ORIGINAL

No. 18-7467

IN THE

SUPREME COURT OF THE UNITED STATES

Phillip E. LaPointe — PETITIONER
(Your Name)

vs.

People of the State of Ill. RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Illinois Appellate Court, Second District
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Phillip E. LaPointe
(Your Name)

2600 N. Brinton Ave.
(Address)

Dixon, Il. 61021
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Does this Court's 8th Amendment protections extend to a just turned eighteen year old who received life without parole, where the evidence shows he was not a mature adult in brain development.

2. Whether this court's decision in Atkins v Virginia should extend to a natural life without parole sentence for an individual with underdeveloped brain functioning.

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

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

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[ ] For cases from **federal courts**:

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts**:

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

[X] reported at ~~2018 Il App (2d) 160903~~; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Illinois Supreme Court court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

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

[ ] No petition for rehearing was timely filed in my case.

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

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

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

[X] For cases from **state courts**:

The date on which the highest state court decided my case was Nov. 28, 2018
A copy of that decision appears at Appendix B.

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eighth Amendment

Illinois Constitution Art. I, Sec 11 (rehabilitation clause)

STATEMENT OF THE CASE

Phillip LaPointe, petitioner was born January 29, 1960. Thirty-seven (37) days after his eighteenth birthday he was accused and arrested for the murder of a cab driver Peter Moreno Jr. in Elmhurst, Illinois. Petitioner could not assist the police in presenting an alibi or his attorney as he had overdosed on a massive amount of LSD the morning prior to this crime.

Trial counsel presented a bona fide doubt about the petitioner's competence to the trial judge who appointed a local psychiatrist to examine the defendant. The psychiatrist felt the defendant could understand the legal process, but recommended he be allowed to do further testing to determine the defendant's mental status. He also placed the defendant on several psychotropic medications (Thorozine, Librium, Tranxene) to treat the defendant's hallucinations from the LSD overdose. The court was not made aware of the defendant's medicated condition, nor did it follow the doctor's recommendation for further testing, no fitness hearing was ever held.

Unable to assist his counsel due to his amnesia, trial counsel recommended a plea deal to his client where the state had offered a 40 year term of imprisonment in return for his guilty plea. Counsel advised his client that since the murder was not exceptionally brutal and heinous the maximum penalty the judge could give was 40 years. Based upon this advice petitioner pleaded guilty but, explained he did not know if he did the murder or not.

The PSR was lacking in many areas and the judge did not know of the prior mental health issues of the petitioner, and ignored many of the mitigating factors such as his family life, drug use which was used as an aggravating factor, his medicated condition while in the jail.

The PSR did include the fact that petitioner was examined by a school psychologist Terry R. Nelson who concluded that LaPointe needed to be enrolled in special classes due to underdeveloped brain functioning. A diagnosis later confirmed by by two seperate psychologists defendant was seeing before the crime, who recommended seperation from the family and placement in drug treatment facility's. However, in 1978 these were not considered mitigating factors in Illinois nor in this court's jurisprudence yet.

Several collateral challenges were made including an Apprendi violation which was not held to be retroactive. Counsel's ineffective assistance was shown when trial counsel testified in an evidentiary hearing and admitted he had misadvised his client as to the possible statutory maximum penalty a guilty plea could result in. The State courts held such misadvice did not prejudice the defendant since the difference between 40 years and life was not a big deal.

Petitioner presented the current 8th Amendment challenge based upon the scientific evidence recognized by this court in its holding of Miller v Alabama, showing an individual's brain does not fully mature until the early 20's. Illinois refuses to recognize the scientific evidence and apply it to petitioner's facts.

REASONS FOR GRANTING THE PETITION

1. Whether this Court's 8th Amendment protections extend to a just turned eighteen year old who received life without parole, where the evidence shows he was not a mature adult in brain development is an issue yet to be addressed by this court.

This Honorable Court in **Miller v Alabama**, 132 S.Ct. 2455, 183 L.Ed.2d 407, 567 U.S. 460 (2012) held that mandatory life imprisonment for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments.

In this holding this court referred to "the penalty when imposed on a **teenager**, as compared with an older person." **Miller**, 132 S.Ct. at 2466. Also, in **Roper v Simmons**, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) this court recognized that "the qualities that distinguish juveniles from adults do not disappear when an individual turns 18." **Roper**, 543 U.S. at 574.

Based upon the phrasing of this court and its recognition about the scientific studies indicating that the juvenile brain do not fully mature until the early 20's. Petitioner tried to show proof of his lack of brain development to the State of Illinois as he had only attained his eighteenth birthday by a mere (37) thirty-seven days.

This court in Roper held the age of 18 is the point where society draws the line for many purposes between childhood and adulthood. "It is, we conclude, the age at which the line for death eligibility ought to rest." **Roper**, 543 U.S. at 574. However, that demarkation line is is in conflict with scientific studies this court used in making it's juvenile holdings **Roper**, 543 U.S. at 569-70; **Graham**, 130 S.Ct. 2011, 2026-27 (2010)(showing brain development occurs at a later age than previously thought).

In the petitioner's case as in Miller petitioner was on drugs when the crime occurred. Petitioner's stepfather who testified to being a alcoholic and physically abused him. And petitioner's past juvenile criminal history was limited to a non-violent burglary conviction **Miller**, 132 S.Ct. at 2469.

Additionally, the petitioner's mental health went untestified to despite the family presenting facts to the attorney that petitioner was seeing multiple psychologists prior to the crime in question and was diagnosed as bi-polar maniac depressive. During the trial the petitioner was taking multiple psychotropic medications including Thorozine, Tranxene, Librium to deal with his hallucinations and amnesia, a bona fide doubt was raised to the trial court by counsel and the judge appointed a local psychiatrist to examine the defendant. However, no fitness hearing ever occurred.

The Presentence Report (PSR) mentioned that petitioner was enrolled in "special classes" but made no mention of how limited LaPointe was in school with his underdeveloped brain functioning **LaPointe**, 2018 Il App (2d) 160903 ¶ 28. None of the above factors were considered mitigating in 1978 although the defendant did argue on direct appeal that he was "very young emotionally and was capable of change after he matured." **LaPointe**, 160903 ¶ 9 quoting **People v LaPointe**, 59 Ill. Dec. 59 (1981), in short there was not any medical testimony available to substantiate about the defendant's mental youth in 1978, and even if there had been, in Illinois, it would not have been considered a mitigating factor 730 ILCS 5/5-5-3.1 (West's 1978).

The sentencing court in 1978 based its decision to give a life without parole to the just turned 18 year old not because the defendant's conduct showed irretrievable depravity, or permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation **Miller**, 567 U.S. at 477-78. But, because the court felt the crime was exceptionally brutal and heinous due to a perceived lack of remorse **LaPointe**, 2018 I1 App (2d) 160903 ¶ 10-11 quoting the Illinois Supreme Court's 1981 decision to uphold the life sentence.

The defendant's irrational behavior while in jail while on several psychotropic medications (Thorozine, Tranxene, Librium) was misinterpreted by the trial court because no testimony was given by the psychiatrist who placed the defendant on these medications to treat his hallucinations, and no fitness hearing occurred despite a bona doubt being raised.

In the state court filings the petitioner presented evidence of his extensive mental health history that the court in 1978 was unaware of **Lapointe**, 160903 ¶ 22. And that petitioner had rehabilitated despite trial court's not considering whether at some point in the future the defendant could be rehabilitated. Not only is the petitioner one the most changed inmates in Illinois history but has successfully completed all the available schooling and certificates and degree's that Illinois offers **LaPointe**, 160903 ¶ 25, 26. His underdeveloped brain functioning was offered to the state courts **LaPointe**, 160903 ¶ 28 to support the argument that Miller should be extended to a just turned 18 year old which the Illinois Supreme Court declined to do **People v LaPointe**, 124014 (Nov. 28, 2018) based upon its holding in **People v Harris**, 2018 IL 121932 (Oct. 18, 2018). The defendant in that case however, did not have a traditional life sentence but a

defacto life sentence and did not have the underdeveloped brain functioning petitioner here had.

This Court went even further in its holding of **Montgomery v Louisiana**, 577 U.S. ___, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016) where your Honors reiterated that the sentencing judge take into account "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." **Montgomery**, 136 S.Ct. at 733 and that "a hearing where youth and its attendant characteristics" are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life from those who may not **Montgomery**, 136 S.Ct. at 735.

In petitioner's case his youth although just turned 18 by a mere thirty-seven (37) days was not considered as mitigating, his family history of an abusive alcoholic step-father was not considered as mitigating, his extensive mental health history was not considered and not even known about by the court, his irrational behavior while on psychotropic medications was considered an aggravating factor because the court was unaware the defendant was having hallucinations while in the jail because no fitness hearing ever occurred. Additionally, the defendant admitted freely that he had substance abuse problems as a teenager was considered an aggravating factor in 1978 and of course his underdeveloped brain functioning went unnoticed in the PSR as only a brief sentence mentioned defendant was in "special classes".

In lockstep with the petitioner in Montgomery, the current petitioner petitioner has also shown a lenghty track record while in prison of being the most rehabilitated inmate in Illinois **LaPointe**, 160903 ¶ 25 earning several college diploma's until Illinois took away the pell grants to support such programs. Petitioner has spent the past 40 years knowing he was condemned to die in prison, yet has spent the

entire time learning, growing in maturity and learning skills that if he were ever given the chance to be released he would use those skills to gain meaningful employment and become a productive member of society again.

However, Illinois has no parole system or way to review to show that petitioner's crime did not reflect irreparable corruption when the evidence shows the opposite **LaPointe**, 160903 ¶ 26 This Court held in Montgomery that prisoner's like montgomery "must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside of prison walls must be restored." **Montgomery**, slip op. at 22.

On direct appeal petitioner challenged his life sentence based upon the judges finding of an enhanced factor which in 1981 was held Constitutional to do **People v LaPointe**, 88 Ill.2d 482, 499-501 (1981) a practice later to have been ruled unconstitutional by this court to do in **Apprendi v New Jersey**, 530 U.S. 466 (2000) but not held to be retroactive. However, petitioner also challenged on direct appeal concerning his youth where the Supreme court commented that "highly relevant-if not essential-to a sentencing judge's selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." **LaPointe**, 88 Ill.2d at 497.

But, in 1978-81 there was no scientific studies about brain development in youths courts around the country have since recognized using the Miller approach that numerous factors play an essential role in considering an appropriate sentence **People v Holman**, 2017 IL 120655 ¶ 40-43 (collecting cases). Perhaps the proper question should be

2. Should a just turned eighteen year old with underdeveloped brain functioning be given a life without parole sentence in light of this Court's holding in Atkins v Virginia, and the Miller scientific studies.

This Honorable Court in **Atkins v Virginia**, 536 U.S. 304, 153 L.Ed.2d 335, 122 S.Ct. 2242 (2002) held that the execution of criminals who were mentally retarded held to constitute cruel and unusual punishment in violation of Federal Constitution's Eighth Amendment.

With this Court's recent recognition in Miller about the scientific studies which shows that "the research clarifies that substantial psychological maturation takes place in middle and late adolescence and even into early adulthood." Elizabeth S. Scott & Lawrence Steinberg, Rethinking Juvenile Justice 60 (2008) and that current cases now recognize that human brain development continues to develop into the early twenties. **State v Null**, 836 N.W. 2d 41, 55 (2013)

Our community's standards of decency have considerably evolved, albeit in the context of juvenile defendants and the eighth amendment over recent years. Perhaps it is time for this Court to take its holding in Atkins and combine that with the scientific evidence recognized in Miller, to determine whether life without parole even for a barely adult with underdeveloped brain functioning is Constitutional under this Court's 8th Amendment jurisprudence.

The PSR (Appendix C from 1978) did not mention the Wechsler Adult Intelligence Scale number for petitioner which was apprx. 65, only that from "the projective tests given" that LaPointe suffered some "confusion as to the expectations" that others had of him. Needed "additional latitude to function as an individual" and that LaPointe be "enrolled in special classes." IC000013-Appdx. C.

In petitioner's case he asked for leave to file a successive post-conviction petition in order to show evidence of his under-developed brain functioning, based upon the new research which this Court recognized in Miller's holding and was recognized as retroactive in Montgomery. However, Illinois would not allow such evidence to be presented because the petitioner was thirty-seven (37) days past his 18th birthday **LaPointe**, 160903 ¶ 19,20.

It wasn't until recently an Illinois court finally recognized that an intellectually disabled offender who was an adult could rely on this Court's holdings of Atkins and Miller to gain relief **People v Coty**, 2018 IL App (1st) 162383 ¶ 76. While the lower court below addressed the 8th Amendment claim in the context of Miller, the court gave no indication that petitioner's "extensive mental health history" **Lapointe**, 160903 ¶ 22 or that his underdeveloped brain functioning **Lapointe**, 160903 ¶ 28 had been considered under Atkins rationale which was the basis of the Miller analysis **Coty**, 162383 ¶ 69. While petitioner could try and go back to the trial court and simply make an Atkins claim leaving out Miller, Atkins has not been made retroactive to collateral attacks as Montgomery did for Miller.

Additionally, this Court held in **Graham v Florida**, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) "that some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation should be given by the States." **Graham**, 130 S.Ct. at 2030, 176 L.Ed.2d at 845-46. This court did not indicate when such an opportunity must be provided or provide guidance regarding the nature or structure of of such a second-look or back - end opportunity. Instead, this Court left it to the states "to explore the means and mechanisms for compliance." **Graham**, 176 L.Ed.2d at 846; **Null**, 836 N.W.2d at 67-68.

Illinois has no such meaningful opportunity for petitioner as there is no longer a parole system where a reviewing board could look at the petitioner's maturation and growth since his incarceration in 1978.

And when petitioner tried to show his direct appeal was flawed because relevant evidence was overlooked and newer research recognized in Miller should be applied, the Illinois courts cannot look past the fact petitioner was 18, based upon this Court's bright line rule in Miller applying to only those under 18 **LaPointe**, 160903 ¶ 29, 36-37.

The presentence report in 1978 made a one sentence comment that the defendant was enrolled "in special classes". The special classes were due to the fact petitioner could not function in a high school level due to his underdeveloped brain functioning. Only one of the two psychologists petitioner was seeing prior to the crime in question Dave Clayton was interviewed and no questions were directed in the area of his brain maturity, only that he needed "to be separated from the family and placed into residential treatment."

Dr. Ed Shay's diagnosis and Dr. Dave Clayton's diagnosis about underdeveloped brain functioning and maturity were excluded from the PSR because in 1978 such factors were not considered relevant and not within the statutory guidelines in 1978 **LaPointe**, 160903 ¶ 14 quoting the direct appeal. A fact this Court now recognizes is an important factor for juveniles.

Whether important under Atkins and Miller as applied to an 18 year-old is a question yet to be determined by this court. But, under this Court's "evolving standards" proportionality review courts should be informed by "objective factors to the maximum possible extent." **Atkins**, 536 U.S. at 312.

As such when the petitioner presented argument and evidence that he had underdeveloped brain functioning **LaPointe**, 160903 ¶ 28 as a just turned 18 year old and requested leave to file a successive post-conviction petition to present such evidence, Illinois in its hard nosed look at this Court's holding in Miller concluded that no matter the evidence, because petitioner was 18 Miller offers no relief **LaPointe**, 160903 ¶ 29.

Natural life without parole is a de facto death sentence, given his young age petitioner will spend more years of his life in prison suffering longer that the majority of adult offenders. Despite this drawn out de facto death sentence, petitioner grew in both maturity and mentally with help of the mental health officals in Illinois' department of corrections and offered proof of his rehabilitation in his petition **LaPointe**, 160903 ¶ 25.

The fact petitioner was on psychotropic medications prior to sentencing and for years afterward (Thorozine, Haldol, Melleril) went unknown to the courts, as only a brief mention appears in the PSR "he is taking medication for nerves while in jail" (PSR 000013), these medications were for the hallucinations the petitioner was expierencing not nerves, but no fitness hearing was ever held once counsel raised a bona fide doubt and a psychiatrist appointed to examine defendant. **Pate v Robinson**, 383 U.S. 375 (1966). As the court did not follow the psychiatrists recommendation for further testing to determine his mental status.

CONCLUSION

The scientific evidence recognized by this court in Miller concludes that thirty-seven days past one's eighteenth birthday does not automatically make one an adult, if that person has underdeveloped brain maturation. But, because of this Court's demarcation line of 18 court's around the country including Illinois refuse to even entertain the notion that a developmentally disabled teenager should be given Miller relief.

Atkins reasoning should be applied to a de facto death sentence which life without parole is, the evolving standards of society recognize that teenager's although legally recognized as adults at 18 sometimes mentally are not equipped to understand and deal with the same things normal adults can.

With this Court's pronouncement in Graham that States must give defendant's "some meaningful opportunity to obtain release based demonstrated maturity and rehabilitation." Because Illinois has no means and mechanisms for compliance, petitioner asks this Honorable give guidance and clarification to the states on how to treat young adults with underdeveloped brain functioning. Thirty-seven days should not be a bar to protection under the 8th Amendment against cruel and unusual punishment.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: December 27, 2018

/s/ Phillip E. LaPointe
Phillip E. LaPointe A-83069
2600 N. Brinton Ave.
Dixon, Il. 61021

Signed and Sworn to
Before me this 27th
day of December 2018.

Sally A Joos
NOTARY PUBLIC

OFFICIAL SEAL
SALLY A. JOOS
NOTARY PUBLIC, STATE OF ILLINOIS
My Commission Expires Jul 12, 2020