No. 18-

IN THE

SUPREME COURT OF THE UNITED STATES

TIA SKINNER

Petitioner,

V.

STATE OF MICHIGAN

Respondent.

On Petition for a Writ of Certiorari to the

Supreme Court of Michigan

PETITION FOR A WRIT OF CERTIORARI

Kimberly Thomas (P66643)
Counsel of Record
University of Michigan Law School
Juvenile Justice Clinic
701 S. State St.
Ann Arbor, MI 48109
734-763-1193
kithomas@umich.edu
jjc-admin@umich.edu

Attorney for Petitioner

QUESTIONS PRESENTED

I. Whether Michigan's *Miller* v. *Alabama* sentencing statute requires a jury determination and proof beyond a reasonable doubt, under the Sixth and Fourteenth Amendments, of circumstances that increase the potential punishment from that available after the jury determination of guilt?

II. Whether the Eighth Amendment requires the finding of narrowing criteria, such as permanent incorrigibility or irreparable corruption, prior to allowing the imposition of a life without parole sentence on a juvenile?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Tia Skinner respectfully petitions this Court for a writ of certiorari to review the judgment of the Michigan Supreme Court in this case.

OPINION AND ORDERS BELOW

The opinion of the Michigan Supreme Court (Pet. App. 1a-29a) being petitioned for review is published at *People* v. *Skinner*, 917 N.W.2d 292 (Mich. 2018). The order of the Michigan Supreme Court denying the motion for rehearing (Pet. App. 74a) is at *People* v. *Skinner*, 915 N.W.2d 886 (Mich. Aug. 24, 2018) (mem.) (denying rehearing). The opinion of the Michigan Court of Appeals (Pet. App. 30a-62a), that was reversed by the Michigan Supreme Court, is published at *People* v. *Skinner*, 312 N.W.2d 484 (Mich. App. 2015). The order of the trial court, denying Skinner's motion for a jury determination is unpublished (Pet. App. 64a.) The opinion of the Michigan Court of Appeals on remand (Pet. App. 65a-73a), affirming the life without parole sentence, is unpublished at 2018 WL 5929052 (No. 317892, Nov. 13, 2018).

JURISDICTION

The Michigan Supreme Court's denial of rehearing was entered on August 24, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

RELEVANT CONSTITUTION PROVISIONS

The Sixth Amendment to the U.S. Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed…" U.S. Const., Am. VI.

The Eighth Amendment to the U.S. Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., Am. VIII.

The Fourteenth Amendment to the U.S. Constitution states: "…nor shall any state deprive any person of life, liberty, or property, without due process of law…" U.S. Const., Am. XIV.

RELEVANT STATUTORY PROVISIONS
Full Text in Appendix

Mich. Comp. L. § 769.25. Criminal defendant less than 18 years; circumstances; imprisonment for life without possibility of parole; violations; motion; response; hearing; record; sentence. Pet. App. at 75a.

Mich. Comp. L. § 769.25a. Case as final on or before June 24, 2012; effect of state supreme court or United States Supreme Court decision; procedures; resentencing hearings; priority; credit for time served. Pet. App. at 76a.

INTRODUCTION

The first question presented is whether Michigan's *Miller* v. *Alabama* sentencing statute requires a jury determination and proof beyond a reasonable doubt, under the Sixth and Fourteenth Amendment, of facts that increase the potential punishment to life without parole from the punishment authorized by the jury's determination of guilt, which is a term of years sentence.

This question is a nationally significant issue of federal constitutional law that implicates the right to trial by jury in cases that involve the imposition of the most severe sentence available for children. At least seven states have already confronted Sixth Amendment challenges to their *Miller* statutes, and uncertainty about the interaction of *Apprendi* and *Miller* is poised to generate

additional confusion, inconsistency, and litigation in the other states that continue to impose life without parole.

This case squarely presents a clear Sixth Amendment issue, and it is an excellent vehicle for resolving the question presented. The Michigan Supreme Court directly confronted the Sixth and Fourteenth Amendment question and held that *Apprendi* and its progeny do not require jury factfinding for circumstances that increase the possible sentence for juveniles from the term of years authorized after the jury verdict to life without parole. Pet. App. 12a-13a. Michigan has a disproportionate share of the nation's juvenile defendants serving life without parole sentences, and their *Miller* hearings have been on hold pending resolution of this constitutional question.

Petitioner respectfully requests that this Court grant certiorari on this Sixth Amendment question.

The second question presented is whether, in those states that have chosen to retain and continue to impose a life without parole sentence for children, there must be a finding of irreparable corruption or other criteria to narrow the class of convicted individuals eligible for a life without parole sentence.

On this question, there is a clear, robust and irreconcilable split in the state high courts on the meaning of the Eighth Amendment and this Court's cases that only this Court can resolve. A failure to resolve this ripe split will result in two differently-treated groups of youth – one group where there is a narrowing of eligibility for life without parole to those that are irreparably corrupt or otherwise determined to be the "worst of the worst," and a second group where there is no narrowing criteria or additional circumstances that contribute to principled distinctions between eligible and non-eligible youth.

This case cleanly raises the question presented. In the opinion below, the Michigan Supreme Court found that, as a matter of Eighth Amendment law, the class of youth eligible for life without parole did not need to be narrowed more than every youth convicted of felony murder or premeditated murder, and additional findings did not need to be made before imposing life without parole. Pet. App. 14a-16a (citing *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 735 (2016)).

Petitioner respectfully requests that this Court grant certiorari on this Eighth Amendment question or, in the alternative, grant, vacate, and remand this case.

STATEMENT OF THE CASE

This case arises out of the sentencing of Ms. Skinner, who was sentenced to life without parole under Michigan's statute passed pursuant to this Court's decision in *Miller* v. *Alabama*. 567 U.S. 460 (2012). The Michigan Supreme Court, below, decided both questions presented in this petition.

1. Trial and sentence pre-*Miller*. On August 16, 2011, Tia Skinner was convicted by a jury of first-degree murder for the killing of her adoptive father, the attempted murder of her adoptive mother, and of the conspiracy to commit these crimes. On September 16, 2011, she was sentenced to mandatory life without parole for the first-degree murder conviction and sentenced to life in prison for the attempted murder and conspiracy to commit murder charges.

2. Appeal, resentencing, and remand for second resentencing. While her appeal was pending, this Court decided *Miller*. The Michigan Court of Appeals affirmed the convictions and two paroleable life sentences and remanded for resentencing on the murder conviction. *People* v. *Skinner*, unpublished opinion per curiam of the Court of Appeals, February 21, 2013 (Docket No. 306903).

At that hearing on July 11, 2013, no witnesses were called on Tia Skinner's behalf and none of the documentary evidence in the record below was presented by the court appointed attorney. She was again sentenced to life without parole. Then, while her sentencing appeal was pending before the Court of Appeals, Michigan's *Miller* statute, Mich. Comp. Laws (MCL) § 796.25 took effect. On May 30, 2014, the prosecution filed its motion for life without parole pursuant to MCL 769.25(3). The Michigan Court of Appeals remanded for resentencing pursuant to the state's *Miller* sentencing statute.

3. 2014 Motion for a Jury Determination and Sentencing Hearing under Michigan's *Miller* statute. In the St. Clair County Circuit Court, Tia Skinner moved for her resentencing hearing to be heard by a jury. That motion was denied by the trial court on September 2, 2014. Pet. App. 64. For the resentencing hearing under MCL 769.25, she presented testimony of experts, family members, prison officials as well as hundreds of pages of documents—from children's protective services, probate court, juvenile court, the federal court, herself, and family members, pertaining to her personal history and record while incarcerated. The prosecution presented four witnesses and a video to support its claims that aggravating factors were present. Tia Skinner was again sentenced to life without parole.

4. Michigan Court of Appeals. On appeal, the Michigan Court of Appeals held: "[T]he Sixth Amendment mandates that juveniles convicted of homicide who face the possibility of a sentence of life without the possibility of parole have right to have their sentence determined by a jury." Pet. App. 32a. While the government's application for leave to appeal was pending in the Michigan Supreme Court, the state Court of Appeals convened a special conflict panel in another case, *People* v. *Hyatt*, 891 N.W.2d 549 (Mich. Ct. App. 2016), and determined that, under the

Sixth Amendment, a judge, not a jury, is to determine whether to sentence a juvenile to life without parole under MCL 769.25. *People* v. *Hyatt*, 891 N.W.2d at 579.

The *Hyatt* conflict panel also emphasized that sentencing a juvenile to life without parole will be disproportionate under the Eighth Amendment "in the vast majority of cases." *Id*. at 571. Accordingly, it found MCL 769.25 complied with the Eighth Amendment, but only so long as the trial court implementing the statute "not only consider[s] the *Miller* factors, but decide[s] whether [the] defendant is the truly rare juvenile…who is incorrigible and incapable of reform." *Id.* at 579.

5. Michigan Supreme Court. The Michigan Supreme Court granted leave, heard arguments on both Skinner and Hyatt and issued one opinion on both cases. Pet. App. 1a. In that opinion, the court held that MCL 769.25 does not violate the Sixth Amendment, because the statute does not require that any particular fact be found in order to impose a sentence of life without parole. According to the court, life without parole is authorized by the jury's verdict alone, and any "additional fact-finding by the court is not prohibited by the Sixth Amendment…because it does not expose the defendant to an enhanced sentence." Pet. App. 12a.

The court also held that the Eighth Amendment, as construed in *Miller* and *Montgomery*, does "not require trial courts to make a finding of fact regarding a child's incorrigibility." Pet. App. 9a. (Internal quotations omitted). Rather, the court found that the Eighth Amendment and this Court's holdings in *Miller* and *Montgomery* require only that a sentencer "follow a certain *process* [by] considering an offender's youth and attendant characteristics" before imposing life without parole. *Id.* (Emphasis in original.) Finally, the Michigan Supreme Court found that it was not required, under either *Miller* or *Montgomery*, "to deviate from its traditional abuse-of-discretion standard in reviewing a trial court's decision to impose life without parole." Pet. App.

16a. The court reversed and remanded. Pet. App. 18a. The Michigan Supreme Court denied petitioner's request for rehearing and reconsideration on August 24, 2018. Pet. App. 74a.

REASONS FOR GRANTING THE WRIT

I. This Court should resolve whether Michigan's *Miller* statute requires a jury determination and proof beyond a reasonable doubt, under the Sixth and Fourteenth Amendment, of circumstances that increase the potential punishment from that available after the jury determination of guilt.

Certiorari should be granted because the Michigan Supreme Court incorrectly decided an important question in this Court's *Apprendi* line of cases, other states need to resolve this question regarding their *Miller* statutes, and resolution of this question will clarify the line between constitutionally barred judicial fact-finding and constitutionally permissible discretionary sentencing.

1. Michigan's *Miller* statute. The Michigan legislature enacted MCL 769.25 and MCL 769.25a in response to *Miller* v. *Alabama*, as Michigan previously provided a mandatory life without parole sentence for all premeditated murder and felony murder convictions. *See* MCL 750.316 (defining first-degree murder). This included all 17 year olds, who are considered adults for purposes of criminal court jurisdiction in Michigan, as well as 14 – 16 year olds charged with murder, who are within criminal court jurisdiction unless the prosecutor files in juvenile court. See MCL 712A.2(a) (defining jurisdiction of juvenile court); MCL 600.606(1) (addressing jurisdiction of 14 to 16 year olds charged with enumerated offenses).

2. The statute operates as follows. At the time of trial, a juvenile defendant does not know whether he will receive the statutory term of years sentence or whether the prosecutor, after the jury convicts, will file a motion seeking life without parole. After conviction of a qualifying offense, defendants under 18 are automatically eligible for a term of years sentence

ranging from a minimum of 25 to 40 years, and a maximum of 60 years. MCL 769.25(9). If the government wants to seek a life without parole sentence, it must first "file a motion" seeking that sentence and specifying "the grounds on which the prosecuting attorney is requesting the court to impose a sentence of imprisonment for life without the possibility of parole." MCL 769.25(3). If the prosecutor does not file this motion, the court must sentence the youth to a term of years within the range provided by the statute. MCL 769.25(4). If the motion is filed, a hearing must be held, during which the *Miller* factors and any other relevant criteria, "including the individual's record while incarcerated," are considered. MCL 769.25(6). As a result of that hearing, the court "shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed." MCL 769.25(7). If, instead, the government does not file a motion requesting a life without parole sentence and alleging grounds to impose that sentence (with the following required hearing and court findings on the record), then the defendant is statutorily-entitled to be sentenced to a term of years. See MCL 769.25(4) (if the prosecutor does not file a motion, then "the court shall sentence the defendant to a term of years" provided by law); MCL 769.25a(4)(c) (same for retroactive cases).

A. This case presents an important question of federal Constitutional law that the Michigan Supreme Court incorrectly decided.

The Sixth and Fourteenth Amendments and this Court's caselaw provide that "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority." *Blakely* v. *Washington*, 542 U.S. 296, 303-04 (2004) (internal citation omitted). See also *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000) ("[O]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory

maximum must be submitted to a jury, and proved beyond a reasonable doubt."); U.S. Const., Am. VI; U.S. Const., Am. XIV. The *Apprendi* Court cautioned that, for Sixth Amendment purposes, the court is to look at the real-world *effect* of the fact-finding to determine when the Sixth Amendment right to a jury determination is implicated. See *Apprendi*, 530 U.S. at 494; see also *Ring* v. *Arizona*, 536 U.S. 584, 604 (2002).

The issue in this case is whether individuals who are sentenced under MCL 769.25 are entitled to a jury determination of facts that allow them to be subjected to the greater punishment of life without parole, instead of the usual statutory term of years sentence, in light of *Apprendi*, 530 U.S. 466; *Ring*, 536 U.S. 584; *Cunningham* v. *California*, 540 U.S. 270 (2007); *Miller*, 567 U.S. 460; and *Alleyne* v. *United States*, 570 U.S. 99 (2013). Michigan's *Miller* statute provides that, upon the jury's determination of guilt, a juvenile defendant can only receive a term of years sentence, MCL 769.25(9), and the facts alleged by the prosecution and found by the judge that enhance the possible sentence to life without parole violate this Court's *Apprendi* caselaw.

Upon conviction of first-degree murder, these now-convicted young people are still subjected to a statutory term of years' sentence with a minimum of 25 – 40 years and a maximum of 60 years. MCL 769.25(4), (9); see also MCL 769.25a. Compare *Blakely*, 542 U.S. at 309 (noting that what the offender "knows he is risking" upon conviction is relevant to the jury entitlement).

Like other cases in which jury findings are required, Michigan law requires the government to file a motion, alleging reasons for seeking a greater sentence of life without parole for the child. MCL 750.25(3) (stating that, if seeking life without parole, the prosecutor "shall" file a "motion," and the motion "shall specify the grounds on which the prosecuting attorney is requesting the court to impose a sentence of imprisonment for life without the possibility of

parole"). Compare *Apprendi*, 530 U.S. at 471 (in which the prosecutor filed a motion alleging additional circumstances and, after a hearing, the court found that, in that case, the defendant acted with a biased purpose).

If the government files a motion with the "grounds" it believes support the greater seeking a life without parole sentence, then a hearing on this motion must be heard. MCL 769.25(3), (6). That the Michigan statute uses the word "grounds" for the facts the prosecutor is alleging merit a life without parole sentence is immaterial. "[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt." *Ring*, 536 U.S. at 2444 (Scalia, J., concurring); see also *Hurst* v. *Florida*, 136 S.Ct. 616, 622 (2016) (using the language of "findings" instead of "facts").

Once the government motion is filed, at the required hearing, the court must "specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed." MCL 769.25(7).

B. The Sixth Amendment question presented was raised and squarely decided by the state supreme court below; this case is an excellent vehicle to answer the question presented.

The Michigan Supreme Court held in *Skinner* that Michigan's *Miller* statute does not violate the Sixth and Fourteenth Amendments because it asserted that the imposition of life without parole can be based on the jury's verdict alone, and does not require the finding of any specific fact before sentencing the juvenile defendant to life without parole. Pet. App. 12a-13a. After concluding that *Miller* factors, which must be "consider[ed]" under the statute, are mitigating factors only, the Michigan Supreme Court stated that "The Sixth Amendment does not

prohibit trial courts from considering mitigating circumstances in choosing an appropriate sentence." Pet. App. 12a. The Michigan Supreme Court found that after the government files its motion alleging aggravating reasons and the required hearing occurs, the court may "'specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed,'" without violating *Apprendi*, because the statute does not "expressly" require the court to find a particular fact. Pet. App. 11a.

This Court, however, has held that the Sixth and Fourteenth Amendments apply even where the statute did not give an inclusive list of facts that could or must be found. See, *e.g.*, *Blakely*, 542 U.S. at 305 (stating the court would exceed its authority if it found "*any* aggravating fact" not found by the jury) (emphasis in original); *Cunningham*, 540 U.S. at 278-79 (finding that an aggravating circumstance, according to the statute at issue, could be, in addition to a few enumerated examples, "any additional criteria reasonably related to the decision being made").

C. The Sixth Amendment implications of state *Miller* provisions will continue to be litigated. Resolution of this case in Michigan, with its large number of youth serving life without parole whose *Miller* hearings have been on hold pending this Constitutional question, will give guidance for juvenile life without parole cases nationally.

This case is significant nationally. In addition to the Michigan Supreme Court, state courts in North Carolina, Pennsylvania, Florida, Utah, and Louisiana have all considered Sixth Amendment challenges to their respective *Miller* provisions and have upheld them with reasoning that resembles the Michigan Supreme Court's in *Skinner.* See *State* v. *James*, 813 S.E.2d 195, 209 (N.C. 2018) ("a valid statutory scheme for the sentencing of juveniles convicted of first-degree murder does not require the sentencing authority to find the existence of aggravating circumstances before imposing a sentence of life imprisonment without the possibility of parole"); *Commonwealth* v. *Batts*, 163 A.3d 410, 456 (Pa. 2017) (rejecting jury

requirement under the Sixth Amendment because a "finding of 'permanent incorrigibility' cannot be said to be an element of the crime committed; it is instead an immutable characteristic of the juvenile offender"); *Beckman* v. *State*, 230 So.3d 77, 95 (Fla. Dist. Ct. App. 2017), petition for cert. pending, No.18-6185 (filed. Oct. 2, 2018) (quoting the Michigan Court of Appeals in *Hyatt* to explain that, "where a sentencing judge imposes a sentence within the range prescribed by statute, 'any facts found function as mere sentencing factors, rather than elements of an aggravated offense'"); *State* v. *Houston*, 353 P.3d 55, 68 (Utah 2015) (finding no *Apprendi* violation); *Louisiana* v. *Fletcher*, 149 So.3d 934, 942- 43 (La. App. 2 Cir. 2014) (finding no *Apprendi* violation).

In contrast, the Missouri legislature, in recognition of the constitutional dimension of jury findings that increase the punishment, provided for a jury determination of circumstances in aggravation. Mo. Rev. Stat. § 565.033(2) (2016). Even states that have not yet litigated or addressed the issue the will undoubtedly face this question.

Michigan is primed to be the state with the highest number of life without parole sentencing hearings. Three states – Michigan, Pennsylvania, and Louisiana – account for two thirds of prisoners serving life without parole for crimes committed as juveniles.[1] Given the shift away from life without parole for children in many other states that previously had significant numbers of "juvenile lifers" – either through statutory bans or parole eligibility across the board,[2] statutes that narrow eligible offenses,[3] or prosecutorial discretion[4] – Michigan is at the center of the national debate.

---

[1] Josh Rovner, *Juvenile Life Without Parole: An Overview*, The Sentencing Project (Oct. 22, 2018) https://www.sentencingproject.org/publications/juvenile-life-without-parole/.
[2] Twenty-one states now ban juvenile life without parole. See *id*.
[3] Louisiana passed legislation in June 2017 limiting juvenile life without parole to defendants convicted of first degree murder (which does not include felony murder), and opens the door to parole eligibility after 25 years. See La. Code Crim. Proc. Ann. § 878.1 (2017).

Of the approximately 360 juveniles serving life without parole in Michigan – at the time of *Miller*, the second highest number in the country – the government continues to pursue new life without parole sentences in approximately 66 percent of these cases.[5] During the time the Michigan Supreme Court's ruling in *Skinner* and *Hyatt* was pending, all *Miller* resentencing hearings were put on hold in Michigan. See *Hill* v. *Snyder*, 878 F.3d 193, 202–03 (6th Cir. 2017) ("Accordingly, this group of roughly 250 class members must await resolution of *Skinner* and *Hyatt* before they may receive a new *Miller*-compliant sentence under [MCL] 769.25 and 769.25a").

Deciding the Sixth Amendment question in this case will thus ensure uniform application of the Sixth and Fourteenth Amendments across the states and prevent duplicative state-level constitutional challenges to *Miller* sentences.

D. The Michigan Supreme Court's error merits review, especially given this Court's emphasis on jury fact-finding required prior to the most extreme punishments available.

This Court has been particularly attentive to the interplay of the Sixth Amendment and the most extreme sentences available, given the gravity of the constitutional deprivation when someone is given the ultimate sentence without the required imprimatur of the citizen jurors. *Ring*, 536 U.S. at 609 ("The right to trial by jury guaranteed by the Sixth Amendment would be

---

[4] Philadelphia has reduced the number of juveniles serving life without parole sentences, in part using prosecutorial discretion to conduct a "searching individual analysis" of each individual. Steve Tawa, *Philadelphia DA Adopts New Guidelines For Juvenile-Lifer Cases*, CBS Philly (Feb. 23, 2018), https://philadelphia.cbslocal.com/2018/02/23/philadelphia-da-adopts-new-guidelines-for-juvenile-lifer-cases/ (last accessed Nov. 4, 2018). Where Philadelphia previously had more juveniles serving LWOP than any other jurisdiction in the world, it has resentenced hundreds of defendants, making them eligible for parole if approved by a judge. *Id.*

[5] As of 2017, "according to data from court records and the Michigan Department of Corrections, prosecutors in 18 Michigan counties have recommended continued life without parole sentences for all of the juvenile lifers under their purview. Statewide, 66% of Michigan's juvenile lifers have been recommended for the continued life sentence." *See* Allie Gross, *Michigan Remains a Battleground in a Juvenile Justice War Keeping Hundreds in Prison.* Detroit Free Press (Pub. Nov. 19, 2017, updated Jan. 8, 2018), https://www.freep.com/story/news/local/michigan/2017/11/19/michigan-juvenile-justice-prison/866267001/ (last accessed Nov. 4, 2018).

senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death…the Sixth Amendment applies to both."). In cases that involve the imposition of the most severe sentence available by law, this Court must give clear guidance to the lower courts about when judges can exercise constitutionally permissible sentencing discretion to impose the sanction of juvenile life without parole or death, and when notice must be given and the authority for these sentences must constitutionally be derived from jury fact-finding beyond a reasonable doubt. See *id*.

This case raises such an issue. For example, the Michigan Supreme Court in this case asserted that Michigan's juvenile life without parole sentencing system was comparable to the federal death penalty law in which, after a jury finds aggravating circumstances beyond a reasonable doubt to make the defendant statutorily-eligible for the death penalty, the judge engages in additional weighing before the imposition of sentence. See Pet. App. 25a-26a (footnote 11) (citing *United States* v. *Gabrion* and observing that in the federal death penalty context "whether the aggravating circumstances outweigh the mitigating circumstances is not a fact that must be proved beyond a reasonable doubt."); see also *United States* v. *Gabrion*, 719 F.3d 511 (6th Cir. 2013).[6]

The line between permissible judicial discretion and impermissible judicial fact-finding, raised in this case, will also clarify application of the Sixth Amendment to other cases percolating in the lower courts. For example, there is a split over the application of the Sixth Amendment to statutes that permit trial courts to impose increased sentences based on a determination of prior offenses and a finding that the sentence serves the "public interest." The

[6] In *Gabrion*, the federal death penalty statute at issue first required finding of aggravating factors, by a jury beyond a reasonable doubt. The provision then "require[d] the decision-maker to 'consider' various factors and then 'determine' whether or not to impose the death penalty. The Sixth Circuit maintained that the process of "considering" did not qualify as "fact-finding," and that "the defendant was "already 'death eligible'" based on the jury's verdict and finding of two aggravating factors. 719 F.3d 511, at 533.

Ninth Circuit and six states have rejected such sentencing laws as unconstitutional violations of the right to trial by jury under the Sixth Amendment, while the Second Circuit and the New York Court of Appeals have upheld New York's sentencing provision.[7] See, *e.g.*, *Kaua* v. *Frank*, 436 F.3d 1057 (9th Cir. 2006); *Portalatin* v. *Graham*, 624 F.3d 69, 73 (2d Cir. 2010).

The courts applying the Sixth Amendment to these "public interest" enhancements have, similarly, sought to determine whether the provisions involve permissible exercises of judicial discretion or unconstitutional fact-finding related to the defendant and the impact of his crime. Compare *Flubacher* v. *State*, 414 P.3d 161, 170–71 (Haw. 2018) (ruling that because "a judge, and not a jury, made the required finding that [the defendant's] extended term sentence was necessary for the protection of the public…the 'required finding expose[d] the defendant to a greater punishment than that authorized by the jury's guilty verdict,'" and therefore violated *Apprendi*); with *Portalatin*, 624 F.3d at 74, 90-91 (holding that the recidivism finding of the New York law allowed an enhanced sentence and the "history and character" prong "informs only the sentencing court's discretion").

II. State supreme courts are divided over whether the Eighth Amendment requires finding of narrowing criteria, such as permanent incorrigibility or irreparable corruption, prior to allowing the imposition of a life without parole sentence on a juvenile. The Michigan Supreme Court's decision, in requiring only a conviction, violates the Eighth Amendment.

[7] In addition to the Ninth Circuit, six states have struck down sentencing enhancement schemes on the grounds that the statutes required judicial fact-finding in violation of the Sixth Amendment. These states are Hawaii, Connecticut, Minnesota, Ohio, Arizona, and New Jersey. See *State* v. *Maugaotega*, 168 P.3d 562, 576–77 (Haw. 2007); *State* v. *Bell*, 931 A.2d 198, 233 (Conn. 2007); *State* v. *Kendell*, 723 N.W.2d 597, 604, n.4 610 (Minn. 2006), *State* v. *Foster*, 845 N.E.2d 470, 493 (Ohio 2009); *State* v. *Price*, 171 P.3d 1223, 1226 (Ariz. 2007); *State v. Pierce*, 902 A.2d 1195, 1199-1208 (N.J. 2006). There are also a number of state court of appeals decisions that strike down sentencing enhancement statutes that call for judicial fact finding. See, *e.g.*, *Booker* v. *State*, 244 So. 3d 1151, 1164 (Fla. Dist. Ct. App. 2018) (noting "because the trial judge's factual findings—and thereby Booker's enhanced sentence—were neither based on a *jury* finding that he poses a 'danger to the public' nor limited to only the *fact* that Booker had prior convictions, the [sentencing statute] is unconstitutional under the Sixth Amendment as applied to [the defendant].")

A. A robust and clear split of state courts of last resort exists in states that continue to provide for and impose life without parole on juveniles.

The Michigan Supreme Court held that neither the Eighth Amendment nor the relevant state statute require any additional finding or narrowing of eligibility beyond the homicide conviction in order to impose a life without parole sentence. Pet. App. 15a. The Michigan court acknowledges language in this Court's *Miller* and *Montgomery* decisions "that at least arguably would suggest that a finding of irreparable corruption is required before a life-without-parole sentence can be imposed." Pet. App. 12a; see also Pet. App. 13 (stating that *Miller*'s language "conceivably could be read to suggest that the sentencer must find that the juvenile offender's crime reflects irreparable corruption"); *id*. (language in *Montgomery* "arguably would seem to suggest that a finding of irreparable corruption is required").

The Michigan Supreme Court is the most recent state court of last resort to address this issue. Of these, at least seven have concluded that a narrowing determination, usually a finding of "irreparable corruption" or "permanent incorrigibility," is required under the Eighth Amendment prior to the possible imposition of a life without parole sentence on a child. *Landrum* v. *State*, 192 So.3d 459, 468 (Fla. 2016) (requiring resentencing where the sentencer "did not consider whether the crime itself reflected 'transient immaturity' rather than 'irreparable corruption'" and stating that the Eighth Amendment requires individualization that separates "the 'rare' juvenile offender whose crime reflects 'irreparable corruption,' from the juvenile offender whose crime reflects 'transient immaturity'"); *Veal* v. *State*, 784 S.E.2d 403, 411 (Ga. 2016), *cert denied*, No. 17-1510, 2018 U.S. LEXIS 5986, 2018 WL 2102458 (U.S. Oct. 9, 2018) (requiring a "specific determination that [the child] is irreparably corrupt"); *People* v. *Holman*, 91 N.E. 3d 849, 863 (Ill. 2017), *cert denied*, 138 S.Ct. 937 (2018) (upholding sentence but

stating that "[u]nder *Miller* and *Montgomery*, a juvenile defendant may be sentenced to life imprisonment without parole, but only if the trial court determines that the defendant's conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation"); *State* v. *Seats*, 865 N.W.2d 545, 558 (Iowa 2015) ("The question the court must answer at the time of sentencing is whether the juvenile is irreparably corrupt, beyond rehabilitation, and thus unfit to reenter society, notwithstanding the juvenile's diminished responsibility and greater capacity for reform than ordinarily distinguishes juveniles from adults.");[8] *Luna* v. *State*, 387 P.3d 956, 963 (Okla. Crim. App. 2016) (remanding "for resentencing to determine whether the crime reflects Luna's transient immaturity, or an irreparable corruption and permanent incorrigibility warranting the extreme sanction of life imprisonment without parole"); *Commonwealth* v. *Batts*, 163 A.3d 410, 416 (Pa. 2017) ("[W]e recognize a presumption against the imposition of a sentence of life without parole for a juvenile offender. To rebut the presumption, the Commonwealth bears the burden of proving, beyond a reasonable doubt, that the juvenile offender is incapable of rehabilitation."); *Davis* v. *State*, 415 P.3d 666, 682 (Wyo. 2018) (prosecution can overcome the presumption against life without parole with "proof beyond a reasonable doubt that the juvenile offender is irreparably corrupt, in other words, beyond the possibility of rehabilitation"). The U.S. Court of Appeals for the Fourth Circuit also reached this conclusion. *Malvo* v. *Mathena*, 893 F.3d 265, 274 (4th Cir. 2018), petition for cert. pending, No. 18-217 (filed Aug. 16, 2018) ("[A] sentencing judge *also* violates *Miller*'s rule any time it imposes a discretionary life-without-parole sentence on a juvenile homicide offender without first concluding that the offender's 'crimes reflect permanent incorrigibility,' as distinct from 'the transient immaturity of youth.'").

[8] But see *State* v. *Sweet*, 879 N.W.2d 811 (Iowa 2016) (banning life without parole for juveniles under the Iowa constitution).

In contrast, at least five state courts of last resort that have determined that no finding of irreparable corruption or permanent incorrigibility, or, in some cases, no finding beyond the face of the conviction, are needed to constitutionally impose a life without parole sentence. *Chandler* v. *State*, 242 So.3d 65, 69 (Miss. 2018), petition for cert. pending, No.18-203 (filed Aug. 15, 2018) (stating that *Miller* and *Montgomery* "does not require trial courts to make a finding of fact regarding a child's incorrigibility," "no rebuttable presumption exists in favor of parole eligibility" and applying abuse of discretion standard to review of LWOP sentencing decision, if the trial court applied the proper legal standard); *State* v. *Valencia*, 386 P.3d 392, 396 (Ariz. 2016), *cert. denied*, 138 S.Ct. 467 (2017) (not requiring the sentencer to find "irreparable corruption" and stating that defendants "will have an opportunity to establish, by a preponderance of the evidence, that their crimes did not reflect irreparable corruption but instead transient immaturity," and are, therefore, unconstitutional); *State* v. *Ramos*, 387 P. 3d 650 (Wash. 2017), *cert. denied*, 138 S.Ct. 467 (2017);[9] *Johnson* v. *State*, 395 P.3d 1246, 1257 (Idaho 2017), *cert. denied*, 138 S.Ct. 470 (2017) ("As to the latter part of her argument, that the court erred because it did not specifically find that Johnson was "irreparably corrupt," that argument is without merit."); see also *Windom* v. *State*, 398 P.3d 150 (2017), *cert denied*, 138 S.Ct. 977 (2018) (reversing sentence to allow *Miller* evidence and consideration, but not overruling *Johnson*). See also *State v. James*, 813 S.E.2d 195 (N.C. May 11, 2018) (ruling that state law created two equally available sentencing options and requiring "consideration" of, but also noting the need to comply with this Court's directive that LWOP is reserved "the rare juvenile offender whose crime reflects irreparable corruption"). The Ninth Circuit Court of Appeals has also weighed in on this side. *United States* v. *Briones*, 890 F.3d 811 (9th Cir. 2018).

[9] But see *State v. Bassett*, 429 P.3d 343 (Wash. 2018) (determining that the state constitution required a categorical ban on life without parole sentences for juveniles).

The question presented is ripe for consideration. Of the states whose high courts have not decided the question presented and that still impose life without parole, only a few states have more than a handful of individuals still facing life without parole sentences.[10]

Among the courts that have concluded no narrowing criteria is required prior to imposition of juvenile life without parole, the Michigan Supreme Court took the most extreme interpretation, explicitly stating that there need not be any additional narrowing of the class of individuals eligible for life without parole beyond the homicide conviction. Pet. App.13a ("*Miller* simply held that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment and that before such a sentence can be imposed on a juvenile, the sentence must consider the mitigating qualities of youth. *Miller* thus did not hold that a finding of 'irreparable corruption' must be made before a life-without-parole sentence can be imposed on a juvenile.").

This patchwork of conflicting, binding interpretations of the Eighth Amendment has led, in practice, to distinct constitutional treatment of children who commit qualifying crimes based on their state of residence. At the time of this petition, twenty-one states and the District of Columbia ban the imposition of life without parole through legislation or case law.[11] An additional four states do not have anyone serving a juvenile life without parole sentence.[12]

Of the states that still permit youth to be sentenced to life without parole, three states – Michigan, Pennsylvania, and Louisiana – account for two thirds of prisoners serving life without

---

[10] See Juvenile Life Without Parole: An interactive map of juvenile life without parole sentences in the United States (last visited Nov. 16, 2018), available at https://juvenilelwop.org/map/; The Associated Press, 50 State Examination (July 31, 2017) (surveying results by state of total numbers of juvenile lifers and the results of resentencings); (listing the number of juvenile life without parole sentences in each state).

[11] Josh Rovner, *Juvenile Life Without Parole: An Overview*, The Sentencing Project (Oct. 22, 2018) https://www.sentencingproject.org/publications/juvenile-life-without-parole/.

[12] *Id*.

parole for crimes committed as juveniles.[13] A child in Pennsylvania must first be shown to be "incapable of rehabilitation;" *Batts*, 163 A.3d at 416; effectively narrowing the imposition of life without parole to a class of defendants and limiting the arbitrary imposition of life without parole based on happenstance of judge or local jurisdiction. By contrast, in Michigan, a child convicted of felony murder or premeditated murder faces no constitutional limitations like these on the arbitrary imposition of a life without parole punishment.

B. The Michigan Supreme Court incorrectly decided the important Eighth Amendment question presented; this Court should grant the Petition or grant, vacate and reverse.

The Court should grant this petition for certiorari because the Michigan Supreme Court's opinion ignored the Eighth Amendment law given by this Court, especially *Montgomery*, and incorrectly decided the question presented. In the alternative, this Court should grant, vacate, and reverse the decision of the Michigan Supreme Court in this case, as the decision contravenes this Court's cases applying the Eighth Amendment.

In *Montgomery*, in determining that *Miller* was a substantive rule of constitutional law, this Court stated that "life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption'" and that *Miller* "rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." 136 S.Ct. at 735. It further stated that "[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects "'unfortunate yet transient immaturity.'" *Montgomery*, 136 S.Ct. at 735 (internal citations omitted); see also *id*. (stating that "*Miller*'s substantive holding [is] that life without parole is an excessive sentence for children whose crimes reflect transient immaturity").

[13] *Id*.

In other words, *Miller* and *Montgomery* required a narrowing of the class of defendants who are constitutionally eligible for a life without parole sentence beyond the mere fact of a qualifying offense. The Michigan Supreme Court's decision in this case, contrary to this Eighth Amendment requirement, makes all individuals convicted of a qualifying offense constitutionally eligible for life without parole, regardless of whether or not they are the "rare" youth whose qualifying crimes reflect "transient immaturity" or "irreparable corruption." Compare *Montgomery* at 735 (internal citations omitted); and *Miller*, 567 U.S. at 479-80.

The Michigan Supreme Court essentially eliminates from the Eighth Amendment substantive constitutional protection under *Miller*, directly contrary to the Court's *Montgomery* decision. See, *e.g.*, *Montgomery*, 136 S.Ct. at 735 ("That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment.").

The *Skinner* court rejects any required facts to narrow the category of youth who can constitutionally receive life without parole, stating, for example, "[A]ll *Miller* requires sentencing courts to do is to consider how children are different before imposing life without parole on a juvenile" (emphasis added). Pet. App. 15a. The Court further finds that the Eighth Amendment does not require a presumption against life without parole for a youth. Instead, "*Miller* and *Montgomery* simply require that the trial court consider 'an offender's youth and attendant characteristics' before imposing life without parole." *Id*. (citations omitted). Compare, *e.g.*, *Luna*, 387 P.3d at 960 ("The Court made clear that Miller did more than require a sentencer to consider a juvenile offender's youth before imposing the harshest penalty because sentencing a child to life without parole is disproportionate for the vast majority of

juvenile offenders and is reserved for that rare juvenile offender whose crime reflects irreparable corruption."). In fact, the Michigan court suggests that, if anything, the convicted youth is presumed to be sentenced to life without parole and "bears the burden of showing that life without parole is not the appropriate sentence." Pet. App. 16a (citations omitted).

The Michigan Supreme Court also invented a novel meaning of "rare," language taken from this Court's caselaw. The S*kinner* court seems to conclude that every youth convicted of premeditated or felony murder would be "rare" compared to *all* juvenile offenders. "[O]nly those juvenile offenders who have been convicted of first-degree murder can be subject to life without parole, which is a small percentage of juvenile offenders . . . *Miller* and *Montgomery* simply noted that those juvenile offenders who are deserving of life-without-parole sentences are rare." Pet. App. 15a. The *Skinner* Court dismissed this Court's statement that life without parole should be uncommon by saying "The first sentence of this paragraph was simply the Court's prediction that the imposition of life without parole on juveniles will be 'uncommon.' This is demonstrated by the use of the word 'think' rather than 'hold.'" *Id*.

In Michigan, because the age of juvenile court jurisdiction ends at sixteen, any seventeen-year-old child convicted of felony murder or premeditated murder is, according to the Michigan Supreme Court, constitutionally eligible for life without parole. *Id*. Likewise, under Michigan's jurisdictional and homicide laws, a fourteen-year-old child who aided and abetted a felony murder and is convicted would face no constitutional limitation on the imposition of a life without parole sentence, even without the finding of any additional aggravating circumstance or narrowing determination. See Mich. Comp. L. 600.606(1) (presumptively "divest[ing] the juvenile court of jurisdiction over" 14 – 16 year olds who are charged with murder, among other offenses, and "vest[ing] that jurisdiction in the circuit

courts"); Mich. Comp. L. 750.316 (defining first-degree murder to include all felony murder and premeditated murder).

The Michigan Supreme Court's decision neither narrows the eligible class of individuals, as required by *Miller* and *Montgomery*; nor does it provide any principled guidance to direct sentencing discretion. *Cf. Gregg* v. *Georgia*, 428 U.S. 152, 171–72, 189 (1976) ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.").

CONCLUSION

The petition for a writ of certiorari should be granted or, in the alternative, this Court should grant, vacate and reverse the lower court decision.

Kimberly Thomas (P66643)
Counsel of Record
University of Michigan Law School
Juvenile Justice Clinic
701 S. State St.
Ann Arbor, MI 48109
734-763-1193
kithomas@umich.edu
jjc-admin@umich.edu

APPENDIX