No. __________

IN THE SUPREME COURT OF THE UNITED STATES

GREGORY NIDEZ VALENCIA and JOEY LEE HEALER,

Petitioners,

vs.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After this Court decided *Montgomery v. Louisiana*, 577 U.S. __, 136 S. Ct. 718 (2016), the Arizona Court of Appeals agreed that Petitioners' sentences did not comport with the requirements of this Court's decisions in *Miller* and *Montgomery* and ordered resentencings. Although the Arizona Supreme Court agreed that Petitioners were not sentenced in accordance with *Miller* and *Montgomery*, it instead ordered further post-conviction proceedings at which Petitioners must prove, to be entitled to relief, that their crimes did not reflect irreparable corruption but instead transient immaturity.

The questions presented are:

1. Does the Eighth Amendment require a categorical ban on life-without-possibility-of-parole (LWOP) sentences for juveniles?

2. If LWOP for juveniles is constitutionally permissible under certain circumstances, may a court place the burden on the child to establish that he is not one of the "rare" juvenile offenders for whom the sentence is constitutionally appropriate?

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PETITION FOR WRIT OF CERTIORARI

Gregory Nidez Valencia and Joey Lee Healer respectfully petition for a writ of certiorari to review the Arizona Supreme Court's opinion dated December 23, 2016, which held that rather than being entitled to resentencing hearings, juveniles sentenced to life without possibility of parole (hereinafter "LWOP") in violation of *Miller v. Alabama,* 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. __, 136 S. Ct. 718 (2016), were entitled only to post-conviction hearings at which they could attempt to prove that they were entitled to resentencing hearings.

For the reasons stated herein, this case raises an important federal constitutional question upon which courts nationwide are intractably divided. This Court should consider whether the time has come to abolish LWOP for juveniles. As an alternative, this Court should hold that, before a court may impose a sentence of LWOP (or "natural life" as it is called in Arizona, *see generally* Ariz. Rev. Stat. § 13-752) on a child, the government must bear the burden of establishing that the sentence is constitutionally permissible. For the reasons explained herein, this Court should grant the writ and resolve these important and recurring issues.

OPINIONS BELOW

The Arizona Court of Appeals' opinion (hereinafter "*Valencia I*") dated March 28, 2016, is reported at 370 P.3d 124 (Ariz. Ct. App. 2016). Appendix Exhibit 1. The Arizona Supreme Court's opinion (hereinafter "*Valencia II*") dated December 23, 2016, is reported at 386 P.3d 392 (Ariz. 2016). Exhibit 2.

STATEMENT OF JURISDICTION

The Arizona Court of Appeals, Division Two, entered its judgment on March 28, 2016. Exhibit 1. The Arizona Supreme Court entered its judgment on December 23, 2016. Exhibit 2. The Arizona Supreme Court denied timely motions for reconsideration on February 2, 2017. Exhibits 3, 4, 5. The issues raised herein were raised before the Arizona courts as issues of federal constitutional law. Exhibits 1, 2. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides as follows:

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

Section One of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. 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

Valencia

On October 4, 1995, Gregory Valencia and his friend Ronnie Vera went to a condominium complex in southwest Tucson in the evening and Ronnie stole a bicycle. They remained in the complex looking for another bicycle. A homeowner thought he heard his patio gate rattle. When he went out to investigate, he discovered the boys in the courtyard. Believing they were up to something, he questioned them about their purpose for being in the complex. When they responded they were looking for a friend, the homeowner told the boys to come with him so he could call the police for them to explain their story. When the boys refused and began to leave the complex, the homeowner went back inside to put on his shoes and then ran back out and chased the boys. One of the boys pulled a gun

and shot the homeowner. Valencia and Vera were subsequently arrested and each claimed the other shot the victim. Appendix 80, 87, 89-90.

Both boys were charged with two counts of burglary and one count of first-degree murder.[1] The defendants were tried separately. Valencia's jury convicted him of all three counts.[2] At sentencing, the prosecutor argued to the court that "young people like [Valencia] leave us no alternative" but to impose a sentence of natural life, which, "quite frankly, is probably the light end of what he should get..." Appendix 58-59. The prosecutor later said that "what the law talks about is finding a causal connection between the age and conduct, was the person so immature as a result of their youth that they couldn't appreciate what they were doing." Appendix 71.

The court considered in mitigation that Valencia had just turned seventeen years of age at the time of the offense, the brevity of his

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[1] Ariz. Rev. Stat. § 13-1105(A)(2) allows a person to be convicted of felony murder if he commits an enumerated offense (including any burglary) and, "in the course of and in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person."

[2] The Arizona Court of Appeals overturned Valencia's conviction for the first burglary for insufficient evidence. Appendix 88.

involvement in the criminal justice system, and that he was taking courses and made other rehabilitative efforts in jail. In aggravation, the court found that Valencia brought the gun and was the shooter, that the offense involved an accomplice, the senselessness of the shooting, the emotional harm to the victim's family, and his failure to rehabilitate in the juvenile court system. The court then imposed a sentence of life without any possibility of release during his natural life. Appendix 73-75.

Healer

On November 17, 1994, Healer was arrested after driving a stolen truck, leading Tucson Police Department officers on a high-speed chase that ended with crashing the truck, and attempting to flee on foot. Nearly two weeks later, the owner of the vehicle was found dead in his home. The victim was shot through his eye socket and his eyeglasses had a corresponding hole through the right lens.

One of Healer's friends informed the Sheriff's department that on November 17, Healer had asked to borrow the friend's .22 caliber sawed-off rifle, saying that he needed it to get some money and a vehicle to leave the state. The friend provided the gun, which had one round in the

chamber. Subsequently, Healer returned the gun; he was driving a truck and in possession of two $100 bills and also said he had shot someone in the eye. Appendix 145-146.

Healer was charged with and tried for first-degree murder and other offenses. After a jury found him guilty of felony murder, Healer was advised by counsel not to make any statements about the offense. While remaining silent about the offense, Healer did express remorse for the victims and for the family of the deceased. Appendix 146-147.

Healer's social history report notes that he had problems in school after moving to Nevada at age 5, and those problems persisted throughout his life. After moving to Tucson prior to sixth grade, he accumulated numerous disciplinary referrals and was enrolled in alternative educational plans. He joined a street gang, but after his family moved he stopped associating with the gang. Healer told the presentence investigator that he had a volatile relationship with his mother, and that at the time of his arrest, he was high and he had experimented with LSD and cocaine in addition to abusing alcohol and marijuana. Appendix 147-148.

The presentence investigator offered aggravating and mitigating

factors for the court to consider at sentencing. For the most part these factors were adopted by the trial court at sentencing. Appendix 133, 149-150. The prosecutor told the sentencing court that "it used to be we would look at youth as a mitigating factor almost automatically, we ought not do that any more, Judge." Appendix 113. He made several representations about Healer that defense counsel later disputed. Appendix 115. The sentencing transcript reflects that the court found, "by way of mitigating factors, the defendant's age and his family support," with no further elaboration. Appendix 133, 150. The court did say that the offense "was caused by peer pressure." Appendix 134.

Post-Conviction Proceedings

After this Court decided *Miller v. Alabama*, 567 U.S. 460 (2012), Valencia and Healer filed notices of post-conviction relief to initiate collateral proceedings in 2013. Their respective petitions for post-conviction relief were denied in 2015,[3] and when each petitioned the Arizona Court of Appeals for review, that court consolidated the cases. *Valencia I*, 370 P.3d at 125-26. While those petitions were pending in the

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[3] Both sentencing judges had retired by this point.

Arizona Court of Appeals, this Court accepted review in *Montgomery*, and the Court of Appeals stayed proceedings until *Montgomery* was decided on January 25, 2016, at which time the court ordered the parties to provide supplemental briefing. *Id.* at 126.

The Arizona Court of Appeals granted relief to both Petitioners and ordered they be resentenced. Noting "that the core issue presented in *Miller* concerned the mandatory imposition of a natural-life sentence," the court determined that "there is no question that the rule in *Miller* as broadened in *Montgomery* renders a natural-life sentence constitutionally impermissible, notwithstanding the sentencing court's discretion to impose a lesser term, unless the court takes into account 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Valencia I*, 370 P.3d at 127 (internal quotations omitted, alteration in original). Because the government "d[id] not argue that the facts presented at Valencia's and Healer's respective sentencing hearings would require, or even support, a finding that their crimes reflect permanent incorrigibility," their sentences violated the Eighth Amendment and they were entitled to be resentenced. *Id.* at 127-28.

Arizona appealed this ruling to the Arizona Supreme Court. That court granted review and vacated the opinion of the Court of Appeals. While rejecting Arizona's argument that neither *Miller* nor *Montgomery* had any effect on petitioners' cases, the court merely stated that "Healer and Valencia are entitled to evidentiary hearings" at which "they will have an opportunity to establish, by a preponderance of the evidence, that their crimes did not reflect irreparable corruption but instead transient immaturity," and only if they meet that burden will they be entitled to a resentencing hearing that comports with *Miller*. *Valencia II*, 386 P.3d at 396.

Both Valencia and Healer filed motions for reconsideration, arguing that the constitutional violation occurred at the time of their respective sentencings twenty years earlier, and thus the only proper remedy was a resentencing. They also argued that the burden of proof must be on the government and not on themselves, because the only facts they needed to prove in order to obtain post-conviction relief were that they were under age eighteen at the times of their crimes and that the sentencing courts did not consider the *Miller* factors. The court denied the motions without comment.

REASONS FOR GRANTING THE WRIT

I. This Court Should Now Hold that Imposing a Sentence of Life Without Possibility of Parole (LWOP) on Juveniles Violates the Eighth Amendment.

The Eighth Amendment prohibits "cruel and unusual punishments," and "reaffirms the duty of the government to respect the dignity of all persons." *Hall v. Florida*, 572 U.S. __, 134 S. Ct. 1986, 1992-93 (2014) (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005)). "To enforce the Constitution's protection of human dignity," courts "loo[k] to the evolving standards of decency that mark the progress of a maturing society," recognizing that "[t]he Eighth Amendment is not fastened to the obsolete." *Hall*, 134 S. Ct. at 1992 (internal quotation marks omitted). "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.'" *Kennedy v. Louisiana*, 544 U.S. 407 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting)).

In cases adopting categorical rules, this Court first considers "objective indicia of society's standards, as expressed in legislative

enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. *Roper,* 543 U.S. at 572. Next, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose," *Kennedy*, 544 U.S. at 129, the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution. *Roper,* 543 U.S. at 572. The present case involves a categorical challenge to LWOP sentences for murder convictions for a class of offenders—juveniles.

A. Consistent Legislative Change Shows that Standards Have Evolved.

The analysis begins with objective indicia of national consensus. "[T]he 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" *Atkins v. Virginia,* 536 U.S. 304, 312 (2002) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)). In discerning national consensus, this Court has always based its Eighth Amendment analysis on state legislative judgments, as these judgments reflect the moral values of the American people, *Gregg v. Georgia*, 428 U.S. 153, 175 (1976). This practice also gives deference to

the state legislatures under our federal system. *Roper*, 543 U.S. at 564. As Chief Justice Roberts has explained:

> This Court's precedents have emphasized the importance of state legislative judgments in giving content to the Eighth Amendment ban on cruel and unusual punishment. . . . The clearest and most reliable objective evidence of contemporary values comes from state legislative judgments. Such legislative judgments are critical because in a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people. And we have focused on state enactments in this realm because of the deference we owe to the decisions of the state legislatures under our federal system . . . where the specification of punishments is concerned. For these reasons, [the U.S. Supreme Court has] described state legislative judgments as providing essential instruction in conducting the Eighth Amendment inquiry.

Moore v. Texas, 581 U.S. __, 137 S. Ct. 1039 (2017) (Roberts, C.J., dissenting) (internal quotations and citations omitted).

In *Roper*, this Court banned the execution of juveniles in part on the basis of a consensus of 18 states (plus an additional 12 that had abandoned the death penalty in all circumstances). In *Graham v. Florida*, 560 U.S. 48 (2010), the case in which this Court banned juvenile LWOP for nonhomicide offenders, the Court considered actual sentencing practices in addition to legislative change. The Court relied on six states with legislative bans plus 26 states that rarely or never used the practice

to find that standards had evolved. *Id.* at 62.

When *Miller* was decided, a mere five states banned juvenile LWOP. Today, eighteen states and the District of Columbia have legislatively and judicially proscribed LWOP as a punishment option for juvenile offenders. Thus, in just five years, the number of states that ban LWOP sentences for juveniles has more than tripled, with an average of three states per year abolishing LWOP as a sentencing option for children.

Currently, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Iowa, Kansas, Kentucky, Massachusetts, Nevada, North Dakota, South Dakota, Texas, Utah, Vermont, West Virginia, and Wyoming all ban LWOP sentences for juveniles.[4] An additional five

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[1] *See* Ark. Code Ann. § 5-4-108 (2017); Colo. Rev. Stat. §§ 17-22.5-104(2)(d)(IV), 18-1.3-401(4)(b)(1) (2006); Conn. Gen. Stat. § 54-125a(f) (2015); Del. Code Ann. tit. 11, §§ 4209A, 4204A(d)(2) (2013); D.C. Code § 22-2104(a) (2001); Haw. Rev. Stat. § 706-656 (2014); *State v. Sweet*, 879 N.W.2d 811 (Iowa 2016); Kan. Stat. Ann. § 21-6618 (2010); Ky. Rev. Stat. Ann. § 640.040(1) (1986); *Diatchenko v. Dist. Att'y for Suffolk Dist.*, 1 N.E.3d 270 (2013); Nev. Rev. Stat. § 176.025 (2015); N.D. HB 1195 (2017) (signed into law April 17, 2017; creates new section in N.D.C.C. 12.1-32 that allows all juvenile offenders to petition for release after twenty years); S.D.C.L. § 22-6-1 (2016); Tex. Pen. Code Ann. § 12.31 (2013); Utah Code Ann. § 76-3-209 (2016); Vt. Stat. Ann. tit. 13, § 7045 (2015); W.Va. Code § 61-11-23 (2014); Wyo. Stat. Ann. § 6-2-101(b) (2013).

states (Maine, Rhode Island, New Jersey, New York and New Mexico) have no one serving juvenile LWOP, for a total of twenty-three jurisdictions with de jure bans or de facto moratoria on the practice. California, Florida, and Montana have statutorily narrowed the sentence for juveniles, rendering it unavailable in most instances.[5] This rapid directional change of states that ban LWOP sentences for juveniles—as well as the geographic, political, and cultural diversity of the reforms—reflects a rapidly growing national consensus that the practice is cruel and unusual, in line with the levels of consensus this Court has relied on in banning other outdated sentencing practices.

B. This Court Should Find, In Its Independent Judgment, that Juvenile LWOP Sentences Are Now Unconstitutional.

1. The Reasoning Underpinning this Court's Earlier Juvenile Sentencing Cases Requires Abolition.

This Court first analyzed the constitutionality of severe punishment for children in *Stanford v. Kentucky*, 492 U.S. 361 (1989). The issue was whether the Eighth Amendment barred the death penalty for 16- and 17-year-olds. This Court held that it did not. On the same day

[5] Cal. Penal Code §§ 190.5 & 1170(d)(2); Fla. Stat. Ann. § 775.082(1)(b); Mont. Code Ann. § 46-18-222(1).

this Court held in *Penry* that the Eighth Amendment did not bar a death sentence from being imposed on intellectually disabled[6] offenders. Notably, Gregory Valencia and Joey Healer were sentenced during the *Stanford-Penry* era.

Both *Stanford* and *Penry* have been overruled based upon this Court's analysis of evolving standards of decency. In holding the execution of intellectually disabled offenders cruel and unusual, the Court found significant that "there is a serious question as to whether either justification that we have recognized as a basis for the death penalty applies to mentally retarded offenders." *Atkins*, 536 U.S. at 318-19. The Court explained that "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." *Id.* at 319. Three years later, in *Roper v. Simmons*, 543 U.S. 551 (2005), this Court held that the Eighth Amendment forbids the execution of juvenile offenders. This Court relied upon:

(1) A national consensus had developed against the

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[6] At the time, the term used was "mentally retarded." Today the preferred term is "intellectually disabled."

executions of juvenile offenders, reflected in state legislative reform and decreased imposition of the penalty;

(2) Juveniles' categorically lesser culpability than the average adult criminal based on now recognized salient characteristics of youth; and

(3) Collapse of the penological justifications of deterrence and retribution once the diminished culpability of juvenile offenders is recognized.

This Court recognized that even psychologists and psychiatrists "cannot differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Roper*, 543 U.S. at 573-74.

This Court applied these same considerations in categorically banning LWOP sentences for juvenile nonhomicide offenders in *Graham*. Once again, the Court recognized the salient characteristics of youth as vital to its analysis. The Court held that because of their diminished culpability and because of the signature characteristics of youth, juvenile offenders cannot with reliability be classified among the worst offenders and a juvenile's crime is not as morally reprehensible or deserving of the harshest of penalties. 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 569). This Court held that sentencing a juvenile nonhomicide offender to LWOP violates the Eighth Amendment. *Id*. at 76. Instead, the Court held

that states must give juvenile defendants "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 74.

In *Miller*, the Court held that the Eighth Amendment requires individualized sentencing hearings for juvenile offenders convicted of murder because "children are different" when it comes to sentencing. 132 S. Ct. at 2469. After Arizona and several other states failed to recognize *Miller*'s broad ruling was intended to limit the arbitrary and unconstitutional imposition of LWOP sentences for the vast majority of juvenile offenders, the Court clarified the significance and retroactive application of *Miller*:

> *Miller* . . . did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of the distinctive attributes of youth. Even 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. Because *Miller* determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crimes reflect irreparable corruption, it rendered life without parole an unconstitutional penalty for a class of defendants because of their status—that is, juvenile offenders whose crimes reflect the transient immaturity of youth.

Montgomery, 136 S. Ct. at 734 (internal quotation and citations omitted).

Miller barred LWOP "for all but the rarest of juvenile offenders whose crimes reflect permanent incorrigibility." *Id.*

In this series of cases, the Court has consistently recognized that children simply lack the culpability of adult offenders that can justify our most severe punishments. This Court should recognize that our Constitution no longer permits these individuals with reduced culpability to be sentenced to die in prison, any more than it permits their execution.

2. The "Irreparable Corruption" Standard Is Impossible to Apply Accurately

In considering the continued constitutional viability of juvenile LWOP sentences, this Court should recognize that its standard demanding a determination of a child's future amenability to rehabilitation at the time of sentencing, rather than years later in a parole hearing, is not practical. In *Miller,* the Court held that LWOP "forswears altogether the rehabilitative ideal and is an irrevocable judgment that is at odds with a child's capacity for change." 132 S. Ct. at 2465. Thus, only children who cannot be effectively rehabilitated—who whose crimes reflect "permanent incorrigibility," *Montgomery,* 136 S. Ct. at 734, or "irreparable corruption"—can receive this sentence under this Court's current framework. *Id.* at 734.

But any effort to make such a determination contradicts accepted medical and scientific reasoning. As reported in a brief submitted in support of *Miller* by American Psychological Association, American Psychiatric Association, and National Association of Social Workers as Amici Curiae in Support of Petitioners at 21-22:

> The positive predictive power of juvenile psychopathy assessments, for instance, remains poor. One study found that only 16% of young adolescents who scored in the top quintile on a juvenile psychopathy measure would eventually be assessed as psychopathic at age 24. Donald Lynam et al., *Longitudinal Evidence That Psychopathy Scores in Early Adolescence Predict Adult Psychopathy*, 116 J. Abnormal Psychol. 155, 160 (2007). The authors concluded that "most individuals identified as psychopaths at age 13 will not receive such a diagnosis" as adults. *Id.* at 162. A recent study of 75 male juvenile offenders found that the assessment of psychopathic characteristics did not predict general or violent reconvictions over a 10-year follow-up period. See John Edens & Melissa Cahill, *Psychopathy in Adolescence and Criminal Recidivism in Young Adulthood*, 14 Assessment 57, 60 (2007). And another recent study showed no correlation between a youthful homicide offense and the basic psychological measures of persistent antisocial personality such as "cruelty to people and callous-unemotional behavior." Rolf Loeber & David Farrington, *Young Homicide Offenders and Victims: Risk Factors, Prediction, and Prevention from Childhood* 61 *& tbl. 4.1 (2011).*

Even tests used to attempt to identify juveniles who would be future homicide offenders—juveniles scoring the greatest number of risk factors—yielded a high false positive rate of 87%. *Id.* at 22. There is no

clinical test, guidance, or consensus for determining who is an "irreparably corrupt" or "permanently incorrigible" juvenile offender.

In short, it is simply not possible to determine at sentencing, with any accuracy, which juveniles will be amenable to rehabilitation. Indeed, this Court has recognized as much, noting that "expert psychologists cannot differentiate between a juvenile offender whose crime reflects unfortunate yet transient immaturity from the rare juvenile offender whose crime reflects irreparable corruption." *Graham*, 560 U.S. at 61. The inquiry, even when guided by factors as suggested in *Miller* and *Montgomery*, remains wholly arbitrary: a decision made at the outset "based on a subjective judgment that the defendant's crimes demonstrate an "irretrievably depraved character,' ... is inconsistent with the Eighth Amendment." *Graham,* 560 U.S. at 76 (quoting *Roper*, 543 U.S. at 572). "Existing state laws that allow for the imposition of these sentences based only on a discretionary, subjective judgment by a judge or jury that the offender is irredeemably depraved are insufficient to prevent the possibility that the offender will receive a life without parole sentence for which he or she lacks the moral culpability." *Id.* at 77. Nothing in this reasoning depends on the nature of the crime, and it applies with equal

force to homicides.

This Court is not alone in that recognition. In the wake of *Miller* and *Montgomery,* several state courts, faced with the task of applying these cases, have recognized the unworkability of a standard that requires trial judges to determine at the time of sentencing whether a juvenile is irreparably corrupt. The Supreme Judicial Court of Massachusetts recognized that "given current scientific research on adolescent brain development, and the myriad significant ways that this development impacts a juvenile's personality and behavior, a conclusive showing of traits such as an 'irretrievably depraved character,' can never be made, with integrity," and consequently imposed a categorical ban on juvenile life-without-parole sentences. *Diatchenko v. District Attorney for the Suffolk Dist.*, 1 N.E.3d 270 (Mass. 2013). The Iowa Supreme Court also imposed a categorical ban on the imposition of juvenile LWOP, similarly finding that "the enterprise of identifying which juvenile offenders are irretrievable at the time of trial is simply too speculative" and that *Miller* "asks the sentencer to do the impossible." *State v. Sweet*, 879 N.W.2d 811, 836-37 (Iowa 2016).

Most recently, the Court of Appeals of Washington adopted the

reasoning from *Sweet* into its own opinion finding a categorical ban as a matter of state constitutional law. *State v. Bassett*, __ P.3d __, 2017 WL 1469240 (Wash. Ct. App., April 25, 2017). The Washington court found that asking the sentencing court to "separate the irretrievably corrupt juveniles from those whose crimes reflect transient immaturity" is "a task even expert psychologists cannot complete with certainty." *Id.* This, they found, creates an "unacceptable risk that juvenile offenders whose crimes reflect transient immaturity will be sentenced to life without parole or early release because the sentencing court mistakenly identifies the juvenile as one of the uncommon, irreparably corrupt juveniles." *Id.*

This Court has held in a related context that legislative rules that disregard and are contrary to the findings of the psychological community run afoul of the Eighth Amendment. *Hall*, 134 S. Ct. at 1998-99. Accordingly, this Court should not allow sentencing courts to attempt to make such an impossible determination, and should instead mandate that all juveniles have an opportunity to rehabilitate and demonstrate worthiness of release. Those who are not rehabilitated may simply be denied parole, rather than being denied, ex ante, the opportunity to seek it. This would prevent the release of offenders who had not matured and

changed, without the risk, as identified in *Atkins*, 536 U.S. at 320-21, and *Roper*, 543 U.S. at 572-73, of disproportionate sentencing. In recognition of the scientific community's consensus and this Court's recognition that it is impossible to make such a determination, this Court should now take up the question of whether, given the inherent arbitrariness of the undertaking, courts can ever determine that a child is so irreparably corrupt that it is constitutional to sentence him to die in prison, and should hold that they cannot.

3. Without a Categorical Ban, Significant Problems Persist

In opting not to ban life-without-parole sentences for juveniles categorically, this Court left to the states the task of figuring out how to discern which juvenile offender was the rare and irreparably corrupt offender who could constitutionally receive the sentence. But allowing states to determine their own procedures does not free them from the Court's constitutional requirements. *Cf. Hall*, 134 S. Ct. at 1998. *Montgomery* and *Miller* make clear that children whose crimes reflect transient immaturity must be constitutionally protected from a sentence of LWOP. Some states' interpretations of the factors identified in *Miller* and *Montgomery* leave the unacceptable risk identified in those cases

that children without sufficient culpability will suffer this incredibly harsh sentence. This risk is unacceptable under the Eighth Amendment's cruel punishment proscription.

This Court directed that LWOP would be imposed on juveniles only in the "rare" circumstance. *Miller* and *Montgomery*, while not requiring any particular formalized finding, require significantly more than an empty possibility that a lesser sentence may be imposed. Not all of the states that continue to allow juvenile LWOP are recognizing this.

The Supreme Court of Virginia, for instance, went out of its way to skirt the holdings in *Miller* and *Montgomery*. In *Jones v. Commonwealth*, 795 S.E.2d 705 (Va. 2017), the juvenile petitioner was sentenced to LWOP after pleading guilty to capital murder to avoid the death penalty. Jones petitioned for a resentencing hearing in light of *Miller* and *Montgomery* but was denied relief. The court reasoned that because Virginia law affords trial court judges the technical authority to suspend sentences (though this power has never been exercised with respect to a mandatory life sentence), his sentencing hearing and procedure complied with the mandates of *Miller* and *Montgomery*.

Recently, the Oregon Court of Appeals also ignored the dictates of

Montgomery in *Cunio v. Premo*, 284 Or. App. 698, ___ P.3d ___ (2017). There, the petitioner, who was 16 years old at the time of his crime, was sentenced in 1994 to two indeterminate life sentences plus 280 months. In 1997, he filed for post-conviction relief on the grounds of an excessive and illegal sentence. When petitioner renewed his claim following *Miller* and *Montgomery,* the court denied relief, reasoning that his claim was barred as successive. The court stated that "the fact that, in an earlier appeal or petition for post-conviction relief, a petitioner unsuccessfully raised a ground for relief that would have been successful under later case law does not bring a claim for relief within the escape clauses" of Oregon statutes. *Id.* at 708. *See also Brown v. State*, 2016 WL 1562981 (Tenn. Ct. Crim. App. 2016) (unpublished) (relief denied under *Miller* and *Montgomery* because defendant had opportunity at sentencing to present youth-related mitigation evidence, regardless of how sentencing court treated that evidence). Thus, in Oregon, *Montgomery*'s retroactivity holding is an empty promise.

What can be gleaned from these several cases is that even under *Miller* and *Montgomery*, LWOP sentences for juveniles will continue to be imposed arbitrarily in some states. A categorical ban would put a halt

to such misinterpretations and protect undeserving juveniles from the risk of excessively harsh punishment.

II. If Juveniles May Still Be Sentenced to LWOP, Then the Burden of Proof to Demonstrate Permanent Incorrigibility Must Be on the Government.

A. State Courts Are Deeply and Intractably Divided On This Issue.

As stated above, many states have responded to *Miller* and *Montgomery* by prohibiting LWOP for juveniles altogether. Of the thirty-two states where LWOP remains an option for juveniles, courts have reached conflicting conclusions about whether the burden of proof on permanent incorrigibility may be assigned to the children or whether the government must bear the burden of proving permanent incorrigibility.

Four states clearly place the burden on the child. In North Carolina, the legislature unambiguously placed the burden on the defendant to prove that the appropriate sentence should include eligibility for parole. In *State v. James*, 786 S.E.2d 73, 79-80 (N.C. App. 2016), *review allowed*, 797 S.E.2d 6 (N.C. 2017), the court held that it was acceptable for the legislature to create a presumption that LWOP is appropriate that the defendant must then rebut. Similarly, in *State v. Ramos*, 387 P.3d 650, 658 (Wash. 2017), the Washington Supreme Court held that the juvenile

must prove "by a preponderance of the evidence that his or her crimes reflect transient immaturity." And Arizona, of course, in the instant case, held that the children "will have an opportunity to establish, by a preponderance of the evidence, that their crimes did not reflect irreparable corruption but instead transient immaturity." *Valencia II*, 386 P.3d at 396.

Even more extreme, Virginia has approved a rule in which the LWOP sentence is imposed automatically, and then children have the opportunity to "seek mitigation of the prescribed punishment." *Jones,* 795 S.E.2d at 712. There, not only do children have the burden of establishing that the sentence would be unconstitutional; the sentence is actually imposed on them, and then they can seek discretionary mitigation from the court if they choose.

In addition, although Ohio has not explicitly decided the question, its jurisprudence in a closely related context suggests that it, too, would place the burden on the child. In a case discussing a de facto life sentence for a non-homicide juvenile offender, the Ohio Supreme Court explained that "A defendant convicted of crimes he committed as a juvenile cannot at the outset be sentenced to a lifetime in prison. . . without having a

meaningful opportunity to establish maturity and rehabilitation justifying release." *State v. Moore*, __ N.E. __, ¶ 96, 2016 WL 7448751 (Ohio 2016). And the Pennsylvania Supreme Court is currently considering a petition in which the petitioner is requesting that the Court place the burden on the State, suggesting that the courts there have been doing the opposite. *See Commonwealth v. Batts,* App. No. 45 MAP 2016 (filed July 1, 2016). Thus, four states clearly encumber the child with the burden of proving that the LWOP sentence would be unconstitutional in his case; two more appear to do so, although with less certainty.

Two states place the burden firmly on the government. In Missouri, the rule is crystal clear:

> Hart must be re-sentenced for first-degree murder because he was sentenced to life without parole without any individualized assessment. . . . Until further guidance is received, a juvenile offender cannot be sentenced to life without parole for first-degree murder unless *the state persuades the sentencer beyond a reasonable doubt* that this sentence is just and appropriate under all the circumstances.

State v. Hart, 404 S.W.3d 232, 241 (Mo. 2013) (emphasis added). Similarly, Connecticut, in *State v. Riley*, 110 A.3d 1205, 1214 (Conn. 2015), decreed: "This language [in *Miller*] suggests that the mitigating factors of youth establish, in effect, a presumption against imposing a life

sentence without parole on a juvenile offender that must be overcome by evidence of unusual circumstances."[7]

Other cases imply, but do not overtly state, that the burden should be on the government by relying on the absence of the relevant determination or consideration to rule the sentence inappropriate; presumably, the State would have to have presented the relevant evidence to overcome what is essentially a presumption that the sentence is unconstitutional. For example, the Georgia Supreme Court used the following language:

> The trial court did not, however, make any sort of distinct determination on the record that Appellant is irreparably corrupt or permanently incorrigible, as necessary to put him in the narrow class of juvenile murderers for whom an LWOP sentence is proportional under the Eighth Amendment as interpreted in *Miller* as refined by *Montgomery*.

Veal v. State, 784 S.E.2d 403, 412 (Ga. 2016). And in Illinois, a court recently reasoned:

> Accordingly, under the holding of Reyes, if we were to find that the petitioner's 50-year sentence constitutes a de facto life sentence, we would be compelled to conclude that such a sentence, without consideration of the factors unique to juveniles, is unconstitutional as applied to him under the eighth amendment.

[7] The Connecticut legislature subsequently banned juvenile LWOP.

People v. Buffer, __ N.E.3d __, ¶ 56, 2017 WL 1177715 (Ill. App. 2017). Thus, as many as four states appear to place the burden on the State, with as many as six placing it on the child. Many states have not yet specified who has to prove what, but will ultimately be faced with that determination, absent clear guidance on what is constitutionally permissible. Because state courts are split on this question and the split is only continuing to deepen as more states confront the issues, this Court's review and guidance is needed.

B. The Government Must Bear the Burden of Proving Permanent Incorrigibility.

Although this Court has not dictated a particular procedure for *Miller* hearings, placing the burden on the child does not comport with the mandate of *Miller* and *Montgomery,* which require juvenile life-without-parole sentences to be rare.

Montgomery stressed the point that it would be the "rare juvenile offender" who would be subject to this extreme sentence, 136 S. Ct. at 733, and that it was inappropriate for the "vast majority of juvenile offenders." *Id* at 736. It is absurd to suggest that a sentence that must be uncommon would be the default sentence, imposed unless the defendant produces substantial proof that it is inappropriate. Only the reverse—a

presumption of the lesser sentence, with the rare sentence permissible only if the party seeking it produces the necessary proof—makes sense.

Allocation of the burden of proof necessarily reflects a value choice about which risk is more acceptable. Thus, placing the burden of proof on the government in criminal trials reflects the view that it is better to let a guilty man go free than to send an innocent to prison, or worse. Here, this analysis requires placing the burden of proving that there is no chance of meaningful rehabilitation on the government. The Eighth Amendment does not tolerate the risk that juveniles who may yet mature and reform will be afforded no chance to demonstrate this rehabilitation and receive a meaningful opportunity for release. Crucially, Petitioners are seeking merely an opportunity to demonstrate that release is appropriate—not an actual right to release. Thus, the government has nothing to lose here. For those juveniles for whom release turns out to be inappropriate, nothing much will change; states need not release them. They need only consider, years after the crime, whether release is warranted. But with the burden on the child, there is an unacceptable risk that children who can and do change will nonetheless be forced to die in prison.

Experience in the area of intellectual disability is illustrative here because there are significant similarities as well as significant differences. There, as here, this Court has elected to allow states to act as "laboratories of democracy," *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. __, 135 S. Ct. 2652, 2673 (2015). In *Atkins v. Virginia*, this Court stated, "'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" 536 U.S. 304, 317 (2002) (quoting *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986)) (alteration in original). But this does not mean that states can disregard the core of this Court's dictates without repercussion. For example, in *Hall*, this Court held that using a strict cutoff at IQ 70 to determine intellectual disability disregarded the standards of the psychological community mandated by *Atkins*. *See also Smith v. Ryan*, 813 F.3d 1175 (9th Cir. 2016) (petitioner was intellectually disabled and state court unreasonably applied *Atkins* in finding otherwise); *Van Tran v. Colson*, 764 F.3d 594 (6th Cir. 2014) (same). This year in *Moore*, 137 S. Ct. 1039, this Court further delineated the boundaries of what states may do under *Atkins*, disapproving Texas's idiosyncratic approach of using a list of factors not tethered to current

clinical standards. As with *Atkins*, the states must apply *Miller* and *Montgomery* in a manner that gives meaning to their mandate, and this Court should step in to guide that process where states have strayed too far.

There is a significant difference between *Atkins* and *Miller* as well. Of the class of persons otherwise eligible for the death penalty, relatively few are in the class of the intellectually disabled. Thus, there is a logic in requiring defendants to affirmatively prove the claim that they are among the unusual few who are exempted under *Atkins*. Quite the opposite is true for transient immaturity, which renders juveniles ineligible for LWOP. This Court has explained that the vast majority of offenders have this trait; it is only the "rare" offender who is instead permanently incorrigible. This is the exact mirror of *Atkins*; most defendants potentially facing the sentence are *ineligible* here, where in the *Atkins* context, most defendants are eligible. In both situations, the burden belongs on the party attempting to establish that this is the rare case. But where in *Atkins* that analysis places the burden on the defendant, in *Miller* it places it on the State.

Additionally, as explained in *Montgomery*, this Court stated that

"*Miller* requires a sentencer to consider a juvenile offender's youth and attendant characteristics *before* determining that life without parole is a proportionate sentence..." *Montgomery*, 136 S. Ct. at 734 (internal quotes omitted, emphasis added). This language shows that determination of permanent incorrigibility is a precondition to imposing a life-without-parole sentence on a juvenile, and its absence renders the sentence unconstitutional when imposed. Implicit in this language, and in this Court's pronouncement that a life-without-parole sentence for a juvenile will be "rare," is the idea that the defendant is *presumed* to have the characteristic of "transient immaturity." If juvenile defendants are presumed to show transient immaturity, as they must be for the reverse to be "rare," then the government must bear the burden of proving that the defendant is permanently incorrigible and thus eligible for the ultimate sentence. Accordingly, the Arizona Supreme Court's rule, as well as similar rules in other states, are fundamentally incompatible with *Montgomery*'s mandate.

The lack of clear guidance on procedure from this Court in *Montgomery* permitted the Arizona Supreme Court to take a minimalist approach to its reasoning and order of remand. The apparent lesson

taken by Arizona from the summary orders in *Tatum v. Arizona*, 580 U.S. __, 137 S. Ct. 11 (2016), was only that Arizona could not simply do nothing and leave its juvenile life-without-parole sentences completely unexamined. *Valencia II*, 386 P.3d at 395 (noting the *Tatum* orders as evidence that the State could not prevail in its argument that *Montgomery* had no effect on Arizona petitioners' *Miller* claims). Instead, the Arizona Supreme Court has refused to order the only remedy that the logic of *Montgomery* would allow: a resentencing at which the government bears the burden to prove the defendant's permanent incorrigibility. This Court should grant review to resolve this growing split among the states in favor of putting the burden to establish irreparable corruption on the government.

III. These Cases Present an Appropriate Vehicle for Resolving These Questions.

The Arizona Supreme Court cleanly and unequivocally held that the child must prove his LWOP sentence is constitutionally inappropriate. Each Petitioner, having received an LWOP sentence, now faces a hearing at which he must prove a negative—that he is *not* "irreparably corrupt." But after those hearings occur, the opinion that mandated them—the opinion of which the Petitioners now seek review—

will no longer be subject to certiorari review. A reversal—yielding either an outright ban or a requirement that the state prove their eligibility for this rare sentence—would provide complete relief to these Petitioners and clear guidance to the States about whether they may impose such a sentence and if so, what a constitutional *Miller* hearing entails. The issue, at this juncture, is clean.

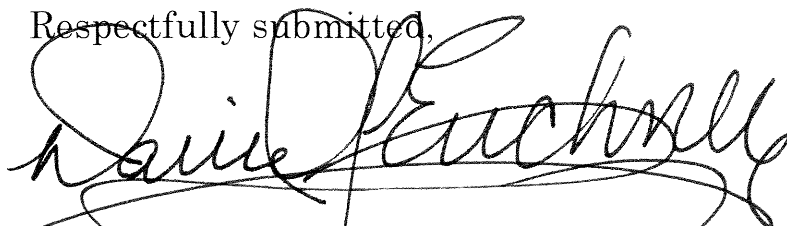
By accepting review in this case, this Court can also bring a halt to incessant litigation in the state courts of Arizona and elsewhere in the nation. This case would be a particularly good choice because in Arizona, unlike in many states with smaller numbers of affected defendants, dozens of cases are pending not only in state courts but also in the United States District Court for the District of Arizona. The various prosecuting agencies in Arizona have been taking inconsistent positions in the various cases, not for any untoward purpose but out of sheer confusion. In an effort to minimize that confusion, most courts have been advised of the status of the *Valencia/Healer* litigation and have stayed proceedings pending the outcome of this petition. Moreover, the benefit of this Court's review will impact not only Arizona litigation but also that in the other

states which have not yet abolished juvenile LWOP sentences, where courts continue to struggle with *Miller* and *Montgomery*.

CONCLUSION

For these reasons, Petitioners respectfully request that this Court accept review of the opinion of the Arizona Supreme Court.

Respectfully submitted,



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