No. 22-

IN THE

Supreme Court of the United States

TONATIHU AGUILAR,

Petitioner,

vs.

DAVID SHINN, Director of the Arizona Department of Corrections, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Miller v. Alabama*, 567 U.S. 460 (2012), this Court held that imposing a sentence of life without parole on a juvenile offender convicted of homicide violates the Eighth Amendment when that sentence is the product of a mandatory sentencing regime. Three years before the crimes for which Mr. Aguilar is serving two consecutive sentences of life without parole were committed, the Arizona legislature abolished parole, leaving only the possibility of "release on any basis" as an available sentencing option.

This Court, the Ninth Circuit, the Arizona Supreme Court, and the Arizona Court of Appeals have all said that "release" under Arizona's first-degree-murder sentencing statute does not mean parole. *See Lynch v. Arizona*, 578 U.S. 613 (2016) (per curiam); *Crespin v. Ryan*, 46 F.4th 803, 806 n.1 (9th Cir. 2022) (citing *State v. Wagner*, 510 P.3d 1083, 1084 (Ariz. Ct. App. 2022)); *Chaparro v. Shinn*, 459 P.3d 50 (Ariz. 2020). Nevertheless, the court below held that Arizona did *not* have a mandatory sentencing scheme, and that the sentences Mr. Aguilar received complied with *Miller*.

This case presents the following question:

When a state abolishes its parole system, does it create a mandatory life-without-parole sentence that, when imposed on a juvenile homicide offender, violates the Eighth Amendment as interpreted in *Miller*?

PARTIES TO THE PROCEEDING

The petitioner is Tonatihu Aguilar. He was the appellant in the court of appeals, and the petitioner in the district court.

The primary respondent is David Shinn, the director of the Arizona Department of Corrections. He is substituted for his predecessor, Charles Ryan, pursuant to this Court's Rule 35.3 and Fed. R. App. P. 43(c)(2).

RELATED PROCEEDINGS

- *Aguilar v. Ryan*, No. 17-16013 (9th Cir. filed May 17, 2017)
- *Aguilar v. Credio*, No. 2:14-cv-2513-PHX-DJH (D. Ariz. filed Nov. 14, 2014)
- *State v. Aguilar*, No. CR-14-0254-PR (Ariz. filed Aug. 12, 2014)
- *State v. Aguilar*, No. 2 CA-CR 2013-0527-PR (Ariz. Ct. App. filed Nov. 26, 2013)
- *State v. Aguilar*, No. 1 CA-CR 12-0722 PRPC (Ariz. Ct. App. filed Nov. 27, 2012)
- *State v. Aguilar*, No. CR-09-0088-PR (Ariz. filed Apr. 15, 2009)
- *State v. Snow et al. ex rel. Aguilar*, No. CV-07-0161-SA (Ariz. filed May 10, 2007)
- *State v. Aguilar*, No. 1 CA-CR 06-0035 (Ariz. Ct. App. filed Jan. 12, 2006)
- *State v. Aguilar*, No. CR-05-0170-PR (Ariz. filed May 9, 2005)

- *State v. Aguilar*, No. CR 2002-006143 (Maricopa Co. Super. Ct. filed Apr. 15, 2002)
- *State v. Aguilar*, No. 1 CA-CR 02-0079 (Ariz. Ct. App. filed Jan. 23, 2002)
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v.

DAVID SHINN, DIRECTOR OF THE ARIZONA DEPARTMENT OF CORRECTIONS, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Tonatihu Aguilar respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The court of appeals's decision affirming the decision of the district court is unreported, but included in the appendix at page 1a. The district court's decision to deny relief is unreported, but included in the appendix at page 5a. The report and recommendation of the magistrate judge is likewise unreported, but included in the appendix at page 16a.

JURISDICTION

The court of appeals issued its opinion affirming the district court on August 19, 2022. (App. 1a) This petition is timely. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eighth Amendment to the U.S. Constitution:

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

28 U.S.C. § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

1. In September 1997, the Maricopa County Attorney filed a six-count information that charged Mr. Aguilar with six counts, including first-degree premeditated murder, in violation of Ariz. Rev. Stat. § 13-1105(A), in connection with the deaths of Hector and Sandra Imperial. These alleged killings occurred on October 15, 1996. At the time, Mr. Aguilar was 16 years old.

The state sought the death penalty, which was a constitutionally authorized punishment at the time. *See Stanford v. Kentucky*, 492 U.S. 361 (1989) (setting the minimum age for death eligibility at 16), *overruled by Roper v. Simmons*, 543 U.S. 551 (2005) (setting the minimum age for death eligibility at 18). The case proceeded to trial, and on March 8, 2001, he was convicted of these murders and of other crimes. As to Hector, the jury convicted him of second-degree murder; as to Sandra, the jury convicted of first-degree.

Seven and a half months later, a capital penalty hearing began before a superior court judge sitting without a jury. *See Walton v. Arizona*, 497 U.S. 639 (1990), *overruled by Ring v. Arizona*, 536 U.S. 584 (2002). Testimony was presented that, as a two-month-old infant, Mr. Aguilar had come down with meningitis, and that even as a first-grader he was exhibiting symptoms of the disease.

When he was eight years old, Mr. Aguilar moved to the United States with his family to live with an uncle in Avondale, Arizona. He was placed in classes for English-language learners. At the age of 10 or 12, he reported, he was "jumped into the Agua Fria Locos" gang. When he was in the fifth grade, he had a teacher who "basically told Tony that he was never going to amount to anything, he wasn't good for anything besides working in the fields.

And according to his mother and according to Tony, this devastated him." A juvenile-court evaluation when he was 14 years old indicated that his English-language proficiency had not improved since he began school in the United States. By the time he was evaluated in connection with the capital sentencing hearing here, however, his English proficiency had improved.

As a young teenager, Mr. Aguilar was arrested for stealing spray paint, and showed signs of abusing the paint as an inhalant. He also used glue and gasoline as inhalants. In May 1994, when he was 14, Mr. Aguilar was beaten on the head with a baseball bat, lost consciousness, and lost teeth. The police report "indicates that there was a rival gang that did beat him up." By November of that year, Mr. Aguilar had been repeatedly involved with the juvenile justice system, including three accusations of noncompliance with probation terms.

His father was an abusive alcoholic who would turn violent and destroy household items—on one occasion, a television, and on another, a dining room table. As a result of this domestic turmoil, the young Mr. Aguilar spent time unsupervised outside the home.

A neuropsychologist testified that Mr. Aguilar showed "markers" of "brain dysfunction," attributable to his use of inhalants, his history of infantile meningitis, and the brain injury he suffered during the baseball bat attack at age 14. Because of the brain damage, Dr. Walter diagnosed a cognitive disorder. At the time of the crimes in the late summer and early fall of 1996 (when Mr. Aguilar was 16½ years old), Dr. Walter believed that Mr. Aguilar was developmentally more akin to a child between the ages of 10 and 13. At that age, he testified, a child has "a lot left to learn in terms of self-control, in terms of judgment, learning from experience. You're certainly—

your impulse control abilities is (sic) going to be rudimentary." An adolescent boy at that developmental level also is "getting major pulses of testosterone, which is going to energize their behavior." For those who also have brain injury, "if they get stressed out, their coping strategies disintegrate, and they can act out and do very dumb things, very inappropriate things." For these reasons, the neuropsychologist testified that Mr. Aguilar's ability to conform his conduct to the requirements of the law was substantially impaired.

At a sentencing hearing held on January 4, 2002, the judge announced the entry of a special verdict detailing his findings about aggravating and mitigating circumstances. The judge found two statutory aggravating factors. First, he found the killing of Sandra Imperial to be especially heinous, cruel or depraved. *See* Ariz. Rev. Stat. § 13-703(F)(6) (1996). "The undisputed testimony is that Sandra Imperial cowered on the floor begging for her life while the Defendant stood over her. This was done in front of her six-year-old son, Hector Imperial Jr. The extreme suffering that she was put through during those moments represent mental and physical anguish that is 'especially cruel.'" Second, he found that Mr. Aguilar was convicted of another homicide—the killing of Hector Imperial—that took place during the commission of the murder of Sandra Imperial. *See* Ariz. Rev. Stat. § 13-703(F)(8) (1996). The judge expressly declined to find that the murder of Sandra Imperial had been committed in expectation of pecuniary gain.

The judge also found two statutory mitigating factors. First, based on the neuropsychologist's testimony about Mr. Aguilar's brain damage, and relying specifically on Mr. Aguilar's use of inhalants, the judge found that he "suffered from some diminished capacity to appreciate

the wrongfulness of his conduct and to conform his conduct to societal norms." *See* Ariz. Rev. Stat. § 13-703(G)(1) (1996). Second, the judge found that Mr. Aguilar's age at the time of the crime was a statutory mitigating factor. *See* Ariz. Rev. Stat. § 13-703(G)(5) (1996). "While chronological age is not solely determinative of this mitigating factor, the testimony of Drs. Walter and Jones supplements the pertinent information regarding chronological age. Their testimony was of an individual with a significant lack of intelligence and maturity."

The judge imposed consecutive sentences of life without parole for the killing of Sandra Imperial, 16 years for the killing of Hector Imperial, 3 years for endangerment, and 10 years for first-degree burglary. He did not mention whether Mr. Aguilar's crimes reflected either transient immaturity or instead permanent incorrigibility. Nor did the possibility of rehabilitation factor into the sentencing decision.

2. In April 2002, a grand jury in Maricopa County, Arizona, indicted Mr. Aguilar on one count of first-degree murder, in violation of Ariz. Rev. Stat. § 13-1105, and six counts of attempted first-degree murder, in violation of Ariz. Rev. Stat. §§ 13-1001 and -1105, in connection with the shooting death of Jonathan Bria. The killing was alleged to have taken place on September 21, 1996, about a month before the deaths of Hector and Sandra Imperial. The state again sought the death penalty. Mr. Aguilar took his case to trial and, 13 months later, was convicted of all seven counts. In the wake of *Ring v. Arizona*, 536 U.S. 584 (2002), the eligibility and penalty phases of the trial were held before a jury.

The jury found three aggravating factors—a prior conviction for a serious offense, *see* Ariz. Rev. Stat. § 13-

703(F)(2) (1996); a prior conviction for an offense carrying a maximum sentence of life imprisonment or the death penalty, *see* Ariz. Rev. Stat. § 13-703(F)(1) (1996); and committing murder while in the custody of, or having escaped from, a jail or prison, *see* Ariz. Rev. Stat. § 13-703(F)(7) (1996). Thus the jury made Mr. Aguilar eligible for a death sentence.

The mitigation presentation at the penalty phase in the 2002 case repeated the presentation at the penalty phase of the 1997 case and expanded on it. A mitigation specialist testified that Mr. Aguilar had been expelled from school in the sixth grade for bringing a BB gun to school. His mother tried to re-enroll him in another school, but the school refused. He was eventually enrolled in an alternative school. But there, he "had a lot of problems with truancy." The mitigation specialist explained, "I think there were probably—it would probably be fair to say he just chose not to go." During this period of time, the mitigation specialist explained, he "had virtually no parental supervision." His arrest record began in the fall of his sixth grade year.

When Mr. Aguilar was 14, he was placed on juvenile intensive probation after admitting guilt on a burglary charge. A petition to revoke his probation noted "that he was not at home on at least 20 occasions." He also did not participate in required drug testing and treatment, counseling, or community service. Probation officers faulted Mr. Aguilar's parents for "downplay[ing] or minimiz[ing] any kind of misbehavior that he had. It was not unusual for them to lie for him, to cover for him."

Toward the end of 1994, Mr. Aguilar's probation officer noted that he was disruptive at the alternative school whenever he attended, which was less than half of the time. The next year he was incarcerated with the

Arizona Department of Juvenile Corrections for 33 days. He was paroled, but did not return to school. In September 1995 he participated in a drive-by shooting by driving the car in which his friend shot at rival gang members. He was arrested three times in 1996 before the crimes in this case took place.

A forensic psychologist testified about Mr. Aguilar's inhalant use and impulsive behavior traits. The same neuropsychologist who testified in the 1997 case testified again about Mr. Aguilar's infantile meningitis and inhalant use. Another neurologist testified about how Mr. Aguilar's brain damage shaped his personality. "Tony's life and experience," this neurologist explained, "certainly is diagnoseable [*sic*] as a personality disorder, but not by choice. I think his personality disorder is not something he chose. It's just how his brain works and has worked and has adapted." "And if the brain doesn't function and the brain doesn't develop, the ability to make decisions and to act in a way that allows you to foresee the consequences of your behavior, antisocial personality is one of the potential results." Even his behavior in jail awaiting trial for his crimes "shows he's still acting out like he would be as a teen-ager, as a young teen-ager. So his brain has not matured." However, the neuropsychologist said, with the "proper medication, with the proper structure, I think that what will happen is that as the brain develops age-wise he will get to the place where he will mellow out. I think that he is still at a time in his life where the brain will develop and will develop in a positive way."

A detective with the Maricopa County Sheriff's Office's General Investigations Bureau recited Mr. Aguilar's disciplinary history while he was in jail awaiting trial for his crimes. Between February 1999 and March 2003, the detective noted 16 separate disciplinary violations, ranging from possessing contraband items

such as earrings, to possession of illegal drugs, to attacking guards and other jail inmates, to vandalism, to a suicide attempt. Much of Mr. Aguilar's aggressive behavior, the detective conceded, was like a "little kid throwing a temper tantrum." A psychologist testified for the prosecution that Mr. Aguilar's behavior was antisocial and attention-seeking, even his suicide attempt, and that antisocial behavior was untreatable.

The jury sentenced Mr. Aguilar to death. While his case was on automatic direct review, *see, e.g.*, *State v. Womble*, 235 P.3d 244, 248 (Ariz. 2010), the Supreme Court held in *Roper v. Simmons*, 543 U.S. 551 (2005), that a death sentence could not be imposed on a person who committed murder before his 18th birthday. The death sentence was vacated. On remand the judge, relying on the aggravating factors found by the jury, imposed a life-without-parole sentence. He did not consider any prospect of rehabilitation.

3. On June 25, 2012, this Court held in *Miller v. Alabama*, 567 U.S. 460 (2012), that the Eighth Amendment forbids imposing a sentence of life without parole on a juvenile homicide offender if that sentence is the product of a mandatory sentencing scheme. Approximately two months later, Mr. Aguilar filed with the superior court notices of postconviction relief in both cases. In both notices he claimed that his life-without-parole sentences were unconstitutional under *Miller*. He asked the court to appoint counsel to assist him in litigating his *Miller* claims.

A month later, the court consolidated his notices and then summarily dismissed his *Miller* claims without appointing counsel for him and without allowing him to file a formal petition. The court said that *Miller* did not categorically ban life-without-parole sentences for

juvenile homicide offenders, but simply "ruled out such a sentence as a mandatory requirement in murder cases." The court said that the "judge or jury must have the opportunity to consider mitigating circumstances prior to imposing the harshest possible sentence for a juvenile." Thus the court concluded that Mr. Aguilar had not set forth any "valid factual or legal basis to support his claim" that *Miller* was a significant change in the law, *see* Ariz. R. Crim. P. 32.1(g) (2012), and dismissed his notices of postconviction relief.

Mr. Aguilar timely sought appellate review with the Arizona Court of Appeals. He disputed the superior court's conclusion that *Miller* was not a significant change in the law that applied to his case, and asked the court to remand his case for an evidentiary hearing on that issue. The appellate court also affirmed the dismissal of Mr. Aguilar's *Miller* claims, faulting Mr. Aguilar for the manner in which he presented his claims of error. "Notably," the court said, "Aguilar does not appear to disagree with the court's reasoning or understanding of *Miller*, rather, he asserts he is entitled to an evidentiary hearing." (App. 56a–57a) But because he did not ask the superior court for an evidentiary hearing—a request that was premature without a formal petition, *see* Ariz. R. Crim. P. 32.6(c) (2012)—the court found no error and affirmed the dismissal of his postconviction proceedings involving his *Miller* claims. (App. 57a) The court also erroneously concluded that he had not sought appellate review of the proceedings relating to the 1997 case because it overlooked the fact that he included both superior court case numbers in the caption to his petition for review. The state conceded before the district court that the state appellate court was incorrect on this point. The Arizona Supreme Court denied discretionary review without comment. This order lists both superior court

case numbers as the subject of the request for discretionary review.

4. In November 2014, while his case was pending before the Arizona Supreme Court, Mr. Aguilar's present counsel asked the district court to appoint him to assist in preparing and filing a federal habeas petition on his behalf. The district court denied this request without prejudice to filing a proposed petition and a formal motion for appointment of counsel. On January 20, 2015, Mr. Aguilar filed a *pro se* petition for a writ of habeas corpus in which he challenged the sentences imposed in both cases as violating *Miller*. The district court appointed counsel for Mr. Aguilar and called for a response from the state.

The state defended against Mr. Aguilar's petition by arguing that his *Miller* claim was untimely and partly unexhausted in the wake of *Montgomery v. Louisiana*, 577 U.S. 190 (2016). It withdrew the untimeliness defense after *Montgomery* held that *Miller* applied retroactively to cases on collateral review. *See* 28 U.S.C. § 2244(d)(1)(C) (pegging the limitations period to the date a retroactively applicable new rule of law was announced). It never asked the district court to dismiss Mr. Aguilar's petition as unexhausted. *See generally Rose v. Lundy*, 455 U.S. 509 (1982) (requiring total exhaustion of claims in a § 2254 habeas petition).

The state also defended against Mr. Aguilar's petition on the merits. It first asserted that the state courts' denial of his *Miller* claims was merits-based. It then asserted that this merits-based denial was reasonable because at the time of both sentencing hearings, an Arizona sentencing judge was required to consider, and the judges in Mr. Aguilar's cases actually did consider, Mr. Aguilar's

youth and attendant characteristics before imposing a life-without-parole sentence in each case.

4. A magistrate judge recommended siding with Mr. Aguilar on the state's exhaustion theory but denying Mr. Aguilar's petition on the merits. As to exhaustion, the magistrate judge said that the record revealed that he had fairly presented his *Miller* claims to the Arizona Supreme Court. She also agreed with Mr. Aguilar that his "*Miller* claims remain exhausted after the *Montgomery* decision." (App. 32a)

On *de novo* review of his *Miller* claims (*see* App. 34a), the magistrate judge concluded that Mr. Aguilar was not entitled to relief. In the 1997 case, she said that the sentencing judge "considered" the arguments from defense counsel regarding Mr. Aguilar's age, relative immaturity, impulsive behavior during the crime, and family background, and in light of those arguments nevertheless imposed a life-without-parole sentence. (App. 44a–45a) "Because the trial court had the opportunity to, and did, consider Petitioner's 'youth and its attendant characteristics' before imposing a natural life sentence, *Miller* was not violated." (App. 45a) And in the 2002 case, the magistrate judge said that by relying on the three aggravating factors found by the jury to impose a life-without-parole sentence, "the trial court considered Petitioner's 'youth and attendant characteristics' before imposing a sentence of life imprisonment without parole." (App. 50a) The magistrate judge recommended certifying the denial of Mr. Aguilar's petition for appeal. (App. 52a)

5. The district court adopted the magistrate judge's recommendation. It observed that the state agreed with the magistrate judge's conclusion that *Montgomery* did not articulate a legal rule different from *Miller*, and thus concluded that it was unnecessary to review the

magistrate judge's decision that Mr. Aguilar's *Miller* claims were exhausted because neither party objected to that conclusion. (App. 7a) Similarly, the district Court noted the state's disagreement with the notion that the limitation on relief set forth in 28 U.S.C. § 2254(d) did not apply, but ultimately concluded that it was unnecessary to review the magistrate judge's decision to review the state courts' decision *de novo* because neither party objected to doing so. (App. 7a–8a)

On *de novo* review of the magistrate judge's treatment of the merits of Mr. Aguilar's *Miller* claims, the district court agreed that the record "shows that the sentencing judges in Petitioner's cases considered mitigating and aggravating factors, including Petitioner's youth and attendant characteristics, under a sentencing scheme that afforded discretion and leniency. Consequently, this Court finds no violation of *Miller*." (App. 14a) The district court certified the denial of Mr. Aguilar's *Miller* claims for appeal. (App. 15a)

6. The court of appeals affirmed the district court's denial of Mr. Aguilar's habeas petition. The court first held that *Miller* did not require an express or implicit finding of permanent incorrigibility. (App. 2a (citing *Jones v. Mississippi*, 141 S. Ct. 1307, 1318, 1320 (2021))) Rather, the fact that the sentencing judges had a measure of discretion was sufficient to satisfy the Eighth Amendment. (App. 3a (citing *Jones*, 141 S. Ct. at 1318; *Jessup v. Shinn*, 31 F.4th 1262, 1266 (9th Cir. 2022))) And despite the fact that the Arizona legislature had abolished the parole scheme before Mr. Aguilar's crimes took place, the court held that the life-without-parole sentences were not mandatory once the death penalty was foreclosed by this Court's decision in *Simmons*. (App. 3a–4a) Finally, the court rejected the contention that the capital sentencing hearings Mr. Aguilar was provided were

adequate vehicles for considering youth and its attendant characteristics, as *Miller* requires, because in its view Arizona law "did not foreclose age from being a substantial, or even dispositive, mitigating factor in capital sentencing decisions." (App. 4a (citing *State v. Jackson*, 918 P.2d 1038, 1048 (Ariz. 1996); *State v. Jimenez*, 799 P.2d 785, 797 (Ariz. 1990)))

This timely petition followed.

REASONS FOR GRANTING THE PETITION

In *Miller v. Alabama*, 567 U.S. 460 (2012), this Court held that, under the Eighth Amendment, a life-without-parole sentence imposed on a juvenile homicide offender cannot be the product of a mandatory sentencing scheme. That holding remains good law. *See Jones v. Mississippi*, 141 S. Ct. 1307, 1321 (2021) ("Today's decision does not overrule *Miller*."). The court of appeals's decision to affirm the denial of relief here rests in part on too narrow an understanding of what it means for a sentence to be mandatory. If a state abolishes its parole scheme, as Arizona has, then a sentencing judge in that state has no choice but to impose a sentence that does not carry the possibility of parole. Thus the sentence is mandatory in the sense forbidden by *Miller*. This Court should grant the petition for certiorari, reverse the decision of the court of appeals, and remand with instructions to reverse the decision of the district court and remand with instructions to grant a conditional writ of habeas corpus.

1. In affirming the denial of relief here, the court of appeals relied heavily on its decision in *Jessup v. Shinn*, 31 F.4th 1262 (9th Cir. 2022). It specifically relied on the holding in *Jessup* that, notwithstanding the Arizona legislature's abolition of parole, the life-without-parole sentence that Mr. Aguilar received was not mandatory.

(App. 2a–4a) Because, the court of appeals reasoned, the sentencing judge had *some* measure of discretion to impose a sentence other than life without parole, there was no Eighth Amendment violation. (App. 3a–4a)

The reasons for this Court to review these aspects of the court of appeals's decision here are the same as those reasons presented in the petition for certiorari in *Jessup*, No. 22-5889. The court of appeals's holding that Arizona, having abolished its parole scheme, did not create a mandatory sentencing scheme conflicts with both the holding in *Commonwealth v. Batts*, 66 A.3d 286, 289 (Pa. 2013), and with the Department of Justice's guidance to federal prosecutors about how to handle *Miller* claims brought by federal prisoners, *see, e.g.*, *United States v. Briones*, 929 F.3d 1057, 1061 & n.2 (9th Cir. 2019) (en banc), *vacated and remanded on other grounds*, 141 S. Ct. 2589 (2021). And because Arizona has created a mandatory sentencing scheme, the Arizona Court of Appeals's decision to deny Mr. Aguilar's *Miller* claim is contrary to clearly established federal law. The fact that the sentencing judge and jury may have exercised some measure of sentencing discretion is immaterial; Arizona law authoritatively holds that the judge did not have discretion to make Mr. Aguilar eligible for release *on parole*, discretion that is required under *Miller*. Whether or not the state court's decision unreasonably applied *Miller*, it was contrary to *Miller*, and that suffices for a federal habeas court to grant relief.

2. Apart from the reasons set forth in the *Jessup* petition for granting relief, the court of appeals deviated from the requirements of *Miller* and misapplied AEDPA for reasons specific to Mr. Aguilar's case.

First, the court of appeals erred by failing to take the Arizona Supreme Court's authoritative statements about

how a juvenile homicide offender's age can be a mitigating factor in a capital sentencing hearing. It is simply untrue, contrary to the court of appeals's observation, that Mr. Aguilar's age at the time of the crime was, by itself, a mitigating factor that was sufficiently substantial under Arizona law to call for a sentence other than death. Rather, the Arizona Supreme Court had repeatedly said that "chronological age is not the end point of the analysis, but the beginning" in terms of assessing age as a mitigating factor. *State v. Jackson*, 918 P.2d 1038, 1048 (Ariz. 1996). But "children who are emotionally and physically abused" cannot escape a death sentence under Arizona law on that basis alone. *Id.* at 1049 (citing cases of adults sentenced to death to justify not treating emotional and physical abuse of a juvenile homicide offender as mitigating); *but see Miller*, 567 U.S. at 477 (explaining that a judge must be able to consider a juvenile's "family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional"). Age "alone will not act to require life imprisonment in every case of first degree murder by a minor." *State v. Jimenez*, 799 P.2d 785, 797 (Ariz. 1990). A combination of age and other strong mitigating evidence must be present in order for age to count as a mitigating factor. *See id.* at 801. "While the age of the defendant might be a mitigating circumstance, it will not alone always require leniency." *State v. Gillies*, 662 P.2d 1007, 1020 (Ariz. 1983) (citing *State v. Valencia*, 645 P.2d 239, 241 (Ariz. 1982)).

The "Arizona court's construction of the State's own law is authoritative," *Ring v. Arizona*, 536 U.S. 584, 603 (2002), and binding not only on this Court, *see Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (per curiam), but also on the court of appeals, *see Woods v. Sinclair*, 764 F.3d 1109, 1136 (9th Cir. 2014). Even though Arizona law required a sentencing body in a capital case to consider not only

"youth" but the defendant's "level of intelligence, maturity, involvement in the crime, and past experience" with the juvenile justice system, *Jackson*, 918 P.2d at 1048, it did *not* require the judge to consider how those extra facts "counsel against irrevocably sentencing" a juvenile homicide offender "to a lifetime in prison," *Miller*, 567 U.S. at 480. The fact that the Arizona Supreme Court—prodded by this Court's decisions in *Smith v. Texas*, 543 U.S. 37 (2004) (per curiam), and *Tennard v. Dretke*, 542 U.S. 274 (2004)—had abandoned any requirement of a causal nexus between the mitigating evidence and the crime (*cf.* App. 4a) is therefore irrelevant.

Second, the court of appeals either overlooked or misapplied AEDPA. The district court ruled that Mr. Aguilar's *Miller* claims had not been "adjudicated on the merits" by the Arizona Court of Appeals, such that the federal habeas court could review those claims *de novo*. (App. 7a–8a) *See* 28 U.S.C. § 2254(d). Before the court of appeals, the parties disputed whether this mode of analysis was correct. (C.A. Op. Br. at 36–38; C.A. Ans. Br. at 15–22)

The court of appeals never expressly resolved this dispute. Its discussion of Mr. Aguilar's arguments on appeal points in opposite directions. The court's heavy reliance on *Jessup v. Shinn*, 31 F.4th 1262 (9th Cir. 2022)—a case plainly subject to the limitation set forth in § 2254(d), *see* 31 F.4th at 1265—suggests that it believed that the state appellate court *had* adjudicated Mr. Aguilar's claims on the merits, such that it could reverse only if that court had reached a decision that was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). But if this belief were correct, it should have explained how the district court's contrary conclusion was wrong. *Cf.*

Corcoran v. Levenhagen, 558 U.S. 1, 2 (2009) (per curiam) (suggesting that a court of appeals must either address an argument or explain why considering it is unnecessary).

If the limitation on relief in § 2254(d)(1) applies, then the court of appeals erred in counting *Jones* as part of the clearly established law that governed the state court's adjudication of Mr. Aguilar's claims, because *Jones* was decided over six years *after* the Arizona Court of Appeals ruled on those claims. *See Greene v. Fisher*, 565 U.S. 34, 38 (2011) ("As we explained, § 2254(d)(1) requires federal courts to focus on what a state court knew and did, and to measure state-court decisions against this Court's precedents *as of the time the state court renders its decision*.") (quoting *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011)) (cleaned up; emphasis in original). *Jones* is not a new substantive rule of law that applies retroactively to Mr. Aguilar's case; rather, by its very terms it simply clarified "how to interpret *Miller* and *Montgomery*." 141 S. Ct. at 1313. Thus *Jones* is not part of the relevant "clearly established" law by virtue of falling "within one of the exceptions recognized in" *Teague v. Lane*, 489 U.S. 288, 311 (1989). *See Greene*, 565 U.S. at 39 n.*.

If, on the other hand, the limitation on relief in § 2254(d)(1) does *not* apply, then the court of appeals was not necessarily bound by *Jessup* at all. *Jessup*, recall, applied the § 2254(d)(1) limitation on relief. *See* 31 F.4th at 1265. But if that limitation did not apply to the district court's consideration of *Mr. Aguilar's* claims under *Miller*, then the district court was free to "determine the principles necessary to grant relief" without looking to *Jessup* as controlling precedent. *Lafler v. Cooper*, 566 U.S. 156, 173 (2012) (citing *Panetti v. Quarterman*, 551 U.S. 930, 948 (2007)). The upshot is that if the limitation on relief in § 2254(d)(1) did not apply, the court of appeals would have been free to conclude, notwithstanding

Jessup, that Arizona had a mandatory sentencing scheme by virtue of the abolition of parole.[1]

In short, the court of appeals either misapplied AEDPA by assuming that the state court adjudicated Mr. Aguilar's *Miller* claims on the merits, or it overlooked AEDPA by failing to distinguish *Jessup* from this case on the basis that the state court did not adjudicate those claims on the merits. These mistakes in applying AEDPA also counsel in favor of granting review in this case.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternately, the petition should be held to wait for a decision in *Michael Jessup v. David Shinn*, No. 22-5889.

Respectfully submitted,
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[1] Indeed, Judge Hurwitz—who served on the Arizona Supreme Court from 2003 to 2012—posited at oral argument in this case that, if *de novo* review were allowed, the sentences might be mandatory in the sense forbidden by *Miller*. *Watch* Oral Argument Video, *Tonatihu Aguilar v. Charles Ryan*, No. 17-16013, at 0:31 to 2:30 (9th Cir. Feb. 6, 2019) <https://youtu.be/f32OUrj_qkE>. Searching YouTube for the Ninth Circuit case number will also bring up the oral argument video.