No. 19-6006

In the
Supreme Court of the United States

NICHOLAS RAMON WILKERSON,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

On Petition for Writ of Certiorari to the
Alabama Court of Criminal Appeals

BRIEF IN OPPOSITION

Steve Marshall
Alabama Attorney General

Edmund G. LaCour Jr.*
Solicitor General

A. Barrett Bowdre
Deputy Solicitor General

OFFICE OF ALA. ATT'Y GEN.
501 Washington Avenue
P.O. Box 300152
Montgomery, AL 36130
(334) 353-2196
edmund.lacour@AlabamaAG.gov
*Counsel of Record

Counsel for State of Alabama

QUESTION PRESENTED

In 1994, Nicholas Wilkerson was sentenced to a mandatory term of life imprisonment without parole for a murder he committed when he was 17. Following this Court's decisions in *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), Wilkerson was re-sentenced. The sentencing judge held a two-day hearing, entered a written order in which he expressly considered 14 separate factors related to Wilkerson's youth, and concluded that Wilkerson's crime was "not the result of 'transient immaturity or youth,' but instead was the product of 'irreparable corruption.'" He thus re-sentenced Wilkerson to life without parole. The question presented is:

Did Wilkerson's re-sentencing comply with the Eighth Amendment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT

Petitioner Nicholas Wilkerson was "17 years, 2 months, and 12 days old" the day he shot and killed William Wesson. Pet. App. C, at 1; Pet. App. B, at 5-6. That was May 15, 1992. *Id.* A few days before, one of Wilkerson's friends had quit his job at Bill's Farmhouse Restaurant in Cullman, Alabama, after the owner, Wesson's son, denied his request to leave early one night. Pet. App. B, at 6. So it was that Wilkerson and four of his friends decided to rob the restaurant. They rented a car and arrived at Bill's Farmhouse on the evening of May 15, just as the restaurant was closing. *Id.* They waited for the workers to open the back door to take the trash out, then Wilkerson and two others stormed inside, armed with loaded weapons and with stockings covering their faces. *Id.* They first encountered Wesson's wife, who worked at the restaurant. *Id.* at 5-7. They forced her to get on the floor and stuck a shotgun to her head. *Id*. Then, as one of his compatriots worked on getting the cash register open, Wilkerson confronted Wesson, who had come to pick his wife up from work. *Id.* He made Wesson lie face-down on the floor, sat on his back, and stole his wallet. *Id.* Then he shot Wesson in the back. *Id.* at 7. Wesson died on the floor of his son's restaurant. *Id*. The three gunmen rejoined their friends, returned the car they had rented, and split the money they had stolen. *Id.* at 7-8.

1. Wilkerson was tried and convicted of capital murder. *Id.* at 1; *see* Ala. Code § 13A-5-40(a)(2). At the time, that meant that he could be sentenced either to death or to life imprisonment without parole. *See* Ala. Code § 13A-5-39(1) (1994). Pursuant to an agreement with the State, he was sentenced to life without parole. Pet. App. B, at 2; *see Wilkerson v. State*, 686 So. 2d 1266, 1268 (Ala. Crim. App. 1996).

2. In 2013, Wilkerson sought state postconviction relief based on this Court's holding in *Miller v. Alabama*, 567 U.S. 460, 465 (2012), that a mandatory sentence of life without parole for a crime committed by a juvenile violates the Eighth Amendment. Pet. App. B, at 4. The trial court stayed the proceedings pending this Court's decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), as to whether *Miller*'s guarantee applied retroactively. Pet. App. B, at 4. Once this Court held that it did, the trial court scheduled Wilkerson's re-sentencing hearing. *Id.*

a. The hearing lasted two days, August 15 and 16, 2017. *Id.* at 8. Ten witnesses testified; 125 exhibits were admitted; and the transcript of the hearing filled 351 pages—all on the question of what Wilkerson's sentence should be in light of his youth when he murdered Wesson. R. 1-351. The State presented three of Wesson's daughters as witnesses and offered into evidence Wilkerson's disciplinary records from the Alabama Department of Corrections. Pet. App. B, at 9. Those records showed that Wilkerson had accrued 65 alleged infractions for (among other

things) "fighting, stealing, possessing weapons, possessing drugs (including cocaine) and alcohol, possessing cellular telephones, threatening to start a riot, and stabbing an inmate in the head and ear." *Id.* Notably, at least ten of the infractions—including one he received for stabbing another inmate with a weapon—occurred *after* Wilkerson filed his motion for postconviction relief in 2013, when he was 38 years old. Pet. App. C, at 4.

Wilkerson presented seven witnesses: his mother, aunt, nephew, sister, and brother, R. 70-99, 109-17, 117-23, 131-53, 153-64; a specialist from a reentry and recovery program, R. 100-09; and a clinical pediatric neuropsychologist, Dr. Joseph Ackerson, R. 177-263. Dr. Ackerson testified that he had conducted a neuropsychological evaluation of Wilkerson, interviewed Wilkerson's mother, reviewed the psychological report and Wilkerson's testimony from the original trial, talked with a correctional officer at Wilkerson's prison, reviewed Wilkerson's disciplinary records from the prison, and spoken with a mitigation specialist. Pet. App. B, at 13; R. 183, 196-97, 226. Dr. Ackerson reported that Wilkerson grew up in a "very stable and very supportive" home environment. R. 185. He also opined that Wilkerson had suffered from attention deficit/hyperactivity disorder (ADHD) from a young age, and that the "inability to stop and think," combined with an IQ score of 77, meant that he was vulnerable to peer pressure as a child. Pet. App. B, at 14; R. 202-05. Dr. Ackerson concluded that Wilkerson's ability to stay out of trouble if released from

prison would depend on his remaining "free of alcohol and drugs" and not being "around other criminal elements." Pet. App. B. at 17; R. 250.

b. After the hearing, the sentencing judge issued a five-page order re-sentencing Wilkerson to life imprisonment without the possibility of parole. Pet. App. C, at 5. In that order, the judge explained that the Alabama Supreme Court required sentencing judges to weigh 14 factors when sentencing a juvenile convicted of capital murder. *Id.* (citing *Ex parte Henderson*, 144 So. 3d 1262, 1284 (Ala. 2013)). The judge thus specifically considered—and wrote at least a paragraph about—each of the following factors:

> (1) the juvenile's chronological age at the time of the offense and the hallmark features of youth, such as immaturity, impetuosity, and failure to appreciate risks and consequences;
>
> (2) the juvenile's diminished culpability;
>
> (3) the circumstances of the offense;
>
> (4) the extent of the juvenile's participation in the crime;
>
> (5) the juvenile's family, home, and neighborhood environment;
>
> (6) the juvenile's emotional maturity and development;
>
> (7) whether familial and/or peer pressure affected the juvenile;
>
> (8) the juvenile's past exposure to violence;
>
> (9) the juvenile's drug and alcohol history;
>
> (10) the juvenile's ability to deal with the police;

(11) the juvenile's capacity to assist his or her attorney;

(12) the juvenile's mental-health history;

(13) the juvenile's potential for rehabilitation; and

(14) any other relevant factor related to the juvenile's youth.

Id. at 1-5 (quoting *Henderson*, 144 So. 3d at 1284). These factors come straight from this Court's decision in *Miller*. *See* 567 U.S. at 477-78.

After considering each of these 14 factors, the sentencing judge concluded:

> Defendant Nicholas Wilkerson participated in planning a restaurant robbery. During that robbery he alone shot and killed William Wesson with a handgun he was holding. He shot the victim in the back as he lay on the floor, and then he left the victim for dead. The crimes committed by this Defendant are not representative of an immature and impetuous youth, but rather a mature, cold and calculated criminal eager to cover his tracks at all costs. The Defendant went to great lengths to participate in the robbery and murder of William Wesson and to cover his crime afterwards. This Defendant expressed no remorse for his actions at the time of the incident or at his trial.
>
> Notably, Defendant's conduct since his incarceration demonstrates that his crime was not the result of 'transient immaturity or youth,' but instead was the product of 'irreparable corruption.' *Click v. State*, 215 So. 3d 1189, [1194 (Ala. Crim. App. 2016) (quoting *Montgomery*, 136 S. Ct. at 734)]. Considering all the circumstances, this Court finds that this is the rare case where the original sentence of the trial judge was an appropriate sentence for a juvenile defendant convicted of Capital Murder.

Id. at 5. The judge re-sentenced Wilkerson to life imprisonment without parole. *Id.*

3. Wilkerson appealed his sentence to the Alabama Court of Criminal Appeals. Pet. App. B, at 1-57. He argued that the court should establish new standards

for *Miller* hearings that (1) made a sentence of life imprisonment without parole presumptively unconstitutional for a juvenile, (2) required the State to prove beyond a reasonable doubt that a juvenile defendant is "irreparably depraved or corrupt" before a defendant can be sentenced to life without parole, and (3) mandated a heightened standard of review for life-without-parole sentences for juvenile offenders. *See id.* at 17-18.

The Court of Criminal Appeals issued a 57-page opinion affirming Wilkerson's sentence and denying his requested standards. *Id.* at 1-57. First, the court explained that neither *Miller* nor *Montgomery* imposed a "presumption" against life-without-parole sentences for juvenile offenders, but instead simply "mandate[d] individualized sentencing for juveniles charged with capital murder." *Id.* at 21. The court also noted that the Alabama legislature and courts had already established standards for these individualized hearings, by which judges must consider all the *Miller* factors and "make specific written findings as to [their] consideration of the sentencing factors used in determining whether life imprisonment without parole was the appropriate sentence." *Id.* at 25 (citing *Betton v. State*, No. CR-15-1501, -- So. 3d --, 2018 WL 1980780, at *6 (Ala. Crim. App. Apr. 27, 2018)).

Second, the court rejected Wilkerson's argument that the proper standard for sentencing a juvenile defendant to life without parole is proof beyond a reasonable doubt that the defendant is "irreparably depraved." The court noted that the "normal

procedures applicable at a sentencing hearing" applied to *Miller* hearings as well—meaning that "both the State and the defendant may present evidence to the circuit court to assist in its sentencing determination," and "[w]hether the juvenile defendant convicted of capital murder is eligible for a sentence of life imprisonment without the possibility of parole is a question to 'be determined by the preponderance of evidence.'" *Id.* at 27 (quoting Ala. R. Crim. P. 26.6). The court emphasized that "whether a juvenile who has been convicted of capital murder should be sentenced to life imprisonment without the possibility of parole is ultimately a *moral judgment*, not a factual finding." *Id.* at 36 (citing *People v. Skinner*, 917 N.W.2d 292, 305 n.11 (Mich. 2018), *cert. denied*, 139 S. Ct. 1543 (2019)).

Third, the court declined Wilkerson's invitation to adopt a more stringent standard of review that would apply only to juvenile defendants sentenced to life without parole after an individualized hearing. *Id.* at 38-39. "Because life imprisonment without the possibility of parole remains a sentencing option for juvenile offenders," the court explained, "the standard of review to be applied is an abuse-of-discretion standard." *Id.* at 39.

4. Wilkerson unsuccessfully sought certiorari review from the Alabama Supreme Court. *See* Pet. App. A.

REASONS FOR DENYING THE WRIT

Wilkerson asks this Court to hold that the Eighth Amendment requires a formal factual finding to determine whether a juvenile homicide offender is incorrigible. Pet. i. This Court should deny the petition.

First, Wilkerson already received what he asks for. The sentencing judge explicitly found that Wilkerson's crime "was the product of 'irreparable corruption.'" Pet. App. 5 (citation omitted). That makes Wilkerson the wrong person to present this question to the Court. Moreover, while courts across the country have implemented the requirements of *Miller* and *Montgomery* in different ways, the sentencing hearing Wilkerson received would pass muster under all but the most radical of them, making this case a poor vehicle for deciding the constitutional floor.

Second, while Wilkerson mentions a Sixth Amendment argument in his petition, he never squarely presents this issue to the Court, nor did he ask the court below to rule on it. So the court didn't. That is reason enough to deny the petition. But there is also not a substantial split of authority on the issue. Only two state courts have held that the Sixth Amendment requires a jury to make factual findings about the rehabilitative potential of a juvenile defendant. One of those decisions has effectively been abrogated by new state legislation, *see State v. Hart*, 404 S.W.3d 232 (Mo. 2013), while the other decision is currently pending before this Court in a cert

petition in which the underlying court *did* rule on the issue. *See Oklahoma v. Johnson*, No. 19-250 (filed Aug. 22, 2019).

I. Wilkerson Is Not The Right Person To Present The Eighth Amendment Issue Because The Trial Judge Explicitly Found That His Crime Was The "Product Of Irreparable Corruption."

Wilkerson's argument is "that the Eighth Amendment requires a factual finding of 'permanent incorrigibility,' 'irreparable corruption,' and 'that rehabilitation is impossible' before ... a court [may] impose a life-without-parole sentence" on a juvenile defendant. Pet. 25-26. But though the Eighth Amendment doesn't require it, Wilkerson already received such a finding. The sentencing judge explicitly found that Wilkerson's "crime was not the result of 'transient immaturity or youth,' but instead was the product of 'irreparable corruption.'" Pet. App. C, at 5 (citation omitted). So Wilkerson is simply not the right person to present his claim to this Court. And the split of authority is largely irrelevant to this case anyway. The re-sentencing Wilkerson received would have complied with the factfinding requirements of almost every court that has considered the issue. That indicates that the differences in approach are more semantic than substantive, and confirms that this case would be a poor vehicle for determining the constitutional floor.

1. Wilkerson received the factfinding he says the Eighth Amendment requires. The judge in his case held two days of hearings and heard from ten witnesses, including a pediatric neuropsychologist, to determine the effect that Wilkerson's

youth had on his crime. The judge then issued a written order in which he wrote at least a paragraph about 14 separate sentencing factors drawn from *Miller*. Pet. App. C, at 1-5. There is thus abundant evidence in the record that the judge considered the unique characteristics of youth when he sentenced Wilkerson to life without parole.

The judge also made an explicit determination—or "finding"—of Wilkerson's "potential for rehabilitation." He concluded: Wilkerson's "crime was not the result of 'transient immaturity or youth,' but instead was the 'product of irreparable corruption.'" *Id.* at 5 (citation omitted). As the judge explained, his finding was based at least in part on Wilkerson's behavior since he became incarcerated—and particularly since he filed his motion for postconviction relief in 2013. Since then, the judge noted, Wilkerson "ha[d] been found guilty of at least ten disciplinary infractions ... including a major infraction for fighting with a weapon, an infraction where [he] stabbed another inmate with a weapon." *Id.* at 4.

Finally, the judge concluded his order with an additional finding: "Considering all the circumstances, this Court finds that this is the rare case where the original sentence of the trial judge was an appropriate sentence for a juvenile defendant convicted of Capital Murder." *Id.* at 5. Though not explicitly labeled a "fact finding"—as if sentencing is simply a matter of finding facts instead of applying moral judgment, *cf. Skinner*, 917 N.W.2d at 305 n.12—the determination is the same.

Wilkerson asked for a finding of his corrigibility, and that is what he got.[1] He is the wrong person now to argue that the Eighth Amendment requires a finding of incorrigibility before a juvenile offender may be sentenced to life imprisonment without parole.

2. It is also significant that Wilkerson's re-sentencing would pass muster under nearly all the approaches courts have adopted to apply *Miller* and *Montgomery*. For despite this Court's reminder in *Montgomery* "[t]hat *Miller* did not impose a formal factfinding requirement," *Montgomery*, 136 S. Ct. at 735, some courts have held that *Miller* requires exactly that. *E.g.*, *Davis v. State*, 415 P.3d 666, 683-84 (Wyo. 2018) (noting that a district court must "set forth specific findings supporting a distinction between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption" (quoting *Sen v. State*, 301 P.3d 106, 127 (Wyo. 2013)). Contra Wilkerson's categorization, however, these decisions do not fit neatly into two distinct categories, with some courts requiring factfinding and others not. There are many more categories than that. *Cf.* Pet. 12-20. Yet as the facts of this case show, the differences in approach are largely semantic. Words like "conclusion," "consideration,"

[1] Although Wilkerson also contends that the factual finding must be made beyond a reasonable doubt—which his was not—that is not the question he asks this Court to answer. *See* Pet. i.

and "factual finding" are often used to mean the same thing, or close to the same thing. That again makes this case a poor vehicle for determining the constitutional floor.

First, some courts put the burden on the juvenile offenders "to establish, by a preponderance of the evidence, that their crimes did not reflect irreparable corruption but instead transient immaturity." *State v. Valencia*, 386 P.3d 392, 396 (Ariz. 2016), *cert. denied*, 138 S. Ct. 467 (2017); *see, e.g.*, *Jones v. State*, 285 So. 3d 626, 631 (Miss. 2017), *petition for cert. filed*, No. 18-1259 (Mar. 29, 2019); *State v. Ramos*, 387 P.3d 650, 658 (Wash.), *cert. denied*, 138 S. Ct. 467 (2017). There is no question that Wilkerson's re-sentencing would be sufficient in these jurisdictions.

Second, another group of courts require judicial "consideration" of *Miller*'s guarantee, but tend to treat such consideration like they would sentencing factors under 18 U.S.C. § 3553(a) instead of explicit "factual findings" or "determinations." *E.g.*, *Skinner*, 917 N.W.2d at 317; *State v. James*, 813 S.E.2d 195, 209 (N.C. 2018); *People v. Holman*, 91 N.E.3d 849, 863-65 (Ill. 2017), *cert. denied*, 138 S. Ct. 937 (2018); *Johnson v. State*, 395 P.3d 1246, 1258-59 (Idaho), *cert. denied*, 138 S. Ct. 470 (2017); *Landrum v. State*, 192 So. 3d 459, 468-69 (Fla. 2016); *People v. Gutierrez*, 324 P.3d 245, 249 (Cal. 2014). Again, there is no doubt that Wilkerson's re-sentencing would pass muster in these jurisdictions, too.

Third, some courts go a step further and require on-the-record "consideration" of a defendant's potential corrigibility. Though these courts do not call such consideration "factual findings," they nevertheless conduct a searching review of the record to ensure that the sentencing judge explicitly weighed the characteristics of youth and made a reasoned determination as to his corrigibility. *See, e.g.*, *United States v. Briones*, 929 F.3d 1057, 1067 (9th Cir. 2019) (en banc) (noting that the "record must reflect that the court meaningfully engaged in *Miller*'s central inquiry"), *petition for cert. filed*, No. 19-720 (Dec. 6, 2019); *White v. Premo*, 443 P.3d 597, 608 (Or. 2019) (reversing life-without-parole sentence because the "record d[id] not convince [the appellate court] that the sentencing court reached the conclusion that [the] petitioner is one of the rare juvenile offenders who is irreparably depraved"), *petition for cert. filed*, No. 19-264 (Aug. 28, 2019); *Malvo v. Mathena*, 893 F.3d 265, 274 (4th Cir. 2018) (holding that sentencing judge must "conclud[e]" that the offender's crimes reflect permanent incorrigibility before sentencing to life without parole), *cert. granted*, 139 S. Ct. 1317 (2019), *petition dismissed* (Feb. 26, 2020) (No. 18-217); *see also* Pet. App. B, at 25 (requiring sentencing courts "to make specific written findings as to [their] consideration of the sentencing factors used in determining whether life imprisonment without parole was the appropriate sentence"). Plainly,

the sentencing judge's on-the-record consideration of the *Miller* factors and his determination of Wilkerson's incorrigibility would suffice in these jurisdictions as well.

Fourth, other courts require an explicit factual finding or "determination" of incorrigibility, but do not require these "facts" to be proved beyond a reasonable doubt. *E.g.*, *Veal v. State*, 784 S.E.2d 403, 412 (Ga. 2016) (reversing trial court that failed to "make any sort of distinct determination on the record that [the defendant] is irreparably corrupt or permanently incorrigible"), *cert. denied*, 139 S. Ct. 320 (2018); *White v. State*, -- S.E.2d --, No. S19A1004, 2020 WL 129482, at *3 (Ga. Jan. 13, 2020) (rejecting defendant's argument that trial court erred by applying a preponderance of the evidence standard); *State v. Seats*, 865 N.W.2d 545, 557 (Iowa 2015) ("[I]f the sentencing judge believes the information in the record rebuts the presumption to sentence a juvenile to life in prison with the possibility of parole ... the judge must make specific findings of fact discussing why the record rebuts the presumption."). Because Wilkerson received a finding that his crime was the product of "irreparable corruption," his re-sentencing would also likely comply with the law of these jurisdictions.

Finally, there is one last category, composed of a small group of state courts, in which the differences in approach could yield a different result in this case. These courts hold that *Miller* requires formal factfinding, proved beyond a reasonable

doubt to either a judge or jury, "to overcome the presumption against the imposition of a sentence of life without parole for a juvenile offender." *Commonwealth v. Batts*, 163 A.3d 410, 455 (Pa. 2017) (requiring factfinding by sentencing judge); *see, e.g.*, *Davis*, 415 P.3d at 681-84 (same); *Johnson v. Elliott*, -- P.3d --, No. 2019 OK CR 9, 2019 WL 2251707, at *2 (Okla. Crim. App. May 24, 2019) (requiring factfinding by jury), *petition for cert. filed*, No. 19-250 (Aug. 22, 2019); *Hart*, 404 S.W.3d at 241 (same). Because the sentencing judge in Wilkerson's case did not state that his finding of incorrigibility was made "beyond a reasonable doubt," Wilkerson's sentence might not pass muster under this approach—though the evidence suggests that the State could have met this standard, too. *See supra* pp. 2-6. In any event, the main difference those cases present is the standard of proof required, not whether "the Eighth Amendment require[s] a factual finding" of incorrigibility. Pet. i. And though (as discussed next) Wilkerson argues that the *Sixth* Amendment supplies the standard of proof, the only question presented to the Court is whether the *Eighth* Amendment requires a factual finding at all. *See id.* The answer is that it does not—but Wilkerson received one anyway. That makes the split of authority largely irrelevant to the Eighth Amendment question in any case, and particularly unlikely to make a difference in this one.

II. To The Extent Wilkerson Raises A Sixth Amendment Question, The Court Should Deny The Writ Because The Court Below Did Not Rule On The Issue And There Is Not A Substantial Split Of Authority.

Wilkerson also asserts that the split of authority on the Eighth Amendment question "has ramifications for the Sixth Amendment's right to trial by jury" because "[i]f a factual finding is required ... the Sixth Amendment requires that the finding be proven to a jury beyond a reasonable doubt." Pet. 21. Yet he never argues that *his* Sixth Amendment rights were violated, and he never argued that to the court below, either. This Court should deny the writ for that reason alone. But even if that issue had been properly presented—either to this Court or to the one below—denial is still warranted because the split in authority has only just emerged, is lopsided (against Wilkerson), and could likely resolve itself.

A. Wilkerson Did Not Ask the Court Below to Decide Whether a Jury is Required for Re-Sentencing Under *Miller*.

The court below noted that "Wilkerson has not expressly asked this Court to hold that a jury, rather than a judge, must make a factual determination before he may be sentenced to life imprisonment without the possibility of parole." Pet. App. B, at 36. To be sure, at the Court of Criminal Appeals, Wilkerson did cite to cases such as *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, 136 S. Ct. 616 (2016), that held that aggravating factors must be found beyond a reasonable doubt by a jury before a defendant can be sentenced to death. But he did so to argue that a finding of irreparable corruption under *Miller* must also be made beyond a reasonable doubt—not to argue that a jury must be the one to make that finding.

See Wilkerson's Ct. Crim. App. Op. Br. at 31-37 ("As such, the same Sixth Amendment *principles* applicable in [cases applying *Ring* and *Hurst*] are applicable to *Miller* sentencing events: unless there is a determination beyond a reasonable doubt that an aggravating circumstance exists—i.e., that a juvenile's crime evidenced 'permanent incorrigibility,' 'irreparable corruption,' and 'irretrievable depravity'—the Eighth Amendment (and Sixth Amendment) prohibits a *court* from sentencing a juvenile defendant to life-without-parole." (emphasis added)). Thus, because Wilkerson did not expressly argue that a jury must be the one to make those findings, the court below never addressed the issue. That is reason enough for this Court to deny the petition. *See Adams v. Robertson*, 520 U.S. 83, 86 (1997) ("With 'very rare exceptions,' we have adhered to the rule in reviewing state-court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." (quoting *Yee v. Escondido*, 503 U.S. 519, 533 (1992)).

B. Wilkerson Does Not Ask This Court to Decide Whether a Jury is Required for Re-Sentencing Under *Miller*.

Although Wilkerson's petition mentions the "disparate application of the Sixth Amendment right" to have a jury make factual findings in a *Miller* re-sentencing hearing, he never argues that *his* Sixth Amendment rights were violated, and he never asks this Court to review the Sixth Amendment issue by itself. *Cf.* Pet. 21.

Instead, he presents the Sixth Amendment question as a tack-on to the Eighth Amendment issue—an issue that could be affected by a holding that the Eighth Amendment requires formal factfinding, but not an independent reason for granting certiorari. That is why his question presented refers only to the Eighth Amendment, pet. i; why he frames the "issue at the heart of the petition" as "whether the Eighth Amendment requires a formal factual finding," pet. 8; and why he concludes the second part of his petition by urging that "the fundamental Sixth Amendment considerations involved" support his request that the Court "resolve whether a factual finding is required b[y] the *Eighth Amendment*," pet. 24 (emphasis added). Thus, because Wilkerson does not raise the Sixth Amendment issue as an independent question for review, this Court should not consider it as such.

C. Only Two Courts Have Held That *Miller* Hearings Require Jury Factfinding—And Those Courts are Clearly Wrong.

Even if Wilkerson had properly presented the Sixth Amendment issue, review would still not be warranted because the split in authority is new, lopsided against Wilkerson, and could resolve itself.

1. Only two state courts have held that the Sixth Amendment requires a trial by jury for re-sentencing under *Miller*. Shortly after *Miller*, the Supreme Court of Missouri recognized that "no consensus ha[d] emerged" regarding the burden of proof for juvenile re-sentencings. *Hart*, 404 S.W.3d at 241. The court therefore made

a prudential determination that, "[u]ntil further guidance is received," a juvenile offender could not be sentenced to life without parole unless a jury found "beyond a reasonable doubt that th[e] sentence is just and appropriate." *Id.* Before the court could revisit its decision after *Montgomery*, however, the Missouri state legislature intervened to provide parole eligibility for juvenile offenders serving life-without-parole sentences. *See* Mo. Rev. Stat. § 558.047 (2016). Thus, one of the two decisions creating the "split" has already been effectively abrogated by state legislation. *See Montgomery*, 136 S. Ct. at 736 ("A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.").

That leaves the Oklahoma Court of Criminal Appeals as the only court to hold, after *Montgomery*, that "[t]he Sixth Amendment demands that the trial necessary to impose life without parole on a juvenile homicide offender must be a trial by jury, unless a jury is affirmatively waived." *Stevens v. State*, 422 P.3d 741, 750 (Okla. Crim. App. 2018) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). The State of Oklahoma has petitioned this Court for a writ of certiorari from a subsequent decision by the same court. *See Johnson*, No. 19-250. And if this Court does not correct the Oklahoma court's error, the error is of recent vintage, giving some reason to think the state court might reconsider its aberrational holding.

2. "[A]ll the [other] courts that have considered this issue have ... concluded that the Sixth Amendment is not violated by allowing the trial court to decide whether to impose life without parole." *Skinner*, 917 N.W.2d at 311. Those courts include the supreme courts of three states (Michigan, Pennsylvania, and Utah) and the intermediate appellate courts of five additional states (Florida, Mississippi, California, North Carolina, and Louisiana). *See, e.g.*, *id.*; *Batts*, 163 A.3d at 478-79; *State v. Houston*, 353 P.3d 55, 68 (Utah 2015), *cert. denied*, 136 S. Ct. 2005 (2016); *Beckman v. State*, 230 So. 3d 77, 94-97 (Fla. Dist. Ct. App. 2017), *cert. denied*, 139 S. Ct. 1166 (2019); *Cook v. State*, 242 So. 3d 865, 876 (Miss. Ct. App. 2017), *cert. denied*, 139 S. Ct. 787 (2019); *People v. Blackwell*, 207 Cal. Rptr. 3d 444, 465 (Cal. Ct. App. 2016), *as modified on denial of reh'g* (Sept. 29, 2016), *cert. denied*, 138 S. Ct. 60 (2017); *State v. James*, 786 S.E.2d 73, 82 (N.C. Ct. App. 2016), *aff'd*, 813 S.E.2d 195 (N.C. 2018); *State v. Fletcher*, 149 So. 3d 934, 943 (La. App. 2014), *cert. denied*, 136 S. Ct. 254 (2015).

So the vast majority of courts have gotten the law right. As this Court stated in *Montgomery*, before a juvenile may be sentenced to life without parole, "the *sentencing judge* [must] take into account 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" 136 S. Ct. at 733 (emphasis added) (quoting *Miller*, 567 U.S. at 480); *see also Miller*, 567 U.S. at 489 (stating that "a judge or jury" must consider the specific attributes

of the juvenile offender before sentencing him); *cf. McKinney v. Arizona*, No. 18-1109, 586 U.S. ___ (Feb. 25, 2020) (slip op., at 5) ("In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court carefully avoided any suggestion that 'it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute.'" (emphasis omitted) (quoting 530 U.S. at 481)). Only one court's contrary decision is still being applied—and that case presents a cleaner vehicle for review anyway. *See Johnson*, No. 19-250.

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

STEVE MARSHALL
Alabama Attorney General

Edmund G. LaCour Jr.*
Solicitor General

A. Barrett Bowdre
Deputy Solicitor General

OFFICE OF ALA. ATT'Y GEN.
501 Washington Avenue
P.O. Box 300152
Montgomery, AL 36130
(334) 353-2196
edmund.lacour@AlabamaAG.gov

Counsel for State of Alabama
*Counsel of Record

February 26, 2020