No. 18-7917

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Najee Wilkins — PETITIONER
(Your Name)

vs.

State of Michigan — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Michigan Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Najee Sharif Wilkins #769141
(Your Name)
Chippewa Correctional Facility
4269 West M-80
(Address)

Kincheloe, Michigan 49784
(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED

1. Petitioner was sentenced to 45-100 years concurrent to 10-40 years for second-degree murder and perjury committed when he was under the age of 18, which makes him ineligible for release on parole until the age of 68. Before imposing these sentences, the sentencing judge did not consider Petitioner's mitigating characteristics of youth, that is, his impulsivity, susceptibility to peer pressure, and the transient nature of these characteristics, see Miller v. Alabama, 567 U.S. 467, 471 (2012), and did not find that he is one of the "rarest of children . . . whose crimes reflect irreparable corruption," Montgomery v. Louisiana, 136 S.Ct. 718, 726 (2016), as the Eighth Amendment requires when juvenile offenders are sentenced to life without parole, which this Court defined as a sentence that does not provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Miller, at 479. Does Petitioner's sentence violate the Eighth Amendment?

2. A prosecution witness testified at the preliminary examination but refused to testify at trial. His preliminary examination testimony was admitted at trial over defense counsel's objection that he did not have an adequate opportunity to cross-examine the witness at the preliminary examination because he had not yet received full discovery at that time. Did the admission of the witness's testimony violate the Confrontation Clause?

LIST OF PARTIES

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The opinion of the highest state court to review the merits appears at Appendix A to the petition and is unpublished.

JURISDICTION

The highest state court denied review on July 27, 2018. Appendix B.

Petitioner filed a timely motion for rehearing, which was denied on October 30, 2018. Appendix C.

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, "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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Eighth Amendment to the United States Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

In 2016, Petitioner Najee Wilkins was convicted, after a jury trial in Grand Rapids, Michigan, of one count of second-degree murder, Mich. Comp. Laws § 750.317, and one count of perjury, Mich. Comp. Laws § 767A.9(1)(b), for the 2008 killing of Khiry Walker, when Petitioner was 17 years old, and for statements Petitioner made pursuant to an investigative subpoena regarding Walker's death. Appx. A, p.1.

Petitioner was sentenced to 45-100 years for the murder conviction, concurrent to 10-40 years for the perjury conviction. Id. Since Petitioner was 23 years old at the time he started serving his sentences and since all Michigan defendants sentenced for crimes committed after December 15, 2000 must serve their entire minimum term before becoming eligible for parole, Petitioner will not be eligible for parole until he is 68 years old. See Mich. Comp. Laws §§ 791.234(5); 800.33(14); 800.34(5).

"On November 25, 2008, 17-year-old Khiry Walker died from a gunshot wound to the head. . . from behind, shortly after 7:00 p.m., . . . in the Martin Luther King park in Grand Rapids, Michigan." Appx. A., p.1. "The investigation was hindered from its early stages owing in large part to a lack of cooperation from witnesses" but "the few people that were willing to speak" revealed that "Walker and his friends had been engaged in an ongoing feud with another group of local teenagers" that included Petitioner, Dareyon York, and Avery Ford. Id., pp.1-2.

Petitioner, York, and Ford testified in 2009 pursuant to an

investigative subpoena. Id., p.2. Petitioner "testified that he was at York's house on the evening of November 25, 2008, and did not have any information concerning the shooting." Id. "Years later, Detective Kubiak received information that ultimately led the prosecutor to charge Ford, York, Davis, and [Petitioner] in connection with their investigative subpoena testimony. In the wake of the perjury charges, Ford and York recanted their previous testimony and implicated [Petitioner] in Walker's murder." Id.

York testified that he and Petitioner waited at a bus stop on the night of the shooting to confront Walker. Id. "When Walker disembarked from the bus, he saw [Petitioner], 'threw a little punch,' and then ran toward the park. According to York, [Petitioner] pursued Walker with a .22 caliber Ruger in hand and fired two shots at the ground while yelling for Walker to stop. Walker continued to run and [Petitioner] shot in his direction twice more." Id.

Rodney Lewis testified at the preliminary examination and was cross-examined by defense counsel but refused to testify at trial. Appx. A, p.6-7. The trial court admitted his preliminary examination testimony over defense counsel's objection that he had not had an adequate opportunity to cross-examine Lewis at the preliminary examination because "When we ran the prelim back in October, I did not have half or maybe even a -- I only had a quarter of the stuff that I have now. While I had an opportunity to cross-examine him, it certainly wasn't a cross-examination that I would be conducting at trial today, which would be much

more thorough based upon all the information I received after the time of the prelim." Trial Trans., Vol. 6, pp.5-7.

At the sentencing hearing on March 3, 2016, only a month after this Court issued its decision in Montgomery v. Louisiana, 136 S.Ct. 718 (2016), defense counsel objected to a sentence longer than 40 years based on Montgomery, Miller v. Alabama, 567 U.S. 460 (2012), and on a state statute, Mich. Comp. Laws § 769.25, enacted to implement those decisions, which provides that a juvenile offender convicted of the greater offense of first-degree murder must be sentenced, if not to life without parole, to a minimum term no longer than 40 years and to a maximum term no longer than 60 years. Sent. Trans., pp.11-12. The trial court overruled the objection because Mich. Comp. Laws § 769.25, applies, by its terms, only to defendants convicted of first-degree murder and not the offense Petitioner was convicted of, second-degree murder. Id., 12. The trial court based its 45-100 year sentence on the circumstances of the offense, Petitioner's criminal history, his lack of remorse, and his efforts to encourage witnesses to lie. Id., 13-15. The court did not consider Petitioner's mitigating characteristics of youth or his prospects for reform and never found him to be incapable of reform. Id., 13-15.

On appeal, Petitioner argued, among other things, (1) that the admission of Lewis's preliminary examination testimony violated the Confrontation Clause, and (2) that his sentence was disproportionate under state law and under the Eighth Amendment as articulated in Montgomery and Miller, because the sentencing

court did not consider Petitioner's mitigating characteristics of youth and because Petitioner's sentence exceeds the "default sentence range," People v. Carp, 496 Mich. 440, 458 (2014), vacated on other grds, Carp v. Michigan, 136 S.Ct. 1355 (2016), for juveniles convicted of the greater offense of first-degree murder in Michigan.

On September 19, 2017, the Michigan Court of Appeals affirmed the convictions and sentences. Appx. A. It rejected the Confrontation Clause claim by speculating that defense counsel would have "employed the same strategy at the preliminary examination as he did at trial" in cross-examining Lewis, and "Defendant's reliance on the mere fact that defense counsel did not have all the discovery materials at the time of the preliminary examination is unpersuasive because the same is true of nearly every criminal prosecution during the early stages of the case, and courts have routinely upheld the admissibility of preliminary examination testimony at subsequent trials." Appx. A, pp.8-9.

It rejected the Eighth Amendment claim by finding the sentencing judge's considerations adequate. Id., p.23.

On July 27, 2018, and October 30, 2018, the Michigan Supreme Court denied discretionary review (Appx. B) and reconsideration (Appx. C), respectively.

Petitioner now seeks the writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. PETITIONER'S 45-100-YEAR SENTENCE, WHICH DENIES PAROLE-ELIGIBILITY UNTIL THE AGE OF 68, AFTER HIS 64.6-YEAR LIFE EXPECTANCY, FOR SECOND-DEGREE MURDER COMMITTED WHEN HE WAS A JUVENILE, IMPOSED WITHOUT CONSIDERATION OF HIS MITIGATING CHARACTERISTICS OF YOUTH OR A FINDING OF IRREPARABLE CORRUPTION, VIOLATES THE EIGHTH AMENDMENT.

A. INTRODUCTION

The Court should grant certiorari because this case involves two questions that have split the circuits and the states' highest courts, one of which this Court has said, "if presented on direct review," as in this case, "would be []substantial." Virginia v. LeBlanc, 136 S.Ct. 1726, 198 L.Ed.2d 186, 191 (2017)(denying the claim on habeas review because of AEDPA's highly deferential standard of review); Sup. Ct. Rule 10.

The first question is whether the Eighth Amendment, as articulated in Miller v. Alabama, 567 U.S. 460 (2012), and Montgomery v. Louisiana, 136 S.Ct. 718 (2016), bars only mandatory sentences of life without parole (LWOP) imposed on juvenile offenders or if it also requires sentencers to consider the mitigating characteristics of youth before imposing such a sentence.

The second question is whether Miller and Montgomery apply only to sentences explicitly labeled "life without parole" or also to sentences that are the functional equivalent of LWOP but happen to have a different label, such as, in this case, long term-of-years sentences that approach or exceed a juvenile

offender's life expectancy.

The majority of states' highest courts and federal appellate courts to have considered these questions have held that sentencers must consider the mitigating characteristics of youth before imposing LWOP and sentences that are de facto LWOP on juvenile offenders.

B. THE EIGHTH AMENDMENT, MILLER, AND MONTGOMERY

"The Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions.'" Miller, 567 U.S. at 469 (quoting Roper v. Simmons, 543 U.S. 551, 560 (2005)). "That right . . . flows from the basic precept that punishment for crime should be graduated and proportioned both to the offender and the offense." Miller, at 469 (quotation marks omitted). "'The concept of proportionality is central to the Eighth Amendment.'" Miller, at 469 (quoting Graham v. Florida, 560 U.S. 48, 59 (2010)). This Court "view[s] that concept less through a historical prism than according to the evolving standards of decency that mark the progress of a maturing society." Miller, at 469.

"Miller took as its starting premise the principle established in Roper and Graham that 'children are constitutionally different from adults for purposes of sentencing.'" Montgomery v. Louisiana, 136 S.Ct. 718, 733 (2016)(quoting Miller, at 471). "These differences result from children's 'diminished culpability and greater prospects for reform,' and are apparent in three primary ways: [1] children

have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking, [2] children are more vulnerable to negative influences and outside pressures . . . [a]nd [3] a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity." Montgomery, 733 (quoting Miller, 471 (quotation marks omitted)).

These "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." Miller, at 472.

In Miller, this Court "h[e]ld that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." Miller, 567 U.S. at 479. "'A State is not required to guarantee eventual freedom,' but must provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" Id. (quoting Graham, 560 U.S. at 75). "Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Miller, at 480.

In Montgomery, this Court held that Miller's holding is fully retroactive on state and federal collateral review because it is a substantive rule in that it prohibits the sentencing of the vast majority of juvenile offenders to LWOP. This Court also

explained in Montgomery that Miller "required that sentencing courts consider a child's diminished culpability and heightened capacity for change before condemning him or her to die in prison" and, "[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' . . . [that is,] the vast majority of juvenile offenders." Montgomery, 136 S.Ct. at 726, 734 (quotation marks omitted; emphasis added).

C. THE MANDATORY/DISCRETIONARY SPLIT

The majority of states' highest courts and federal appellate courts to have considered the question have held that "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." Aiken v. Byars, 765 S.E.2d 572, 577 (S.C. 2014). In other words, "Miller does not stand solely for the proposition that the eighth amendment demands that a sentencer have discretion to impose a lesser punishment than life without parole on a juvenile homicide offender. Rather, Miller logically indicates that, if a sentencing scheme permits the imposition of that punishment on a juvenile homicide offender, the trial court must consider the offender's 'chronological age and its hallmark features' as mitigating." State v. Riley, 110 A.3d 1205, 1216 (Conn. 2015)(emphasis in original). See also McKinley v. Butler, 809 F.3d 908, 911 (7th Cir. 2016); Steilman v. Michael, 407 P.3d

313, 315 (Mont. 2017)("We hold that Miller and Montgomery apply to discretionary sentences"); State v. Zuber, 152 A.3d 197, 201 (N.J. 2017); Landrum v. State, 192 So.3d 459 (Fla. 2016); Veal v. State, 784 S.E.2d 403 (Ga. 2016); Beach v. State, 348 P.3d 629, 633, 638 (Mont. 2015); People v. Gutierrez, 324 P.3d 245, 249 (Cal. 2014); State v. Long, 8 N.E.3d 890, 898-899 (Ohio 2014)("Miller . . . mandate[s] that a trial court consider as mitigating the offender's youth and its attendant characteristics before imposing a sentence of life without parole."); State v. Pearson, 836 N.W.2d 88, 97 (Iowa 2013)(remanding for resentencing because the judge failed to consider all of the mitigating characteristics of youth required by Miller in imposing discretionary terms totalling 35 years, improperly considered other youthful characteristics as aggravating, and "emphasized the nature of the crimes to the exclusion of the mitigating factors of youth, which are required to be be considered under Miller.").

Similarly, some, in reversing mandatory life sentences under Miller, have held that the sentencing courts, on resentencing, must consider the mitigating characteristics of youth. Johnson v. Ponton, 780 F.3d 219, n.2 (4th Cir. 2015); State v. Fletcher, 112 So.3d 1031, 1036-37 (La. 2013); Parker v. State, 119 So.3d 987, 998 (Miss. 2013); Commonwealth v. Batts, 66 A.3d 286, 296 (Penn. 2013); Sen v. State, 301 P.3d 106, 124 (Wyo. 2013); Williams v. People, 59 V.I. 1024, 1040-42 (V.I. 2013).

A minority, however, have held that where "the sentence imposed was not mandatory, there is no violation of Miller."

Bell v. Uribe, 729 F.3d 1052, 1064 (9th Cir. 2013); United States v. Jefferson, 816 F.3d 1016, 1019 (8th Cir. 2016); Davis v. McCollum, 798 F.3d 1317, 1321-1322 (10th Cir. 2015); Evans-Garcia v. United States, 744 F.3d 235, 240-241 (1st Cir. 2014); State v. Ali, 855 N.W.2d 235, 258 (Minn. 2014)("Because the imposition of consecutive sentences was not mandatory, but was discretionary, Mahdi's reliance on Miller is misplaced."); Smith v. State, 2014 Ark. 204, at *4-5 (Ark. 2014); Randell v. State, No. 61232; 2013 Nev. Unpub. LEXIS 1863, at n.1 (Nev. Dec. 12, 2013); Conley v. State, 972 N.E.2d 864, 876 (Ind. 2012).

The Georgia Supreme Court changed its position on this question after Montgomery. Compare Foster v. State, 754 S.E.2d 33, 37 (Ga. 2014) to Veal v. State, 784 S.E.2d 403 (Ga. 2016).

Miller does not merely ban mandatory LWOP but explicitly requires sentencing courts to consider the mitigating characteristics of youth before imposing LWOP (and, as shown below, de facto LWOP). In Miller, this Court explained that it was relying on two strands of precedent, the first of which "prohibited mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death." Miller, 567 U.S. at 470 (emphasis added). In the second, this Court treated juveniles differently from adults because "'[a]n offender's age,' we made clear in Graham, 'is relevant to the Eighth Amendment,' and so 'criminal procedure law that fail to take defendants' youthfulness into account at all would be flawed.'" Miller, at 473-474 (quoting Graham, 560 U.S.

at 76).

Based on both strands of precedent, this Court said, "we require [sentencers] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" and "[o]ur decision . . . mandates only that a sentencer follow a certain process -- considering an offender's youth and its attendant characteristics -- before imposing a particular penalty." Miller, 567 U.S. at 480, 483 (emphasis added).

Later, in Montgomery, this Court characterized Miller as follows:

> Miller required that sentencing courts consider a child's diminished culpability and heightened capacity for change before condemning him or her to die in prison.
>
> * * *
>
> Miller, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of the distinctive attributes of youth. Even 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.
>
> * * *
>
> The procedure Miller prescribes is . . . [a] hearing where youth and its attendant characteristics are considered as sentencing factors [which] is necessary to separate those juveniles who may be sentenced to life without parole from those who may not.

Montgomery, 136 S.Ct. at 726, 734, 735 (quotation marks and

citations omitted; emphasis added).

In this case, the sentencing court based its sentence mainly on the circumstances of the offense, Petitioner's criminal history, lack of remorse, and efforts to intimidate witnesses, but did not consider his mitigating characteristics of youth or prospects for reform and never found him to be incapable of reform. Id., 13-15. Therefore, Petitioner's sentence, which is the functional equivalent of LWOP (as shown below), was imposed in violation of the Eighth Amendment.

D. THE LWOP/DE FACTO LWOP SPLIT

"[T]he majority of jurisdictions that have considered the question [have] h[e]ld that Miller does apply to juvenile homicide offenders facing de facto life-without-parole sentences. . . . [H]olding otherwise would [be] in direct contradiction to Miller." State v. Ramos, 387 P.3d 650, 659-660 (Wash. 2017)(holding that Miller applies to a sentence of 85 years). These cases can be divided into two categories.

The first category is long term-of-years sentences that approach or exceed a juvenile's life expectancy, that is, sentences of 35 years and more. See, e.g., Commonwealth v. Foust, 180 A.3d 416, 431 (Pa. Super. 2018); United States v. Grant, 887 F.3d 131 (3d Cir. 2018)(65 years with parole eligibility at age 72); State v. Zuber, 152 A.3d 197 (N.J. 2017)(110 years with parole eligibility at age 55); McKinley v. Butler, 809 F.3d 908 (7th Cir. 2016)(100 years); People v. Reyes, 63 N.E.3d 884 (Ill. 2016)(97 years); Beach v. State, 348 P.3d

629, 630 (Mont. 2015)(100 years with parole eligibility at age 72); Casiano v. Comm'r of Corrections, 115 A.3d 1031 (Conn. 2015)(50 years); Gridine v. State, 175 So.3d 672 (Fla. 2015)(70 years); State v. Boston, 303 P.3d 453 (Nev. 2015)(100 years); Brown v. State, 10 N.E.3d 1, 8 (Ind. 2014)(150 years); Cloud v. State, 334 P.3d 132, 142 (Wyo. 2014)(35 years after reductions for good time); State v. Pearson, 836 N.W.2d 88, 97 (Iowa 2013)(35 years); Moore v. Biter, 725 F.3d 1184, 1191-92 (9th Cir. 2013)(254 years).

This Court once applied Miller to a long term-of-year sentence. Robinson v. United States, 197 L.Ed.2d 645 (2017)(granting certiorari, vacating the lower court's denial of a juvenile offender's claim that his 193-year sentence violated Miller, and remanding for reconsideration in light of Montgomery). See Robinson v. United States, No. 5:02--CR-80-11; 2015 U.S. Dist. LEXIS 85648 (E.D.N.C. July 1, 2015).

The second category is life sentences that, although nominally "parolable," have such restrictive or arbitrary parole processes as to deny "'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" Miller, 567 U.S. at 479 (quoting Graham, 560 U.S. at 75). See, e.g., Budder v. Addison, 851 F.3d 1047 (10th Cir. 2017); Brown v. Precythe, No. 2:17-cv-04082; 2017 U.S. Dist. LEXIS 180032, at *28-32 (W.D. Mo. Oct. 31, 2017); Maryland Restorative Justice Initiative v. Hogan, No. ELH-16-1021; 2017 U.S. Dist. LEXIS 15160; 2017 WL 467731 (Dist. Md. Fe. 3, 2017); Funchess v. Prince, No. 14-2105; 2016 WL 756530; 2016 U.S. Dist. LEXIS

231131, at *15-16 (E.D. La. Feb. 25, 2016); Hayden v. Keller, 134 F.Supp.2d 1000, 1009 (E.D.N.C. 2015); Diatchenko v. Dist. Atty. for Suffolk Dist., 27 N.E.3d 349 (Mass. 2015); Greiman v. Hodges, 79 F.Supp.3d 933, 943 (S.D. Iowa 2015); State v. Casteneda, 842 N.W.2d 740, 757-758 (Neb. 2014); Cloud v. Wyoming, 294 F.3d 36, 44-48 (Wyo. 2013); Parker v. State, 119 So.3d 987, 997 (Miss. 2013); State v. Dyer, 77 So.3d 928, 930-31 (La. 2011); LeBlanc v. Mathena, 841 F.3d 256, 262-263 (4th Cir. 2016) rev'd on other grounds sub nom Virginia v. LeBlanc, 136 S.Ct. 1726 (2017)(holding that the state court's rejection of the defendant's claim was not "objectively unreasonable" under AEDPA's highly-deferential standard of review for habeas corpus cases but stating, "The Court expresses no view on the merits of the underlying Eighth Amendment claim. Nor does the Court suggest of imply that the underlying issue, if presented on direct review [and thus under de novo review], would be insubstantial.")(citations and quotation marks omitted). Compare Starks v. Easterling, 659 F.App'x. 277, 281 (6th Cir. 2016)(White, J., concurring)("I agree that Starks has not met AEDPA's demanding standard for relief. I write separately because I conclude that, properly applied, the Supreme Court's cases establish that Stark's [parolable] life sentence violates the Eighth Amendment" under Miller and Montgomery).

A minority of jurisdictions have held that Miller applies only to sentences labeled LWOP. State v. Springer, 856 N.W.2d 460, 470 (S.D. 2014); State v. Vang, 847 N.W.2d 248 (Minn. 2014); Angel v. Commonwealth, 704 S.E.2d 386, 401-402 (Va. 2011); Bunch

v. Smith, 685 F.3d 546, 550-551 (6th Cir. 2012); Adams v. State, 707 S.E.2d 359, 365 (Ga. 2011).

The latter courts "seek to avoid the basic thrust of . . . Graham and Miller by refusing to recognize the[ir] underlying rationale," State v. Null, 836 N.W.2d 41, 72-73 (Iowa 2013), including "the principle established in Roper and Graham that 'children are constitutionally different from adults for purposes of sentencing,'" Montgomery, 136 S.Ct. at 733 (quoting Miller, 567 U.S. at 471), and the "foundational principle[] that the imposition of the State's most severe penalties on juvenile offenders cannot proceed as though they were not children." Miller, at 474.

As one court observed, "Finding a determinate sentence exceeding a juvenile's life expectancy constitutional because it is not labeled an LWOP sentence is Orwellian. Simply put, a distinction based on changing a label . . . is arbitrary and baseless." People v. Nunez, 125 Cal Rptr. 616, 624 (Cal. App. 2011). See also Commonwealth v. Foust, 180 A.3d 416, 432 (Pa. Super. 2018)(holding that Miller applies to term-of-year sentences because "[a]s the United States Supreme Court has often noted in criminal cases, 'form is not to be exalted over substance.'")(quoting Blueford v. Arkansas, 566 U.S. 599, 611 (2012)).

This Court's focus under the Eighth Amendment has always been on a sentence's effects, not its label. In Miller, the Court explicitly equated LWOP sentences to the death penalty: "[B]ecause we viewed this ultimate penalty for juveniles as akin

to the death penalty, we treated it similarly to that most severe punishment." Miller, 567 U.S. at 474-75. See also Graham, 560 U.S. at 70 ("In some cases . . . there will be negligible difference between life without parole and other sentences")(quotation marks omitted).

In Miller, this Court defined LWOP, not as a sentence with that label, but as one that does not provide "'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" Miller, at 479 (quoting Graham, at 75). See also Graham, at 70 (citing Solem v. Helm, 463 U.S. 277, 300-301 (1983) and Rummel v. Estelle, 455 U.S. 263 (1980)).

In Rummel, this Court held that a "parolable" life sentence for a third-time adult nonviolent offender did not violate the Eighth Amendment, but "the Court did not rely simply on the existence of some system of parole." Solem, 463 U.S. at 301. "Rather, it looked to the provisions of the system presented," including that parole on a life sentence in that state was "a regular part of the rehabilitative process" and "the normal expectation in the vast majority of cases." Id., 300-301.

In Solem, by contrast, this Court held that a "parolable" life sentence for a seventh non-violent offense (a "no account" check) violated the Eighth Amendment because, the "parole system [was] far more stringent than the one before us in Rummel," since parole could be granted only if the governor granted a commutation, the possibility of which was "nothing more than a hope for an ad hoc exercise of executive clemency." Solem, 463 U.S. at 300-301 (quotation marks omitted).

In Graham, this Court held that LWOP imposed on a juvenile non-homicide offender violates the Eighth Amendment in part because the possibility of executive clemency is "remote." Graham, 560 US at 69-70. See Parker v. State, 119 So.3d 987, 997 (Miss. 2013)(holding that a life sentence with "conditional release" after age 65 is equivalent to LWOP under Miller because "[c]onditional release is more akin to clemency, which the Supreme Court has held '[a]s a matter of law' to be different from parole 'despite some surface similarities.'")(quoting Solem v. Helm, 463 U.S. 277, 300 (1983)).

In other contexts as well, this Court has focused on sentences' effects, rather than their labels. See Lynch v. Arizona, 136 S.Ct. 1818 (2016)(holding that a life sentence with the possibility of release by executive clemency after 25 years is the same as LWOP for purposes of the due process requirement to instruct a death-penalty jury that such a sentence renders the defendant ineligible for parole).

E. PETITIONER'S SENTENCE VIOLATES THE EIGHTH AMENDMENT.

Petitioner Wilkins was sentenced to 45-100 years without the sentencer considering any of the mitigating characteristics of youth. Sent. Tr. 13-15. In Michigan, all defendants sentenced for crimes committed after December 15, 2000, must serve their entire minimum terms before they become eligible for parole. Mich. Comp. Laws §§ 791.234(5); 800.33(14); 800.34(5)(b). Petitioner was 17 years old at the time of the offense in 2008, but he was not arrested and charged until he was 23

years old. Therefore, he will not be eligible for release on parole until he is 68 years old, which is past his life expectancy.

The general life expectancy for black males who, like Petitioner, were born in 1991, is 64.6 years. World Almanac Book of Facts (2007), p.160 (citing National Center for Health Statistics, U.S. Dept. of Health and Human Services). But at least one study found that juveniles sentenced to prison for lengthy terms live, on average, to only the age of 50.6. Cloud v. State, 334 P.3d 132, 136, 142, nn.3 & 7 (Wyo. 2014)(relying on this statistic to hold that a juvenile's sentence of 35 years, after reductions for good time, is equivalent to LWOP); Casiano v. Comm'r of Corrections, 115 A.3d 1031, 1046-47 (Conn. 2014) (relying on the same statistic to hold that a 50-year sentence imposed on a juvenile offender is equivalent to LWOP); State v. Pearson, 836 N.W.2d 88 (Iowa 2016)(holding that a 35-year sentence imposed on a juvenile is equivalent to LWOP).

Even assuming Petitioner's life expectancy is more than 68 years, his sentence still does not provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Miller, 567 U.S. at 479. As the Third Circuit explained in finding a sentence equivalent to LWOP that made the juvenile offender eligible for parole the same year as his life expectancy, age 72, Miller's "mandate encompasses more than mere physical release at a point just before a juvenile offender's life is expected to end. . . . [T]he state must give non-

incorrigible juvenile offenders the opportunity to meaningfully reenter society upon their release." United States v. Grant, 887 F.3d 131, 147-148 (3d Cir. 2018). This is because Miller and Graham make clear that "a non-incorrigible juvenile offender must be afforded an opportunity for release at a point in his or her life that still affords 'fulfillment outside prison walls,' 'reconciliation with society,' 'hope,' and 'the opportunity to achieve maturity of judgment and self-recognition of human worth and potential.'" Id. (quoting Graham, 560 U.S. at 79). See also State v. Null, 836 N.W.2d 41, 71 (Iowa 2013)("The prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society"); Montgomery, 136 S.Ct. at 737 ("hope for some years of life outside prison walls must be restored.").

Therefore, Petitioner's 45-100-year sentence, imposed without consideration of his mitigating characteristics of youth, violates the Eighth Amendment.

It is true that the sentencing court considered Petitioner's criminal convictions and acts committed from the age of 17 until the age of 23, implying that Petitioner is incorrigible. However, the court still did not consider or balance these acts against the mitigating characteristics of youth, as required by Miller. Further, more recent science has shown that a person's brain is not fully mature until he reaches his mid-twenties. Cruz v. United States, No. 11-cv-787; 2018 WL 1541898, at *23 (D.

Conn. Mar. 29, 2018). That means Petitioner's criminal acts that the sentencing court relied on were, biologically, committed when Petitioner was still a juvenile and therefore were at least partly the result of his youthful impulsivity and other mitigating characteristics. But this Court need not address the issue of the age at which a person's misbehavior is no longer mitigated by their lack of neurological maturity. It is sufficient to find an Eighth Amendment violation that the sentencing court did not consider the mitigating characteristics of youth, as Miller requires.

Petitioner's 40-100-year sentence for second-degree murder is also disproportionate because it is greater than the "default sentence range" -- no more than 40 years on the minimum term and 60 years on the maximum term -- for juveniles convicted of the greater offense of first-degree murder in Michigan. People v. Carp, 496 Mich. 440, 458 (2014), vacated on other grds, Carp v. Michigan, 136 S.Ct. 1355 (2016). The Eighth Amendment "right not to be subjected to excessive sanctions. . . . flows from the basic precept that punishment for crime should be graduated and proportioned both to the offender and the offense." Miller, 567 U.S. at 469 (quotation marks omitted; emphasis added). "The concept of proportionality is central to the Eighth Amendment." Id. Under this principle, only those juveniles who are incorrigible and convicted of the worst offenses may be sentenced to LWOP (or de facto LWOP). Montgomery, 136 S.Ct. at 734 ("sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable

corruption")(quotation marks omitted). At a minimum, this must mean that LWOP (and de facto LWOP) may only be imposed on juveniles convicted of the worst offense -- first-degree murder. See People v. Skinner, 917 N.W.2d 292, 313; No. 152448; 2018 Mich. LEXIS 1150, at *41 (Mich. June 20, 2018)("only those juvenile offenders who have been convicted of first-degree murder can be subject to life without parole").

It therefore follows that Petitioner's sentence of de facto LWOP for a lesser offense is disproportionate under the Eighth Amendment. See Solem, 463 U.S. at 291 ("If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment may be excessive."); Landrum v. State, 192 So.3d 459, 468 (Fla. 2016)("permitting the life-without-parole sentence for a juvenile offender convicted of second-degree murder that was imposed without the sentencer considering the 'distinctive attributes of youth' would be grossly disproportionate when juvenile offenders convicted of the more serious charge of first-degree murder and sentenced to life imprisonment will receive the benefit of" the protections mandated by Miller).

II. THE TRIAL COURT'S ADMISSION OF THE PRELIMINARY EXAMINATION TESTIMONY OF AN UNAVAILABLE WITNESS VIOLATED THE CONFRONTATION CLAUSE BECAUSE PETITIONER DID NOT HAVE AN ADEQUATE OPPORTUNITY TO CROSS-EXAMINE.

A. INTRODUCTION

This Court has never squarely decided whether a preliminary examination, conducted before full discovery, provides an adequate opportunity for cross-examination of a prosecution witness such that, if the witness is unavailable at trial, his preliminary examination testimony is admissible under the Confrontation Clause. Miller v. Maclaren, 737 F. App'x 269, 274 (6th Cir. 2018). In fact, the Court has strongly implied that such testimony would be inadmissible under the Confrontation Clause. Barber v. Page, 390 U.S. 719, 725-726 (1968).

The Sixth Circuit, where Petitioner is located, although recognizing "that there is some question whether a preliminary hearing necessarily offers an adequate prior opportunity for cross-examination for Confrontation Clause purposes," has held that this issue cannot be litigated in habeas corpus cases because this Court has not "clearly established" that rule under 28 U.S.C. § 2254(d). Williams v. Bauman, 759 F.3d 630, 636 (6th Cir. 2014)(quotation marks omitted).

The Michigan Court of Appeals in this case held that the admission of the preliminary examination testimony of an unavailable witness did not violate the Confrontation Clause. Appx. A, pp.7-9.

Therefore, "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court[.]" Sup. Ct. Rule 10(c). Accordingly, this Court should grant certiorari.

B. THE CONFRONTATION CLAUSE

"[I]n Crawford, the Court adopted a fundamentally new interpretation of the confrontation right, holding that '[t]estimonial statements of witnesses absent from trial [can be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.'" Williams v. Illinois, 567 U.S. 50, 64-65 (2012)(plurality)(citing Crawford v. Washington, 541 U.S. 36, 59 (2004)). The interpretation rejected by Crawford was that statements of unavailable witnesses were admissible at trial if they bore sufficient "indicia of reliability." Ohio v. Roberts, 448 U.S. 56 (1980).

"Crawford has resulted in a steady stream of new cases in this Court." Williams, 567 U.S. at 65 (citing cases). But none of them have addressed the question presented here.

This Court did discuss the question presented in this case in Barber v. Page, 390 U.S. 719, 725 (1968). In that case, this Court held that the trial court violated the Confrontation Clause by admitting the preliminary examination testimony of a witness who was incarcerated at a federal prison outside the trial court's jurisdiction because the prosecution made no effort to have the witness testify at trial and therefore failed to

establish that the witness was unavailable. This Court explained, at 725-26,

> The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witnesses. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial because its function is the more limited one of determining whether probable cause exists to hold the accused for trial. While there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable, this is not, as we have pointed out, such a case. [FN 6]

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6. Cf. Holman v. Washington, 364 F.2d 618 (5th Cir. 1966); Government of the Virgin Islands v. Aquino, 378 F.2d 540 (3d Cir. 1967).

In Holman and Aquino, the courts found Confrontation Clause violations in the admission of prior trial and preliminary examination testimony, respectively, because the prosecution in both cases failed to establish the unavailability of the witness at trial. In Aquino, the court expressed its belief that preliminary examination testimony should never be admissible at trial but found itself constrained to hold otherwise by decisions of this Court. 378 F.2d at 549 & n.12 (citing West v. State of Louisiana, 194 U.S. 258 (1904) and Motes v. United States, 178 U.S. 458 (1900)). However, this Court did not hold in either West or Motes that the preliminary examination testimony of an unavailable witness is admissible at trial. In West, this Court held that the Confrontation Clause does not apply to the states, a decision overruled in Pointer v. Texas, 380 U.S. 400, 406

(1965). In Motes, this Court held that the trial court violated the Confrontation Clause by admitting the preliminary examination testimony of a witness because the witness's absence from the trial was due to the negligence of the prosecution. 178 U.S. at 469-474. Therefore, contrary to the Aquino court's belief, it was not constrained by this Court's precedent to hold that preliminary examination testimony is admissible at trial where the witness is unavailable.

The Aquino court gave good reasons for its conclusion that preliminary examination testimony should not be admissible at trial, even if the witness is unavailable and the defendant cross-examined him at the preliminary examination. 378 F.2d at 549.

> Were the question one of first impression it would seem that a clear distinction should be recognized between testimony given at a prior trial and testimony given at a preliminary hearing. In the case of a prior trial the goal of the cross-examination is precisely the same as that which would have followed at the second trial -- acquittal of the defendant. At the preliminary hearing however, the cross-examiner is much more narrowly confined by the nature of the proceeding. The government's aim is merely to show a prima facie case and its tactic is to withhold as much of its evidence as it can once it has crossed that line. The fear of adding to the government's case by extensive cross-examination weighs heavily on a defendant's counsel at a preliminary hearing, where much of the government's case remains still in doubt. The cross-examiner therefore is in a far different position than he would be at trial, where the government must go beyond its prima facie case to convince the jury of the defendant's guilt beyond a reasonable doubt. Everyday experience confirms the difference, for it is rare indeed that on a preliminary hearing there will be that full and detailed cross-examination which the witness would undergo at the trial. Credibility is not the issue at a preliminary hearing as it is in a trial. All the arts of cross-examination which are exerted to impair the credibility of a witness are useless in a

preliminary hearing.

In addition, "[s]ince the purpose of the preliminary examination is only to determine whether probable cause exits to proceed to trial defense counsel may lack adequate motivation to conduct a thorough cross-examination, . . . and may wish to avoid tipping its hand to the prosecution by revealing the lines of questioning it plans to pursue." Al-Timimi v. Jackson, 379 F. App'x 435, 438 (6th Cir. 2010). Another "problem is that the opportunity for cross-examination at the preliminary examination may come too early in the process to be useful to the defense" because, for example, as here, the defense had not been provided with full disclosure of exculpatory and impeaching information, which, "had it occurred at the trial stage, may well have implicated the petitioner's due process rights under Brady v. Maryland, 373 U.S. 83 (1963)." Al-Timimi, at 438.

In this case, trial counsel specifically cited the pre-discovery timing of the preliminary examination as a reason for the cross-examination's inadequacy. Trial Trans., Vol. 6, pp.5-7. In addition, the detective who read Lewis's testimony to the jury at trial necessarily omitted every aspect of Lewis's demeanor, his hesitation, his tone of voice, and every other non-verbal indicator of his lack of credibility. The use of a detective to read Lewis's testimony, by itself, also likely lent it a measure of credibility that it otherwise did not possess.

It is true that this Court has twice upheld the admission of preliminary examination testimony of an unavailable witness at

trial. Ohio v. Roberts, 448 U.S. 56 (1980); California v. Green, 399 U.S. 149 (1970). But both of those cases are distinguishable.

First, in neither case did this Court hold that preliminary examinations, in general, provide an adequate opportunity for cross-examination. Nor did this Court otherwise reject the reasoning set forth above that they do not, especially where the defense has not had full discovery. In Green, this Court also disclaimed any attempt "to map out a theory of the Confrontation Clause." Id., at 162. And, in Roberts, this Court declined to resolve the question whether the mere opportunity for cross-examination or de minimis questioning would satisfy the Confrontation Clause. Rather, in both cases, this Court merely held that the particular preliminary hearings were conducted under circumstances "closely approximating those that surrounded the typical trial" and thus that the defense had an adequate opportunity for cross-examination. Green, 399 U.S. at 165; Roberts, 448 U.S. at 73 (holding that the preliminary hearing had the same "accouterments of the preliminary hearing" in Green).

Further, the decision in Roberts is undermined by the fact that this Court overruled Roberts's "indicia of reliability" test in Crawford. And, although Crawford cited the outcome of Roberts as supporting Crawford's new Confrontation Clause test, it did so using language that suggests Roberts's outcome may not have been precisely what it would have been under Crawford's test: "Even our recent cases, in their outcomes, hew closely to the

traditional line." Crawford, 541 U.S. at 58 (citing Roberts; emphasis added). Hewing closely to the line is not the same as toeing the line.

It is also true that there is language in Crawford that appears to approve the use of preliminary examination testimony at trial, but that language is based solely on Green and Roberts which, as shown above, did not resolve the question presented in this case. After announcing the new Confrontation Clause test in Crawford, the Court said the following. 541 U.S. at 57 (emphasis added).

> Our case law has been largely consistent with these two principles. Our leading early decision, for example, involved a deceased witness's prior trial testimony. Mattox v. United States, 156 U.S. 237 (1895). In allowing the statement to be admitted, we relied on the fact that the defendant had had, at the first trial, an adequate opportunity to confront the witness . . . .
>
> Our later cases conform to Mattox's holding that prior trial or preliminary hearing testimony is admissible only if the defendant had an adequate opportunity to cross-examine. See Mancusi v. Stubbs, 408 U.S. 204, 213-216 (1972); California v. Green, 399 U.S. 149, 165-168 (1970); Pointer v. Texas, 380 U.S. at 406-408; cf. Kirby v. United States, 174 U.S. 47, 55-61 (1899). Even where the defendant had such an opportunity, we excluded the testimony where the government had not established the unavailability of a witness. See Barber v. Page, 390 U.S. 719, 722-725 (1968); cf. Motes v. United States, 178 U.S. 458, 470-471 (1900). We have similarly excluded accomplice confessions where the defendant had no opportunity to cross-examine. . . .
>
> Even our recent cases, in their outcomes, hew closely to the traditional line. Ohio v. Roberts, 448 U.S. at 67-70, admitted testimony from a preliminary hearing at which the defendant had examined the witness.

Green and Roberts are the only cases in which this Court upheld the admission of preliminary examination testimony under the Confrontation Clause. In Mattox and Mancusi, this Court upheld the admission of prior trial testimony. In Pointer, this Court found that the admission of preliminary examination testimony violated the Confrontation Clause because the defendant was not represented by counsel at the preliminary examination. In Kirby, this Court found that the admission of trial testimony from a co-defendant's trial violated the Confrontation Clause because the defendant had no opportunity to cross-examine the witness. And in Barber and Motes, this Court found that the admission of the prior testimony violated the Confrontation Clause because the prosecution failed to establish the unavailability of the witnesses.

Therefore, this Court should grant certiorari to decide this "important question of federal law that has not been, but should be, settled by this Court[.]" Sup. Ct. Rule 10(c).

CONCLUSION

Petitioner Najee Wilkins asks this Honorable Court to grant the writ of certiorari.

Respectfully submitted,

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