

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October 2020 Term

LEOBARDO BARRAZA

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari

To the Eighth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1998, an adult nicknamed Chupacabra used 16-year-old Leobardo Barraza to inveigle an adult woman he worked with into a road trip ostensibly to buy drugs in Mexico for which Chupacabra would pay her \$40,000. Chupacabra instead intended to have sex with the woman. He raped her while making Leo hold her infant, and then killed her and the child. Leo fled and lived at large for eight years before his arrest. He matured into a peaceful and productive adult. At his trial for kidnapping, the United States got the judge to deny Leo's request to require the jury to find an intent to kill. Federal law authorized only life in prison without parole at his 2010 sentencing. After this Court decided *Miller v. Alabama*, 567 U.S. 460 (2012), a new judge anchored its sentencing choice to the United States Sentencing Guideline homicide range that advised only life in prison and imposed a 50 year sentence. The Eighth Circuit affirmed, while acknowledging the Guideline the district court applied granted took no account of the transient frailties of youth.

In view of the foregoing, this petition presents this issue:

Whether a federal court commits plain error by anchoring a sentence for a juvenile's crime resulting in death to a Sentencing Guidelines that recommends only life-without parole where no claim or evidence suggests the defendant is irreparably corrupt?

Parties to the Proceedings

Petitioner Leobardo Barraza was represented in the lower court proceedings by his counsel, Lee T. Lawless, Federal Public Defender for the Eastern District of Missouri, and Kevin C. Curran, Assistant Federal Public Defender, 1010 Market, Suite 200, Saint Louis, Missouri, 63101. The United States was represented by Assistant United States Attorneys James Delworth and Angie E. Danis, Thomas Eagleton Courthouse, 111 South 10th Street, Saint Louis, Missouri, 63102.

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OPINION BELOW

The Eighth Circuit's ruling in Petitioner's appeal of his sentence is published at 892 F.3d 1106. The Eighth Circuit's original opinion appears in the appendix, at p. i.

JURISDICTION

The Eighth Circuit Court of Appeals entered its judgment on December 11, 2020. Appx. p. 1. Petitioner's timely motion for panel rehearing and rehearing *en banc* was denied on February 16, 2021. Appx. p. 17. This petition is timely filed within 150 days of the denial of the petition for rehearing by deposit with a third party commercial carrier on July 16, 2021, for delivery within three days to the Clerk of this Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. VIII

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

18 U.S.C. §1201. Kidnapping, provides in pertinent part:

- (a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when—
 - (1) the person is willfully transported in interstate or foreign commerce, regardless of whether the person was alive when transported across a State boundary, or the offender travels in interstate or foreign commerce or uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense;

shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.

18 U.S.C. § 3553. Imposition of sentence

- (a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
 - (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
 - (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and

- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
 - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
 - (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
- (5) any pertinent policy statement—
 - (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

28 U.S.C. §1254. Courts of Appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

- (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree[.]

United States Sentencing Guidelines

U.S.S.G. § 2A1.1 (2018) **First Degree Murder** provides, in pertinent part,

(a)

Base Offense level: 43.

Commentary

Application Notes:

- (1) **Applicability of Guideline.** This guideline applies in cases of premeditated killing. This guideline also applies when death results from the commission of certain felonies. For example, this guideline may be applied as a result of a cross reference (e.g., a kidnapping in which death occurs, see §2A4.1(c)(1)), or in cases in which the offense level of a guideline is calculated using the underlying crime (e.g., murder in aid of racketeering, see §2E1.3(a)(2)).

- (2) **Imposition of a Life Sentence.**

(A) **Offenses involving Premeditated Killing.** In the case of premeditated killing, life imprisonment is the appropriate sentence if a sentence of death is not imposed. A downward departure would not be appropriate in such a case. A downward departure from a mandatory statutory term of life imprisonment is permissible only in cases in which the government files a motion for a downward departure for the defendant's substantial assistance, as provided in 18 U.S.C. §3553(e).

(B) **Felony Murder.** If the defendant did not cause the death intentionally or knowingly, a downward departure may be warranted. For example, a downward departure may be warranted if in robbing a bank, the defendant merely passed a note to the teller, as a result of which the teller had a heart attack and died. The extent of the departure should be based upon the defendant's state of mind (e.g., recklessness or negligence), the degree of risk inherent in the conduct, and the nature of the underlying offense conduct. However, departure below the minimum guideline

sentence provided for second degree murder in § 2A1.2 (Second Degree Murder) is not likely to be appropriate. Also, because death obviously is an aggravating factor, it necessarily would be inappropriate to impose a sentence at a level below that which the guideline for the underlying offense requires in the absence of death.

.....

U.S.S.G. § 2A4.1. Kidnapping, Abduction, Unlawful Restraint (2018), provides, in pertinent part,

(a) Base Offense Level: 32

.....

(b) Cross Reference

(1) If the victim was killed under circumstances that would constitute murder under 18 U.S.C. §1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder).

Fed. R. Crim. P. 52

(b) **Plain Error.** A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.

INTRODUCTION

The Eighth Circuit's ruling conflicts with two lines of this Court's jurisprudence. In its Eighth Amendment cases, the Court has established that life in prison without parole is disproportionate for a juvenile whose crime reflects the transient immaturity of youth. This Court's cases interpreting the advisory United States Sentencing Guidelines system it established in 2005 recognize that the Guidelines remain the "lodestar" factor federal judges integrate as the authoritative view of proper sentencing for "the mine run of cases," and that they form the basis of sentences imposed below, within or above the advisory range. The Eighth Circuit approved a district court's express anchoring of its sentence for a crime by a 16-year-old resulting in death to a guideline that recommended only life in prison without parole, U.S.S.G. §2A1.1(a). The court of appeals did so recognizing that this guideline made no account for the transient nature of youth and did not limit the recommended life term to the rare juvenile whose crime reflected irreparable corruption.

The Eighth Circuit's ruling so plainly violates both lines of authority that this Court should decide the issue to prevent unjustly inflated sentences of juveniles convicted of crimes resulting in death, "the mine run of [which] cases" do not justify the federal punishment of life without parole.

STATEMENT OF THE CASE

In 1998, Leobardo (“Leo”) Barraza was 16. When not in school, he worked at a Chicago bagel store with Maria Eloiza, an adult who had a five-year old son. Jose Jesus Hernandez, an older man nicknamed Chupacabra, began making Leo transport him in an old Cadillac Leo’s father let him use to go from high school to his job. Chupacabra got Leo to entice Ms. Eloiza to make money going on a drug run to Mexico with him to create the façade of a family trip. Chupacabra actually intended to have sex with her. Leo feigned engine trouble to stop in a remote spot in Missouri, at which point Chupacabra raped and killed Ms. Eloiza as Leo held her child nearby. Chupacabra then began striking the infant, who died as well. Leo fled his home after the crime and spent eight years at large. He matured into a non-violent adult and was gainfully employed when police arrested him in 2006. He committed only one other offense at age 20, stealing a pickup that caused damage exceeding \$500.00 for which he received probation and paid off the restitution for the damage. Chupacabra was never apprehended.

A jury convicted Leo of kidnapping resulting in death in 2010. The district court Judge, Stephen N. Limbaugh, Sr., denied defense counsel’s request to instruct the jury that the government had to prove Leo acted with an intent to cause death to convict him. Judge Limbaugh Sr. retired before sentencing and his son, Judge Steven N. Limbaugh Jr., sentenced Leo despite not having sat at trial because the only statutory sentence authorized at that time was life without parole. In 2012, this Court ruled that mandatory life in prison violates the Eighth Amendment as applied to juveniles convicted of murder in *Miller v. Alabama* by denying them individualized consideration of the multiple

mitigating qualities that distinguish adolescence: their proneness to risk-taking, undeveloped appreciation of consequences, susceptibility to negative influences and lack of the means to escape bad situations plus their greater potential for rehabilitation. Leo filed a motion for post-conviction relief which was granted by Judge Limbaugh Jr. in 2014 after the government agreed *Miller* required a resentencing. Proceedings were long delayed however when intervening mental incompetence impaired Leo's communications with counsel. The District Court declared Leo incompetent on October 17, 2018. On August 7, 2019, the Court declared Leo competent and resentencing him at the same time.

The Court calculated the Sentencing Guidelines range and again used offense level 43 according to the first degree murder Sentencing Guideline in U.S.S.G. § 2A1.1(a) cross-referenced in the guidelines for kidnapping in U.S.S.G. § 2A4.1(c)(1) based on the death of Ms. Eloiza and her child. Offense level 43 corresponds to a prison term of life in prison without parole. Counsel for both parties agreed that was the "accurate guideline" for the offense. Judge Limbaugh Jr. stated he "agreed completely" that *Miller* required him to view Leo as a 16 year old and imposed a term of 50 years, stating:

This offense was heinous and gruesome and horrible. It involved a kidnapping and murder of a young woman and a five-year-old child. The sentencing guidelines are for life. That's also the statutory provision.

While this offense was committed when you were only 16 years old, in view of the evidence that was presented at trial, a sentence of 50 years is warranted. Specifically, you premeditated the kidnapping and murder of the adult female victim. You fabricated a story to the adult victim in an effort to convince her to leave her home in the Northern District of Illinois. The adult victim did, in fact, leave her home with her five-year-old son while traveling in Stanton, Missouri, located in the Eastern District of Missouri. And you feigned car trouble and pulled over to get the victim out of the car. You then raped the female victim and murdered her, after which you struck the child victim on the head and strangled him.

As such, and in view of the advisory guidelines range, and for all the reasons stated, pursuant to the provisions of Title 18, United States Code, Section 3553(a), and all the factors thereunder, also in view of the sentencing objectives of just punishment, general deterrence, and incapacitation, and by way of the imposition of a sentence that is sufficient but not greater than necessary to comply with the purposes set forth in the statute, it's the judgment and sentence of the Court that you, Leobardo B. Barraza, [are] hereby committed to the custody of the Bureau of Prisons for a term of 50 years.

Leo appealed his sentence to the Eighth Circuit. He argued that the District Court committed error by anchoring its choice of punishment to a Sentencing Guidelines range of life-without-parole, which has not been amended in light of *Miller*. Appendix at 12. He pointed to this Court's cases recognizing that the advisory Sentencing Guidelines regimen continued to operate as the "lodestar" guiding federal district courts imposition of sentence as the best advice of the United States Sentencing Commission on how the sentencing factors in 18 U.S.C. §3553(a) apply "in the mine run of cases." He also noted this Court's cases declaring life without parole to be a disproportionate and unconstitutional sentence for fatal juvenile crimes reflecting the transient qualities of youth.

The Eighth Circuit affirmed the district court's sentence finding no plain error in the district court's reliance on U.S.S.G. § 2A1.1's advice to impose only life in prison as the applicable Sentencing Guidelines range. Appx.at 14. It held the district court did not plainly err in calculating an advisory Guidelines range of life imprisonment under U.S.S.G. § 2A1.1, observing.

"[t]he Sentencing Guidelines are advisory. *Gall v. United States*, 552 U.S. 38, 46 (2007). The Supreme Court has directed that 'a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.' *Id.* at 49. The advisory Guidelines are 'the starting point and the initial benchmark.' *Id.* In Barraza's case, the § 2A1.1 cross-reference *recommended* a life sentence.

See U.S.S.G. § 2A1.1 cmt. 2 (A). In accordance with *Gall*, the district court calculated an advisory Guideline range of life imprisonment.”

Appx. 14 (emphasis in original). The panel cited Judge Limbaugh’s reference to reading “very closely” a sentencing memorandum defense counsel prepared discussing *Miller*, Leo’s immaturity and youth at the time of the offense, his institutional adjustment and sentences imposed in other juvenile resentencings. *Id.* It further noted the judge stated that he “very much” took into consideration the fact Leo was 16 at the time of the offense and sentences in other similar cases. *Id.* It then observed that the district court relied on the facts of the case, including the theory that Barraza’s older friend coerced him, and imposed a 50-year sentence “in view of the evidence that was presented at trial.” *Id.*

The panel denied Leo’s claim that his 50-year sentence was substantively unreasonable invoking an Eighth Circuit maxim that, “[w]hen a district court varies downward and sentences below a presumptively reasonable Guidelines range, it is nearly inconceivable that the court abused its discretion in not varying downward still further.” *Id.* at 15.

Petitioner filed a motion for rehearing *en banc* which the Eighth Circuit denied on February 16, 2021. Appx. at 17.

GROUNDS FOR GRANTING THE WRIT

- I. The Court should grant certiorari to resolve the conflict in the Court of Appeals's ruling with this Court's Eighth Amendment case law precluding life without parole for homicides reflecting the transient immaturity of youth and its cases prescribing the Sentencing Guidelines as an authoritative gauge of what a reasonable sentence is "in the mine run of cases". Life without parole is not constitutional for the mine run of juveniles who kill.

The Eighth Circuit's direction that federal judges should apply a federal Sentencing Guideline recommending life in prison without parole to a fatal crime committed by a 16 year-old with no prior record and who matured into a peaceful productive adult violates two lines of this Court's precedents. First, this Court's Eighth Amendment cases reject life without parole for minors whose fatal crimes reflect transient immaturity, lack of insight, vulnerability to bad influences and whose prospect to reform is greater. *Miller v. Alabama*, 567 U.S. 460, 479-80 (2012). "[L]ife without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption.'" *Montgomery v. Louisiana*, 136 S. Ct. 718, 726 (2016). Second, the Court's rulings on the authoritative role the advisory Sentencing Guidelines continue to play as the "lodestar" in federal sentencing recognize that misapplication of a harsher guideline triggers constitutional limits, "notwithstanding the fact that sentencing courts possess discretion to deviate from the recommended sentencing range." *Peugh v. United States*, 569 U.S. 530, 541 (2013).

Supreme Court Rule 10(c) notes that certiorari is proper when a United States court of appeals has decided "an important question of federal law in a way that conflicts with relevant decisions of this Court." The profound prejudice from the wrongful anchoring of juvenile sentences to a Sentencing Guideline advising only life without parole warrants this Court's immediate review. That Leo raised his challenge to the misapplication of such

a guideline as plain error on appeal in no way negates the perfect illustration it provides to evaluate the error here. The “essential framework the Guidelines establish for [federal] sentencing proceedings” means that misapplication of the wrong guideline range “can, and most often will, be sufficient to show a reasonable probability of a different outcome” and establishes grounds for plain error relief. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016).

1. *Miller* and *Montgomery* confirm the 8th Amendment excludes LWOP for fatal juvenile crime reflecting the transient qualities of youth and limits that sentence to only the rare juvenile whose crime reflects irreparable corruption.

This Court’s Eighth Amendment decisions soundly establish that its prohibition of “cruel and unusual” punishment prohibits life without parole for fatal crimes committed by juveniles that reflect the transient nature of youth, permitting this punishment only in the unusual, rare instance of a minor found to be irreparably corrupt. The Eighth Amendment embodies a guarantee against “excessive sanctions,” which “flows from the basic precept of justice that punishment for crime should be graduated and proportioned’ to both the offender and the offense.” *Miller*, 567 U.S. at 470, quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005). This line of cases also springs from a foundational principle that “children are constitutionally different from adults for purposes of sentencing.

Montgomery, 136 S. Ct. at 723, quoting *Miller*, 567 U.S. at 471. That premise reflects children’s “diminished culpability and greater prospects for reform,” made apparent in “three primary ways”:

“First, children have a ‘lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking. Second, children ‘are more vulnerable to negative influences and outside pressures,’ including from their family and peers; they have limited ‘control over their own

environment’ and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child’s character is not as ‘well formed’ as an adult’s; his traits are ‘less fixed’ and his actions less likely to be ‘evidence of irretrievable depravity.’”

Miller, 567 U.S. at 471, quoting *Roper*, 543 U.S. at 569-70.

Miller did not totally foreclose a sentencer’s ability to impose life without parole on a juvenile who kills; however, “the Court explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect “irreparable corruption.” *Montgomery*, 136 S. Ct. at 726. In the context of juvenile punishment, the Court explained, “a sentence misses too much if [it] treats every child as an adult.” *Miller*, 567 U.S. at 477. This Court’s “individualized sentencing decisions make clear that, a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.” *Id.*

Like the sentencing statute *Miller* challenged, the First Degree Murder Sentencing Guidelines the District Court made the foundation of Leo’s punishment “missed too much”. It integrated “no consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences”; it took no account of “the family and home environment that surround[ed] him—and from which [a juvenile] cannot usually extricate himself”; it made for “the circumstances of the homicide offense, including the extent of his participation in the conduct and the way ... peer pressures may have affected him,” “his inability to deal with police officers,” and it “disregards the possibility of rehabilitation even when the circumstances most suggest it.” *Id.*

Leo's case illustrate all these mitigating features. His failure to appreciate risks and consequences appeared in his failure to foresee or appreciate the danger of an older man tricking a woman he sought to have intercourse with to go on a long road trip. Chupacabra's exploitation of Leo for transportation and use tales of bravado as a soldier in the Mexican army manipulated Leo's vulnerability to peer pressure and intimidated any effort by the youth to attempt to stop the offense or escape Chupacabra's evil designs. Finally, Leo's lack of any prior record and his peaceful and productive record as a young adult before his arrest at age 24 plus his 10 years of non-violent and studious behavior in prison refuted any suggestion that he fell within the small class of irreparably corrupt juveniles for whom life without parole is authorized.

The claim here is not that the Eighth Circuit's endorsement of using the homicide Sentencing Guideline mandated a sentence of life without parole—it did not. Rather, the problem is that the Eighth Circuit's explicit declaration that Judge Limbaugh had to apply a Guidelines sentence of life without parole as “the starting point and the initial benchmark” for punishing a juvenile homicide against whom that harshest sentence plainly could not be applied arbitrarily inflated the district court's sentencing choice.

Molina-Martinez, 136 S. Ct. at 1345.

2. The dominant role the Sentencing Guidelines range plays in federal sentencing makes plain the error of using U.S.S.G. §2A1.1(a) to punish a juvenile murder.

This Court's jurisprudence explaining the Sentencing Guidelines' prominent role in every federal criminal judgement confirms the profound prejudice and injustice in using U.S.S.G. § 2A1.1 (a) to punish juveniles whose fatal crimes overwhelmingly do not result from “irreparable corruption.”

Congress enacted the Sentencing Reform Act of 1984 to create a United States Sentencing Commission to promulgate uniform guidelines intended to be binding in federal sentencing. *Mistretta v. United States*, 488 U.S. 361, 367 (1989). Prior to that time, sentencing courts had virtually untrammelled discretion to impose sentences, which led to criticisms citing significant sentencing disparities among similarly situated persons. *Id.* at 362, 366-367. The Sentencing Guidelines the Commission drafted incorporated a system employing offense levels that varied according to specified characteristics of the offense and offender, most of which enhanced the sentencing range expressed in a number of months to which a defendant would be sentenced. *Peugh*, 569 U.S. at 535. Each guideline range fell within wider statutory limits on the punishment authorized for an offense, yet, for some 18 years, the Guidelines limits were effectively mandatory. *United States v. Booker*, 543 U.S. 220, 249-250 (2005).

In 2005, the Court held that mandatory Guidelines violated the Sixth Amendment right to a jury determination of every fact that increased the penalty beyond the maximum authorized by the facts established by a plea of guilty or a jury verdict. *Id.* at 244. The Court determined the appropriate remedy for this problem was to strike the portions of the Sentencing Reform Act that rendered the Sentencing Guidelines mandatory. *Id.* at 245-258. The “advisory Sentencing Guidelines” that resulted still required district courts to consider the Guidelines in their analysis of the sentencing factors in 18 U.S.C. § 3553(a), thus providing some residual check on “excessive sentencing disparities.” *Id.* at 264-65.

The Court soon explained that the Sentencing Guidelines remained an authoritative view of the Sentencing Commission as to “the appropriate application of §3553(a) in the mine run of cases.” *Rita v. United States*, 551 U.S. 338, 351 (2007). The Court admonished that “a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.” *Gall v. United States*, 552 U.S. 38, 49 (2007). “As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.” *Id.* Federal judges “must begin their [sentencing] analysis with the Guidelines and remain cognizant of them throughout the sentencing process.” *Id.* The Court admonished judges contemplating a non-Guidelines sentence that they “must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.” *Id.* at 50. In fact, even when the District Court contemplates a sentence that deviates from the Guidelines, “if the judge uses the sentence range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense the basis for the sentence.” *Freeman v. United States*, 564 U.S. 522, 529 (2011) (plurality opinion). “Indeed, the rule [established in *Gall*] that an incorrect Guidelines calculation is procedural error ensures that they remain the starting point for every sentencing calculation in the federal system.” *Peugh*, 569 U.S. at 542.

Though not mandatory, the Sentencing Guidelines play such an “essential role” in a federal judge’s choice of sentence that they qualify as a “law” within the meaning of the Ex Post Facto Clause, making the retroactive application of a harsher range a violation of that constitutional limit as a matter of “fundamental justice.” *Id.* at 544-45. Judges view

them the way this Court describes them: as “the Federal Government’s authoritative view of the appropriate sentences for specific crimes.” *Id.* at 545.

The Eighth Circuit’s ruling directing federal courts to apply the life without parole guideline sentence in U.S.S.G. § 2A1.1 (a) to sentence a juvenile offense resulting in death made no reference to this Court’s holding in *Miller* that such a sentence cannot constitutionally be applied in a case like Leo’s where a fatal offense reflected the multiple-mitigating and transient qualities of youth, rather than the rare instance of “irreparable corruption.” The government notably did not request a life sentence, tacitly acknowledging the Eighth Amendment limits on that punishment for juveniles.

The problem posed in petitioner’s case is that the Eighth Circuit’s endorsement of the Sentencing Guidelines sentence of life without parole in U.S.S.G. §2A1.1(a) plainly conflicts with this Court’s Eighth Amendment rulings declaring it an unconstitutional punishment for fatal juvenile crimes reflecting the transient qualities of youth. *Miller* plainly establishes life without parole will *not* apply in “the mine run of cases” involving juveniles. Yet the Eighth Circuit explicitly quoted this Court’s general direction in *Gall* to declare that federal judges should use the Sentencing Guidelines range of life without parole as “the starting point and the initial benchmark” for the chosen punishment with no mention of this Court’s Eighth Amendment jurisprudence prohibiting that very punishment in a case like Leo’s where the evidence refuted any notion that it reflected a minor’s irreparable corruption.

The conflict between the Eighth Circuit’s stark direction to district courts to apply a Sentencing Guidelines sentence of life without parole as the authoritative view of the

appropriate balance of relevant sentencing factors for a juvenile no one suggested to be incorrigible is so plain that no purpose is served in waiting for other circuits to weigh in on the issue. *See* Supreme Court Rule 10 (c). The conflict the Eighth Circuit's ruling embodies with the many decisions from the two lines of this Court's jurisprudence set out above warrants immediate attention from this Courts review by Certiorari.

3. This case presents a perfect vehicle to resolve the issue

Leo's case presents a perfect vehicle to illustrate the error of applying a life without parole Sentencing Guideline in federal sentencing of juvenile offenses resulting in death. The record underlying his prosecution exemplifies virtually every transient mitigating quality of juvenile offenses underlying this Court's repudiation of life without parole for juveniles. It conspicuously reveals that Leo's offense falls within the "mine run of cases" involving juveniles whose offense in no way manifested "irreparable corruption."

Leo's background and characteristics model the uniquely mitigating conditions of youth that create the "significant gaps between juveniles and adults" relating to sentencing. The transient neurological qualities making juveniles more prone to take risks without full insight of potential consequences, *Miller* at 471, manifested in Leo's statements to police, referring to Chupacabra's intent to rape Maria yet making no reference to any intent to murder her or her infant. Leo's tendency toward impulsive conduct may have been exacerbated by the abandonment he experienced when his parents left him in Mexico at age eight while they sought residence in America, or the sexual abuse he suffered from a 30-year-old coworker at the bagel shop he worked in.

The second “gap” in juvenile culpability based on their vulnerability to negative influences and peer pressure and limited ability to escape bad environments appeared in Leo’s desire for peer acceptance by an older coworker who made sexual advances on him, as well as Chupacabra’s exploitation of Leo as a source of transportation and a lure to ensnare Ms. Eloiza. Impulsivity driven by fear and adrenaline triggered by Chupacabra’s plan likely impaired Leo’s ability to analyze logically the long-term consequences. The unfolding horror of Chupacabra’s acts overwhelmed this 16-year-old’s capacity to resist such adult force, particularly in a remote area like the off-road location where the crime occurred.

Leo’s case also exemplifies the unformed nature of a juvenile’s character and capacity to mature out of criminality. After leaving Illinois as police sought to question him, Leo made his way to Colorado via Mexico and took up residence with an uncle who employed him to install drywall. From 2004 to 2006, Leo made \$2,000 a month, and sent between \$600 to \$1,000 back to a girlfriend and infant in Mexico. At age 20, Leo committed his only adult crime by stealing a pickup, for which he was sentenced to probation and as to which he fulfilled a restitution order for \$3,620.28 in damages. The unusual record documenting Leo’s behavior at large for eight years until his arrest at age 24 provides an unusually detailed model of juveniles’ qualitatively “greater prospects for reform” as their physiological capacities fully develop. *Miller*, 567 U.S. at 471.

Although Leo’s counsel first raised the procedural error in this case in his appeal to the Eighth Circuit, the plain error analysis under Fed. R. Crim. P. 52(b) this Court established in *Molina-Martinez* shows the error here easily satisfies the four-pronged test

for plain error relief. 136 S. Ct. at 1345. Under *United States v. Olano*, 507 U.S. 725 (1993), appellate courts have discretion to remedy plain error when (1) the error was not intentionally relinquished or abandoned, (2), the error was clear or obvious, (3) the error affected the defendant's substantial rights, which ordinarily means one must show a reasonable probability of a different result, but for the error, and (4) the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Molina-Martinez*, at 1343, citing *Olano* at 736. "Nothing in the text of Rule 52(b), its rationale, or the Court's precedents supports a requirement that a defendant seeking appellate review of an unpreserved Guidelines error make some further showing of prejudice beyond the fact that the erroneous, and higher, Guidelines range set the wrong framework for the sentencing proceedings." *Molina-Martinez*, 136 S. Ct. at 1345.

The Eighth Circuit did not find any knowing waiver of the issue. Counsel pointed out on appeal that Leo's was only the second *Miller* federal resentencing in the Eastern District of Missouri. Petitioner's forgoing arguments portrays the plain error in applying a life without parole Sentencing Guideline to a juvenile whose crime no one claimed to be the result of irreparable corruption. Furthermore, counsel cited judgments in an exhibit sealed in the district court detailing multiple cases in which persons convicted of juvenile homicides originally punished by mandatory life without parole were reduced well below the 50 year term applied to Leo. Many of those cases plainly demonstrated the juvenile's intent to kill, unlike Leo's case. These included a reduced 35 year term imposed on a 16-year-old convicted of kidnapping and shooting a member of a rival drug dealer, *see United States v. Williams*, 95 F.3d 723, 725 (8th Cir. 1996)), and a reduced term of 28 years in

prison for a 17-year-old whose concern about being recognized prompted an adult coconspirator to hand him a gun after which the youth shot four people lying on a back room floor to death), *see United States v. Rosario*, 1999 WL 34843855 (E.D. N.Y. 1999).

No shortage of proof exists to document the likelihood of a far shorter sentence but for the district court's application of the life without parole Sentencing Guideline range in Leo's case. Since the record is silent as to what the judge might have done but for the erroneous application of the life without parole Guidelines, the District Court's express reliance on that range is sufficient to show the error affected Leo's substantial rights. *See United States v. Davis*, 825 F.3d 359, 365 (8th Cir. 2016), citing *Molina-Martinez*, 136 S. Ct. at 1347.

It need hardly be stated that an error inflating Leo's sentence to 50 years for a juvenile offense instigated by a manipulative adult who exploited Leo's youth to help setup a kidnapping that resulted in death warrants plain error relief because it "seriously affects the fairness, integrity or public reputation of judicial proceedings."

CONCLUSION

WHEREFORE, petitioner respectfully prays that this Court grant his petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Kevin C. Curran', is written over a horizontal line.

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