No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BOBBY JERRY TATUM, Petitioner

vs.

STATE OF ARIZONA, Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In *Miller v. Alabama*, this Court held that mandatory sentences of life without parole imposed on a juvenile homicide offender violate the Eighth Amendment. 132 S. Ct. 2455, 2469 (2012). In *Montgomery v. Louisiana*, this Court reiterated that if the judge has discretion to impose such a sentence under state law, the Eighth Amendment requires a sentencing judge to find that a crime reflects "permanent incorrigibility" or "irreparable corruption" before imposing that sentence. 136 S. Ct. 718, 734 (2016) (citing *Miller*, 132 S. Ct. at 2469).

Here, Mr. Tatum's life-without-parole sentence was not mandatory, because the state sought the death penalty and the judge found him eligible for that sentence under Arizona's former capital sentencing procedure, *see Walton v. Arizona*, 497 U.S. 639 (1990). When the court below reviewed Mr. Tatum's *Miller*-based challenge to his sentence, it upheld the sentence as satisfying the Eighth Amendment's requirements. In so doing, it relied on the reasons that the sentencing judge gave for not imposing a death sentence. At the time of its ruling, the court below did not have the benefit of this Court's decision in *Montgomery*.

This case thus presents the following two questions:

1. Is a sentencing judge's exercise of discretion not to impose a death sentence the functional equivalent of the findings required under *Montgomery* to impose a sentence of life without parole on a juvenile offender?

2. If not, should this Court vacate the decision of the Arizona Court of Appeals and remand for further consideration in light of *Montgomery*?

PARTIES TO THE PROCEEDING

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In *Montgomery v. Louisiana*, this Court clarified that, where a life-without-parole sentence is not mandatory for a juvenile homicide offender under state law, the Eighth Amendment forbids a judge from imposing that sentence without finding that the crime reflects "permanent incorrigibility" or "irreparable corruption." 136 S. Ct. 718, 734 (2016) (citing *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012)). Because the Arizona state courts did not have the benefit of this Court's decision in *Montgomery* when they rejected his *Miller* claim, petitioner Bobby Jerry Tatum now asks this Court to grant his petition for certiorari, vacate the decision of the Arizona Court of Appeals, and remand his case to that court for further consideration in light of *Montgomery*.

DECISIONS BELOW

The opinions below are unreported. The memorandum decision of the Arizona Court of Appeals, which is the subject of this petition, is included in the appendix at A001. The decisions of the Maricopa County Superior Court, which were the subject of review by the court below, are included at A006 and A010.

STATEMENT OF JURISDICTION

The Arizona Court of Appeals entered the order that is the subject of this petition on February 18, 2015. (A001) The Arizona Supreme Court denied a timely filed petition for discretionary review (A046) on January 5, 2016. (A053) This petition is timely under Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1257(a).

PROVISIONS OF LAW INVOLVED

Eighth Amendment to the U.S. Constitution:

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

STATEMENT OF THE CASE

On July 1, 1994, a grand jury in Maricopa County, Arizona, indicted Mr. Tatum on one count of first-degree murder on a theory of felony murder predicated on armed robbery, in violation of Ariz. Rev. Stat. § 13-1105; one count of conspiracy to commit armed robbery, in violation of Ariz. Rev. Stat. §§ 13-1003 and -1904; one count of attempted armed robbery, in violation of Ariz. Rev. Stat. §§ 13-1001 and -1904; and one count of aggravated assault, in violation of Ariz. Rev. Stat. § 13-1204. The indictment alleged that the crime occurred on May 7, 1994. Mr. Tatum was 17 years old at the time of the crime.

The state sought the death penalty, which was a constitutionally authorized punishment at the time. *See Stanford v. Kentucky*, 492 U.S. 361 (1989). On September 5, 1996, a jury convicted Mr. Tatum of all four counts in the indictment.

The judge held a sentencing hearing on November 20, 1996. The following day, he rendered his special verdict and imposed sentence. In light of Mr. Tatum's conviction for felony murder, the sentencing judge found that although it could not conclude beyond a reasonable doubt that Mr. Tatum intended to kill the victim, it could conclude beyond a reasonable doubt that he was a major participant in the shooting which led to the victim's death, and thus eligible for the death penalty

under *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987). (A-056-A057) Under Arizona's capital sentencing scheme in effect at the time, *see Walton v. Arizona*, 497 U.S. 653 (1990), the judge found that in the commission of the offense, Mr. Tatum had had knowingly created a grave risk of death to another person in addition to the victim. *See* Ariz. Rev. Stat. § 13-703(F)(3) (1994). The judge also found that Mr. Tatum committed the murder for pecuniary gain, thus making him eligible for a death sentence. (A057-59) *See* Ariz. Rev. Stat. § 13-703(F)(5) (1994). The judge found that Mr. Tatum's age at the time of the crime was a statutory mitigating factor. (A060) *See* Ariz. Rev. Stat. § 13-703(G)(5) (1994). The judge found nonstatutory mitigating factors to include Mr. Tatum's lack of criminal record, inconsistent verdicts in a co-defendant's case, immunity given to another participant in the office, and a non-homicide plea agreement given to another co-defendant. (A060-62) Based on these factors, the judge imposed a sentence of life without parole for the murder. (A064) He also imposed terms of 5 years on the count of conspiracy to commit armed robbery, to run consecutive to the sentence on the murder count, and terms of 15 years each on the counts of attempted armed robbery and aggravated assault, to run concurrently with each other and the murder count. (A063-066)

On May 19, 1998, the Arizona Court of Appeals affirmed Mr. Tatum's convictions and sentences on direct review. He did not seek discretionary review with the Arizona Supreme Court. Thus his conviction became final on direct review

on June 18, 1998, when the time for seeking discretionary review with the state supreme court expired. *See Jimenez v. Quarterman*, 555 U.S. 113, 121 (2009).

On November 25, 1998, Mr. Tatum sought postconviction relief from his conviction and sentence. The court denied relief.

This Court decided *Miller v. Alabama*, 132 S. Ct. 2455, on June 25, 2012. On June 24, 2013, filed a *pro se* notice of postconviction relief,* using a form that appears to have been downloaded from a service operated by Westlaw.™ (A008) In a section of the form that directed him to respond "only if this is an untimely notice or the defendant has filed a previous [Ariz. R. Crim. P.] Rule 32 petition in this case," he checked a box asserting that "there has been a significant change in the law that would probably overturn the conviction or sentence." *See* Ariz. R. Crim. P. 32.1(g); *State v. Towery*, 64 P.3d 828 (Ariz. 2003) (discussing whether to apply this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), retroactively under *Teague v. Lane*, 489 U.S. 288 (1989), under Rule 32.1(g)). (A009) Mr. Tatum asserted that his sentences were unconstitutional under *Miller v. Alabama*, 132 S. Ct. 2455 (2012). The court did not appoint counsel for Mr. Tatum. *Cf. State v. Valencia*, Nos. 2 CA-CR 2015-0151-PR, 2 CA-CR 2015-0182-PR, 2016 WL 1203414, at *1 ¶ 4 (Ariz. Ct. App. Mar. 28, 2016) (noting that the court had previously vacated a summary

* In Arizona, a postconviction proceeding is initiated by filing a formal notice of postconviction relief, which is generally followed by a petition. It is the notice of postconviction relief that "set[s] in motion" "Arizona's mechanism for post-conviction relief." *Isley v. Ariz. Department of Corr.*, 383 F.3d 1054, 1056 (9th Cir. 2004). "The notice is followed by the petition setting forth any of eight enumerated grounds for relief. The petition puts flesh and muscle on the skeleton provided by the notice." *Canion v. Cole*, 115 F.3d 1261, 1262 (Ariz. 2005) (citing Ariz. R. Crim. P. 32.1; *State v. Carriger*, 692 P.2d 991, 994–95 (Ariz. 1984)).

dismissal of a *Miller* claim because the superior court had not appointed counsel for the petitioner).

On June 10, 2013, the superior court rejected Mr. Tatum's *Miller* claim. It did so because a sentence of natural life was not mandatory under Arizona law and because "the record demonstrates that the Court was aware that the Defendant was 17 at the time of the offense and considered this a mitigating factor." (A007)

Mr. Tatum filed a *pro se* request for reconsideration. (A012) On July 30, 2013, the court denied his request for reconsideration. (A010) The court assumed *arguendo* that *Miller* applied retroactively but repeated the previous reasons for rejecting Mr. Tatum's *Miller* claim including that it was "clear that the sentencing judge took into account the age of the defendant as part of the sentencing determination." (A011) The superior court did not mention the possibility that the sentencing judge could have sentenced Mr. Tatum to death. Thus the requirements of *Miller* had been satisfied.

Mr. Tatum obtained leave to file an untimely *pro se* petition for review with the Arizona Court of Appeals (A018) and did so on August 22, 2013. (A019) He filed an addendum the same day (A38) His petition for review raised his *Miller* claim, as well as a claim that a sentence of life without parole for a juvenile homicide offender categorically violated the Eighth Amendment. (A019-045)

On February 18, 2015, the Arizona Court of Appeals rejected Mr. Tatum's *Miller* claim in a reasoned decision. (A001) The court assumed *arguendo* that *Miller* applied retroactively to Mr. Tatum's case. But it affirmed the superior court's denial

of relief. Without mentioning the possibility that the sentencing judge could have imposed a death sentence, the court below said that, under Arizona law, Mr. Tatum's sentences of life without parole were not mandatory. (A003) It then concluded that the sentencing judge "expressly found age was a mitigating factor" and thereby complied with *Miller*:

> [A]lthough a psychologist opined that Tatum might be 'amenable to treatment and rehabilitation services' that psychologist also noted Tatum was capable of controlling his impulses despite his age and that Tatum presented an ongoing risk to the community. After considering that evidence as well as evidence presented at trial and by the state, the court determined a natural life sentence was appropriate. We cannot say *Miller* requires more.
>
> (A004)

The Arizona Court of Appeals denied Mr. Tatum's alternate claim that his life-without-parole sentences were categorically barred under the Eighth Amendment because "a natural life sentence with no opportunity for release is permitted if a sentencing court, after consideration of sentencing factors could have imposed a lesser sentence." (A004)

On February 25, 2015, Mr. Tatum filed a timely *pro se* petition for discretionary review with the Arizona Supreme Court, in which he again pressed his *Miller* claim. (A046-052) On January 5, 2016, that court denied Mr. Tatum's petition without comment. (A053)

REASONS FOR GRANTING, VACATING, AND REMANDING

The sentencing judge did not find that Mr. Tatum's crime reflects "permanent incorrigibility" or "irreparable corruption." This Court's intervening decision in

Montgomery confirms that such a finding from a sentencing judge is a constitutional requirement under *Miller* for imposing a life-without-parole sentence on a juvenile. *See* 136 S. Ct. at 734. The court below nevertheless concluded that the sentencing judge complied with *Miller*'s constitutional requirements in imposing the life-without-parole sentence in this case. Thus the *Montgomery* decision is an "intervening development" that the court below "did not fully consider." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). Moreover, in light of a recent published opinion from another panel of the Arizona Court of Appeals,* the decision below likely "rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Id.* Directing the court below to reconsider its treatment of Mr. Tatum's *Miller* claim in light of *Montgomery* would give that court another opportunity to examine the record in light of this Court's recent decision, which issued three weeks *after* the Arizona Supreme Court denied discretionary review in his case. For these reasons, Mr. Tatum respectfully asks the Court to grant certiorari, vacate the decision of the Arizona Court of Appeals, and remand this case to that court for further consideration in light of *Montgomery*. *See Lawrence*, 516 U.S. at 171 (citing *Robinson v. Story*, 469 U.S. 1081 (1984)).

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* Although the decision below and this published opinion come from different divisions of the Arizona Court of Appeals, that court by statute "operate[s] in three-judge panels or departments of a single court, regardless of the division in which the department is located." *State v. Patterson*, 218 P.3d 1031, 1034 (Ariz. Ct. App. 2009). There is no horizontal *stare decisis* within the court—a decision of one division does not bind the other, *see Martinez v. Cardwell*, 542 P.2d 1133, 1136 (Ariz. Ct. App. 1975), nor are later panels of the same division bound by an earlier decision of that panel, *see Neil B. McGinnis Equip. Co. v. Henson*, 406 P.2d 409, 412 (Ariz. Ct. App. 1965).

1. *Montgomery* has clarified that, under *Miller*, a sentencing judge may not impose a life-without-parole sentence on a juvenile offender without a finding of permanent incorrigibility or irreparable corruption.

In *Miller*, this Court held that imposing a sentence of life without parole on a juvenile homicide offender violated the Eighth Amendment. *See* 132 S. Ct. at 2469. Such mandatory sentences prevent a sentencing judge from considering, as a matter of law, a juvenile's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." *Id.* at 2468. By disregarding these features, along with other factors such as a "brutal or dysfunctional" home environment, diminished capacity to navigate the criminal justice system and assist defense counsel, and the possibility of rehabilitation, *see id.*, a sentencing judge operating in a regime of mandatory sentencing runs too great a risk of imposing a constitutionally disproportionate sentence of life without parole, *see id.* at 2469. Mandatory life-without-parole sentencing schemes violate the Eighth Amendment, therefore, because they forbid sentencing judges from taking account of these mitigating circumstances in all circumstances. *See id.*

While in *Miller* this Court did not forbid a sentencing judge from imposing a life-without-parole sentence on a juvenile homicide offender, it did say that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* Where, as here, sentencing judges have discretion to choose a sentence that carries the possibility of parole, the judge must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* Although the cases in *Miller* both

involved a mandatory sentencing scheme, the Court's reasoning for holding those sentences unconstitutional suggests that the Court in *Miller* wanted to impose an express constitutional requirement that a sentencing judge consider those factors on the record before imposing a sentence of life without parole on a juvenile convicted of a homicide crime.

Three and a half years later, in *Montgomery*, this Court made explicit the suggestion it advanced in *Miller*. After holding that state courts were required to give retroactive effect to *Miller*, *see* 136 S. Ct. at 729, the Court in *Montgomery* said that *Miller* meant that "[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects "'unfortunate yet transient immaturity.'" 136 S. Ct. at 734. In *Montgomery* this Court reaffirmed that children's generally "diminished culpability and greater prospects for reform" will require sentences that carry the possibility of parole in all but the rarest of cases. *Id.* at 733–34. Thus, according to *Montgomery*, the Court's decision in "*Miller* did bar life without parole… for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id.* at 734.

2. The court below treated the sentencing judge's decision not to impose a death sentence as the functional equivalent of the required finding under *Montgomery* when there was no legal basis to do so.

Notwithstanding the rationale of *Miller*, the court below rejected Mr. Tatum's challenge to his sentence. In so doing, that court turned the principles underlying *Miller*'s constitutional holding upside down, in two interrelated ways.

First, the court below lost sight of the fact that one of the sentences that the judge could have imposed was the *death penalty*. Because the judge had found a statutory aggravating factor, making Mr. Tatum eligible for such a sentence, *see State v. Ring* (*Ring I*), 25 P.3d 1139, 1151 (Ariz. 2001), *aff'd on this point*, 536 U.S. 584 (2002), the judge was required to impose a death sentence unless he found "mitigating circumstances sufficiently substantial to call for leniency," Ariz. Rev. Stat. § 13-703(E) (1998). At the time Mr. Tatum was sentenced, Arizona law was clear that the fact that he was under the age of 18 at the time of the crime was not, by itself, a mitigating factor that was sufficiently substantial to call for leniency. *See State v. Jackson*, 918 P.2d 1038, 1048 (Ariz. 1996) (citing *State v. Bolton*, 896 P.2d 830, 854 (Ariz. 1995); *State v. Gillies*, 662 P.2d 1007, 1020 (Ariz. 1983)). Nor was a defendant's juvenile status coupled with a history of emotional and physical abuse a legal reason for imposing a sentence other than death, if the crime "does not show juvenile impulsivity." *Id.* at 1049. Only if other mitigating evidence was a "major contributing cause of" the crime did Arizona law permit the defendant's juvenile status to support a sentence other than death. *State v. Jimenez*, 799 P.2d 785, 800 (Ariz. 1990) (citing *State v. Brookover*, 601 P.2d 1322 (Ariz. 1979)).

Subsequent legal developments have undermined much of the legal basis in Arizona law for not treating a defendant's juvenile status, standing alone, as a reason not to impose the death penalty. This Court has imposed a categorical ban on executing juvenile offenders. *See Roper v. Simmons*, 543 U.S. 551 (2005). And this Court has explained that mitigating evidence need not show a causal

connection to the criminal activity before it can be considered as a basis for a sentence other than death. *See Smith v. Texas*, 543 U.S. 37 (2004) (per curiam); *Tennard v. Dretke*, 542 U.S. 274 (2004). So when the court below relied on the fact that the sentencing judge had specifically considered Mr. Tatum's youth as a reason for finding that his sentence also complied with the requirements of *Miller* (A-4), it was treating the pre-*Simmons* exercise of discretion not to impose a death sentence as the functional equivalent of the post-*Miller* discretion to impose life without parole. But now that this Court's subsequent decisions have taken the thumb off of death's side of the scale, these markedly different discretionary choices simply cannot be fungible.

Second, in the face of evidence that this Court has consistently treated as counseling in favor of imposing a sentence *other than* the available maximum, the court below conspicuously failed to explain how the record demonstrated that Mr. Tatum's crime reflected "permanent incorrigibility" or "irreparable corruption." *Montgomery*, 136 S. Ct. at 734. The sentencing judge treated Mr. Tatum's age at the time of the crime as a statutory mitigating factor. (A060) And he treated Mr. Tatum's lack of criminal history as well as the inconsistent verdict and more lenient plea with co-defendants, and immunity as to another participant as a nonstatutory mitigating factors. (A060-61) Further, as noted *supra*, there was explicit testimony by a psychologist that Mr. Tatum might be "amenable to treatment and rehabilitation services." (A004) Under this broad heading, the sentencing judge considered the circumstances of Mr. Tatum's case. This Court has consistently

regarded this kind of evidence as mitigating, in the sense that it supports a sentence *other than* the available maximum. *See Rompilla v. Beard*, 545 U.S. 374, 391–92 (2005); *Eddings v. Oklahoma*, 455 U.S. 102, 116 (1982). Yet the court below treated all this evidence as a reason for *affirming* the life-without-parole sentence in this case, rather than a reason for setting that sentence aside.

In light of this Court's focus in *Miller* and *Montgomery* on how most juveniles should not be sentenced to life without parole, the conclusion of the court below that the sentencing judge took Mr. Tatum's age into account (A003) defies explanation. The circumstances of Mr. Tatum's youth made him "more vulnerable… to negative influences and outside pressures, including from [his] family and peers," and gave him "limited control over [his] own environment." *Miller*, 132 S. Ct. at 2464 (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)). Under this Court's traditional conception of mitigating evidence, the evidence on which the sentencing judge relied here should have led the court below to grant relief. "Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." *Simmons*, 543 U.S. at 570 (citing *Stanford v. Kentucky*, 492 U.S. 361, 395 (1989) (Brennan, J., dissenting)). Yet the court below utterly disregarded the mitigating value of this evidence, effectively treating the sentencing judge's decision not to impose the death penalty as a reason for upholding the life-without-parole sentence that Mr. Tatum ultimately received. Conflating these

discretionary sentencing decisions in this way was constitutional error, as this Court has recently clarified in *Montgomery*.

3. The lower courts, including the Arizona Court of Appeals, have already begun to treat *Montgomery* as a definitive expression of the constitutional requirements for a life-without-parole sentence where state law does not make such a sentence mandatory.

In the two scant months that have passed since *Montgomery* was decided, the lower state and federal courts have begun to view *Montgomery* as requiring a finding of permanent incorrigibility or irreparable corruption in order to comply with *Miller*'s constitutional holding. The Georgia Supreme Court has viewed *Montgomery* as requiring a "specific determination that [a juvenile homicide offender] is *irreparably corrupt*" before imposing a sentence of life without parole. *Veal v. State*, No. S15A1721, 2016 WL 1085360, at *9 (Ga. Mar. 21, 2016). And when *Montgomery* implicitly overruled the Colorado Supreme Court's conclusion that *Miller* did not apply retroactively, the Colorado Court of Appeals ruled that *Miller* required an individualized determination, based on evidence specific to a particular defendant, regarding whether life without parole was an appropriate sentence. *See People v. Wilder*, No. 12CA0066, 2016 WL 736122, at *2 ¶ 12 (Colo. Ct. App. Feb. 25, 2016).

Relying on *Montgomery*, the lower courts have begun to scrutinize the record to see if the sentencing judge made the required finding before imposing a life-without-parole sentence, and granting postconviction relief in cases where the record is silent on this point. The Illinois Appellate Court has instructed that postconviction courts entertaining *Miller* claims must grant relief if the "record

affirmatively shows that the trial court failed to comprehend and apply" the *Miller* factors "in imposing a discretionary sentence of natural life without the possibility of parole" on a juvenile homicide offender. *People v. Nieto*, No. 1-12-1604, 2016 WL 1165717, at *9 ¶ 49 (Ill. App. Ct. Mar. 23, 2016). The United States Court of Appeals for the Seventh Circuit has also so held. *See McKinley v. Butler*, 809 F.3d 908, 910–11 (7th Cir. 2016). And just one week ago, in light of *Montgomery*, another panel of the Arizona Court of Appeals granted postconviction relief to two Arizona state prisoners seeking relief under *Miller* because their respective sentencing judges had not found that the crimes reflected "permanent incorrigibility." *State v. Valencia*, Nos. 2 CA-CR 2015-0151-PR, 2 CA-CR 2015-0182-PR, 2016 WL 1203414, at *4 ¶ 16 (Ariz. Ct. App. Mar. 28, 2016) (citing *Montgomery*, 136 S. Ct. at 734–35; *State v. Steelman*, 585 P.2d 1213, 1232 (Ariz. 1978)).

Finally, both *Miller* and *Montgomery* emphasized that "appropriate occasions for sentencing juveniles to this harshest possible penalty" of life without parole "will be uncommon." *Montgomery*, 136 S. Ct. at 733–34 (quoting *Miller*, 132 S. Ct. at 2469). But in Arizona, as an empirical matter, sentences of life without parole imposed on juvenile homicide offenders do not appear to be uncommon. After studying information provided to it by the Arizona Department of Corrections, the Arizona Justice Project observed that 71 juveniles have been sentenced for first-degree murder committed after January 1, 1994. Of these cases, 33 of them—over 45%—received sentences of life without parole. Such sentences are thus hardly uncommon in Arizona.

CONCLUSION

The petition for writ of certiorari should be granted, the decision of the Arizona Court of Appeals should be vacated, and this case should be remanded for further proceedings in light of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

Respectfully submitted: April 4, 2016.

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