No. 22-6431

In the Supreme Court of the United States

PHILIP JOHNSON,

Petitioner,

v.

STATE OF ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari to the Illinois Appellate Court

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Miller v. Alabama, 567 U.S. 460, 479 (2012), held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile [homicide] offenders." The questions presented are:

1. Whether petitioner's negotiated sentence is consistent with *Miller*, given that it was not compelled by statute and the trial court had discretion to consider his youth before imposing it.

2. Whether petitioner waived any Eighth Amendment claim when he entered a knowing and voluntary guilty plea and asked the trial court to impose the negotiated sentence.

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BRIEF IN OPPOSITION

Petitioner pled guilty in 1996 to one count of first-degree murder and one count of second-degree murder and agreed to an aggregate prison sentence of 110 years. At the plea hearing, the trial court repeatedly emphasized that it was not bound by the plea agreement, did not need to approve the negotiated disposition, and would decide for itself, based on all the information presented, whether it would impose the agreed-upon sentence. Petitioner repeatedly confirmed that he understood the charges and accepted the sentence as the appropriate disposition, and the trial court ultimately accepted petitioner's guilty plea, sentencing him to the negotiated term. With good behavior, petitioner will be released after serving 55 years of his sentence.

More than two decades later, petitioner sought postconviction relief, claiming that he was sentenced to *de facto* life without the possibility of parole in violation of *Miller v. Alabama*, 567 U.S. 460 (2012). The state court denied relief on the grounds that he had waived his ability to collaterally attack his sentence and was not entitled to relief under *Miller* regardless, relying on the Illinois Supreme Court's decision in *People v. Jones*, 190 N.E.3d 731 (Ill. 2021), *cert. denied*, 142 S. Ct. 2731 (2022) (No. 21-7676). Petitioner now seeks certiorari.

The Court should deny the petition, just as it did in *Jones*. Petitioner's term-of-years sentence does not violate *Miller* because it was not compelled by statute and the trial court had discretion to consider petitioner's youth before imposing it. And the Court should not grant certiorari to consider the legal rules applicable to the

waiver question, for multiple reasons, including that there is no division of authority on that question and petitioner is ultimately not entitled to relief under *Miller*.

STATEMENT

1. In 1994, at age 16, petitioner fatally shot his father, James T. Johnson, and his father's girlfriend, Frances M. Buck, and was charged with two counts of first-degree murder for their deaths. C58-67, 159.[1] The evidence—including a tape-recorded statement petitioner gave to police—showed that the murders were premeditated, driven by petitioner's stated belief that he could no longer endure his father's physical and emotional abuse. C32-37.

2. On the first day of petitioner's trial in May 1996, the parties informed the court that they had reached a plea agreement. R71. Before hearing the terms of the agreement, the trial court informed petitioner that it was "not bound to accept the negotiated disposition." R72. It then explained the process: The court would ask petitioner questions to ensure that he desired to plead guilty and understood the consequences, receive any evidence or information about petitioner's history, and then "make a determination of whether or not [it was] going to accept the negotiated disposition." R72-73. The court repeated that "there [wa]s no guarantee" that it would accept the negotiated plea, and that although in most cases it would, petitioner's might be the rare case "that does not meet with the [c]ourt's approval."

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[1] References to "C" are to the common-law record and references to "R" are to the report of proceedings, both of which are lodged with the Illinois Appellate Court.

R73. Petitioner confirmed that he understood, and the court proceeded to hearing the plea. *Ibid.*

Under the terms of the negotiated agreement, the State would file an amended information, charging petitioner with intentional first-degree murder for Buck but with second-degree murder for Johnson. C178-79; R82. Pursuant to the agreement, petitioner would plead guilty to these amended counts. C180-184; R73-74. In exchange, the State would dismiss the first-degree murder charges for Johnson and recommend two term-of-years sentences to run consecutively: a 90-year term for the first-degree murder and a 20-year term for the second-degree murder. R74-77. By statute, with good behavior, petitioner would be released from prison after serving 55 years. R102; see 730 Ill. Comp. Stat. 5/3-6-3(a)(2) (1994). Had petitioner gone to trial on two charges of first-degree murder and been convicted, he would have been sentenced to natural life in prison. R85-86.

The trial court held a hearing on the plea agreement. R71-104. At the plea hearing, petitioner's counsel confirmed that the parties had negotiated for this disposition, that he had ample opportunity to discuss the proposed disposition with petitioner and his family (who were present in the courtroom), and that petitioner had accepted it. R75-76. The trial court explained, and petitioner stated he understood, the original and amended charges, the potential penalties for both, and the consequences of his guilty plea. R78-92, 96-97. The prosecutor set out the factual

basis for the guilty plea, R92-94, and petitioner agreed that it accurately reflected his crimes, R92, 94-95.

The court and the parties discussed petitioner's agreed-upon 110-year sentence at length at the hearing. Petitioner confirmed that it was his intention to plead guilty to one count of first-degree murder and one count of second-degree murder, and to accept consecutive prison sentences "for a total of 110 years." R76-77. Petitioner agreed that he had ample opportunity both previously and on that day to speak with defense counsel about his case, had fully discussed the plea agreement with counsel, and was comfortable with counsel's advice. R77, 81. He stated that he was 17 years old, could read and write English, had completed tenth grade, was in good physical and mental health, and was not taking any medication or other drugs. R80-81. Petitioner further agreed that he was pleading guilty of his own free will, R95, intended "to go through with th[e] negotiated disposition," R76, and no one had threatened him into pleading guilty, promised him anything other than what had been negotiated as part of the plea, or mistreated him since his arrest, R95-96. He also filed a signed, written plea waiver. C184; R103-104.

The trial court found petitioner's plea knowing and voluntary and supported by a sufficient factual basis, and accepted it. R97. As to sentencing, defense counsel waived petitioner's rights to present evidence in mitigation and have a presentence investigation report prepared, but noted that psychological evidence was available to substantiate petitioner's guilty plea on the second-degree murder charge. *Ibid.* The

prosecutor noted that petitioner had no criminal history. R97-98. The trial court "accept[ed] the plea agreement," sentenced petitioner accordingly, and entered judgment. R98; C180-83. It then advised him of his appellate rights, including that he could not appeal from his guilty plea without filing a written motion to withdraw the plea. R98-99; Ill. S. Ct. R. 604(d).

Petitioner did not file a motion to withdraw his plea, and his untimely attempts to appeal were dismissed for lack of jurisdiction. C189-228. Petitioner subsequently sought postconviction review on the ground that he received ineffective assistance of counsel at trial, but the state courts denied relief on that claim. C339, 353-362; *People v. Johnson*, 889 N.E.2d 1119 (Ill. May 29, 2008) (table).

3. In April 2017, more than two decades later, petitioner sought leave to file a successive postconviction petition challenging his sentence. C364-597. The trial court allowed petitioner leave to file the petition and appointed counsel to represent him in filing an amended postconviction petition. C598, 628-829.

Petitioner contended in the amended postconviction petition that his aggregate term-of-years sentence violated the Eighth Amendment under this Court's decision in *Miller*. C628-629. Specifically, petitioner asserted that, although he had not been sentenced to life without parole, his term-of-years sentence was a *de facto* life sentence that he had received "in violation of the constitutionally mandated proceedings set forth in *Miller*." C628. Petitioner acknowledged that Illinois "courts have discretion to either accept or deny a plea." C629. But he argued that "the trial

court failed to exercise its discretion by accepting a plea that clearly disregarded the facts and mitigating evidence which existed," and that his sentence violated *Miller* because the record failed to show that "the trial court considered [his] age" before sentencing him to *de facto* life without parole. *Ibid.*

The trial court found no constitutional violation and dismissed the petition. C871; R235. The Illinois Appellate Court initially reversed the trial court's decision in a divided opinion, Pet. App. D, but the Illinois Supreme Court vacated that opinion and ordered the appellate court to reconsider petitioner's case in light of its decision in *People v. Jones*, 190 N.E.3d 731, Pet. App. C.

On reconsideration, the appellate court affirmed the trial court's judgment. Pet. App. B, ¶ 10. Following *Jones*, the appellate court found that petitioner waived his Eighth Amendment claim by entering a negotiated guilty plea, and that the claim lacked merit in any event because the trial court had exercised its discretion before sentencing petitioner to an aggregate prison term of *de facto* life without parole. *Id.* ¶¶ 9-10. The Illinois Supreme Court denied leave to appeal. Pet. App. A.

REASONS FOR DENYING THE PETITION

I. The Court Should Not Grant Certiorari To Review The State Court's Application Of *Miller* To Petitioner's Case.

Petitioner ultimately seeks relief from his agreed-upon sentence, arguing that it violates *Miller* and asking the Court to review the Illinois Appellate Court's rejection of that claim. Pet. 18-21. The Court should decline the request. The state court correctly identified *Miller*'s rule and found that petitioner's sentence complied

with it, and petitioner identifies no persuasive reason that this Court should grant certiorari to review the factbound question of whether that court erred in applying *Miller* to his case.

1. The Illinois Appellate Court correctly rejected petitioner's claim that his agreed-upon term-of-years sentence, which the trial court entered as a discretionary matter, violates the Eighth Amendment. As this Court explained two years ago in *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), "*Miller* held that the Cruel and Unusual Punishments Clause of the Eighth Amendment prohibits *mandatory* life-without-parole sentences for murderers under 18, but the Court allowed *discretionary* life-without-parole sentences for those offenders." *Id.* at 1312 (emphasis in original). For that reason, a discretionary sentencing system that gives the sentencer "the opportunity to consider mitigating circumstances before imposing" life without parole on a juvenile homicide offender, *Miller*, 567 U.S. at 489, "is both constitutionally necessary and constitutionally sufficient" under *Miller*, *Jones*, 141 S. Ct. at 1313.

Petitioner's sentence does not violate *Miller* because it was not mandatory and because the trial court had an opportunity to consider his youth before it imposed the sentence. First, petitioner's sentence was not mandatory. Petitioner was convicted of first-degree murder and second-degree murder. C178-84; R98. Illinois law did not impose a mandatory sentence for either conviction; instead, the trial court had discretion to impose a sentence of between 20 and 100 years in prison for first-degree murder and a sentence of between 4 and 20 years for second-degree murder. 730 Ill.

Comp. Stat. 5/5-3-3.2(b), 5/5-8-1(a)(1)(a), 5/5-8-1(a)(1.5), 5/5-8-2(a) (1994). Illinois law also required the sentences to run consecutively, *id.* § 5-8-4(a)(i), and provides petitioner an opportunity for release after serving half of the aggregate sentence, *id.* § 3-6-3(a)(2); see *People v. Dorsey*, 183 N.E.3d 715, 729-734 (Ill. 2021). Thus, Illinois law afforded the trial court the discretion to impose a sentence of between 24 and 124 years in prison, of which petitioner would be required to serve 50%. Petitioner's sentence was thus not the result of "a sentencing scheme that mandate[d] life in prison without possibility of parole." *Miller*, 567 U.S. at 479.

Second, Illinois law gave the trial court an opportunity to consider petitioner's youth before it imposed the sentence. See *Jones*, 141 S. Ct. at 1316 ("*Miller* held that a sentencer must have discretion to consider youth before imposing a life-without-parole sentence[.]"). In the context of a negotiated plea, Illinois law permits a trial judge to reject a plea if it determines that the negotiated sentence is "excessive under the facts and circumstances of the case." *Jones*, 190 N.E.3d at 737; see also Ill. S. Ct. R. 402(d)(3). And it has long been the law in Illinois that youth carries constitutional significance at sentencing, such that a trial court must consider a juvenile's youth when imposing sentence. See *People v. Clark*, 2023 IL 127273, ¶¶ 92-93; *People v. Holman*, 91 N.E.3d 849, 863 (Ill. 2017); see also *People v. Miller*, 781 N.E.2d 300, 309-310 (Ill. 2002) (finding mandatory life without parole sentence for juvenile homicide offender unconstitutional pre-*Miller* based on his youth and his role in offenses); see also Ill. Const., art. I, § 11. The law under which petitioner was sentenced thus

required the trial court to consider petitioner's youth and any other mitigating circumstances and decide whether the agreed-upon sentence was appropriate in light of those circumstances. Accordingly, because petitioner's sentence was not compelled by statute and the trial court had discretion to consider his youth before imposing it, the sentence does not violate *Miller*.

2. Petitioner does not dispute that his sentence was not mandatory or that the trial court had discretion to consider his youth before imposing it. Instead, he argues primarily that the decision below misapplied *Miller* to his factual circumstances. Pet. 18-20. But the decision below properly stated *Miller*'s rule, Pet. App. B, ¶ 9, and any dispute over its application to petitioner's case does not warrant the Court's review. See S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Regardless, the decision below did not misapply *Miller*. Petitioner argues that when applied to a discretionary sentence imposed pursuant to a negotiated plea agreement, *Miller* requires not just that the trial court have discretion to consider youth before deciding that a life sentence is appropriate, but also that the trial court have discretion to *sua sponte* modify the bargained-for sentence in the parties' plea agreement and impose a lesser sentence while accepting the plea. Pet. 20. But *Miller* does not impose any such rule; it simply requires the sentencer to have discretion to consider youth before it imposes life without parole. See *Jones*, 141 S. Ct. at 1312,

1316. As the Court has explained, "*Miller* held that a State may not impose a *mandatory* life-without-parole sentence on a murderer under 18," *id.* at 1321 (emphasis added), and "that a sentencer must have discretion to consider youth before imposing a life-without-parole sentence," *id.* at 1316. The trial court's decision to exercise its discretion to accept petitioner's agreed-upon sentence complied with that rule: The record shows that the trial court was aware of both its discretion and responsibility to ensure that the agreed-upon sentence was appropriate under the circumstances of petitioner's case; indeed, the court expressly stated that it was "not bound to accept the negotiated disposition" and would instead "make a determination of whether or not" the sentence was appropriate. R72-75. The Illinois Appellate Court thus did not misapply *Miller* to petitioner's case.

Petitioner's counterarguments are unavailing. Petitioner argues mainly that the state appellate court misapplied *Miller* because the record does not affirmatively show that the trial court considered petitioner's youth in imposing the sentence. Pet. 18-20; Pet. App. B, ¶ 7. But this Court has considered and rejected the argument that *Miller* requires the record to show that "the sentencer actually consider[ed] the defendant's youth" before it imposes life without parole on a juvenile homicide offender. *Jones*, 141 S. Ct. at 1319. Similarly, the fact that the trial court did not consider a presentence investigation report before sentencing petitioner (because petitioner waived his right to one, *supra* pp. 4-5), is irrelevant under *Jones*, because the record shows that the court was aware of both petitioner's age and its obligation

to exercise its independent judgment as to the proposed sentence. As the Court explained, "if the sentencer has discretion to consider the defendant's youth, the sentencer necessarily *will* consider the defendant's youth." *Jones*, 141 S. Ct. at 1319 (emphasis in original). That is what the trial court did here. The fact that the court could not have rejected the sentence without also rejecting the plea, Pet. 20, is irrelevant under *Miller* and *Jones*, because—as petitioner concedes, *ibid.*—the court exercised its discretion in imposing the sentence. So even if the Court were inclined to consider petitioner's request for error correction, the appellate court did not err in concluding that petitioner's *Miller* claim lacks merit.

Finally, petitioner does not appear to contend that the lower courts are divided as to the application of *Miller* to sentences imposed in the context of plea agreements. Pet. 18-21. To the extent he intends to suggest that the small handful of cases cited in this section of the petition are in tension with the decision below, he is mistaken. *Newton v. State*, 83 N.E.3d 726 (Ind. Ct. App. 2017), is consistent with the decision below, in that it *rejects* a defendant's argument that his agreed-on sentence violated *Miller*. See *id.* at 740. *Malvo v. Mathena*, 893 F.3d 265 (4th Cir. 2018), *cert. granted*, 139 S. Ct. 1317 (2019), *pet'n dismissed*, 140 S. Ct. 919 (2020), rests on an expansive interpretation of *Miller*—namely, that it applied to discretionary sentencing schemes, *Malvo*, 893 F.3d at 274—that the Court expressly rejected in *Jones*. See *Jones*, 141 S. Ct. at 1313, 1318-1319. And in *Crespin v. Ryan*, 46 F.4th 803 (9th Cir. 2022), the sentencer stated on the record that it would *not* consider the defendant's youth or any

other characteristics in imposing sentence, *id.* at 810-811, making that the rare case in which, as the Court observed in *Jones*, the sentencer "refuse[d] as a matter of law to consider the defendant's youth," 141 S. Ct. at 1320 n.7. In petitioner's case, by contrast, the record shows that the court was aware of both petitioner's age and its obligation to exercise its independent judgment as to the plea and sentence.

At bottom, petitioner asks the Court to grant certiorari in order to review the Illinois Appellate Court's application of *Miller* to his case. But the Court does not generally review factbound requests for error correction, and, regardless, the state court did not err.

II. The Court Should Not Grant Certiorari To Consider The Legal Principles Applicable To The Waiver Of Sentencing Claims In Plea Bargaining.

In an attempt to identify a question warranting this Court's review, petitioner asserts that his case also implicates a division of authority as to whether, as a matter of federal constitutional law, a person who pled guilty before *Miller* is entitled to collaterally attack his or her sentence after *Miller*. Pet. 9-18. Petitioner is wrong on multiple levels. First, there is no division of authority on this question; indeed, to the State's knowledge, *no* court has held that a defendant who pled guilty before *Miller* is categorically entitled, as a legal matter, to collaterally attack his or her sentence after *Miller*. Second, even if the Court were inclined to grant certiorari to consider that question in some case, this case is a poor vehicle for doing so, both because, as petitioner himself recognizes, see Pet. 15-17, the case presents multiple antecedent

questions with respect to whether petitioner received a sentence entitling him to *Miller*'s protections and, even if he did, because petitioner is ultimately not entitled to relief under *Miller*. Finally, the decision below is consistent with this Court's precedent. The Court should thus deny review, just as it did last Term in *Jones v. Illinois*, No. 21-7676, on which the decision below rests.

A. There is no division of authority.

Petitioner asserts that there is a division of authority as to whether, as a matter of federal constitutional law, a person who pled guilty before *Miller* can mount a collateral attack on his or her sentence after *Miller*. Pet. 9-12. Petitioner is wrong: To the State's knowledge, no court has held that a defendant enjoys such a right as a legal matter; instead, the few cases petitioner cites rest on factual holdings about the scope of the plea bargains entered by the defendants in those cases. Those cases thus do not conflict with the decision below. And petitioner's remaining arguments on this score lack merit.

1. Petitioner's primary contention is that the decision below conflicts with *Malvo*, 893 F.3d 265, which he reads to hold that a defendant who pled guilty before *Miller* is entitled, as a matter of federal constitutional law, to collaterally attack his or her sentence on the ground that it conflicts with *Miller*. Pet. 9-11. But petitioner misreads *Malvo*, which does not rest on his preferred legal rule and accordingly does not conflict with the decision below.

Indeed, *Malvo* does not rest on any holding about a defendant's entitlement, as a matter of federal constitutional law, to collaterally attack his sentence on Eighth Amendment grounds. The defendant in *Malvo* was convicted of capital murder and sentenced to life without parole in one Virginia county, then voluntarily accepted a plea bargain—and an additional life-without-parole sentence—in a second county, all before the Court issued its opinion in *Miller*. See 893 F.3d at 269-270. After *Miller*, the defendant sought to collaterally attack his sentences, contending that they conflicted with *Miller*. *Id.* at 270. The State argued, among other things, that defendant had waived his ability to collaterally attack the second life-without-parole sentence by pleading guilty. *Id.* at 275-277. The Fourth Circuit disagreed with that argument, but not based on a categorical rule that a defendant who enters a guilty plea is *legally* entitled to "bring a collateral Eighth Amendment challenge seeking re-sentencing" after a change in sentencing law, Pet. 9, as petitioner asserts. Rather, the Fourth Circuit examined the record to determine whether, as a *factual* matter, the defendant "waived his constitutional challenge to his sentences by signing the plea agreement." *Malvo*, 893 F.3d at 276. It looked to the text of the plea agreement that the defendant signed and the colloquy conducted by the sentencing judge to determine that, as a matter of fact, the defendant had not waived "the right to pursue future habeas relief" regarding his sentence. *Ibid.* Indeed, the Fourth Circuit expressly stated that it was *not* deciding whether, as a legal matter, a waiver to collaterally attack a sentence based on a "substantive constitutional right" would be

enforceable, *ibid.* (emphasis omitted)—that is, whether a defendant has the constitutional right that petitioner here seeks.

Malvo, in other words, rests not on a broad holding about federal constitutional law, but rather on a narrow holding about the scope of the plea agreement entered into by the defendant in that case. So understood, there is no conflict between *Malvo* and the opinion below, which instead rests largely on principles of Illinois law about plea bargaining. "[T]he construction of [a] plea agreement" is a "matter[] of state law." *Ricketts v. Adamson*, 483 U.S. 1, 6 n.3 (1987). And in Illinois, when a defendant enters into a negotiated plea, that plea is deemed, as a matter of state law, to waive the right to collaterally attack one's sentence. See, *e.g.*, *People v. Absher*, 950 N.E.2d 659, 666 (Ill. 2011); *People v. Evans*, 673 N.E.2d 244, 250 (Ill. 1996). That is because, under Illinois law, "fully negotiated guilty pleas . . . are governed by principles of contract law," and so a defendant generally "may not seek to unilaterally reduce his sentence while holding the State to its part of the bargain." *Absher*, 950 N.E.2d at 666. Under Illinois law, therefore, a defendant who seeks to collaterally attack a sentence to which he voluntarily agreed cannot simply challenge it on postconviction review; he or she must seek to withdraw the plea entirely under the relevant state rules. See *People v. Johnson*, 129 N.E.3d 1239, 1243 (Ill. 2019). In other words, a negotiated plea entered into in Illinois—unlike, in the Fourth Circuit's view, the plea entered into in *Malvo*—*does* waive, legally, the right to collaterally attack one's sentence, as the state appellate court here held. Pet. App. B, ¶ 10; see *Jones*, 190

N.E.3d at 735. There is thus no conflict between *Malvo* and the decision below, because petitioner *did* waive the legal claim that the Fourth Circuit found the defendant in *Malvo* did not.

2. Petitioner does not claim that any other case squarely conflicts with the opinion below. He cites a range of cases that he asserts "have held that a guilty plea does not insulate an illegal or unconstitutional sentence against a later challenge." Pet. 12. As petitioner implicitly concedes, however, none of these cases conflict with the decision below. Most are federal criminal cases that simply set out circumstances in which, in the federal system, an appeal waiver will not be enforced. See, *e.g.*, *United States v. Torres*, 828 F.3d 1113, 1125 (9th Cir. 2016); *United States v. Adkins*, 743 F.3d 176, 192 (7th Cir. 2014); *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007); *United States v. Johnson*, 410 F.3d 137, 151 (4th Cir. 2005). These cases are distinguishable many times over: They arise from the federal system, not the States (and so do not implicate state-law interpretive principles); they are direct appeals, not collateral challenges; and (to the extent they concern sentencing claims at all) they generally consider claims that a sentence was invalid when it was entered, not that a change in law has rendered a previously valid sentence unlawful. They thus have no bearing on petitioner's case. Indeed, some of the cases that petitioner cites undermine, rather than support, his argument, in that they *reject* claims that defendants are entitled to set aside their plea agreements based on subsequent changes in law. See *Johnson*, 410 F.3d at 152 ("post-plea legal changes to applicable

penalties do not provide a basis for upsetting a guilty plea" (emphasis omitted)); see also *id.* at 153 (collecting cases so holding).

The remaining cases petitioner cites are likewise distinguishable. In *Crespin*, 46 F.4th 803, as in *Malvo*, the court held not that a defendant is entitled as a matter of federal constitutional law to collaterally attack a negotiated plea on the ground that it conflicts with *Miller*, but only that the defendant there, as a factual matter, had not waived his right to do so, *id.* at 808-809. Indeed, the court observed that the limited scope of the defendant's plea agreement "simply echoed Arizona law." *Id.* at 908. But Illinois law provides for a different rule. *Supra* p. 15. The other cases cited by petitioner are of even less use to him. Two *reject* claims that defendants are entitled to collaterally attack their plea agreements based on subsequent changes in law. See *Commonwealth v. Noonan*, No. MICR1992-01300, 2014 WL 3818676, *5 (Mass. Super. July 21, 2014); *Contreras v. Davis*, No. 1:13cv772, 2013 WL 6504654, *2 (E.D. Va. Dec. 11, 2013). The rest merely describe different state-law rules regarding the scope of plea agreements, see, *e.g.*, *Bell v. State*, 749 S.E.2d 672, 675-676 (Ga. 2013) (under Georgia law, a defendant who enters into a plea bargain "does not waive the right to challenge an illegal and void sentence" on direct appeal); *Bryant v. State*, 870 S.E.2d 33, 36 (Ga. Ct. App. 2022) (same); *State v. Darby*, No. A-004099-06T5, 2008 WL 2121748, *2 (N.J. Super. Ct. App. Div. May 20, 2008) (similar rule in New Jersey); *People v. Kilgore*, 608 N.Y.S.2d 12, 13 (App. Div. 1993) (similar rule in New York); are unpublished lower-court opinions, see, *e.g.*, *Lee v. United States*, No.

3:16-CV-08138, 2018 WL 4906327, *7 (D. Ariz. July 6, 2018); *Jackson v. Clarke*, No. 2:13cv355, 2014 WL 12789351, *8 (E.D. Va. May 16, 2014); or both. And none holds that a defendant is entitled, as a matter of federal constitutional law, to collaterally attack an agreed-upon sentence on the ground that it conflicts with subsequent precedent.

3. For these reasons, there is no division of authority at all on the primary question that petitioner identifies for the Court's review. But even to the extent that there is tension between some of the cases petitioner cites and the decision below, any such tension would not warrant the Court's review at this time. The Court decided *Jones* only two years ago, and even on petitioner's account, only a handful of courts have considered the waiver question as applied to a *Miller* claim since that time. Further percolation thus might aid the Court's consideration of this complex question. Or, given that *Jones* resolved many of the outstanding questions about the scope and reach of *Miller*, it is possible that this issue will diminish in importance (at least as applied to *Miller* claims), and that it will not require the Court's attention at all. In either case, it would be premature to grant certiorari to consider the merits of a constitutional claim that, to the State's knowledge, no court has ever squarely accepted.

B. This is a poor vehicle.

Even if the Court were inclined to grant certiorari in *some* case to consider the legal principles applicable to waiver of Eighth Amendment claims in the plea context,

this case would be a poor vehicle in which to do so, including because, as petitioner recognizes, Pet. 15-17, the case presents antecedent questions with respect to whether he was sentenced to so-called *de facto* life without parole, and because, even if he was, petitioner is ultimately not entitled to relief under the Court's decisions in *Miller* and *Jones*.

First, unlike in *Miller*, *Montgomery v. Louisiana*, 577 U.S. 190 (2016), and *Jones*, petitioner was not sentenced to life without the possibility of parole for one homicide. Rather, he was sentenced to two consecutive term-of-years sentences—a 90-year sentence and a 20-year sentence—with, assuming good behavior, release after 55 years in prison. *Supra* pp. 3-5. Illinois courts have deemed any sentence of more than 40 years in prison the functional equivalent of life without parole for *Miller*'s purposes, whether imposed as a sentence for a single offense or as an aggregate sentence for multiple offenses. See *People v. Buffer*, 137 N.E.3d 763, 774 (Ill. 2019); *People v. Reyes*, 63 N.E.3d 884, 887-888 (Ill. 2016). But this Court has never considered whether and when a mandatory term-of-years sentence can be the functional equivalent of life without parole, nor whether multiple term-of-years sentences can be aggregated to form a *de facto* life-without-parole sentence; indeed, the Court has repeatedly and recently denied certiorari in cases presenting these questions. See, *e.g.*, *State v. Gulley*, 505 P.3d 354 (Kan.), *cert. denied*, 143 S. Ct. 361 (2022) (No. 21-1464); *Pedroza v. State*, 291 So.3d 541 (Fla.), *cert. denied*, 141 S. Ct. 341 (2020) (No. 19-8849); *State v. Shanahan*, 445 P.3d 152 (Idaho), *cert. denied*, 140

S. Ct. 545 (2019) (No. 19-6254); *Veal v. State*, 810 S.E.2d 127 (Ga.), *cert. denied*, 139 S. Ct. 320 (2018) (No. 17-1510); *Willbanks v. Dep't of Corr.*, 522 S.W.3d 238 (Mo.), *cert. denied*, 138 S. Ct. 304 (2017) (No. 17-165).[2] The presence of those questions here makes this a poor vehicle in which to consider any other question about *Miller*.

Petitioner acknowledges the antecedent questions with respect to whether he is even entitled to *Miller*'s protections, Pet. 15-17, but appears to believe that this feature of this case makes it a more attractive vehicle. But the Illinois Appellate Court never considered whether petitioner was, in fact, sentenced to life without parole, because Illinois decisions had resolved that question in his favor. See *Buffer*, 137 N.E.3d at 774; *Reyes*, 63 N.E.3d at 887-888. And this Court does not generally grant cases in which an antecedent question not briefed or resolved by the court below would complicate the Court's review. See, *e.g.*, *California Bldg. Indus. Ass'n v. City of San Jose*, 136 S. Ct. 928, 929 (2016) (Thomas, J.) (concurring in denial of certiorari where "threshold questions . . . might preclude us from reaching the [merits]").

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[2] See also, *e.g.*, *Kinkel v. Persson*, 417 P.3d 401 (Or. 2018), *cert. denied*, 139 S. Ct. 789 (2019); *Steilman v. Michael*, 407 P.3d 313 (Mont. 2017), *cert. denied*, 138 S. Ct. 1999 (2018); *Lucero v. People*, 394 P.3d 1128 (Colo. 2017), *cert. denied*, 138 S. Ct. 641 (2018); *State v. Ali*, 895 N.W.2d 237 (Minn. 2017), *cert. denied*, 138 S. Ct. 640 (2018); *State v. Ramos*, 387 P.3d 650 (Wash.) (*en banc*), *cert. denied*, 138 S. Ct. 467 (2017); *State v. Charles*, 892 N.W.2d 915 (S.D.), *cert. denied*, 138 S. Ct. 407 (2017); *State v. Zuber*, 152 A.3d 197 (N.J.), *cert. denied*, 138 S. Ct. 152 (2017); *Demirdjian v. Gipson*, 832 F.3d 1060 (9th Cir. 2016), *cert. denied*, 138 S. Ct. 71 (2017); *People v. Franklin*, 370 P.3d 1053 (Cal.), *cert. denied*, 137 S. Ct. 573 (2016); *Casiano v. Comm'r of Corr.*, 115 A.3d 1031 (Conn.), *cert. denied*, 136 S. Ct. 1364 (2016); *State v. Riley*, 110 A.3d 1205 (Conn. 2015), *cert. denied*, 136 S. Ct. 1361 (2016).

Even if the Court were inclined to grant certiorari in a case presenting a *de facto* life-without-parole question, notwithstanding its repeated denial of certiorari in such cases, this would still be a poor candidate. For one, as noted, it presents multiple questions about so-called *de facto* life-without-parole sentences: not only whether a single term-of-years sentence can constitute *de facto* life without parole (and, if so, at what point), but whether (and under what circumstances) multiple such sentences can be aggregated to be viewed as one *de facto* life-without-parole sentence. *Cf. Bunch v. Smith*, 685 F.3d 546, 552 (6th Cir. 2012) ("At what number of years would the Eighth Amendment become implicated in the sentencing of a juvenile: twenty, thirty, forty, fifty, some lesser or greater number? Would gain time be taken into account? . . . Does the number of crimes matter?"). To the extent the Court wants to consider questions like this, its review would be aided by a more straightforward case—for instance, one presenting only a single lengthy sentence rather than two separate sentences and a statutory opportunity for release. For another, petitioner's own case may shortly become moot, as the Illinois legislature is currently considering a bill that would provide parole eligibility to every juvenile offender, regardless of when the offender was sentenced. See 103d Ill. Gen. Assem., Senate Bill 2073, 2023 Sess.[3] Should this proposed legislation be enacted, petitioner would have an opportunity to

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[3] The pending legislation and its status is available on the Illinois General Assembly's website at: https://www.ilga.gov/legislation/BillStatus.asp?DocNum=2073&GAID=17&DocTypeID=SB&LegId=146946&SessionID=112&GA=103 (last accessed Apr. 21, 2023).

seek parole, mooting not only his case but any cases remaining in Illinois with alleged *Miller* claims. See *Montgomery*, 577 U.S. at 212 ("A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them."). For these reasons, too, this case is a poor vehicle in which to consider any question about *Miller* or the legal principles applicable to the waiver of an Eighth Amendment claim.

Finally, and independently, the question petitioner asks the Court to review is ultimately an academic one as applied to him, because, as discussed, see *supra* Part I, petitioner is not entitled to relief under *Miller*. So even if the Court were inclined to grant certiorari to consider the legal principles applicable to the waiver of an Eighth Amendment claim, it should wait for a case in which the petitioner's Eighth Amendment claim arguably has merit.

C. The decision below is consistent with this Court's precedent.

Finally, this Court's review is unwarranted because the decision below—like the Illinois Supreme Court's decision in *People v. Jones*, 190 N.E.3d 731, on which the state appellate court relied—is consistent with this Court's precedent, and specifically with *Brady v. United States*, 397 U.S. 742 (1970).

Brady concerned a criminal defendant who voluntarily pled guilty and received a 50-year prison sentence in order to avoid the prospect of a capital sentence had he gone to trial. 397 U.S. at 743-744. After this Court held in *United States v. Jackson*, 390 U.S. 570 (1968), that a person who violated the federal statute in question could

not constitutionally be sentenced to death, the defendant sought to collaterally attack his plea, contending that he would not have pled guilty had he known he would not, in fact, have faced a possible capital sentence. *Brady*, 397 U.S. at 756. This Court rejected that argument. *Ibid.* It explained that "the decision to plead guilty" will generally be "influenced" by one's assessment of the relative risks and benefits of proceeding to trial, but that does not mean that it can be withdrawn if one later realizes that one "did not correctly assess every relevant factor entering into his decision." *Id.* at 757. For that reason, the Court held, "absent misrepresentation or other impermissible conduct by state agents, a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." *Ibid.* The Illinois Supreme Court applied *Brady* to reject the defendant's argument in *People v. Jones*, 190 N.E.3d at 735-736, that he was entitled to collaterally attack his plea, *id.* at 736, and the Illinois Appellate Court in petitioner's case applied *Jones* to reach the same result here, see Pet. App. B, ¶ 10.

Petitioner argues, as he did below, that *Brady* is inapposite because he seeks to challenge only his sentence, not his guilty plea itself. Pet. 10-11. That argument is incorrect on multiple levels. For one, as noted, *supra* p. 15, under Illinois law, a defendant can only challenge an agreed-upon sentence by seeking to set aside his or her guilty plea, see *Absher*, 950 N.E.2d at 666, and so petitioner's premise is simply mistaken: He, like the defendant in *Brady*, is in fact challenging his conviction, not

merely his sentence. In any event, petitioner's proposed distinction is irrelevant: The decision to accept a specific sentence as an appropriate penalty for one's conduct is, just like the decision to plead guilty in the first instance, driven by an assessment of the relative risks and benefits of proceeding to trial, and so, under *Brady*, it "does not become vulnerable because later judicial decisions indicate that the [decision] rested on a faulty premise." 397 U.S. at 757. The Illinois Appellate Court's rejection of petitioner's claim that he is constitutionally entitled to set aside his sentence is, in other words, fully consistent with *Brady*.

Petitioner's other arguments, Pet. 12-14, lack merit. Petitioner speculates that he would have been better off had he proceeded to trial, because (in his view) he would have been convicted, sentenced to mandatory life without parole, and received a new sentencing hearing. Pet. 13. But petitioner voluntarily pled guilty knowing that, had he chosen instead to proceed to trial, he might have been acquitted. And, in any event, as this Court observed in *Brady*, petitioner's decision cannot be undone simply because later events suggest that it may have "rested on a faulty premise." 397 U.S. at 757. Petitioner's remaining contentions are little more than policy arguments about why a different rule would promote rehabilitation, encourage plea bargaining, or better reflect the notion that the Eighth Amendment must be "viewed through the evolving standards of decency that mark the progress of an enduring society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). But none of these arguments show that Illinois courts have misunderstood or misapplied this Court's precedents; they are simply

requests that the Court grant certiorari in order to change those precedents. Especially given that petitioner's sentence fully complies with the Eighth Amendment, see *supra* Part I, and that he identifies no other reason why certiorari would be warranted here, the Court should decline those requests.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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