

In the Supreme Court of the United States

BRANDON KELLY,
SUPERINTENDENT, OREGON STATE PENITENTIARY,

Petitioner,

v.

LYDELL MARCUS WHITE,

Respondent,

**ON PETITION FOR WRIT OF CERTIORARI TO
THE OREGON SUPREME COURT**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Oregon Supreme Court erred in holding that the constitutional rule from *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) that sentencing a juvenile to life without parole violates the Eighth Amendment unless the juvenile is the “rare juvenile offender whose crime reflects irreparable corruption,” applies to a state with a discretionary sentencing scheme.

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BRIEF IN OPPOSITION

INTRODUCTION

In 1993, when respondent Lydell White was 15 years, he and his twin brother, Laycelle White, committed the offenses for which a state court judge sentenced him to life without parole.¹ The sentencing court did not consider whether White was one of the rare, irreparably corrupt juvenile offenders who a court may constitutionally sentence to life without parole. It could not have done so because the sentencing hearing took place in 1995, 13 years prior to *Miller v. Alabama*, 567 U.S. 460 (2012).

The Oregon Supreme Court in its decision below on state collateral review applied *Miller* and *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718 (2016) to Mr. White's case as a matter of state law. That issue is not before this Court. The Oregon Supreme Court then correctly applied *Miller* and *Montgomery* to conclude that the sentence violates the Eighth Amendment, and it granted Mr. White a new sentencing hearing.

The petitioner, the Superintendent of the Oregon State Penitentiary as the representative of the State of Oregon (the State hereafter), seeks certiorari based on the incorrect claim that this case presents the same question as *Mathena v. Malvo*, 139 S. Ct. 1317 (2019) (No. 18-217). *Malvo* presents a question of the scope of retroactivity in a federal habeas case under 18 U.S.C. § 2254, which the State fails to recognize in its petition. This case arises from the Oregon Supreme Court decision to apply *Miller* and *Montgomery* "retroactively" as a matter of state law, and thus the question of retroactivity under *Teague v. Lane*, 489 U.S. 288 (1989) is not present in this case.

STATEMENT

I. Mr. White's Convictions and Sentences

In 1994, when petitioner was 15 years old, he and Laycelle murdered an elderly couple. *White (Lydell) v. Premo*, 443 P.3d 597, 598 (Or. 2019) (setting out facts relevant to Laycelle's and Lydell's cases). Mr. White and was convicted of those murders,

¹ Petitioner also filed a petition for certiorari in the case of Respondent's twin brother, Laycelle White, in case no. 19-265. The cases present the same issues.

one count of aggravated murder for one victim and one count of murder for the other victim. *Id.*

The court held a sentencing hearing in 1995. As the Oregon Supreme Court correctly explained in its opinion when contrasting Mr. White's case to a case in which it affirmed a functional life without parole sentence, *Kinkel v. Persson*, 417 P.3d 401 (Or. 2018), *cert. denied sub. nom., Kinkel v. Laney*, 139 S. Ct. 789 (2019):

This case is different. Petitioner received a de facto life sentence for one murder as opposed to an aggregate life sentence for many more, and we cannot conclude that the trial court's decision reflects a determination that petitioner is one of the rare juvenile offenders whose crimes demonstrate irreparable corruption.

To be sure, the trial court found that the crimes that petitioner committed were heinous. Petitioner planned for over a week to steal a car and obtained a weapon and wore gloves to do so. Petitioner was aware that he might murder someone in the process and sought out victims who would be unable to fight back—a couple in their 80s with significant health problems. When petitioner and his brother broke into their home, they brutally beat both victims, striking them with their fists and weapons. The trial court described that brutality in detail:

“You and your brother beat these people for a long, long time until they were dead. Human beings are tough. * * * It is very hard to kill a person with your fists and even with a club. It's brutal, it is ugly, it is noisy and there is a lot of screaming, it is messy, you yourself got covered with their gore and it goes on for a long, long time and you can stop at any point during the process, but you weren't overcome by the brutality or the gore or the horror of what you were engaged in.

“* * * [M]ost of us cannot even imagine the scene as messy and as gruesome as you participated in and yet you didn't stop, you kept on and on and after you found the car keys didn't fit, you went back * * * and you continued to brutalize one of those individuals who wasn't yet dead.”

It does not appear, however, that the sentencing court in this case “[took] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Miller*, 567 U.S. at 480. The sentencing court recognized that petitioner lacked internal controls, but it expressed an inability to determine the cause of that inability. The court said,

“I don’t think you have the internal control to control your behavior. I don’t know fully the reasons for that, perhaps some of it is genetic, perhaps some of it is the way your father treated your family. I’m sure some is related to your gang affiliation and your close involvement with that subculture, but ultimately the responsibility for our conduct, each of us, is ourselves. No matter the past, no matter the reasons, no matter the failures of the system to intervene earlier, to give more treatment at an earlier stage, no matter about anything else, you did what you did. And the simpl[e] matter is we can’t afford to take a chance on you ever again.”

The court did not make a finding, as the sentencing court did in *Kinkel*, that petitioner’s crime was motivated by an incurable psychological condition, but, instead, expressed its hope that petitioner would be rehabilitated. That rehabilitation, the court said, should occur “inside the walls [of prison] rather than outside the walls.” This record does not convince us that the sentencing court reached the conclusion that petitioner is one of the rare juvenile offenders who is irreparably depraved or that no reasonable trial court could reach any other conclusion. Accordingly, we reverse the judgments of the lower courts barring petitioner’s claim for post-conviction relief and remand to the post-conviction court for further proceedings.

White (Lydell), 443 P.3d at 607-08 (bracketed text in Oregon Supreme Court opinion).

Oregon law required a sentence of life in prison with the possibility of parole after 20 years for the aggravated murder conviction. Or. Rev. Stat. § 163.105(1) (1993) (life with possibility

of parole); Or. Rev. Stat. § 161.620 (1993) (prohibiting sentence of life without the possibility of parole for juvenile younger than 17). The Oregon Board of Parole and Post-Prison Supervision controls when Mr. White will be released for that offense, and the sentence for aggravated murder is not at issue in this state post-conviction case.

The sentence for the murder conviction was governed the Oregon Felony Sentencing Guidelines, which applied equally to adult offenders or juveniles waived to adult court, like Mr. White. *See State v. Davilla*, 157 Or. App. 639, 642-47, 972 P.2d 902 (1998) (explaining the application of the state sentencing guidelines to a juvenile convicted of murder). The guidelines established a presumptive guidelines range and the sentencing court could depart up or down, consistent with the guidelines rules. The presumptive sentence for murder under the guidelines was 178-194 months. Appendix 86-87 to Petitioner's Brief on the Merits, *White (Lydell)*, 443 P.3d 597 (Or. S. Ct. Case No. S065188). The court identified six reasons for an upward departure, the same six reasons it identified in Laycelle's case, and it identified no mitigating factors that might support a downward departure; the court did not mention Mr. White's youth in its judgment. *Id.* It then imposed an 800-month (66.7-year) prison sentence—a 606-month (50.5-year) upward departure from the presumptive sentence for an adult offender convicted of murder—concurrent with the sentence for aggravated murder. Mr. White is ineligible for release from prison until he completes the 800-month sentence for the single count of murder.

II. Proceedings in State Collateral Review Following *Miller*

Mr. White had a state collateral review proceeding pending in the state trial court when this Court decided *Miller*. Mr. White amended his petition based on *Miller*, and the trial court granted summary judgment to the State. Mr. White appealed. This Court decided *Montgomery* while the appeal was pending in the Oregon Court of Appeals. The Oregon Court of Appeals affirmed on state-law procedural grounds. *White (Lydell) v. Premo*, 397 P.3d 504 (Or. Ct. App. 2017).

The Oregon Supreme Court allowed review and reversed the Court of Appeals and the trial court. *White (Lydell)*, 443 P.3d at 608. The court held that *Miller* and *Montgomery* constituted new and surprising changes in the law that prevented the application of various state-law procedural bars. *White (Lydell)*, 443 P.3d at 603. It then applied the merits of *Miller* and *Montgomery* to Mr. White's case. It concluded that the 800-month sentence was effectively life without parole and thus the rule from *Miller* and *Montgomery* applied. *Id.* at 603-08.

The Court explained that “[t]his record does not convince us that the sentencing court reached the conclusion that petitioner is one of the rare juvenile offenders who is irreparably depraved or that no reasonable trial court could reach any other conclusion.” *Id.* at 608. The court thus reversed the Court of Appeals and the state post-conviction court. *Id.*

REASONS FOR DENYING THE PETITION

Respondent, the State of Oregon, does not ask this Court to decide whether Mr. Whites’ 800-month sentence is equivalent to life without parole under the Eighth Amendment. The State of Oregon does not ask this Court to decide whether the record of the 1995 sentencing hearing in Mr. White’s shows that the sentencing court somehow complied with *Miller* and *Montgomery* even though the sentencing hearing was held years before this Court’s decision in *Miller*. Indeed, the State does not need ask this Court to take this case or Mr. White’s twin brother’s case on its own merits.

The State asks this Court to grant certiorari because, it claims, this case presents the same question as in *Malvo*: whether *Miller* and *Montgomery* apply to state’s with discretionary sentencing schemes. But that is not actually the question before this court and *Malvo*. *Malvo* involves a question about the scope of *Miller*’s retroactivity under Teague in a federal habeas corpus case under 18 U.S.C. § 2254.

And even if the State were correct about the question presented in *Malvo*, *Montgomery* makes clear that the Eighth Amendment rule from *Miller* applies before a court may sentence a juvenile to life without parole, regardless of the sentencing scheme in the state. The Oregon Supreme Court correctly relied on that clear direction from this Court to hold that to comply with the Eighth Amendment the sentencing court had to conclude that Mr. White’s crimes were not the product of unfortunate yet transient immaturity but instead that Mr. White was irredeemably corrupt. The court correctly held that the sentencing court had not done so, based on a rule from *Miller* and *Montgomery* that the State does not challenge. This Court should deny the State’s petition.

I. The Oregon Supreme Court Resolved on State Law The Only Question Presented in *Malvo*: Application of the Federal Rules Governing Retroactivity

The decision of the Oregon Supreme Court answered on state-law grounds the only question presented in *Malvo*—whether *Miller* and *Montgomery* apply, as a procedural matter, to Mr. White’s case. As the warden’s brief begins in *Malvo*:

This case is not about the meaning of the Eighth Amendment. Instead, it is about how and when decisions announcing new constitutional interpretations are made retroactive to other cases that have long become final when those interpretations are announced.

Brief for Petitioner at 1, *Malvo* (No. 18-217).

The procedural questions in this case about “retroactivity” were questions of state statutory interpretation because Mr. White and his brother, Laycelle, filed their successive petitions for state collateral relief after the statute of limitations. *White (Lydell)*, 443 P.3d at 599-603 (conducting analysis under state law). The Oregon Supreme Court interpreted the Oregon Legislature’s intent in enacting provisions of Oregon’s Post-Conviction Hearings Act (PCHA), Or. Rev. Stat. §§ 138.510-138.680:

Three procedural barriers to post-conviction relief are relevant here: a statute of limitations, a claim preclusion limitation, and a successive petition limitation. ORS 138.510(3),[□] 138.550(2), (3).[□] The petition before us now is barred by all three of those procedural limitations, unless review is permitted by what we refer to as their “escape” clauses. Each of those escape clauses permit a petitioner to bring a claim that would be procedurally barred if the “grounds” on which the petitioner relies were not asserted and could not reasonably have been either asserted or raised in certain described circumstances.

White (Lydell), 443 P.3d at 599 (footnotes omitted).

The court applied that interpretation to Mr. White’s case to conclude that this Court’s decision in *Miller* meant that Mr. White or his brother could not “reasonably have asserted” the Eighth Amendment claim based on *Miller* in his prior post-conviction proceedings or within the limitations period:

Understanding, then, the genesis of *Miller*, we return to the question of whether petitioner’s claim is procedurally barred, either because he previously raised a *Miller* claim or because he reasonably could have anticipated and raised a *Miller* claim. On the first point, the superintendent contends that, in his direct appeal, petitioner raised

a claim that was so “close” to a *Miller* claim that it constitutes a procedural bar to this proceeding. The superintendent is correct that, in his direct appeal, petitioner noted his age at the time of his offense as a reason why the court should find his sentence unconstitutional. However, the whole of petitioner’s argument was as follows:

“There can be no doubt that the crimes in this case were violent and offensive to society. However, defendant was only 15 at the time the crimes were committed and 17 at the time of sentencing. The philosophy of the juvenile criminal code should be one of rehabilitation and not vindictive justice. The sentence of 800 months imposed upon defendant was excessive, and for the reasons given, constituted cruel and unusual punishment.”^[1]

In his subsequent post-conviction proceeding, petitioner again raised the Eighth Amendment as a basis for relief, but he did not rely on *Miller* or the rule set out in *Miller*. In *Chavez* [*v. State of Oregon*, 364 Or. 654 (2019)] terms, we conclude that petitioner did not litigate “a virtually identical * * * claim at roughly the same time that [Miller] was pursuing his claim.” 364 Or. at 662.

As to the superintendent’s second point, we are not convinced that petitioner reasonably could have asserted a *Miller* claim at the time of his direct appeal or his earlier post-conviction proceeding. At those times, the Court had not yet held that juveniles typically possess traits that make them less blameworthy than adults, and certainly had not held that mandatory life-without-parole sentences for juveniles who commit homicide violate the Eighth Amendment. The state may be correct that, in the years preceding *Miller*, certain offenders were arguing that sentencing authorities must take their youth into consideration, but, under *Chavez*, the statutory question is not whether a claim conceivably could have been raised, but, rather, whether it reasonably could have been raised. *Chavez*, 364 Or. at 663. The rule that the Court articulated in *Miller*, in 2012, was sufficiently

“novel, unprecedented, [and] surprising” that we cannot conclude that petitioner reasonably could have anticipated it within two years of his conviction in 1995 or at the time of his later post-conviction proceeding. *See id.* (describing *Padilla*). We hold that petitioner’s claim for post-conviction relief is not procedurally barred, and we turn to its merits.

White (Lydell), 443 P.3d at 603 (footnotes omitted). The court then applied *Miller* and *Montgomery* to the facts of this case.

II. This Case Is A Poor Vehicle For Considering Whether A Discretionary Sentence of Juvenile Life Without Parole Implicates the Eighth Amendment

A. This case does not present a *Teague* question

The Oregon Supreme Court did not conduct a *Teague* retroactivity analysis in this case. It was not required to do so under *Danforth v. Minnesota*, 552 U.S. 264 (2008). This Court noted in *Danforth* that Oregon had incorrectly concluded that it had to apply *Teague* to determine the retroactivity of from this Court. *Id.* at 277 n. 14. The Oregon Supreme Court has not yet announced how it will determine retroactivity post-*Danforth*. Regardless, in this case, the court applied *Miller* and *Montgomery* after concluding that there were no procedural obstacles under state law.

The question about retroactivity under *Teague* applies only in federal court in a habeas corpus proceeding or, potentially, if a state court elected to tether its state retroactivity test to this court’s interpretation of *Teague*. In this case however, the Oregon Supreme Court concluded that the state post-conviction statutes permitted the Court to apply the merits of *Miller* and *Montgomery* to Mr. White’s case. In reaching that conclusion, it did not conduct a *Teague* analysis. It did not even conduct a retroactivity analysis resembling *Teague*. Accordingly, the procedural question about retroactivity that is the only question presented by *Malvo* is not present in this case.

B. The state can prevail on its question presented only if this Court overrules *Montgomery*, but the State has not asked this Court to overrule *Montgomery*

Montgomery plainly requires the application of the rule from *Miller* to states with discretionary sentencing scheme. As this Court explained “[e]ven if a court considers a child’s age before

sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects ‘unfortunate yet transient immaturity.’” *Montgomery*, 136 S. Ct. at 734 (quoting *Miller*, 567 U.S. at 479).

That rule could apply only if a court had discretion whether to impose a sentence of life without parole or a sentence that provides a juvenile with a meaningful opportunity for release. The finding that a juvenile is irreparably corrupt triggers the discretion to impose a life without parole sentence under the Eighth Amendment.

The Commonwealth of Virginia, during oral argument in *Malvo*, acknowledged that *Montgomery* clarifies that the rule from *Miller* applies to a state with a discretionary sentencing scheme.

JUSTICE KAGAN: General, this is—may be Justice Sotomayor’s question phrased a little bit differently. Of course, *Miller* talks about mandatory schemes a lot because *Miller* was about a mandatory scheme, but do you think after *Miller* in a state where there was not a mandatory scheme, a judge could say, you know what, I just don’t feel like thinking about the defendant’s youth, I don’t think it’s remotely relevant, and I’m going to just sweep away anything that the defendant presents to me about that, I couldn’t care less?

Do you think that that’s permissible under *Miller*?

MR. HEYTENS: Justice Kagan, I’m sorry, I don’t think that would be permissible, but I think we need to distinguish between why that’s not permissible. I think, as a matter of the Eighth Amendment, that’s not permissible. But I think that the articulation of the cases following *Woodson* and the death penalty illustrate why that is a new rule for *Teague* purposes.

Transcript of Oral Argument at 9, *Malvo* (No. 18-217) (argued on Oct. 16, 2019).

As that exchange illustrates, this Court would have to overrule *Montgomery* to hold that *Miller* and *Montgomery* apply only to state that mandate a sentence of life without parole for a juvenile convicted of homicide. The Commonwealth in *Malvo* has not asked this Court to overrule rule *Montgomery*. It advanced a narrower position that only the portion of *Miller* that struck down

mandatory life-without-parole sentences applied retroactively under *Teague*.

Here, too, the State here does not ask this Court to overrule *Montgomery*. The State asks this Court to reverse the Oregon Supreme Court because, according to the State, *Miller* and *Montgomery* do not apply to Oregon’s discretionary sentencing scheme. *Montgomery*, however, plainly instructs that the Eighth Amendment rule from *Miller* applies to a discretionary sentencing scheme. The only way for the State to prevail would be for this Court to disavow that part of *Montgomery*. Because the State has not asked this Court to revisit or overrule *Montgomery*, the State cannot obtain the remedy it seeks. This Court should deny certiorari for that reason alone.

C. There is no conflict in the lower courts that justifies certiorari

The question the State believes is presented by *Malvo*—whether *Miller* and *Montgomery* apply to discretionary sentences of life without parole imposed on a juvenile—is not a question that this Court needs to resolve. The vast majority of lower courts correctly understand that *Montgomery* clarified that *Miller* applies to discretionary sentences.

After *Montgomery*, only one jurisdiction has held that *Miller* does not apply to discretionary sentences of juvenile life without parole. The other is the Virginia Supreme Court decision in *Jones v. Commonwealth (Jones II)*, 795 S.E.2d 705 (Va. 2017), *cert. denied*, 138 S. Ct. 81 (2017), a decision discussed in the briefs in *Malvo*. One jurisdiction refused to apply *Miller* in an idiosyncratic context: where a juvenile defendant voluntarily pleads guilty to life without parole 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).

By contrast, the courts of at least twelve states, including Oregon in this case, have concluded that *Miller* applies to discretionary sentences. *Steilman v. Michael*, 407 P.3d 313, 315 (Mont. 2017), *cert. denied*, 138 S. Ct. 1999 (2018); *People v. Holman*, 91 N.E.3d 849, 861 (Ill. 2017), *cert. denied*, 138 S. Ct. 937 (2018); *Windom v. State*, 398 P.3d 150, 155 (Idaho 2017), *cert. denied*, 138 S. Ct. 977 (2018); *Veal v. State*, 784 S.E.2d 403, 410-412 (Ga. 2016); *Landrum v. State*, 192 So. 3d 459, 466 (Fla. 2016); *State v. Young*, 794 S.E.2d 274 (N.C. 2016); *Luna v. State*, 387 P.3d 956, 961 (Okla. Crim. App. 2016); *Casiano v. Commissioner of Corr.*, 115 A.3d 1031, 1043 (Conn. 2015); *State v. Houston*, 353 P.3d 55 (Utah 2015); *State v. Long*, 8 N.E.3d 890,

899 (Ohio 2014); *Bear Cloud v. State*, 334 P.3d 132, 141-43 (Wyo. 2014).

The majority of states are correct, as petitioner explained in section II.B., above. *Montgomery* requires a state to apply *Miller* to discretionary life-without-parole sentences. There is thus no jurisdiction split that justifies certiorari on this issue.

D. There Is At Least One Ancillary Question To Address Before Reaching The Question Of Discretion

The case involves at least one ancillary question to resolve before this Court were to reach the question of whether a discretionary sentence of juvenile life without parole violates the Eighth Amendment. Mr. White was convicted of one count of aggravated murder and one count of murder. The sentencing court imposed a life with parole sentence for aggravated murder and an 800-month sentence for murder as an upward departure from the presumptive sentence for an adult, concurrent with the 800-month sentence.

That presents the question of whether the 800-month sentence constitutes functional life without parole and, if it does, whether functional life without parole implicates the Eighth Amendment in the same way as a sentence labeled life without parole. Below, the Oregon Supreme Court answered both of those questions in the affirmative. *White (Lydell)*, 443 P.3d at 604-07. The State has not asked this Court to review that conclusion. Nonetheless, it is an issue presented in this case that impacts the application of the Eighth Amendment, and this Court would have to address it before answering whether *Miller* and *Montgomery* apply to discretionary sentences.

III. The Oregon Supreme Court Correctly Concluded That The 1994 Sentencing Hearing Did Not Comply with *Miller* and *Montgomery*

The State expressly declines to seek certiorari on the question of whether the sentencing court complied with *Miller* and *Montgomery* if those cases apply to Oregon's sentencing scheme. The State's decision is sound. The Oregon Supreme Court simply quoted *Miller* and *Montgomery* and applied the Eighth Amendment rule from those cases to the facts of this case. *White (Lydell)*, 443 P.3d at 601-07.

The Oregon Supreme Court correctly concluded that the sentencing court, in 1995, did not conclude that Mr. White was irreparably corrupt. The sentencing court expressed uncertainty about the reason why the 15-year-old Mr. White could not control his impulses and stated that even if Mr. White were rehabilitated,

that rehabilitate would occur in prison. It then imposed a 50.5-year upward departure sentence from the presumptive state guidelines sentence for an adult convicted of murder based on six aggravating factors. None of those factors amounted to a finding that Mr. White was one of the rare children convicted of murder who was irreparably corrupt. Because the decision below applied the rule from *Miller* and *Montgomery* this case as a matter of state law, the Oregon Supreme Court properly concluded that that rule requires the sentencing court to re-sentence Mr. White.

CONCLUSION

Mr. White respectfully asks this Court to deny the State's petition for certiorari.

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November 2019