that sentence. *People v. Croft*, 2018 IL App (1st) 150043. As discussed in Reason I, *Holman*'s premise is based on an errant reading of *Graham v. Florida*, 560 U.S. 48, 73 (2010), used by Illinois to foreclose the defendant from the opportunity to present relevant new evidence to demonstrate that he is not irreparably corrupt. *Croft*, ¶23, *citing Holman*, ¶47. This approach, which compels exclusive "backward-looking" review of a cold record, contravenes *Miller* and generates a conflict on whether juveniles sentenced before *Miller* are entitled to an evidentiary hearing on that question.

A. The Illinois Appellate Court's Decision Deepens An Existing Conflict.

The states are split over whether inmates serving life without the possibility of parole for juvenile offenses sentenced prior to *Miller* must now have an opportunity to present evidence concerning their eligibility for that sentence. Decisions from this Court have contemplated that such hearings would occur (*see* Reason I), and many states have met that expectation. However, Illinois, as found in *Croft*, has decidedly joined the jurisdictions

that do not guarantee such a hearing. *Holman*, ¶47 ("[G]ood conduct while imprisoned cannot undercut [an earlier finding of permanent incorrigibility]. The only evidence that matters is evidence of the defendant's youth and its attendant characteristics *at the time of sentencing*"). *Id.* (emphasis added).

In *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), where the issue was whether *Miller* should be given retroactive effect to cases that were final when *Miller* was decided (*Montgomery*, 136 S. Ct. at 725), the petitioner offered substantial post-sentencing information about his rehabilitation. He proffered "his evolution from a troubled, misguided youth to a model member of the prison [, noting] ... he helped establish an inmate boxing team, of which he later became a coach ... and that he strives to offer advice and serve as a role model to other inmates." *Montgomery*, 136 S. Ct. at 736. Because Mr. Montgomery's claims of rehabilitation had neither been tested nor addressed below, the Court declined to "confirm their accuracy." *Montgomery*, 136 S. Ct. at 736. However, the Court emphasized that the claims were "one kind of evidence that prisoners might use to demonstrate rehabilitation." *Id.* Plainly, *Montgomery* contemplated that there would be an opportunity to present such evidence.

Most states have taken this Court's cue. Across the country, states are providing juveniles with hearings where they can present evidence that they are not irreparably corrupt. For example, California, Florida, and Pennsylvania have guaranteed a hearing for all juveniles under such a sentence. *See People v. Gutierrez*, 324 P.3d 245, 249, 266-267 (Cal. 2014);

Commonwealth v. Batts, 163 A.3d 410, 435 (Pa. 2017); *Landrum v. State*, 192 So.3d 459, 470 (Fla. 2016). In Pennsylvania, it is the state's burden to prove that the defendant is "permanently incorrigible and that rehabilitation would be impossible" before the court can impose a life without the possibility of parole sentence. *Batts*, 163 A.3d at 457. In California, every person serving such a sentence for a juvenile offense received a new hearing after the Supreme Court of California clarified that there was a presumption against such a sentence. *Gutierrez*, 324 P.3d at 266-267. In Florida, every juvenile sentenced to LWOP before *Miller* will also receive a re-sentencing proceeding, if they are eligible for LWOP at all. *See Landrum*, 192 So.3d at 470.

A number of other states have reached the same result. These include Arizona, Georgia, North Carolina, Oklahoma, and South Carolina. *See State v. Valencia*, 386 P.3d 392, 396-397 (Ariz. 2016) (finding re-sentencing under *Miller* to be the appropriate relief, not post-conviction relief); *Veal v. State*, 784 S.E.2d 403, 412 (Ga. 2016); *State v. James*, 786 S.E.2d 73, 79-80 (N.C. App. 2016); *Aiken v. Byars*, 765 S.E.2d 572, 577 (S.C. 2014) ("*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"); *State v. Luna*, 387 P.3d 956, 963 (Okla. Ct. Crim. App. 2016).[2] This approach allows the inmate to

---

[2]Under the Oklahoma sentencing scheme, *Luna* looked for affirmative evidence of whether the juvenile offender's conduct "reflected permanent incorrigibility and irreparable corruption." *Luna,* 387 P. 3d at 962. *Luna* found no evidence of important youth-related considerations, such as the juvenile's chronological age and its hallmark features or circumstances that suggested the

present evidence in light of the Court's newly announced substantive protection.

Illinois has joined Idaho, Indiana, North Dakota and the Seventh Circuit in determining that juveniles sentenced to LWOP under a pre-*Miller* sentencing scheme are not guaranteed a post-*Montgomery* opportunity to present evidence that they are ineligible for the punishment (*Holman*, ¶47; *Croft*, ¶23). *Kelly v. Brown*, 851 F.3d 686, 687-88 (7th Cir. 2017); *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."); *Adamcik v. Idaho*, 408 P. 3d 474, 488-490 (Id. 2017); *Garcia v. State*, 903 N.W.2d 503 (N.D. 2017); *Newton v. State*, 83 N.E.3d 726, 743-44 (Ind. Ct. App. 2017) (denying evidentiary hearing on eligibility for juvenile defendant who entered pre-*Roper* guilty plea to avoid the death penalty and was sentenced to life without the possibility of parole).[3] These states countenance cold-record review to determine whether a pre-*Miller* sentencing complies with *Miller*'s mandate.

---

possibility of rehabilitation. *Luna* also found no evidence concerning adolescent brain development and its effect on behavior and the juvenile's capacity to consider the consequences of his wrongful acts. 387 P. 3d at 962.

[3]*Newton* observed that only four juveniles had ever been sentenced to LWOP in Indiana. *Newton*, 83 N.E. 2d at 744. In contrast, Croft is aware of two other published decisions in the first Illinois appellate district alone where LWOP sentences were affirmed within four months of his decision – on April 18, 2018, *People v. Johnson*, 2018 IL App (1st) 153266, and, on June 29, 2018, *People v. Davis*, 2018 IL App (1st) 152413. Both *Johnson* and *Davis* relied on Croft's case to affirm those sentences. *Johnson*, ¶¶24-26; *Davis*, ¶38.

Although this Court has given the states some latitude in establishing individual procedural frameworks, the states must ensure the protection of federal constitutional rights. A hearing "gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Montgomery*, 136 S. Ct. at 735.

In *Montgomery*, this Court explained, "prisoners must be given the opportunity to show their crime did not reflect irreparable corruption." 136 S. Ct. at 736-37; *Id.* at 736 (noting Mr. Montgomery's proffered post-sentencing conduct indicating rehabilitation "are relevant . . . as an example of one kind of evidence that prisoners might use to demonstrate rehabilitation"). The Court in *Miller* and *Montgomery* seemed to assume those serving LWOP sentences imposed before *Miller* would receive a hearing.

B. *Miller*'s Substantial Change In Sentencing Juvenile Offenders To Die In Prison Requires An Opportunity To Present Evidence.

Miller substantially altered the stakes and assessment of evidence of youth. Before *Miller*, youth was regularly raised as an aggravating factor. As previously observed, Justices Sotomayor and Ginsberg noted in their concurrence in *Adams v. Alabama*, 136 S. Ct. 1796, 1800-1801 (2016), in the "pre-*Miller* era," youth was just a consideration among many at a sentencing hearing – it was not a dispositive, "standalone mitigating factor" as it is now considered to be. Prosecutors would use it to suggest the defendant was particularly dangerous and judges would use youthfulness to support harsher

sentences.

Similarly, in *Roper v. Simmons*, the prosecutor used the defendant's age as a reason the jury should 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. Quite the contrary." 543 U.S. at 558; *see also Johnson v. Texas*, 509 U.S. 350, 368 (1993); *Graham v. Collins*, 506 U.S. 461, 519 (1993) (Souter, J., dissenting) ("It is no answer to say youth is fleeting; it may not be fleeting enough, and a sufficiently young defendant may have his continuing youth considered ... as aggravating, not mitigating").

Here, it is Croft's contention that, if the sentencing judge considered his youth, it was as an aggravating factor, *not* the dispositive factor contemplated in *Miller*. Not only is this untenable under *Miller*, it is in contravention of settled jurisprudence from this Court. *See Bobby v. Bies*, 556 U.S. 825 (2009). In *Bies*, there had been in a change in law, *i.e.*, a decision barring execution of mentally retarded offenders, which warranted a new hearing in his case. The change in law had converted intellectual disability in Bies' case from a double-edged sword – evidence that could help or hurt either party – into an exclusively defensive weapon. *Bies*, 536 U.S. at 837. Similarly, the change in the law when imposing a LWOP term to a juvenile defendant requires that the juvenile be afforded the opportunity to use that change to his advantage since, as in *Bies*, youth and its attendant characteristics is now considered an exclusively defensive status.

The failure of the Illinois courts to recognize the change wrought by *Miller* is contrary to this Court's precedents and other courts that have consistently recognized that normal finality concerns simply do not apply when there is a substantial alteration in the law. *See e.g.*, *Luna*, 387 P. 3d at 963 ("We find that *Miller* requires a sentencing trial procedure conducted before the imposition of the sentence, with a judge or jury fully aware of the constitutional line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption") (internal quotes omitted); *Aiken*, 765 S.E. 2d at 577. As the Chief Justice of the Ohio Supreme Court put it: "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." *State v. Long*, 8 N.E. 3d 890, 899 (Ohio 2014) (O'Connor, C.J., concurring).

Even if the sentencing court here had not used Mr. Croft's age against him, the fundamental change in doctrine after *Miller* would warrant re-opening the sentencing to allow the parties to present evidence relevant to the newly dispositive question: Whether Mr. Croft's charged conduct reflects transient immaturity or, instead, is he among the rare juvenile offenders who is irreparably corrupt. *See, e.g., Luna*, 387 P.3d at 962 (relying on *Montgomery, Luna* stated: "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") (internal quotes omitted)). Analogous to *Bies, Miller*

dramatically changed the analysis for the value of youth.

In sum, granting review will ensure that every inmate facing a sentence to die in prison for a juvenile offense has an opportunity to present evidence on which side of the "line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption" they stand. *Montgomery*, 136 S. Ct. at 734. This Court should grant review and ensure every juvenile sentenced to LWOP receives an opportunity to demonstrate in light of *Miller* that he or she is not irreparably corrupt.

CONCLUSION

For the foregoing reasons, petitioner, Curtis Croft, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Appellate Court.

Respectfully submitted,

PATRICIA MYSZA
Deputy Defender

KATHLEEN M. FLYNN
Supervisor
Counsel of Record
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stDistrict@osad.state.il.us

COUNSEL FOR PETITIONER

Of Counsel:
Manuel S. Serritos
Assistant Appellate Defender