No.

IN THE
Supreme Court of the United States

SHAWN LABARRON DAVIS,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Court stated in *Montgomery v. Louisiana* that the Eighth Amendment prohibits life without parole sentences "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." 136 S. Ct. 718, 734 (2016). Nonetheless, state courts of last resort are divided 7-4 on whether the Eighth Amendment authorizes a juvenile to be sentenced to life without parole absent a finding of permanent incorrigibility.

The first question presented is:

1. Whether the Eighth Amendment requires the sentencing authority to make a finding that a juvenile is permanently incorrigible in order to impose a sentence of life in prison without the possibility of parole.

The second question presented is:

2. Whether the Eighth Amendment prohibits a life without parole sentence for a crime committed by a juvenile.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Shawn Davis respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Mississippi in this case.

OPINIONS AND ORDERS BELOW

The trial court's pronouncement of a life without parole sentence (Pet. App. 10a–16a) is unpublished. The opinion of the Court of Appeals of Mississippi (Pet. App. 4a–9a) is published at 234 So. 3d 440. The order of the Supreme Court of Mississippi denying certiorari (Pet. App. 1a) is unpublished.

JURISDICTION

The Supreme Court of Mississippi's denial of certiorari was entered on January 11, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

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

INTRODUCTION

Shawn Davis was sentenced to life in prison without the possibility of parole for a crime he committed soon after his sixteenth birthday. The sentencing court did not mention Davis's age in explaining the sentence, focusing instead on the crime itself. The judge never made a finding of permanent incorrigibility, an error that would have been grounds for reversal under the Eighth Amendment in the highest courts of Georgia, Florida, Oklahoma, Illinois, Pennsylvania, Iowa, and Wyoming.

Not so in Mississippi. No court has ever found Davis to be permanently incorrigible. Nevertheless, for a crime he committed as a boy, Davis is condemned to age and die without any "hope for some years of life outside prison walls." *Montgomery v. Louisiana*, 136 S. Ct. 718, 737 (2016).

The incorrigibility finding is crucial and warrants this Court's consideration. If such a finding is not required, "States [will be] free to sentence a child whose crime reflects transient immaturity to life without parole." *Id.* at 735. That result would vitiate the special protection that the Eighth Amendment affords to juvenile offenders.

The Court should grant certiorari.

STATEMENT OF THE CASE

1. *Petitioner*. When Shawn Davis was growing up, his mother took drugs and alcohol every day to the point of slurring her speech. Tr. 61–62, 71–72.[1] His

[1] All references to "R.," "Tr.,"and "Ex. ___" are to the record, record transcript, and record exhibits on file with the Mississippi Court of Appeals, No. 2016-CA-00638.

father was not around. *Id.* at 80. His uncle would beat him with an extension cord. Ex. S-1.10 at 2. His mother encouraged the whipping. *Id.*

Davis and his mother were eventually evicted from their home. Tr. 62. They moved to a building infested with drugs and notorious for prostitutes and heroin dealers. *Id.* at 64, 79.

Davis did not like himself or have many friends, and he was picked on at school. *Id.* at 71; Ex. S-1.10 at 4. In the afternoon, family members would see him in tears as he got off the bus. Tr. 71. He told a psychologist, "Sometimes I want to kill myself because I don't like my life." Ex. S-1.10 at 2. He acted out, bringing some sort of knife to school on one occasion, and threatening a teacher on another. *Id.* at 1, 5. At school, other children berated him because of his clothing, shoes, and hygiene. Tr. 71.

His mother might have done something about that, but she was spending their money on drugs and alcohol instead. *Id.* She sold their food stamps on the street. *Id.* She used the money to buy more drugs. *Id.* The refrigerator was always empty. *Id.*

In the hope of making friends, Davis would do what other kids told him. *Id.* at 95. At thirteen, after Davis was charged with stealing a car and referred for an examination by a state court, the psychologist reported that he was susceptible to "negative peer influence." Ex. S-1.10 at 2, 5. He feared alienating people on whom he depended. *Id.* at 3. He was "driven by immediate impulses rather than concerned about the consequences of his actions," exhibited "problems in impulse control," and tended to "act and speak without thinking things through." *Id.* at 3–4.

Amid all the difficulty, there were glimpses of joy and hope. At his cousin's wedding, Davis smiled broadly and embraced the groom. Tr. 87-88, Exs. D-1, D-3. He played football; a family photo shows him kneeling in his Gautier Middle School uniform and trying to look tough at the age of 12. Tr. 86, Ex. D-2. He loved his grandmother and lay in bed with her when she passed away. Tr. 85–86. He was an usher in church, and tried to keep attending even when his mother stopped. *Id.* at 93–94.

2. *The crime.* Davis turned sixteen in November of 2004. *Id.* at 59. Six weeks later, he participated in the brutal homicide of a man named Dorian Johnson. *Id.*

Though Davis did not have many friends, *id.* at 95, he was friends with Mary Scarborough, who also participated in the murder, *id.* at 127–30. The victim, Johnson, was a man in his fifties who had sex with Scarborough, a seventeen-year-old girl, in exchange for giving her money and paying her bills. *Scarborough v. State*, 956 So. 2d 382, 383 (Miss. Ct. App. 2007). Johnson would take Scarborough and petitioner riding in his car and give them cigarillos and drugs. Tr. 79–80. Others commented that it was improper or unseemly for Johnson to be riding around with two young kids. *Id.* at 80–81. Davis's older cousin tried to get Johnson to stay away. *Id.* at 80.

Johnson became aggressive with Scarborough, and she tried to end their relationship. *Scarborough*, 956 So. 2d at 383. Scarborough's ex-boyfriend, Anthony Booker, told Johnson to leave her alone. *Id.* Johnson refused to end the relationship, and instead started stalking Scarborough. *Id.*

Davis, Scarborough, and Booker made a plan to scare Johnson into leaving Scarborough alone, which

evolved into a plan to kill Johnson. *Id.* While Davis and Scarborough smoked marijuana in Johnson's car with him, Scarborough flashed the interior lights, a signal for Booker to come over. *Id.* at 384. The three beat and stabbed Johnson, loaded him into a car, and drove first in the direction of an alligator habitat that was closed, and then to a different location. *Id*. At the second location, they continued to beat and stab Johnson, with Davis stabbing his face. *Id.* Johnson died from these injuries. *Id.* at 384–85.

3. *Original proceedings.* Less than nine months before this Court declared the death penalty unconstitutional for juveniles, *see Roper v. Simmons*, 543 U.S. 551 (2005), Davis pleaded guilty in the Circuit Court of Jackson County, Mississippi to simple murder, in order to avoid possibly being sentenced to death. R. 42; Tr. 4. He assisted the State by testifying against Scarborough, who was also convicted of murder. Ex. S-1.3; *Scarborough*, 956 So. 2d at 385.

The court sentenced Davis to life in prison. R. 42. The parties agree that Mississippi law, both now and at the time of the sentence, prohibits parole for defendants convicted of murder. Resp. Miss. Ct. App. Br. 5.[2]

4. *Resentencing.* Following this Court's decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which held that mandatory life-without-parole sentences imposed on juveniles violate the Eighth Amendment, the state circuit court ordered Davis to be

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[2] Mississippi Code Ann. § 47-7-3(1)(f), which applies to this case, prohibits parole for crimes of violence committed between June 30, 1995 and July 1, 2014. Section 47-7-3(1)(g)(i) prohibits parole for crimes of violence committed after July 1, 2014.

resentenced. R. 73–74. Davis requested a sentence of life in prison with the possibility of parole. *Id.* at 78.

The same judge who originally took Davis's plea and sentenced him to life without parole presided over the resentencing. Tr. 1, 30. Six witnesses testified for Davis about the circumstances of his childhood. *Id.* at 60-95. The State did not call witnesses. *Id.* at 60. The court sentenced Davis to life in prison without the possibility of parole. Pet. App. 16a.

The court did not make a finding that Davis was permanently incorrigible. Although Davis had just turned sixteen at the time of the murder, the court did not mention his age in its statement of reasons for the sentence. *See id*. at 11a–16a. The court referred to him as a "wild animal" rather than a teenage boy. *Id*. at 15a. The court stated that the crime suggested "depravity" and that such depravity was common to Davis's generation: "[A]s to the depravity of this murderous scheme, I could not help but despair an entire generation of our youth was possibly being raised without any vestige of human kindness whatsoever." *Id*. at 13a. The court opined that Davis lacked remorse and posed a danger to the public, and alluded to his prison disciplinary history, which included fighting and possession of homemade knives. *Id.* at 12a-13a, 15a. The court also described Davis's "difficult and dysfunctional family life," and his upbringing amid the "unseemly life of public housing." *Id*. at 11a.

In the main, however, the Court's rationale for the sentence consisted of a description of the crime. *See id*. at 13a–16a. The Court recounted the murder in painstaking, graphic detail. Id. at 13a–15a. It devoted

one-half of its rationale for the sentence to the crime itself and Davis's role in it. *See id.* at 13a–16a.

5. *Court of Appeals of Mississippi*. Davis appealed his sentence to the Court of Appeals of Mississippi. *Id.* at 5a. He made two arguments that remain relevant at this stage of the proceedings. He asserted that the life without parole sentence violated the Eighth Amendment because the trial court did not find permanent incorrigibility: "The court's analysis does not include any finding [that] with Davis, rehabilitation was impossible." Pet. Miss. Ct. App. Br. 19. He also argued that juvenile life without parole sentences categorically violate the Eighth Amendment. *Id.* at 21–22.

The court of appeals rejected Davis's arguments and affirmed the trial court. Pet. App. 8a–9a. The court of appeals' analysis of the sentence consisted of one paragraph:

> We do not find the trial court abused its discretion in applying the *Miller* sentencing factors to conclude that Davis should be sentenced to life without the possibility of parole. The circumstances of this case are not meaningfully distinguishable from those of [*Hudspeth v. State*, 179 So. 3d 1226, 1227 (Miss. Ct. App. 2015)], in which this Court affirmed the trial court's imposition of a life sentence without parole after consideration of the *Miller* factors. *Id.* In particular, the circumstances of the crime and Davis's level of participation are not in his favor. It was Davis's premeditated idea to kill the victim in addition to robbing him, and it was Davis who slashed the victim more than thirty times with a knife. No

> evidence was presented that Davis "succumbed to any peer pressure in committing the crime."

Id. at 8a (quoting *Hudspeth*, 179 So. 3d at 1228).

The court of appeals also rejected Davis's argument that the Eighth Amendment prohibits life without parole sentences for juveniles. *Id.* The court of appeals denied rehearing, with one judge voting to grant rehearing. *Id.* at 2a.

6. *Supreme Court of Mississippi*. Davis petitioned for certiorari in the Supreme Court of Mississippi. *Id.* at 1a. As relevant here, Davis argued that his sentence violates the Eighth Amendment because (1) the trial court did not make a finding of irreparable corruption, and (2) juvenile life without parole sentences are categorically impermissible. Miss. Cert. Pet. 1.

The Supreme Court of Mississippi denied the petition, with three justices voting to grant certiorari. Pet. App. 1a.

7. This petition followed.

REASONS FOR GRANTING THE PETITION

There is a deep split of authority on whether the Eighth Amendment permits a juvenile to be sentenced to life without parole in the absence of a finding that the juvenile is permanently incorrigible. Among state courts of last resort, the issue has resulted in at least eleven majority opinions, split 7-4, and three dissents. Because the division of authority results from differing interpretations of this Court's decision in *Montgomery v. Louisiana,* 136 S. Ct. 718 (2016), only this Court can resolve the disagreement.

The issue is important because without an incorrigibility finding, there is no way to know if a sentencing court determined, as this Court's jurisprudence demands, that a particular juvenile defendant is in fact among the "rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id.* at 734. In practical terms, if a finding of permanent incorrigibility is not required, States will remain "free to sentence a child whose crime reflects transient immaturity to life without parole." *Id*. at 735.

This case presents the question cleanly and illustrates the danger of dispensing with the incorrigibility finding. The sentencing court might have viewed Davis as "rare" and permanently incorrigible, *id.* at 734, or it may have ignored his age and given too much weight to the facts of the crime itself. The appellate court discussed nothing but the crime. Pet. App. 8a.

This case also presents the question whether the Eighth Amendment categorically forbids a life without parole sentence for a juvenile—a punishment that American society has come to reject. In the six years since *Miller*, States have moved decisively to prohibit life without parole sentences for juveniles. All told, the sentence is extinct, or nearly so, in 34 jurisdictions.

I. This Court should decide whether a juvenile life-without-parole sentence requires a finding of permanent incorrigibility.

A. The question divides state supreme courts.

State supreme courts are intractably divided on whether the Eighth Amendment requires a sentencing judge to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole. At least seven state courts of last resort hold that such a finding is required. *See Veal v. State*, 784 S.E.2d 403, 412 (Ga. 2016); *People v. Holman*, 91 N.E.3d 849, 863 (Ill. 2017); *Luna v. State*, 387 P.3d 956, 961 (Okla. Crim. App. 2016); *Landrum v. State*, 192 So. 3d 459, 469 (Fla. 2016); *Sen v. State*, 301 P.3d 106, 127 (Wyo. 2013); *Commonwealth v. Batts*, 163 A.3d 410, 435 (Pa. 2017); *State v. Seats*, 865 N.W.2d 545, 555–56 (Iowa 2015).

Four hold that it is not required. *State v. Valencia*, 386 P.3d 392, 396 (Ariz. 2016); *Chandler v. State*, No. 2015–KA–01636–SCT, 2018 WL 1193479, at *3 (Miss. Mar. 8, 2018); *State v. Ramos*, 387 P.3d 650, 663 (Wash. 2017); *Johnson v. State*, 395 P.3d 1246, 1258 (Idaho 2017).

The issue has also prompted three dissents by justices who sit on state courts of last resort. *Chandler*, 2018 WL 1193479, at *4 (Waller, C.J., dissenting); *Luna*, 387 P.3d at 965 (Hudson, J., concurring in part and dissenting in part); *Luna*, 387 P.3d at 963 (Lumpkin, J., concurring in part and dissenting in part).

1. The disagreement among courts flows directly from an ambiguity in this Court's decision in *Montgomery*.

Montgomery's logic strongly implies that a juvenile life without parole sentence cannot be imposed without a finding of permanent incorrigibility. *Montgomery* holds that the Eighth Amendment bars life without parole sentences "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." 136 S. Ct. at 733–34. *Montgomery* therefore charges sentencing authorities with the duty of separating juveniles who commit homicides into two categories—a small group that cannot be redeemed, and a much larger group that can. *Id.* at 733–34. It would seem that a conclusion that a juvenile is permanently incorrigible, and therefore belongs to the class who can be sentenced to life without parole, could take no form other than a finding, whether oral or written.

However, the following statement in *Montgomery* complicates the issue:

> Louisiana suggests that *Miller* cannot have made a constitutional distinction between children whose crimes reflect transient immaturity and those whose crimes reflect irreparable corruption because *Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility. That this finding is not required, however, speaks only to the degree of procedure *Miller* mandated in order to implement its substantive guarantee. When a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural

> requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems. *See Ford v. Wainwright*, 477 U.S. 399, 416–417 (1986) ("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences").

Id. at 735.

As we show below, most courts consider any ambiguity introduced by this dictum (the "*Montgomery* fact-finding dictum") to be secondary to *Montgomery*'s central logic. These courts require a finding of permanent incorrigibility. Other courts, however, rely on the dictum to conclude that sentencing authorities may impose life without parole sentences on juveniles without finding permanent incorrigibility.

2. Six state courts of last resort hold that the Eighth Amendment requires a finding of permanent incorrigibility before a juvenile may be sentenced to life without parole.

a. *Supreme Court of Georgia*: In *Veal v. State*, the trial court sentenced a defendant to life without parole during the interval between *Miller* and *Montgomery*. 784 S.E.2d 403, 410 (Ga. 2016). The trial court failed to make an explicit finding of permanent incorrigibility. *Id.* at 412. The Supreme Court of Georgia stated that it might have affirmed the trial court under *Miller*, "[b]ut then came *Montgomery*." *Id*. at 410. Under *Montgomery*'s "explication of *Miller*," the sentencer must "determine whether a particular defendant falls into this almost-all juvenile murderer category for which [life without parole] sentences are

banned." *Id.* at 411 (citing *Montgomery*, 136 S. Ct. at 736). To impose life without parole, the court must make a "specific determination that [the defendant] is irreparably corrupt." *Id.* at 411. The supreme court remanded the case for a new sentencing because "[t]he trial court did not . . . make any sort of distinct determination on the record that Appellant is irreparably corrupt or permanently incorrigible." *Id* at 412.

b. *Court of Criminal Appeals of Oklahoma*: In Oklahoma, the court of last resort in criminal cases requires a finding of permanent incorrigibility. *Luna v. State*, 387 P.3d 956 (Okla. Crim. App. 2016). In *Luna*, the court vacated a juvenile life without parole sentence and remanded the case "for resentencing to determine whether the crime reflects Luna's transient immaturity, or an irreparable corruption and permanent incorrigibility warranting the extreme sanction of life imprisonment without parole." *Id.* at 963. The court noted that the fact-finder at sentencing (which in Oklahoma is a jury) "made no factual findings of permanent incorrigibility and irreparable corruption." *Id.* at 961.

Two judges filed partial concurrences and dissents, disagreeing with the majority's holding that *Montgomery* requires a finding of permanent incorrigibility. Judge Lumpkin cited *Montgomery*'s fact-finding dictum and opined that the Court of Criminal Appeals "wrongly expands upon the requirements of [*Montgomery*]." *Luna*, 387 P.3d at 963 (Lumpkin, J., concurring in part and dissenting in part). Judge Hudson also concluded that *Montgomery* does not require a finding that a defendant "is irreparably corrupt and permanently incorrigible."

Luna, 387 P.3d at 965 (Hudson, J., concurring in part and dissenting in part).

c. *Supreme Court of Florida*: In *Landrum v. State*, the Supreme Court of Florida ordered a new sentencing where the trial court's statement of reasons for a life without parole sentence indicated that it "did not consider whether the crime itself reflected 'transient immaturity' rather than 'irreparable corruption.'" 192 So. 3d 459, 468 (Fla. 2016). The supreme court held that "the Eighth Amendment requires that sentencing of juvenile offenders be individualized in order to separate the 'rare' juvenile offender whose crime reflects 'irreparable corruption,' from the juvenile offender whose crime reflects 'transient immaturity.'" *Id.* at 466 (citing *Montgomery*, 136 S. Ct. at 734).

d. *Supreme Court of Illinois*: The Supreme Court of Illinois holds that "[u]nder *Miller* and *Montgomery*, a juvenile defendant may be sentenced to life imprisonment without parole, but only if the trial court determines that the defendant's conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation." *People v. Holman*, 91 N.E. 3d 849, 863 (Ill. 2017). In *Holman*, the findings were sufficient to authorize a life without parole sentence because the trial court "concluded that the defendant's conduct placed him beyond rehabilitation." *Id.* at 865.

e. *Supreme Court of Wyoming*: Even prior to *Montgomery*, the Supreme Court of Wyoming held that the Eighth Amendment requires a finding of permanent incorrigibility. The trial court held that under *Miller*, "the district court must set forth specific findings supporting a distinction between 'the

juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Sen v. State*, 301 P.3d 106, 127 (Wyo. 2013).

f. *Supreme Court of Iowa*: In its pre-*Montgomery* decision in *State v. Seats*, the Supreme Court of Iowa vacated a life without parole sentence. 865 N.W.2d 545, 555–56 (Iowa 2015). The supreme court stated that the trial court could impose life without parole again on remand only if it "finds this is the rare and uncommon case requiring it to sentence Seats to life in prison without the possibility of parole[.]" *Id.* at 558. The court later reiterated the need for such a finding in its post-*Montgomery* decision in *State v. Sweet*, 879 N.W.2d 811, 833 (Iowa 2016).[3]

g. *Supreme Court of Pennsylvania*: The Supreme Court of Pennsylvania requires a finding of permanent incorrigibility, although it is unclear whether the court derives the requirement from state procedural law or federal constitutional law. *See Commonwealth v. Batts*, 163 A.3d 410, 433, 435 (Pa. 2017). At one point, *Batts* states that *Montgomery* does not impose a formal fact-finding requirement:

> Although the *Montgomery* Court acknowledged that *Miller* contains no "formal factfinding requirement" prior to a sentencing court imposing a sentence of life without the possibility of parole on a juvenile, the Court stated that this omission was purposeful so as to permit the States to sovereignly administer their criminal justice systems and establish a

[3] In *Sweet*, the Supreme Court of Iowa went on to hold that the Iowa constitution categorically prohibits juvenile life without parole. *Id.* at 839.

> procedure for the proper implementation of *Miller*'s holding.

Id. at 433 (quoting *Montgomery*, 136 S. Ct. at 735).

On the other hand, a later portion of the decision states just the opposite—this Court's jurisprudence requires a finding of permanent incorrigibility: "Under *Miller* and *Montgomery*, a sentencing court has no discretion to sentence a juvenile offender to life without parole unless it *finds* that the defendant is one of the 'rare' and 'uncommon' children possessing the above-stated characteristics, permitting its imposition." *Id.* at 435 (emphasis added) (citing *Montgomery*, 136 S. Ct. at 726, 734; *Miller*, 567 U.S. at 479; *Graham v. Florida*, 560 U.S. 48, 73 (2010); *Roper*, 543 U.S. at 572–73).

3. Four state supreme courts hold that the Eighth Amendment does *not* require a trial court to make a finding of permanent incorrigibility to sentence a juvenile to life without parole.

a. *Supreme Court of Arizona*: In *State v. Valencia*, two juveniles had been sentenced to life in prison without the possibility of parole for homicides committed in the 1990s. 386 P.3d 392, 393 (Ariz. 2016). The intermediate appellate court vacated the sentences because the trial judge did not make a finding of permanent incorrigibility. *Id.* The Supreme Court of Arizona reversed and reinstated the sentences, concluding that *Miller* and *Montgomery* do not require a finding of permanent incorrigibility. *Id.* at 396. The Court derived that conclusion from *Montgomery*'s fact-finding dictum. *Id.* at 395–96 (quoting *Montgomery*, 136 S. Ct. at 736).

b. *Supreme Court of Mississippi*: The Supreme Court of Mississippi held in *Chandler v. State*, No. 2015–KA–01636–SCT, 2018 WL 1193479, at *3 (Miss. Mar. 8, 2018) (pending), that *Miller* and *Montgomery* do not require a finding of permanent incorrigibility. Relying solely on the *Montgomery* fact-finding dictum, the court stated, "*Miller* does not require trial courts to make a finding of fact regarding a child's incorrigibility." *Id.* (citing *Montgomery*, 136 S. Ct. at 735).

Chief Justice Waller dissented, joined by three other justices. *Id.* at *4 (Waller, C.J., dissenting). They concluded that "the trial court's resentencing of Chandler was insufficient as a matter of law" because the trial court "did not articulate that Chandler is among 'the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'" *Id.* (quoting *Montgomery*, 136 S. Ct. at 734).

c. *Supreme Court of Washington*: The Supreme Court of Washington rejects the view that "the sentencing court must make an explicit finding that the juvenile's homicide offenses reflect irreparable corruption before imposing life without parole." *State v. Ramos*, 387 P.3d 650, 663 (Wash. 2017). The court grounded this conclusion on *Montgomery*'s fact-finding dictum: "[T]he Supreme Court has expressly acknowledged that '*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility.'" *Id.* at 665 (quoting *Montgomer*y, 136 S. Ct. at 735).

d. *Supreme Court of Idaho*: The Supreme Court of Idaho also holds that a finding of permanent incorrigibility is not required. *Johnson v. State*, 395 P.3d 1246, 1258 (Idaho 2017). Relying on the

Montgomery fact-finding dictum, the supreme court found the argument that such a finding is required to be "without merit." *Id.*[4]

B. The question is important.

1. The issue this case raises is important because *Montgomery*'s command cannot be meaningfully enforced except through a required finding. *Montgomery* instructs sentencing authorities to limit life without parole to "the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." 136 S. Ct. at 734. That function necessarily requires a finding of permanent incorrigibility. Indeed, even the dissent in *Montgomery* stated that the decision requires sentencing authorities to "resolve" the question of incorrigibility. *Id.* at 744 (Scalia, J., dissenting). Trial courts resolve questions by making findings.

2. Findings are crucial to juvenile life without parole sentences just as they are crucial to death sentences. In the same way that an aggravator must be found to sentence a defendant to death, permanent incorrigibility must be found to sentence a juvenile to life without parole. These are the only punishments that the Eighth Amendment limits to "a subclass of defendants convicted of murder." *See Tuilaepa v. California*, 512 U.S. 967, 972 (1994). Like capital

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[4] The California Supreme Court is currently considering whether the Eighth Amendment requires an incorrigibility finding. *See People v. Padilla*, 4 Cal. App. 5th 656 (2016), *rev. granted* 387 P.3d 741 (Cal. 2017) ("*Montgomery* cannot be satisfied unless the trial court, in imposing [a life without parole] term, determines that in light of all the *Miller* factors, the juvenile offender's crime reflects irreparable corruption resulting in permanent incorrigibility, rather than transient immaturity").

punishment, juvenile life without parole calls for "a distinctive set of legal rules" because this Court "view[s] this ultimate penalty for juveniles as akin to the death penalty." *Miller*, 567 U.S. at 475; *see also id.* at 481 ("if . . . 'death is different,' children are different too.").

A required finding in the juvenile life without parole context would limit the extraordinary punishment to the eligible group of offenders. In capital punishment cases, the Court has stated "that the trier of fact must convict the defendant of murder and *find* one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase." *Tuilaepa*, 512 U.S. at 971–72 (1994) (emphasis added).[5] The same logic applies to juvenile life without parole sentences and requires a finding to ensure that the punishment is restricted to the eligible group. Without a finding that a given juvenile is irreparably corrupt, there remains "a grave risk" that corrigible juveniles will be sentenced to life without parole and thereby "held in violation of the Constitution." *Montgomery*, 132 S. Ct. at 736.

3. The finding is necessary for appellate review as well. As Justice Sotomayor recently wrote, life without parole sentences—perhaps even for adults—may require an appellate court to determine whether a trial court's sentence "properly took account of [the defendant's] circumstances, was imposed as a result

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[5] *See also Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988) (holding that a death sentence satisfied the Eighth Amendment because the jury at the guilt phase "found" an aggravating factor); *Jurek v. Texas*, 428 U.S. 262, 273 (1976) (plurality opinion) (upholding Texas capital murder law that "essentially requires that one of five aggravating circumstances be found before a defendant can be found guilty of capital murder . . .").

of bias, or was otherwise imposed in a 'freakish manner.'" *Campbell v. Ohio*, 538 U.S. ___, 2017 WL 4409905, at *2 (Mar. 19, 2018) (statement of Sotomayor, J., respecting the denial of certiorari). An appellate court left to guess what a sentencing authority might have been thinking cannot adequately review whether a sentence complies with the Eighth Amendment.

4. This case itself illustrates why the holdings of *Miller* and *Montgomery* become impossible to enforce if sentencing authorities can dispense with the incorrigibility finding. Not only did the trial and appellate courts fail to find incorrigibility, but it is unclear whether they actually *believed* Davis to be permanently incorrigible, the key determination required by the Eighth Amendment.

The trial court may have considered Davis irreparably corrupt, or it may have fixated on the crime and dismissed him as a "wild animal." Pet. App. 15a. The trial court devoted half of its justification for the sentence to a description of the crime. *See id.* at 13a–16a. While the court stated that Davis's "release into society through parole would constitute a danger to the public in general and especially to vulnerable citizens in particular," it based that view entirely on the crime itself—"the nature of this offense, pitiless, prolonged agony of the victim, the family, caused as a result of [Davis's] planning." *Id.* at 15a–16a.

The trial court did not consider Davis's age in explaining the sentence. Nor did it consider Davis to be "rare." *Montgomery*, 136 S. Ct. at 734. On the contrary, the court stated that Davis's "depravity" reflected "an *entire generation* of our youth . . . possibly

being raised without any vestige of human kindness whatsoever." Pet. App. 13a (emphasis added).

While the trial court did not have the benefit of this Court's ruling in *Montgomery*, the Mississippi Court of Appeals did. The court of appeals nonetheless failed to mention *Montgomery,* and its assessment of Davis's incorrigibility is even less scrutable than the trial court's. *See id.* at 7a–8a. The court of appeals devoted only a single paragraph to the appropriateness of the sentence. *Id.* at 8a. That paragraph consisted entirely of a description of the crime and neither noted Davis's age nor opined on his capacity for reform. *Id.* Without a finding of permanent incorrigibility, there is no way to tell if the state courts believed Davis to fit into the narrow category of irreparably corrupt juveniles.

5. The question presented is one of federal constitutional law, not mere state procedural implementation of a federal constitutional rule. The state supreme courts that have imposed a fact-finding requirement derive that requirement from the Eighth Amendment, as interpreted by this Court. *See supra* at 12–16. The one possible exception is the Supreme Court of Pennsylvania, which appears to base a fact-finding requirement on both state procedural implementation and federal Eighth Amendment law. *See supra* at 15–16. Because state supreme courts have split on a question of federal law, it is the province of this Court to resolve the issue. *See Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983) ("[W]hen . . . a state court decision fairly appears to rest primarily on federal law, . . . we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.").

C. This case is an excellent vehicle to decide the question.

1. This case provides a clean vehicle to decide whether the Eighth Amendment forbids juvenile life without parole sentences unaccompanied by a finding of permanent incorrigibility. Because this petition arises from a direct appeal of Davis's resentencing, the legal issue is not complicated by retroactivity principles or other doctrines that limit collateral review. The record is clear that neither the trial court nor the state court of appeals found Davis irreparably corrupt. The question whether the Eighth Amendment requires a finding of permanent incorrigibility is not obscured by other issues in this case. For example, in some cases, the parties dispute whether a given juvenile sentence constitutes "life without parole" within the meaning of *Miller* and *Montgomery*, but in this case, the parties agree that Davis was sentenced to life without parole. Pet. Miss. Ct. App. Br. 4-5; Resp. Miss. Ct. App. Br. 5–6.

2. While the Court generally may prefer to grant review in cases that include a written opinion by a state court of last resort, the Supreme Court of Mississippi considered and rejected the argument that *Montgomery* requires an incorrigibility finding in *Chandler*. *See Chandler*, 2018 WL 1193479, at *3. The court filed a reasoned opinion on the issue, and four justices joined a reasoned dissent. This Court therefore has the benefit of the considered views of the Supreme Court of Mississippi on the first question presented, notwithstanding that court's decision not to hear this case.[6]

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[6] The majority in *Chandler* consisted of the same justices who voted to deny certiorari in this case. The same justices who

D. Now is the ideal moment to decide the question.

1. Resolution of the required finding question is time-sensitive, as the wave of resentencings triggered by *Montgomery*'s retroactivity holding continue to progress through state judicial systems.[7] If sentencing a juvenile to life without parole requires a finding of permanent incorrigibility, then defendants in the current wave of resentencing hearings should receive the benefit of that rule. A finding requirement would almost certainly not apply retroactively.[8] Prompt resolution is critical because juveniles being sentenced (or resentenced after *Montgomery*) will get one bite at the apple. If this Court recognizes a finding requirement after their sentences become final, the new rule will not help them.

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dissented in *Chandler* voted to grant Davis's petition for certiorari, with the exception of Justice Ishee. Justice Ishee did not participate in Davis's case. Pet. App. 1a; *Chandler*, 2018 WL 1193479.

[7] See Associated Press, *50-State Examination*, Jul. 31, 2017, https://www.ap.org/explore/locked-up-for-life/50-states

[8] The plurality opinion in *Teague v. Lane*, 489 U.S. 288 (1989), establishes that only two types of new rules apply retroactively on federal habeas review: substantive rules and watershed rules of procedure. *Teague*, 489 U.S. at 311; *Montgomery*, 136 S. Ct. at 728. A required finding surely would not qualify as a substantive rule—it would be a procedural rule necessary to effectuate the substantive holding of *Miller* and *Montgomery* that the Eighth Amendment does not permit life without parole sentences for juveniles who are not permanently corrupt. As for watershed procedural rules, "the doctrine is highly exceptional." Dov Fox & Alex Stein, *Constitutional Retroactivity in Criminal Procedure*, 91 WASH. L. REV. 463, 466 (2016). The Court has not recognized a watershed rule in the three decades since *Teague*. *Id.*

On the other hand, if the Eighth Amendment does not require a finding of permanent incorrigibility, this Court's timely clarification could conserve the resources of busy state prosecutors and trial judges. In that case, state appellate courts should stop throwing out life-without-parole sentences (and often requiring yet a *third* sentencing hearing after a defendant has already been resentenced under *Miller* or *Montgomery*) on the ground that the Eighth Amendment requires a finding of permanent incorrigibility. *See, e.g.*, *Veal*, 784 S.E.2d at 412; *Luna*, 387 P.3d at 961, 963; *People v. Padilla*, 4 Cal. App. 5th 656 ,672 (Cal. Ct. App. 2016). Whatever the answer is, there is benefit to knowing it soon.

2. The division of authority is mature, having occasioned at least eleven majority opinions and three dissents by jurists on state courts of last resort. *See supra* at 12–18. Further percolation will not help to resolve the question because the disagreement focuses on what this Court intended in *Montgomery*. *See supra* at 11–18. Only the Court itself can answer that question.

II. In the alternative, the Court should grant review to decide whether the Eighth Amendment prohibits sentencing juveniles to life without parole.

Miller reserved the question whether "the Eighth Amendment requires a categorical bar on life without parole for juveniles." 567 U.S. at 479. That question is ripe for consideration today. In the six years since *Miller*, State legislatures have moved decisively to prohibit the sentence. In other jurisdictions, it hangs on as matter of law but is dead as a matter of fact. All told, 34 jurisdictions have eliminated juvenile life

without parole entirely or limited the sentence to five or fewer incarcerated offenders. Meanwhile, cases like this one—where the sentencing judge failed to mention Davis's age and capacity for rehabilitation in explaining the sentence, and focused almost entirely on the crime itself—typify the arbitrary manner in which the sentence is imposed. To send a juvenile to prison with no hope of getting out alive violates the Cruel and Unusual Punishments Clause of the Eighth Amendment.

1. Thirty-four jurisdictions in the United States have eliminated, or nearly eliminated, juvenile life without parole. This clear trend toward abolition demonstrates that our society has come to reject this extreme punishment. *See Graham*, 560 U.S. at 62 (stating that legislative enactments and "[a]ctual sentencing practices" provide objective indicia of societal consensus); *see also Miller*, 567 U.S. at 482.

Spurred by *Miller*, legislatures have unambiguously addressed juvenile life without parole sentences—and rejected their imposition. Prior to *Miller*, only four states prohibited the practice.[9] Six years later, the landscape has changed. Seventeen more jurisdictions now bar the practice by statute or court ruling, for a total of twenty-one.[10] Another six

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[9] See Alaska Stat. § 12.55.125; Colo. Rev. Stat. §§ 17-22.5-104(IV), 18-1.3-401(4)(b)(1); Kan. Stat. Ann. § 21-6618; Ky. Rev. Stat. Ann. § 640.040(1).

[10] See Juvenile Sentencing Project, Juvenile Life Without Parole Sentences in the United States, November 2017 Snapshot (Nov. 20, 2017), https://www.juvenilelwop.org/wp-content/uploads/November%202017%20Snapshot%20of%20JLWOP%20Sentences%2011.20.17.pdf. *See also* S.B. 294, 91st Gen. Assemb., Reg. Sess. (Ark. 2017) (amending Ark. Code §§ 5-4-104(b), 5-4-108, 5-4-602(3), 5-10-101(c), 5-10-102(c), 16-80-104, 16-93-612(e), 16-93-

613, 16-93-614, 16-93-618, and enacting new sections), http://www.arkleg.state.ar.us/assembly/2017/2017R/Bills/SB294.pdf; S.B. 394, Reg. Sess. (Cal. 2017) (amending Cal. Penal Code §§ 3051, 4801), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB394; S.B. 796, Jan. Sess. (Conn. 2015) (amending Conn. Gen. Stat. §§ 54-125a, 46b-127, 46b-133c, 46b-133d, 53a-46a, 53a-54b, 53a-54d, 53a-54a), https://www.cga.ct.gov/2015/ACT/pa/pdf/2015PA-00084-R00SB-00796-PA.pdf; S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013) (amending Del. Code Ann. tit. 11, §§ 636(b), 4209(a), 4209A, 4204A), http://delcode.delaware.gov/sessionlaws/ga147/chp037.pdf; B21-0683, D.C. Act 21-568 (D.C. 2016) (amending, in relevant part, D.C. Code §§ 24-403 *et seq*.); H.B. 2116, 27th Leg. Sess. (Haw. 2014) (amending Haw. Rev. Stat. §§ 706-656(1), 706-657 (2014)); A. 373, 217th Leg. (N.J. 2017) (amending N.J. Stat. 2C:11-3), http://www.njleg.state.nj.us/2016/Bills/AL17/150_.PDF; A.B. 267, 78th Reg. Sess. (Nev. 2015) (enacting Nev. Rev. Stat. §§ 176, 176.025, 213, 213.107), https://www.leg.state.nv.us/Session/78th2015/Bills/AB/AB267_EN.pdf; H.B. 1195, 65th Leg. Assemb. (N.D. 2017) (amending N.D. Cent. Code § 12.1-20-03 and enacting § 12.1-32), http://www.legis.nd.gov/assembly/65-2017/documents/17-0583-04000.pdf; S.B. 140, 2016 S.D. Sess. Laws ch. 121 (S.D. 2016) (amending S.D. Codified Laws § 22-6-1 and enacting a new section), http://sdlegislature.gov/docs/legsession/2016/Bills/SB140ENR.pdf; S.B. 2, 83rd Leg., Special Sess. (Tex. 2013) (amending Tex. Penal Code Ann. § 12.31, Tex. Code Crim. Proc. Ann. art. 37.071); H.B. 405, 61st Leg., Gen. Sess. (Utah 2016) (amending Utah Code Ann. §§ 76-3-203.6, 76-3-206, 73-6-207, 73-6-207.5, 73-6-207.7 and enacting § 76-3-209); H. 62, 73rd Sess. (Vt. 2015) (enacting Vt. Stat. Ann. tit. 13, § 7045); 5 H.B. 4210, 81st Leg., 2d Sess. (W.Va. 2014) (amending and enacting W. Va. Code §§ 61-2-2, 61-2-14a, 62-3-15, 62-3-22, 62-3-23, 62-12-13b), http://www.wvlegislature.gov/Bill_Status/bills_text.cfm?billdoc=HB4210%20SUB%20ENR.htm&yr=2014&sesstype=RS&billtype=B&houseorig=H&i=4210; H.B. 23, 62nd Leg., Gen. Sess. (Wyo. 2013) (amending Wyo. Stat. Ann. §§ 6-2-101, 6-2-306, 6-10-201, 6-10-301, 7-13-402); *See also Diatchenko v. District Attorney for Suffolk Dist*., 1 N.E.3d 270 (Mass. 2013) (juvenile life without parole sentences violate the Massachusetts Constitution); *State*

states appear to have zero juvenile offenders serving life without parole sentences.[11] In seven other states, five or fewer individuals remain incarcerated pursuant to such sentences.[12] In total, thirty-four jurisdictions have abandoned juvenile life without parole sentences or curtailed them to the point of near elimination.

2. Moreover, only a categorical bar to juvenile life without parole sentences can prevent the "'unacceptable likelihood . . . that the brutality or cold-blooded nature of any particular crime [will] overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a [lesser] sentence[.]" *Graham*, 560 U.S. at 77–78 (quoting *Roper*, 543 U.S. at 573).

This case provides a troubling illustration of the very risk that a brutal crime will blind a sentencing court to the individual defendant before it. The trial court focused principally on the crime itself, recounting it in graphic terms. Pet. App. 13a–15a. The court ignored Davis's age, in violation of *Miller*. *See id.* at 11a–16a. It failed to address incorrigibility. *See id.* The appellate court, in turn, affirmed the sentence in a cursory opinion that described *only* the crime and

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v. Sweet, 879 N.W.2d 811 (Iowa 2016) (juvenile life without parole sentences violate the Iowa Constitution).

[11] These are: Maine, Minnesota, Missouri, New Mexico, New York, and Rhode Island. November 2017 Snapshot, *supra,* at 8, 9, 10, 11, 14.

[12] These are: Idaho (4), Indiana (5), Montana (1), Nebraska (4), New Hampshire (5), Ohio (no more than 3), and Oregon (5). *Id.* at 6, 10, 11, 12, 13.

totally ignored Davis's individual circumstances. *Id.* at 7a–8a.

3. This case provides an excellent vehicle to address the question whether the Eighth Amendment categorically bars life without parole for juveniles. The posture of the case—direct appeal rather than collateral review—simplifies the issue. The case presents the question cleanly, on a complete record, with the issue fully preserved in the lower courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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