No.

IN THE

SUPREME COURT OF THE UNITED STATES

ASHANTI LUSBY, Petitioner,
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Supreme Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In *Jones v. Mississippi*, No. 18-1259, __U.S.__, 141 S.Ct. 1307, 1314-15 (2021), this Court reaffirmed, when reviewing a post-*Miller* sentencing hearing, that *Miller v. Alabama*, 567 U.S. 40 (2011), mandates that "'a sentencer follow a certain process–considering an offender's youth and attendant characteristics–before imposing' a life-without-parole sentence" on a juvenile homicide offender, though the sentencer need not make an explicit finding of incorrigibility (*quoting Miller*, 567 U.S. at 483). This Court has also held that *Miller* applies retroactively to cases on collateral review. *Montgomery v. Louisiana*, 577 U.S. 190, 208, 212-13 (2016). However, as the Illinois Supreme Court noted in the decision at issue here, "th[is] Court [has] offered no guidance about how to determine whether a sentencing hearing held *before Miller* was decided nonetheless comported with its requirements." *People v. Lusby*, No. 124046. __ N.E. 3d __, 2020 IL 124046, ¶35 (Oct. 20, 2020) (emphasis added). Moreover, States throughout the country, as well as the justices of the Illinois Supreme Court who decided this case, are divided on this issue. The question presented is how to determine when a juvenile sentenced to life in prison without parole or its functional equivalent prior to *Miller,* when the sentencing court did not have the benefit of *Miller*, is entitled to a new sentencing hearing, to ensure the juvenile's sentence does not violate the Eighth Amendment.

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The petitioner, Ashanti Lusby, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The decision of the Illinois Supreme Court (Appendix A) is reported at *People v. Lusby*, __ N.E.3d __, 2020 IL 124046 (Oct. 22, 2020) (modified upon denial of rehearing on February 26, 2021), and is published.

JURISDICTION

On October 22, 2020, the Illinois Supreme Court issued an opinion. A petition for rehearing was timely filed and denied on February 26, 2021. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Eighth Amendment to the United States Constitution

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

Fourteenth Amendment to the United States Constitution

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Ashanti Lusby was 16 years old in 1996, when 27-year-old teacher Jennifer Happ was sexually assaulted and murdered in her home in Joliet, Illinois. Lusby was arrested in early 2001, after his friend Dwayne Williams told police Lusby was involved. A jury found Lusby guilty of multiple crimes, including first degree murder, aggravated criminal sexual assault, and home invasion. Lusby was subjected to a maximum sentence of 130 years' imprisonment. The sentencing court found "no factors in mitigation" and imposed the maximum sentence after a hearing at which defense counsel neither presented any evidence nor pointed the court to specific evidence of Lusby's youth or capacity for rehabilitation.

Trial proceedings

Evidence adduced at trial established that Happ's next-door neighbors heard a gunshot at approximately 9:30 p.m. on February 8, 1996. (R. 420) A friend of Happ's discovered her body on the couch in her living room the next day. (R. 109-126) The medical examiner testified Happ died from a single gunshot wound to her head. (R. 211, 234-35, 238) She also sustained injuries to her pelvic area that were consistent with sexual assault. (R. 235, 253) DNA from semen on rectal and vaginal swabs matched a blood sample collected from Lusby. (R. 268-69, 321, 327)

Detective Brian Lewis testified that during an interrogation on April 13, 2001, Lusby was told the police investigation clearly pointed to him as the person responsible for Happ's death. (R. 405-09) Lusby denied knowing anything about Happ or her murder. (R. 413)

Lusby's ex-girlfriend, Darylyn Phillips, testified that on the night of Happ's

death, Lusby, Williams, and Fabian Carpenter left Lusby's home after watching a pornographic film; Lusby had a gun in his waistband. (R. 337-48) The boys returned 30-45 minutes late (around 9:30 p.m.), went into Lusby's bedroom, closed the door, and ignored Phillips when she tried to talk to them. (R. 347, 349-351, 354, 379) They all seemed nervous and excited. (R. 349-350, 378)

Lusby testified that he was 16 years old on February 8, 1996, and he was not attending school because he had been expelled the prior year. (R. 507, 524) At approximately 5:30 p.m. on February 8, 1996, he was walking home from a friend's house when he saw Happ standing outside her front door wearing nothing but a T-shirt. (R. 508-511) Happ asked Lusby why he was looking at her and how old he was. Lusby said he was 18. (R. 512) Happ invited him inside, where they engaged in consensual sex. When he left, Happ was still alive. (R. 512, 517-18)

In rebuttal, the State published a certified statement of conviction showing Lusby had pled guilty to felony robbery on April 30, 1999. (R. 646)

Sentencing

Following the jury's verdict, a pre-sentence investigation report ("PSI") was prepared by a probation officer on Lusby's behalf. (C. 47-52) The PSI listed the names and dates of offenses for which Lusby had been adjudicated delinquent or convicted, including aggravated discharge of a firearm in August, 1996; robbery in September 1999; resisting a peace officer in April 2001; and aggravated battery in October 2002, following a jail fight that happened while Lusby was awaiting trial in this case. (C. 47)

The PSI provided further that Lusby was born in Chicago on April 11, 1979, where he lived for ten years until his family moved to Joliet, Illinois. (C. 49) Lusby

returned to Chicago for one year when he was 14 years old, but returned to Joliet thereafter. (C. 49) He was expelled his sophomore year due to "gang banging," and later received his GED in an Illinois Youth Center. (C. 49) Lusby told the probation officer he had a good relationship with both parents and that they visited him often in jail; but the officer noted, "According to the Will County Adult Detention Facility, [his] father is not even listed as one of the defendant's visitors, and there is no record that he has ever visited." (C. 48) Lusby had two sisters, each of whom also had criminal histories, as well as two children of his own. (C. 48) Lusby had used marijuana, PCP, and alcohol. (C. 51) The PSI concluded with the probation officer's opinion that Lusby "may benefit from counseling to control his violent tendencies." (C. 52)

At sentencing in 2002, the State introduced 21 victim impact letters that discussed Happ's positive impact on the community. (C. 3-41) The State also presented two witnesses. (R. 818) Robert Miller testified that in 2001, he and Lusby fought while they were both in pretrial detention in Will County. (R. 818-821) Miller suffered several injuries, including a broken nose. (R. 827-28) Happ's mother read a prepared statement in which she discussed the effect of Happ's death on her friends, family, students, and strangers. (R. 830-42)

Sentencing counsel presented no evidence in mitigation. (R. 842)

Arguing in aggravation, the State indicated Lusby was eligible for up to 100 years' imprisonment for murder based on the jury's finding of "exceptionally brutal and heinous behavior indicative of wanton cruelty," plus two concurrent 30-year terms of imprisonment for aggravated criminal sexual assault and home invasion, to be served consecutively with the murder count. (R. 843-845) Pointing to Lusby's criminal

background, the State argued that "the younger part of [Lusby's] life is an indication of what this guy's potential is," and asserted that the court has "got to consider" that Lusby's young life showed he would "continue to be dangerous well into his senior citizen years."(R. 846-847) The State asked the court to "never again, never again let this individual out on our streets in this county again." (R. 849-50)

Speaking in mitigation, sentencing counsel began by noting twice, "I don't know what to say." (R. 850) He also asserted that "in this case the worst happened to one of our best." (R. 850) Discussing Lusby's criminal history, counsel stated, "I don't know what happened in the jail. I don't know if it was a fight. I don't know that." (R. 850-51) He also asserted, "I do know that my client was 17 years old when this took place."[1] (R. 851) Counsel continued, "[w]e know that nobody is of [*sic*] the same person forever." (R. 851) He concluded, "I just ask you to exercise reason, your conscience, your experience in setting an appropriate sentence, Judge." (R. 851)

Speaking in allocution, Lusby expressed sympathy for Happ and her family and, acknowledging the fight in Will County Jail, said he had been "rough around the edges." (R. 852) Lusby insisted he had never raped or killed anyone. (R. 852)

The circuit court imposed sentence as follows:

> All right. Well, this is a case that is a very difficult case from the standpoint of the facts of the injuries and of the method of murder of the victim. It certain - - certainly the defendant's age is a factor at the very least to the extent that he is not eligible for the imposition of capital punishment based solely because of his age, because but for his age at under the age of 18, certainly this - - these are the type of things, let me put it that way, that I have seen that all the attorneys that are in this trial have seen as facts that would - - that could be considered capital punishment activities.

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[1]In fact, Lusby was 16 when these crimes occurred. (C. 49)

> But I cannot, I cannot ignore the fact that Miss Happ was terrorized and sexually assaulted and humiliated and executed in her own home, and this was clearly a depraved act by you, Mr. Lusby, and it shows absolutely no respect for human life. It is ironic to me I guess that this Miss Happ was working to provide a positive influence on children in the area and the area that you lived in and even children that were - would be yours or your nieces or nephews or other family members might have been influenced positively by this woman, but your actions saw that that didn't happen.
>
> So it is very difficult for me to consider any leniency in this case. It is very difficult for me to see any factors in mitigation. I have gone through the section on mitigation. There are no factors in mitigation that apply.
>
> I have gone through the factors in aggravation and those factors there are many that apply, and I sincerely believe that the appropriate sentence is a sentence that will see that this does not occur outside of the Department of Corrections again. This is a choice that you made at a young age and I know that choices, youthful choices can be - - are not, you know, sometimes can be made in very very poor judgment, but this is not one that can be taken back, and this is not one that can be considered minor, and this is not one that can be considered for anything but setting your future in the Department of Corrections.
>
> From what I've seen here from everything that I have seen and heard in this trial this is a life you chose, a life of carrying weapons, a life of showing no respect for human life, and I am not at all uncomfortable in imposing the maximum sentence on the murder of 100 years. The consecutive sentence on the other two Class X offenses again the manner and method of this crime makes me convinced that it is not for me to minimize it in any way, and as a consequence I will impose an additional consecutive 30 year sentence on each of these offenses. So that is the order of the Court. Certainly you have every right to appeal the sentence. (R. 853-55)

Sentencing counsel filed a motion to reconsider sentence, asserting that the sentence "was excessive in that it failed to adequately consider the fact" of Lusby's youth or "his potential for rehabilitation and return to useful citizenship." (C. 321) Without including details, the motion also asserted that, "given his young age, and appropriate counseling and direction, the Defendant maintains an excellent potential to be restored to useful to [*sic*] citizenship, given an opportunity to do so," and that the

consecutive term failed "to give due regard" to Lusby's "history and character." (C. 321)

The circuit court denied the motion, stating that it was "comfortable" with its sentence and "took into account all the factors both in aggravation and in mitigation that apply here."(R. 870-871)

Direct Appeal and First Post-Conviction Petition

Lusby's convictions and sentence were affirmed on direct appeal, against challenges to the evidence at trial. *See People v. Lusby*, No. 3-03-0058 (Nov. 19, 2004) (unpublished order). (C. 356-359)

Lusby filed his first *pro se* post-conviction petition on September 7, 2005, raising additional trial issues. (C. 361-371) The circuit court summarily dismissed the petition. (C. 374; R. 895-901) In a divided decision, a majority of the appellate court affirmed. *People v. Lusby*, No. 3-06-0018 (Dec. 4, 2007) (unpublished order). (C. 417-425)

Current Post-conviction Petition and Decision on Review

On November 21, 2014, Lusby requested leave to file the successive *pro se* post-conviction petition at issue here. (C. 437-451) Lusby argued that his *de facto* life sentence violates both the United States' and Illinois' constitutions, and he requested a new sentencing hearing for his youth and attendant circumstances to be considered. (C. 448-451) The circuit court denied Lusby leave to file the petition. (R. 923) The circuit court's decision was reversed on appeal, and the appellate court majority held that Lusby was entitled to a new sentencing hearing because the trial court did not properly consider Lusby's youth and attendant characteristics before imposing the *de facto* life sentence. *People v. Lusby*, 117 N.E.3d 527, 537 (App. Ct. Ill. 2018).

In a divided decision, the Illinois Supreme Court reversed the decision of the

appellate court. The majority agreed that Lusby's 130-year sentence was a *de facto* life sentence that triggered the protections of *Miller*. *People v. Lusby*, __ N.E.3d __, 2020 IL 124046, ¶34. The majority then noted that this Court has "offered no guidance about whether a sentencing hearing held before *Miller* was decided nonetheless comported with its requirements." *Lusby*, 2020 IL 124046, ¶35. Citing the Illinois Supreme Court's own prior decision in *People v. Holman*, 91 N.E.3d 849 (2017), the majority noted that, in Illinois, "the inquiry looks back to the trial and the sentencing hearing to determine whether the trial court at that time considered evidence and argument related to the *Miller* factors." *Lusby*, 2020 IL 124046, ¶35. The majority then combed through the record of the trial and sentencing to determine if any evidence related to those factors existed. *Id*. at ¶¶36-51. The majority never cited to any instance where the trial court actually considered any attribute of Lusby's youth. It concluded that Lusby's sentencing hearing complied with *Miller* because Lusby "had every opportunity to present mitigating evidence," and because the trial court presided over the case from beginning to end. *Id*. at ¶52.

The dissent concluded that Lusby's pre-*Miller* sentencing hearing did not comport with *Miller* because, *inter alia*, "the record clearly shows that the trial court did not consider the attendant characteristics of defendant's youth." *Lusby*, 2020 IL 124046, ¶¶83, 102 (Neville, J., dissenting). The dissent observed that the trial court focused only on the brutality of the crime, with no corresponding consideration given to Lusby's youth. *Id*. at ¶86 (Neville, J., dissenting). The dissent also cited a number of flaws in the majority's decision on appeal, noting that it: (1) overlooked "that a *de facto* life sentence for a juvenile is rare and uncommon"; (2) "misapprehend[ed] the trial

court's findings at the sentencing hearing, which did not address defendant' s youth and attendant characteristics"; (3) "misperceive[d] facts in the record that pertain to defendant's family environment"; and (4) "neglect[ed] to analyze explicit evidence in the record that supports the possibility of defendant's rehabilitation." *Id.* at ¶¶77-78 (Neville, J., dissenting).

Lusby filed a petition for rehearing, which the majority denied. The dissent issued a "SEPARATE OPINION UPON DENIAL OF REHEARING." *Lusby*, 2020 IL 124046, ¶¶107-47 (Neville, J., dissenting). It emphasized that "the trial court failed to apply *any* of the *Miller* factors to its sentencing determination." *Id.* at ¶120 (Neville, J., dissenting) (emphasis in original). It also explained that the majority "wrongly focused on [Lusby's] opportunity to present mitigating evidence," which was insufficient to address his corrigibility as a juvenile. *Id.* at ¶122 (Neville, J., dissenting). It noted how, while Illinois had passed legislation offering parole to juvenile offenders, that opportunity was only available to juveniles sentenced on or after June 1, 2019. *Id.* at ¶¶134-35 (Neville, J., dissenting) (citing 730 ILCS 5/5-4.5-115(b) (2019)). The dissent determined that "the legislature has placed a high duty on the Illinois judicial system to ensure that juvenile homicide offenders sentenced to life in prison before June 1, 2019, receive a full and adequate hearing regarding their corrigibility at the time of sentencing." *Id.* at ¶135 (Neville, J., dissenting). The dissent rejected the majority's decision to give more rather than less deference to juvenile sentencing hearings occurring prior to *Miller*. *Id.* (Neville, J., dissenting).

REASON FOR GRANTING CERTIORARI

This Court should grant review to resolve a disparity amongst the States and the Illinois Supreme Court justices on how to address juvenile homicide offenders sentenced to discretionary life without parole or its functional equivalent prior to *Miller v. Alabama*.

In *Miller v. Alabama*, 567 U.S. 460, 479-80 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190, 208 (2016), this Court held that sentencing a juvenile offender to a lifetime in prison is unconstitutionally excessive for all but the "rare" juvenile offender whose crimes reflect irreparable corruption. Moreover, in *Montgomery*, this Court held that "*Miller*'s conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders raises a grave risk that many are being held in violation of the Constitution," and that *Miller* applies retroactively to cases on collateral review. *Montgomery*, 577 U.S. at 212-13.

In *Jones v. Mississippi*, No. 18-1259, __U.S.__, 141 S.Ct. 1307 (2021), this Court recently issued a narrow decision, determining when reviewing a post-*Miller* sentencing hearing that trial courts are not required to make any explicit finding of incorrigibility or provide any "on-the-record sentencing explanation with an implicit finding that the defendant is permanently incorrigible" before imposing a sentence of life without parole ("LWOP") on a juvenile homicide offender. This Court also emphasized that *Miller* and *Montgomery* remained good law, mandating that "'a sentencer follow a certain process–considering an offender's youth and attendant characteristics–before imposing' a life-without-parole sentence." *Id.* at 1314-15, *quoting Miller*, 567 U.S. at 483. It re-affirmed that "'[a] hearing where youth and its attendant characteristics are considered as sentencing factors is necessary to separate those

juveniles who may be sentenced to life without parole from those who may not.'" *Jones*, 141 S.Ct. at 1317-18, *quoting Montgomery*, 577 U.S. at 210.

As the Illinois Supreme Court noted twice in the decision presently before this Court, this Court has "offered no guidance about whether a sentencing hearing held before *Miller* was decided nonetheless comported with its requirements." *People v. Lusby*, __ N.E.3d __, 2020 IL 124046, ¶35. Moreover, throughout the country, there is a widespread disparity in how states have resolved this question themselves. Among them, Illinois sits near the strictest end of the spectrum. It does not afford any opportunity for parole for juvenile homicide offenders sentenced prior to 2019. It also declines to grant new sentencing hearings to juvenile homicide offenders sentenced to LWOP or its term-of-years equivalent prior to *Miller*, even if the sentencing court did not consider the distinct attributes of youth. Instead, the focus is on whether the juvenile was given a chance to offer traditional evidence in mitigation, and whether the reviewing court can determine in hindsight that some evidence now recognized as related to the *Miller* factors appears anywhere within the four corners of the record. *See Lusby*, 2020 IL 124046, ¶¶34-52. As the facts of this case in particular show, Illinois's practice allows for sentences imposed prior to *Miller* in violation of the Eighth Amendment to stand. Thus, this Court should review the Illinois Supreme Court's decision.

A. Wide disparity exists throughout the country in the treatment of juvenile homicide offenders sentenced to discretionary LWOP prior to *Miller*.

In *Montgomery*, this Court recognized that the "vast majority" of juveniles sentenced to LWOP prior to *Miller* had received a sentence that the law "cannot

impose." *Montgomery,* 136 S.Ct. at 736. Subsequent to *Montgomery*, the States have drastically differed in their application of *Miller* to pre-*Miller* sentencing hearings. Thus, the ability of juveniles to seek review of their pre-*Miller* LWOP sentences has become dependent more on what state the juvenile lives in, rather than on whether their sentencing hearing actually complied with *Miller*.

Specifically, in 30 states and the District of Columbia, *all* juveniles sentenced to LWOP prior to *Miller* are now either automatically entitled to a new sentencing hearing or have become eligible for parole or judicial modification of their sentence. Among this group, 13 states have enacted legislation or are in the process of passing legislation that offers parole eligibility to *every* juvenile homicide offender sentenced to LWOP, whether they were sentenced before or after *Miller*.[2] Four other states and

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[2]These states include: (1) Arkansas (ARK. S.B. 294, 91st Gen. Assemb. (Reg. Sess. 2017)); (2) California (CAL. PENAL CODE §3051 (eff. Jan. 1, 2020)); (3) Colorado (COL. REV. STAT. 18-1.3-404(4)(b)(I) (eff. March 23, 2020)); (4) Connecticut (CONN. GEN. STAT. 54-125a(f)(1) (eff. Oct. 1, 2015)); (5) Massachusetts (*see Diatchenko v. District Attorney For Suffolk Dist.*, 1 N.E.3d 270, 282-87 (Mass. 2013) (holding that all mandatory and discretionary LWOP sentences given to juveniles were unconstitutional and ordering parole board to consider parole for juvenile homicide offenders previously sentenced to LWOP)); (6) Nevada (NEV. REV. STAT. 213.12135 (eff. Oct. 1, 2015)); (7) New Mexico (*See* AP, C. Attanasio, *New Mexico Senate passes early juvenile parole bill*)(March 10, 2021)(noting that New Mexico Senate had passed a bill (New Mexico SB 247) allowing all juveniles convicted of crimes committed as minors to be eligible for parole after 15 years); (8) Ohio (2019 Ohio Senate Bill No. 256, Ohio One Hundred Thirty-Third General Assembly) (precluding both *de juris* and *de facto* LWOP sentences for all juveniles sentenced before or after *Miller*, and making homicide offenders eligible for parole after 25 or 30 ytears, depending on offense)); (9) Texas (*see Lewis v. State*, 428 S.W.3d 860 (Tex. Crim. App. 2014) (all juveniles sentenced to LWOP prior to *Miller* are entitled to a reformation of their sentences to life in prison, allowing them to be eligible for release after 40 years)); (10) Virginia (VA CODE ANN.. §53.1-165.1(E) (eff. July 1, 2020)); (11) Washington (*see State v. Bassett*, 428 P.3d 343, 355 (Wash. 2018) (sentencing a juvenile to LWOP violates State constitution)); (12) West Virginia (W

the District of Columbia, while not offering parole to all juveniles sentenced to LWOP, nevertheless allow any juvenile given that sentence or its term of years equivalent before or after *Miller* to appeal to a court for a modification of their sentence after a certain amount of time.[3] In 10 other states, *every* juvenile homicide offender serving a sentence of LWOP prior to *Miller* had been sentenced under a mandatory scheme, and thus *all* those juveniles were deemed eligible for sentencing relief following *Montgomery*.[4] Finally, in four other states, though discretionary LWOP sentences were

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VA CODE 61-11-23(a)(eff. May 9, 2018)); *see also Christopher J. v. Ames*, 828 S.E.2d 884, 895 (W. Va. 2019) (holding that section 61-11-23(a) applies retroactively)); and (13) Wyoming (WYO. STAT. ANN. §6-2-101(b) (eff. July 1, 2013) (mandating that juvenile convicted of first-degree murder receive a life sentence); (WYO. STAT. Ann. §6-10-301(c) (eff. July 1, 2013); *State v. Mares*, 415 P.3d 666, 671-72 (Wyo. 2018) (juvenile parole statute applies retroactively)).

[3] These jurisdictions include: (1) Delaware (DEL CODE ANN. TIT. 11 §4204A(d)(1) (eff. June 4, 2013)); (2) District of Columbia (D.C. CODE §24-403(a) (eff. May 10, 2019)); (3) Iowa (*see State v. Sweet*, 879 N.W.2d 811, 839 (Iowa 2016) (finding life without parole categorically unconstitutional for all juveniles under Iowa Constitution, and holding that any juvenile may appeal for sentence modification at any time)); (4) Maryland (2021 MD S.B. 494) (March 12, 2021)); and (5) North Dakota (N.D. CENT. CODE §12.1-32-13.1 (eff. Aug. 1, 2017)).

[4] These states include: (1) Alabama (*see Wilkerson v. State*, 284 So. 3d 937, 948 (Ct. Crim. App. Ala. 2018) (noting that the only sentence available to juvenile offenders convicted of capital murder in Alabama prior to *Miller* was life without parole)); (2) Hawaii (*see* https://juvenilesentencingproject.org/legislation-eliminating-lwop/) (last visited May 13, 2021) (noting how LWOP was mandatory for all juveniles convicted of first degree murder or attempt first degree murder prior to *Miller*); *see also* HAW. REV. STAT. 706-656(1) (2014) (requiring now that all juvenile homicide offenders be sentenced to life with the possibility of parole)); (3) Louisiana (LSA-R.S. 14:30 (penalty for first degree murder is death or LWOP); (LSA-R.S. 13:30.1) (penalty for second degree murder is LWOP)); (4) Michigan (The Associated Press, "A state-by-state look at juvenile life without parole," July 31, 2017 (available at https://apnews.com/article/9debc3bdc7034ad2a68e62911fba0d85 (last visited May 14, 2021); (5) Mississippi (*see Parker v. State*, 119 So. 3d 987, 997-1000 (Miss. 2013) (recognizing that all life sentences were without parole and

authorized for juveniles, there were no juveniles serving that sentence in those states when *Miller* was decided.[5]

Within the 20 remaining states that have *not* offered parole eligibility to juvenile homicide offenders, and who also require some sort of action from a juvenile to initiate review of a discretionary LWOP sentence imposed prior to *Miller*, there is a vast discrepancy on how courts determine which juveniles may receive a new sentencing hearing. For example, the Supreme Court of South Carolina held in *Aiken v. Byars*, 765 S.E.2d 572, 578 (S.C. 2014), that every single juvenile homicide offender who had ever been sentenced to discretionary LWOP in the State could receive a new sentencing hearing, simply by filing a motion for re-sentencing within one year of the date that *Aiken* was issued. The Court recognized that in most of the cases before the court, the age of the juvenile had been mentioned at sentencing; and in many cases, there had

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finding that scheme unconstitutional for juvenile homicide offenders sentenced prior to *Miller*)); (6) Missouri (*see State v. Hart*, 404 S.W.3d 232, 236-37 (MO 2013) (recognizing that prior to *Miller*, all juveniles were punished by death or life without parole)); (7) Nebraska (NEB. REV. STAT.§28-105) (all class IA felonies were punishable by mandatory sentence of life imprisonment)); (8) New Hampshire (N.H. REV. STAT. §630:1-a(III) (any person convicted of first degree murder was required to be sentenced to life imprisonment and is not eligible for parole); (9) Pennsylvania (18 Pa. C.S.A. §1102(a)(1) (only eligible sentences for first-degree murder in Pennsylvania were death or LWOP); and (10) South Dakota (Equal Justice Initiative, *South Dakota Abolishes Life Without Parole Sentences for Children* (2016) (available at https://eji.org/news/south-dakota-abolishes-juvenile-life-without-parole/) (discussing how life imprisonment was previously mandatory for juveniles convicted of certain felonies).

[5] *See* The Associated Press, "A state-by-state look at juvenile life without parole," July 31, 2017 (available at https://apnews.com/article/9debc3bdc7034ad2a68e62911fba0d 85 (last visited May 13, 2021)(noting that the following states had no juvenile serving that sentence when *Miller* was decided: (1) Alaska; (2) Maine; (3) Rhode Island; and (4) Vermont.

also been a discussion of the juvenile's life prior to the crime. *Id*. at 573-74. However, the Court also determined that none of those hearings had approached "the sort of hearing envisioned by *Miller* where the factors of youth are *carefully and thoughtfully* considered." *Id*. at 577 (emphasis added). Thus, the Court decided to give *Miller* "universal application" and held that every single juvenile who had a LWOP sentence in South Carolina was entitled to re-sentencing "to allow the inmates to present evidence specific to their attributes of youth and allow the judge to consider such evidence in light of its constitutional weight." *Id*.

Three other states, while not affirmatively declaring that all juveniles sentenced to discretionary LWOP prior to *Miller* may receive a new sentencing hearing, have nevertheless created a presumption that a discretionary LWOP sentence given to a juvenile homicide offender prior to *Miller* requires that result. For example, in *Landrum v. State*, 192 So. 3d 459 (Fla. 2016), the Florida Supreme Court reviewed a pre-*Miller* sentencing hearing that resulted in a discretionary LWOP sentence to a homicide offender who was 16 at the time of her crime. *Id*. at 467. The record clearly showed that the sentencing court was aware of her age and that her family members still considered her a child. *Id*. However, the Court also recognized that prior to *Miller*, sentencing courts had "unfettered discretion" in how to sentence a juvenile homicide offender, without understanding that LWOP sentences for juveniles should be rare, reserved only for those who are irredeemably corrupt. *Id*. at 467-69. Thus, where the trial court had not considered the distinctive youthful attributes of the juvenile, the Court granted the defendant a new sentencing hearing, while also disapproving of six Florida appellate decisions reaching a contrary result. *Id*. at 469-70.

Thus, South Carolina and Florida recognize as a matter of common sense that courts sentencing juvenile homicide offenders prior to *Miller* were not required to consider an offender's youth *and* its attendant characteristics, and thus it should be presumed that those sentencing courts did not apply that constitutional mandate, unless the record showed otherwise. Kansas and Kentucky agree. *See Williams v. State*, 476 P.3d 805 (Ct. App. Kan. 2020) (juvenile convicted of two murders and sentenced in 1999 to life with parole eligibility after 50 years entitled to a new sentencing hearing, even though defense presented evidence at sentencing regarding defendant's youth, because sentencing court was not then required to consider juvenile's diminished culpability and heightened capacity for change); *Phon v. Commonwealth*, 545 S.W.3d 284, 290-302 (Ky. 2018) (even though juvenile homicide offender presented "robust evidence" of mitigation at sentencing hearing prior to *Miller*, and even though sentencing jury had ability to consider his youthful characteristics, court determined to afford him benefit of new statute allowing for parole eligibility after 25 years).

Six other states also hinge the decision on whether to a grant a new sentencing hearing to a juvenile homicide offender sentenced to LWOP prior to *Miller* on whether the record affirmatively indicates not just that the sentencer *received* evidence on the mitigating characteristics of youth, but also *considered* that evidence in the manner now required by *Miller*. For example, in *Dennis v. State*, 796 S.E.2d 275, 276-77 (Ga. 2017), the Georgia Supreme Court held that a LWOP sentence given to a 17-year-old who pled guilty to homicide in 1998 was "void and subject to a challenge on Eighth Amendment grounds at any time," because the plea hearing did not *affirmatively* show that sentencing court examined any of the required factors under *Miller* and

Montgomery.

Idaho, Montana, New York, Oklahoma, and Oregon have taken a similar approach. *Compare Windom v. State*, 398 P.3d 150, 156-58 (Idaho 2017) (relief granted even though trial court stated it had considered youth in mitigation, because specific evidence of the required factors and characteristics of youth was not presented), with *Johnson v. State*, 395 P.3d 1246, 1258-59 (Idaho 2017) (LWOP sentence affirmed because two doctors had testified at sentencing about the developmental state of an adolescent's brain compared to an adult and on how youth are more prone to impulsivity, and because trial court spent "considerable time" discussing defendant's unique characteristics of youth before concluding, "I don't think it's a product of your age"). *See also State v. Keefe*, 478 P.3d 830, 832-33, 837 (Mont. 2021) (noting that a juvenile homicide offender had been given a new sentencing hearing because trial court had not expressly considered his youth and its attendant characteristics); *People v. Lora*, 140 N.Y.S. 3d 390, 391-96 (S.Ct. N.Y. Co. 2021) (new sentencing hearing ordered because record insufficient to conclude trial court considered the attendant characteristics of youth); *State v. Luna*, 387 P.3d 956, 961-63 (Okla. Ct. Crim. App. 2016) (new sentencing hearing ordered because no evidence presented to sentencing jury directed at the juvenile's youth and attending characteristics); *White v. Premo*, 443 P.3d 597 (Ore. 2019) (new sentencing hearing granted even though sentencing court took defendant's individual characteristics into account when imposing that sentence, because "[i]t does not appear ... 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'") (quoting *Miller*, 567 U.S. at 480).

Taking a different approach, three other states–Arizona, New Jersey, and North Carolina–focus on whether the juvenile homicide offender is ever given a chance to demonstrate maturity and rehabilitation since his crimes. For example, in Arizona, juveniles sentenced to discretionary LWOP prior to *Miller* are entitled to an evidentiary hearing and may receive sentencing relief if they show "by a preponderance of the evidence, that their crimes did not reflect irreparable corruption but instead transient immaturity." *State v. Valencia*, 386 P.3d 392, 395-96 (Ariz. 2016). The opportunity of the juvenile to present evidence of his rehabilitation is also important to New Jersey and North Carolina. *See State v. Zuber*, 152 A.3d 197 (N.J. 2017) (at new sentencing hearing, court must "view defendant as he stands before the court" and consider any rehabilitative efforts made since his original sentence); *State v. Young*, 794 S.E.2d 274, 278-80 (N.C. 2016) (LWOP sentence given to juvenile prior to *Miller*, which allowed for judicial review after 25 years, violated *Miller* because, *inter alia*, nothing in statute required court to consider evidence that defendant has matured).

By contrast, four states–Indiana, Minnesota, Utah, and Wisconsin–take the strict view that *no* discretionary LWOP sentence imposed prior to *Miller* could be unconstitutional, because the fact that the trial courts had discretion *not* to impose that sentence is all that is required, whether or not the court considered individualized characteristics of youth. *See Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012); *State v. Williams*, 862 N.W.2d 701, 703-04 (Minn. 2015); *State v. Houston*, 353 P.3d 55, 72-75 (Utah 2015); *State v. Barbeau*, 883 N.W.2d 520, ¶¶32-33, 41 (Ct. App. Wis. 2016).

The final two states–Tennessee and Illinois–do not foreclose review of discretionary LWOP sentences given to juveniles prior to *Miller* altogether. However,

they remain reluctant in granting new sentencing hearings to juveniles given those sentences compared to the other States described above. For example, in *Lee v. Phillips*, No. W2019-01634-CCA-RC-HC, 2020 WL 4745484 (Tenn. Ct. Crim. App. Jackson Co. 2020), the Tennessee appellate court noted that courts in Tennessee had "consistently" held that a discretionary LWOP sentence imposed on a juvenile prior to *Miller* could be upheld, so long as the petitioner was given a sentencing hearing where he was permitted to present evidence that emphasized his youth and immaturity, whether or not it was considered by the court.

Illinois has adopted a similar approach. As will be explained further in the next section, *infra*, the majority of the Illinois Supreme Court held that a pre-*Miller* sentencing hearing passes constitutional muster if the juvenile was given chance to present traditional evidence in mitigation and if a hindsight review reveals some evidence within the trial or sentencing record that the reviewing court can now recognize as relevant under *Miller*. *See People v. Lusby*, __ N.E.3d __, 2020 IL 124046, ¶¶36-51. Thus, in Illinois, the focus is on a backwards-looking review of the record as a whole, rather than on the actual reasoning of the court when imposing the sentence.

In short, there is widespread disparity among the states on this issue. To be sure, *Jones* held recently–when reviewing a post-*Miller* sentencing hearing–that States may make their own choices about what is required of sentencers when imposing sentence on a juvenile homicide offender, *beyond* what is required by *Miller*. *Jones*, 141 S.Ct. at 1323. However, *Jones* only gave that discretion to allow States to require "*additional* sentencing limits in cases involving defendants under 18 convicted of murder." *Id*. (emphasis added). This Court was also clear that the baseline requirement

of *Miller* and *Montgomery* is that the sentencer follow a "certain process" and "consider[] an offender's youth and attendant characteristics" before imposing a LWOP sentence. *Id*. at 1314-15.

Applying *Miller* and *Montgomery*, juveniles must be given some sort of process by which they can present and the court can consider factors related to their youth in light of what we now know based on *Miller*. Or, at the minimum, reviewing courts should *at least* look at whether the original sentencing court actually considered the district attributes of youth. The practice of Illinois and other States that does *not* require that the record show that the trial court who sentenced a juvenile homicide offender to LWOP prior to *Miller* actually considered the offender's youth and attendant characteristics fails to ensure that basic constitutional mandate.

B. Illinois's method of review does not satisfy the Eighth Amendment, and this case presents a compelling vehicle to address this issue.

As noted above, Illinois is among the harshest of the States in its treatment of juvenile homicide offenders sentenced to LWOP prior to *Miller*. To be sure, Illinois is in conformity with the majority of states who have extended *Miller* and *Montgomery* not only to *de juris* LWOP sentences, but also to *de facto* life sentences. *See People v. Reyes*, 63 N.E.3d 884, 888 (Ill. 2016) (a "term-of-years sentence that cannot be served in one lifetime has the same practical effect on a juvenile defendant's life as would an actual [ ] sentence of life without parole–in either situation, the juvenile will die in prison").[6] However, Illinois remains extreme in its review of *de juris* or *de facto* LWOP

[6] Other jurisdictions applying *Miller* to *de facto* life sentences or allowing parole eligibility or sentence modification to both *de juris* and *de facto* life sentences include: Alaska (AS §33.16.090 (eff. July 9, 2019)); California (CAL. PENAL CODE

sentences imposed on juvenile homicide offenders prior to *Miller*.

First, Illinois only recently initiated a system of parole for juvenile offenders, and it restricts eligibility to juveniles sentenced on or after June 1, 2019. *See* 730 ILCS 5/5-4.5-115(b) (eff. Jan. 1, 2020). Nor does Illinois–like Arizona, for example–afford juveniles sentenced prior to *Miller* with an evidentiary hearing to allow them a chance to show their crimes were not the product of their incorrigibility or to present evidence of their rehabilitation while in prison. *See Valencia*, 386 P.3d at 395-96. To the

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§3051; *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012)); Connecticut (CONN. GEN. STAT. 514-125a(f)(1) (eff. Oct. 1, 2015)); *Casiano v. Commr. of Corr.*, 115 A.3d 1031, 1044 (Conn. 2015)); Delaware (DEL CODE ANN. TIT. 11 §4204A(d)(1) (eff. June 4, 2013)); District of Columbia (D.C. CODE §24-403.03(a) (eff. May 10, 2019)); Florida (*Henry v. State*, 175 So.3d 675, 680 (Fla. 2015)); Idaho (*State v. Shanahan*, 442 P.3d 152, 158-61 (Idaho 2019)); Iowa (*State v. Null*, 836 N.W.2d 41, 71-73 (Iowa 2013)); Kansas (*Williams v. State*, 476 P.3d 805, 816-22 (Ct. App. Kan. 2020)); Louisiana (*State ex rel. Morgan v. State*, 217 So.3d 266, 267 (La. 2016)); Maryland (*Carter v. State*, 192 A.3d 695, 725 (Md. 2018)); Massachusetts (*Commonwealth v. LaPlante*, 123 N.E.3d 759, 763 (Mass. 2019)); Missouri (*State ex rel. Carr v. Wallace*, 527 S.W.3d 55, 56-57 (Mo. 2017)); Montana (*Steilman v. Michael*, 407 P.3d 313, 319 (Mont. 2017)); Nebraska (*State v. Smith*, 892 N.W.2d 52, 64-66 (Neb. 2017); *State v. Goynes*, 876 N.W.2d 288, 301-02 (Neb. 2016)); Nevada (NEV. REV. STAT. 213.12135 (eff. October 1, 2015)); New Hampshire (*State v. Lopez*, ___ A.3d ___, 2021 WL 1538846, **4-5) (New Hamp. April 20, 2021)); New Jersey (N.J.H.S. 2C:11-3(b)(1), (5) (eff. July 21, 2017); *State v. Zuber*, 152 A.3d 197, 212, 214 (N.J. 2017)); New Mexico (*Ira v. Janecka*, 419 P.3d 161, 163, 166 (N.M. 2018)); New York (*People v. Lora*, 140 N.Y.S. 3d 390, 393 (Sup. Ct. New York Co. 2021)); North Carolina (*State v. Kelliher*, 849 S.E.2d 333, 344-45 (N. Car. 2020)); North Dakota (N.D. CENT. CODE §12.1-32-13.1 (eff. Aug. 1, 2017)); Ohio (2019 Ohio Senate Bill No. 256, Ohio One Hundred Thirty-Third General Assembly); Oregon (*White v. Premo*, 443 P.3d 597 (Ore. 2019)); Pennsylvania (*Commonwealth v. Foust*, 180 A.3d 416, 433-34, 436 (Pa. Super. Ct. 2018)); (Virginia (VA CODE ANN. §53.1-165.1(E) (eff. July 1, 2020)); Washington (*State v. Delbosque*, 456 P.3d 806, 812 (Wash. 2020)); and Wyoming (*Bear Cloud v. State*, 334 P.3d 132, 141-42 (Wyo. 2014)). This issue is also currently pending in the Tennessee Supreme Court. *See State v. Booker*, No. E2018-01439-CCA-R3-CD, 2020 WL 1697367 (Tenn. Ct. App. 2020) (leave to appeal granted September 16, 2020).

contrary, the Illinois Supreme Court has specifically held that any evidence of the defendant's good conduct and rehabilitation while in prison "cannot undercut" any prior finding by the sentencing court that the juvenile could *not* be rehabilitated. *See People v. Holman*, 91 N.E.3d 849, 64 (Ill. 2017). Thus, by only offering parole eligibility to *future* juvenile homicide offenders, the Illinois legislature placed a high duty on Illinois's judiciary to make sure juveniles sentenced prior to June 1, 2019, received an adequate individualized sentencing hearing where the unique aspects of their youth were considered. *See Lusby*, 2020 IL 124046, ¶135 (Neville, J., dissenting).

Illinois's judiciary has failed in that duty. In fact, the Illinois Supreme Court gives *less* scrutiny and *more* deference to sentencing courts who imposed a *de juris* or *de facto* LWOP sentence *prior* to *Miller*. Specifically, trial courts imposing a LWOP sentence on a juvenile *after Miller* "must *consider specifically* the characteristics mentioned by the Supreme Court" in *Miller*. *Holman*, 91 N.E.3d at 862-64 (emphasis added). By contrast, if the same sentence was imposed on a juvenile homicide offender *prior to Miller*, it will be affirmed as long as it appears the trial court heard "some evidence *related to* the *Miller* factors. " *Lusby*, 2020 IL 124046, ¶40 (emphasis added). The Court has also required that the record show the trial court *considered* that evidence. *Id.* However, that determination is not made by reviewing the trial court's actual reasoning at sentencing. Instead, the reviewing court may *presume* the trial court considered the *Miller* factors properly for juveniles sentenced before *Miller*, if after searching in hindsight, the reviewing court can point to some evidence purportedly related to youth in the record, either at trial or sentencing. *Id.* at ¶¶36-52.

Specifically, in the case presently before this Court, Ashanti Lusby was 16 years

old at the time of his crimes. (C. 42) He was convicted of first-degree murder, aggravated criminal sexual assault, and home invasion, and was sentenced to an aggregate term of 130 years in prison. (R. 855) Lusby is eligible for good-time credit against his sentence, allowing for his earliest possible date of release after 65 years, or in 2066, when he would be 87 years old, a term that exceeds his life expectancy.[7] *See People v. Reedy,* 708 N.E.2d 1114, 1121-22 (Ill. 1999) (defendants sentenced in Illinois prior to June 19, 1998, are eligible for good-time credit against their sentences). Thus, Lusby's sentence is recognized in Illinois as a *de facto* life sentence to which *Miller* applies. *See People v. Buffer*, 137 N.E.3d 763, 774 (Ill. 2019) (any prison sentence greater than 40 years is a *de facto* life sentence in Illinois).

However, at the time of Lusby's *pre-Miller* sentencing hearing, which occurred in 2002, consideration of the role that Lusby's youth played in his crimes was so trivial that his age was not even correctly identified by his attorney, who asserted incorrectly that Lusby had been 17 years old on the date of the events. (R. 851) Moreover, the only evidence offered at sentencing consisted of a sparse pre-sentence investigation report ("PSI") that contained virtually no details about Lusby's background. Regarding his personal history, it simply listed the ages and addresses of his parents and siblings,

[7] Lusby was born on April 11, 1979. (C. 42-46) According to the Center for Disease Control, a Black male born in 1980 has a life expectancy of 63.8 years at birth. If he lives to be 65, he can be expected to live until he is 78 years old. If he lives until 75, he can be expected to live until he is 83 years old. *See* Table 22, *Life Expectancy at birth, at 65 years of age, and at 75 years of age, by race and sex: United States, selected years 1900-2007* (https://www.cdc.gov/nchs/data/hus/2010/022.pdf) (last visited May 17, 2021). *See also People v. Sanders*, 56 N.E.3d 563, 587 (Ill. Ct. App. 2016) (noting that a United States Sentencing Commission Preliminary Report indicated that a person held in a general prison population has a life expectancy of about 64 years).

named certain criminal offenses committed by his sisters, and indicated that the probation department was unable to verify his relationship with his parents. (C. 48) Elsewhere, it merely named the different locations where Lusby had lived, his children, the schools he had attended, a company where he was briefly employed, and his prior convictions. (C. 49-51) It also noted without further description that Lusby had used drugs in the past and enjoyed spending time with his children and family. (C. 49-51) This report offered no significant substantive details about Lusby's life and character.

Moreover, absolutely no evidence or argument was presented at sentencing regarding how Lusby's youth may have impacted his crimes, or any evidence regarding his background and rehabilitative potential. Aside from misstating Lusby's age at the time of the events, sentencing counsel merely asserted generally that "nobody is of the same person forever [*sic*]," and requested that the court "exercise reason, your conscience, your experience in setting an appropriate sentence." (R. 851-52)

By contrast, the prosecutor argued Lusby's youth as *aggravating*, claiming that Lusby had already "shown us what he can do at a young age." (R. 846-47) The prosecutor told the court it *had* to consider that "the younger part of his life is an indication of what this guy's potential is," and it demonstrated "he will continue to be dangerous well into his senior citizen years." (R. 846-47)

The record also affirmatively shows that the trial court did not view Lusby's youth as mitigating. The first remarks made by the court when imposing sentence were that the facts of this case "could be considered capital punishment activities," but the court was prohibited from imposing that sentence due to Lusby's age. (R. 853) The court then stated that, still, it could not ignore the "depraved act" committed against

the Jennifer Happ, and said "it is very difficult for me to consider any leniency in this case." (R. 853-54) Under *Miller* and *Montgomery*, courts imposing a sentence on a juvenile homicide offender must now operate with an eye *toward* leniency, unless the evidence shows the juvenile is among the rarest of juveniles who is forever corrupt. *See Miller*, 567 U.S. at 480 ("although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel *against* irrevocably sentencing them to a lifetime in prison")(emphasis added). Yet here the trial court started with the premise that it *would* impose the maximum available sentence, which required Lusby to die in prison, unless it were to exercise leniency.

Nor did the trial court's reasoning when imposing sentence ever take into account the characteristics of youth noted in *Miller*. Instead, the court found that *no* mitigating factors existed and specifically discounted Lusby's youth as mitigating, asserting:

> This is a choice that you made at a young age and I know that choices, youthful choices can be – are not, you know, sometimes are sometimes in very poor judgment [*sic*], but this is not one that can be taken back, and this is not one that can be considered minor, and this is not one that can be considered for anything but setting your future in the Department of Corrections. (R. 854-55)

Stating that Lusby "chose" his life, which involved carrying weapons and "showing no respect for human life," the court expressed, "I am not at all uncomfortable in imposing the maximum sentence ... ." (R. 855)

In short, a *de facto* LWOP sentence was imposed on Lusby–a 16-year old offender–without any hesitation or discomfort from the trial court; without any accurate knowledge from Lusby's own attorney as to his age at the time of the offense;

and without the trial court ever considering how children are different from adults or the unique attributes of Lusby's own youth. Even in Illinois, if this sentence had been imposed after *Miller*, it could not stand. *See Holman*, 91 N.E.3d at 862-64 (trial courts imposing a *de juris* or *de facto* life sentence on a juvenile *after Miller* "must *consider specifically* the characteristics mentioned by the Supreme Court" in *Miller*).

Indeed, the dissent in Lusby's case believed Lusby should receive a new sentencing hearing because "the record clearly shows that the trial court did not consider the attendant characteristics of youth." *Lusby*, 2020 IL 124046, ¶83 (Neville, J., dissenting). Yet the majority rejected the straightforward analysis of the dissent and instead required that Illinois courts perform a tortured analysis when reviewing pre-*Miller* sentencing hearings. Specifically, rather than looking at the actual reasoning of the sentencing court, the majority reviewed the four corners of the record. Then, relying on its own knowledge of *Miller*, the majority was able to spot some basic facts related to Lusby's youth as having been presented either at trial or sentencing, and then effectively presumed that the sentencing court considered that evidence properly, even without the benefit of *Miller*. *Lusby*, 2020 IL 124046, ¶¶36-52. The majority also found it enough that Lusby was given a chance to offer evidence in mitigation. *Id*. This deferential hindsight analysis fails to ensure the constitutionality of LWOP sentences imposed on Illinois juveniles prior to *Miller*, for several reasons.

1. The majority's hindsight analysis requires an incomplete and inaccurate assessment of the *Miller* factors.

First, like any decision where a reviewing court resolves an issue on appeal never briefed by the parties or the trial court below, this method of analysis allows a court of review that was in no way related to the trial or sentencing proceedings to

make conclusions about the juvenile's youth that the juvenile was never given a chance to develop and address. For example, the majority here determined that sufficient evidence existed in the record addressing Lusby's age and maturity level because the record showed, first, that"[t]he defendant was 16 when he murdered Happ." *Lusby*, 2020 IL 124046, ¶38.

However, as noted above, Lusby's own attorney misreported at sentencing that Lusby was 17 at that time. (R. 851) Moreover, the only consideration actually given by the sentencing court as to how Lusby's youth may have impacted his crimes involved the court's assertion that *sometimes* youthful choices could be made in poor judgment, but the court refused to consider whether poor juvenile judgment impacted Lusby's actions, simply because those actions could not be taken back. (R. 854) Yet the poor judgment that is characteristic of a juvenile does not become less mitigating simply because it cannot be taken back. *All* juveniles facing the possibility of a *de juris* or *de facto* life sentence will have committed a horrific crime that cannot be taken back. The central premise of *Miller*, though, is that even children who commit "heinous crime" are capable of change. *Montgomery*, 577 U.S. at 212. Thus, rather than focusing on the *effect* of Lusby's crime, the sentencing court was required to consider how that poor judgment was a distinct and transient characteristic of youth that mitigated his culpability for these events. *See Miller*, 567 U.S. at 471. The record clearly shows that the sentencing court did not do so.

Also unaddressed either by the sentencing court or the majority of the Illinois Supreme Court is that additional evidence in the record tends to *support* Lusby's immaturity at the time of this offense. For example, Lusby's PSI indicates he was

expelled from school in 10th grade, a year before the charged events. (C. 49; R. 507, 524) Thus, when Lusby committed these offenses, he had long been without the daily structure provided by a school. The absence of such structure–including positive role models like teachers, counselors, and fellow students–likely affected his maturity level and impacted his judgment and the choices he made.

The evidence at trial also did not show that any level of planning went into the charged events, allowing for the possibility that Lusby's actions were the result of impulsive decision-making. Specifically, the State's evidence showed Lusby and his friends had been watching a pornographic film that night. (R. 337-48) After watching the film, the three young men left the house for only about 30 to 45 minutes before returning, at which time they all seemed nervous and excited. (R. 347-51, 354, 378) Thus, this series of events began after a group of teens watched pornography, ended less than an hour later with all these young men appearing nervous, and involving a sex crime in addition to homicide. This series of events tends to support that these actions were impulsive and not well thought-through. *See also In re J.B.*, 107 A.3d 1, 17-18 (Penn. 2014) ("studies suggest that many of those who commit sexual offenses as juveniles do so as a result of impulsivity and sexual curiosity, which diminish with rehabilitation and general maturation").

As another example, the majority determined that sufficient evidence had been presented from which the sentencing court could have assessed Lusby's background and home environment because evidence at trial showed Lusby lived with his mother and two sisters, and because the PSI prepared for sentencing indicated that Lusby reported that he had good relationships with both parents and they visited him in jail.

Lusby, 2020 IL 124046, ¶¶40-41. Yet the majority overlooked that the probation officer specifically rebutted Lusby's assertion that his father had visited him in jail. (C. 48) It is also now known that growing up in a home without a father can be a significant contributor to violence committed by a juvenile. *See Miller*, 567 U.S. at 479-80; Jennifer Schwartz, *The Effect of Father Absence and Father Alternatives on Female and Male Rates of Violence*, Report to the U.S. Department of Justice (July 2004) (available at http://www.ncjrs.gov/pdffiles1/nij/grants/206316.pdf (last visited May 17, 2021) (documenting studies showing that "[f]ather absence as a predictor of violence is extremely robust for both female and male violence"). Yet no evidence was presented at trial or sentencing on the details of Lusby's childhood and adolescence, or on how the absence of his father had impacted his life. Thus, the majority's ability to point to minimal facts in the record related to Lusby's background was no substitute for the sentencing court's actual consideration of Lusby's home environment before sentencing Lusby to prison for the rest of his life.

The incomplete nature of the majority's hindsight review to address how the transient characteristics of Lusby's youth impacted his actions in this case is further evidenced by how the majority noted that there had been no evidence offered at trial or sentencing that anyone except Lusby was responsible for Happ's murder, and that there was also "no evidence" that peer pressure led Lusby to kill Happ. *Lusby*, 2020 IL 124046, ¶43. However, as the majority acknowledged in its statement of facts, but excluded from its substantive analysis, the State's evidence *did* show at least that two other young man were with Lusby on the night of Happ's death, as noted above. Certainly, none of the evidence at trial or sentencing showed what these other two

young men were doing when Happ was killed. But that serves only as another reason why Lusby's pre-*Miller* sentencing hearing did not comport with *Miller*. Pursuant to *Miller*, sentencing courts must now consider, *inter alia*, that juveniles are vulnerable to negative influences and pressure from their peers. *See Miller*, 567 U.S. at 471. Whether or not those two young men were involved in the crimes, Lusby was still prone as a 16-year-old to act impulsively simply by being present with his peers, without thinking enough about Happ or the consequences of his actions. *See* Vivian E. Hamilton, *Immature Citizens and the State*, 2010 B.Y.U. L. Rev. 1055, 1110 (2010) (the lack of maturity and foresight inherent in all juveniles can be exacerbated by circumstances requiring decisions "in the heat of passion, in the presence of peers, on the spur of the moment, in unfamiliar situations ... [and] when behavior inhibition is required for good outcomes").

It is also now known that any negative influences surrounding Lusby would play a role in his overall development and behavior, whether or not anyone specifically "led" him to commit a crime. *See Miller*, 567 U.S. at 472 ("numerous studies post-*Graham* indicate that exposure to deviant peers leads to increased deviant behavior and is a consistent predictor of adolescent delinquency"). Here, Lusby was expelled from school due to gang-banging (C. 49), and there was no indication that his father ever played any significant role in his life. Lusby's PSI also showed that his sisters had also been involved in crime. As noted by the dissent below, that factor suggested Lusby's parents had not been able to properly raise Lusby and his siblings. *See Lusby*, 2020 IL 124045, ¶90 (Neville, J., dissenting). The fact that Lusby had joined a gang at a young age is a further signal of the crime-producing environment in which he was raised. (C. 49) *See*

Youth Gangs: An Overview, "Why Do Youth Join Gangs?"; Juvenile Justice Bulletin, August 1998 (available at https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/jjbulletin/9808/why.html) (young males who live in poor neighborhoods and reside in poor family structures are at a very high risk for gang involvement). But, again, nothing about Lusby's background–or his inability to extricate himself from those surroundings as a 16-year-old–was considered by the court before sentencing Lusby to die in prison. Ultimately, this record gives no indication that Lusby had *any* positive influences in this life, at the same time it does suggest substantial *negative* influences. A proper *Miller* hearing would take into account this evidence, unlike the hearing received by Lusby prior to *Miller*. *See Miller*, 567 U.S. at 477 (trial court must consider the environment in which juvenile was raised).

The majority also noted that sufficient information existed for the trial court to address Lusby's prospects toward rehabilitation because the PSI listed Lusby's criminal history and the State argued at sentencing that Lusby would continue to be dangerous as an adult. *Lusby*, 2020 IL 124046, ¶¶47-52. However, as noted above, the prosecutor's argument that the crimes committed by Lusby as a youth constituted proof that he would grow to become even more dangerous as an adult was precisely the type of pre-*Miller* perception that is no longer true. *See Miller*, 567 U.S. at 472 ("as the years go by and neurological development occurs, [the juvenile offender's] 'deficiencies will be reformed'") (*quoting Graham v. Florida*, 560 U.S. 48, 68 (2010)).

Moreover, neither Lusby's crimes in this case nor the additional crimes he committed as a juvenile or young adult prove he is incorrigible. At sentencing, the trial court determined that Lusby's actions in this case had been brutal. (R. 853-55)

However, "the gruesomeness of a crime is not sufficient to demonstrate that a juvenile offender is beyond redemption." *Adams v. Alabama*, 136 S.Ct. 1796, 1799 (Mem) (2016) (Sotomayor, J., dissenting). At a proper *Miller* hearing, the sentencing court would have been required to consider the circumstances of the crime alongside individualized characteristics of Lusby's youth. *See Miller*, 567 U.S. at 476. As explained above, there are significant details about Lusby's life, as well as the circumstances of this crime, that suggest his youth very well may have played a role.

Similarly, Lusby's other crimes occurred when he was a juvenile, or before or when he was 22 years old. An emerging consensus exists that the brains of young adults continue to develop into their mid-20s. *See* Ruben C. Gur, *Declaration of Ruben C. Gur, Ph.D., Patterson v. Texas, Petition for Writ of Certiorari to the United States Supreme Court* (2002) ("[t]he evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable."); Andrea MacIver, *The Clash Between Science and the Law*, 35 Northern Illinois Law Review, 15-24 (Fall 2014) ("New science shows the brain continues to develop until one's early twenties.").

Moreover, aside from being adjudicated delinquent as a juvenile for aggravated discharge of a firearm, the only violent crime in Lusby's history was an aggravated battery conviction occurring shortly after he was placed in custody for this offenses charged in this case. (C. 47; R. 819-30) When Lusby spoke about that event in allocution, he stated, "[t]he fight in the jail, you know, I fight, we have problems. I-I been a little rough around the edges." (R. 852) Thus, he acknowledged his actions,

while also alluding to the violent jail setting in which that occurred. "Entering prison at a young age is particularly dangerous," since "[y]outh incarcerated in adult prisons are five times more likely to be victims of sexual or physical assault than are adults." *Sanders*, 56 N.E.3d at 587 (collecting studies). Thus, there are alterative explanations for Lusby's behavior in jail and the other crimes he committed as a youth which could be explored at a re-sentencing hearing, not necessarily reflective of his incorrigibility. Ultimately, even when a young offender engages in an "escalating pattern of criminal conduct," it simply does not follow "that he would be a risk to society for the rest of his life." *Graham*, 500 U.S. at 73.

Moreover, as noted by the dissent, the sentencing court ignored evidence in the record that tended to *support* that Lusby had rehabilitative potential, or at least precluded any conclusion that he was incorrigible. *Lusby*, 2020 IL 124042, ¶95 (Neville, J., dissenting). Specifically, the probation officer who met with Lusby personally prior to sentencing concluded that Lusby "may benefit from counseling to control his violent tendencies." (C. 52) At the time of Lusby's sentencing hearing, this finding likely had little impact on the court. However, now this type of evidence is among the most important considerations before sentencing a juvenile to die in prison. *See Montgomery*, 577 U.S. at 208 (sentencing a juvenile offender to life in prison is unconstitutional for all but the rare juvenile offender who is incapable of ever achieving rehabilitation); *Jones*, 141 S.Ct. at 1317-18 (though no specific finding of incorrigibility is required, *Montgomery* was still "clear" in holding that a "'hearing where youth and its attendant characteristics are considered as sentencing factors is necessary *to separate those juveniles who may be sentenced to life without parole from*

those who may not'") (*quoting Montgomery*, 577 U.S. at 210) (emphasis added). Again, the majority's hindsight review of what attributes of youth *might* have been considered by the sentencing court is no replacement for a review of whether the record actually shows the trial court considered youth properly.

In short, if provided with a chance for a full and fair sentencing hearing where the attributes of Lusby's youth are properly considered, Lusby may very well be able to demonstrate that he is not one of the rare juvenile offenders whose crimes as a juvenile show him to be irredeemably corrupt. The majority's focus only on what evidence already existed in the record about the youth of a juvenile sentenced prior to *Miller*, without any consideration of what is missing from the record on that issue or what could be developed in light of what we now know, clearly fails to ensure that LWOP sentences imposed on juveniles in Illinois prior to *Miller* satisfy the Eighth Amendment.

2. The majority's analysis rests on an improper presumption that sentencing courts knew how to view the attributes of youth properly, even before *Miller*.

The method of review set forth by the majority also rests entirely on a *presumption* that the sentencing court at a pre-*Miller* sentencing hearing knew how to view evidence regarding a juvenile's youth properly and actually did so, even without the benefit of *Miller*. Such a presumption may be fair when reviewing sentencing hearings occurring *after Miller*. *See Jones*, 141 S.Ct. at 1318 (finding, when analyzing a *post-Miller* sentencing hearing, that trial courts tasked with sentencing a juvenile homicide offender will consider the attendant characteristics of youth, given discretion to do so). However, South Carolina, Florida, Kansas, Kentucky, Georgia,

Idaho, Montana, New York, Oklahoma, and Oregon have explicitly or implicitly realized, it is entirely unreasonable to presume that a sentencing court complied with the procedural requirements of *Miller* prior to that decision, unless the record proves that fact to be true. *See Aiken*, 765 N.E.2d at 578; *Landrum*, 192 So. 3d at 467-70; *Williams*, 476 P.3d at 805; *Phon*, 545 S.W.3d at 290-302; *Windom*, 398 P.3d at 156-58; *Keefe*, 478 P.3d at 832-37; *Lora*, 140 N.Y.S.3d at 391-96; *Luna*, 387 P.3d at 961-63; and *White*, 443 P.3d at 597.

Looking at this case, it was not until a full decade after the court imposed a 130-year sentence on Lusby, in 2002, that this Court held in *Miller* that sentencing courts must not only consider *mitigating evidence* before sentencing a child to die in prison, but must also consider a child's "diminished culpability and heightened capacity for change." 567 U.S. at 479. Indeed, it was not even until 2005–three years after Lusby was sentenced–that this Court held in *Roper v. Simmons*, 543 U.S. 551, 575 (2005), that the Eighth Amendment categorically barred the death penalty for crimes committed by juveniles under the age of 18, and established for the first time "that children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471. *Compare Adams,* 136 S.Ct. at 1800-01 (Sotomayor, J., concurring) (noting how, at sentencing hearings occurring prior to *Miller*, "youth was just one consideration among many," but that "after *Miller* we know that youth is the dispositive consideration").

In fact, at the time of Lusby's sentencing hearing in 2002, youth was often viewed as *aggravating*. *See Roper*, 543 U.S. at 558 (prosecutor argued when requesting death for a juvenile homicide offender, "Age, he says. Think about age. Seventeen years

old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary."); *Graham v. Collins*, 506 U.S. 461, 519 (1993) (Souter, J., dissenting) ("It is no answer to say youth is fleeting; it may not be fleeting enough, and a sufficiently young defendant may have his continuing youth considered ... as aggravating, not mitigating"). As quoted earlier, *supra*, the argument made by the prosecutor in *Roper* strongly resembles the argument made by the prosecutor in Lusby's case, when telling the court that it *had* to consider the fact that Lusby had committed crimes as a youth as evidence that Lusby would continue to be dangerous even as a "senior citizen." (R. 845-46) Moreover, Lusby's sentencing court was apparently moved by the prosecutor's remarks, because in the very same breath where it acknowledged Lusby's young age, it also stated that *no* mitigating factors existed. (R. 854)

Given the dramatic sea change in how juvenile crime was viewed before and after *Roper*, *Graham*, and *Miller*, unless the record affirmatively shows a sentencing court actually considered the unique attributes of youth when imposing a LWOP sentence, it is absurd to presume in any case that a court sentencing a juvenile prior to these decisions properly considered any age-related facts that had been casually mentioned, but not developed, at trial or sentencing. Moreover, given the manner in which Lusby's own youth was argued as aggravating and explicitly rejected by the sentencing court as mitigating, applying that presumption here was a work of fiction.

3. The mere fact that a juvenile homicide offender had the opportunity to present traditional evidence in mitigation is not enough to satisfy *Miller*.

Finally, the majority's reasoning was also flawed in its conclusion that the mere

fact that Lusby was given the opportunity to present evidence *in mitigation* was enough to show his sentencing hearing complied with *Miller*. *See Lusby*, 2020 IL 124046, ¶52; *accord Holman*, 91 N.E.3d at 864-65. *Miller* does not require merely that juvenile homicide offenders be given an opportunity to present mitigating evidence before being sentenced to die in prison. Instead, these offenders "must be given the opportunity to show their crime did not reflect irreparable corruption … ." *Montgomery*, 577 U.S. at 212. *See also Miller*, 567 U.S. at 479-80 (sentencer must distinguish between juvenile offenders whose crimes reflect unfortunate yet transient immaturity, and the rare juvenile offenders whose crimes reflect irreparable corruption) (*aff'd* in *Jones*, 141 S.Ct. at 1317-18). Moreover, since there was no case law at the time Lusby was sentenced on which he could rely to assert that his youth rendered him categorically less culpable than an adult, and that the most important fact was his corrigiblity, he could not have been expected to include evidence relating to the transient characteristics of his youth in mitigation, let alone convince the court that this type of evidence mattered.

4. Conclusion

Illinois's process of determining whether a LWOP sentence imposed on a juvenile homicide offender prior to *Miller* comports with the Eighth Amendment should be reviewed. The sentencing court in this case expressly declined to find Lusby's youth as mitigating and never considered how the specific attributes of how Lusby's youth impacted his crimes. Moreover, as even a cursory review of the record shows, providing Lusby with a *Miller*-compliant sentencing hearing where his youth is properly considered may very well show that he is not the rare juvenile offender who is

irredeemably corrupt.

As explained in Section A, *supra,* a majority of states have determined that the focus when reviewing pre-*Miller* sentencing hearings must be on whether the record explicitly shows the sentencer properly considered the distinct attributes of youth. Thus, clearly, this method of review has not presented an onerous burden on the states, or resulted in a waste of judicial resources. Yet the tortured hindsight analysis adopted by the majority of the Illinois Supreme Court fails to ensure that LWOP sentences given to juveniles in Illinois prior to *Miller* satisfy the Eighth Amendment. Moreover, Lusby's own *de facto* life sentence, imposed prior to *Miller* without a proper consideration of his youth, is unconstitutional. Thus, this Court should grant review of the Illinois Supreme Court's decision in this case.

CONCLUSION

For the foregoing reasons, Petitioner Ashanti Lusby respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Supreme Court.

Respectfully submitted,

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