

No. 16-9424

IN THE
Supreme Court of the United States

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Gregory Nidez Valencia, Jr. and Joey Lee Healer,
Petitioners,

v.
State of Arizona,
Respondent.

----- ♦ -----
On Petition For Writ Of Certiorari
To The Supreme Court of Arizona

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**BRIEF OF AMICUS CURIAE JUVENILE LAW
CENTER IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICUS¹

Juvenile Law Center, founded in 1975, is the oldest public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Among other things, Juvenile Law Center works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and; that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

¹ Pursuant to Rule 37.2 counsel of record received timely notice of the intent to file this brief and the consent of counsel for all parties is on file with this Court. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part. No person or entity, other than *Amicus*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In *Miller v. Alabama*, 567 U.S. 460 (2012), this Court held that the mandatory imposition of life without parole sentences on juvenile offenders convicted of murder is cruel and unusual punishment. Four years later in *Montgomery v. Alabama*, 136 S. Ct. 718, 731 (2016), this Court held that *Miller* created a substantive rule that must apply retroactively to cases on collateral review.

Miller's mandate—that a sentencing court must consider youth and the hallmark characteristics attendant to youth prior to imposing a life without parole sentence—is now being implemented in courts across the country. Courts are faced with the task of reexamining thousands of unconstitutional mandatory life without parole sentences using the specific factors set forth in *Miller* to ensure that only the rarest of juvenile offenders whose crimes reflect permanent incorrigibility may be sentenced to life without the possibility of parole.

States across the country have responded to the Court's mandate in *Miller* by passing new sentencing legislation which establishes alternative sentencing schemes with parole eligibility, and some states have even eliminated life without parole sentences for juveniles entirely.

Yet in Arizona, *Miller*'s mandate remains ignored. Rather than setting forth a straightforward procedure through which individuals serving unconstitutional life without parole sentences can be resentenced or offered parole, individuals must petition for postconviction relief and participate in an evidentiary hearing to determine their eligibility for a resentencing hearing. This hearing cannot and does not take the place of a resentencing hearing as contemplated

by *Miller* because it establishes a presumption in favor of life without parole and places the burden on the petitioner to demonstrate that his crime was a result of transient immaturity. This Court should grant *certiorari* to protect the integrity of its decisions in *Miller* and *Montgomery*.

ARGUMENT

I. This Case Presents An Important Question Of Law That The Arizona Supreme Court Decided In Conflict With This Court's Precedent

A. This Court Ruled In *Miller v. Alabama* And *Montgomery v. Louisiana* That Individuals Serving Mandatory Life Without Parole Sentences Were Entitled To Resentencing Hearings

This Court's decision in *Montgomery v. Louisiana* held that *Miller v. Alabama* articulated a new substantive rule of constitutional law that must be applied retroactively: mandatory life without parole sentences are unconstitutional and void. The Court wrote:

A conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void. It follows, as a general principle, that a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of

whether the conviction or sentence became final before the rule was announced.

Montgomery v. Alabama, 136 S. Ct. 718, 731 (2016) (citation omitted).

To remedy such violations, the Court provided states with two options: states could either permit juvenile homicide offenders to be immediately considered for parole; or states could resentence individuals serving mandatory life without parole sentences consistent with the process prescribed in *Miller*, which requires consideration of age and its attendant characteristics to fashion an individualized sentence. See *Montgomery*, 136 S. Ct. at 736 (“A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.”). *Miller* mandated that “a sentencer follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty.” *Miller v. Alabama*, 567 U.S. 460, 483 (2012). In so requiring, the Court stated, “our decision flows straightforwardly from our precedents: specifically, the principle of *Roper*, *Graham*, and our individualized sentencing cases that youth matters for purposes of meting out the law’s most serious punishments.” *Id.*

In the instant matter, Arizona did not choose either of the permissible options. Rather, the State relied upon its postconviction relief process whereby individuals serving mandatory life without parole sentences are required to demonstrate that they are eligible for a resentencing hearing. The Arizona Supreme Court cited its postconviction rule and reasoned that “[i]n order to be entitled to resentencing,

Healer and Valencia must also establish that *Miller* ‘if determined to apply . . . would probably overturn’ their sentences.” *State v. Valencia*, 386 P.3d 392, 395–96 (Ariz. 2016) (quoting Ariz. R. Crim. P. 32.1(g)). This reasoning ignores this Court’s rulings in *Miller* and *Montgomery* overturning life without parole sentences. Indeed, the Arizona Supreme Court held that “the retroactivity of *Miller* and the failure of the sentencing courts to expressly determine whether the juvenile defendants’ crimes reflected ‘irreparable corruption’ do not in themselves entitle Valencia and Healer to post-conviction relief.” *Id.* at 396. This interpretation of *Miller* is at odds with this Court’s precedent.

B. Arizona’s Resentencing Process Offends Fundamental Principles Of Due Process Established By This Court In *Miller* And *Montgomery*

1. Arizona’s Requirement That A Postconviction Evidentiary Hearing Must Precede Resentencing Misapplies This Court’s Mandate In *Miller*

In Arizona, a defendant is entitled to postconviction relief when “[t]here has been a significant change in the law that if determined to apply to defendant’s case would probably overturn the defendant’s conviction or sentence.” Ariz. R. Crim. P. 32.1(g). When Rule 32 was enacted, its purpose was to afford relief for “retroactive applications of new constitutional and non-constitutional legal principles.” See Keith J. Hilzendeger, *Arizona State Post-Conviction Relief*, 7

ARIZ. SUMMIT L. REV. 585, 635 (2014). Under Rule 32.1(g), the Arizona courts follow a two-step inquiry in order to determine whether or not to grant relief. First, the court must determine if there has been a “significant change in the law.” If there has been such a change, the court then decides whether or not to apply that change to the defendant’s case. *State v. Shrum*, 203 P.3d 1175, 1178 (Ariz. 2009) (en banc) (The “significant change in the law” that affords relief under Rule 32.1(g) “requires some transformative event, a ‘clear break from the past’” (quoting *State v. Slemmer*, 823 P.2d 41, 49 (Ariz. 1991) (en banc))). See also Hilzendeger, *supra*, at 636. In most situations, this determination is made by assessing whether a new rule applies retroactively to the defendant’s case, which by definition has already become final. Ariz. R. Crim. P. 32.1(g).

In this situation, however, neither the “significant change in the law” nor the retroactivity of the ‘new rule’ is in question. This Court held in *Montgomery* that *Miller* established a new substantive rule of constitutional law that must be retroactively applied. *Montgomery*, 136 S. Ct. at 736. *Montgomery* held that *Miller* overturned mandatory life without parole sentences for *all* individuals serving such sentences. *Id.* Nevertheless, the Arizona Supreme Court found that despite the retroactivity of the change in law, the change was inapplicable. *Valencia*, 386 P.3d at 395-96.

In order to be entitled to resentencing, Healer and Valencia must also establish that *Miller* ‘if determined to apply . . . would probably overturn’ their sen-

tences. But the retroactivity of *Miller* and the failure of the sentencing courts to expressly determine whether the juvenile defendants' crimes reflected 'irreparable corruption' do not in themselves entitle Valencia and Healer to post-conviction relief. *Montgomery* noted that '*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility,' but instead held that imposing a sentence of life without parole on 'a child whose crime reflects transient immaturity' violates the Eighth Amendment.

Id. (citation omitted) (quoting *Montgomery*, 136 S. Ct. at 736).

The Arizona Supreme Court's reasoning is circular and flawed. Rather than providing a resentencing hearing at which life without parole can only be imposed by proving permanent incorrigibility, the Arizona process requires evidence of 'transient immaturity' to trigger a resentencing hearing.

This Court's ruling in *Tatum v. Arizona*, 137 S. Ct. 11, 12 (2016) (mem.) (Sotomayor, J., concurring), is also instructive. In *Tatum*, this Court granted review, vacated, and remanded for reconsideration several decisions by the Arizona Court of Appeals that rejected claims for postconviction relief under *Miller* where the sentencing court had considered the petitioner's youth, citing *Montgomery*. In her concurrence in *Tatum*, Justice Sotomayor emphasized that mere recitation of an individual's age or superficial consideration of the *Miller* factors is insufficient:

It is clear after *Montgomery* that the Eighth Amendment requires more than mere consideration of a juvenile offender's age before the imposition of a sentence of life without parole. It requires that a sentencer decide whether the juvenile offender before it is a child 'whose crimes reflect transient immaturity' or is one of 'those rare children whose crimes reflect irreparable corruption' for whom a life without parole sentence may be appropriate.

Id. at 13 (Sotomayor, J., concurring) (quoting *Montgomery*, 136 S. Ct. at 734). When "[t]here is no indication that, when the factfinders . . . considered petitioners' youth, they even asked the question *Miller* required them **not only to answer, but to answer correctly**: whether petitioners' crimes reflected 'transient immaturity' or 'irreparable corruption,' remand is required. *Adams v. Alabama*, 136 S. Ct. 1796, 1800 (2016) (mem.) (Sotomayor, J., concurring) (quoting *Montgomery*, 136 S. Ct. at 734); see also *Tatum*, 137 S. Ct. at 13 (Sotomayor, J., concurring). Justice Sotomayor noted, "none of the sentencing judges addressed the question *Miller* and *Montgomery* require a sentencer to ask: whether the petitioner was among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'" *Tatum*, 137 S. Ct. at 12 (Sotomayor, J., concurring) (citing *Montgomery*, 136 S. Ct. at 734).

Likewise, Valencia and Healer were not provided an opportunity to have their youth meaningfully considered to determine whether they are among the "rarest of juvenile offenders" whose crimes reflect

“permanent incorrigibility.” Therefore, they are entitled to resentencing hearings where the presumption is that they are ineligible for life without parole sentences.

2. Arizona’s Resentencing Scheme Improperly Presumes Life Without Parole Sentences Are Appropriate

This Court has advised that “given all we have said in *Roper*, *Graham*, and this decision about children’s diminished culpability and heightened capacity for change, we think *appropriate occasions for sentencing juveniles to this harshest possible penalty* [life without parole] *will be uncommon.*” *Miller*, 567 U.S. at 479 (emphasis added). That is particularly so, the Court stated, because the salient characteristics of youth—the lack of maturity, evolving character, vulnerability and susceptibility to negative influences and external pressure—would make it “difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” *Graham v. Florida*, 560 U.S. 48, 68 (2010) (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)).

In *Montgomery*, the Court reiterated that *Miller* “did bar life without parole . . . for all but the rarest of juvenile offenders, *those whose crimes reflect permanent incorrigibility.*” 136 S. Ct. at 734 (emphasis added). “*Miller* drew a line between children whose crimes reflect transient immaturity and *those rare children whose crimes reflect irreparable corruption.*” *Id.* (emphasis added). A life without parole sentence “could [only] be a proportionate sentence for the latter

kind of juvenile offender.” *Id.* In a dissenting opinion, Justices Scalia, Thomas, and Alito found that imposition of a life without parole sentence will be “a practical impossibility” given this Court’s decision in *Montgomery*. *Montgomery*, 136 S. Ct. at 744 (Scalia, J., dissenting).

Thus *Miller*, *Montgomery*, and their progeny established a presumption against juvenile life without parole. A clear majority of states that have considered this issue have found such a presumption. Most recently, the Pennsylvania Supreme Court, in *Commonwealth v. Batts*, No. 45 MAP 2016, 2017 WL 2735411 (Pa. June 26, 2017), held that there must be a presumption against the imposition of life without parole sentences as the resentencings or sentencings of youth convicted of homicide in Pennsylvania go forward. The court reasoned that “a faithful application of the holding in *Miller*, as clarified in *Montgomery*, requires the creation of a presumption against sentencing a juvenile offender to life in prison without the possibility of parole.” *Batts*, No. 45 MAP 2016, 2017 WL 2735411 at *31.

A presumption against life without parole sentences requires a sentencer to recognize that “the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes,” *Miller*, 567 U.S. at 472, and that the vast majority of juvenile offenses are a reflection of transient immaturity inherent to adolescent behavioral and neurological development. *See id.* at 471-73. (“[N]one of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. Those features are evident in the same way, and to the same

degree [no matter the crime].”) Judges must ensure that, due to the inherent immaturity and reduced culpability of children, only the truly rare and uncommon juvenile whose crime reflects irreparable corruption is sentenced to life without parole. *Id.* See also *Batts*, No. 45 MAP 2016, 2017 WL 2735411 at *31-32 (“Only in ‘exceptional circumstances’ will life without the possibility of parole be a proportionate sentence for a juvenile.”).

The Arizona resentencing process, however, implicitly, if not explicitly, establishes a presumption *in favor* of life without parole sentences. The Arizona Supreme Court reasoned that this Court merely speculated that irreparable corruption would not be found among the vast majority of defendants and therefore the language was not binding precedent, but dictum.

By announcing in advance that most murders committed by juveniles “reflect the transient immaturity of youth,” the Court trivializes the killers’ actions and culpability. . . .

. . . .

. . . By being convicted of first-degree murder, juvenile offenders already have been proven “uncommon” and outside of the “vast majority” of young people who manage to avoid committing such heinous crimes.

Valencia, 386 P.3d at 398 (Bolick, J., concurring).

C. Arizona’s Postconviction Evidentiary Hearing Is An Inappropriate Prerequisite To Resentencing Because It Places The Burden On The Defendant To Demonstrate Eligibility For A Resentencing Hearing

A defendant petitioning for postconviction relief is entitled to an evidentiary hearing to determine material issues of fact. Ariz. R. Crim. P. 32.8(a). This evidentiary hearing is also proper where the defendant has presented a “colorable claim.” *State v. Rosario*, 987 P.2d 226, 230 (Ariz. Ct. App. 1999). A colorable claim is “one that, if the allegations are true, might have changed the outcome.” *State v. Runningeagle*, 859 P.2d 169, 173 (Ariz. 1993) (en banc). The petitioner bears the burden of establishing a colorable claim and proving the alleged facts by a preponderance of evidence. Ariz. R. Crim. P. 32.8(c). The petitioner must show the claim is supported by “provable reality, not mere speculation.” *Rosario*, 987 P.2d at 230. If a constitutional defect is proven, the burden shifts and the State bears the burden of proving the defect was harmless beyond a reasonable doubt. Ariz. R. Crim. P. 32.8(c).

In the instant case, the Arizona Supreme Court found that Valencia and Healer were entitled to evidentiary hearings on their postconviction petitions because they had made a colorable claim for relief based on *Miller. Valencia*, 386 P.3d at 396. The court found that at their evidentiary hearings, “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. Only if they meet this burden will they establish that their

natural life sentences are unconstitutional, thus entitling them to resentencing.” *Id.* (citation omitted).

The Arizona Supreme Court’s reasoning is flawed for several reasons. First, the constitutional defect in the sentence has already been proven. Mandating a postconviction evidentiary hearing where a young person must prove the unconstitutionality of his sentence creates an erroneous barrier to relief that is offensive to due process. This Court invalidated and overturned all mandatory life without parole sentences. *See* Part IA, *supra*; *Montgomery*, 136 S. Ct. 718, 731 (2016). As defendants’ sentences have already been ruled unconstitutional, Petitioners can have no further burden here to prove that they are eligible for a resentencing hearing. Following *Miller* and *Montgomery*, the State must now remedy the ongoing violation of the Petitioners’ Eighth Amendment rights by either offering parole eligibility or by resentencing all of the individuals who were sentenced to life without parole as juveniles according to the process set forth in *Miller*. *See Montgomery*, 136 S. Ct. at 736.

Second, the evidentiary hearing does not fulfill *Miller*’s requirement that prior to imposing a juvenile life without parole sentence, the sentencer must “follow a certain process” which meaningfully considers youth and how it impacts the juvenile’s overall culpability. *Miller*, 567 U.S. at 483. *Miller* delineated specific factors that sentencers must examine before imposing a discretionary sentence of life without parole: (1) the juvenile’s “chronological age” and related “immaturity, impetuosity, and failure to appreciate risks and consequences;” (2) the juvenile’s “family and home environment that surrounds him;” (3) “the circumstances of the homicide offense, including the extent of his participation in the conduct and the way

familial and peer pressures may have affected him;” (4) the “incompetencies associated with youth” in dealing with law enforcement and a criminal justice system designed for adults; and (5) “the possibility of rehabilitation.” 567 U.S. at 477-78.

The purported consideration of “various aggravating and mitigating factors, including the defendant’s age”, *Valencia*, 386 P.3d at 393, at the original sentencing hearings does not fulfill *Miller*’s requirement that youth and its attendant characteristics be considered prior to sentencing a juvenile to life without parole.

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. The hearing does not replace but rather gives effect to *Miller*’s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.

Montgomery, 136 S. Ct. at 735 (citation omitted).

Third, Arizona improperly places the burden on the defendant to prove, by the preponderance of the evidence, that his sentence is likely to be overturned because his crime was characterized by transient immaturity. The Pennsylvania Supreme Court addressed this issue in *Batts* and held that although

[c]ertain isolated statements in the *Miller* and *Montgomery* decisions might be

interpreted to suggest that the offender should bear the burden of proving that he is among the great majority of juveniles who are not constitutionally eligible for a sentence of life without parole.

However, any suggestion of placing the burden on the juvenile offender is belied by the central premise of *Roper*, *Graham*, *Miller*, and *Montgomery* – that as a matter of law, juveniles are categorically less culpable than adults. This central premise arises from “a conclusion firmly based upon the generally known results of wide human experience,” which is that the vast majority of adolescents change as they age and, despite their involvement in illegal activity, do not “develop entrenched patterns of problem behavior.”

Batts, No. 45 MAP 2016, 2017 WL 2735411 at *30-31 (citations omitted). Therefore, the *Batts* court, after examining the due process considerations at stake, held that the burden must be on the State to demonstrate, beyond a reasonable doubt, that the individual is one of the rare juvenile offenders whose crimes reflect permanent incorrigibility and that therefore, a life without parole sentence is appropriate. *Id.* See also *State v. Hart*, 404 S.W.3d 232, 241 (Mo. 2013) (en banc) (“[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. Riley*, 110 A.3d 1205, 1214 (Conn. 2015) (finding a presumption against life

without parole sentences that must be “overcome by evidence of unusual circumstances.”), cert. denied, 136 S. Ct. 1361; *State v. Seats*, 865 N.W.2d 545, 555 (Iowa 2015) (finding a presumption against life without parole sentences). Thus, the burden must shift to the State to prove beyond a reasonable doubt that the unconstitutionality of the sentence was harmless.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that this Court grant the petition for a *writ of certiorari*.

Respectfully Submitted,

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