No. 19-7751

In the
Supreme Court of the United States

CHRISTOPHER MICHAEL THRASHER,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In 1993, Christopher Michael Thrasher was sentenced to a mandatory term of life imprisonment without parole for two murders he orchestrated when he was 16. Following this Court's decisions in *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), Thrasher was re-sentenced. The sentencing judge held three days of hearings, entered a written order in which he expressly considered 14 separate factors related to Thrasher's youth, and concluded that Thrasher's crime was "not the result of 'transient immaturity or youth,' but instead was the product of 'irreparable corruption.'" He thus re-sentenced Thrasher to life without parole. The question presented is:

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

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STATEMENT

On February 8, 1992, two boys named Allen Eakes and Kevin Duncan were beaten with a baseball bat, drug into a creek outside Bessemer, Alabama, and left to die. Pet. App. 44c. Eakes was 15 years old when he drowned to death in Shades Creek. Duncan was 14. Tr. 266.

Three teenagers were tried and convicted of the murders: Carvin Stargell, Nathan Gast, and the petitioner, Christopher Thrasher, who was 16 years and 7 months old at the time. Pet. App. 43c, 45c. According to the sole witness of that night's events, 14-year-old Ginger Minor, although Stargell and Gast were the boys' immediate assailants, it was Thrasher who had orchestrated their murders—he who acted as the leader of the gang to which Stargell and Gast belonged, he who ordered Stargell and Gast to kill Eakes and Duncan. Pet. App. 5b-6b, 44c. The trio also tried to kill Minor that night, beating her with the same baseball bat used to kill Eakes and Duncan and leaving her for dead, too. *Id.* Fortunately, she survived—barely—and was able to testify at trial. *Id.*

1. Thrasher was tried and convicted of capital murder. Pet. App. 7b; *see* Ala. Code § 13A-5-40(a)(10). At the time, that meant that he could be sentenced either to death or to life imprisonment without parole. *See* Ala. Code § 13A-6-2(c) (1993). Thrasher waived his right to have a jury participate in his sentencing hearing,

and the trial court sentenced him to life imprisonment without the possibility of parole. Pet. App. 8b; *see Thrasher v. State*, 668 So. 2d 949 (Ala. Crim. App. 1995).

2. In 2013, Thrasher 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. 8b. 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. *Id.* at 8b-9b. Once this Court held that it did, the trial court scheduled Thrasher's re-sentencing hearing. *Id.* at 9b.

a. The hearing lasted three days, October 2, 3, and 4, 2017. Tr. 1, 65, 248. Eight witnesses testified; 39 exhibits were admitted, plus the records from the original trial; and the transcript of the hearing filled 271 pages—all on the question of what Thrasher's sentence should be in light of his youth when he orchestrated the murders of Eakes and Duncan. Tr. 1-271. The State did not present any witnesses in its case-in-chief, and instead relied on the trial transcript, the presentence report from the original sentencing hearing, an updated presentence report filed shortly before the resentencing hearing, and a disciplinary report from the Alabama Department of Corrections. Pet. App. 12b. The disciplinary report showed that Thrasher had accrued "approximately 38 disciplinary infractions," some of them "major, violent infractions," since being imprisoned. Pet. App. 47c. Notably, at least seven of the

infractions occurred *after* Thrasher filed his motion for postconviction relief in 2013, when he was 38 years old. *Id.* The State did present two rebuttal witnesses—the siblings of the two murder victims. Tr. 236-46.

Thrasher presented six witnesses: his sister, Tr. 38-64; Dr. Paul O'Leary, a board-certified child and adolescent forensic psychiatrist, *id.* at 66-120; the father of one of the victims, *id.* at 120-30; a teacher who taught Thrasher in elementary school, *id.* at 132-45; Dr. Jeffery Walker, a professor of criminal justice at the University of Alabama Birmingham and the chair of the department, *id.* at 146-202; and Ginger Minor, the woman who survived and testified against Thrasher at trial, *id.* at 203-32. Dr. O'Leary testified that when Thrasher was 16, he likely had the "emotional intelligence age of a 13-year-old" because of his lower IQ. *Id.* at 77. He also said that Thrasher's teenage years at home were "very unstructured" and that, as a result, Thrasher had "been repeatedly truant" and "used and abused drugs." *Id.* at 84. As Thrasher spent time in prison, however, Dr. O'Leary noted that he had received fewer disciplinary infractions for violent behavior (though he continued to receive infractions for possessing drugs and other contraband) and had completed his high school education. *Id.* at 86.

b. After the hearing, the sentencing judge issued a six-page order re-sentencing Thrasher to life imprisonment without the possibility of parole. Pet. App. 43c-48c. 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.* at 43c (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;
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> (4) the extent of the juvenile's participation in the crime;
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> (5) the juvenile's family, home, and neighborhood environment;
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> (6) the juvenile's emotional maturity and development;
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> (7) whether familial and/or peer pressure affected the juvenile;
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> (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;
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> (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 43c-48c (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 Christopher Thrasher participated in planning, and ordered the brutal murder of two minor victims. After the two minors were brutally beaten to death, and after this Defendant was informed that they had been killed, and after he was presented with the blood evidence of the murders on the murder weapon, he attempted to cover up evidence of the crimes by trying to kill the only witness who could lead to a prosecution. 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. This Defendant expressed no remorse for his actions at the time of the incident, at his trial, or in the intervening years.
>
> 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.

Pet. App. 48c. The judge re-sentenced Thrasher to life imprisonment without parole. *Id.*

3. Thrasher appealed his sentence to the Alabama Court of Criminal Appeals. Pet. App. 4b-41b. He argued that the court must "develop a framework" for "sentencing juvenile defendants pursuant to *Miller*"; that the trial court erred by re-sentencing him to life imprisonment without the possibility of parole; and that the court should remand the case for the trial court to hold an evidentiary hearing for a

Brady claim he had attempted to raise concerning payments from the victims' families to Ginger Minor. *Id.* at 22b-23b.

The Court of Criminal Appeals issued a 38-page opinion affirming Thrasher's sentence and denying his requested standards. *Id.* at 4b-41b. In doing so, it largely relied on a recently issued decision, *Wilkerson v. State*, 284 So. 3d 937 (Ala. Crim. App. 2018), *petition for cert. filed*, No. 19-6006 (Sept. 6, 2019), to deny Thrasher's request for a new "framework" for *Miller* re-sentencings. Pet. App. 23b-26b. Thrasher raised the exact same Eighth Amendment arguments in his appeal that Wilkerson had; both defendants were represented by the same appellate counsel. *Id.* 23 n.4.

The court in *Wilkerson* first 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." 284 So. 3d at 948 (quoting *Betton v. State*, No. CR-15-1501, -- So. 3d --, 2018 WL 1980780, at *4 (Ala. Crim. App. Apr. 27, 2018)). 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 950 (citing *Betton*, 2018 WL 1980780, at *6).

Second, the *Wilkerson* court confirmed 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 950-51 (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 955 (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 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 956. "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.*

4. Thrasher unsuccessfully sought certiorari review from the Alabama Supreme Court. *See* Pet. App. 1a.

REASONS FOR DENYING THE WRIT

Thrasher 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, Thrasher already received what he asks for. The sentencing judge explicitly found that Thrasher's crime "was the product of 'irreparable corruption.'" Pet. App. 48c (citation omitted). That makes Thrasher 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 Thrasher 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 Thrasher 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. Thrasher 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."

Thrasher's argument is that the Eighth Amendment requires "the sentencer to make a factual determination—based on the evidence presented at the specialized hearing—of whether a juvenile is, or was, defined by the transient immaturity of youth and demonstrated capacity for change, or is defined by 'such irretrievable depravity that rehabilitation is impossible and life without parole is justified.'" Pet. 20 (quoting *Montgomery*, 136 S. Ct. at 733). But though the Eighth Amendment doesn't require it, Thrasher already received such a finding. The sentencing judge explicitly found that Thrasher's "crime was not the result of 'transient immaturity or youth,' but instead was the product of 'irreparable corruption.'" Pet. App. 48c5 (citation omitted). So Thrasher 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 Thrasher 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. Thrasher received the factfinding he says the Eighth Amendment requires. The judge in his case held three days of hearings and heard from eight witnesses, including a child and adolescent psychiatrist, to determine the effect that Thrasher'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. 43c-48c. There is thus abundant evidence in the record that the judge considered the unique characteristics of youth when he sentenced Thrasher to life without parole.

The judge also made an explicit determination—or "finding"—of Thrasher's "potential for rehabilitation." He concluded: Thrasher's "crime was not the result of 'transient immaturity or youth,' but instead was the 'product of irreparable corruption.'" *Id.* at 48c (citation omitted). As the judge explained, his finding was based at least in part on Thrasher's behavior since he became incarcerated—and particularly since he filed his motion for postconviction relief in 2013. Since then, the judge noted, Thrasher "ha[d] been found guilty of at least seven disciplinary infractions." *Id.* at 47c.

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 48c. 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. Thrasher 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 Thrasher'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 Thrasher's categorization, however, these decisions do not fit neatly into two distinct categories, with some courts requiring factfinding and others not. There are many

[1] Although Thrasher 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.

more categories than that. *Cf.* Pet. 16-24. Yet as the facts of this case show, the differences in approach are largely semantic. Words like "conclusion," "consideration," 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), *cert. granted*, No. 18-1259 (Mar. 9, 2020); *State v. Ramos*, 387 P.3d 650, 658 (Wash.), *cert. denied*, 138 S. Ct. 467 (2017). There is no question that Thrasher'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 Thrasher'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 dismissed*, 140 S. Ct. 993 (2020); *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*, 140 S. Ct. 919 (2020); *see also Wilkerson*, 284 So. 3d at 950 (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 Thrasher'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*, 837 S.E.2d 838, 842-43 (Ga. 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 Thrasher received a finding that his crime was the product of "irreparable corruption," his resentencing 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*, 457 P.3d 1089, 1090-91 (Okla. Crim. App. 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 Thrasher's case did not state that his finding of incorrigibility was made "beyond a reasonable doubt," Thrasher'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. 2-5. In any event, the main difference these cases present is the standard of proof required, not whether the Eighth Amendment "requires a factual finding" of incorrigibility. Pet. i. And though (as discussed next) Thrasher 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 Thrasher 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 Thrasher 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.

Thrasher also asserts that the split of authority on the Eighth Amendment question "carries ramifications for the rights guaranteed by the Sixth Amendment."

Pet. 24. "If the Eighth Amendment requires a factual finding before a juvenile homicide defendant may be sentenced to life without parole," he reasons, "then the Sixth Amendment requires that finding be made by a jury and supported by proof beyond a reasonable doubt." *Id.* Yet Thrasher never argues that *his* Sixth Amendment jury right was 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 Thrasher), and could likely resolve itself.

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

Thrasher did not expressly ask the court below 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. To be sure, at the Court of Criminal Appeals, Thrasher 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* Thrasher's Ct. Crim. App. Op. Br. at 45-53 ("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 a juvenile displays permanent incorrigibility and lacks rehabilitative potential, the Eighth Amendment (and the Sixth Amendment) prohibits LWOP." (emphasis added)). Thus, because Thrasher 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. Thrasher Does Not Ask This Court to Decide Whether a Jury is Required for Re-Sentencing Under *Miller*.

Although Thrasher's petition mentions the "disparate application of the Sixth Amendment" to argue that juries must make factual findings in *Miller* re-sentencing hearings, he never argues that *his* Sixth Amendment right to a jury was violated, and he never asks this Court to review the Sixth Amendment issue by itself.[2] *Cf.* Pet. 24.

[2] Thrasher does contend that his "sentence was imposed … without the protections afforded him by the Sixth Amendment," pet. 28, but the context of that statement makes clear that it refers only to the standard of proof he says the Sixth Amendment requires. *See id.* (asserting that "[h]e has consistently argued that finding [of incorrigibility] must be proven beyond a reasonable doubt").

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 asks this Court to "offer clarity on whether the Eighth Amendment requires a factual finding," pet. 15; and why he hinges the consideration of the Sixth Amendment issue on the answer to his question presented, pet. 27. Thus, because Thrasher 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 Thrasher had properly presented the Sixth Amendment issue, review would still not be warranted because the split in authority is new, lopsided against Thrasher, 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.").[3]

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

[3] Arkansas also affords the defendant a right to a jury in a *Miller* re-sentencings, but that determination was made based solely on state law. *See, e.g.*, *Kitchell v. State*, 594 S.W.3d 848, 850 (Ark. 2020) (vacating new sentence imposed in *Miller* hearing because the re-sentencing jury had been told the initial sentence); *Buckley v. State*, 76 S.W.3d 825, 830-31 (Ark. 2002) (holding that state law required that a jury determine a felony defendant's sentence unless both the defendant and the prosecution waived that right).

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*, 140 S. Ct. 702, 707 (2020) ("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,

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