No. 22-_____

IN THE

Supreme Court of the United States

TONATIHU AGUILAR,

Petitioner,

v.

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

JON M. SANDS
Federal Public Defender
KEITH J. HILZENDEGER
Counsel of Record
Assistant Federal Public Defender
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2700 voice
keith_hilzendeger@fd.org
Counsel for Petitioner

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TONATIHU AGUILAR, *Petitioner - Appellant*, vs. CHARLES L. RYAN; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, *Respondents - Appellees*.	No. 17-16013 D.C. No. 2:14-cv-2513-DJH MEMORANDUM[*]

Appeal from the United States District Court
for the District of Arizona
Diane J. Humetewa, District Judge, Presiding

Argued and Submitted February 6, 2019
Submission Vacated March 19, 2019
Resubmitted August 12, 2022
Filed August 19, 2022
Phoenix, Arizona

Before: HAWKINS, M. SMITH, and HURWITZ, Circuit Judges.

[*] This disposition is not appropriate for publication and is not precedent except as provided in Ninth Circuit Rule 36-3.

Tonatihu Aguilar was convicted of two first-degree murders in Arizona state court. Aguilar was sixteen at the time of each crime. For the first conviction, Aguilar was sentenced to life without the possibility of parole ("LWOP"), and for the second, he was resentenced to LWOP after his death sentence was vacated in light of *Roper v. Simmons*, 543 U.S. 551 (2005). Arguing that the LWOP sentences violated the Eighth Amendment's prohibition against cruel and unusual punishment because of his age at the time of the murders, Aguilar unsuccessfully sought post-conviction relief in state court. Aguilar's 28 U.S.C. § 2254 habeas corpus petition was then denied by the district court, which granted a certificate of appealability. We affirm.

1. Aguilar contends that his LWOP sentences were unconstitutional under the Supreme Court's decisions in *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016), because neither sentencing judge made an express nor an implicit finding of incorrigibility. Although that argument finds some facial support in the language of those two cases, it is foreclosed by the Supreme Court's later decision in *Jones v. Mississippi*, in which certiorari was granted for the express purpose of explaining "how to interpret *Miller* and *Montgomery*." 141 S. Ct. 1307, 1313 (2021). *Jones* clarified that the Eighth Amendment categorically forbade mandatory sentencing schemes and required "only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing" LWOP. *Id.* at 1311 (quoting *Miller*, 567 U.S. at 483). The Court stressed that "a separate factual finding of permanent incorrigibility is not required," *id.* at 1318, nor is an "on-the-record sentencing explanation with an implicit finding of permanent incorrigibility," *id.* at 1320. The "key

assumption of both *Miller* and *Montgomery*," the Court explained, "was that discretionary sentencing allows the sentencer to consider the defendant's youth, and thereby helps ensure that life-without-parole sentences are imposed only in cases where that sentence is appropriate in light of the defendant's age." *Id.* at 1318; *see also Jessup v. Shinn*, 31 F.4th 1262, 1266 (9th Cir. 2022) ("*Miller* requires, for a juvenile offender, an individualized sentencing hearing during which the sentencing judge assesses whether the juvenile defendant warrants a sentence of life with the possibility of parole.").

2. Both of Aguilar's sentencing hearings complied with the rule announced in *Jones*. Arizona law at the time of these sentencings did not require that LWOP be imposed "*automatically*, with no individualized sentencing considerations whatsoever." *Id.* at 1267; *see* Ariz. Rev. Stat. § 13-703(A) (2001). In the first sentencing, the judge referred to age as a mitigating factor and in the second case the judge heard extensive argument about why Aguilar's age supported a lesser sentence. As *Jones* held, the Eighth Amendment requires no more.

3. Aguilar also argues that his sentences were unconstitutional because the Arizona legislature had in 1993 eliminated parole for crimes committed in 1994 or later, and replaced parole with a credit system for early release, *see Jessup*, 31 F.4th at 1266–67, and that statutory scheme was not amended until after the Supreme Court's decision in *Miller* to allow life sentences with the possibility of parole for juvenile offenders convicted of first-degree murder, *see State v. Randles*, 334 P.3d 730, 732 (Ariz. Ct. App. 2014). However, in *Jessup*, we found that habeas relief was not warranted in these circumstances because in imposing an LWOP sentence, the sentencing judge considered the defendant's "age and other relevant considerations" before concluding that no

possibility of release was warranted. 31 F.4th at 1267. We also noted that nothing "in the record suggests that the precise form of potential release at issue had any effect on the sentencing judge's exercise of discretion. Much to the contrary, the record makes clear that the sentencing judge (and everyone else involved) genuinely, if mistakenly, thought that he was considering a sentence of life with the possibility of parole." *Id.* The same is true here.

4. Finally, Aguilar contends that Arizona law at the time of his sentencings did not afford the judge the discretion *Miller* requires because age did not automatically justify a sentence other than death and because Arizona had a causal-nexus requirement for mitigating evidence in death penalty cases. Even assuming that these arguments were exhausted in the state court, they fail. Even before *Roper* held that a death sentence could not be imposed on a defendant less than eighteen years of age, 543 U.S. at 568, Arizona law did not foreclose age from being a substantial, or even dispositive, mitigating factor in capital sentencing decisions, *see State v. Jackson*, 918 P.2d 1038, 1048 (Ariz. 1996); *State v. Jimenez*, 799 P.2d 785, 797 (Ariz. 1990). Any causal-nexus requirement had been abandoned by the Arizona Supreme Court by the time of Aguilar's resentencing in the second case. *See State v. Anderson*, 111 P.3d 369, 391–92 (Ariz. 2005). And, the record in the first case does not suggest that any absence of a causal nexus prevented the judge from considering Aguilar's youth before imposing LWOP; indeed, as noted above, the judge expressly noted age as a mitigating factor.[1]

AFFIRMED.

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[1] Aguilar's motion for judicial notice is denied.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Tonatihu Aguilar, Petitioner, vs. Charles Ryan, et al., Respondents.	No. CV-14-2513-PHX-DJH **ORDER**

This matter is before the Court on Petitioner's Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 10) and the Report and Recommendation ("R&R") (Doc. 46) issued by United States Magistrate Judge Bridget S. Bade on September 1, 2016. Petitioner has raised one claim for relief in the petition. (Doc. 10 at 3).His claim is based on the Supreme Court decision in *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 2469 (2012), which held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." In two separate cases in the Maricopa County Superior Court in Phoenix, Arizona, CR 1997-009340 and CR 2002-006143, Petitioner was sentenced to life without possibility of parole after being convicted of first-degree murder.[1] Petitioner alleges the two natural life sentences for offenses he committed as a juvenile violate *Miller*,

[1] Petitioner was also convicted of other offenses.

which has been made retroactive to cases that are otherwise final on direct review.

In the R&R, Judge Bade first determined that Petitioner exhausted state court remedies for his Miller claims. (Doc. 46 at 14). Because it was not entirely clear whether the state courts adjudicated Petitioner's claims on the merits, Judge Bade conducted a de novo review rather than apply the deferential standard of review set forth in 28 U.S.C. § 2254(d). (Doc. 46 at 15). Following that review, Judge Bade concluded that Petitioner is not entitled to habeas corpus relief because the sentencing courts in his two cases complied with Miller by considering Petitioner's "youth and attendant characteristics" before imposing the life without parole sentences. (Doc. 46 at 16, 24, 28–29, and 30). Judge Bade therefore recommends the Petition be denied. (Id. at 30).

Petitioner, through counsel, filed Objections to the Report and Recommendation of the Magistrate Judge ("Objections") (Doc. 50) on October 4, 2016. Respondents then filed a Response to Objections to Report and Recommendation ("Response to Objections") (Doc. 51) on October 18, 2016. In addition, the parties jointly filed a Notice of Supplemental Authority (Doc. 52) on November 1, 2016. Respondent filed another Notice of Supplemental Authority (Doc. 53) on January 9, 2017.

I. Background

Magistrate Judge Bade provided a comprehensive summary of the factual and procedural background of this case in the R&R. (Doc. 46 at 2-9). The Court need not repeat that information here. Moreover, Petitioner has not objected to any of the information in the factual and procedural background section. *See Thomas v. Arn*, 474 U.S. 140, 149 (1989) (The relevant provision of the Federal

Magistrates Act, 28 U.S.C. § 636(b)(1)(C), "does not on its face require any review at all… of any issue that is not the subject of an objection."); see also Fed.R.Civ.P. 72(b)(3) ("The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to.").

Petitioner does not object to Judge Bade's determination that even in the wake of the Supreme Court's decision in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), Petitioner has exhausted state court remedies for the claim asserted in his habeas petition. (Doc. 50 at 1). *Montgomery* held that *Miller* applies retroactively to cases that have already become final as a result of the conclusion of direct review. *Montgomery*, 136 S.Ct. at 734. In their Response to Objections, Respondents "clarify their position regarding exhaustion" but do not object to Judge Bade's determination on that issue. Respondents argue that if *Montgomery* expanded the holding in *Miller* by imposing new requirements (in addition to merely holding that *Miller* applies retroactively), then Petitioner did not exhaust his state court remedies because *Montgomery* had not yet been decided when Petitioner presented his Miller claim in state court. (Doc. 51 at 2). Respondents, however, take the position that *Montgomery* did not expand the holding in *Miller* and they assert that the R&R adopts that same position. Consequently, because neither side objects to Judge Bade's decision that Petitioner exhausted his state court remedies, this Court will not review that decision. *See Arn*, 474 U.S. at 149; Fed.R.Civ.P. 72(b)(3).

Likewise, this Court need not review Judge Bade's decision to conduct a *de novo* review rather than apply the deferential standard of review in 28 U.S.C. § 2254(d). Petitioner does not object to that decision. (Doc. 50 at 3). Respondents, on the other hand, assert that the

deferential standard applies and that the R&R does not conclude otherwise. (Doc. 51 at 3). Respondents, however, do not object to Judge Bade's decision to conduct a *de novo* review. (*Id.*). The Court will therefore not review that decision. *See Arn*, 474 U.S. at 149; Fed.R.Civ.P. 72(b)(3).

II. Legal Standards

As noted above, the Supreme Court held in *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 2469 (2012), "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." *Id.* Although the *Miller* Court did not impose a "categorical bar on life without parole for juveniles," it explained that "we think appropriate occasion for sentencing juveniles to this harshest possible penalty will be uncommon" because of the great difficulty distinguishing between "'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Id.* (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005) and *Graham v. Florida*, 560 U.S. 48, 68 (2010)). "Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 567 U.S. 460, 132 S.Ct. at 2469.

In *Montgomery v. Louisiana*, __ U.S. __, 136 S.Ct. 718, 734 (2016), the Supreme Court held that "*Miller* announced a substantive rule of constitutional law" and is therefore retroactive. In reaching this conclusion, the

Montgomery Court explained that *Miller* "did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" *Montgomery*, 136 S.Ct. at 734 (quoting *Miller*, 132 S.Ct. at 2465). "Even 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." *Id.* (internal quotations and citations omitted). A sentence of life without parole for a juvenile is excessive except in the rare circumstances when the juvenile's crimes reflect permanent incorrigibility. *Id.*

However, as the *Montgomery* Court recognized, *Miller* did not impose a formal fact-finding requirement on the state trial courts. *Id.* at 735. "When a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems." *Id.*

III. Standard of Review

The district judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C); *see also* Fed.R.Civ.P. 72(b)(3) ("The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to."); *U.S. v. Reyna-Tapia*, 328 F.3d 1114, 1121 (same). The judge "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C); Fed.R.Civ.P. 72(b)(3).

IV. Analysis

Here, Petitioner argues that Judge Bade erred in concluding that the requirements of *Miller* were satisfied when the sentencing judges in Petitioner's two cases considered Petitioner's "youth and attendant characteristics" before imposing life without parole sentences. Petitioner contends that "mere judicial consideration of 'youth and its attendant characteristics' is not sufficient to meet the demands of the Eighth Amendment." (Doc. 50 at 6). Petitioner argues that under *Miller*, before imposing a life without parole sentence, the judge must categorize a juvenile defendant and determine whether his crimes reflect unfortunate yet transient immaturity or irreparable corruption. (Doc. 50 at 5). Petitioner contends that Judge Bade "failed to explain how the sentencing judge in either case determined that [Petitioner's] crime did not reflect transient immaturity but instead permanent incorrigibility." (Doc. 50 at 4) (emphasis in original). Thus, according to Petitioner, Judge Bade failed to explain how the sentences comply with *Miller*.

Respondents argue in response that, as explained in *Montgomery*, *Miller* does not require trial courts to make specific factual findings regarding a juvenile defendant's incorrigibility. They claim that Petitioner's argument that more specific findings were required ignores this aspect of *Montgomery*. Respondents contend that the record amply shows the state trial courts gave extensive consideration to Petitioner's youth before imposing life without parole sentences against him. That extensive consideration, they argue, establishes compliance with *Miller*.

In the R&R, Judge Bade summarized at length the youth-related evidence presented at Petitioner's sentencing hearings. (Doc. 46 at 19-29). In the first case,

Petitioner presented testimony from legal experts who addressed the death penalty as applied to juvenile offenders.[2] The testimony included statements about how juveniles are less culpable than adults because their brains do not develop fully until their early 20s, they are impulsive, and they are less receptive to deterrence. (Doc. 46 at 19). According to the testimony, courts should consider a defendant's chronological age, youthfulness, and immaturity when sentencing a juvenile offender. (*Id.*). Petitioner also presented testimony from three other witnesses – a neuropsychologist, a psychologist, and a mitigation specialist – who testified about Petitioner's specific circumstances, including his age, intellectual development, mental health, family and home environment, his peers, and the circumstances of the offense. (Doc. 46 at 19-24). The record reflects that the trial court judge considered this evidence and defense counsels' arguments regarding Petitioner's age, intellectual development and maturity as mitigating factors before imposing a sentence of life without parole. (Doc. 46 at 23-24).

In the second case, Petitioner was initially sentenced to death for the first-degree murder conviction. After the Supreme Court held in *Roper v. Simmons*, 543 U.S. 551 (2005), that the Eighth Amendment bars the execution of juvenile offenders, Petitioner's case was remanded to determine whether Petitioner should be sentenced to natural life or life with a possibility of parole. (Doc. 46 at 25). Upon remand, Petitioner again presented substantial mitigating evidence pertaining to his youth. Among other evidence, a neuropsychologist testified about brain function and development, and determined based on his re-

[2] At that time, death was among the sentences being considered by the trial court for Petitioner's first degree murder conviction.

view of Petitioner's case that several factors may have affected the development of Petitioner's brain. (Doc. 46 at 25-28). The record shows that the trial court judge considered the mitigating evidence that was presented along with defense counsels' arguments that Petitioner's age, immaturity, and impulsivity supported a lesser sentence. As Judge Bade found, "the record reflects that the trial court considered Petitioner's 'youth and attendant characteristics' before imposing a sentence of life imprisonment without parole," though the trial court did not make factual findings pertaining to the specific factors identified in *Miller* and reiterated in *Montgomery*. (Doc. 46 at 28).

Petitioner does not object to Judge Bade's factual summary of Petitioner's sentencing hearings including the evidence presented, the arguments made, and the trial court judges' decisions. Rather, Petitioner objects to Judge Bade's legal conclusion – that although *Miller* requires a sentencing judge to consider a juvenile offender's youth and attendant characteristics before deciding that life without parole is a proper sentence, "failure to make specific factual findings [regarding those considerations] does not run afoul of *Miller*." (Doc. 46 at 28-29). After conducting its own *de novo* review, this Court agrees with Judge Bade's conclusion. Petitioner has not demonstrated to the Court's satisfaction that *Miller* or *Montgomery* requires specific factual findings that address the considerations set forth in *Miller*.

Petitioner's sentencing hearings in the two cases for which he received sentences of life without parole occurred in 2001 and 2005. (Doc. 46 at 3, 6). *Miller* was decided in 2012. *Montgomery* was decided in 2016. Thus, it should come as no surprise that the sentencing judges in Petitioner's cases did not specifically address the distinction highlighted in *Miller* between "transient im-

maturity" and "permanent incorrigibility." Indeed, Petitioner acknowledges that even if the sentencing judges in this case had the benefit of *Miller*, the decision does not require sentencing judges to "intone the magic words 'permanent incorrigibility' or 'irreparable corruption' before imposing a life without parole sentence." (Doc. 50 at 2). Petitioner claims, however, that the sentencing judges were required to not only consider these concepts, they were also required to explain on the record how Petitioner's crimes showed permanent incorrigibility or irreparable corruption before imposing life without parole sentences. (Doc. 50 at 2, 6). But Petitioner points to nothing in *Miller* or *Montgomery* that calls for on the record explanations of sentencing judges' findings. To the contrary, *Montgomery* addressed this issue and recognized that *Miller* did not impose a formal fact-finding requirement on the state trial courts so as to avoid interfering with the States' administration of their criminal justice system. *Montgomery*, 136 S.Ct. at 735. This Court therefore declines to interpret *Miller* to require a sentencing judge to make formal findings of fact regarding a juvenile offender's youth and attendant characteristics before imposing a life without parole sentence.

Moreover, this Court's reading of *Miller* is consistent with the Ninth Circuit's decision in *Bell v. Uribe*, 748 F.3d 857, 869 (9th Cir. 2014). As in this case, the defendant in *Bell* "was not sentenced to life without the possibility of parole pursuant to a mandatory sentencing scheme that did not afford the sentencing judge discretion to consider the specific circumstances of the offender and the offense." *Id.* The record reflected in *Bell*, as it does here, that the sentencing judge made an individualized sentencing determination and imposed a sentence of life without the possibility of parole. *Id.* The Ninth Circuit explained:

> Even though the face of [the applicable California sentencing statute] affords a sentencing judge discretion to impose a sentence of 25 years to life imprisonment in recognition that some youthful offenders might warrant more lenient treatment, the court concluded that such mercy was not warranted in the present case. Because the sentencing judge did consider both mitigating and aggravating factors under a sentencing scheme that affords discretion and leniency, there is no violation of *Miller*.

Bell. 748 F.3d at 870. The Court did not require specific factual findings addressing the considerations set forth in *Miller*. *See id.*

The record in this case also 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*.

V. Conclusion

For the foregoing reasons, and after conducting its own de novo review, the Court reaches the same conclusion as Magistrate Judge Bade and finds Petitioner has not shown that his life without parole sentences violated the rule announced in *Miller*. Petitioner's habeas petition must therefore be denied.

Accordingly,

IT IS ORDERED that Magistrate Judge Bade's R&R (Doc. 46) is **accepted** and **adopted**. Petitioner's Objections (Doc. 50) are overruled.

IT IS FURTHER ORDERED that the Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 10) is **denied** and **dismissed with prejudice**.

IT IS FURTHER ORDERED that pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, a Certificate of Appealability and leave to proceed *in forma pauperis* on appeal are **granted** because jurists of reason could find this Court's ruling debatable.

IT IS FINALLY ORDERED that the Clerk of Court shall terminate this action and enter judgment accordingly.

Dated this 16th day of May, 2017.

s/Diane J. Humetewa
Honorable Diane J. Humetewa
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Tonatihu Aguilar, Petitioner, vs. Charles Ryan, et al., Respondents.	No. CV-14-2513-PHX-DJH **REPORT AND RECOMMENDATION**

On January 20, 2015, Petitioner Tonatihu Aguilar filed an Amended Petition for Writ of Habeas Corpus. (Doc. 10.) Petitioner argues that his sentences of life imprisonment, imposed in two separate cases, are unconstitutional under the Supreme Court's decision in *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, 2469 (2012) (holding that mandatory life without parole for those under the age of eighteen at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments).

On April 22, 2015, Respondents filed an answer arguing that the amended petition is untimely, *Miller* does not apply retroactively to cases on collateral review, and that Petitioner's claims lack merit. (Doc. 22.) After Respondents filed their answer, the Supreme Court granted review in *Montgomery v. Louisiana*, ___ U.S. ___, 135 S. Ct. 1546 (2015), in which one of the questions presented was whether *Miller* applies retroactively. *Montgomery*, 2014 WL 4441518 (U.S. Sept. 4, 2014) (writ

of certiorari). On January 26, 2016, Respondents notified the Court that the Supreme Court had issued its decision in *Montgomery*, and held that *Miller* applies retroactively to cases on collateral review. (Doc. 39, Ex. A at 14-22.) In view of Montgomery, and in the interest of creating a clear record, the Court ordered further briefing. (Doc. 40.) On February 26, 2016, Respondents filed an amended answer. (Doc. 41.) On April 1, 2016, Respondents filed a notice of supplemental authority arguing that based on a recent Arizona Court of Appeals' decision, the Court should either stay this matter to permit Petitioner to pursue potential remedies in state court, or deny the amended petition on the merits. (Doc. 44.) Petitioner then filed an amended reply to the amended answer, in which he also addressed the arguments in Respondents' notice of supplemental authority. (Doc. 45.) For the reasons set forth below, the Court recommends that habeas corpus relief be denied.

I. Factual and Procedural Background

The amended petition seeks habeas corpus relief from Petitioner's natural life sentences that were imposed for two unrelated murders in Maricopa County Superior Court Case Nos. CR1997-009430 and CR2002-006143.[1] (Doc. 10.) The Court discusses the background of those cases before considering Petitioner's claims.

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[1] Rule 2(e) of the Rules Governing Section 2254 Cases provides that "[a] petitioner who seeks relief from judgments of more than one state court must file a separate petition covering the judgment or judgments of the each court." Petitioner challenges two separate judgments from the same court. Therefore, Rule 2(e) does not bar Petitioner from seeking relief in a single § 2254 petition. Respondents do not object to Petitioner challenging two separate judgments in a single petition. (Doc. 41 at 6 n.5.)

A. Charges, Trial, Sentence, and Direct Review in No. CR1997-009430

In Case No. CR1997-009430 (the 1997 case), Petitioner was charged with two counts of first-degree murder, and several other counts, including one count of endangerment. (Doc. 22, Ex. B.)[2] After a trial, the jury found Petitioner guilty of: (1) second-degree murder for the killing of Hector Imperial, Sr.; (2) first-degree murder for the killing of Sandra Imperial; and (3) endangerment of Hector Imperial, Jr. (Doc. 22, Ex. E.) The convictions were based on evidence that Petitioner went to the Imperials' home on October 14, 1996, and threatened Sandra Imperial about money for a car he had sold the Imperials. (Doc. 22, Ex. O at 5-6.) The next day, October 15, 1996, Petitioner returned and killed Hector Imperial, Sr. (*Id.* at 2-3.) Petitioner left the house, but returned a short time later and killed Sandra Imperial. (*Id.* at 3-4.) Petitioner was sixteen years old at the time. (Doc.22, Ex. F at 5.)

The State sought the death penalty, and the court conducted a sentencing hearing in October and November 2001. (Doc. 22, Exs. G, H, I.) Hector Imperial's brother, Ruben Imperial, testified for the State. (Doc. 22, Ex. G at 5-10.) Five witnesses testified on Petitioner's behalf: (1) Lisa Christianson, a mitigation specialist with the Maricopa County Office of the Legal Advocate (Doc. 22, Ex. G at 11-65; Ex. H at 62-76); (2) Professor Constance de la Vega, of the University of San Francisco School of Law, who addressed the issue of executing juvenile offenders under international law (Doc. 22, Ex. G at 66-114); (3) Professor Victor Streib, a professor at the Ohio

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[2] Respondents' exhibits are attached to their original answer. (Doc. 22; *see also* Doc. 40 at 2 (stating that the "amended answer may cite to portions of the record that Respondents previously filed").)

Northern University School of Law, who addressed the issue of executing juvenile offenders under American law (Doc. 22, Ex. G at 115-147); (4) Dr. Mark Walter, a neuropsychologist, who described the effects of injuries to the brain that Petitioner had suffered as an infant, child, and young teenager (Doc. 22, Ex. H at 5-61); and (5) Dr. Carlos Jones, a psychologist, who evaluated Petitioner and testified about his intelligence and mental health in view of his alleged brain damage and use of inhalants. (Doc. 22, Ex. I at 3-47.)

On January 4, 2002, the trial court held a hearing for the imposition of sentence. (Doc. 22, Ex. J.) The court found two statutory aggravating factors that made Petitioner eligible for the death penalty. (Doc. 22, Ex. J at 6-7.) The court also found two statutory mitigating factors. (Doc. 22 at 7.) First, in view of the doctors' testimony, the court found that Petitioner's "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired." (Doc. 22, Ex. J at 7; Ex. L at 2); *see* Ariz. Rev. Stat. § 13-703(G)(1) (1997). Second, the court found Petitioner's age at the time of the murders a mitigating circumstance. (Doc. 22, Ex. J at 7; Ex. L at 3); *see* Ariz. Rev. Stat. § 13-703(G)(5) (1997). After finding the mitigating circumstances sufficient to call for leniency, the court imposed a sentence of life without parole for the first-degree murder conviction, plus a total of twenty-nine years' imprisonment on the other counts of conviction, with the sentences to run consecutively. (Doc. 22, Ex. J at 7-8; Doc. 22, Exs. K, L.)

On direct appeal, Petitioner raised claims that are unrelated to his current habeas petition. (Doc. 22, Exs. M, N, O, P.) The Arizona Court of Appeals affirmed Petitioner's convictions and sentences. (Doc. 22, Exs. Q,

R.) The Arizona Supreme Court denied Petitioner's petition for review. (Doc. 22, Exs. S, T.)

B. Charges, Trial, Sentence, and Direct Review in No. CR2002-006143

In Case No. CR2002-006143 (the 2002 case), the State charged Petitioner on April 15, 2002 with one count of first-degree murder, and multiple counts of attempted firstdegree murder, based on a shooting that took place on September 21, 1996. (Doc. 22, Ex. BB.) After a trial, the jury found Petitioner guilty of one count of first-degree murder and six counts of attempted first-degree murder. (Doc. 22, Ex. CC.) The convictions were based on evidence that Petitioner was driving in his car alone following a pick-up truck that was carrying seven passengers when he fired multiple gunshots at the truck and passengers. (Doc. 22, Ex. NN at 2-5.)

The State sought the death penalty and the case proceeded to an aggravation phase. At the conclusion of the aggravation phase, the jury found two aggravating factors that made Petitioner eligible for the death penalty. (Doc. 22, Ex. KK at 12; Doc. 32-1 at 137-39.)[3] The penalty phase hearing began on May 15, 2003. (Doc. 22, Ex. KK at 12.) During that hearing, Petitioner presented mitigating evidence from eight witnesses: (1) Alan Hubbard, general counsel for the Mexican consulate in Phoenix, who verified Petitioner's birth certificate (Doc. 32-4 at 38-49); (2) Jose Acosta, Petitioner's sixth-grade teacher, who testified regarding Petitioner's difficulties in

[3] Documents 32, 33, 34, 35, and 36 are Petitioner's "Notice of Augmentation of State Court Record." Attached to those documents are transcripts of several hearings held in the Maricopa County Superior Court in the 2002 case. In his briefing, Petitioner does not refer to the transcripts as separate exhibits. Therefore, the Court cites to the CM/ECF document and page numbers.

school that year (Doc. 32-4 at 49-79); (3) Lisa Christianson, a mitigation specialist (Doc. 32-4 at 80-128; Doc. 33-1 at 17-66); (4) Dr. Carlos Jones, a psychologist, who testified about Petitioner's mental health in view of his brain damage and use of inhalants (Doc. 33-1 at 66-175); (5) Dr. Mark Walter, a neuropsychologist, who described the effects of injuries to the brain that Plaintiff suffered as an infant, child, and young teenager (Doc. 33-4 at 3-151; Doc. 34-1 at 3-73); (6) Luzminda Kendrick, a licensed therapist, who treated Petitioner after he was suspended and later expelled from school at the age of thirteen (Doc. 4-1 at 74-109; Doc. 34-2 at 6-62); (7) Maria Gloria Aguilar, Petitioner's mother, who testified about Petitioner's family life when he was growing up, his meningitis as an infant, and his use of inhalants (Doc. 34-2 at 63-158; Doc. 34-4 at 3-11); and (8) Dr. Ricardo Weinstein, a psychologist trained in quantitative electroencephalography, who described Petitioner's brain damage and how his brain development compared to that of other adolescents. (Doc. 34-4 at 11-122.)

The State presented the testimony of ten witnesses. (Doc. 35-1, 35-2, 36-1, 36-2 at 6-27). After hearing the evidence, the jury returned a verdict finding that there was "no mitigation sufficiently substantial to call for leniency." (Doc. 22, Ex. KK at 13.) On June 19, 2003, the court imposed the death penalty on the first-degree murder conviction. (Doc. 22, Ex. EE.) The trial court also sentenced Petitioner to six concurrent terms of thirty years' imprisonment on each conviction for attempted-first-degree-murder, to run concurrently with the death sentence in the 2002 case, but consecutive to the sentences in the 1997 case. (Doc. 22, Ex. FF.) The death sentence triggered an automatic appeal to the Arizona Supreme Court. *See* Ariz. Rev. Stat. § 13-703.04 (2003). While that direct appeal was pending, the United States Supreme Court held in *Roper v. Simmons*, 543 U.S. 551 (2005), that

the Eighth Amendment bars the execution of a juvenile offender. Accordingly, the Arizona Supreme Court remanded the case to the trial court to determine whether Petitioner was under the age of eighteen at the time of the offense and, if so, to vacate the death sentence and impose an appropriate sentence for the first-degree murder conviction. (Doc. 22, Ex. GG.)

On December 16, 2005, the trial court held a resentencing hearing. (Doc. 22, Ex. II.) Before the hearing, defense counsel filed a sentencing memorandum and submitted three exhibits including the cross-examination of Hector Imperial, Jr., a Sheriff's Department report, and the transcript of Dr. Weinstein's testimony. (*Id.* at 5, 15; Doc. 22, Ex. HH.) In the sentencing memorandum, defense counsel argued that a sentence of life without parole until Petitioner had served twenty-five years was appropriate, in part, because the crime was impulsive in nature, and because Petitioner "was less capable than an adult of using appropriate and considered judgment." (Doc. 22, Ex. HH at 3.) He also argued that Petitioner's behavior had improved over time. (*Id.* at 2.)

At the outset of the hearing, the trial court stated that it had received defense counsel's memorandum and exhibits, and had "read all of [Defense counsel's] papers" "in preparation for the hearing." (*Id.* at 5, 8.) At the hearing, defense counsel again requested a mitigated sentence of life without eligibility for parole for twenty-five years. (Doc. 22, Ex. II at 4, 6.) Defense counsel argued that Dr. Weinstein's testimony, including his testimony about the development of Petitioner's brain, supported the request for a mitigated sentence. (*Id.* at 15.) Defense counsel also referred to Petitioner's age at the time of the offense. (*Id.* at 18.) The prosecution asserted that defense counsel was arguing that "not only is the death penalty

not appropriate for 16-year-olds because their brains aren't developed… he's also telling you natural life isn't appropriate for them either." (*Id.* at 17.) The trial court found that Petitioner was under the age of eighteen at the time of the offense. (Doc. 22, Ex. II at 27.) At the conclusion of the hearing, the trial court sentenced Petitioner to natural life imprisonment for the firstdegree murder conviction. (*Id.* at 28.) The court stated that the basis for its decision was "the three aggravating factors found by the jury." (*Id.*) Petitioner appealed, raising claims unrelated to his current habeas corpus petition. (Doc. 22, Exs. KK, NN.) The Arizona Court of Appeals affirmed, and the Arizona Supreme Court denied Petitioner's subsequent petition for review. (Doc. 22, Exs. OO, PP, QQ.)

C. Consolidated Post-Conviction Proceedings

On June 25, 2012, the Supreme Court decided *Miller*, 132 S. Ct. 2455. The Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id.* at 2469. Petitioner filed separate notices of post-conviction relief in the trial court pursuant to Rule 32 of the Arizona Rules of Criminal Procedure, arguing that his natural life sentences in the 1997 and 2002 cases violated the Eighth Amendment as applied in *Miller*. (Doc. 22, Exs. VV, WW.) On October 26, 2012, the trial court consolidated the notices of post-conviction relief for consideration. (Doc. 22, Ex. XX.)

The trial court first found that the notices of post-conviction relief were untimely under Rule 32.4(a). (*Id.*) The trial court noted that Petitioner argued that it should consider his untimely notices under Rule 32.1(g) because *Miller* was a significant change in the law that, if applied retroactively, would probably affect the outcome of

Petitioner's case (*Id.*) Petitioner argued in his notices of post-conviction relief that *Miller* prohibited imposing a life sentence without parole on a juvenile. (*Id.*) The court disagreed with Petitioner's characterization of *Miller*, and stated that *Miller* did not categorically ban sentencing juveniles to life imprisonment. (*Id.*) Rather, the trial court stated that *Miller* prohibits sentencing juveniles to mandatory life sentences, but permits such sentences when the judge or jury has the opportunity to consider mitigating circumstances before sentencing a juvenile to life. (*Id.*) The trial court concluded that Petitioner had not set forth a valid legal or factual basis to support his claim and, therefore, had not demonstrated that *Miller* was a significant change in the law that applied to Petitioner's sentences in the 1997 and 2002 cases. (*Id.*) The trial court dismissed the notices of postconviction relief. (Doc. 22, Ex. XX at 2.)

Petitioner filed a single petition for review in the Arizona Court of Appeals, which included both superior court case numbers in the caption and addressed his sentences in both cases. (Doc. 22, Ex. YY.) The Arizona Court of Appeals granted review, but denied relief. (Doc. 22, AAA at 5.) The appellate court first noted that it was only considering Petitioner's claims related to the 2002 case because it concluded that although the petition for review referred to both the 2002 and 1997 cases, Petitioner's notice of post-conviction relief filed in the trial court only pertained to the 2002 case.[4] (Doc. 22, Ex. AAA at 4 n.4.)

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[4] The parties agree that this statement was erroneous. (Doc. 45 at 5-6.) Respondents state that the appellate court apparently overlooked, or never received, a notice of post-conviction relief that Petitioner had filed in connection with the 1997 case. (Doc. 41 at 5 n.4 (citing Doc. 22, Exs. VV, WW).)

The appellate court then stated that Petitioner argued that *Miller* was a significant change in the law that entitled him to relief from his sentence of natural life imprisonment and excused his untimely notice of post-conviction relief. (Doc. 22, Ex. AAA at 3-5.) The appellate court concluded that "[e]ven assuming without deciding that the rule announced in *Miller* constitutes a significant change in the law, [Petitioner] has not shown how the trial court abused its discretion in dismissing his untimely notice." (Id. at 4.) The appellate court noted that Petitioner did not appear to disagree with the trial court's understanding of *Miller*, but argued that he was entitled to an evidentiary hearing. The appellate court noted that an evidentiary hearing may be appropriate if a petitioner's notice of post-conviction relief is timely and he establishes a colorable claim. (*Id.*) Because Petitioner had neither requested an evidentiary hearing in the trial court, nor "provide[ed] the basis for such a hearing," the appellate court determined that the trial court did not err in failing to conduct an evidentiary hearing. (*Id.*) Accordingly, the appellate court granted review but denied relief. (*Id.* at 5.) Petitioner filed a petition for review in the Arizona Supreme Court that was denied on February 10, 2015. (Doc. 22, Exs. BBB, CCC.)

D. Federal Habeas Corpus Proceedings

On January 20, 2015, Petitioner filed his amended petition for writ of habeas corpus in this Court. (Doc. 10.) Petitioner challenges his natural life sentences in the 1997 and 2002 cases. Petitioner claims that his sentences are unconstitutional under *Miller*. (*Id.*) Petitioner argues that the sentencing courts imposed sentences of life imprisonment without parole and did not consider that Petitioner was a juvenile at the time of the offenses. (*Id.* at 3.) In accordance with this Court's order (Doc. 40), on February 26, 2016, Respondents filed an amended answer

(Doc. 41), and Petitioner filed an amended reply. (Doc. 45.) Respondents also filed a notice of supplemental authority (Doc. 44), which Petitioner addresses in his amended reply. The Court will first address the issues presented in the notice of supplemental authority, and then address Petitioner's claims.

II. Notice of Supplemental Authority and the *Montgomery* Decision

As previously noted, in *Miller*, the Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller*, 132 S. Ct. at 2469. The Court subsequently held in *Montgomery* that *Miller* applies retroactively to cases on collateral review. *Montgomery*, 136 S. Ct. 718. On April 12, 2016, Respondents filed a notice of supplemental authority advising the Court of the Arizona Court of Appeals' recent decision in *State v. Valencia*, 2016 WL 1203414 (Ariz. Ct. App. Mar. 28, 2016). (Doc. 44.) In *Valencia*, the Arizona Court of Appeals concluded that *Montgomery* announced a new "constitutional standard" that requires courts to make a specific finding that a juvenile's crime reflects "permanent incorrigibility" before imposing a life sentence without parole. *Valencia*, 2016 WL 1203414, at *3, *4.

Relying on *Valencia*, Respondents argue that Petitioner may have available, but unexhausted, state remedies related to any claims based on *Montgomery*. Respondents argue that Petitioner must either abandon any arguments that rely on *Montgomery*, or ask for a stay of this proceeding to allow him to exhaust his *Montgomery* claims in state court. In response, Petitioner argues that *Montgomery* "explicates the holding in *Miller*," but does not create a new right. (Doc. 45 at 8.)

Therefore, Petitioner asserts that his *Miller* claims "remain properly exhausted in the wake of *Montgomery*." (*Id.* at 9.) As discussed below, the Court concludes that Petitioner has exhausted state remedies on his claims that his sentences of life imprisonment without parole imposed in the 1997 and 2002 cases violate the Eighth Amendment and, therefore, finds that there is no reason to stay this matter to permit Petitioner to return to state court.

A. Section 2254's Exhaustion Requirement

Ordinarily, a federal court may not grant a petition for writ of habeas corpus unless the petitioner has exhausted available state remedies. 28 U.S.C. § 2254(b). To exhaust state remedies, a petitioner must afford the state courts the opportunity to rule on the merits of his federal claims by "fairly presenting" them to the state's "highest" court in a procedurally appropriate manner. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) ("[t]o provide the State with the necessary 'opportunity,' the prisoner must 'fairly present' his claim in each appropriate state court… thereby alerting that court to the federal nature of the claim"); *Castille v. Peoples*, 489 U.S. 346, 349 (1989) (same). In the amended petition, Petitioner argues that his sentences of life imprisonment without parole, imposed in the 1997 and 2002 cases, violate the Supreme Court's holding in *Miller* because, in each case, the court imposed that sentence "without considering the fact that [Petitioner] was a juvenile at the time of the murders…." (Doc. 10 at 3.) In their amended answer, Respondents do not argue that Petitioner's claims based on *Miller* are unexhausted. (Doc. 41.) However, they assert that if Petitioner argues that *Montgomery* changed the law announced in *Miller*, then any arguments he asserts based on that interpretation of *Mongtomery* are unexhausted. (Doc. 41 at 12-13 n.7.) Respondents make that same argument in their notice of supplemental authority. (Doc. 44.) In his

amended reply, Petitioner argues that his claims are based on *Miller*, as explained by *Montgomery*, and that they are exhausted. (Doc. 45 at 9.) Petitioner does not request permission to return to state court to present any claims to the state courts. (Doc. 45 at 9-12.)

The record reflects that in connection with the 1997 and the 2002 cases, Petitioner presented a *Miller* claim to the trial court in his notices of post-conviction relief. (Doc. 22, Exs. VV, WW.) Petitioner argued that his sentences of life imprisonment without the possibility of parole violate the Eighth Amendment as articulated in *Miller*. (Id.) After the trial court dismissed the notices of post-conviction relief related to the 1997 and 2002 cases (Doc. 22, Ex. XX at 2), Petitioner filed a single petition for review in the Arizona Court of Appeals arguing that the trial court erred by dismissing the notices of post-conviction relief and that his sentences of life without parole in the 1997 and 2002 cases violated *Miller*. (Doc. 22, Ex. YY.) The appellate court denied relief. (Doc. 22, Ex. AAA.) Petitioner filed a petition for review in the Arizona Supreme Court arguing that his life sentences without parole in the 1997 and 2002 cases violated Miller. (Doc. 22, Ex. BBB.) The Arizona Supreme Court denied review. (Doc. 22, Ex. CCC.)

As set forth above, Petitioner presented his claims that his sentences of life imprisonment without parole in the 1997 and 2002 cases violate the Eighth Amendment, as explained in *Miller*, to the trial court and to the Arizona Court of Appeals on postconviction review. The appellate court apparently believed that Petitioner had only challenged his sentence in the 2002 case in the trial court. However, the record reflects that Petitioner challenged his sentences in the 1997 and the 2002 cases in both the trial court and the appellate court. (Doc. 22, Exs. VV, WW, XX, YY.) Thus, Petitioner gave the trial court and the

appellate court "the opportunity to pass upon and correct the alleged violation of [Petitioner's] federal rights." *Baldwin*, 541 U.S. at 29. Therefore, he exhausted state remedies on his sentencing claims. *See Boerckel*, 526 U.S. at 845.

Respondents do not dispute that Petitioner exhausted his challenge to his sentences of life imprisonment to the extent that his arguments are based solely on *Miller*. (Docs. 41, 44, Doc. 45 at 5-6.) However, they argue that to the extent that Petitioner argues that *Montgomery* created a new rule and relies on that alleged new rule to support his claims, such claims are unexhausted. (Doc. 41 at 12-13, n.7; Doc. 44.) Petitioner argues that *Montgomery* explained *Miller* and that his reliance on *Montgomery* does not render his claims unexhausted. (Doc. 45 at 9.) As set forth below, the Court agrees that *Montgomery* explained the *Miller* decision, and that Petitioner's claims remain exhausted after *Montgomery*. The Court, however, disagrees with Petitioner's characterization of the *Miller* decision as requiring specific fact finding, as set forth in his amended reply. (Doc. 45 at 7.)

B. The *Miller* and *Montgomery* Decisions

Petitioner argues that *Miller* established the following two rules: (1) "a mandatory sentence of life without parole for a juvenile homicide defendant violates the Eighth Amendment"; and (2) "the Eighth Amendment forbids a judge from imposing a sentence without explaining how the juvenile's crime reflects 'permanent incorrigibility' or 'irreparable corruption.'" (Doc. 45 at 7.) The second purported rule that Petitioner identifies follows *Valencia*, in which the Arizona Court of Appeals construed *Montgomery* to conclude that the Supreme Court announced a new standard that requires a sentencing court to make a finding of "permanent incorrigibility"

before imposing a natural life sentence on a juvenile. *See Valencia*, 2016 WL 1203414, at *3, * 4. The court of appeals held that these specific findings required by the *Montgomery* decision "constitute a significant change under Arizona law" and, therefore, concluded that the petitioners in that case were entitled to relief under Rule 32.1(g) and remanded for further proceedings. *Id.* at *4. This Court, however, as set forth below, concludes that *Miller* and *Montgomery* do not require a sentencing court to make a specific finding of "permanent incorrigibility" or "irreparable corruption" before sentencing a juvenile defendant to life without parole and, therefore, declines to follow *Valencia*.[5] *See Miller*, 132 S. Ct. at 2464; *Montgomery*, 136 S. Ct. at 735.

In determining whether *Miller* announced a new substantive rule that should apply retroactively under *Teague v. Lane*, 489 U.S. 288 (1989),[6] the Court in

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[5] "When interpreting state law, a federal court is bound by the decision of the highest state court." *In re Kirkland*, 915 F.2d 1236, 1238 (9th Cir. 1990) (citation omitted.) Here, the highest state court, the Arizona Supreme Court, has not addressed whether *Miller* and *Montgomery* require specific findings of "permanent incorrigibility" or "irreparable corruption" when sentencing juveniles, and whether such findings would constitute a significant change in Arizona law that would entitle a petitioner to relief under Rule 32.1(g). Thus, "[i]n the absence of such a decision, a federal court must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance." *Id.* at 1239 (citations omitted). Because the Arizona Court of Appeals decision in *Valencia* was based on its application of the Supreme Court's decisions in *Miller* and *Montgomery*, this Court looks directly to those decisions to predict how the Arizona Supreme Court would decide these issues.

[6] Under *Teague*, two categories of decisions apply retroactively to cases on collateral review: (1) new substantive rules, and (2) "watershed rules of criminal procedure." *See Welch v. United States*,

Montgomery referred to language from its decision in *Miller* stating that a sentence of life without parole should be reserved for "all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery*, 136 S. Ct. at 734 (citing *Miller*, 132 S. Ct. at 2469). In *Montgomery*, the Court interchangeably used concepts of "irretrievable depravity," "permanent incorrigibility," and "irreparable corruption," in its discussion of the retroactivity of *Miller*. *See Montgomery*, 136 S. Ct at 733-34. However, the Court concluded that *Miller* "did not require trial courts to make a finding of fact regarding a child's incorrigibility." *Id.* at 735. The Court noted that "[w]hen a new substantive rule of constitutional law is established, [the] Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems." *Id.* The Court explained that "[t]he procedure *Miller* prescribes" is "[a] hearing where 'youth and its attendant characteristics' are considered as sentencing factors…." *Id.* (quoting *Miller*, 132 S. Ct at 2460). However, the Court stated that "*Miller* did not impose a formal fact finding requirement…." *Id.* 136 S. Ct. at 735.

In summary, the Court's discussion in *Montgomery* of its holding in *Miller* was in the context of determining whether that holding should be given retroactive effect under *Teague*. The Court held that "*Miller* announced a substantive rule of constitutional law," and thus should be given retroactive effect. *Montgomery*, 136 S. Ct. at 736. Contrary to Petitioner's assertion in his amended reply, the Court did not conclude that its decision in *Miller* requires a sentencing court to "explain[] how the

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___U.S. ___, 136 S. Ct. 1257, 1264 (2016) (discussing *Teague* and its progeny).

juvenile's crime reflects 'permanent incorrigibility' or 'irreparable corruption.'" (Doc. 45 at 7). Instead, while "'*Miller* requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence,'" *United States v. Pete*, 2016 WL 1399337, at *8 (9th Cir. Apr. 11, 2016) (quoting *Montgomery*, 136 S. Ct. at 734), it "did not impose a formal fact finding requirement…." *Montgomery*, 136 S. Ct at 735.

Accordingly, the Court concludes that Petitioner's *Miller* claims remain exhausted after the *Montgomery* decision. The Court also concludes that *Miller*, as explained by *Montgomery*, does not require a sentencing court to make findings of "permanent incorrigibility" or "irreparable corruption" before sentencing a juvenile defendant to life without parole. Because Petitioner exhausted state remedies on the claims asserted in his amended petition, the Court considers those claims after determining the applicable standard of review.

III. Standard of Review

If a habeas corpus petition includes a claim that was "adjudicated on the merits in State court proceedings," federal court review of that claim is limited by 28 U.S.C. § 2254(d).[7] However, if no state court adjudicated a claim on the merits, the federal court conducts de novo review. *See* 28 U.S.C. §2254(d); *Riley v. McDaniel*, 786 F.3d 719,

[7] Under § 2254(d), if a claim was adjudicated on the merits in state court, a federal court cannot grant habeas relief unless the petitioner shows: (1) that the state court's decision "was contrary to" federal law as clearly established in the holdings of the United States Supreme Court at the time of the state court decision, or (2) that it "involved an unreasonable application of" such law, or (3) that it "was based on an unreasonable determination of the facts" in light of the record before the state court. 28 U.S.C. § 2254(d)(1) and (2).

723 (9th Cir. 2015) (stating that because no state court had adjudicated the merits of the petitioner's claim, but had denied a state habeas corpus petition on a procedural ground, and the state had not established a procedural bar to consider of the petitioner's claim, the court's review was de novo).

The parties dispute whether the state courts adjudicated Petitioner's claims on the merits. (Docs. 41 at 8-11; Doc. 45 at 19-20.) Respondents argue that the state courts adjudicated on the merits Petitioner's claims that his sentences in the 1997 and 2002 cases violate the Eighth Amendment and, therefore, this Court's review is constrained by § 2254(d). (Doc. 41 at 8-11.) Petitioner argues that de novo review applies. (Doc. 45 at 19-20.) As the parties' briefing on this issue indicates, whether the state courts adjudicated Petitioner's claims on the merits is complicated by the wording of the trial court's ruling on post-conviction review, and the appellate court's failure to recognize that Petitioner had filed notices of post-conviction review related to his sentence in both the 1997 and 2002 cases. (Doc. 22, Exs. XX, AAA.)

The Court, however, need not resolve this issue because Petitioner and Respondents also addressed the merits of Petitioner's claims. (Docs. 41, 45.) Respondents assert that this Court should apply § 2254(d) and defer to the state court's rejection of Petitioner's *Miller* claims. (Doc. 41 at 8.) Their conclusion that the state courts' rejection of Petitioner's *Miller* claims was "reasonable" under § 2254(d) is based on their assessment of the merits of Petitioner's claims. (Doc. 41 at 11-18.) Specifically, Respondents discuss the state court records and conclude that the sentencing courts in the 1997 and the 2002 cases considered Petitioner's youth and attendant characteristics before imposing natural life sentences. Thus, they argue that Petitioner's sentences comport with the

Constitution, the trial court reasonably rejected Petitioner's *Miller* claims, and he is not entitled to habeas relief. (Doc. 41 at 17, 18.) This analysis necessarily involves consideration of the merits of Petitioner's claims. Because the parties addressed Petitioner's claims on the merits, the Court will conduct a de novo review of the merits of Petitioner's claims.

IV. Review of Petitioner's Claims

In *Miller*, the Supreme Court explained that "[m]andatory life without [possibility of] parole for a juvenile precludes consideration" of the defendant's "chronological age and its hallmark features," the defendant's "family and home environment," the "circumstances of the [underlying] homicide offense," that the defendant "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth," and "the possibility of rehabilitation." 132 S. Ct. at 2468. Thus, the Court determined that the Eighth Amendment requires "a judge or jury… to consider [such] mitigating circumstances before imposing the harshest penalty possible for juveniles." *Id.* at 2475. As discussed below, Petitioner is not entitled to habeas corpus relief under *Miller* because the sentencing courts in the 1997 and 2002 cases considered his "youth and attendant characteristics" before imposing sentences of life imprisonment. *See Montgomery*, 136 S. Ct. at 734 (citing *Miller*, 132 S. Ct. at 2471).

A. Arizona Sentencing Law

In his amended reply, Petitioner argues that at the time of his sentencings in the 1997 and 2002 cases, a sentence of life imprisonment without parole was, in effect, mandatory in Arizona, in violation of *Miller*. (Doc. 45 at 12-16.) In both the 1997 and the 2002 cases,

Petitioner was sentenced pursuant to Ariz. Rev. Stat. § 13-703 (West 1996), which provided that the court could sentence a person convicted of first-degree murder to a sentence of death, natural life imprisonment, or life without the possibility of "commutation or parole" until after serving twenty-five years. Ariz. Rev. Stat. § 13-703(A). Additionally, at the time of Petitioner's sentencings, § 13-703 provided that the court must hold a sentencing hearing to determine "the existence or non-existence of [aggravating and mitigating] circumstances." *Id.* at § 13-703(B). Thus, facially, Arizona's relevant sentencing statutes did not mandate a sentence of life without parole for a defendant convicted of first-degree murder, but provided a lesser alternative and allowed a sentencer to consider mitigating factors as a reason to impose a lesser term.

However, Arizona's sentencing statutes must be viewed in the context of the Arizona legislature's decision to abolish the mechanism for parole for felony offenses committed on or after January 1, 1994. *See* Ariz. Rev Stat. § 41-1604.09(I)(1). Under this revised scheme, defendants sentenced after January 1, 1994 earn "release credits" against their sentence. Ariz. Rev. Stat. § 41-1604.06(B). The Arizona courts have recognized that this system of earned release credits does not apply to an indeterminate life sentence. *See Lawrence v. Ariz. Dep't Corr.*, 729 P.2d 953, 954 (Ariz. Ct. App. 1986) (holding that credits may not be applied to a sentence carrying a maximum term of life). Therefore, a prisoner's only possibilities for release would be through a pardon or commutation by the governor. *See* Ariz. Rev. Stat. § 31-402(C)(4).[8] Considering the highly

[8] "[T]he board of executive clemency… [s]hall receive petitions from individuals, organizations or the department of [corrections] for review and commutation of sentences and pardoning of offenders in extraordinary cases and may make recommendations to the

discretionary nature of such relief, a sentence of life imprisonment without parole was, in effect, mandatory. *State v. Vera*, 334 P.3d 754, 576 (Ariz. Ct. App. 2014) (stating that, until the recent enactment of Ariz. Rev. Stat. § 13-716, a sentence of life imprisonment without parole was effectively mandatory in view of Arizona's statutes on parole and earned release credits).[9]

Subsequently, in 2014, the Arizona legislature enacted Ariz. Rev. Stat. § 13-716, which provides that "a person who is sentenced to life imprisonment with the possibility of release after serving a minimum number of calendar years… 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." This provision, however, was not in place when Petitioner's

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governor." Ariz. Rev. Stat. § 31-402(C)(4). "[T]he governor retains ultimate authority to grant or deny a recommended commutation." *McDonald v. Thomas*, 40 P.3d 819, 824 (Ariz. 2002); *see also Wigglesworth v. Mauldin*, 990 P.2d 26, 33 (Ariz. Ct. App. 1999) (stating that "an Arizona governor's discretion to act on the Board's recommendations remains unfettered, subjective, arbitrary, and a matter of grace.").

[9] In *Miller*, the Supreme Court cited Ariz. Rev. Stat. § 13-752 (West 2010) and § 41-1604.09(I) (West 2011), and identified Arizona as one of twenty-nine jurisdictions "mandating life without parole for children…." *Miller*, 132 S. Ct. at 2473 n.13. The Court, however, was not considering an Arizona sentence and did not indicate that every sentence of life without parole imposed in Arizona under those statutes would violate the rule announced in that case. Additionally, the Court did not mention Ariz. Rev. Stat. §§ 13-703(B) and (G), which provide that the sentencing courts should consider mitigating circumstances, including the "defendant's ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law," and the "defendant's age." Therefore, footnote 13 in the *Miller* decision does not require a conclusion that Petitioner's sentences violate the rule announced in that decision, and Petitioner does not make such an argument. (Docs. 1, 45.)

sentences were imposed. Therefore, while the relevant sentencing statute that applied when Petitioner was sentenced, Ariz. Rev. Stat. § 13-703(A), did not facially contradict *Miller*, that statute applied with the Arizona statutes regarding parole and earned release credits,[10] in effect, imposed a mandatory sentence of life without parole. *Miller*, however, did not categorially ban the imposition of a life-without-parole sentence on a juvenile. *Miller*, 132 S. Ct. at 2469. Rather, *Miller* requires that there be judicial consideration of age-related factors before a court sentences a juvenile to life imprisonment without the possibility of parole. *Id.* at 2467-68.

In *Miller*, the Court found that a sentencing scheme mandating life imprisonment for a juvenile violates the Eighth Amendment because such a scheme excludes certain key considerations, including:

> consideration of [a juvenile defendant's] chronological age and its hallmark features — among them immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him — and from which he cannot usually extricate himself — no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him."

Miller, 132 S. Ct. at 2467-68. However, the Court stated that its holding did not foreclose the imposition of a sentence of life without parole in homicide cases, but required a sentencing court "to take into account how children are different, and how those differences counsel

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[10] *See* Ariz. Rev Stat. § 41-1604.09(I), and Ariz. Rev. Stat. § 41-1604.06(B).

against irrevocably sentencing them to a lifetime in prison." *Id.*

At the time of Petitioner's sentencings in the 1997 and the 2002 cases, Arizona's relevant sentencing statute facially allowed the sentencing court the discretion to impose a lesser sentence than natural life imprisonment. Additionally, § 13-703 provided that the court must hold a sentencing hearing to determine "the existence or non-existence of [aggravating and mitigating] circumstances included in subsections F and G of that section." Ariz. Rev. Stat. § 13-703(B). These mitigating circumstances included the "defendant's ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law," and the "defendant's age." Ariz. Rev. Stat. § 13703(G). Thus, Arizona statutes gave the sentencing court the opportunity to consider a defendant's age before imposing a sentence of life imprisonment.

As set forth in Section IV(B) and (C), the sentencing courts did consider Petitioner's "youth and attendant characteristics" before imposing natural life sentences in each case. *See Montgomery*, 136 S. Ct. at 734 (citing *Miller*, 132 S. Ct. at 2471). Therefore, Petitioner's sentences do not violate *Miller* and the Court does not need to determine whether Arizona's sentencing scheme that was in place at the time of Petitioner's sentencings was unconstitutional.[11]

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[11] Moreover, the amended petition does not argue that Arizona's sentencing scheme was unconstitutional and, therefore, this issue is not squarely before the Court. *See Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (citing *Koerner v. Grigas*, 328 F.3d 1039, 1048 (9th Cir. 2003) (stating that "[t]he district court need not consider arguments raised for the first time in a reply brief.").

B. The 1997 Case

The State initially sought the death penalty in the 1997 case. (Doc. 22, Ex. C.) Petitioner, who was a citizen of Mexico, moved to strike the State's death-penalty allegation on the ground that international law does not permit the execution of juvenile offenders. (*Id.*) The Mexican government filed an amicus brief noting that international law does not permit the execution of juvenile offenders because they are immature. (Doc. 22, Ex. D.)

During sentencing hearings in Fall 2001, Petitioner presented testimony related to the sentencing of juvenile offenders. Professor De La Vega from the University of San Francisco School of Law testified that international law forbids sentencing juveniles to death. (Doc. 22, Ex. G at 66-114.) Victor Streib, a law professor from Ohio Northern University, testified that juvenile executions were rare within the United States because, among other things, juvenile offenders are less culpable than adults. (*Id.* at 116-37.) He also testified that juveniles' brains do not "develop fully until the early 20s," juveniles are "impulsive," and they are less receptive to deterrence. (*Id.* at 143-45.) Therefore, he testified that when sentencing a juvenile defendant, the court should consider a defendant's chronological age, youthfulness, and immaturity. (*Id.* at 147.)

Petitioner also presented testimony from Dr. Walter, Lisa Christianson, and Dr. Jones, which was specific to Petitioner and included evidence about his age, intellectual development, mental health, family and home environment, his peers, and the circumstances of the offense. Dr. Walter, a neuropsychologist, testified that he evaluated Petitioner in June 2001 and reviewed Petitioner's records from the Arizona Department of Juvenile Corrections, "youth rehabilitations record,"

school records, and detective reports related to the offense. (*Id.* at 6-7.) Those records included a psycho-educational evaluation from Dr. Berman, dated March 3, 1993, an evaluation by Dr. Roger Martig from August 1997, a report of a psychological evaluation by Dr. Carlos Jones that was completed "just before [Dr. Walter] had evaluated [Petitioner]," and a biographical overview of Petitioner. (*Id.* at 7-8.)

Dr. Walter testified the records showed that Petitioner had indications of "brain dysfunction" when he was thirteen to fourteen-years old. (*Id.* at 8.) Dr. Walter testified that records from four years later, in 1997, showed that Petitioner had "improved intellectually quite a bit," but he still showed signs of brain dysfunction. (*Id.*) Dr. Walter opined that the brain dysfunction or brain damage could have been caused by Petitioner sniffing inhalants, such as paint, when he was a teenager, his bout with meningitis when he was two years old, or by being beaten with a baseball bat when he was thirteen or fourteen years old. (*Id.* at 9-10.) Dr. Walter also testified about Petitioner's problems in school, including being expelled from school in his early teens. (Doc. 22, Ex. H at 22.)

Dr. Walter testified "the frontal and temporal lobes" of the brain are not fully developed until age eighteen, and possibly not until age twenty. (Doc. 22, Ex. H. at 1112.) Therefore, juveniles have problems "with memory and learning, with impulse control, learning from experience, that type of functioning, which… most of us would interpret… as maturity." (*Id.* at 12.) Dr. Walter testified that "[t]he frontal lobe is especially important in terms of conscious awareness of what we're doing, planning, and being aware of the consequences of our actions." (*Id.*) These areas of the brain "aren't completely grown really

until — possibly until the early 20s, but certainly until the late teens." (*Id.*)

Dr. Walter testified that he diagnosed Petitioner with cognitive disorder and personality disorder. (Doc. 22, Ex. H at 25.) Based on the records and his testing, Dr. Walter stated that at the time of the offense in October 1996, Petitioner was "cognitively and psychologically functioning about the age of 10 to [13]." (*Id.* at 28-29.) He explained that at that stage, a person is in the beginning of adolescence and has "a lot left to learn in terms of self-control, in terms of judgment, [and] learning from experience." (*Id.* at 29.) Dr. Walter testified that Petitioner had the ability to function on a day-to-day basis by controlling his emotions. (*Id.* at 30-31.) However, if Petitioner was stressed, he would "snap[]" and "deal with whatever situation was placing stress on him in an irrational and ineffective manner." (*Id.* at 31.) Dr. Walter testified that reports from different doctors over a period of several years described Petitioner's condition in a manner that was consistent with his diagnosis. (*Id.* at 33.) Dr. Walter testified that he was familiar with the facts of the case and agreed that the evening of the killings was a "stress producing situation." (Id. at 33-34.) He testified that in that situation, he would expect Petitioner to be "impulsive," and that he would react based on his environment including the other people who were present and the "attitude of the victims." (*Id.* at 35.)

On cross-examination, Dr. Walter testified that Petitioner had an average IQ and the he "general[ly] knows right from wrong." (*Id.* at 44.) He admitted that during his evaluation of Petitioner, Petitioner denied being under stress at the time of the offense, and denied that "his buddies made him do it." (*Id.* at 44-45.) He agreed that the evidence showed that Petitioner killed Hector Imperial, left the house, and came back to kill

Sandra Imperial. (*Id.* at 47.) He also agreed the evidence showed that the day before the offense Petitioner had gone to the Imperials' house and told them if they did not pay the money they owed for a car he had sold them he would "shoot." (*Id.* at 49-50.) Dr. Walter testified that, even though Petitioner made a threat the day before the incident, he still considered the shooting impulsive. (*Id.* at 50-52, 53.) Dr. Walter agreed that the evidence showed that after the offense Petitioner fled the country for a year. (*Id.* at 54.) He testified that fleeing the country was a rational act and shows that "he did know what he did was wrong after the fact." (*Id.* at 55.)

Lisa Christianson, a mitigation specialist with the Office of the Legal Advocate, also testified on Petitioner's behalf. (Doc. 22, Ex. G at 11-65; H at 62-74.) She testified that she was assigned as a mitigation specialist in Petitioner's case and that she investigated his background and talked with Petitioner "at the jail." (Doc. 22, Ex. G at 12.) She testified that Petitioner was hospitalized with meningitis when he was young. (*Id.* at 15-18.) She testified that Petitioner's family left Mexico and came to the United States when he was eight years old. (*Id.* at 18-19.) She opined that Petitioner was raised in a "dysfunctional family environment." (*Id.* at 68.) She explained that Petitioner's father abused alcohol and destroyed the family's property "about once a month." (*Id.*; Doc. 22, Ex. G at 35-36.) She testified that Petitioner did not receive a lot of direction or supervision from his parents. (Doc. 22, Ex. H at 69.) She testified that during his teenage years, from age thirteen to sixteen, Petitioner lacked consistency in his school setting and reportedly did not have a lot of friends. (*Id.*) She also testified that there was evidence that Petitioner lacked proficiency in English, which can be "an isolator." (Doc. 22, Ex. G at 29.) She testified that Petitioner started having contact with "juvenile authorities when he was approximately 10 to 12." (*Id.* at

21.) The records reflected that Petitioner was charged with shoplifting spray paint in November 1993, and Petitioner told Christianson he was sniffing paint at that time. (*Id.* at 21-22, 64-65.) Christianson testified about Petitioner's other encounters with the legal system. (*Id.* at 20-23, 24, 3235, 41-42, 59-60.)

She testified that Petitioner told her he "was jumped [into a gang]" when he was ten or twelve years old. (Doc. 22, Ex. H at 70; Doc. 22, Ex. G at 23.) She testified that there was evidence of gang involvement when Petitioner was fourteen years old and Petitioner lived in a neighborhood that was "full of street gang activity." (Doc. 22, Ex. G at 27-28, 30-33, 43.) She testified that in early 1995, Petitioner's "peer group was largely fellow gang members." (*Id.* at 43.) She testified that Petitioner was having "severe school problems." (*Id.* at 44.) She testified that in Summer 1996, Petitioner had dropped out of school, was unemployed, was still involved in a gang, had no parental supervision, and had runaway several times. (*Id.* at 45-46.)

Dr. Carlos Jones, a psychologist who evaluated Petitioner in 1994 and 2001, also testified on Petitioner's behalf. (Doc. 22, Ex. I at 3-47.) Dr. Jones testified that he performed various intelligence and personality tests on Petitioner. (*Id.* at 5.) He opined that Petitioner's intelligence was in the "low average range." (*Id.* at 5-6.) He testified that he was familiar with the facts of the criminal case. (*Id.* at 11.) He opined that at the time of the offense, Petitioner had a "high likelihood of some organic brain damage from the inhalant abuse," "thought disorder," and paranoia. (*Id.* at 11-12.) Dr. Jones testified that under the circumstances of the offense, "there would be a high likelihood that [Petitioner] would be out of control and unable to remain in control…." (*Id.* at 12.) Dr. Jones acknowledged that Petitioner was sixteen years old

at the time of the offense and testified that it was "highly likely and probable that his maturity level was less than the average 16 year old." (*Id.* at 13, 43.) He testified that at the time of the offense, Petitioner was functioning at an "[u]pper 12 to mid 13[-year-old]" age range. (*Id.* at 14.)

In addition to this testimony, defense counsel offered into evidence "records from the jail back when [Petitioner] was a juvenile," and numerous letters Petitioner had written inquiring about participating in the G.E.D. program and degree programs for "people who can't study on site." (*Id.* at 50-51.) The court accepted the evidence. (Id. at 51.)

At the conclusion of the sentencing hearing, defense counsel argued that "the first and most substantial [mitigating factor was] age." (Doc. 22, Ex. I at 76-77.) Defense counsel further argued that the court should consider as mitigating factors Petitioner's chronological age, the degree of his intellectual development, and his maturity. (*Id.* at 78, 80.) He emphasized the doctors' testimony that, at the time of the offense, Petitioner's degree of development was not consistent with a "normal" sixteen-year old. (*Id.*) Rather, "his level of development, maturity and insight and judgment was that of a 12 or 13 year old." (*Id.*) Defense counsel further argued that the evidence related to the offense showed "impulsivity, lack of judgment, [and] lack of insight." (*Id.* at 81-82.) Defense counsel also argued that the Court should consider evidence that Petitioner had a "troubled, abusive, and dysfunctional family." (*Id.* at 84.)

The record reflects that the trial court considered these arguments. (Doc. 22, Ex. I at 85 (stating that the attorneys had given the court "a lot of material" and that the court wanted "to go over this as well as the memorandums."); Ex. J at 4 (stating that the court had

read and reviewed the presentence report, considered the time Petitioner has spent in custody, read counsel's memoranda, considered counsel's arguments, and considered all documentation and exhibits.) On January 4, 2002, the court held a hearing to impose the sentence and render a special verdict. (Doc. 22, Ex. J.) The court entered a special verdict that specifically found Petitioner's age to be a mitigating factor, cited Dr. Walter's testimony, and noted Petitioner's "significant lack of intelligence and maturity." (Doc. 22, Ex. L at 3.) The trial court also noted Petitioner's age as a mitigating factor during its pronouncement of the sentence. (Doc. 22, Ex. J at 7.) The court also noted that Petitioner "was found guilty of another homicide committed on the same occasion" and that his crime was "an especially cruel, heinous, depraved killing." (*Id.* at 6–7.) After considering the evidence and arguments pertaining to sentencing, the court imposed a natural-life sentence. (Doc. 22, Ex. J at 7.)

Thus, the evidence presented during the sentencing proceedings included evidence of Petitioner's age and "its hallmark features." *See Miller*, 132 S. Ct. at 2468. 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. *See Montgomery*, 136 S. Ct. at 734 (citing *Miller*, 132 S. CT. at 2471). Therefore, Petitioner has not established that he is entitled to habeas corpus relief related to his sentence in the 1997 case.

C. The 2002 Case

In the 2002 case, Petitioner was initially sentenced to death for a first-degree murder conviction. (Doc. 22, Ex. EE.) Subsequently, in *Roper*, the Supreme Court held that the Constitution does not permit juvenile offenders to be sentenced to death and, therefore, the Arizona

Supreme Court remanded the case to the trial court for resentencing. (Doc. 22, Ex. GG.)

The issue on remand was whether Petitioner would be sentenced to natural life or to life with a possibility of parole. Petitioner argued in his sentencing memorandum that he should receive "a life sentence, with parole eligibility after twenty-five years because that sentence [was] appropriate under all the facts and circumstances of [the] case, which include[d] the impulsive nature of the crime" and "the fact that [Petitioner] was less capable than an adult of using appropriate and considered judgment[.]" (Doc. 22, Ex. HH at 3.) The memorandum also discussed "the recognized differences between young people and adults," including "impetuous and ill-considered actions, vulnerability to negative influences and outside pressures, and that the character of juveniles is not wellformed." (*Id.* at 1.) Defense counsel argued that evidence had been presented "that all of these factors were present [for Petitioner] at the time of the offense in 1996." (*Id.* at 2.) He specifically argued that, based on testimony by Ricardo Weinstein, Ph.D., Petitioner's "'executive function' was still not completely developed at the time of testing some six years after this offense." (*Id.*) Defense counsel further argued that Petitioner's actions were "impulsive" and "ill-considered." (*Id.*)

In support of the sentencing memorandum, among other evidence, defense counsel submitted the transcript of Dr. Weinstein's testimony from Petitioner's previous sentencing hearing in June 2003. (Doc. 22, Ex. HH; Doc. 34-4 at 11-122.) Dr. Weinstein, a neuropsychologist, testified that in March 2003 he evaluated Petitioner in connection with the 2002 case by reviewing police reports and reports from other doctors who had performed neuropsychological an psychological evaluations of Petitioner. (Doc. 34-4 at 14, 19-20 33, 79-80.) He also

interviewed Petitioner's mother. (Doc. 34-4 at 19-20, 33, 85-86.) In May 2003, Dr. Weinstein performed an electroencephalogram (EEG) on Petitioner who was then twenty-two years old. (*Id.* at 40, 79.)

Dr. Weinstein testified about the how the brain functions and explained that the frontal lobes of the brain control "executive functions," including problem solving, spontaneity, memory, language, motivation, judgment, impulse control, and social and sexual behavior. (*Id.* at 24-25.) He testified about the development of the brain from "conception through young adulthood." (*Id.* at 28-29.) Dr. Weinstein stated that brain development is affected by genetics, and by environmental factors including parenting and exposure to drugs or toxic substances. (*Id.* at 29.) He testified that the first three years of life are very important to brain development because cells that are not used disappear. (*Id.* at 30.) Thus, lack of stimulation or experience leads to "cell death or pruning." (*Id.* at 30-31.) Dr. Weinstein further testified that the frontal lobe of brain does not function well between the ages of the ten and seventeen. (*Id.* at 44.) Dr. Weinstein further testified that the brain continues development until about age twenty-two. (*Id.* at 33.)

Based on his review records related to Petitioner, Dr. Weinstein identified several factors, including a stressful pregnancy, living in poverty, abuse, lack of stimulation, and a bout with meningitis that may have affected the development of Petitioner's brain from before he was born through his childhood. (*Id.* at 34-35, 90, 92.) Dr. Weinstein also testified that there was evidence that at a young age Petitioner started inhaling toxic substances, which kills brain cells. (Doc. 34-4 at 35.) There was also evidence that Petitioner used drugs and alcohol during puberty, and was hit in the head with a baseball bat and lost consciousness at age fourteen, and these factors affect

brain development. (Doc. 34-4 at 35, 93-94.) He testified that when Petitioner was sixteen, his age at the time of the offense, his brain had not developed to a point where it could function adequately. (*Id.* at 109.) He further stated that the brain of a "normal" sixteen-year-old is not fully developed, but is undergoing "major changes, particularly affecting the frontal lobe." (*Id.*)

Dr. Weinstein testified that there was evidence that Petitioner had brain damage that would "impair his judgment, reasoning, impulse control and ability to adequately size up a situation." (*Id.* at 36, 39.) Dr. Weinstein testified that an EEG that he performed on Petitioner's brain showed "excessive slow wave functioning or slow functioning," that was typical of brain injuries and brain damage. (*Id.* at 39.) The EEG results also showed that "the prefrontal area and all the frontal areas [of Petitioner's brain were] not talking to the rest of the brain," and showed that there was "poor communication between the right and the left side of the brain." (*Id.* at 40, 54.) Dr. Weinstein testified that the EEG results showed that Petitioner had a brain dysfunction, which he categorized as "mild to moderate." (*Id.* at 40, 42-43.) Dr. Weinstein explained that moderate brain dysfunction is "similar to how a six-year-old functions," and mild dysfunction is comparable to "a kid that can think, that can start doing things, but you cannot let them be on their own and make decisions because they don't have the capacity to do that." (*Id.* at 43.) Dr. Weinstein testified that he didn't "think that [Petitioner has] ever gotten to where we can say he thinks like an adult, he behaves like an adult, he behaves and acts in the environment how you would expect somebody thinks about what they do before they act, that considers the consequences of their actions and behaviors." (*Id.* at 46.) He testified that Petitioner's ability to function ranged between "12, 14, and 16 years old in terms of where he is

at times. And I'm talking about how he makes decisions, how he acts up, how he comes up with the ideas that he does." (*Id.* at 119.) He testified that Petitioner's "brain wasn't working in 1996. His brain is not working now. (*Id.* at 121.) He also testified that Petitioner did not have a normal brain and could not "conform his conduct" because of the dysfunction of his brain. (Tr. 118.)

Dr. Weinstein testified that a person with "the brain pattern" reflected on Petitioner's EEG would act impulsively when under stress. (*Id.* at 51, 53.) He stated that since 1996 when the offense occurred, Petitioner had not had the opportunity to develop adequately and there was evidence that, during his incarceration, he was "still acting out like he would be as teenager, as a young teenager. So his brain has not matured." (Id. at 110-11.) He opined that Petitioner was "still at a time in his life where the brain will develop and will develop in a positive way." (Id. at 111.)

At the outset of the 2005 re-sentencing hearing, the trial court stated that it had "read all of [defense counsel's] papers," which included the transcript of Dr. Weinstein's testimony. (Doc. 22, Ex. II at 5, 8.) Consistent with the sentencing memorandum, defense counsel argued that Petitioner should receive a lesser sentence than life without imprisonment because of his age, the state of his development, and the impulsive nature of the crime. (Doc. 22, Ex. II at 15-16.) He argued that Dr. Weinstein's testimony regarding the development of Petitioner's brain supported a lesser sentence. (*Id.* at 15.) Defense counsel also referred to Petitioner's age. (*Id.* at 18.) The prosecution asserted that defense counsel was arguing "not only is the death penalty not appropriate for 16-year-olds because their brains aren't developed… he's telling you natural life isn't appropriate for them either." (*Id.* at 17.) At the conclusion of the hearing, the court

sentenced Petitioner to natural life, stating that the basis for its decision was "the three aggravating factors found by the jury." (*Id.* at 28.) Those factors were: (1) the fact that Petitioner committed first-degree murder while on release from a jail or corrections department; (2) Petitioner had previously been convicted of first-degree murder; and (3) Petitioner had previously been convicted of other serious offenses. (*Id.* at 28; Doc. 22, Ex. JJ.)

As set forth above, the record reflects that the trial court considered Petitioner's "youth and attendant characteristics" before imposing a sentence of life imprisonment without parole. *See Montgomery*, 136 S. Ct. at 734 (citing *Miller*, 132 S. Ct. at 2471). As Petitioner notes, the trial court did not make factual findings regarding Petitioner's youth or other facts mentioned in the *Miller* and *Montgomery* decisions. (Doc. 22, Ex. II at 28.) However, as previously stated, "'*Miller* requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence,'" *United States v. Pete*, 2016 WL 1399337, at *8 (9th Cir. Apr. 11, 2016) (quoting *Montgomery*, 136 S. Ct. at 734), but it "did not impose a formal fact finding requirement…." *Montgomery*, 136 S. Ct at 745. Accordingly, the trial court's failure to make specific factual findings does not run afoul of *Miller*. Because the trial court complied with *Miller*, Petitioner is not entitled to habeas corpus relief based on his sentence in the 2002 case.

D. Harmless Error Analysis

Respondent further argues that, even assuming the sentencing courts in the 1997 and the 2002 cases violated *Miller*, any error was harmless. (Doc. 41 at 18.) Petitioner does not address this issue. (Doc. 45.) "For reasons of

finality, comity, and federalism, habeas petitioners 'are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Davis v. Ayala*, ___ U.S.___, 135 S. Ct. 2187, 2197 (2015) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). Under that test, habeas corpus relief is proper only if the federal court has "grave doubt about whether a trial error of federal law 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Rogers v. McDaniel*, 793 F.3d 1036, 1042 (9th Cir. 2015). There must be more than a "reasonable possibility" that the error was harmful. *Brecht*, 507 U.S. at 637. "The *Brecht* harmless error analysis also applies to habeas corpus review of an error with respect to sentencing, in other words, the test is whether such error had a 'substantial and injurious effect' on the sentence." *Hernandez v. LaMarque*, 2006 WL 2411441, at *3 (N.D. Cal., Aug.18, 2006) (citing *Calderon v. Coleman*, 525 U.S. 141, 145-57 (1998) (finding sentencing error harmless because even if evidence of three prior convictions was insufficient, the petitioner was not prejudiced by the court's consideration of those convictions because it found four other prior convictions that would have supported the petitioner's sentence)). Because the Court has not found error, the Court does not conduct a *Brecht* analysis.

V. Conclusion

As set forth above, Petitioner has not shown that his sentences in the 1997 or the 2002 cases violated the rule announced in *Miller*. Accordingly, Petitioner is not entitled to habeas corpus relief.

Accordingly,

IT IS RECOMMENDED that the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 10) be **DENIED**.

IT IS FURTHER RECOMMENDED that a certificate of appealability and leave to proceed in forma pauperis on appeal be granted because reasonable jurists could find the ruling debatable.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed until entry of the District Court's judgment. The parties shall have fourteen days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6, 72. The parties have fourteen days within which to file a response to the objections. Failure to file timely objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the District Court without further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure to file timely objections to any factual determinations of the Magistrate Judge may be considered a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation. *See* Fed. R. Civ. P. 72.

Dated this 1st day of September, 2016.

s/Bridget S. Bade
Bridget S. Bade
United States Magistrate Judge

APPENDIX D

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

TONATIHU AGUILAR,
Petitioner.

No. 2 CA-CR 2013-0527
Filed March 20, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24

Petition for Review from the
Superior Court in Maricopa County
Nos. CR2002006143; CR1997009340
The Honorable Robert E. Miles, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Diane Meloche, Deputy County Attorney, Phoenix
Counsel for Respondent

Tonatihu Aguilar, Florence
In Propria Persona

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Kelly and Judge Eckerstrom concurred.

E S P I N O S A, Judge:

¶1 After a jury trial in 2003, petitioner Tonatihu Aguilar, who was sixteen years old at the time of his offenses, was convicted of one count of first-degree murder and six counts of attempted firstdegree murder. He was sentenced to natural life for the first-degree murder and concurrent, aggravated terms of thirty years' imprisonment for the attempted first-degree murder offenses.[1] We affirmed his convictions and sentences on appeal. *State v. Aguilar*, No. 1 CA-CR 06-0035 (memorandum decision filed Mar. 17, 2009). Aguilar now seeks review of the trial court's summary dismissal of his successive notice of post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief

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[1] 1Aguilar initially was sentenced to death for the first-degree murder offense, but pursuant to *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (holding death penalty unconstitutional for juvenile offenders), that sentence was vacated and Aguilar was resentenced to natural life. The sentences in the underlying matter, CR 2002-006143, are consecutive to the sentences in another matter, CR 1997-009340, which included convictions for first- and second-degree murder, endangerment, and burglary.

absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 In October 2012, Aguilar filed an untimely, successive pro se notice of post-conviction relief. On the form he used for his notice, Aguilar checked the boxes indicating he was raising claims based on newly discovered evidence[2] and a significant change in the law. *See* Ariz. R. Crim. P. 32.4(a) (notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h)). In support of his claim that there has been a significant change in the law, he stated, "Sentenced to natural life as juvenile. *Miller v. Alabama*, 567 U.S. ___ (2012).[3] 'Life without parole for juveniles violates the Eighth Amendment's ban on cruel and unusual punishment.'"

¶3 In its ruling summarily dismissing Aguilar's notice of post-conviction relief, the trial court found the notice

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[2] It appears Aguilar's claims regarding newly discovered evidence were based on the following: "Statements suppressed by trial judge and later overturned by Ariz. Court of Appeals… Miranda warnings for juvenile inadequate, confession was therefore inadmissible. Recent Arizona Republic articles claim state failed to disclose [Child Protective Services] records that may have benefitted juvenile defendants." Aguilar has not substantiated these claims or indicated why they were not "stated in the previous petition or in a timely manner," as Rule 32.2(b) requires. Therefore, to the extent he attempts to raise them on review by asserting the trial court "failed to address the other issues raised in [his] petition," we find no abuse of discretion in the court's summary dismissal of his notice regarding these claims. *See* Ariz. R. Crim. P. 32.2(b).

[3] *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, 2469 (2012) (mandatory life sentences without possibility of parole or automatic natural life sentences for offenders under age of eighteen at time of crimes unconstitutional).

untimely and concluded, "*Miller* does not place a categorical ban on sentencing juveniles to life without parole," rather, the "Supreme Court ruled out such a sentence as a mandatory requirement in murder cases." The court also concluded that *Miller* held "the judge or jury must have the opportunity to consider mitigating circumstances prior to imposing the harshest sentence possible for a juvenile," and then determined, because Aguilar had "set[] forth no valid factual or legal basis to support his claim," he had failed to establish *Miller* was a significant change in the law that applied to his case.

¶4 On review, Aguilar asserts he is "appeal[ing]" from "his consecutive sentences of life without parole."[4] He argues the decision in *Miller* constitutes a significant change in the law entitling him to relief and excusing his untimely notice. Aguilar further contends *Miller* "did not place a categorical ban on sentencing juveniles to life without parole, but did rule that [a] judge or jury must have the opportunity to consider mitigating circumstances prior to imposing the harshest sentence."

¶5 Even assuming without deciding that the rule set forth in Miller constitutes a significant change in the law, Aguilar has not shown how the trial court abused its discretion in dismissing his untimely notice. Notably, Aguilar does not appear to disagree with the court's

[4] 4Although Aguilar refers in his petition for review to both CR 2002-006143 (the underlying matter) and CR 1997-009340, and while the trial court referred to both matters in its ruling dismissing the notice of post-conviction relief, because Aguilar filed his notice based only on CR 2002-006143, we treat that matter as the only one before us on review. *Cf. State v. Pruett*, 185 Ariz. 128, 130 n.1, 912 P.2d 1357, 1359 n.1 (App. 1995) (appellate court has discretion whether to treat petition for post-conviction relief and related petition for review as including cause number not designated in caption).

reasoning or understanding of *Miller*, rather, he asserts he is entitled to an evidentiary hearing. *Cf.* Ariz. R. Crim. P. 32.9(c) (party may petition "for review of the actions of the trial court"). However, Aguilar neither requested an evidentiary hearing below, nor did he provide the basis for such a hearing. *See State v. Rosario*, 195 Ariz. 264, ¶ 11, 987 P.2d 226, 228 (App. 1999) (evidentiary hearing may be appropriate if petitioner establishes colorable claim and notice of post-conviction relief is timely). Therefore, the court did not err in declining to conduct an evidentiary hearing.

¶6 Accordingly, although we grant review, relief is denied.[5]

[5] The Arizona Justice Project filed a motion for leave to file an amicus brief to argue that the rule announced in *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455 (2012), applies in Arizona, and more specifically, that it applies retroactively to Aguilar. Because Aguilar has not addressed the issues raised in the amicus brief in his petition for review, we do not consider them. Moreover, it appears the motion for leave to file an amicus brief was improvidently granted in this case.