No. 17-560

IN THE

Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

ETHAN ALLEN WINDOM,

Respondent.

On Petition for Writ of Certiorari to the Idaho Supreme Court

BRIEF IN OPPOSITION

ANDREW PARNES
LORI NAKAOKA
P.O. Box 5988
671 First Avenue North
Ketchum, ID 83340

JOHN R. MILLS
Counsel of Record
PHILLIPS BLACK PROJECT
836 Harrison Street
San Francisco, CA 94107
(888) 532-0897
j.mills@phillipsblack.org

Counsel for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether this Court should disturb the considered judgment of the Idaho Supreme Court that the evidence presented at Mr. Windom's pre-*Miller* juvenile sentencing failed to provide the sentencer with an adequate basis to make a post-*Montgomery* finding of irreparable corruption. *See Montgomery v. Louisiana*, 136 S. Ct. 718 (2016); *Miller v. Alabama*, 567 U.S. 460 (2012).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

INTRODUCTION

Upon reviewing the paucity of relevant evidence in Mr. Windom's pre-*Miller* sentencing proceedings, the Idaho Supreme Court found an insufficient basis for deeming him irreparably corrupt. Under Idaho's sentencing practices, the court therefore ordered the post-conviction court to grant resentencing, allowing Mr. Windom to supplement the record, so the sentencer could make such an assessment in light of all of the evidence. In contrast to Mr. Windom's case, the Idaho Supreme Court recently upheld another pre-*Miller* sentence, concluding that sentencing proceeding included *sufficient* evidence to retrospectively uphold the sentence. *Johnson v. State*, 395 P.3d 1246 (Idaho 2017), *cert. denied,* No. 17-236 (U.S. Nov. 27, 2017). Idaho's approach, permitting retrospective assessment of the record, provides the *least* protection for juvenile defendants among the rapidly shrinking number of states retaining life without the possibility of parole sentences for juvenile offenses (JLWOP).

Despite the fact that this case involves nothing more than the Idaho Supreme Court implementing this Court's decisions in *Miller* and *Montgomery* in this individual case, the State urges this Court to accept review to answer effectively two questions (1) whether discretionary sentences of life without parole can only be imposed upon the "'the rare juvenile offender whose crime reflects irreparable corruption,'" and (2) if so, what process is required for making such an assessment and whether the process here was inadequate.

Taking the questions in reverse: As the Idaho Supreme Court found, the sentencing "transcript does not show that any evidence was presented regarding the distinctive attributes of [Mr. Windom's] youth" and was inherently inadequate for making an assessment about Mr. Windom's culpability. Pet. App. 16. A proceeding lacking "any" evidence relevant to the impact of youth on culpability cannot comply with *Miller*.

Moreover, as a legal matter, despite having had less than two years to sort out *Miller*'s retroactive application via *Montgomery*, states almost uniformly have held that, at a minimum, the protections required by the Idaho Supreme Court adhere. In light of the significant change in stakes after *Miller* and *Montgomery*, states retaining JLWOP require resentencing in all cases, where the parties can present the wide range of evidence relevant to "'the mitigating qualities of youth.'" *Miller*, 567 U.S. at 476 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). The remaining two, after *Montgomery*, require presentation of some evidence of those factors, either at a pre-*Miller* sentencing hearing or in post-conviction, before concluding the defendant is "'the rare juvenile offender whose crime reflects irreparable corruption.'" *Id.* at 479-80 (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)). The ruling below, at bottom, is a fact-bound decision about the quantum of evidence required before determining whether a juvenile is irreparably corrupt.

On the first question, after *Montgomery*, there is no meaningful split of authority: States are overwhelmingly either holding that *Miller* applies

to mandatory and discretionary sentences alike or abandoning JLWOP sentences all together. Moreover, holding otherwise would upend this Court's retroactivity doctrine, which has reserved retroactive application for only new substantive constitutional rules and "watershed rules of criminal procedure." *Teague v. Lane*, 489 U.S. 288, 311 (1989). If *Miller* is not substantive (and does not reach a category of defendants, regardless of the process by which they were sentenced) then *Montgomery* reworked *sub silentio* the longstanding retroactivity doctrine. Yet that position is precisely the holding the State urges this Court to adopt.

STATEMENT OF THE CASE

1. Ethan Windom, at age seventeen, pleaded guilty to second-degree murder. His public defender advised him to do so despite having received no assurance that the judge would impose a sentence less than the maximum available: life without the possibility of parole. With that plea, Mr. Windom could have received a sentence of as little as ten years and as much as life without the possibility of parole. Idaho Code § 18-4004.

A year earlier, Mr. Windom had taken five-fold the prescribed amount of his anti-anxiety medication and murdered his mother, clubbing her to death with weights attached to a dumbbell and then stabbing her corpse's throat, chest, abdomen, and exposed brain with a knife. Pet. App. 28. A month before the murder, he had expressed his desire to be admitted to a psychiatric hospital. R.

000034-35.[1] The offense occurred during a psychotic episode, the product of his poorly controlled, but well established, mental illness, including early stage schizophrenia. At the time of his arrest, Mr. Windom was "[a]cutely psychotic."[2] Pet. App. 30. He provided a statement at the time of arrest, which was used by the State and the sentencing court in aggravation. Pet. App. 29, 36; R. 000058-60.

At Mr. Windom's sentencing, the focus was on Mr. Windom's psychiatric disorders. Two doctors provided reports that his prior "paranoid, psychotic delusional illness" was "evolving" into schizophrenia. They further noted that he had been compliant with treatment during incarceration. Pet. App. 29-30. Counsel for Mr. Windom presented no other evidence and no witnesses. R. 000405 ("No evidence, Your Honor.").

The State presented testimony that Mr. Windom had bullied his mother, that she feared him, and that he been fascinated with both the movie *American Psycho* and serial killers. Pet. App. 28. There was no evidence presented about how Mr. Windom's youth affected his behavior and prospects for rehabilitation.[3] The sentencing court imposed

---

[1] "R. __" refers to the Clerk's Record on Appeal before the Idaho Supreme Court. *Windom v. State*, No. 44037 (Idaho).

[2] Mr. Windom did not pursue an insanity defense, as Idaho has abolished *any* defense based on mental illness. Idaho Code § 18-207 ("Mental condition shall not be a defense to any charge of criminal conduct.").

[3] There was some evidence, although no testimony, about the prospects for treatment of his mental illness. Pet. App. 29-30.

the maximum available sentence of JLWOP. Pet. App. 33.

2. Mr. Windom appealed. Under Idaho law, the propriety of a sentence is reviewed for a "clear abuse of discretion." *State v. Stevens*, 191 P.3d 217, 226 (Idaho 2008). For a defendant to prevail on appeal in challenging a sentence, the sentence must be "excessive under any reasonable view of the facts." *State v. Charboneua*, 861 P.2d 67, 69 (Idaho 1993) (internal quotation omitted).

On direct review, in a split decision, the Idaho Supreme Court addressed the legality of Mr. Windom's sentence, holding that state law did not prohibit imposing a JLWOP sentence "based solely upon the nature and gravity of the offense." *State v. Windom*, 253 P.3d 310, 313 (Idaho 2011). It further held that the sentencing court did not abuse its discretion in not placing greater weight on the evidence about Mr. Windom's prospects of recovery from his mental illness and related prospects for rehabilitation. *Id.* at 318.

In dissent, Justice Warren E. Jones argued that the sentencing court had violated Idaho law by turning the burden of persuasion on its head and failing to account for Mr. Windom's youth. *Id.* He explained that the sentencing court erred "by requiring [Mr. Windom] to show a high degree of certainty that he *could* be rehabilitated someday." *Id.* He argued that under Idaho law the burden is on the "State to show a high degree of certainty that [Mr. Windom] *could not* be rehabilitated someday." *Id.* Furthermore, he noted that the court below "nowhere account[ed] for the fact that most

juveniles Ethan's age have the cognitive ability to comprehend their behavior, but lack the neurological maturity and knowledge gained from life experiences to control it." *Id.* at 325.

Mr. Windom's direct review proceedings concluded when the Idaho Supreme Court denied his petition for rehearing on June 21, 2011. *Id.*

3. On September 12, 2012, Mr. Windom filed a *pro se* federal petition for writ of habeas corpus raising the following as his first claim: "My sentence is violating the 8th amendment claim [sic]. (Miller v. Alabama/Jackson v. Hobbs)." Petition, *Windom v. Blades*, 1:12-cv-00468-EJL (D. Idaho Sept. 12, 2012), ECF No. 1.[4] Mr. Windom requested appointment of counsel. Mot. for App't of Counsel, ECF No. 6 (May 14, 2013). That request, along with his petition, was denied in the same order. Order at 22-23, ECF No. 16 (Jan. 7, 2014).

Mr. Windom remained unrepresented in his state and federal post-conviction proceedings until the Ninth Circuit ordered the District Court to appoint counsel to represent him in the appeal from the district court's denial. Order Appointing CJA Counsel, ECF No. 28 (Mar. 9, 2015). The Ninth Circuit ultimately remanded Mr. Windom's federal case for reconsideration in light of *Montgomery*. *Windom v. Blades*, No. 14-35746, 667 Fed. Appx. 240 (9th Cir. June 22, 2016) (memorandum decision). And on remand, the district court stayed

[4] Unless otherwise indicated, "ECF No. __" refers to the litigation documents in the proceedings before the Federal District Court for the District of Idaho. *Windom*, 1:12-cv-00468-EJL.

proceedings to permit Mr. Windom to exhaust potentially available state remedies. Order, ECF No. 40 (Sept. 15, 2016).

4. On August 15, 2015, Mr. Windom, represented by *pro bono* counsel, filed a state petition for post-conviction relief. R. 000005. Immediately after *Montgomery*, *pro bono* counsel[5] moved to amend the state post-conviction petition in light of the Court's decision. R. 00287, 00351. That motion was denied on February 23, 2016. R. 000387.

In the denial, the post-conviction judge, who had previously presided at sentencing, did not permit the presentation and consideration of any information beyond what had been presented in the original sentencing proceeding. R. 000378. Despite the lack of any further fact-finding, the court concluded "that Windom's actions did not reflect 'the transient immaturity of youth' but in the words of the United States Supreme Court, reflected those actions of 'the rarest of children' whose crime reflected 'irreparable corruption' deserving life without [possibility of] parole." R. 000385-386.

5. Mr. Windom appealed and in a unanimous decision the Idaho Supreme Court reversed. Pet. App. 20. That court held that the post-conviction court abused its discretion by not permitting Mr. Windom to amend his petition in light of *Montgomery*. *Id.* Idaho Code section 19-4902(a) did

[5] *Pro bono* counsel Lori Nakaoka and Andrew Parnes's motion for appointment was denied by the state district court which found technical violations of the relevant state statutory requirements. R. 00362.

not bar Mr. Windom's claim because it was "filed within a reasonable time after the petitioner has notice of the issue(s) raised." Pet. App. 10-11 (quoting *Charboneau v. State*, 395 P.3d 379, 389 (Idaho 2017)). Because, under state law, Mr. Windom "did not have a claim under *Miller* until *Montgomery* was issued," his motion to amend was timely. Pet. App. 15. The court then, relying on its own precedent, concluded that *Miller* and *Montgomery* together provided a substantive rule reaching Idaho JLWOP sentences. Pet. App. 14-16 (citing *Johnson*, 395 P.3d at 1258-59).

The court below also held that the factual record, unaltered since Mr. Windom's sentencing, lacked "any evidence . . . regarding the distinctive attributes of youth mentioned by the Supreme Court in *Miller* and *Montgomery*." Pet. App. 16. For that reason, the court held that even though the sentencing court alluded to having "considered Windom's 'relative youth' as a mitigating factor," that court did not have before it "evidence . . . regarding the factors required by *Miller*." Pet. App. 17. Because "[t]hose factors must be individualized for the juvenile being sentenced," the sentencing court held that the factual record before the sentencing court was inadequate to assess whether Mr. Windom was eligible for a JLWOP sentence. Pet. App. 17-18.

As it had done previously, the Idaho court permitted a "retrospective analysis" of whether *Miller* and *Montgomery* permitted the sentence in question. Pet. App. 18; *see also Johnson*, 395 P.3d at 1259 (permitting the same and concluding that the record in that case was adequate to the task).

Here, they concluded that analysis could not be reliably completed because "the evidence of the required characteristics and factors was not presented during the sentencing proceeding." Pet. App. 18. The court reversed and remanded so that Mr. Windom could present his evidence for consideration at resentencing. Pet. App. 20.

The state petitioned for review.

REASONS FOR DENYING THE PETITION

The decision below is a case-specific application by the Idaho of this Court's juvenile sentencing jurisprudence. *Miller*, 567 U.S. at 471 ("*Roper* and *Graham [v. Florida*, 560 U.S. 48 (2010)] establish that children are constitutionally different from adults for purposes of sentencing."). Looking at the record evidence presented at Windom's pre-*Miller* sentencing hearing and Idaho's pre-*Miller* sentencing law and practice, the state court determined that his JLWOP sentence was not adequately informed by consideration of the "distinctive attributes of youth." *Id.* at 472.

"*Miller* . . . established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" *Montgomery*, 136 S. Ct. at 734 (quoting *Miller*, 567 U.S. at 472). Because children are less blameworthy, "[t]he heart of the retribution rationale" does not justify imposing the harshest sentences on juvenile offenders in the same way it might for adults. *Graham*, 560 U.S. at 71 (quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987)). "Life without parole 'forswears altogether the rehabilitative ideal,'" *Miller*, 567 U.S. at 473

(quoting *Graham*, 560 U.S. at 74) making such a sentence problematic for juveniles specifically because "incorrigibility is inconsistent with youth." *Id.* Deterrence is ill served by JLWOP sentences because "the same characteristics that render juveniles less culpable than adults – their immaturity, recklessness, and impetuosity – make them less likely to consider potential punishment. *Id.* at 472 (internal quotations omitted).[6]

Relying on *Roper* and *Graham*, "*Miller* required that sentencing courts consider a child's 'diminished culpability and heightened capacity for change' before condemning him or her to die in prison." *Montgomery*, 136 S. Ct. at 726 (quoting *Miller*, 567 U.S. at 471.). Before condemning a juvenile to die in prison, sentencing courts must determine whether the juvenile before them has committed a crime that "reflect[s] transient immaturity" or whether the juvenile is among "those rare children whose crimes reflect irreparable corruption." *Id.* at 734. A sentencer must consider the "mitigating qualities of youth." *Miller*, 567 U.S. at 476 (quoting *Johnson*, 509 U.S. at 367).

Montgomery definitively established that *Miller* provided a substantive protection and was

---

[6] Incapacitation is also ill-served by JLWOP because simply permitting juveniles "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" without reducing the need for incapacitating the unreformed. *Montgomery*, 136 S. Ct. at 736; *see also Ring v. Arizona*, 536 U.S. 584, 615 (2002) (Breyer, J., concurring).

retroactively applicable to sentences that had become final. *Montgomery,* 136 S. Ct. at 736.

I. The Idaho Supreme Court Correctly Applied *Miller* to Conclude that Insufficient Evidence of the Mitigating Aspects of Youth Was Presented and Considered.

Although, the sentencing court necessarily had before it Mr. Windom's age, that court made only brief reference to his youth in assessing the appropriate sentence: In the 33-page sentencing order there was a single, passing reference to his "relative youth." R. 00053, R. 100-132. However, "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). Because the sentencing court lacked any relevant information beyond Mr. Windom's age, Idaho sentencing law dictated Mr. Windom's entitlement – and among Idaho's JLWOP population, *only* Windom's entitlement – to present additional evidence. Pet. App. 20.

1. For the four inmates in Idaho serving JLWOP sentences,[7] the Idaho Supreme Court permits a retrospective assessment of the evidence, where necessary and appropriate, to determine whether the juvenile offender is irreparably corrupt. Two have not had their cases adjudicated after *Miller*. *Adamcik v. State*, No. 44358 (Idaho) (argued Nov. 9, 2017); *Draper v. State*, No. CV-

[7] Juvenile Sentencing Project, *Juvenile Life Without Parole Sentences in the United States, November 2017 Snapshot* available at https://tinyurl.com/y7z9gkna.

2017-4791-PC (Sixth Jud. Dist. Idaho) (application for post-conviction relief pending). For another, the court upheld the sentence without a hearing because the sentencing evidence was sufficient for a retrospective assessment. *Johnson*, 395 P.3d at 1257-59.

It is only Mr. Windom who has received any post-*Miller* relief from the Idaho Supreme Court. And that relief was both very limited and directly tied to the facts of his sentencing hearing. The Idaho Supreme Court held that Mr. Windom was entitled to present evidence related to the mitigating aspects of his youth because such evidence was wholly lacking before the sentencing court. Pet. App. 20.

The court below did not order resentencing for an entire class of inmates in one fell swoop as other states have done. *See Aiken v. Byers*, 765 S.E.2d 572, 576 (S.C. 2014), *cert. denied,* 135 S. Ct. 2379 (U.S. June 1, 2015). The court did not even hold that Mr. Windom himself was entitled to a sentence less than JLWOP. Pet. App. 20. All he received was an opportunity to present evidence in a resentencing proceeding that will address the impact of his youth on his culpability. That opportunity was necessary because the sentencing "transcript does not show that any evidence was presented regarding the distinctive attributes of youth[.]" Pet. App. 16. The court explained, "[a] retrospective analysis does not comply with *Miller* and *Montgomery* where the evidence of the required characteristics and factors was not presented during the sentencing hearing." Pet. App. 18.

In contrast, in *Johnson v. State*, the Idaho Supreme Court held that the evidence was sufficient to make a retrospective assessment. *Johnson*, 395 P.3d at 1259. Against this backdrop, two things become clear. First, the decision in Mr. Windom's case is best understood as the Idaho Supreme Court, which is in the best position to determine how to implement this Court's juvenile sentencing decisions in light of local law and practice, fashioning remedies that are procedurally and substantively congruent with Idaho state law. Such issues are only loosely related to federal questions at all, and are not worthy of this Court's review.

Second, the State's construction of the question presented is highly misleading. The State suggests that the Idaho Supreme Court has "precluded the sentencer's 'retrospective' finding regarding transient immaturity." PWC i. Such a claim only makes sense with a significant qualification: "where there is no evidence of the mitigating aspects of youth having ever been presented and considered." Plainly the Idaho Supreme Court has permitted some retrospective findings of irreparable corruption. *Johnson*, 395 P.3d at 1259. The limited holding of that court is that such findings, prospective or retrospective, must be supported by evidence that is absent from the record in this case. Such an unremarkable holding does not warrant review.

2. The better, majority view is to permit presentation of evidence and consideration of the entire record in a resentencing proceeding (in lieu of retrospective only assessments), as the majority

of states have decided. This approach recognizes the significance of the change in the inquiry required in JLWOP sentencing proceedings.

As with intellectual disability, after this Court created a categorical exemption absent a finding of irreparable corruption, the "change in applicable legal context" established the need to permit additional evidence and to litigate for the first time this newly extant "ultimate fact." *Bobby v. Bies*, 556 U.S. 825, 834, 836-37 (2009). That need exists, even if a factfinder, pre-*Miller* specifically found the defendant "irreparably corrupt" because the significance of that finding fundamentally changed after *Miller* and *Montgomery*.

To avoid an "unacceptable risk" of erroneously condemning a juvenile to die in prison, courts permit presentation of additional evidence. *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014) (holding intellectual disability assessment for purposes of death-eligibility must account for standard error of measure). This generally occurs at a resentencing proceeding, where the factfinder can decide anew whether the juvenile is among the rare homicide offenders eligible to die in prison. *In re Kirchner*, 2 Cal.5th 1040, 1043 (2017); *Landrum v. State*, 192 So.3d 459, 470 (Fla. 2016); *State v. Luna*, 387 P.3d 956, 958 (Okla. Ct. Crim. App. 2016); *Veal v. State*, 784 S.E.2d 403, 405 (Ga. 2016); *State v. Long*, 8 N.E.3d 890, 899 (Ohio 2014); *Aiken*, 765 S.E.2d at 578; *State v. James*, 786 S.E.2d 73, 79-80 (N.C. App. 2016), *review allowed,* 797 S.E.2d 6 (N.C. 2017). One state reviews new evidence before determining whether resentencing is required as opposed to ordering resentencing and then

considering the evidence. *State v. Valencia*, 386 P.3d 392 (Ariz. 2016), *cert. denied,* No. 16-9424, 2017 U.S. LEXIS 6914, 2017 WL 2424075 (U.S. Oct. 2, 2017). Both approaches permit presentation of additional evidence before affirming a JLWOP sentence.

Idaho, along with North Dakota, is in the second, much smaller category of jurisdictions that require presentation of additional evidence only where the extant record is insufficient to assess whether the juvenile, in light of the mitigating aspects of youth, is among those eligible for JLWOP. *Garcia v. State*, 2017 ND 263, 2017 N.D. LEXIS 269 (N.D. Nov. 16, 2017), *reh'g denied,* No. 20170030 (N.D. Dec. 7, 2017). These two states still require presentation and consideration of evidence regarding the mitigating aspects of youth before imposing JLWOP, something that did not occur here.

It is well within the province of states to determine in the first instance "how to enforce the constitutional restriction upon [imposing JLWOP] sentences." *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (quoting *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986)). These approaches reflect state experimentation with the proper procedures for enforcing this constitutional right and do not reflect a substantial "split" of authority. All agree that evidence of the *Miller* factors must be considered before imposing a JLWOP sentence. In light of *Montgomery*'s recent vintage and the approaches undertaken by the states, this Court should allow the states to continue to serve their role as laboratories in our democracy. *See New State Ice*

Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

3. Moreover, the procedure mandated by the Idaho Supreme Court here provides less protection than the other approaches discussed *supra*, giving particular credence to the state court's finding that the evidence at sentencing was inadequate to assess whether Mr. Windom was irreparably corrupt. That is, even under this forgiving approach, the Idaho Supreme Court unanimously found the record inadequate to make the required assessment.

That conclusion should not have been surprising. On direct review, prior to *Miller*, the Idaho Supreme Court found it necessary to address whether sentencing someone based "solely upon the nature and gravity of the offense" was prohibited by state law. *Windom*, 253 P.3d at 313. Plainly such a sentence would not have been imposed in light of the mitigating aspects of youth, violating *Miller*.

To date, Mr. Windom has not had the opportunity to present evidence in light of *Miller* and *Montgomery*. Against this backdrop, this Court should credit the Idaho Supreme Court's conclusion that the record did not permit what this Court has required: taking "into account the differences among offenders and crimes" to determine that Mr. Windom is among the rare juvenile offenders who is irreparably corrupt. *Miller*, 567 U.S. at 480 n.8. In sum, the state court's decision in Mr. Windom's case was a straightforward and faithful application of this Court's sentencing jurisprudence to the facts

of one case. It broke no new ground and, thus, certiorari should be denied.

II. After Montgomery, States Are Clear That the Eighth Amendment and Miller Apply to All JLWOP Sentences.

At the time of *Montgomery*, there was a substantial split over whether *Miller* merely provided a procedural protection or whether it created a substantive constitutional limitation on the application of JLWOP. If it were the former, it would not be retroactive. If it were the latter, then it would be. *See Teague*, 489 U.S. at 311. *Montgomery* answered that question: *Miller* provided a substantive rule retroactively applicable on collateral review. *Montgomery*, 136 S. Ct. at 734.

In light of this holding, it became clear that *Miller* was about more than process. It limited sentences, whether discretionary or mandatory, according to Eighth Amendment principles. Immediately after *Montgomery*, even popular commentary was unequivocal: "*Miller* will now rule out all life-without-parole sentences for juveniles who commit crimes before age eighteen, unless prosecutors can prove to a judge that a particular youth is beyond saving as a reformed person." Lyle Denniston, *Opinion Analysis: Further Limit on Life Sentences for Youthful Criminals*, SCOTUSBlog (Jan. 25, 2016, 12:26 PM), available at https://tinyurl.com/h7khdjo. Although prior to *Montgomery* there was a split of authority on *Miller*'s reach, *Montgomery* fully addressed the broad question the State presents.

1. The Idaho Supreme Court was among those surprised to learn that *Miller* provided a substantive, rather than procedural, protection: "There was nothing in the *Miller* decision that indicated it would be applied retroactively." Pet. App. 10. This surprise notwithstanding, even before *Montgomery*, there were ample states that reached the opposite conclusion. *See Montgomery*, 136 S. Ct. at 725 (collecting cases).

However, *Montgomery* definitively answered the question of whether *Miller* provided a categorical bar or was limited to its procedural protections. *Miller* provided a categorical prohibition of life without parole for all but the rarest of juvenile offenders: "Even if a court considers a child's age before sentencing him or her to a lifetime in prison, the sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity." *Id.* at 734. It was a categorical exclusion of a class of offenders, regardless of the preceding process (mandatory or discretionary), for imposing the sentence. As such, it was a retroactively applicable substantive rule of constitutional law.

2. The pre-*Montgomery* cases the State relies upon to establish an imagined "split" simply reflect the confusion that *Montgomery* resolved. After *Montgomery*, states are *not* split on "what qualifies as a '*Miller* violation.'" PWC 11. The states are clear that it violates the Eighth Amendment to impose JLWOP – using any process, mandatory or discretionary – on all but the rare juvenile offender who is irreparably corrupt.

Georgia's treatment of the issue is illustrative. In its Petition, the State cites *Foster v. State*, 754 S.E.2d 33 (Ga. 2014), which, before *Montgomery*, held that a discretionary JLWOP sentence did not violate the Eighth Amendment because Georgia's statute did not "mandate life without parole." *Id.* at 37; PWC 12. The *Foster* court held that *Miller* only reached "*[m]andatory* life without parole sentences for juveniles." *Foster*, 754 S.E.2d at 37. Georgia was prototypical of the pre-*Montgomery* states on one side of the "split."

As the Georgia Supreme Court put it, "But then came *Montgomery*." *Veal*, 784 S.E.2d at 410. After *Montgomery*, Georgia reversed course: "[A]n LWOP sentenced imposed on a juvenile who is not properly determined to be in the very small class of juveniles for whom such a sentence may be deemed constitutionally disproportionate 'is . . . contrary to law and, as a result, void.'" *Id.* at 411 (quoting *Montgomery*, 136 S. Ct. at 731); *see also Jackson v. State*, 883 N.W.2d 272, 277 (Minn. 2016) (overruling in light of *Montgomery* prior decisions holding *Miller* was a non-retroactive rule of criminal procedure).

The only post-*Montgomery* case the State relies upon for its "split" is an unpublished Indiana intermediate appellate court opinion that by its own terms is applicable only to the "narrow circumstance" (inapplicable here) where a "juvenile defendant voluntarily enters into a plea agreement to serve JLWOP," and knowingly forgoes the opportunity to "present evidence of mitigating factors at his sentencing." *Newton v. State*, 83 N.E.3d 726, 740 (Ind. Ct. App. 2017). Outside of

this context, Indiana has not addressed the applicability of *Miller* in light of *Montgomery*.

Although not cited in the Petition, apparently only one other post-*Montgomery* case, *Jones v. Commonwealth*, distinguishes between discretionary and mandatory sentences, but it too has salient features not present here. 795 S.E.2d 705, 714 (Va. 2017), *cert. denied,* No. 16-1337 (U.S. Oct. 2, 2017). In *Jones,* the court upheld a guilty plea to JLWOP that included a waiver of the defendant's right to all future appeals, rendering the court's discussion of *Miller* unnecessary to the outcome. *Id.* The cases on the state's side of the split either pre-date *Montgomery* or involve idiosyncrasies unrelated to the issues before the Court.

On the other side of the ledger, state after state, before and after *Montgomery*, has concluded that the Eighth Amendment extends to discretionary and mandatory JLWOP sentences alike. Courts in Arizona, California, Connecticut, Florida, Georgia, Idaho, Mississippi, Montana, North Dakota, Ohio, Oklahoma, and South Carolina, and all have held that *Miller* protections apply to discretionary sentences. PWC 13 (listing Arizona, Connecticut, Idaho, Mississippi, and Oklahoma); *Steilman v. Michael,* No. OP 16-0328, 2017 Mont. LEXIS 713 (Mont. Dec. 13, 2017); *Garcia*, 2017 ND 263, 2017 N.D. LEXIS 269 ; *In re Kirchner*, 2 Cal.5th at 1042 ; *Landrum*, 192 So.3d at 460; *Veal*, 784 S.E.2d at 410; *State v. Long*, 8 N.E.3d 890, 899 (Ohio 2014); *Aiken*, 765 S.E.2d at 576; *see also Adams v. Alabama*, 136 S. Ct. 1796, 1796-97 (2016) (granting, vacating, and remanding

discretionary sentence in light of *Montgomery*); *Tatum v. Arizona*, 137 S. Ct. 11, 11 (2016) (same); *McKinley v. Butler*, 809 F.3d 909, 911 (7th Cir. 2016) (Posner, J.).

Beyond the near uniformity with which states retaining JLWOP are holding that the Eighth Amendment applies to discretionary and mandatory sentences, states are rapidly abandoning or limiting JLWOP's reach, accepting this Court's invitation to permit "juvenile homicide offenders to be considered for parole." *Montgomery*, 136 S. Ct. at 736. Since *Miller*, approximately three jurisdictions per year have abandoned JLWOP with twenty states and the District of Columbia now prohibiting JLWOP sentences. Matt Henry, *Spotlight on Juvenile Life Without Parole*, In Justice Today (Oct. 13, 2017) available at *https://tinyurl.com/y8qexwpu*. With such rapid legislative treatment underway, this Court should refrain from intervening and complicating or chilling the policymaking underway. *See Kennedy v. Louisiana*, 554 U.S. 407, 448 (2008) (Alito, J., dissenting) (noting Court intervention "stunted" legislative consideration of ongoing legal controversy).

3. Holding that *Miller* provided only a procedural protection – *i.e.* does not extend to cases where a sentence is imposed via a discretionary process – would upend the Court's retroactivity doctrine. New constitutional rules are retroactively applicable only if they fall into one of two categories: watershed rules of criminal procedure and substantive rules of constitutional law. *See Teague*, 489 U.S. at 311. The former category may

consist only of *Gideon v. Wainwright*, 372 U.S. 335 (1963). *See Miller v. Lampert*, 125 P.3d 1260, 1265 (Or. 2006) ("Since *Teague*, the Court . . . has pointed 'only' to the right to counsel recognized in *Gideon* . . . as the kind of rule that would qualify [as a watershed rule]."). The latter category includes "rules forbidding criminal punishment of certain primary conduct," as well as "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989). Thus, to hold *Miller* merely places procedural restrictions on the imposition of JLWOP, making it a procedural rule, would be to place it on equal footing with *Gideon*.

Of course *Montgomery* did no such thing. Indeed, it definitively established that Eighth Amendment protections for juveniles applied uniformly to "'a class of defendants because of their status or offense.'" *Montgomery*, 136 S. Ct. at 728 (quoting *Penry*, 492 U.S. at 330). In doing so, the Court was unambiguous: "*Miller* announced a substantive rule of constitutional law." *Id.* at 734.

It is true, as the State emphasizes, that there are procedural protections enumerated in *Miller*. Pet. 12-13. But the co-existence of procedural protections with a substantive constitutional right is neither novel nor relevant to the question here. Other categorical exemptions from punishment also include procedural protections. *See, e.g.*, *Brumfield v. Cain*, 135 S. Ct. 2269, 2296-97 (2015) (describing procedural protections relevant to intellectual disability and the death penalty); *Panetti v. Quarterman*, 551 U.S. 930, 934-35 (2007)

(describing procedural protections relevant to incompetence to be executed). The existence of procedural protections is irrelevant because the question is whether the defendant is in the exempted class. If the juvenile is not among the irreparably corrupt, then the sentence is unconstitutional, no matter the process by which it was obtained. *Miller* provided procedural protections, but it also provided a categorical exclusion.

Holding, as the State suggests, that *Miller*'s protections are contingent on the process by which they obtained would upend the Court's jurisprudence on retroactivity.

4. In the end, the protections the court below assured Mr. Windom are *de minimis*. Both by confessing and by entering a guilty plea without also obtaining any concession from the State or assurance from the court, Mr. Windom demonstrated he may have what has been recognized as a defining characteristic of youth: being "less likely to consider potential punishment." *Miller*, 567 U.S. at 477-78 (noting youth's impairment of ability to "deal with police officers or prosecutors (including on a plea agreement) . . . ."); *see also Atkins*, 536 U.S. at 320 (noting impairments associated with intellectual disability impair defendants' ability to protect their interests in the criminal justice process, creating a "special risk of wrongful execution."). However, the court below did not at any point foreclose the possibility of a JLWOP sentence. Instead, it simply required the sentencer to consider some evidence about the mitigating aspects of youth before

concluding Mr. Windom is among the rare juvenile offenders who are irreparably corrupt.

CONCLUSION

Mr. Windom respectfully requests that the Court deny the Petition.

Respectfully submitted,

ANDREW PARNES
LORI NAKAOKA
P.O. Box 5988
671 First Avenue North
Ketchum, ID 83340

JOHN R. MILLS
Counsel of Record
Phillips Black Project
836 Harrison Street
San Francisco, CA 94107
(888) 532-0897
j.mills@phillipsblack.org

DECEMBER 21, 2017