No. 19-399

IN THE
Supreme Court of the United States

BARRY CAESAR GARCIA, PETITIONER,

v.

STATE OF NORTH DAKOTA, RESPONDENT.

On Petition For A Writ Of Certiorari To
The Supreme Court of North Dakota

# REPLY IN SUPPORT OF CERTIORARI


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## INTRODUCTION

The State is correct that Mr. Garcia's sentence was handed down nine years before *Roper v. Simmons*, 543 U.S. 551 (2005), not sixteen. Opp. 1. He was also sentenced sixteen years before *Miller v. Alabama*, 567 U.S. 460 (2012), and twenty years before *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the cases announcing and explicating the "irreparable corruption" standard applicable to juveniles sentenced to life without parole. According to the North Dakota Supreme Court, the 1996 sentencing court anticipated and complied with this constitutional standard.

The State is mistaken about the Court's jurisdiction. It was not until the North Dakota Supreme Court addressed the applicability of a *Miller*-fix state statute that this Court had jurisdiction to consider the federal questions at issue. That is, prior to the North Dakota Supreme Court's final judgment that a newly enacted *Miller*-fix state statute did not provide sentencing relief to Mr. Garcia, the decision "was not final for the purposes of [28 U.S.C.] § 1257." *Johnson v. California*, 541 U.S. 428, 431 (2004) (per curiam). Additionally, the Motion for New Trial proceedings, which led to *Garcia II*, rendered his case again non-final as a matter of federal law.

The State's other arguments fare no better. The Supreme Court of North Dakota did, indeed, hold that *Miller*'s holding "is limited to mandatory sentences of life in prison without the possibility of parole." Pet. App. 30a. And the decision's alternative holding implicates a related split of authority: whether, after *Miller*, an evidentiary hearing is re-

quired to assess eligibility for a sentence of life without the possibility of parole.

Finally, the State's attempt to collapse the questions presented distorts the key issue at the heart of the case: whether Mr. Garcia is eligible for the death-in-prison sentence he is now serving. No evidence has been taken after *Miller* on that question, and this Court should grant review and reverse.

## ARGUMENT

### I. THIS COURT HAS JURISDICTION TO REVIEW THE DENIAL OF *MILLER* RELIEF TO MR. GARCIA.

The State argues that this Court is without jurisdiction because the North Dakota Supreme Court's decision in *Garcia v. State*, 903 N.W.2d 503 (N.D. 2017) ("*Garcia I*") is unrelated to *Garcia v. State*, 925 N.W.2d 442 (N.D. 2019) ("*Garcia II*"). The State claims that this Petition is untimely because it is based on *Garcia I*, which "exten[sively] analy[zed]" *Roper*, *Miller*, *and Montgomery* and denied post-conviction relief to Mr. Garcia. Opp. 2-3. This argument ignores that the Court lacked § 1257 jurisdiction until *Garcia II*'s ruling on the applicability of North Dakota's *Miller*-fix statute. Further, once the North Dakota district court properly considered Mr. Garcia's Motion for a New Trial, his case was non-final under federal law.

### a. Until the North Dakota Supreme Court Ruled on the Applicability of North Dakota's *Miller*-Fix Statute to His Sentence, Supreme Court Review Was Premature.

There are two decisions concerning the legality of Mr. Garcia's sentence. While Mr. Garcia's appeal from denial of *Miller* relief was pending, North Dakota passed N.D. Cent. Code § 12.1-32-13.1, its *Miller*-fix statute. That law allows a court to "reduce a term of imprisonment imposed upon a defendant convicted as an adult for an offense committed and completed before the defendant was eighteen years of age if," among other things, "[t]he defendant has served at least twenty years in custody for the offense." N.D. Cent. Code § 12.1-32-13.1(1).[1] In response, Mr. Garcia asked the court to remand for the lower court to evaluate whether a sentencing reduction was warranted under the statute. The North Dakota Supreme Court declined. App. 41a, 43a. Instead, it "left for the District Court to address it in the first place." App. 6a (*Garcia I*). At the same time, the Supreme Court of North Dakota went on to rule on the merits of Mr. Garcia's *Miller* claims. App. 43a.

At that point, this Court lacked jurisdiction to review that ruling. "The Court will not pass upon a constitutional question although properly presented

[1] In light of the new statute, the State's insistence that life without the possibility of parole "remains" a possible sentence is only true in the formal sense because even if a defendant is initially sentenced to life without parole, the defendant has the possibility of release via a sentencing reduction under the statute. Opp. 1.

by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). As such, this Court has interpreted 28 U.S.C. § 1257 to foreclose review where "the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come [which may dispose of the case]." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477 (1975).

Indeed, the application of this principle foreclosed review by this Court in *Johnson v. California*, 541 U.S. 428 (2004) (per curiam), in very similar circumstances, which were present here until the North Dakota Supreme Court's most recent decision (*Garcia II*) in this case finally denied relief to Mr. Garcia on state law grounds. In *Johnson*, this Court granted review on the petitioner's Equal Protection claim under *Batson v. Kentucky*, 476 U.S. 79 (1986) as adjudicated by the California Supreme Court. That court had reversed the California Court of Appeal's reversal of a conviction in a partially published decision on *Batson*. *Johnson*, 541 U.S. at 431. Only the published portion of the Court of Appeal's opinion was part of the petition's appendix. *Id.*

The unpublished portion of the Court of Appeal's opinion did not rule on whether the defendant's evidentiary errors under state law independently merited relief. Instead, it provided "guidance for the trial court on retrial" and declined to rule on whether the claimed evidentiary errors were "properly preserved." *Id.*

After this Court granted certiorari and upon review of the unpublished portion of the opinion, the petition was dismissed for lack of jurisdiction. *Id.* at 432. The Court held that the potential resolution of the case on state law grounds rendered it without § 1257 authority to hear the case. *Id.* at 431-32.

Here, prior to *Garcia II*'s holding that North Dakota's *Miller*-fix did not apply, Mr. Garcia's case was analogous to *Johnson*. The state's *Miller*-fix statute could have provided relief to Mr. Garcia and foreclosed review by this Court, just as the state-law evidentiary errors in *Johnson* could have provided potential relief and for that reason ultimately foreclosed review in that case.

To hold otherwise would allow the *Garcia I* decision that did not address the new North Dakota statute to "frustrate the operations of federal law." *Perez v. Campbell*, 402 U.S. 637, 651 (1971) (rejecting the doctrinal exception that permitted state law to thwart the operation of federal law).[2] That would be especially problematic here, where the Supreme Court of North Dakota invited Mr. Garcia to seek review of the applicability of the *Miller*-fix statute before the District Court, presumably as part of the same case: "Although the parties have fully briefed to us the issue of whether this new statute applies retroactively to Garcia's final conviction, we leave for the district court to determine in the first instance whether Garcia comes within its scope." Pet. App. 43a.

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[2] It is the failure of the North Dakota Supreme Court to address the applicability of the *Miller*-fix statute in *Garcia I* that runs the risk of frustrating federal review, not the statute itself.

As in *Johnson*, review of Mr. Garcia's *Miller* claim in *Garcia I* was premature until *Garcia II*. 28 U.S.C. § 1257. This Court now has jurisdiction.

### b. Reopening Mr. Garcia's Case to Address Whether the *Miller*-fix Statute Applied to Him Rendered the Case Non-Final.

In the context of federal habeas proceedings, this Court has addressed the effect of reopening a case in the manner undertaken by the Supreme Court of North Dakota. In *Jimenez v. Quarterman*, 555 U.S. 113 (2009), the Court held that even after a case becomes final, re-opening it renders the conviction non-final. *Id.* at 119-20. There, the Court held that once a state court re-opens a case, the conviction does not become final again until "the entirety of the state direct appellate review process [is] completed" and the "time for seeking certiorari review in this Court expire[s]." *Id.* at 120-21.

Here, when the post-conviction court reopened the case to consider the applicability of the *Miller*-fix statute, as affirmed by the North Dakota Supreme Court, the case was again non-final under § 1257.[3]

[3] The judgment was also rendered "non-final" as a matter of state law. Mr. Garcia's case was not final when he filed his motion for a new trial because at that point the district court retained "jurisdiction to alter, amend or modify the judgment" of his petition for post-conviction relief. *State v. Vollrath*, 920 N.W.2d 746, 748 (N.D. 2018). That the district court retained jurisdiction to modify its judgment is demonstrated by the North Dakota Supreme Court's review of the denial on its merits. *Cf. Ness v. St. Aloisius Hosp.*, 301 N.W.2d 647, 651 (N.D. 1981) (finding that review was foreclosed given that the district court was without jurisdiction to make a ruling on that

Because this Petition is timely filed after *Garcia II*, this Court has jurisdiction to review the case.

## II. The Supreme Court of North Dakota Joined a Minority of State Courts in Finding that *Miller* Only Applies to Mandatory Sentences, Contrary to *Miller* and *Montgomery.*

There is no sound basis for not taking the Supreme Court of North Dakota at its word. That court characterized *Miller* as applying only to mandatory sentences, an issue this Court will likely resolve in *Mathena v. Malvo*, No. 18-217 (U.S.). The court below explained: "[t]he holding of *Miller* is limited to mandatory sentences of life in prison without the possibility of parole." Pet. App. 30a. It went on to invoke "irreparable corruption" as but one factor in Eighth Amendment proportionality review, rather than as a pre-requisite for eligibility for a sentence of life without possibility of parole for a juvenile offense. *Id.* The North Dakota Supreme Court thus held that *Miller*'s categorical exemption only applies to mandatory sentences, joining a minority of courts. Pet. 9-10 (explicating split of authority). As such, the State's effort to distinguish this case from *Malvo* and those addressing a similar question is misguided. Opp. 7-8.

Any doubt about the lower court's view on the matter should be eliminated in light of its handling of Mr. Garcia's *Miller* claim. According to the North Dakota Supreme Court, outside of mandatory sentences, *Miller* and *Montgomery* are satisfied by ref-

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issue). Therefore, no federalism concerns weight against considering the case non-final.

erence to a "broader rationale" of considering youth, and are, in discretionary sentencing regimes, free to ignore this Court's specific guidance for a sentencer to separate those rare juvenile offenders whose crimes reflect irreparable corruption rather than transient immaturity. Pet. App. 30a; *Montgomery*, 136 S. Ct. at 734.

The lower court's "broader rationale" posits *Miller* as a guide in Eighth Amendment proportionality analysis—as opposed to the categorical exemption from punishment mandated by *Miller* and explicated in *Montgomery*. Pet. App. 31a ("[W]e understand the touchstone for Eighth Amendment *proportionality analysis* is that consideration of whether a juvenile's crimes reflect 'transient immaturity' rather than the 'irreparable corruption' . . . .") (emphasis added). That the court cabined *Miller*'s holding to mandatory sentences is reflected in its failure to apply *Miller*'s categorical exemption to discretionary sentences, instead applying a "broader rationale" that reflects a diluted version of *Miller*.

Thus, even as the court purported to apply *Miller* to Mr. Garcia's discretionary sentence, it declined to apply the categorical exemption from punishment at the heart of that punishment and implicated the split on the reach of that exemption. As such, Mr. Garcia respectfully requests that this Court either grant his Petition or hold the case pending resolution of *Malvo.*

## III. For Juveniles Sentenced to Life Without the Possibility of Parole Prior to *Miller*, States Must Either Provide a Hearing on Their Eligibility for that Sentence or Make Them Eligible for Parole.

Mr. Garcia has never had a "fair hearing" where he presented evidence and had an opportunity to be heard on the fundamental question in this case: whether he is eligible for the sentence he is serving. *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007). Instead, the State, like the North Dakota Supreme Court before it, rests on the 1996 sentencing proceeding as providing an adequate record to answer whether his crime was, like those of the overwhelming majority of juveniles, the product of "transient immaturity" or, instead, was the product of "irreparable corruption." *Montgomery*, 136 S. Ct. at 734 (quotations omitted).

The State suggests, both in its argument and in its restatement of the question presented, that no hearing is required because Mr. Garcia is in fact eligible for his sentence. Opp. i, 6-7. But that conclusion ignores the question raised by Mr. Garcia: whether he is entitled to either a post-*Miller* hearing on his eligibility for life without the possibility of parole or a parole-eligible sentence. That question has split the lower courts. Pet. 13. Beyond describing the holdings of several cases (Opp. 7-8), the State has made no effort to explain why the Court should not resolve this split of authority on a question concerning the harshest penalty under law for juveniles.[4] It should.

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[4] The State also does not dispute that this question relates to the issues presently before the Court in *McKinney v. Arizona*,

The need for a hearing after *Miller* is critical. Pet. 14-16. The standard controlling Mr. Garcia's eligibility for the sentence he is serving was announced long after his 1996 sentencing proceeding. *See generally*, *Miller*, 567 U.S. 460. Even if Mr. Garcia's sentencing proceeding had complied superficially with the requirements of *Miller*, a new hearing would be appropriate because of the changed significance of youth and irreparable corruption in light of *Miller*. Pet. 15 (discussing *Bobby v. Bies*, 556 U.S. 825 (2009)).

But the hearing here falls well short of even considering the mitigating aspects of youth,[5] much less addressing whether Mr. Garcia was irreparably corrupt. The State fails to address this question directly and instead suggests that Mr. Garcia's sentence comports with *Miller* and *Montgomery* as a "proper individualized analysis," under *Miller*. Opp. 7. In its attempt, the State simply rehashes the errors of the district court in 1996 and the North Dakota Supreme Court.

First, the State mentions a review of the presentencing investigation report, police reports, and charging documents. Opp. at 1. Yet these materials were used to further Mr. Garcia's *prosecution*. Even

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No. 18-1109 (U.S.). This case should also either be granted or held for review in light of *McKinney*.

[5] These aspects include: (1) the youth's chronological age and immaturity, impetuosity, and the failure to appreciate risks and consequences; (2) the youth's family and home environment; (3) the circumstances of the offense, including extent of participation in the criminal conduct; (4) the impact of familial and peer pressures on the offender; (5) effect of offender's youth on the criminal justice process, such as inability to comprehend a plea bargain; and (6) the youth's possibility of rehabilitation. *Miller*, 567 U.S. at 477-78.

the sentencing report omits a meaningful discussion of the impact of youth, with one court having described it as "contain[ing] almost exclusively negative information." *Garcia v. Bertsch*, No. A3-04-075, 2005 WL 4717675, at *19 (D.N.D. Sept. 12, 2005), aff'd, 470 F.3d 748 (8th Cir. 2006).

But the State is correct to note that the information before the sentencing court strongly suggested that the mitigating aspects of youth affected Mr. Garcia. The sentencing court knew that Mr. Garcia's father was in prison and that his mother had been murdered and that he struggled with drug and alcohol abuse, including having been under the influence of LSD at the time of the offense.[6]

However, this evidence was given no weight by the 1996 sentencing court because it made a single factor, expression of remorse, dispositive without discussing how youth may affect that factor. The sentencing court professed belief in the ability of youth to rehabilitate, but made it clear that only those who express remorse in the context of a sentencing proceeding can do so: "in order for this [change] to be accomplished, the person must be willing to admit the wrongfulness of their conduct." Pet. App. 36a. Hinging Mr. Garcia's potential for rehabilitation on a single dispositive factor departs from *Miller*'s mandates and highlights why a post-*Miller* hearing on eligibility is required.[7]

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[6] This information was before the sentencing court, but was also discussed in the opinion below. App. 32a, 34a.

[7] The post-conviction court below heard compelling information from Mr. Garcia about his upbringing and how he had changed as an adult. App. 93a. However that court declined to consider it in reaching its decision, (App. 92a), making clear that Mr.

Lastly, the State's reference to consideration of the tragic outcomes from the crime further does not fit in *Miller*'s framework. *Miller* requires consideration of the circumstances of the offense only as far as they are connected to the offender. *Miller* does not just give further guidance regarding the proportionality analysis of the punishment, but is rooted in categorical analysis regarding the offender (*i.e.*, whether a juvenile offender exhibits "transient immaturity" or not). *Montgomery*, 136 S. Ct. at 735.

As opposed to a "proper individualized determination," (Opp. 7), Mr. Garcia's sentencing decision includes only a cursory consideration of youth that is out of step with what *Miller* requires before imposing a sentence of life without the possibility of parole. Such a sentencing proceeding sentencing runs afoul of the Eighth Amendment and creates the intolerable risk of an unconstitutional sentence, and this Court should grant review and reverse.

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Garcia has not had a post-*Miller* opportunity to make his case for ineligibility for his present sentence.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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