No.

IN THE

Supreme Court of the United States

JERRARD T. COOK,

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, federal appellate courts and state courts of last resort are divided 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 Jerrard Cook 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 circuit court's order sentencing petitioner to life without the possibility of parole (Pet. App. 27a) is unpublished. The opinion of the Court of Appeals of Mississippi affirming the circuit court (Pet. App. 4a) is reported at 242 So.3d 865. The order of the Supreme Court of Mississippi denying certiorari (Pet. App. 1a) is unpublished but is referenced in the Southern Reporter at 237 So.3d 1269.

JURISDICTION

The Supreme Court of Mississippi's denial of certiorari was entered on March 22, 2018. Justice Alito extended the time to file this petition to July 20, 2018. 17A1336. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

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

INTRODUCTION

Jerrard Cook has been condemned to life in prison without the possibility of parole for a murder he committed when he was just seventeen years old. The court that sentenced Cook made no finding that his crime reflected permanent incorrigibility. Nor could it have reasonably done so: the psychologist appointed by the court to examine Cook stated that Cook was *not* one of those rare juvenile offenders who is incapable of rehabilitation.

That the sentencing authority made no finding of permanent incorrigibility would have been grounds for reversal under the Eighth Amendment in the Fourth Circuit and the highest courts of seven states. But not in Mississippi, where no finding of permanent incorrigibility is required before sentencing a teenaged offender to die in prison.

Mississippi's approach, which it shares with four other states, warrants the Court's review. The Court has already made clear that the Eighth Amendment prohibits the extreme punishment of life imprisonment without the possibility of parole for "all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016), *as revised* (Jan. 27, 2016). This case perfectly illustrates the danger that state sentencing authorities, if not required to make a finding of permanent incorrigibility, will deviate from the substance of the Court's Eighth Amendment rule and impose sentences of life without parole even on juveniles who are not irreparably corrupt.

The Court should grant certiorari.

STATEMENT OF THE CASE

1. *Petitioner*. For the first twelve years of his life, Jerrard Cook, a boy of "average to low-average intelligence," was raised by his grandmother. Tr. 176.[1] He had no relationship with his father, who went to prison for drug-related offenses around the time Cook was born. Tr. 154–55. His mother, herself a longtime drug user, was rarely around; she would have given Cook up for adoption if her own mother had not talked her out of it. Tr. 154–57.

Cook and his grandmother were close. Tr. 159. The relationship shaped Cook's behavior. Tr. 159. At his grandmother's insistence, Cook attended church "[e]very day the doors opened." Tr. 157. While his grandmother was raising him, Cook "was a good child in school"; he was involved in student activities, and he would bring home his artwork and sports trophies. Tr. 158.

When Cook was about twelve years old, his grandmother passed away. Tr. 158–59. The loss was devastating. Tr. 158–59. A forensic psychologist appointed by the court to evaluate Cook testified that he "spiraled out downwards" and "was largely unsupervised" after her death. Tr. 177.

Without much supervision as a teenager, Cook began skipping school, using illegal drugs, and hanging around with a bad crowd—including Cearic Barnes, Tr. 121, who would eventually become his co-defendant, Pet. App. 28a. Cook, like many adolescents, was

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[1] Herein, all references to "R." and "Tr." are to the record clerk's papers and record transcript on file with the Mississippi Court of Appeals, No. 2016-CT-00687-COA.

influenced by peer pressure, and without his grandmother's guidance, he "gravitated more toward the street," where "his behavior . . . was largely motivated by wanting to appear cool, appear tough." Tr. 178. Cook seemed to respond well to periods of structure and discipline, such as when he was sent to training school or mentored by a local authority figure. Tr. 159–61. But when those temporary solutions ended, he was set adrift, and his behavior backslid. Tr. 159–61.

Cook's mother has admitted that, despite her son's rebellious behavior, she did not punish him. Tr. 160. Moreover, although she believed he was using drugs as a teenager, she made no meaningful attempt to stop him. Tr. 160. Cook never received any therapy or counseling. Tr. 183.

2. *Crime and original sentence.* When Cook was seventeen years old, he shot and killed an eighteen-year-old acquaintance named Marvin Durr. Pet. App. 5a.

On the day in question, Cook and his friend Cearic Barnes had been walking through town with another teenager; as a group, they had talked about robbing local convenience stores, but had not followed through on any of their plans. Pet. App. 28a; *see also id.* at 6a. Cook had a gun with him that he had taken from his uncle's house. *Id.* at 6a. When the third friend left, Barnes and Cook decided they would flag down a car from the side of the road, steal it, and drive to a nearby town to rob a store. *Id.* at 6a–7a. The first car they flagged down was a police cruiser, and it drove on after a brief stop. *Id.* at 7a. The second car they flagged down was driven by Marvin Durr, Barnes's cousin. *Id.* Durr agreed to give them a ride to Cook's

aunt's house. *Id.* Barnes and Cook gave Durr wrong directions, and after he missed a turn, they told him to let them out by the side of the road. *Id.* Durr did so, but as he was driving away, Cook flagged him down again and shot him in the head, killing him. *Id.*

Barnes and Cook tried to remove Durr's body from the car, but they could not, so Cook sat on Durr's body and drove the car to a nearby bridge, where he knew there were alligators in the water. *Id.* There, Barnes and Cook were still unable to remove Durr's body, so Barnes set fire to the car to destroy evidence. *Id.* Cook discarded the gun and burned the clothes. *Id.* at 8a.

In 2003, Cook pleaded guilty to capital murder. *Id.* at 29a. He was sentenced to life in prison without the possibility of parole. *Id.*

3. *Resentencing hearing*. Following this Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), which held that mandatory life-without-parole sentences imposed on juveniles violate the Eighth Amendment, Cook filed a motion requesting that the state circuit court vacate his original sentence and resentence him to life with the possibility of parole. R. 62.

The circuit court granted the motion in part, vacating Cook's sentence and ordering a resentencing hearing. R. 28–29. For purposes of that hearing, the court ordered Cook to undergo a "mental competency examination that includes, among other things, the specific sentencing considerations enunciated in *Miller v. Alabama*." R. 30. The court appointed forensic psychologist W. Criss Lott, Ph.D., to conduct the evaluation and, if necessary, testify at the resentencing hearing. R. 30.

At Cook's resentencing hearing, the State called three witnesses, none of whom had had any significant interactions with Cook since at least as far back as his trial and original sentencing, fourteen years earlier. Danny Smith had prosecuted Cook fourteen years ago as a district attorney. Tr. 79–80. Mr. Smith admitted that he had had no contact with Cook since Cook's sentencing and that his opinion of Cook was based entirely on what he could remember about the prosecution. Tr. 99. Bobby Bell, Sr., a local police chief, had served as a "mentor" to Cook back when Mr. Bell had worked as a truant officer and substitute teacher. Tr. 102. Mr. Bell acknowledged that he had not "seen or talked to" Cook since Cook was twelve or thirteen years old. Tr. 103, 106. Jerry S. Durr, the victim's father, also testified. Tr. 108. Mr. Durr acknowledged that he had had no direct personal interactions with Cook since the time of his sentencing, with the exception of a letter from Cook in which Cook apologized for the murder of Marvin Durr. Tr. 113.

Cook called several witnesses who knew him as a child and had continued to interact with him after his conviction: his mother, Sharon Cook, Tr. 153–64; his cousin, Angela Daniels, Tr. 117–29; his fiancé, Vera Quarles, Tr. 165–71; and his pastor, Reverend Bruce Smith, Tr. 129–40. In addition to discussing Cook's difficult childhood, *see* Tr. 154–58, and immaturity at the time of the crime, *see* Tr. 134, 160, 167–68, these witnesses explained that Cook had "matured a lot" while in prison, Tr. 123, had "taken responsibility" for his crime, Tr. 164, and had consistently expressed remorse, Tr. 164, 170. Furthermore, Reverend Smith testified to his belief that Cook had undergone a sincere religious "change" while incarcerated. Tr. 135.

Cook also called Dr. Lott, the forensic psychologist appointed by the court. Tr. 172. Dr. Lott was the only expert to testify at the hearing.

Among other things, Dr. Lott testified that Cook "did not appear to be one of those . . . rare offenders who couldn't be rehabilitated." Tr. at 192. Dr. Lott stated that in "90 plus percent of the cases," juveniles who have committed offenses, including violent offenses, become less likely to offend after age seventeen. Tr. 187, 188. "[I]t's my opinion," Dr. Lott testified, "that [Cook] does not represent one of those rare offenders who could not be rehabilitated." Tr. 203.

4. *Reinstatement of sentence.* Following the hearing, the circuit court issued an order reinstating Cook's original sentence of life imprisonment without the possibility of parole. Pet. App. 27a. The court opined that neither Cook's young age at the time of the murder, Cook's upbringing, nor the circumstances of the crime "weigh[ed] against a sentence of life without parole." Pet. App. 29a–31a. Based on Cook's prison disciplinary record, the court stated its belief that he lacked "any significant possibility of rehabilitation." Pet. App. 31a. The court made no reference whatsoever to Dr. Lott's testimony that Cook "does not represent one of those rare offenders who could not be rehabilitated." Tr. 203; Pet. App. 27a–32a.

Cook moved to set aside the court's order reimposing a sentence of life in prison without the possibility of parole. R. 49. He made two arguments that remain relevant at this stage. First, the circuit court "failed to make a specific finding, supported by credible evidence, that [Cook] is rare, uncommon, and irreparably corrupt." R. 52. Second, the sentence of "life with-

out the possibility of parole is excessive, unreasonable, cruel and unusual when applied to juveniles in general, as a class, and specifically as to [Cook]," and therefore, it "violates . . . the Fifth, Eighth, and Fourteenth Amendments to the Constitution." R. 56. The circuit court denied the motion. R. 59.

5. *Court of Appeals of Mississippi*. Cook appealed his sentence to the Court of Appeals of Mississippi. *See* Pet. App. 21a. Again, he made two arguments that remain relevant at this stage. First, he argued that the circuit court erred in imposing a life without parole sentence because the court made no finding that Cook was irreparably corrupt. Brief of the Appellant at 17.[2] Second, and alternatively, Cook argued that sentencing juveniles to life without parole is categorically unconstitutional because it violates the Eighth and Fourteenth Amendments. *Id.* at 22.

The court of appeals rejected Cook's arguments and affirmed the circuit court. Pet. App. 25a. First, the court held that sentencing authorities are not required to make a finding of permanent incorrigibility before imposing a life without parole sentence on a juvenile offender. The court reasoned that, "in *Montgomery*, the [Supreme] Court specifically stated that '*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility' and that '*Miller* did not impose a formal factfinding requirement.'" *Id.* at 22a (quoting *Montgomery*, 136 S. Ct. at 735). Instead, the court found that *Miller* simply "identif[ied] some factors that the judge is supposed to consider in reaching a sentencing decision." Pet.

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[2] Brief of the Appellant, *Cook v. State*, 242 So.3d 865 (Miss. Ct. App. Aug. 8, 2017), 2016 WL 10732890.

App. 16a. Thus, the court concluded that a judge may impose a sentence of life without parole as long as she has "discussed and applied" the so-called *Miller* factors and her conclusion is not "arbitrary or capricious." *Id.* at 21a.

In addition to rejecting a fact-finding requirement, the court dismissed *Montgomery*'s "permanent incorrigibility" and "irreparable corruption" standard, *see Montgomery*, 136 S. Ct. at 734, as a "theological concept." Pet. App. 16a.[3] The court stated: "We … note that the United States Supreme Court has never defined 'irreparable corruption,' a term that sounds more like a theological concept than a rule of law to be applied by an earthly judge." *Id.* at 16a.

Second, the court held that the Constitution does not categorically bar sentencing juveniles to life without parole. *Id.* at 25a.

The court of appeals denied rehearing, with one judge voting to grant it. Pet. App. 2a.

6. *Supreme Court of Mississippi.* Cook petitioned the Supreme Court of Mississippi for a writ of certiorari. *See id.* at 1a. In relevant part, Cook argued that the reinstatement of his sentence violated the Eighth Amendment because: (1) the sentencing authority did not find and could not have found that Cook was the rare, permanently incorrigible juvenile offender for whom a life-without-parole sentence is permissible; and (2) the Constitution categorically bars sentencing

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[3] In *Montgomery*, the Court uses the terms "permanent incorrigibility" and "irreparable corruption" interchangeably. *See, e.g.*, *Montgomery*, 136 S. Ct. at 734.

juvenile offenders to life imprisonment without possibility of parole. Miss. S. Ct. Pet. at 6, 8.[4] The Supreme Court of Mississippi denied Cook's petition, with two justices voting to grant it. 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. The Ninth Circuit is split with the Fourth Circuit on this question, and among state courts of last resort, the issue has resulted in at least twelve majority opinions, split 7–5, and four dissents. The split is deep and acknowledged. 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 authority 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, state sentencing authorities will remain "free to sentence a child whose crime reflects transient immaturity to life without parole." *Id*. at 735.

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[4] Petition for Certiorari, *Cook v. State*, 237 So. 3d 1269 (Table) (Miss. 2018), *available at* http://bit.ly/Miss_CertPet.

This case presents the question cleanly and illustrates the danger of dispensing with the incorrigibility finding. This Court has consistently recognized that "[i]t is 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." *Roper v. Simmons*, 543 U.S. 551, 573 (2005). *See also Graham v. Florida*, 560 U.S. 48, 68 (2010). And in this case, a court-appointed psychologist examined Cook and testified to his "opinion that [Cook] does *not* represent one of those rare offenders who could not be rehabilitated." Tr. 203 (emphasis added). Yet the trial court—free from any obligation to make a finding that Cook is permanently incorrigible—imposed a life without parole sentence without so much as mentioning the expert witness's opinion.

This case also presents the question of 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.[5]

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[5] The same two questions are presented in a petition pending before the Court in *Davis v. Mississippi*, No. 17-1343.

I. This Court Should Decide Whether Sentencing An Offender To Life Without Parole For A Crime Committed As A Juvenile Requires A Finding Of Permanent Incorrigibility.

A. The Question Divides Both The Federal Circuits And State Supreme Courts.

Federal circuits and state supreme courts are intractably divided on whether the Eighth Amendment requires a sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole. The Fourth Circuit holds that a finding of permanent incorrigibility is required, *see Malvo v. Mathena*, 893 F.3d 265, 267 (4th Cir. 2018), while the Ninth Circuit holds just the opposite, *see United States v. Briones*, 890 F.3d 811, 819 (9th Cir. 2018).

At least seven state courts of last resort hold that a finding is required, while five state courts of last resort hold just the opposite. *See infra* at 16–22. The issue has also prompted at least four dissents by federal court of appeals judges and justices who sit on state courts of last resort. *See infra* at 15–17, 21. And the split is acknowledged. *See People v. Skinner*, No. 152448, 2018 WL 3059768, at *25 (Mich. June 20, 2018) (Markman, C.J., dissenting) (noting "the split of authority in state courts post-*Miller* on whether a court must make a specific 'finding' of irreparable corruption").[6]

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[6] *See also* Alice Reichman Hoesterey, *Confusion in Montgomery's Wake*, Appendix B: Irreparable Corruption Determination, 45 FORDHAM URB. L.J. 149, 190–93 (2017).

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 may not be sentenced to life without parole 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* also charges sentencing authorities with the duty of "separat[ing] those juveniles who may be sentenced to life without parole from those who may not." *Id*. at 735. It would seem, then, that a sentencing authority must reach a conclusion that a juvenile is permanently incorrigible, and therefore one of "those juveniles who may be sentenced to life without parole," *id.*, before imposing such a sentence. It also would seem that such a conclusion 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. The Fourth and Ninth Circuits are split on whether a finding of permanent incorrigibility is required. The Fourth Circuit recently held that "a sentencing judge … violates *Miller*'s rule any time it imposes a discretionary life-without-parole sentence on a juvenile homicide offender without first concluding that the offender's 'crimes reflect permanent incorrigibility,' as distinct from 'the transient immaturity of youth.'" *Malvo*, 893 F.3d at 274. "[I]rreparable corruption or permanent incorrigibility," the court stated, is "a determination that is now a prerequisite to imposing a life-without parole sentence on a juvenile homicide offender." *Id.* at 275. As a result, the court affirmed the district court's ruling granting a writ of habeas corpus, vacating a juvenile life sentence without

the possibility of parole, and ordering the state trial court to hold a resentencing "to determine … whether [the defendant] qualifies as one of the rare juvenile offenders who may, consistent with the Eighth Amendment, be sentenced to life without the possibility of parole because his 'crimes reflect permanent incorrigibility.'" *Id.* at 267 (quoting *Montgomery*, 136 S. Ct. at 734).

The Ninth Circuit, however, rejected a finding requirement in *United States v. Briones*, where "[t]he gist of [the defendant's] appeal" included the argument that "the district court failed to make an explicit finding that Briones was 'incorrigible.'" 890 F.3d at 818. Relying on *Montgomery*'s factfinding dictum, the Ninth Circuit stated that "[n]othing in the *Miller* case suggests that the sentencing judge use any particular verbiage or recite any magic phrase." *Id.* at 819 (citing *Montgomery*, 136 S. Ct. at 735).

Judge O'Scannlain concurred in part and dissented in part, faulting the district court for imposing a life sentence "[w]ithout any evident ruling on th[e] question" of permanent incorrigibility. *Id.* at 822–23 (O'Scannlain, J., concurring in part and dissenting in part). Judge O'Scannlain opined that "[p]erhaps … the district court could have determined that … Briones is permanently incorrigible … [,] [b]ut the transcript does not indicate that the district court made such determination." *Id.* at 824. Thus, Judge O' Scannlain would have "remand[ed] for the limited purpose of permitting the district court properly to perform the analysis required by *Miller* and *Montgomery*." *Id.* at 822.

3. Seven 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 Supreme Court of Georgia stated that it might have affirmed the trial court under *Miller*, "[b]ut then came *Montgomery*." *Id.* at 410. The court explained that under *Montgomery's* "explication of *Miller*," the sentencer must "determine whether a particular defendant falls into th[e] almost-all juvenile murderer category for which [life without parole] sentences are banned." *Id.* at 411(emphasis omitted) (citing *Montgomery*, 136 S. Ct. at 736). That is, the sentencer must make a "specific determination that [the defendant] is *irreparably corrupt*." *Id.* 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, as necessary to put him in the narrow class of juvenile murderers for whom [a life without parole] sentence is proportional under the Eighth Amendment as interpreted in *Miller* as refined by *Montgomery*.

Id. at 412.

b. *Court of Criminal Appeals of Oklahoma*: Oklahoma's court of last resort for 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. Indeed, the court held that the fact-finder at sentencing (which in Oklahoma is a jury) may not impose a life without parole sentence on a juvenile "unless [it] find[s] beyond a reasonable doubt that the defendant is irreparably corrupt and permanently incorrigible." *Id.* at 963 n.11. *See also Stevens v. State*, No. PC-2017-219, 2018 WL 2171002, at *7 (Okla. Crim. App. May 10, 2018) (citing *Luna*, 387 P.3d at 963 n.11) ("It is the State's burden to prove, beyond a reasonable doubt, that [a juvenile homicide offender] is irreparably corrupt and permanently incorrigible.").

Two judges filed partial concurrences and dissents in *Luna*, 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 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 irrepara-

ble corruption beyond the possibility of rehabilitation." *People v. Holman*, 91 N.E. 3d 849, 863 (Ill. 2017).

d. *Supreme Court of Wyoming*: The Supreme Court of Wyoming holds that before a life without parole sentence may be imposed, "*Miller* and *Montgomery* require a sentencing court to make a finding that . . . the juvenile offender's crime reflects irreparable corruption resulting in permanent incorrigibility, rather than transient immaturity." *Davis v. State*, 415 P.3d 666, 695 (Wyo. 2018). The sentencing court must make the finding "explicitly"—it is not enough to say, as did the sentencing court in *Davis*, that "[the offender] is 'one of those rare cases where the sentence previously imposed was appropriate.'" *Id.* [7]

e. *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 "the juvenile is irreparably corrupt, beyond rehabilitation, and thus unfit ever to reenter society." *Id.* at 558. The court later re-

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[7] Even before *Montgomery*, the Supreme Court of Wyoming had held that the Eighth Amendment requires a finding of permanent incorrigibility. In *Sen v. State*, 301 P.3d 106, 127 (Wyo. 2013), the court held that to sentence a juvenile to life without parole, "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.'"

iterated the need for such a finding in a post-*Montgomery* decision. *State v. Sweet*, 879 N.W.2d 811, 833 (Iowa 2016).[8]

f. *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).

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 fact-finding requirement" prior to a sentencing court imposing a sentence of life without the possibility of parole on a juvenile, the

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[8] In *Sweet*, the Supreme Court of Iowa also held that the Iowa Constitution categorically prohibits juvenile life without parole. 879 N.W.2d at 839.

> Court stated that this omission was purposeful so as to permit the States to sovereignly administer their criminal justice systems and establish a 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—that 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*, 560 U.S. at 73; *Roper*, 543 U.S. at 572–73).

4. Five 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 supreme 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*, 242 So.3d 65, 69 (Miss. 2018), 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 71 (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 (emphasis omitted) (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.*

e. *Supreme Court of Michigan*. The Supreme Court of Michigan rejects a fact-finding requirement based on the *Montgomery* fact-finding dictum. *See Skinner,* 2018 WL 3059768, at *15. However, the court also characterized this Court's decisions on juvenile life without parole sentences as "not models of clarity" and acknowledged that "there is language in both *Miller* and *Montgomery* that at least arguably would suggest that a finding of irreparable corruption is required before a life-without-parole sentence can be imposed." *Id.* at *10, 14.

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 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 ("[I]f . . . 'death is different,' children are different too.").

A required finding in the juvenile life without parole context would limit the extraordinary punishment of life without parole 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).[9] 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

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[9] *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 . . .").

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 of bias, or was otherwise imposed in a 'freakish manner.'" *Campbell v. Ohio*, 138 S. Ct. 1059, 1061 (2018) (statement of Sotomayor, J., respecting the denial of certiorari) (footnote omitted). Whether an offender is permanently incorrigible is *the* central question in juvenile life without parole cases, and the sentencing authority should be required to answer it so as to ensure the opportunity for adequate review on appeal. In other words, the appellate court should not be left to guess the sentencing authority's thoughts on the decisive issue.

C. This Case Is An Excellent Vehicle To Decide The Question.

1. This case provides a strong vehicle to decide whether the Eighth Amendment forbids juvenile life without parole sentences unaccompanied by a finding of permanent incorrigibility. The court of appeals clearly rejected the contention that a permanent incorrigibility finding is required. Pet. App. 22a. The court noted that Cook "reasons that he is entitled to parole eligibility unless the sentencer finds that his offense reflects 'irreparable corruption.'" Pet. App. 21a (quoting *Montgomery*, 136 S. Ct. at 734). The court stated that "[t]he *Miller* and *Montgomery* opinions refute Cook's argument." *Id.* at 22a. The court continued: "Moreover, in *Montgomery*, the [Supreme] Court specifically stated that '*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility' and that '*Miller* did not impose a formal factfinding requirement.'" Pet. App. at 22a (quoting *Montgomery*, 136 S. Ct. at 735). The court

also disparaged the permanent incorrigibility standard as "more like a theological concept than a rule of law." Pet. App. 16a.

2. The trial court clearly failed to make a finding of permanent incorrigibility. To be sure, the trial court stated its belief that Cook lacked "any significant possibility of rehabilitation." Pet. App. 31a. But that statement falls far short of a finding that Cook is forever *incapable* of rehabilitation. *Montgomery*, 136 S. Ct. at 733. The trial court also failed to acknowledge the permanent incorrigibility standard, failed to recognize that only the "rarest" juvenile homicide offenders will be permanently incorrigible, and failed even to mention the court-appointed psychologist's expert opinion that Cook "does not represent one of those rare offenders who could not be rehabilitated." Pet. App. 31a; Tr. 203.

3. 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*, 242 So.3d at 69. The supreme court filed a reasoned opinion on the issue, and four justices joined a reasoned dissent. *See supra* at 21. 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. Moreover, the decision not to hear this case lets stand the appellate court's open rebellion against the permanent incorrigibility standard, which it derided as a "theological concept." Pet. App. 16a.

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, thirty-four 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 discounted Cook's age and failed to mention the court-appointed psychologist's testimony that Cook was not incapable of rehabilitation—illustrate the arbitrary manner in which the sentence is imposed. Pet. App. 29a. 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.[10] 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.[11] Another six states

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[10] 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).

[11] 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

appear to have zero juvenile offenders serving life without parole sentences.[12] In seven other states, five or fewer individuals remain incarcerated pursuant to such sentences.[13] In total, thirty-four jurisdictions have abandoned juvenile life without parole sentences or curtailed them to the point of near elimination.

2. Only a categorical bar to juvenile life without parole sentences can prevent the intolerable risk that corrigible juveniles will be sentenced to life without parole. If, as the court of appeals would have it, permanent incorrigibility is "a theological concept," not

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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. Dist. Att'y for Suffolk Dist.*, 1 N.E.3d 270 (Mass. 2013) (juvenile life without parole sentences violate the Massachusetts Constitution); *State v. Sweet*, 879 N.W.2d 811 (Iowa 2016) (juvenile life without parole sentences violate the Iowa Constitution).

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

[13] 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.

"a rule of law to be applied by an earthly judge," Pet. App. 16a, arbitrary application is unavoidable—it is certain that some life without parole sentences will be "imposed capriciously or in a freakish manner." *Campbell*, 138 S. Ct. at 1060 (statement of Sotomayor, J., respecting the denial of certiorari) (quoting *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)).

A categorical bar is also necessary to 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).

3. This case provides an excellent vehicle to address 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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