No. 19-

IN THE
Supreme Court of the United States

BARRY CAESAR GARCIA, PETITIONER,

v.

STATE OF NORTH DAKOTA, RESPONDENT.

On Petition For A Writ Of Certiorari To
The Supreme Court of North Dakota

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the constitutional standard announced in *Miller v. Alabama*, 567 U.S. 460 (2012),—that sentences of life without the possibility of parole for juvenile offenses must be limited to "'the rare juvenile offender whose crime reflects irreparable corruption'"—is limited to mandatory sentences.

2. Whether, when a juvenile was originally sentenced before *Miller*, the state must either determine that the juvenile may constitutionally be sentenced to life without the possibility of parole or provide an opportunity to be considered for parole.

STATEMENT OF RELATED PROCEEDINGS

State v. Garcia, Criminal No. 960180 (N.D.) (opinion issued Apr. 1, 1997)

Garcia v. State, Nos. 20030162, 20030307 (N.D.) (opinion issued Apr. 13, 2004)

Garcia v. Bertsch, No. A3-04-075 (D. N.D.) (opinion issued on Sept. 12, 2005)

Garcia v. Bertsch, No. 05-4378 (8th Cir.) (opinion issued on Dec. 12, 2006)

Garcia v. Bertsch, No. 13-cv-00021 (D. N.D.) (opinion issued on Apr. 12, 2013)

There are no other proceedings in any state and federal trial and appellate courts that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Barry Garcia respectfully petitions for a writ of certiorari to review the judgment of the North Dakota Supreme Court.

OPINIONS BELOW

The Supreme Court of North Dakota's opinion affirming the denial of post-conviction relief is reported at 925 N.W.2d 442. The Supreme Court of North Dakota's denial of a petition for rehearing is not reported. Pet. App. 12a. The district court's order denying relief is not reported. Pet. App. 13a-14a. The Supreme Court of North Dakota's opinion affirming the initial denial of post-conviction relief is reported at 903 N.W.2d 503. Pet. App. 15a-44a. The initial district court's hearing denying relief is not reported. Pet. App. 45a-113a.

JURISDICTION

The North Dakota Supreme Court entered judgment on April 11, 2019. Petitioner filed a timely motion for rehearing, which was denied on May 16, 2019, and a corrected opinion was filed on May 24, 2019. On July 22, 2019, Justice Gorsuch granted an extension of time to file this Petition to and including September 23, 2019. This Court has jurisdiction under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

Article One, Section Nine, Clause Two of the United States Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

Article Six, Paragraph Two of the Constitution provides in pertinent part: "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

In 1996, nearly 16 years before this Court's ruling in *Roper v. Simmons,* 543 U.S. 551 (2005), the North Dakota District Court sentenced 17-year-old Barry Garcia to life without parole. Garcia was sixteen years old when he committed the offense. The sentencing hearing lasted less than 45 minutes and no witnesses were called. Pet. App. 33a. Petitioner Garcia was sentenced after being found guilty of killing Cherryl Tendeland and injuring her husband, Pat Tendeland. Pet. App. 16a-18a.

On the night of the crime, Garcia was riding around with three other teenagers. Pet. App. 16a. The four were packed together in a car owned by one of teens, and had brought shotgun shells and a sawed-off shotgun with them. Pet. App. 16a. The

gun and ammunition belonged to the Skyline Piru Bloods gang, as did the teens with whom Garcia was riding along with that night. Pet. App. 16a. After riding a around for a period, the teens encountered Pat and Cherryl Tendeland who were riding with Connie Guler. Pet. App. 17a. Seeing Garcia and another teen walking around, Pat Tendeland backed his car towards the two boys. Garcia walked up to the car, shooting Cherryl Tendeland at close range in the face. Pat was injured with shrapnel. Cherryl died from her injuries. Pet. App. 17a-18a. On the night of the crime, Garcia had been smoking marijuana, using LSD, and drinking alcohol.

Garcia was convicted of aggravated assault and murder in a highly publicized trial. At the sentencing hearing, the State argued that Garcia had a "sociopath personality" and was "antisocial" (while admitting that such characterizations were diagnostically inappropriate for someone as young as Garcia was at the time of his sentencing), offering a "prediction" that Garcia was "minimally amendable to rehabilitation." Pet. App. 32a.

At sentencing, neither party offered lay or expert witnesses, or any written statements or documentary evidence. Defense counsel's argument rested on a general and common sense understanding of youth at the time—detached from any scientific or rigorous understanding of youth development. In describing Garcia's drug and alcohol abuse, *defense* counsel lamented that "17- and 18-year old kids with alcohol or drug problems are not particularly amenable to treatment," and that teenagers with mental illness "have no insight." Garcia was sixteen at the time of the offense, and no evidence was offered on how

youth may have affected Garcia's ability to make decisions or his prospects for rehabilitation.

Despite the paltry presentation by defense counsel there were clear indicia of the tumult and pain that punctuated Garcia's childhood and adolescence. By the time Garcia found himself on the fateful ride, he had lost both parents, his father to incarceration and his mother to fatal violence. The State conceded Mr. Garcia's "unstable, chaotic family history," minimizing it by explaining that he "chose to follow [criminality] from a very, very young age. His fault or not, he chose to do that."

The sentencing court started its analysis using the statutory fourteen discretionary sentencing factors, none of which included youth as a factor. Having heard no evidence at sentencing, the court turned to its personal views on youth in evaluating how Garcia's age affected his sentence. Pet. App. 34a-37a. Explaining a "personal philosophy" that "young people are never beyond redemption," the Court nonetheless believed that Garcia's failure to express remorse extinguished any hope for rehabilitation. Pet. 37a. The court wished Garcia "good luck" for a future gubernatorial pardon and sentenced him to life without parole.

On appeal, Garcia argued that his sentence was cruel and unusual based on the lack of statutory guidance given in imposing the most severe sentence. Additionally, Garcia argued that the court should have requested mitigation evidence. The North Dakota Supreme Court rejected both of these claims. Regarding the latter, the court agreed that no mitigation evidence was presented, but rejected the claim on the basis that there was no constitutional requirement to present mitigating evidence.

Similarly, the Court found no standard requiring sentencing guidance for life without the possibility of parole sentences, characterizing Garcia's argument as trying to inject capital sentencing standards into his case. Garcia's appeal to this Court was denied.

In the years following Mr. Garcia's sentence, appeal and initial attempt at post-conviction relief, this Court published a series of opinions providing substantive constitutional protections for juveniles, culminating in *Miller v. Alabama*, 567 U.S. 460 (2012).

Following the decision in *Miller*, in 2013, Garcia filed a federal habeas petition pro se, citing *Miller.* In his unsuccessful petition, Garcia argued that "the judge observed many things about youth, but he refused to observe the most obvious—that it was because of my youth that I was so quiet[.]" Am. Pet., *Garcia v. Bertsch*, No. 13-cv-00021 (D.N.D. Mar. 5, 2013), at *2, ECF No. 6. However, the U.S. District Court for the District of North Dakota did not reach the merits of Mr. Garcia's habeas petition, dismissing it without prejudice on the basis that it lacked subject-matter jurisdiction. Order Dismissing §2254 Petition Without Prejudice, *Garcia v. Bertsch*, No. 13-cv-00021 (D. N.D. Apr. 12, 2013).

After this Court in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) explained that *Miller* provided a substantive rule applicable to retroactive review, Garcia filed the petition at issue in this case.

At the hearing on Garcia's petition, Garcia was given the opportunity make a statement and offered insight into the chaotic life he lived prior to age sixteen. He explained how his youth and upbringing made it difficult for him to speak up at sentencing

and detailed his personal growth since being incarcerated. Pet. App. 92a-96a.

The district court denied the State's motion to dismiss, concluding that *Montgomery* clarified a new substantive constitutional standard from *Miller*. However, the court ultimately rejected Garcia's claims, reasoning that the sentencing court had satisfied its responsibilities under the Eighth Amendment because it had made the requisite finding of "irreparable corruption" required by *Montgomery* and *Miller* at the original sentencing hearing in 1996. Pet. App. 97a-113a.

Garcia appealed the district court's decision on January 19, 2017. While briefing was in progress, the North Dakota legislature passed HB 1195, later signed by the Governor and enacted on April 17, 2017, as N.D.C.C. § 12.1-32-13.1 (hereinafter, the "Act."). Pet. App. 41a-43a. The Act was drafted as a "*Miller*-fix," to "ensure that North Dakota is in compliance with the letter and spirit of [*Miller* and *Montgomery*], and will bring the state's juvenile sentencing policies in line with the juvenile brain and behavioral development science underlying these decisions."

On appeal, Garcia presented the newly enacted legislation, requesting either a ruling on the applicability of the provision or a remand to the district court for consideration in the first instance.

Before addressing the Act, the court below resolved Garcia's constitutional claims on two bases. First, the court held that the protections provided in *Miller* did not apply because the sentencing court had discretion to impose a sentence less than life without the possibility of parole: "The holding of *Miller* is limited to mandatory sentences of life in

prison without the possibility of parole . . . ." Pet. App. 30a.

Second, the court held that even if *Miller* applied, the 1996 sentencing proceeding met its mandates. As the court below put it, "[*Miller* and] *Montgomery* do[] not change the incentive of either the prosecution or Garcia in highlighting youthful prospects for rehabilitation. Youth was the central thrust of Garcia's plea for mercy." Pet. App. 40a.

Regarding the Act, the Supreme Court of North Dakota explained that "although the parties have fully briefed to us the issue of whether this new statute applies retroactively to Garcia's final conviction, we leave for the district court to determine in the first instance whether Garcia comes within its scope." Pet. App. 43a.

Back before the district court, Garcia argued he fell under the protection of the Act. The court held he did not. Pet. App. 13a-14a. On appeal, the Supreme Court of North Dakota affirmed the district court's finding, foreclosing Mr. Garcia from seeking relief under the statute. Pet. App. 2a.

With his state remedies fully exhausted, Garcia files this petition.

REASONS FOR GRANTING THE PETITION

I. COURTS ARE DIVIDED ON WHETHER *MILLER V. ALABAMA* APPLIES TO DISCRETIONARY SENTENCING SCHEMES.

The decision below widens the split among state courts regarding whether the presence of discretion in sentencing—in any form—satisfies the requirements of *Miller v. Alabama*, 567 U.S. 460 (2012). In concluding otherwise, the court below joined the minority of jurisdictions limiting *Miller*'s protections only to mandatory sentences. However, such a distinction departs from the constitutional standard set forth in both *Miller* and this Court's conclusion in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) that *Miller* provided a substantive constitutional rule.

The Court has accepted review of *Mathena v. Malvo*, 18-217 (U.S.). The resolution of that case will almost certainly resolve this split of authority, and Garcia respectfully requests that the Court either grant his petition or hold his case pending resolution of *Malvo*. In the event the Court does not resolve this split in *Malvo*, the Court should do so in Garcia's case. The conflict in authorities is well established and concerns the administration of the most severe punishments on a constitutionally recognized vulnerable population.

A. The North Dakota Supreme Court Sided with the Minority of Jurisdictions in the Split on Whether *Miller*'s and *Montgomery*'s Holdings Apply Only to Mandatory Sentencing Schemes.

The North Dakota Supreme Court limited *Miller* to mandatory sentences when considering Mr. Garcia's case. Pet. App. 30a. ("The holding of *Miller* is limited to mandatory sentences of life in prison without the possibility of parole, and its central rationale rests on the mandatory nature of the sentence prohibiting the sentencing court from considering the mitigating attributes of youth.").

In so holding, North Dakota joined the minority of states that have held that *Miller* does not apply where the sentence at issue involved at least some form of sentencing discretion.[1]

However, a majority of jurisdictions have held that the presence of discretion does not satisfy *Miller*'s standard.[2]

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[1] *Newton v. State*, 83 N.E.3d 726, 740 (Ind. Ct. App. 2017) (citing *Conley v. State*, 972 N.E.2d 864, 879 (Ind. 2012)); *State v. Charles*, 892 N.W.2d 915, 920 (S.D. 2017), *cert. denied*, No. 17-6005 (Oct. 30, 2017); *Jones v. Commonwealth*, 795 S.E.2d 705, 711 (Va. 2017); *Bell v. State*, 522 S.W.3d 788 (Ark. 2017); *State v. Houston*, 353 P. 3d 55 (Utah 2015); *State v. Williams*, 862 N.W. 2d 701 (Minn. 2015); *State v. Nathan*, 522 S.W.3d 881 (Mo. 2017); *see also State v. Redman*, No. 13–0225, 2014 WL 1272553 (W. Va. 2014); *Castillo v. McDaniel*, No. 62188, 2015 WL 667917 (Nev. Feb. 12, 2015); *State v. Roy*, 2017 WL 1040715, at *1 (Del. Super. Ct. Mar. 13, 2017), *aff'd*, 180 A.3d 42 (Del. 2018).

[2] *Commonwealth v. Batts*, 163 A.3d 410, 435 (Pa. 2017); *Steilman v. Michael*, 407 P.3d 313, 318-19 (Mont. 2017); *State v. Zuber*, 152 A.3d 197, 211-12 (N.J. 2017); *People v. Holman*, 91

The split of authorities on the question about *Miller*'s and *Montgomery*'s application to discretionary sentences is presently under review at the Court. In *Mathena v. Malvo*, No. 18-217, the central issue presented by Virginia is whether the scope of *Miller* reaches discretionary sentencing schemes. Petition for Writ of Certiorari at 1-3, *Mathena v. Malvo*, No. 18-217 (Aug. 16, 2018). And the Court is presently holding *Newton v. Indiana*, 17-1511 (U.S.), which presents the same question, pending resolution of *Malvo*.

Given the importance of this question, the Court should grant review or, in the alternative, hold this case pending resolution of *Malvo*.

B. The Decision Below is Wrong.

The North Dakota Supreme Court held that *Miller* reached only those cases in which the sentence is a product of a mandatory sentencing scheme. However, this application of *Miller* ignores its core principles and raises the risk that juvenile defendants like Garcia "face[] a punishment that the law cannot impose on them." *Montgomery*, 136 S. Ct at 734 (in-

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N.E.3d 849, 861 (Ill. 2017); *Johnson v. State*, 395 P.3d 1246, 1258 (Idaho 2017); *State v. Valencia*, 386 P.3d 392, 395 (Ariz. 2016); *Landrum v. State*, 192 So. 3d 459, 466-67 (Fla. 2016); *Luna v. State*, 387 P.3d 956, 961 (Okla. Crim. App. 2016); *State v. Riley*, 110 A.3d 1205, 1213 (Conn. 2015); *State v. Seats*, 865 N.W. 2d 545, 558 (Iowa 2015); *People v. Gutierrez*, 324 P.3d 245, 249 (Cal. 2014); *Aiken v. Byars*, 765 S.E.2d 572, 577 (S.C. 2014) *cert. denied*, 135 S. Ct. 2379 (2015) (No. 14-1021); *Veal v. State*, 784 S.E.2d 403, 410 (Ga. 2016); *Parker v. State*, 119 So. 3d 987, 995 (Miss. 2013); *State v. Long*, 8 N.E.3d 890, 896 (Ohio 2014); *see also State v. Ramos*, 387 P.3d 650 (Wash. 2017), *as amended* (Feb. 22, 2017), *reconsideration denied* (Feb. 23, 2017), *cert. denied*, 138 S. Ct. 467 (2017).

ternal quotation omitted). Like a minority of jurisdictions nationwide, the North Dakota Supreme Court held that *Miller* is "limited to mandatory sentence of life in prison with the possibility of parole." Pet. App. 30a. While providing lip service to the "broader rationale" applying to all cases, the court characterized the guidance in *Montgomery*—and therefore *Miller*—as merely offering "a clearer formulation of the requirements than the Eighth Amendment demanded of sentencing courts in 1996" with regard to juvenile sentencing. Pet. App. 30a. By limiting *Miller* to mandatory sentences, the court below rendered it as being limited to a set of procedural requirements to consider age in mitigation.

But that is not what *Miller* held. *Miller* exempted, as a class, all but the rare juvenile offenders from the punishment of life without the possibility of parole. As such, most juveniles are exempt from life without the possibility of parole *regardless* of the process by which the sentence is imposed. *See Montgomery*, 136 S. Ct. at 730 (quoting *United States v. United States Coin & Currency*, 401 U.S. 715, 724 (1971)); *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989). This is the essence of categorical protections from punishment. *See, e.g.*, *United States v. Eichman*, 496 U.S. 310 (1990) (barring punishment for flag burning); *Roper*, 543 U.S. at 578 (barring death sentences for juveniles).

The North Dakota Supreme Court substituted the categorical exemption announced in *Miller* for a standard whereby the mere presence of discretion to consider youth as mitigation obviates the protection of *Miller*. This is patently wrong and raises the risk that those sentenced prior to *Miller* will be subject to disproportionate sentencing.

II. EITHER PROVIDING A HEARING ON ELIGIBILITY FOR LIFE WITHOUT THE POSSIBILITY OF PAROLE OR ACTUAL POSSIBILITY OF PAROLE IS REQUIRED WHEN A JUVENILE WAS SENTENCED PRE-*MILLER*.

The lower court's opinion also implicates another question on which courts across the nation diverge and which this Court may answer in a case where review has been granted: whether states must provide juveniles sentenced to life without parole prior to *Miller* a hearing for determination of eligibility for that sentence under the new constitutional standard announced in *Miller*, if they elect to not make the juvenile parole eligible.

In a related merits-stage case, *McKinney v. Arizona*, 18-1109 (U.S.), the Court has will review two questions, the second of which is relevant here. That question concerns whether, when a sentencer has unconstitutionally been prohibited from considering mitigating evidence, a new sentencing hearing is required before imposing a sentence of death. Here, the Supreme Court of North Dakota has left standing Garcia's sentence of life without the possibility of parole, even though he has never received the constitutional consideration articulated by this Court in *Miller*. Because the resolution of *McKinney* is closely related to the question here, the Court should grant review here as well or, in the alternative, hold the case pending its resolution.

A. Courts Disagree on Whether a Resentencing Hearing is Required Before Imposing a Life Without Parole Sentence When a Juvenile's Original Sentence Occurred Pre-*Miller*.

At least nine states have concluded that any juvenile offender sentenced to life imprisonment without the possibility of parole prior to *Miller* is entitled to have that sentence reconsidered at a post-*Miller* evidentiary hearing.[3] Three of these states—California, Florida, and Pennsylvania—are responsible for nearly 1,000 of the estimated 2,589 pre-*Miller* life without the possibility of parole sentences imposed on juveniles. *See* Human Rights Watch, *State Distribution of Estimated 2,589 Juvenile Offenders Serving Juvenile Life Without Parole* (2009).

North Dakota is among the jurisdictions that do not offer juveniles sentenced under a pre-*Miller* regime a resentencing hearing whereby a court can for the first time fully take heed of the new guidance and constitutional standards presented in *Miller* and *Montgomery*.[4]

In light of the deep divide on this question, this Court should grant review.

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[3] *See Gutierrez*, 324 P.3d at 249-50 ; *Batts*, 163 A.2d at 435; *Landrum*, 192 So.3d at 470; *Valencia*, 386 P.3d at 393; *Veal*, 784 S.E.2d at 405; *State v. James*, 786 S.E.2d 73, 79-80 (N.C. App. 2016), *review allowed*, 797 S.E.2d 6 (N.C. 2017); *Aiken*, 765 S.E.2d at 577 ("*Miller* does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered"); *Luna*, 387 P.3d at 958; Wash. Rev. Code § 10.95.035 (2015).

[4] *Johnson*, 395 P.3d at 1258-59; *Newton*, 83 N.E.3d at 744-45; *Holman*, 91 N.E.3d 851; *Kelly v. Brown*, 851 F.3d 686, 687-88 (7th Cir. 2017).

B. When Imposing Life Without the Possibility of Parole, Courts Cannot Ensure Sentences Adhere to *Miller*'s Constitutional Standards Without a Post-*Miller* Sentencing Hearing.

Denying resentencing when the original decision took place pre-*Miller*—and in this case, pre-*Roper*—undermines this core protection provided in *Miller* and *Montgomery*, and takes courts back in the time pre-*Miller* where the administration of the most severe sentence was unreliably applied to a vulnerable population.

It is unlikely that a court in 1996, however prescient, could have considered fully the factors in *Miller*. Here the court's attempt, even if in good faith, merely superficially considered youth in line with its "personal philosophy" and common-sense understanding of adolescence. It was not guided by this Court's explanation of how the penological justifications for punishment collapse in the presence of youth, nor was it able to benefit from the guidance about how the science on youth development informs sentencing.

A 1996 trial court would also not have been aided by the evidence relevant under *Miller*, impairing any court from faithful adherence to the constitutional commands announced in that case. At Garcia's 1996 sentencing and trial, there was little to no presentation about the role that the peers accompanying Garcia played on his behavior, nor was there any presentation on exactly how Garcia's drug and alcohol use affected him.

Without a resentencing hearing, a reviewing court is forced to look at an incomplete, outdated record and to rationalize the reasoning of a court

which had a view of the constitutional role of youth that could not have incorporated this Court's recent jurisprudence.

More fundamentally, "*[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 (emphases added).

Like the proscription of sentencing the intellectually disabled to death announced in *Atkins v. Virginia*, 536 U.S. 304 (2002), *Miller* created a categorical bar to a punishment, and in doing so radically changed the litigation stakes for all parties. This Court has held that even where a jury has, before *Atkins*, found that a person is intellectually disabled, the state may re-try that precise question because of the changed incentives presented by *Atkins*. *See Bobby v. Bies*, 556 U.S. 825, 837 (2009). After *Atkins*, evidence of intellectual disability that hitherto helped in mitigation or hurt in aggravation became exclusively a defense weapon that could make a defendant entirely ineligible for the death sentence. *Id.*

In fact, *Miller* presents a stronger case for a hearing on eligibility resentencing because the relevant categorical exemption—all but the irreparably corrupt—did not exist prior to the court's decision.

This Court has recognized that juveniles sentenced to life without parole prior to *Miller* need not be resentenced after the decision under a single condition: that they be provided a meaningful opportunity to obtain relief via parole. *Montgomery*, 136 S. Ct. at 736. North Dakota did not take that route. Because Garcia has never had an opportunity to

present evidence in light of *Miller*'s protections and no court has determined whether he is eligible for a sentence of life without parole under the standard articulated in *Miller*, this Court should grant review and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 2019