Cause No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

AARON MORAN BROWN

Petitioner-Appellant,

v.

STATE OF INDIANA,

Respondent-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF INDIANA

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QUESTIONS PRESENTED FOR REVIEW

1. Does the substantive rule of *Miller v. Alabama*, 567 U.S. 460 (2012), apply to *de facto* life sentences for juveniles, as the solid majority of jurisdictions to consider the question have held?

2. Does Brown's 100-year sentence, with earliest possible release at age 62, constitute a *de facto* life sentence?

3. Did the Indiana Court of Appeals misinterpret *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), when it held that Indiana's parole system, which provides no discretion or opportunity to present evidence of rehabilitation, was an adequate remedy for a *Miller* violation?

LIST OF PARTIES

All parties appear in the caption on the cover page.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

I. OPINION BELOW

The Indiana Court of Appeals' opinion is reported at *Brown v. State*, 131 N.E.3d 740 (Ind. Ct. App. 2019), and is reprinted in Appendix A, *infra*. The Indiana Supreme Court's order denying transfer of the case is reprinted in Appendix B, *infra*.

II. JURISDICTION

The Indiana Court of Appeals' opinion affirming the trial court's denial of post-conviction relief was issued on August 28, 2019. The Indiana Supreme Court denied Brown's petition for transfer on December 19, 2019.

The jurisdiction of this Court to review the judgment of the Indiana courts is invoked under 28 U.S.C. Section 1257(a), Brown having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

III. CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the Constitution provides:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

IV. STATEMENT OF THE CASE

A. Facts and Prior Proceedings

On February 6, 1994, 16-year-old Aaron Brown killed his mother and stepfather. *Brown v. State*, 659 N.E.2d 671, 672 (Ind. Ct. App. 1995). Brown turned himself in, and subsequently pled guilty without a plea agreement to two counts of

murder on September 19, 1994. *Id.* At that time, the sentence for murder ranged between thirty and sixty years, with the advisory sentence being forty years. *Id.* at 673 (citing I.C. 35-50-2-3(a) (1993)). Brown received an enhanced sentence of fifty years for each count to be served consecutively, for a total of 100 years. *Id.* at 674. On direct appeal, the Court of Appeals found Brown's 100-year sentence was not manifestly unreasonable under Indiana appellate court's authority to review sentences. *Id.* at 675. Brown did not raise an Eighth Amendment challenge to his sentence on direct appeal.

Brown filed a *pro se* petition for post-conviction relief ("PCR") on May 5, 2000. App. Vol. II at 6. The post-conviction court denied the petition on March 25, 2003, after an evidentiary hearing at which Brown was not present. *Id.* at 7. As the filings in Brown's first PCR petition are not part of the current record, it is unknown what issues he raised.[1]

Over two decades after Brown's crime and sentence, this Court issued a series of cases applying the Eighth Amendment to the sentencing of juveniles. *See, Roper v. Simmons*, 543 U.S. 569 (2004); *Graham v. Florida*, 560 U.S. 68 (2010); and *Miller v. Alabama*, 567 U.S. 460 (2012). As most relevant to Brown's claim, the Court held in *Miller* that a mandatory sentence of life without parole ("LWOP") for juvenile offenders violated the Eighth Amendment, and that a sentencing court must consider the characteristics of youth before sentencing a juvenile to a lifetime

[1] The Court of Appeals erroneously cited the issues raised in Brown's successive petition as the issues in his first PCR petition. Appendix A, p. 4.

in prison. *Miller*, 567 U.S. 460. In 2016, the Court held that *Miller* announced a substantive constitutional rule that was retroactive on state collateral review. *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

Due to this significant constitutional development, Brown sought permission to file a successive petition for post-conviction relief, alleging his 100-year sentence violated the Eighth Amendment of the U.S. Constitution and Article 1, Section 16, of the Indiana Constitution. App. Vol. II at 16. Brown alleged the trial court did not properly consider his youth at his original sentencing, entitling him to a new sentencing hearing. *Id.* at 16-17. On December 15, 2017, the Indiana Court of Appeals authorized the filing of Brown's successive petition. *Id.* at 44-45.

The State filed a Motion for Summary Judgment[2] on March 26, 2018, alleging four issues. App. Vol. II, 52. The ultimately dispositive allegation was that *Miller* was inapplicable because Brown did not receive a LWOP sentence and would be eligible for release when he was sixty-two. *Id.* at 57-60. Brown filed a response in opposition on May 25, 2018, arguing that most of the State's claims were irrelevant and the operative question was whether Brown received a *Miller*-compliant hearing where the court properly weighed his juvenile status. App. Vol. II, 155.

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[2] The PCR rules discuss summary disposition, rather than summary judgment. P.-C. R. 1(4)(g). However, because the State and PCR court used the term "summary judgment" in their pleadings, and because the standard of review is the same, Brown uses "summary judgment" when referring to the pleadings. *See Norris v. State*, 896 N.E.2d 1149, 1151 (Ind. 2008) (noting review of summary disposition in PCR proceedings is the same as review of summary judgment in civil matters).

On July 31, 2018, the PCR court held a hearing on the State's Motion for Summary Judgment. The court's principle focus was whether Indiana had defined what constituted a de facto LWOP sentence. PCR Tr. 11, 13-16. The parties agreed that, with good time credit and the maximum educational credits, Brown's earliest potential release date would be when he was sixty-two years old. *Id.* at 7, 11. The State requested the court take judicial notice that "62 is not beyond a reasonable lifetime." *Id.* at 15. The court refused, stating, "I'm not going to do that in the context of summary judgment." *Id.*

On September 12, 2018, the PCR court granted the State's Motion for Summary Judgment, concluding Brown's 100-year sentence did not implicate the holding in *Miller*. App. Vol. II, 193. It reasoned that Brown's sentence was neither a de facto life sentence, nor was it without parole, given his eligibility to be paroled in his early sixties. *Id.* at 200-02. It relied on the Supreme Court's guidance in *Montgomery* that a "State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." *Montgomery*, 136 S. Ct. at 736.

On the appeal of his successive PCR, Brown argued that (1) *Miller* applies to de facto LWOP sentences, and (2) whether a sentence with release at sixty-two constitutes a de facto life sentence is a mixed question of fact and law. Appellant's Br. 19-27. Brown noted that incarceration negatively affects life expectancy. *Id.* at 23. Brown further argued that courts in other jurisdictions have held that sentences similar to Brown's implicated *Miller*, because this Court's mandate that

rehabilitated juveniles deserved a "meaningful opportunity" for release requires more than an opportunity for geriatric release. *Id.* at 27-28. Brown requested that the court remand his case back to the PCR court for an evidentiary hearing. *Id.* at 28. The State argued Brown's sentence did not implicate the Eighth Amendment at all, because it was a discretionary term-of-years sentence imposed as a result of multiple crimes. Appellee's Br. 16-30.

B. The Indiana Court of Appeals Opinion

On August 28, 2019, the Court of Appeals, affirmed the PCR court's grant of summary judgment. The court recognized that the Seventh Circuit has held that *Miller* applies to de facto life sentences. Appendix A, at 6 (citing *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016)). However, the Court did not resolve the question of whether *Miller* applies to de facto life sentences.[3] Instead, in affirming the PCR court, the court reiterated this Court's recommendation that, in lieu of resentencing juvenile homicide offenders, courts could remedy a *Miller* violation by permitting them "'to be considered for parole.'" Appendix A, at 9 (quoting *Montgomery*, 136 S. Ct. at 736). It stated,

> Brown did not receive a mandatory life without the possibility of parole; rather, Brown is eligible for parole with an earliest possible release date of age sixty-two. The fact that the widely-accepted remedy for a *Miller* violation is already available to Brown undercuts Brown's claim that a *Miller* violation has occurred here.

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[3] Another panel of the Indiana Court of Appeals has held that *Miller* applies to de facto LWOP sentences. *Wilson v. State*, 128 N.E.3d 492, 501 (Ind. Ct. App. 2019). That court did not discuss what constituted a de facto LWOP sentence, presumably because Wilson's 181-year sentence precluded any possibility of release in his lifetime even considering good time credit. The Indiana Supreme Court granted transfer in *Wilson*, and that case remains pending.

Appendix A, at 9-10.

The Indiana Supreme Court denied Brown's petition for transfer. *See* Appendix B.

V. REASONS THE WRIT SHOULD BE GRANTED

A. There is a split among the states and among federal circuits regarding whether *Miller* applies to de facto life sentences

This Court has interpreted the Eighth Amendment to impose unique constraints on and requirements for the sentencing of children who commit serious offenses. States and federal circuits are split regarding how to apply those constraints and requirements to de facto LWOP sentences. The writ should be granted so this Court can resolve that split and clarify how its Eighth Amendment jurisprudence applies to such sentences.

In *Roper*, which barred the death penalty for child offenders, this Court reasoned that when compared to adults, juveniles lack maturity and impulse control, are more vulnerable to negative influences, and their personalities are more changeable. *Roper*, 543 U.S. at 569. "These differences render suspect any conclusion that a juvenile falls among the worst offenders." *Id.*

Five years after *Roper*, this Court held that a child cannot be sentenced to LWOP for a non-homicide offense and must have a "realistic" and "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75, 82. The Court stated LWOP "forswears altogether the rehabilitative ideal," and noted "defendants serving life without parole sentences

are often denied access to vocational training and other rehabilitative services." *Id.* at 74.

Subsequently, *Miller* held mandatory LWOP sentences are unconstitutional for children who commit homicide, and that sentencers must take into account youth and its attendant circumstances before sentencing a child to life in prison. *Miller*, 567 U.S. at 480, 489. The Court echoed its decisions in *Roper* and *Graham*, reasoning that youth and its distinctive attributes render children less blameworthy and diminish the penological justifications for deterrence, retribution, incapacitation, and rehabilitation. *Miller*, 567 U.S. at 472-73.

In *Montgomery*, the Court held that *Miller* announced a substantive constitutional rule that was retroactive. *Montgomery*, 136 S. Ct. at 736. *Miller* established that children must be afforded the same meaningful opportunity for release in homicide cases as in non-homicide cases, except in the rare case where the sentencer determines the child "exhibits such irretrievable depravity that rehabilitation is impossible." *Montgomery*, 136 S. Ct. at 733.

Since *Montgomery*, lower courts have divided over the question of whether *Miller* applies to sentences that are functionally equivalent to LWOP. Fourteen states have applied *Miller* to de facto LWOP sentences,[4] while five states have

[4] *See, People v. Franklin*, 370 P.3d 1053, 1060 (Cal. 2016) ("a juvenile may not be sentenced to the functional equivalent of LWOP for a homicide offense without the protections outlined in *Miller*."); *Casiano v. Comm'r of Correction*, 115 A.3d 1031 (Conn. 2015) (applying *Miller* to 50 year sentence); *State v. Shanahan*, 445 P.3d 152 (Idaho 2019) ("[T]he rationale of *Miller* applies to life sentences without the possibility of parole and their functional equivalents."); *People v. Reyes*, 63 N.E.3d 884 (Ill. 2016) (applying *Miller* to aggregate sentence of 97 years); *State v. Null*, 836

determined that *Miller* only applies to *de jure* LWOP sentences.[5] The states that have applied *Miller* to de facto LWOP sentences generally recognize that there is no logical or relevant distinction between LWOP and a lengthy term-of-years sentence. *See e.g., Carter v. State*, 192 A.3d 695, 726 (Md. 2018) ("[T]he reasoning of *Graham* and *Miller* . . . is equally applicable to a sentence that is labeled as 'life without parole' as to a sentence expressed as a number of years without parole when the number is high enough."). States that have refused to apply *Miller* to de facto LWOP either refuse to, in their view, expand *Miller* without this Court requiring them to do so, *see e.g., State v. Mahdi Hassan Ali*, 895 N.W.2d 237 (Minn. 2017), or

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N.W.2d 41 (Iowa 2013) (applying state constitution to find 52.5-year sentence implicates *Miller*); *Carter v. State*, 192 A.3d 695, 726 (Md. 2018) ("[T]he reasoning of *Graham* and *Miller* . . . is equally applicable to a sentence labeled as 'life without parole' as to a sentence expressed as a number of years without parole when the number is high enough."); *Parker v. State*, 119 So.3d 987 (Miss. 2013) (life sentence with eligibility for conditional release implicated *Miller*); *Steilman v. Michael*, 407 P.3d 313, 319 (Mont. 2017) ("Logically, the requirement to consider how 'children are different' cannot be limited to de jure life sentences when a lengthy sentence denominated in a number of years will effectively result in the juvenile offender's imprisonment for life."); *State v. Zuber*, 152 A.3d 197 (N.J. 2017) (applying *Miller* to 110-year sentence with parole eligibility after 55 years); *Ira v. Janecka*, 419 P.3d 161 (N.M. 2018) (*Roper, Graham,* and *Miller* apply to aggregate term-of-years sentences); *White v. Premo*, 443 P.3d 597 (Or. 2019) (*Miller* applies to 800-month sentence), *cert. pending*; *Commonwealth v. Foust*, 180 A.3d 416 (Pa. 2018) (*Miller* applies to de facto life sentences); *State v. Ramos*, 387 P.3d 650 (Wash. 2017) (applying *Miller* to aggregate de facto life sentence); *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014) (*Miller* applies to aggregate sentence with parole eligibility after 45 years).

[5] *See, State v. Helm,* 431 P.3d 1213 (Ariz. Ct. App. 2018) (*Miller* does not apply to life ***with*** parole sentence); *Lucero v. People*, 394 P.3d 1128 (Colo. 2017) (*Graham* and *Miller* apply only to de jure LWOP); *Veal v. State*, 810 S.E.2d 127 (Ga. 2018) (*Miller* does not apply to de facto LWOP); *State v. Mahdi Hassan Ali,* 895 N.W.2d 237 (Minn. 2017) (*Miller* does not apply to de facto LWOP); *State v. Nathan*, 522 S.W.3d 882 (Mo. 2017) (declining to apply *Graham* and *Miller* to aggregate sentences for non-homicide and homicide offenses).

reason that there is a distinction between de jure and de facto LWOP. *See e.g.*, *Lucero v. People*, 394 P.3d 1128, 1130 (Colo. 2017) ("Life without parole is a specific sentence, distinct from sentences to terms of years.").

The federal circuit courts are also split over whether *Miller* applies to de facto LWOP sentences. The Seventh Circuit has held that *Miller* applies to de facto LWOP sentences, observing that "the 'children are different' passage . . . from *Miller v. Alabama* cannot logically be limited to de jure life sentences." *McKinley v. Butler*, 809 F.3d 908, 911 (7th Cir. 2016). However, the Eighth Circuit has held that a 600-month sentence does not fall within *Miller*'s ban on mandatory LWOP sentences. *U.S. v. Jefferson*, 816 F.3d 1016 (8th Cir. 2016).

The splits among states and among federal circuits demonstrate the critical need for this Court to clarify the scope of *Miller*.

B. There is disagreement among lower courts about what constitutes a de facto life sentence

Among the jurisdictions that apply *Miller* to de facto LWOP sentences, there is disagreement over what constitutes a de facto LWOP sentence and how to make such a determination. This Court's guidance on this question is also necessary.

In *Graham*, this Court emphasized that life sentences provide juvenile offenders with "no chance of fulfillment outside prison walls, no chance for reconciliation with society." 560 U.S. at 79. The Court noted that one of the harms of a life sentence was that lifers often lacked opportunities to participate in vocational programming, *id.* at 74, indicating that it contemplated that meaningful release would occur while one is still of working age.

Some courts have taken an actuarial approach to the question of what constitutes a meaningful opportunity for release, looking at life expectancy data. In *Casiano v. Commissioner of Correction*, the Supreme Court of Connecticut cited to a study finding juveniles sentenced to life sentences have an average life expectancy of 50.6 years and another study indicating that inmates suffer "a two-year decline in life expectancy for every year locked away in prison." 115 A.3d 1031, 1046 (Conn. 2015). This data "suggests that a juvenile offender sentenced to a fifty year term of imprisonment may never experience freedom." *Id.* The 50.6 number was based on a study of minors sentenced to natural life in Michigan. *Id.*

Other jurisdictions have rejected an actuarial approach. The Iowa Supreme Court stated, "[W]e do not believe the determination of whether the principles of *Miller* or *Graham* apply in a given case should turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates." *State v. Null*, 836 N.W.2d 41, 71-72 (Iowa 2013). *See also, People v. Contreras*, 411 P.3d 445 (Cal. 2018) (rejecting an actuarial approach).

Brown's case is ideally suited to resolve the question of what constitutes de facto LWOP because his age when he is eligible for release (62) is squarely in the range where courts struggle to determine whether a sentence is de facto LWOP. In fact, one court has specifically referred to age 62 at the time of parole eligibility as the "outer limit" of a constitutional sentence. *Ira v. Janecka*, 419 P.3d 161, 170, 171 (N.M.2018). Several jurisdictions have determined that *Miller* applies to term-of-

years sentences similar to Brown's.[6] Other jurisdictions have found that sentences similar to Brown's are not de facto LWOP.[7] Reviewing Brown's case will allow this Court to provide guidance to courts regarding cases in the range of sentences they struggle with the most.

This Court's guidance is needed regarding what constitutes a de facto LWOP sentence and what approach to take in making that determination.

C. The Court of Appeals misinterpreted *Montgomery* when it held that Indiana's parole system was an adequate remedy for a *Miller* violation

The Court of Appeals misinterpreted *Montgomery* when it held Brown received the remedy proposed by this Court. The *Montgomery* Court suggested that, rather than relitigating sentences at the trial court level,

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[6] *People v. Contreras*, 411 P.3d 445 (Cal. 2018) (50 year sentence with parole eligibility at age 66 is de facto LWOP); *Casiano v. Comm'r of Correction*, 115 A.3d 1031 (Conn. 2015) (50 year sentence without parole is de facto LWOP); *People v. Buffer*, 127 N.E.3d 763 (Ill. 2019) (drawing line for what constitutes de facto LWOP at 40 years, based on state legislation); *State v. Null*, 836 N.W.2d 41 (Iowa 2013) (52.5-year sentence without parole is de facto LWOP); *Carter v. State*, 192 A.3d 695, 726 (Md. 2018) (100-year sentence with parole eligibility after 50 years is de facto LWOP); *State v. Zuber*, 152 A.3d 197, 212 (N.J. 2017) (sentence with parole eligibility after 55 years is de facto LWOP); *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014) (sentence with parole eligibility after 45 years is de facto LWOP).

[7] *Mason v. State*, 235 So.3d 129 (Miss. Ct. App. 2017) (50 year sentence is not de facto LWOP); *Ira v. Janecka*, 419 P.3d 161 (91.5-year sentence with parole eligibility at age 62 is not de facto life); *State v. Strowder*, -- N.E.3d --, 2019 WL 5846964 (Ohio 2019) (citing cases finding that sentences with parole eligibility ranging from age 58 to 66 are not de facto LWOP); *Commonwealth v. Clary*, -- A.3d --, 2020 WL 21200 (Pa. Super. 2020) (citing cases finding that sentences with parole eligibility ranging from 60 to 67 are not de facto LWOP); *Hernandez v. Montgomery*, 2015 WL 775402 (C.D.C. Cal.) (citing federal district court cases from California finding that sentences with parole eligibility ranging from age 60 to 64 are not de facto LWOP).

> A State may remedy a *Miller* violation by permitting juvenile homicide offenders **to be considered for parole**, rather than by resentencing them. Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment. . . . Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change.

Montgomery, 136 S. Ct. at 736 (emphasis added). The Court discussed Montgomery's efforts at rehabilitation—establishing an inmate boxing team, working at the silkscreen department, and serving as a role model to other inmates—as the type of relevant submissions one might present to a parole board to demonstrate rehabilitation. *Id.*

Indiana's parole system offers no such opportunity. What Indiana calls parole bears little resemblance to the parole systems discussed in *Montgomery* as an adequate remedy for a *Miller* violation. Under Indiana's nondiscretionary parole framework, there is no consideration of an inmate's rehabilitative efforts. In fact, there is no parole board hearing or similar hearing.

Instead, Indiana provides that a person convicted of murder shall be released from incarceration once he has completed his fixed term of imprisonment, less the credit time he has earned. I.C. 35-50-6-1(e); *See also* "Indiana Parole Board," https://www.in.gov/idoc/2324.htm (explaining difference between "old code" offenders, over whom the board maintains discretion, and "new code" offenders, for whom release is mandatory) (last visited Mar. 13, 2020). When a person convicted of

murder is released after serving his term, less credit time, he is placed on lifetime parole. I.C. 35-50-6-1(e).

Thus, Brown's release upon earning credit time is not the opportunity to present evidence of his rehabilitation to a parole board as contemplated by *Montgomery*. The rehabilitation efforts he has pursued—completion of a Master of Arts, participation in vocational skills and personal improvement programming at prison, work as a Suicide Companion, etc.—can have no further impact on his sentence beyond the time cuts he has already earned. App. Vol. II, 38-40.

Unlike Indiana, a solid majority of states provide inmates with statutory good time credit, which reduces their maximum period of incarceration, *and* an opportunity for even earlier release on parole.[8] Indiana is one of fifteen states that provide good time credit, but not an opportunity for discretionary parole. Of those fifteen states, it appears that only Indiana, Arizona, and Minnesota place inmates on some type of supervision when they are released upon earning good time credit. *See* Ariz. Rev. St. 41-1604.07 and Minn. Stat. 244.04. The result of this system is that Indiana's good time credit system is more restrictive than most good time statutes, which provide for unsupervised release. Rather than providing a more

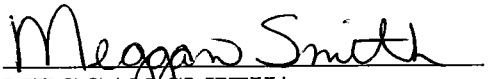
[8] Thirty states provide statutory good time credit and an opportunity for discretionary parole. Unless otherwise noted, all data regarding good time statutes and parole systems was taken from *Grading the Parole Release Systems of All 50 States*, Prison Policy Initiative (Feb. 26, 2019), Appendix A, *available at* https://www.prisonpolicy.org/reports/parole_grades_table.html (last visited Nov. 7, 2019) and *Earned and Good Time Policies: Comparing Maximum Reductions Available*, Prison Fellowship, *available at* https://www.prisonfellowship.org/wp-content/uploads/2018/04/GoodTimeChartUS_Apr27_v7.pdf (last visited Nov. 7, 2019).

generous parole system than discussed in *Montgomery*, what Indiana actually provides is a less generous good time credit statute and no opportunity for earlier release on discretionary parole. Such a system is not what *Montgomery* envisioned as an adequate remedy for a *Miller* violation.

CONCLUSION

For the reasons set forth above, Aaron Brown urges this Court to grant Certiorari.

Respectfully submitted,



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Cause No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

AARON MORAN BROWN,	)
	)
Petitioner-Appellant,	)
	)
v.	)
	)
STATE OF INDIANA,	)
	)
Respondent-Appellee.	)

PROOF OF SERVICE AND CERTIFICATE OF MAILING

I hereby certify that I have, this 16th day of March, 2020, mailed the attached and foregoing **PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF INDIANA**, to the Clerk of the United States Supreme Court, One First Street, North East, Washington, D.C. 20543-0001, pursuant to Supreme Court Rule 29, by certified mail, return receipt requested, designating said method of filing as of the time of mailing, in the United States Mail, first class postage affixed.

I hereby certify that I have, this 16th day of March, 2020, served upon Curtis Hill, Indiana Attorney General, a copy of the above and foregoing **PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF INDIANA**, by mailing it in the United States Mail, first class postage affixed, addressed to his office located at 402 West Washington Street, IGCS – 5th Floor, Indianapolis, Indiana 46204-2770.

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APPENDIX A

Brown v. State, No. 18A-PC-3128
(Ind. Ct. App., August 28, 2019)

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IN THE COURT OF APPEALS OF INDIANA

Aaron Moran Brown,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

August 28, 2019

Court of Appeals Case No. 18A-PC-3128

Appeal from the DeKalb Circuit Court

The Honorable Kurt Bentley Grimm, Judge

Trial Court Cause No. 17C01-9402-CF-8

Tavitas, Judge.

Case Summary

[1] Aaron Moran Brown appeals from the post-conviction court's ("PC court") entry of summary disposition in favor of the State on Brown's successive petition for post-conviction relief ("PCR"). We affirm.

Issue

[2] The sole issue on appeal is whether the PC court erred in granting summary disposition for the State and denying Brown's successive petition for PCR on the ground that Brown's aggregate sentence is unconstitutional.

Facts

[3] This matter arises from Brown's challenge to his convictions and sentences in light of the United States Supreme Court's holding in *Miller v. Alabama*, 567 U.S. 460, 489 (2012), which declared that mandatory sentencing schemes that require the imposition of life sentences without the possibility of parole for juvenile homicide offenders violate the Eighth Amendment. In the aftermath of *Miller*, incarcerated offenders throughout the country—including Brown—who received significant sentences as juveniles, have challenged their sentences as unconstitutional.

[4] The facts as stated in Brown's direct appeal follow:

> On February 7, 1994, Brown was charged by information with the murders of Elizabeth Grueb, his biological mother, and Jeffrey Grueb, his step-father. He pled guilty without a plea agreement in September of 1994. Following a guilty plea hearing the trial court entered judgment on the plea. The evidence reveals that in the early morning hours of February 6, 1994, Brown, then 16-years old, lay in wait for his parents to return home from a party, and upon their arrival, murdered them with a shotgun. Shortly thereafter, Brown turned himself in to the authorities.

Brown v. State, 659 N.E.2d 671, 672 (Ind. Ct. App. 1995), *trans. denied.*

[5] At Brown's sentencing hearing on December 16, 1994, the trial court found the following aggravating circumstances: (1) "despite the fact that [Brown] ha[d] no prior record of criminal activity [he was] in need of correctional or rehabilitative treatment that c[ould] best be provided by [his] commitment to a penal facility"; (2) Brown's membership in a gang; (3) one of Brown's murder victims was his mother; (4) Brown premeditated the murders and lay in wait for his mother and stepfather; (5) Brown's lack of remorse; and (6) Brown's statement, after the murders, that he could conceive of killing again under certain circumstances. Appellant's App. Vol. II p. 29.

[6] The trial court found Brown's youthful age to be a mitigating circumstance and stated: "When this happened you were sixteen (16). You're seventeen (17) as you sit here today. In the eyes of the law in general terms, not even yet an adult." *Id.* at 30. The trial court also found Brown's lack of prior criminal history, as well as his prompt confession and cooperation with law enforcement to be mitigating. Concluding that the aggravating circumstances outweighed the mitigating circumstances, the trial court imposed consecutive fifty-year sentences on each of Brown's murder convictions, for an aggregate sentence of one hundred years.

[7] On direct appeal, Brown argued that: (1) his sentence was manifestly unreasonable in light of the nature of his offenses and his character; (2) he was denied his right against self-incrimination; (3) the trial court improperly articulated aggravating circumstances and overlooked, or assigned inadequate weight, to significant mitigating circumstances; and (4) the trial court "failed to

contemplate Brown's general character when structuring his sentence[.]" We affirmed, and our Supreme Court denied transfer. *Brown*, 659 N.E.2d at 674.

[8] In May 2000, Brown filed a pro se petition for post-conviction relief wherein he argued that his sentence violates the Eighth Amendment of the U.S. Constitution and Article 1, Section 16 of the Indiana Constitution because "no [] consideration was made in Brown's sentencing" to "[a] juvenile's specific characteristics[,]" and because his sentence is "the functional equivalent of a [sentence of] life without parole."[1] Appellant's App. Vol. II pp. 36-37. After a hearing on March 20, 2003, the PC court denied Brown's petition for PCR.

[9] On November 3, 2017, Brown sought, and we subsequently granted, leave to file a successive petition for PCR pursuant to Post-Conviction Rule 1, Section 12. Brown filed his successive petition for PCR on November 3, 2017, and argued that he is entitled to relief under *Miller*. On March 26, 2018, the State moved for summary disposition. On July 31, 2018, the trial court conducted a hearing on the State's motion for summary disposition. On September 12, 2018, the trial court granted summary disposition in favor of the State and against Brown.[2] Brown now appeals from the entry of summary disposition in the State's favor.

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[1] The Department of Correction has determined Brown's earliest anticipated release date to be February 29, 2040, when Brown will be sixty-two years old. Thus, as the State argued below, "Brown's actual sentence is 46 years in real time." App. Vol. II pp. 37, 54.

[2] The trial court did not rule on Brown's ensuing motion to correct error, which was deemed denied.

Analysis

[10] Brown argues that "the trial court did not properly consider his youth at his original sentencing[,]" and that, pursuant to *Miller*, "he [i]s entitled to a new sentencing hearing." Appellant's Br. p. 12. The State counters that "[Brown] does not fall within" the category of offenders contemplated by the Supreme Court in *Miller* because Brown "received a *Miller*-compliant sentencing hearing" and is eligible for parole at the age of sixty-two. Appellee's Br. pp. 14, 38.

[11] We review the grant of a motion for summary disposition in PCR proceedings on appeal in the same way as a motion for summary judgment in a civil matter. *Norris v. State*, 896 N.E.2d 1149, 1151 (Ind. 2008). Thus, summary disposition—like summary judgment—is a matter for appellate *de novo* review. *Id.* Post-Conviction Rule 1(4)(g) provides:

> The court may grant a motion by either party for summary disposition of the petition when it appears from the pleadings, depositions, answers to interrogatories, admissions, stipulations of fact, and any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The court may ask for oral argument on the legal issue raised. If an issue of material fact is raised, then the court shall hold an evidentiary hearing as soon as reasonably possible.

[12] A PC court is permitted to summarily deny a petition for PCR only if the pleadings conclusively show the petitioner is entitled to no relief as a matter of law. *Gann v. State*, 550 N.E.2d 803, 804 (Ind. Ct. App. 1990). The necessity of an evidentiary hearing is avoided when the pleadings show only issues of law.

Id. The need for a hearing is not avoided, however, when a determination of the issues hinges, in whole or in part, upon facts not resolved. *Id.* This is true even though the petitioner has only a remote chance of establishing his claim. *Id.* at 804-805.

[13] 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, 132 S. Ct. at 2463. In *Miller*, the United States Supreme Court ("U.S. Supreme Court") held that mandatory sentencing schemes that require lifetime incarceration without possibility of parole for juvenile homicide offenders violate the Eighth Amendment. 567 U.S. at 489, 132 S. Ct. at 2475. Subsequently, in *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016), the U.S. Supreme Court gave its *Miller* holding retroactive effect. The Seventh Circuit has since held that *Miller* applies, not only to a life sentence, but also to sentences that—although set out as a term of years—are essentially a life sentence. *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016).

[14] Specifically, *Miller* holds that a sentencing scheme that "prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater capacity for change'" impedes "individualized sentencing for defendants facing the most serious penalties" and is unconstitutional as violative of the Eighth Amendment. *Miller*, 567 U.S. at 465, 483, 132 S. Ct. at 2460, 2471. "[S]entencers must be able to consider the mitigating qualities of youth" because "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even

when they commit terrible crimes." 567 U.S. ---, 132 S. Ct. at 2458 (citing *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005), and *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011 (2010)).

[15] > . . . [M]andatory life-without-parole sentences for children "pos[e] too great a risk of disproportionate punishment." *Miller*, 567 U.S. at 479, 132 S. Ct. at 2469. *Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." The Court recognized that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified. But in light of "children's diminished culpability and heightened capacity for change," *Miller* made clear that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."

Montgomery, 136 S. Ct. at 733 (citations omitted).

[16] In its order on the State's motion for summary judgment, the PC court found:

> . . . Here, Brown did not receive a mandatory life sentence, nor did he receive a sentence which precluded parole. . . . [E]ven if Brown is correct in his claim that his sentence was a *de facto* life sentence, he would also have to demonstrate that his *de facto* life sentence was without parole in order to implicate *Miller*. Even then, *Miller* does not preclude the imposition of a mandatory life sentence without parole upon a defendant who committed the qualifying crime as a juvenile, rather it holds that before such sentence imposition can occur[,] certain factors have to be analyzed and considered by the sentencing court. Thus, for Brown to be successful on his petition for post-conviction relief, he must demonstrate that the sentence he received was in fact, if

> not [in] name, a life sentence and the nature of the sentence in essence renders any prospect of parole merely illusory.
>
> * * * * *
>
> Due to eligibility for parole, and Indiana's good time credit statutes, Brown can potentially be released from prison when he is in his early 60's. He did not receive a life sentence without parole. He did not receive a de facto life sentence without parole. He did not receive a de facto life sentence where the opportunity for parole or release is merely illusory. In short, Brown did not receive a sentence that implicates the narrow holding of *Miller*, and as a matter of law he is not entitled to the relief requested in his petition for post-conviction relief.

Appellant's App. pp. 199-201.

[17] The trial court's reading of *Miller* is underscored by the Seventh Circuit's reasoning in *Kelly v. Brown*, 851 F.3d 686, 687 (7th Cir. 2017), which is factually akin to the instant case. Kelly sought leave from the Seventh Circuit to file a successive petition for habeas relief from a 110-year sentence—comprised of two, fifty-five year terms—for murders that Kelly committed when he was sixteen years old. Kelly would be eligible for parole at the age of seventy. The Seventh Circuit reasoned that, in affirming the trial court on direct appeal, our Supreme Court found that the trial court: (1) imposed the presumptive (not an enhanced) sentence for each murder; (2) "properly outlined its reasoning for [Kelly]'s sentences"; (3) adequately balanced the aggravating and mitigating circumstances"; and (4) "considered [Kelly's] age[.]" *Id.* at 687. Thus, the Seventh Court concluded, "Kelly was afforded all he was entitled to under

Miller." Accordingly, the Seventh Circuit denied authorization for Kelly's successive petition for habeas relief.

[18] Here, the record reveals that the trial court, in its discretion, entered an extensive sentencing statement and engaged in thoughtful consideration of the aggravating and mitigating circumstances, including Brown's youthful age at the time he committed the murders. Regarding Brown's youthful age, the trial court stated: "When this happened you were sixteen (16). You're seventeen (17) as you sit here today. In the eyes of the law in general terms, not even yet an adult." Appellant's App. Vol. II p. 30. After concluding that the aggravating circumstances outweighed the mitigating circumstances, the trial court imposed an enhanced sentence of fifty years on each count, however, the court did not impose the maximum sentence.[3]

[19] We need not reach the question of whether the trial court's discussion of Brown's youthful age was adequate or too "cursory." *See Kelly*, 851 F.3d at 689 (J. Posner, dissenting). Brown is not a candidate for *Miller* review. The law is well settled that "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." *See Montgomery*, 136 S. Ct. at 736. Brown did not receive a mandatory

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[3] At the time of Brown's offenses, the sentencing range for murder was thirty to sixty years, with a presumptive sentence of forty years, with not more than twenty years added for aggravating circumstances or not more than ten years substracted for mitigating circumstances. Ind. Code § 35-50-2-3 (1993). Thus, Brown faced a maximum sentence of sixty years on each murder conviction, for a maximum aggregate sentence of 120 years.

sentence of life without the possibility of parole; rather, Brown is eligible for parole with an earliest possible release date of age sixty-two. The fact that the widely-accepted remedy for a *Miller* violation is already available to Brown undercuts Brown's claim that a *Miller* violation has occurred here.

[20] To the extent that Brown seeks revision of his sentence pursuant to Indiana Appellate Rule 7(B), Brown has already unsuccessfully argued, on direct appeal, that his sentence is manifestly unreasonable in light of the nature of the offenses and his character.[4] After considering the aggravating and mitigating circumstances, including Brown's mitigating youthful age at the time of the murders, we concluded that "[c]onsidering the nature of the offense, the character of the offender and the many aggravating factors, Brown's sentence is not unreasonable." *Brown*, 659 N.E.2d at 675. *Cf. Martez Brown v. State*, 10 N.E.3d 1 (Ind. 2014) (revising offender's sentence downward on direct appeal pursuant to Rule 7(B)), *cf. Fuller v. State*, 9 N.E.3d 653 (Ind. 2014) (reducing offender's sentence on direct appeal, pursuant to Rule 7(B)). The PC court did not err in granting the State's motion for summary disposition because Brown is entitled to no relief as a matter of law.[5]

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[4] When Brown was sentenced in 1994, the standard for reviewing a sentence was the now-obsolete "manifestly unreasonable" standard. *See* Indiana Appellate Rule 17(B) (1994).

[5] We note that transfer is pending in *State v. Stidham*, 110 N.E.3d 410 (Ind. Ct. App. 2018), in which we reversed the PC court's reduction of Stidham's sentence pursuant to its grant of Stidham's petition for PCR. In reversing the PC court's judgment, a panel of this Court concluded that: (1) Stidham's claims that his sentence violated the Eighth Amendment of the U.S. Constitution and Article 1, Section 16 of the Indiana Constitution were barred on principle of res judicata as Stidham asserted the same claim on direct appeal in 1993 "and the Indiana Supreme Court rejected the claim"; and (2) "[t]o the extent Stidham's claims [we]re

Conclusion

[21] The PC court did not err in granting the State's motion for summary disposition. We affirm.

[22] Affirmed.

Crone, J., and Bradford, J., concur.

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based on improvements [in his character] since 1994, [Stidham was] essentially requesting a sentence modification," which was not authorized under the post-conviction rules, which "do not provide for modification of a sentence which has been established by the Legislature as appropriate for the offense and which has been found to be constitutional." 110 N.E.3d at 420, 421.

Brown argues that his case is readily distinguishable from *Stidham* because, unlike Stidham, Brown: (1) did not assert an Eighth Amendment claim on direct appeal; and (2) has not previously presented any tribunal with evidence of his rehabilitation efforts.

APPENDIX B

Order Denying Petition to Transfer
(Ind. December 19, 2019)

In the
Indiana Supreme Court

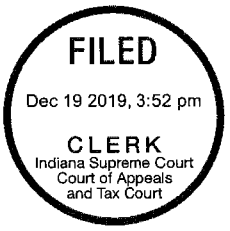
Aaron Moran Brown,
Appellant(s),

v.

State Of Indiana,
Appellee(s).

Court of Appeals Case No.
18A-PC-03128

Trial Court Case No.
17C01-9402-CF-8



Order

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction, filed pursuant to Indiana Appellate Rules 56(B) and 57, following the issuance of a decision by the Court of Appeals. The Court has reviewed the decision of the Court of Appeals, and the submitted record on appeal, all briefs filed in the Court of Appeals, and all materials filed in connection with the request to transfer jurisdiction have been made available to the Court for review. Each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices, and each participating member of the Court has voted on the petition.

Being duly advised, the Court DENIES the petition to transfer.

Done at Indianapolis, Indiana, on 12/19/2019.

Loretta H. Rush
Chief Justice of Indiana

All Justices concur.