No. 22-5961

In the Supreme Court of the United States

RICHARD ROJAS,

Petitioner,

v.

RYAN THORNELL, Director, Arizona Department of Corrections, Rehabilitation and Reentry, et al.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Miller v. Alabama, 567 U.S. 460, 480 (2012), held that "mandatory penalty schemes" under which juvenile homicide offenders are automatically sentenced to life in prison without the possibility of parole ("LWOP") are impermissible. Instead, *Miller* requires that a sentencing judge only impose LWOP after making a choice to do so, "tak[ing] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Before sentencing Rojas to LWOP, Rojas's sentencer considered whether a parole-eligible sentence was appropriate in light of his youth and attendant characteristics. Accordingly, the Arizona Court of Appeals rejected Rojas's *Miller* claim. The Ninth Circuit found that the holding of the Arizona Court of Appeals was reasonable under 28 U.S.C. § 2254(d).

The question presented is:

Whether the Arizona Court of Appeals' judgment was contrary to *Miller* or an unreasonable application of *Miller* to the facts of this case.

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INTRODUCTION[1]

Petitioner Richard Rojas received a life-without-parole sentence, not because Arizona law dictated such a sentence, but because his sentencer, after taking his youth into account, found that LWOP was the most appropriate sentence. Consistent with *Miller*'s requirements, the trial court conducted an individualized sentencing that took into account Rojas's youth and attendant characteristics, Rojas's specific background and history, his family's statements, his conduct before and during trial, and the specific facts of Rojas's crimes. R. 6-2 at 197–212.

Unlike in *Miller*, the court did not impose Rojas's sentence by default. Instead, the court made a meaningful choice between two sentences while considering Rojas's youth and attendant characteristics. Although the sentencing judge found Rojas's youth was a mitigating circumstance, the judge determined that LWOP was nevertheless the appropriate sentence, given the heinous nature of the homicides and Rojas's complete lack of remorse. *Id.*

Because Rojas received all that *Miller* requires, he is not entitled to habeas relief. In any event, any theoretical violation of *Miller* would be harmless under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), because Rojas cannot show prejudice arising from his sentencing hearing. Accordingly, the Ninth Circuit's opinion does not warrant this Court's review.

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[1] Pursuant to Supreme Court Rule 35.3, Respondents hereby notify the Court that Ryan Thornell has succeeded David Shinn as the Director of the Arizona Department of Corrections, and the caption reflects this change.

STATEMENT OF THE CASE

1. *Arizona statutory law*. In 2001, when Rojas was sentenced, Arizona's first-degree murder statute "provided two sentencing options for juveniles convicted of first-degree murder: (1) natural life; and (2) life without eligibility for release 'until the completion of the service of twenty-five calendar years if the victim was fifteen or more years of age and thirty-five if the victim was under fifteen years of age.'" *State v. Valencia*, 386 P.3d 392, 394, ¶ 10 (Ariz. 2016) (quoting A.R.S. § 13–703(A) (Supp. 1995)).[2] Death was, at the time, a third option, but was eliminated for juvenile offenders by *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

As for the availability of "release" for those who received a release-eligible sentence, Arizona removed the authority of any agency to implement parole procedures in 1994 and did not restore this authority until 2014. *See Jessup v. Shinn*, 31 F.4th 1262, 1266–67 (9th Cir. 2022); *Valencia*, 386 P.3d at 394, ¶ 11. Nonetheless, Arizona judges and attorneys appear to have been under the universal mistaken impression that parole was an available form of release.[3] *Jessup*, 31 F.4th at 1267 & n.1. As a result, Arizona judges continued to impose sentences providing

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[2] There are no material differences between the 1995 statute and the 1999 statute that applied when Rojas was sentenced in 2001 (for the murders he committed in 1999).

[3] For example, two years before Rojas was sentenced, the Arizona Supreme Court stated that Arizona's first-degree murder statute included parole eligibility. *See State v. Wagner*, 982 P.2d 270, 273, ¶ 11 (Ariz. 1999) ("Arizona's statute . . . states with clarity that the punishment for committing first degree murder is either death, natural life, or *life in prison with the possibility of parole*.") (emphasis added); *see also State v. Fell*, 115 P.3d 594, 597–598, ¶¶ 11 (Ariz. 2005) (confirming the accuracy of an earlier case stating that the statute included "*life imprisonment with the possibility of parole* or imprisonment for 'natural life' without the possibility of release") (emphasis added).

for parole eligibility during the 20-year period in which parole procedures were not available.[4] *Id.*

In 2014, Arizona restored the authority to implement parole procedures for juvenile offenders who received release-eligible sentences: "*Notwithstanding any other la*w, a person who is sentenced to life imprisonment with the possibility of release after serving a minimum number of calendar years for an offense that was committed before the person attained eighteen years of age *is eligible for parole* on completion of service of the minimum sentence, *regardless of whether the offense was committed on or after January 1, 1994*." Ariz. Rev. Stat. ("A.R.S.") § 13–716 (enacted 2014; emphasis added). The change applied to juveniles sentenced between 1994 and 2014. *Id.*

2. *Factual background, trial, and sentencing proceeding.* In 1998, Rojas shot and killed Michael Fromme and Amy Hoppes at a carwash during an armed robbery. Pet. App. at 19a. Rojas shot Fromme three times in the head after Fromme refused to hand over his money and keys. R. 6-1 at 142, 145–46. Hoppes ran away screaming, and Rojas chased after her. *Id.* at 86, 135–36. A witness described seeing a man chase Hoppes through the carwash. *Id.* at 85–86, 136.

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[4] *See Jessup*, 31 F.4th at 1267 n.1 ("The Arizona reporter is full of cases in which the sentencing judge mistakenly thought that he or she had discretion to allow parole. . . . '[P]rosecutors continued to offer parole in plea agreements, and judges continued to accept such agreements and impose sentences of life with the possibility of parole.'") (internal citation omitted); *see also* Katherine Puzauskas & Kevin Morrow, *No Indeterminate Sentencing Without Parole*, 44 Ohio N.U.L. Rev. 263, 288 (2018) ("[S]ince 1994 the Arizona judiciary has sentenced more than two hundred defendants to life imprisonment with a possibility of parole after twenty-five or thirty-five years.").

Rojas eventually came up from behind Hoppes, grabbed her, shot her twice in the head, and then shot her again after she was on the ground. *Id.* at 85–86, 136. Rojas was with two other co-defendants at the time, and all three had conspired to rob Fromme and Hoppes after seeing them at the car wash. *Id.* at 88–89, 129, 134, 145–146.

Rojas twice confessed to close acquaintances that he had killed the victims, explaining that he had shot Fromme in the head three times because Fromme refused to surrender his keys and money, and that he had shot Hoppes because she had tried to run away. *Id.* at 96, 145–146. Rojas was fifteen years old when he murdered Hoppes and Fromme. Pet. App. at 11a.

Six days later, Rojas, the same co-defendants from the carwash murders, and one additional man, conspired to steal marijuana from a local dealer. R. 6-2 at 237. Two of Rojas's co-defendants entered the dealer's home. *Id.* at 237. A struggle ensued, and two of the occupants were shot to death. *Id.* at 237. For his role in that burglary-turned-double-homicide, Rojas ultimately pleaded guilty to one count of conspiracy to commit first-degree burglary. R. 6-1 at 72.

Rojas proceeded to trial for the carwash murders and was tried separately from his co-defendants. Pet. App. at 19a. The jury convicted him of two counts of first-degree murder, conspiracy to commit armed robbery, and one count of armed robbery (related to Fromme). *Id.* at 19a–20a. The jury acquitted Rojas on one count of armed robbery (related to Hoppes). *Id.* at 20a

At sentencing, the judge had before him (1) a presentence investigation report that documented Rojas's age, history of substance abuse, statements about the murders, social history considerations, and statements from the victims' families and other interested parties; (2) sentencing memoranda from both the State and Rojas; and (3) "two volumes" of records from a California social services agency detailing Rojas's personal background and dysfunctional family history; and (4) a memorandum from a mitigation specialist containing the specialist's assessment of Rojas based on an interview and review of his records. R. 6-2, at 206; Pet. App. at 11a.

Several of the letters from the victims' families specifically implored the judge to sentence Rojas to "life without the possibility of parole." R. 7. Additionally, the prosecutor recounted to the judge that Fromme's mother had repeatedly complained about Rojas "and his uncle and others involved in this offense . . . laughing and joking and smiling while they were on the chain," and that it was "particularly offensive to her, on more than one occasion." R. 6-2 at 203.

In response, Rojas's attorney admitted he had seen Rojas "to be laughing on the chain over the year and a half or so that it took this case to get to trial." *Id.* at 207. But defense counsel then argued, "I don't think we should forget that he was 15 and 16 or 17 at the time," and that Rojas's behavior was not "demonstrative that he doesn't respect the Court or respect the victims," but rather, that it was "just an indication that he's a young guy." *Id.* Counsel for Rojas also argued that when he "compare[d] Richard Rojas to kids who were raised in healthy normal families . . .

it's not difficult to predict what would have happened to Richard Rojas." *Id.* Rojas's mother pleaded for the sentencing judge to "consider[] his young life." *Id.* at 200. At sentencing, Rojas maintained he was innocent and claimed he was "set up." *Id.* at 207–08.

The judge made the following findings and observations at Rojas's sentencing hearing:

> I heard the evidence in this case . . . . In my view, the evidence was overwhelming that you were the person that shot those two people. . . .
>
> This was a heinous crime. Mr. Fromme, you shot him three times. The last time he was still alive. And then as Amy Hoppes ran away screaming, you shot her twice in the head.
>
> . . . This was two murders for absolutely no reason. These people were washing their car. And I'm not sure exactly why you did it, if you were high on drugs or because Ms. Hoppes knew who you were, that you were trying to eliminate witnesses. That's inconsequential.
>
> I did read all the papers, the documents from Orange County. Yes, you had a miserable childhood, but you know, there's a lot of people out there that have had worse childhoods than you and they don't go out and commit double homicide. . . .
>
> I have considered the aggravating and mitigating circumstances. The mitigating circumstances being your age and no prior felony convictions. The aggravating circumstances being multiple victims of multiple perpetrators, the fact that it was done for pecuniary gain, the effect on the families. And also the manner of the killing, the terror. The witnesses testified to the screaming of Amy Hoppes as she tried to run away from you before you shot her.

Id. at 209–10.

Based on those findings, the court found that the "aggravating circumstances outweigh[ed] the mitigating," the appropriate sentence for the two counts of first-

degree murder was "natural life imprisonment," and that the two sentences should run consecutively. *Id.* at 210-11; *see also* A.R.S. § 13–703(A)(1999) (allowing sentencing court to exercise discretion in sentencing a defendant convicted of first-degree murder to either natural life imprisonment or life with a possibility of release after 25 years if the victim is over fifteen years old).

2. *State post-conviction proceedings.* In 2013, Rojas sought post-conviction relief in state court, arguing that his natural life sentences violated *Miller*. R. 6-2 at 31. Although the superior court found Rojas's petition to be untimely, it nevertheless addressed the merits. *Id.* The superior court denied post-conviction relief, finding that (1) "the record demonstrates that the age of the Defendant was determined to be a mitigating factor," (2) "the sentence of natural life without the possibility of parole was not statutorily mandated," and (3) "the Court had the discretion to order life with the possibility of parole but chose not to." *Id.* at 32. Rojas moved for reconsideration, which the superior court denied, further explaining that "[t]he record in this matter is clear that the sentencing judge took into account the age of the defendant as part of the sentencing determination (page 13 of sentencing transcript)." *Id.* at 101. The court further found that *Miller*'s "requirements regarding mitigation [had] been met in this matter and there is no basis for defendant to be relieved from the natural life sentence[s]. . . . ." *Id.*

The Arizona Court of Appeals likewise denied relief. *Id.* at 194–95. The court reasoned that "Rojas's sentences to natural life were not mandatory," because "[t]he trial court knew it had the option to sentence Rojas to natural life or life with

a possibility of parole after twenty-five years' imprisonment." *Id.* at 195 (citing A.R.S. § 13–703(A) (1999)). Additionally, because the sentencing court "acknowledged Rojas's 'miserable childhood,' and found that his age at the time he committed the murders and his lack of prior felony convictions were mitigating factors," the court of appeals found the sentencing court took into account "how children are different" and that Rojas's sentences to natural life complied with *Miller*. *Id.*

The Arizona Supreme Court summarily denied relief without comment.

3. *Federal habeas proceedings.* In 2015, Rojas sought federal habeas relief in district court and argued his natural life sentences violated *Miller*. A magistrate judge determined that the trial court "did not consider Rojas's 'age-related characteristics' nor discuss 'how children are different'" and therefore concluded that "the Arizona Court of Appeals' conclusion [wa]s an objectively unreasonable application of *Miller*." In a footnote, the magistrate judge rejected Rojas's cursory argument that the "possibility for a life sentence with the possibility of parole was not an option in defendant's case as Arizona no longer has parole system in place for crimes committed after January 1, 1994." Pet. App. at 32a. The magistrate judge reasoned that Rojas's claim was "meritless" because the Arizona legislature had since enacted A.R.S. § 13–716 and amended A.R.S. § 41–1604.09(I), which established parole eligibility for juveniles sentenced to life imprisonment with the possibility of release. *Id.* (citing *State v. Stewart*, 377 P.3d 383, 384 (Ariz. Ct. App. 2016)). Rojas did not object to this finding. *Id.* at 10a.

The district court found that the R&R's "conclusions can only be read as an extension of *Miller* to require a sentencing judge to discuss 'how children are different,' either a direct requirement, or indirectly by equating consideration of a factor to expressly mentioning that consideration in the sentencing proceeding." *Id.* at 14a–15a. Consequently, the district court ruled that Rojas's sentencing "did not violate the constitutional principles set forth in *Miller*" and denied and dismissed Rojas's habeas petition with prejudice. *Id.* at 16a.

The Ninth Circuit unanimously affirmed, finding the sentencing judge had "deliberated between a sentence of 'natural life,' Arizona's term for life without possibility of release, and a sentence of life with the possibility of release after 25 years." *Id.* at 2a. The Ninth Circuit found that "[t]he sentencing judge considered many factors, including Petitioner's age and 'miserable childhood,' and concluded that Petitioner warranted a sentence without any form of release." *Id.* And "[u]nlike the mandatory state statutes at issue in *Miller*," the Ninth Circuit held Rojas received "an individualized sentencing hearing during which the judge considered many factors, including Petitioner's youth." *Id.* at 3a. Comparing the facts of this case to *Jessup*, the Ninth Circuit also found that "nothing in the record here suggests that the precise form of release played any role in the sentencing judge's discretionary decision to deny release." *Id.*

Finally, the Ninth Circuit adopted its reasoning in *Jessup* that in light of "Arizona's more recent statutory changes," a release-eligible sentence would "nearly certain[ly]" entitle defendants to parole eligibility. *Id.* at 2a–3a; *Jessup*, 31 F.4th at

1268 (citing A.R.S. § 13–716 (2014) and *Chaparro v. Shinn*, 459 P.3d 50, 52 (Ariz. 2020)).

Rojas petitioned for rehearing en banc. *Id.* at 5a. No judge called for a vote on his petition, and it was summarily denied. *Id.*

REASONS FOR DENYING THE PETITION

The Ninth Circuit correctly held that the Arizona Court of Appeals' ruling was neither contrary to nor an unreasonable application of *Miller*. Rojas already received an individualized sentencing hearing that satisfied *Miller*'s requirements because his sentencer—believing that a parole-eligible sentence could be imposed—considered his youth and attendant circumstances before finding that a parole-eligible sentence was inappropriate. If Rojas's sentencer had chosen the lesser option, Rojas would now be serving a parole-eligible sentence in light of subsequent statutory developments. While undoubtedly unusual, this statutory scheme did not violate *Miller*, which held unconstitutional state laws *mandating* "that each juvenile die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life *with* the possibility of parole) more appropriate." 567 U.S. at 465. At the very least, the Arizona Court of Appeals' decision does not clash with any clearly-established Supreme Court holding because this Court has never addressed a factual situation like the one here.

For those reasons, certiorari is not warranted. On top of all that, this case would be a poor vehicle for this Court's review because recent developments in state

law could potentially moot Rojas's petition. Finally, given that Rojas's sentencer actually considered whether he should be eligible for a parole-eligible sentence in light of his youth and attendant circumstances, any theoretical error would be harmless under *Brecht*.

I. The Ninth Circuit Correctly Held That the Arizona Court of Appeals' Decision Was Not Contrary to, or an Unreasonable Application of, *Miller*.

A. Rojas received all that *Miller* demands.

As both the Arizona Court of Appeals and Ninth Circuit correctly held, *Miller*'s requirements were satisfied because Rojas received an individualized sentencing hearing at which youth and attendant characteristics were taken into account before the sentencer decided Rojas should be ineligible for parole.

1. *Rojas's sentencer did exactly what* Miller *mandated: consider youth and attendant characteristics before sentencing a juvenile homicide offender to life in prison without the possibility of parole.*

Before sentencing a juvenile offender to LWOP, *Miller* requires sentencers to conduct an individualized sentencing hearing where they "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 567 U.S. at 480. *Miller* "mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing [life without parole]." *Id.* at 483. Contrary to Rojas's assertion, *see* Pet. at 13, *Miller* does not require any specific recitation from the sentencer before imposing a natural life sentence. *See Montgomery v. Louisiana*, 577 U.S. 190, 211 (2016) (recognizing that "*Miller* did not

impose a formal factfinding requirement" and that "a finding of fact regarding a child's incorrigibility . . . is not required").

Rojas's sentencer followed *Miller*'s requirements. At sentencing, defense counsel presented a mitigation report detailing Rojas's "miserable upbringing," highlighted his youth as a mitigating factor, and specifically attributed some of Rojas's in-court behavior to his youth. R. 6-2 at 205–06. After finding that Rojas's youth and upbringing were both mitigating factors, the court nevertheless determined that the aggravating circumstances of the crimes outweighed the mitigating factors and sentenced Rojas to natural life on both murder counts. *Id.* at 209–210. Rojas thus received the very individualized consideration of his youth that *Miller* demands. *See Jones v. Mississippi*, 141 S. Ct. 1307, 1315 (2021) ("*Miller* repeatedly described youth as a sentencing factor akin to a mitigating circumstance.").

The resentencing Rojas seeks would merely repeat the sentencing hearing he received years ago. He has not identified any evidence that he was prevented from presenting as his previous sentencing hearing, and there is no reason to suppose that the result would be any different on remand.

2. *The Arizona Court of Appeals complied with* Miller *in rejecting Rojas's claim.*

The Arizona Court of Appeals rejected Rojas's *Miller* claim because his sentencer considered his youth and attendant characteristics before deciding that a parole-eligible sentence was inappropriate. Pet. App. at 3a (holding that "[t]he state court . . . reasonably applied *Miller* in holding that the sentencing court's

consideration of Petitioner's youth and 'miserable childhood' sufficed to meet the demands of the Eighth Amendment"). Adopting its reasoning in *Jessup*, the Ninth Circuit further found that as a matter of Arizona law, Rojas's sentence had not been mandatory within the meaning of *Miller*. *Id.* at 2a–3a.

3. *The Ninth Circuit properly applied* Miller *when it found that the Arizona Court of Appeals' ruling was not contrary to, or an unreasonable application of,* Miller.

This Court recently clarified *Miller*'s reach when it explained that "a discretionary sentencing procedure suffices to ensure individualized consideration of a defendant's youth." *Jones*, 141 S. Ct. at 1321. It explained that "*Miller* mandated '*only* that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing' a life-without-parole sentence." *Id.* at 1314 (quoting *Miller*, 567 U.S. at 483; emphasis added).[5] The Ninth Circuit correctly rejected Rojas's claim because Rojas received all that *Miller* demands. *See* Pet. App. at 3a.

Rojas claims the Arizona Court of Appeals unreasonably applied *Miller* when it held that "Rojas's sentences to natural life were not mandatory. The trial court knew it had the option to sentence Rojas to natural life or life with a possibility of parole after twenty-five years' imprisonment." Pet. at 5, 16–17; Pet. App. at 8a. He relies on a recent state court of appeals decision which held that Arizona's scheme

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[5] Because the state court rendered its decision prior to *Jones*, *Jones* is not technically part of the body of clearly-established Supreme Court precedents that bound the state court. *See Greene v. Fisher*, 565 U.S. 34, 38 (2011). However, *Jones* confirms that the Ninth Circuit correctly applied *Miller*.

at the time of Rojas's sentencing was "mandatory" for purposes of *Miller*. *See* Pet. at 15 (citing *State v. Wagner*, 510 P.3d 1083, 1087, ¶ 22 (Ariz. App. 2022), *review continued* (Jan. 31, 2023)). As explained below, *see infra* Part I(B), *Wagner* diverged from Arizona Supreme Court precedent in *Valencia*, in which the Arizona Supreme Court held the sentencing scheme was not mandatory. *See Valencia*, 386 P.3d at 394, ¶ 11. The Arizona Supreme Court's decision in *Valencia* remains the only binding authority from that court on the topic, and therefore controls over *Wagner*. In any event, as explained below, because the Arizona Supreme Court has recently granted review of another case adopting *Wagner*'s reasoning, Rojas's petition is a poor vehicle to resolve this issue.

Moreover, the Arizona Court of Appeals' factual findings are presumed to be correct and can be reversed by a federal habeas court only when the federal court is presented with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Brumfield v. Cain*, 576 U.S. 305, 314 (2015). Rojas fails to show by clear and convincing evidence that the Arizona Court of Appeals incorrectly found that the sentencing judge "knew [he] had the option to sentence Rojas to natural life or life with a possibility of parole after twenty-five years' imprisonment," Pet. App. at 8a, particularly given that both the State and Rojas submitted a considerable number of documents to prove aggravating and mitigating circumstances.

B. If Rojas's sentencer had selected the lesser sentence, Rojas would now be serving a parole-eligible sentence.

Rojas claims that his sentence violated *Miller*, arguing that Arizona had a mandatory sentencing scheme just like the state schemes at issue in *Miller*. *See* Pet. at 14–16. But unlike Rojas, the two *Miller* defendants received automatic LWOP sentences because their state statutory schemes provided only one option for juvenile homicide offenders. *See* 567 U.S. at 474 ("[T]he mandatory penalty schemes at issue here *prevent* the sentencer from taking account" of the characteristics of youth.) (emphasis added). *Miller* made a point of highlighting that the sentencers in question imposed the sentences automatically and by necessity. For example, the Arkansas sentencing judge noted "that 'in view of the verdict, there's only one possible punishment.'" *Id.* at 466 (brackets omitted); *see id.* at 469 (discussing the Alabama sentencing proceeding: "[A] jury found Miller guilty. He was therefore sentenced to life without the possibility of parole").

By contrast, here Rojas had the opportunity to show mitigating circumstances, including his youth and attendant characteristics to convince the court to impose a sentence less than natural life. After weighing the aggravating and mitigating circumstances, Rojas's sentencer exercised its discretion to impose a sentence of natural life on both first-degree murder counts. Arizona judges' apparently universal belief in the availability of a parole-eligible sentence meant that both the State and Rojas expended efforts to persuade the judge to impose either the greater or lesser sentence. To support his request for mitigated sentences, Rojas's counsel (1) engaged a mitigation specialist, who reviewed

extensive records from Rojas's time in foster care and interviewed Rojas before authoring a report to the court; (2) submitted "two volumes" of Rojas's foster care records; (3) submitted a sentencing memorandum; (4) invited Rojas's family members to speak at sentencing on his behalf, and (5) argued for the court not to forget Rojas's young age when considering his behavior in court.

Conversely, the State asked the court to "sentence [Rojas] to the maximum available term." R. 6-2 at 204. The prosecutor noted that the Rojas's age was "not much different than the victims," who were 21 and 23 years old. *Id.* at 203. Given the "shockingly evil" nature of these offenses and the aggravating factors present, the prosecutor asked the court to "sentence the defendant to the maximum available term, consecutive on all counts, [so] that the defendant never ha[s] an opportunity to take a gun and shoot another individual." *Id.* at 204.

Thus, in this case, Rojas's sentencer deliberated between two possible sentences—natural life and life with the possibility of release after 25 years. *See Id.* at 197–212. Rojas does not dispute the availability of two options under the applicable first-degree murder statute. *See* Pet. at 4 (acknowledging that because the State did not seek the death penalty, "only two possible sentences under Arizona law" were available). Here, the harshest option was *not* the only available choice and thus was not imposed automatically, by default. *See Miller*, 567 U.S. at

477 (under mandatory sentencing schemes "every juvenile will receive the same sentence as every other").[6]

Moreover, Arizona is not contending here that *Miller* would have been satisfied based on the mistaken beliefs of judges and parties alone. If parole truly was illusory and forever remained unavailable, a *Miller* violation might result. But here, Arizona sentencing judges not only believed they were choosing between LWOP and parole-eligible sentences, those juveniles who received the parole-eligible sentences all received parole eligibility within 25 years by virtue of the 2014 legislative fix. *See* A.R.S. § 13–716. Thus, juveniles like Rojas were sentenced by judges who thought parole-eligible sentences were available, and those juveniles who received the release-eligible option are in fact eligible for parole. The functional outcome is no different than if parole-eligibility had been on the books all along.

Under these circumstances, to conclude that Arizona's scheme was indistinguishable from the mandatory schemes at issue in *Miller* would make little sense. Again, the scheme produced a result where many juveniles received release-eligible sentences that the sentencing judges believed were parole-eligible and that

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[6] Arizona courts have viewed the lack of available parole procedures at the time of sentencing as an implementation problem that was cured by A.R.S. § 13–716. *See State v. Vera*, 334 P.3d 754, 759–61, ¶¶ 21–22, 26 (Ariz. App. 2014) (explaining that "§ 13–716 does not alter Vera's penalty, create an additional penalty, or change the sentence imposed," and instead "affect[ed] only the implementation of Vera's sentence by establishing his eligibility for parole after he has served the minimum term of twenty-five years").

were, in the end, in fact parole-eligible. *See Jessup*, 31 F.4th at 1267 n.1. No "mandatory" scheme could produce this result.[7]

C. At the very least, the Arizona Court of Appeals holding does not conflict with any clearly-established Supreme Court holding.

At the very least, the Arizona Court of Appeals ruling does not conflict with any clearly-established Supreme Court holding. The circumstances presented here are fundamentally different—and significantly more complex—than the straightforward mandatory schemes confronted in *Miller*.

Nor was the Arizona Court of Appeals decision contrary to, or an unreasonable application of, *Miller* itself. At bottom, Rojas attempts to make Arizona's scheme as straightforward as the schemes confronted in *Miller*, but to do so is to ignore several critical differences. *Miller* provides no clear answer for the unusual situation where sentencers believe they can impose parole-eligible sentences and those sentences, when imposed, ultimately become parole-eligible.

This is fatal to Rojas's petition. Habeas relief is warranted only when the state court's ruling was "objectively unreasonable," *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002), and "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded

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[7] Moreover, it would make no sense to conclude that Arizona's scheme was mandatory for some and not for others, based only on the sentence that the sentencing judge chose. So, if this Court were to conclude that the scheme was mandatory for juveniles like Rojas, it might likewise have to conclude the scheme was mandatory for juveniles who are now serving parole-eligible sentences. Setting aside the question of prejudice for a moment, the Court could thus reach a nonsensical result by which a juvenile serving a parole-eligible sentence has a *Miller* claim.

disagreement," *Harrington v. Richter*, 562 U.S. 86, 103 (2011). "Where the 'precise contours' of the right remain 'unclear,' state courts enjoy 'broad discretion' in their adjudication of a prisoner's claims." *White v. Woodall*, 572 U.S. 415, 424 (2014) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003)); *see also Wright v. Van Patten*, 552 U.S. 120, 126 (2008) ("Because our cases give no clear answer to the question presented, let alone one in [petitioner's] favor, 'it cannot be said that the state court unreasonably applied clearly established Federal law.'") (quoting *Carey v. Musladin*, 549 U.S. 70, 77 (2006)).

II. This Case Is a Poor Vehicle to Address the Question Presented.

This case is a poor vehicle for this Court's review because recent developments in state law may moot Rojas's petition. In addition, habeas law prevents the relief Rojas seeks because any error was harmless under *Brecht*.

A. Recent developments in state law could potentially moot Rojas's petition.

In 2016, the Arizona Supreme Court held that juvenile homicide offenders sentenced to natural life were entitled to a post-conviction evidentiary hearing where they would "have an opportunity to establish, by a preponderance of the evidence, that their crimes did not reflect irreparable corruption but instead transient immaturity." *Valencia*, 386 P.3d at 396, ¶ 18. The Arizona Supreme Court recently granted review to consider whether such hearings should continue after *Jones*, 141 S. Ct. at 1318–19. *See State v. Hon. Cooper/Bassett,* No. CR–22–0227–PR (oral argument held January 10, 2023). It stayed several other cases raising the same issue. *See, e.g.*, *State v. Cabanas*, No. CR–22–0185–PR; *State v.*

Wagner, No. CR–22–0156–PR; *State v. Arias*, No. CR–22–0237–PR; and *State v. Odom*, CR–22–0248–PR.

In one of the stayed cases, the Arizona Court of Appeals strayed from its own prior decisions and followed the reasoning of the district court in *Jessup*, holding that Arizona's scheme was "mandatory" for purposes of *Miller*. *See Wagner*, 510 P.3d at 1087, ¶ 22, *review continued* (Feb. 28, 2023). In the other now-stayed cases, decided by the Arizona Court of Appeals after *Wagner*, that court followed *Wagner*'s reasoning. If the Arizona Supreme Court affirms *Wagner*, Rojas could be entitled to resentencing under state law, which would moot his petition in this Court. If the Arizona Supreme Court reverses *Wagner*, the defendants in those cases could seek this Court's review.

This Court would be better served by deferring any review of this issue until the outcome of these developments is clear. *See McCray v. New York*, 461 U.S. 961, 963 (1983) (opinion of Stevens, J., respecting the denial of certiorari) ("allow[ing] the various States to serve as laboratories in which the issue receives further study" will enable this Court "to deal with the issue more wisely at a later date"). Even assuming that current developments in the Arizona Supreme Court do not moot Rojas's petition, the better vehicle to address the constitutionality of Arizona statutes would be a decision from the Arizona Supreme Court interpreting and analyzing those statutes, rather than one from the Ninth Circuit on habeas review analyzing an eight-year-old unpublished decision from the Arizona Court of Appeals.

B. Any theoretical error would be harmless under *Brecht* because Rojas already received the remedy prescribed by *Miller*.

As explained above, Rojas's sentencing complied with *Miller*. But even assuming otherwise, any theoretical error would be harmless because Rojas received everything he was entitled to under *Miller*—full consideration of his youth and attendant characteristics by the sentencing court before deciding whether a parole-eligible sentence was appropriate. Pet. App. at 2a–3a. Put differently, if Rojas were granted a new sentencing he would receive: (1) a sentencing at which a judge would choose between LWOP and life with eligibility for parole; (2) actual eligibility for parole after 25 years if sentenced to the lesser option; and (3) individualized consideration of his characteristics, including his youth at the time of the crime. He received each of those things in 2001.

And as the Ninth Circuit reasonably concluded, "nothing in the record here suggests that the precise form of release played any role in the sentencing judge's discretionary decision to deny release." *Id.* at 3a. Faced with two sentencing options, the judge chose the harsher sentence; therefore, Rojas would be unable to show any substantial and injurious effect from any theoretical error. *See Brecht*, 507 U.S. at 637 (requiring habeas petitioners to establish "actual prejudice" or that the error "had [a] substantial and injurious effect or influence in determining the jury's verdict" before they are entitled to relief).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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