No. 22–6023

In the Supreme Court of the United States

TONATHIU AGUILAR,
Petitioner,
v.
RYAN THORNELL, Director, Arizona Department of Corrections, Rehabilitation and Reentry, et al.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Miller v. Alabama, 567 U.S. 460, 480 (2012), held that "mandatory penalty schemes" under which juvenile homicide offenders are automatically sentenced to life in prison without the possibility of parole ("LWOP") are impermissible. Instead, *Miller* requires that a sentencing judge only impose LWOP after making a choice to do so, "tak[ing] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." In two separate criminal cases, before sentencing Aguilar to LWOP, both of Aguilar's sentencers considered whether a parole-eligible sentence was appropriate in light of his age and age-attendant characteristics, as well as his other proffered mitigation. Accordingly, the Ninth Circuit Court of Appeals correctly rejected Aguilar's *Miller* claims.

The question presented is:

Whether the Ninth Circuit erred when it found, under de novo review, that Aguilar's LWOP sentences did not violate *Miller*.

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INTRODUCTION[1]

In two separate state-court criminal proceedings, Aguilar received LWOP sentences for his first-degree murder convictions, not because Arizona law dictated those sentences, but because his sentencers, after taking his youth into account, each found that LWOP was the most appropriate sentence. Consistent with *Miller's* requirements, Aguilar's sentencers conducted individualized sentencings that took into account Aguilar's age and age-attendant characteristics, as well as other proffered mitigation. Unlike in *Miller*, the sentencers here did not impose Aguilar's sentences by default; rather the sentencers made a meaningful choice between two sentences, balancing all of Aguilar's proffered mitigation (including his age-attendant characteristics) against the facts and circumstances of his crimes, and then decided that the LWOP sentences were appropriate. As explained further below, the sentencing judges believed the other option was a parole-eligible sentence, and all juveniles sentenced to that other option ultimately received parole-eligible sentences. Thus, Aguilar's sentences are fully consistent with *Miller*.

Finally, Aguilar's case is a poor vehicle to address the question presented here, because recent developments in state law could potentially moot Aguilar's petition and, in any event, any error that did occur would be harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

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

The Ninth Circuit's decision therefore does not warrant this Court's review.

STATEMENT OF THE CASE

1. *Arizona statutory law*. The Arizona sentencing scheme under which Aguilar was sentenced in his 1997 case, and under which he was resentenced in his 2002 case, provided that Aguilar could be sentenced either to life without parole, or life with the possibility of release after serving twenty-five years. Ariz. Rev. Stat. § 13–703(A) (1996);[2] *see also* Pet. App. at 34a–35a. Additionally, that statute provided that a court had to conduct a sentencing hearing to determine the existence or non-existence of aggravating and mitigating circumstances, and the defendant's age is listed in the statute as a mitigating circumstance. Ariz. Rev. Stat. §§ 13–703(B), (G)(5) (1996); *see also* Pet. App. at 35a.

As for the availability of "release" for those who received a release-eligible sentence, Arizona removed the authority of any agency to implement parole procedures in 1994 and did not restore this authority under 2014. *State v. Valencia*, 386 P.3d 392, 394, ¶ 11 (Ariz. App. 2016). Nonetheless, Arizona judges and attorneys appear to have been under the universal mistaken impression that parole was an available form of release. As a result, Arizona judges continued to impose

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[2] Death was a third sentencing option under the former Arizona statute, but that sentence was rendered unconstitutional for juvenile murderers by the Court's decision in *Roper v. Simmons*, 543 U.S. 55, 578 (2005).

sentences providing for parole eligibility during the 20-year period in which parole procedures were not available.[3]

2. *Charges, trial, sentences, and direct appeal in No. CR1997–009340 ("the 1997 case").*[4] On October 14, 1996, 16-year-old Aguilar went to the home of Hector and Sandra Imperial, and threatened Sandra Imperial regarding money for a car he had sold the Imperials. The following day Aguilar returned and killed Hector Imperial, Sr.; he returned a short time later and killed Sandra Imperial.

In September 1997 the State charged Aguilar with two counts of first-degree murder and a number of other counts, including one count of endangerment. After trial, on March 8, 2001, the jury found Aguilar guilty of: (1) first-degree murder for the killing of Sandra Imperial; (2) second-degree murder for the killing of Hector Imperial, Sr.; and (3) endangerment of Hector Imperial, Jr.

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[3] *See, e.g., Chaparro v. Shinn*, 459 P.3d 50, 52, ¶ 3 (Ariz. 2020); *State v. Vera*, 334 P.3d 754, 755, ¶ 2 (Ariz. App. 2014); *State v. Randles*, 334 P.3d 730, 731–32, ¶ 3 (Ariz. App. 2014); *see also Jessup v. Shinn*, 31 F.4th 1262, 1268 n.1 (9th Cir. 2022) (noting that the Arizona reporter "is full of cases" in which the court believed it had the discretion to allow parole in sentencing defendants convicted of first-degree murder); *Viramontes v. Attorney Gen. of Arizona*, CV–16–00151–TUC–RM, 2021 WL 977170, at *1 (D. Ariz. Mar. 16, 2021) ("Despite the elimination of parole, prosecutors continued to offer parole in plea agreements, and judges continued to accept such agreements and impose sentences of life with the possibility of parole.").

[4] The following factual and procedural history of Aguilar's two proceedings is based upon the recitations contained in Aguilar's petition, at pp. 3–14, as well as the district court's order denying and dismissing Aguilar's habeas corpus petition, and the magistrate judge's report and recommendation, found in Aguilar's Appendix, at 5a–14a, and 16a–25a, respectively.

Because the State sought the death penalty, in October and November of 2001 the court conducted a capital sentencing hearing regarding the first-degree murder conviction. Hector Imperial's brother, Ruben Imperial, testified for the State. Five witnesses testified on Aguilar's behalf: (1) Lisa Christianson, a mitigation specialist with the Maricopa County Office of the Legal Advocate; (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; (3) Professor Victor Streib, a professor at the Ohio Northern University School of Law, who addressed the issue of executing juvenile offenders under American law; (4) Dr. Mark Walter, a neuropsychologist, who described the effects of injuries to the brain that Aguilar had allegedly suffered as an infant, child, and young teenager; and (5) Dr. Carlos Jones, a psychologist, who evaluated Aguilar and testified about his intelligence and mental health in view of his alleged brain damage and use of inhalants.

On January 4, 2002, the trial court announced its special verdict, and found two statutory aggravating factors that made Aguilar eligible for the death penalty.[5] The court also found two statutory mitigating factors. First, in view of the doctors'

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[5] Specifically, the court found that the murder of Sandra Imperial was especially heinous, cruel or depraved. *See* Ariz. Rev. Stat. § 13–703(F)(6) (1996). The court also found that Aguilar had committed multiple murders. *See* Ariz. Rev. Stat. § 13–703(F)(8) (1996). The trial court made these findings prior to this Court's decision in *Ring v. Arizona,* 536 U.S. 584, 609 (2002), which subsequently required jurors, rather than a sentencing court, to find these death-qualifying aggravating factors.

testimony, the court found that Aguilar's "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired."[6] Second, the court found Aguilar's age at the time of the murders a mitigating circumstance.[7] After finding the mitigating circumstances sufficient to call for leniency, the court imposed an LWOP sentence for the first-degree murder conviction, plus a total of twenty-nine years' imprisonment on the other counts, with the sentences to run consecutively. On direct appeal, the Arizona Court of Appeals affirmed Aguilar's convictions and sentences, and the Arizona Supreme Court denied Aguilar's petition for review.[8]

3. *Charges, trial, sentences, and direct appeal in No. CR2002–006143 ("the 2002 case").* On September 21, 1996, about a month before he murdered the Imperials, Aguilar was driving alone in his car, following a pick-up truck that was carrying seven passengers, when he fired multiple gunshots at the truck and passengers. Consequently, on April 15, 2002, the State charged Aguilar with one count of first-degree murder in connection with the death of Jonathan Bria, and six counts of attempted first-degree murder; once again, the State noticed death in connection with the first-degree murder count. After a trial, the jury found Aguilar guilty on all counts. At the conclusion of the aggravation phase, the jurors found

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[6] *See* Ariz. Rev. Stat. § 13–703(G)(1) (1996).

[7] *See* Ariz. Rev. Stat. § 13–703(G)(5) (1996).

[8] On direct appeal, Aguilar raised claims unrelated to the question presented here.

three death-qualifying aggravating factors.[9] The penalty phase hearing began on May 15, 2003, and repeated and expanded upon the presentation that had been made during the penalty phase of the 1997 case. Aguilar presented mitigation evidence from eight witnesses: (1) Alan Hubbard, general counsel for the Mexican consulate in Phoenix, who verified Aguilar's birth certificate; (2) Jose Acosta, Aguilar's sixth-grade teacher, who testified regarding Aguilar's difficulties in school that year; (3) Mitigation Specialist Lisa Christianson; (4) Psychologist Dr. Carlos Jones, who testified concerning Aguilar's mental health in view of his alleged brain damage and use of inhalants; (5) Neuropsychologist Dr. Mark Walter, who described the effects of injuries to the brain that Aguilar allegedly suffered as an infant, child, and young teenager; (6) Luzminda Kendrick, a licensed therapist, who treated Petitioner after he was suspended and later expelled from school at the age of thirteen; (7) Maria Gloria Aguilar, Aguilar's mother, who testified concerning Aguilar's family life when he was growing up, his meningitis as an infant, and his use of inhalants; and (8) Dr. Ricardo Weinstein, a psychologist trained in quantitative electroencephalography, who described Aguilar's alleged brain damage and how his brain development compared to that of other adolescents. The State

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[9] The jurors found these death-qualifying aggravating circumstances– Ariz. Rev. Stat. § 13–703 (F)(2) (1996) (prior conviction of a serious offense); Ariz. Rev. Stat. § 13–703(F)(1) (1996) (prior conviction of an offense carrying a maximum sentence of life imprisonment or the death penalty); and Ariz. Rev. Stat. § 13–703(F)(7) (1996) (commission of murder while in the custody of, or having escaped from, a jail or prison).

presented the testimony of ten witnesses. After hearing the evidence, the jurors returned a verdict finding that there was "no mitigation sufficiently substantial to call for leniency." On June 19, 2003, the court imposed the death penalty for the first-degree murder conviction, and also sentenced Aguilar 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.

While Aguilar's direct appeal was pending with the Arizona Supreme Court, this Court decided *Roper v. Simmons*, 543 U.S. 551 (2005), holding that the Eighth Amendment bars the execution of juvenile offenders. Accordingly, the Arizona Supreme Court remanded the case to the trial court to determine whether Aguilar 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.

Prior to the December 16, 2005 resentencing 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 prior testimony. In the sentencing memorandum, defense counsel argued that a sentence of life with parole after Aguilar had served twenty-five years was appropriate, because the crime was impulsive in nature, and because Aguilar "was less capable than an adult of using appropriate and

considered judgment." Counsel also argued that Aguilar's behavior had improved over time.

At the outset of the hearing, the trial court stated that it had read all of the sentencing memoranda and exhibits. During the hearing, defense counsel again requested a mitigated sentence of life with parole-eligibility after twenty-five years. Defense counsel argued that Dr. Weinstein's testimony, including his testimony about the development of Aguilar's brain, supported the request for a mitigated sentence, and counsel also referenced Aguilar's age at the time of the offense. At the conclusion of the hearing, the trial court sentenced Aguilar to LWOP. Aguilar appealed, raising claims unrelated to his current habeas corpus petition. The Arizona Court of Appeals and the Arizona Supreme Court affirmed Aguilar's convictions and sentences.

4. *Consolidated state post-conviction proceedings.* In 2012, Aguilar filed separate notices of postconviction relief in the trial court pursuant to Rule 32 of the Arizona Rules of Criminal Procedure, arguing that his LWOP sentences in the 1997 and 2002 cases violated the Eighth Amendment under *Miller*. The trial court consolidated the notices, found that they were untimely under Arizona's procedural rules, and alternatively found that the claims lacked merit.

Aguilar filed a single petition for review in the Arizona Court of Appeals, addressing his sentences in both cases. The Arizona Court of Appeals granted review, but denied relief. The Court of Appeals first noted that it was only considering Aguilar's claims related to the 2002 case because it concluded that

although the petition for review referred to both the 2002 and 1997 cases, Aguilar's notice of postconviction relief filed in the trial court only pertained to the 2002 case.[10] The Court of Appeals then held that Aguilar failed to demonstrate that the trial court abused its discretion in dismissing his notice of post-conviction relief. The Arizona Supreme Court denied discretionary review without comment.

5. *Federal habeas corpus proceedings.* Aguilar filed his amended petition for writ of habeas corpus in the district court on January 20, 2015, arguing that his LWOP sentences were unconstitutional under *Miller*. On May 16, 2017, the district court denied and dismissed Aguilar's habeas petition on de novo review, finding that no *Miller* error occurred because in both of Aguilar's cases the sentencers "considered mitigating and aggravating factors, including [Aguilar's] youth and attendant characteristics, under a sentencing scheme that afforded discretion and leniency." Pet. App. at 14a.

In a memorandum decision issued August 19, 2022, the Ninth Circuit Court of Appeals affirmed the district court's ruling: (1) rejecting Aguilar's argument that the state courts were required to make either an express or an implicit finding of incorrigibility in order to sentence him to life without parole; (2) finding that both of Aguilar's sentencing hearings satisfied the requirements of *Miller*, as clarified in *Jones v. Mississippi*, 141 S. Ct. 1307 (2021); (3) holding that the lack of parole

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[10] The parties agreed below that this statement was erroneous. Respondent argued that the Court of Appeals apparently overlooked, or never received, a notice of post-conviction relief that Petitioner had filed in connection with the 1997 case.

procedures at the time Aguilar's sentencings did not render Aguilar's LWOP sentences unconstitutionally mandatory; and (4) finding that Arizona law at the time of his sentencings did not prevent the sentencers from considering Aguilar's age and age-attendant characteristics prior to sentencing. Pet. App. at 1a–4a.

REASONS FOR DENYING THE PETITION

The Ninth Circuit correctly held that Aguilar is not entitled to federal habeas corpus relief. As demonstrated below, the sentencers imposed Aguilar's LWOP sentences after considering his age-attendant characteristics and his other proffered mitigation. Aguilar thus already received individualized sentencing hearings that satisfied *Miller's* requirements because his sentencers—believing that a parole-eligible sentence could be imposed—considered his youth and attendant circumstances before finding that a parole-eligible sentence was inappropriate. If either sentencer had chosen the lesser option, Aguilar would now be serving a parole-eligible sentence in that case in light of subsequent statutory developments. While undoubtedly unusual, this statutory scheme did not violate *Miller*, which held unconstitutional state laws *mandating* "that each juvenile die in prison even if a judge or jury would have thought that his youth and attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life *with* the possibility of parole) more appropriate." 567 U.S. at 465.

Aguilar has already received everything that he is entitled to under *Miller*.

Moreover, contrary to Aguilar's protestations, any misapplication of AEDPA by the Ninth Circuit in affirming the district court's denial of habeas relief is harmless.

Additionally, Aguilar's argument that the Ninth Circuit's decision conflicts with a decision of the Pennsylvania Supreme Court, as well as with the "Department of Justice's guidance to federal prosecutors", fails. Neither involve

circumstances in which the sentencer considered parole-eligibility in light of youth and attendant characteristics. Rather, under both the Pennsylvania and federal schemes in effect immediately before *Miller*, LWOP sentences were imposed automatically. That is not the case here.

For all those reasons, certiorari is not warranted. On top of all that, this case would be a poor vehicle for this Court's review because recent developments in state law could potentially moot Aguilar's petition. Regardless, because Aguilar received sentencings at which the judges considered his age-attendant characteristics and made a choice, any theoretical error that did occur here would be harmless under *Brecht*.

I. The Ninth Circuit Correctly Found, Under De Novo Review, That Neither of Aguilar's LWOP Sentences Violated *Miller*.

A. Aguilar received all that *Miller* demands.

As the Ninth Circuit correctly found, *Miller's* requirements were satisfied because Aguilar received individualized sentencings in both of his cases during which his age and age-attendant characteristics were considered before his LWOP sentences were imposed.

1. Aguilar's sentencers followed *Miller's* dictates: consideration of youth and attendant characteristics before sentencing a juvenile offender to LWOP.

Before sentencing a juvenile offender to LWOP, *Miller* requires sentencers to conduct an individualized sentencing hearing where they "take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 567 U.S. at 480. *Miller* "mandates only that

a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing [life without parole]." *Id.* at 483.

Aguilar's sentencers followed that process in both cases.

a. The 1997 case.

As previously discussed, in the 1997 case the State initially sought the death penalty. During the capital sentencing hearing that took place in 2001, Aguilar presented five mitigation witnesses, three of whom proffered evidence specifically regarding Aguilar's age-related and other personal characteristics.

Dr. Mark Walter, a neuropsychologist, testified that medical records showed that Aguilar had indications of "brain dysfunction" that could have been caused by the meningitis Aguilar contracted when he was two years old, the fact that Aguilar was beaten with a baseball bat when he was thirteen or fourteen years old, and Aguilar's abuse of inhalants. Pet. App. at 40a. Walter told the court that generally an individual's frontal and temporal brain lobes are not fully developed until at least age eighteen, and possibly not until age twenty, and that he diagnosed Aguilar with "cognitive disorder and personality disorder." *Id.* at 40a–41a. Walter opined that based on his review of Aguilar's medical records, as well as his own examinations, at the time of the offense (October 1996) Aguilar was cognitively and psychologically functioning as if he were ten to thirteen years old. *Id.* at 41a. According to Walter, if Aguilar was stressed, he would react in an irrational and ineffective manner and, based on Walter's knowledge of the facts surrounding the offenses, he would have expected Aguilar to act in an "impulsive" manner. *Id.*

Mitigation specialist Lisa Christianson testified that she conducted an investigation into Aguilar's background and had spoken with him. *Id.* at 42a. Christianson opined generally that Aguilar was raised in a "dysfunctional family environment," specifically noting: (1) Aguilar's father abused alcohol, and destroyed the family's property "about once a month"; (2) Aguilar's parents provided him with little direction or supervision; and (3) that from age thirteen to sixteen Aguilar lacked consistency in his school setting and didn't have many friends. *Id.* Christianson also told the court Aguilar was charged with shoplifting spray paint in 1993, and that Aguilar informed her that he was abusing it as an inhalant at that time. *Id.* at 43a. Christianson also testified that Aguilar told her that he was "jumped" into a gang when he was ten or twelve years old, that he dropped out of school in 1996, and that his "peer group was largely fellow gang members." *Id.* Christianson concluded that prior to his arrest Aguilar was unemployed, had continued his gang involvement, had no parental supervision, and had run away several times. *Id.*

Dr. Carlos Jones, a psychologist, testified that he had evaluated Aguilar in 1994 and in 2001, and that his testing indicated that Aguilar's intelligence was in the "low average range." *Id.* Jones opined that at the time of the offenses, Aguilar had a "high likelihood of some organic brain damage from [] inhalant abuse," "thought disorder," and paranoia. *Id.* Based on his knowledge of the circumstances of the offenses, Jones believed "there would be a high likelihood that [Aguilar] would be out of control and unable to remain in control", and that although Aguilar

was sixteen years old at the time of the offenses, Aguilar was functioning at an "[u]pper 12 to mid 13[-year-old]" age range. *Id.* at 43a–44a.

In addition to this live testimony, Aguilar's attorney offered into evidence "records from the jail back when [Aguilar] was a juvenile". *Id.* at 44a. After the presentation of evidence, Aguilar's attorney argued that "the first and most substantial [mitigating factor was] age", and that the court should additionally consider the degree of Aguilar's intellectual development, and his maturity. *Id.* Counsel emphasized the doctors' testimony that, at the time of the offense, Aguilar's degree of development was not consistent with a "normal" sixteen-year old, but rather "his level of development, maturity and insight and judgment was that of a 12 or 13 year old." *Id.* Counsel further argued that the circumstances of the offenses demonstrated Aguilar's "impulsivity, lack of judgment, [and] lack of insight," and that the court should consider Aguilar's "troubled, abusive, and dysfunctional family." *Id.*

Subsequently, the court acknowledged that it had read and reviewed the presentence report, considered the time Aguilar had spent in custody, and read and considered the arguments and all documentation and exhibits. *Id.* at 44a–45a. In rendering its special verdict on January 4, 2002, the court found Aguilar's age to be a mitigating factor, cited Dr. Walter's testimony, and noted Aguilar's "significant lack of intelligence and maturity." *Id.* at 45a. Rather than imposing death, the court subsequently imposed the lesser sentence of LWOP. *Id.*

Thus, the record demonstrates that the court's sentencing in the 1997 case complied with *Miller's* requirements—the court considered Aguilar's "youth and attendant characteristics—before imposing [LWOP]." 567 U.S. at 483.

To the extent Aguilar is arguing that the capital sentencing hearing conducted in his 1997 case cannot meet the requirements of *Miller*,[11] his argument fails for several reasons. Most importantly, *Miller* held only that "a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." 567 U.S. at 483. It does not require that the sentencer's consideration of these characteristics prior to sentencing take place in any particular forum or manner. Additionally, Aguilar's subsidiary argument—that the Ninth Circuit misstated Arizona law when it held that age could be "a substantial, or even dispositive, mitigating factor in capital sentencing decisions"[12]—is not only incorrect, but misses the point. First, contrary to Aguilar's suggestion, in Arizona age alone can be a dispositive mitigating factor in a capital sentencing decision. *See Valencia*, 645 P.2d at 241–42 ("In the instant case, the age of the defendant, 16 at the time of both crimes, is 'sufficiently substantial' to call for life imprisonment instead of death."); *State v. Jackson*, 918 P.2d 1038, 1048 (Ariz. 1996) ("It is well settled that the age of the defendant at the time of the commission of the murder can be a substantial and relevant mitigating circumstance.") (citing

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[11] *See* Pet. at 15–17.

[12] *See* Pet. at 15–16.

Valencia, 645 P.2d at 214). Regardless, although age alone may be a dispositive mitigating factor in Arizona capital cases, Arizona capital sentencers typically consider both age *and age-related characteristics*, similar to *Miller's* dictates. *See State v. Greenway*, 823 P.2d 22, 37 (Ariz. 1991) ("When addressing the issue of young age, we look at defendant's level of maturity, judgment and involvement in the crime.") (citing *State v. Walton*, 769 P.2d 1017, 1035 (Ariz. 1989)); *State v. Gerlaugh*, 698 P.2d 694, 706 (Ariz. 1985); and *State v. Gillies*, 691 P.2d 655, 662 (Ariz. 1984)). And, as demonstrated above, that is exactly what the state court did in Aguilar's 1997 case—it considered Aguilar's age, and his age-related characteristics, prior to sentencing him to LWOP, precisely as *Miller* commands.

b. The 2002 case.

As previously related, in this matter the State charged Aguilar on April 15, 2002 with one count of first-degree murder, and multiple counts of attempted first-degree murder, based on a shooting spree that took place on September 21, 1996; the State sought death in connection with the first-degree murder count. At the conclusion of the guilt phase of trial, the jurors found Aguilar guilty of one count of first-degree murder and six counts of attempted first-degree murder. At the conclusion of the aggravation phase of the trial, the jurors found two death-qualifying aggravating circumstances. Pet. App. at 20a.

The capital penalty phase hearing began on May 15, 2003. As previously discussed, during that hearing, Aguilar presented evidence from eight witnesses regarding age and age-attendant mitigation, his mental condition and alleged brain

damage, as well as other mitigation regarding his personal, familiar, social, and school history. Pet. App. 20a–21a. At the conclusion of the hearing, the jury found that there was "no mitigation sufficiently substantial to call for leniency," and returned a death verdict. On June 19, 2003, the court imposed the death penalty on the first-degree murder conviction, and terms of imprisonment on the other six convictions. Pet. App. at 21a. While Aguilar's direct appeal was pending, this Court decided *Roper*, which held that the Eighth Amendment prohibits the execution of juvenile offenders. The Arizona Supreme Court then remanded the case to the trial court to determine whether Aguilar was under the age of eighteen at the time of the offense and, if so, to vacate Aguilar's death sentence and resentence him on the first-degree murder conviction. *Id.* at 21a–22a.

Prior to the resentencing hearing, Aguilar's counsel filed a sentencing memorandum, arguing that Aguilar should be sentenced to life with the possibility of parole after twenty-five years, because: (1) the crime was impulsive in nature; (2) Aguilar "was less capable than an adult of using appropriate and considered judgment"; and (3) Aguilar's behavior had improved over time. Counsel also submitted three exhibits, including the transcript of Dr. Weinstein's testimony during the capital sentencing hearing. Pet. App. 22a.

The resentencing hearing commenced on December 16, 2005; at the beginning, the trial court stated that it had received and read counsel's memorandum and exhibits. Pet. App. at 22a. Defense counsel argued for a mitigated sentence of life with the possibility of parole after twenty-years, based on

Dr. Weinstein's testimony (including his testimony about the development of Aguilar's brain), as well as Aguilar's age at the time of the offense. *Id*. The court nonetheless sentenced Aguilar to LWOP. *Id.* at 23a.

Thus, the record demonstrates that the court's sentencing in the 2002 case also complied with *Miller's* requirements—the court considered Aguilar's "youth and attendant characteristics—before imposing [LWOP]." 567 U.S. at 483.

2. The Ninth Circuit correctly found that Aguilar's sentences complied with *Miller*.

This Court recently clarified *Miller's* reach when it explained that "a discretionary sentencing procedure suffices to ensure individualized consideration of a defendant's youth." *Jones*, 141 S. Ct. at 1321. The Court explained that "*Miller* mandated '*only* that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing' a life-without-parole sentence." *Id*. at 1314 (quoting *Miller*, 567 U.S. at 483) (emphasis added).

The Ninth Circuit followed these principles and rejected Aguilar's claims as raised in this Court because Aguilar received all that *Miller* demands. *See* Pet. App. at 3a–4a (finding "Arizona law at the time of these sentencings did not require that LWOP be imposed *automatically*, with no individualized sentencing considerations whatsoever," noting that both sentencers heard age-attendant mitigation prior to imposing sentence, and finding that the sentencers believed they could impose parole-eligible sentences) (original emphasis, internal citations and quotation marks omitted).

Aguilar's argument—that the Ninth Circuit erred by misapplying the Antiterroism and Effective Death Penalty Act of 1996 ("AEDPA")[13]—is not persuasive. In the district court, Respondent argued that because the Arizona court addressed the merits of Aguilar's claims, deferential review under 28 U.S.C. § 2254(d) was appropriate. Noting Aguilar's disagreement, and acknowledging that Respondent alternatively addressed the merits of Aguilar's claims, the magistrate judge recommended rejection of Aguilar's claims on their merits. Pet. App. at 33a–34a. Finding that neither party specifically objected to the magistrate judge's decision to review the claims on a de novo basis, the district court similarly applied a de novo review in denying the claims. *Id.* at 7a–8a. On appeal, Respondent again argued that review under § 2254(d) was the proper standard; however, the Ninth Circuit did not address this argument, and rejected Aguilar's claims just as the district court had.

Aguilar first contends that assuming the Ninth Circuit denied his claims under § 2254(d), it erred because: (1) it failed to explain why the district court erred in reviewing his claims on a de novo basis; and (2) it erred in citing *Jones* as clearly established federal law, due to the fact that *Jones* was decided after the Arizona courts denied his claims. *See* Pet. at 17–18. However, Aguilar's argument fails from the outset. There is nothing in the Ninth Circuit's memorandum decision that suggests it was applying a § 2254(d) discretionary review. The decision never

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[13] Pet. 17–19.

mentions § 2254(d), never uses the phrase "clearly established federal law," never employs the words "deference" or "deferential," and never suggests that the decisions of the Arizona courts are entitled to deference. Pet. App. at 1a–4a.

Aguilar alternatively argues that if the Ninth Circuit employed de novo review in its decision, then it erred by relying on *Jessup v. Shinn*, 31 F.4th 1262 (9th Cir. 2022) as controlling authority, because *Jessup* was decided under a § 2254(d) standard of review. Pet. App. at 18–19. This argument similarly fails. The Ninth Circuit's reliance on *Jessup* had nothing to do with the standard of review under which *Jessup* was decided; rather, the Ninth Circuit cited *Jessup* for its analysis concerning *Miller's* legal requirements, for its historical findings concerning Arizona's decision to eliminate parole procedures, and for the fact that, similar to *Jessup*, the sentencers and parties in Aguilar's cases believed the court could impose a parole-eligible sentence. *Id.* at 3a–4a.

The Ninth Circuit correctly decided that, even under a de novo standard of review, Aguilar was not entitled to habeas relief.

B. If either of Aguilar's sentencers had imposed a parole-eligible sentence, Aguilar would now be serving that sentence.

Aguilar overlooks the above and claims that his sentences violated *Miller*, arguing that Arizona had a mandatory sentencing scheme just like the state schemes at issue in *Miller*.[14]

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[14] Pet. at 14.

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

This is a far cry from the lengthy, individualized sentencings that Aguilar received, during which he proffered age-attendant mitigation supported by expert opinion, and where, as the Ninth Circuit found, both sentencers believed parole-eligible sentences could be imposed,[15] as was the apparently universal belief at that time.[16]

In arguing that *Miller* was nonetheless violated here, Aguilar argues that the sentencer's mistaken belief is irrelevant, even if genuine. The statutorily available options at the time of sentencing, according to Aguilar, are the beginning and end of the analysis. But while this may typically be the case, it will not always be the case

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[15] *See* Pet. App. 4a.

[16] *See n.3, supra*.

in the unusual circumstance where sentencing judges misunderstand the law. Consider, for example, a state sentencing scheme that plainly provides for two options: (1) LWOP, and (2) life with the possibility of parole after 25 years. Such a scheme on its face surely complies with *Miller*. But what if a sentencing judge mistakenly believed that LWOP was mandatory and acted accordingly at sentencing hearings? Surely *Miller* violations would result, statutory scheme aside.

Moreover, Arizona is not contending here that *Miller* would have been satisfied based on the mistaken beliefs of judges and parties alone. If parole truly was illusory and forever remained unavailable, a *Miller* violation might result. But here, sentencing judges not only believed they were choosing between LWOP and parole-eligible sentences, those juveniles who received the parole-eligible sentences all received parole eligibility within 25 years by virtue of a 2014 legislative fix. *See* A.R.S. § 13–716 ("Notwithstanding any other law, a person who is sentenced to life imprisonment with the possibility of release after serving a minimum number of calendar years for an offense that was committed before the person attained eighteen years of age is eligible for parole on completion of service of the minimum sentence, regardless of whether the offense was committed on or after January 1, 1994."); *see also State v. Randles*, 334 P.3d 730, 733 ¶ 10 (Ariz. App. 2014), *as amended* (Sept. 22, 2014) (finding that § 13–716 "is applicable to all such sentences, and accordingly, applies retroactively to" defendant's release-eligible sentence imposed during the time period when there was no statutory authority to implement parole); *State v. Vera*, 334 P.3d 754, 762, ¶ 27 (Ariz. App. 2014) (finding

§ 13–716 applicable to defendant's release-eligible sentence imposed during that same time period when parole could not be implemented).

Thus, juveniles like Aguilar were sentenced by judges who thought parole-eligible sentences were available, and those juveniles who received the release-eligible option are in fact eligible for parole. The functional outcome is no different than if parole-eligibility had been on the books all along.

II. There Is No Conflict with the Pennsylvania Supreme Court or the Department of Justice's Instructions to Federal Prosecutors Regarding Federal Statutes.

Contrary to Aguilar's assertion, there is no conflict between the Ninth Circuit's decision, and the Pennsylvania Supreme Court or "the Department of Justice's guidance to federal prosecutors about how to handle *Miller* claims brought by federal prisoners". *See* Pet. at 15. Neither addressed a situation where a defendant received a *Miller*-compliant hearing during which the sentencer considered youth and age-related characteristics before finding that a parole-eligible sentence was inappropriate. In both Pennsylvania and the federal system, it was clear to all at the time of the relevant sentencings that only a single sentencing option was available.

A. Neither involved a situation where the sentencer considered age and attendant characteristics before determining that a parole-eligible sentence was inappropriate.

In *Batts*, Pennsylvania's Supreme Court was not addressing a situation where the defendant had already received a *Miller*-compliant hearing at which the sentencer considered youth and attendant characteristics while deciding between

two sentencing options before determining that a parole-eligible sentence was not appropriate. *See Commonwealth v. Batts*, 66 A.3d 286 (Pa. 2013). Similarly, Aguilar has failed to identify any instructions from the Department of Justice relating to a sentencing proceeding analogous to the *Miller*-compliant one that he received. Aguilar's "conflict" argument fails for this reason alone.

B. Neither involved a choice between two sentencing options because only a single sentence was available in both statutory systems.

In both Pennsylvania and the federal system, only a single sentencing option was available to juvenile homicide offenders prior to *Miller*: LWOP. *See* 18 Pa. Cons. Stat. Ann. § 1102 (West 2012) ("A person who has been convicted of a murder of the first degree or of murder of a law enforcement officer of the first degree shall be sentenced to death or to a term of life imprisonment.");[17] 61 Pa. Cons. Stat. Ann. § 6137(a)(1) (West 2012) (providing parole eligibility to any qualifying inmate "except an inmate condemned to death or serving life imprisonment"); *Commonwealth v. Secreti*, 134 A.3d 77, 78 (Pa. Super. 2016) (explaining that the juvenile homicide offender was sentenced to "to *automatic* life imprisonment" without consideration of youth or attendant characteristics) (emphasis added); *see Batts*, 66 A.3d at 441; 18 U.S.C.A. § 1111(b) (providing that the punishment for first-degree murder is "death" or "imprisonment for life"); 18 U.S.C.A. § 3591 (recognizing that "no person

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[17] As previously noted, the death penalty was eliminated for juvenile offenders by *Roper*. 543 U.S. at 578.

may be sentenced to death who was less than 18 years of age at the time of the offense").

The different statutory systems explain the different outcomes. *Miller* requires sentencers to have a choice between at least two options so that sentencers may consider whether age and attendant circumstances would justify a lesser sentence than LWOP. Pennsylvania and federal sentencers had no such choice and did not believe they did. Accordingly, there is no conflict with the decision below.[18]

C. Pennsylvania's statute implementing parole was prospective only, unlike Arizona's, which operated both prospectively and retrospectively.

Another key difference is that Pennsylvania's post-*Miller* remedial statute was explicitly prospective-only. *See Batts*, 66 A.3d at 293 ("The new sentencing statute, by its terms, applies only to minors convicted of murder *on and after the date Miller was issued* (June 25, 2012)."") (emphasis added) (citing 18 Pa. Cons. Stat. § 1102.1 (West 2012)); *Commonwealth v. Felder*, 269 A.3d 1232, 1236 n.5 (Pa. 2022) ("[T]he General Assembly has not passed a statute addressing the sentencing of juveniles convicted of first-[degree] murder pre-*Miller*[.]") (internal citation omitted). Because sentences imposed prior to *Miller* remained unconstitutionally

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[18] Moreover, even assuming there had been a conflict with the Department of Justice instructions, it is of course an agency, and not a court. Thus, however persuasive its guidance might otherwise be, it would not create the type of conflict this Court is charged with resolving. *See* Supreme Court Rule 10 (stating that "a petition for a writ of certiorari will be granted only for compelling reasons" such as various types of conflicts among state *courts* of last resort and federal circuit *courts*).

mandatory, the Pennsylvania Supreme Court held that resentencings were required. *Batts*, 66 A.3d at 297. In other words, because there was no lesser sentence option in Pennsylvania prior to *Miller*, as there was in Arizona, Pennsylvania could not remedy pre-*Miller* sentences by making a lesser sentence parole-eligible, as Arizona did.

As previously discussed, Arizona, in contrast to Pennsylvania, applied its corrective statute both prospectively *and* retrospectively. *See* Ariz. Rev. Stat. § 13–716 (implementing parole procedures for one of the options "*regardless of whether the offense was committed on or after January 1, 1994*") (emphasis added). And Arizona juvenile homicide offenders who received release-eligible sentences are now serving parole-eligible sentences due to § 13–716.

III. This Case is a Poor Vehicle to Address the Question Presented.

Moreover, this case is a poor vehicle for this Court's review because pending developments in state law may moot Aguilar's petition. In addition, Aguilar is not entitled to habeas relief, because he cannot demonstrate actual prejudice under *Brecht*.

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

In 2016, the Arizona Supreme Court held that juvenile homicide offenders sentenced to natural life were entitled to a post-conviction evidentiary hearing where they would "have an opportunity to establish, by a preponderance of the evidence, that their crimes did not reflect irreparable corruption but instead transient immaturity." *Valencia*, 386 P.3d at 396, ¶ 18. The Arizona Supreme Court

recently granted review to consider whether such hearings should continue after *Jones*, 141 S. Ct. at 1318–19. *See State v. Hon. Cooper/Bassett,* No. CR–22–0227–PR (oral argument held January 10, 2023). The Arizona Supreme Court stayed several other cases raising the same issue. *See*, *e.g.*, *State v. Cabanas*, No. CR–22–0185–PR; *State v. Wagner*, No. CR–22–0156–PR; *State v. Arias*, No. CR–22–0237–PR; and *State v. Odom*, CR–22–0248–PR.

In one of the stayed cases, the Arizona Court of Appeals strayed from its own prior decisions, holding that Arizona's scheme at the time of Aguilar's sentencing was "mandatory" for purposes of *Miller*. *See State v. Wagner*, 510 P.3d 1083, 1087, ¶ 22 (Ariz. App. 2022), *review continued* (Fe. 28, 2023). In other now-stayed cases, decided by the Arizona Court of Appeals after *Wagner*, that court followed *Wagner's* reasoning. If the Arizona Supreme Court affirms *Wagner*, Aguilar could be entitled to resentencing under state law, which would moot his petition in this Court. If the Arizona Supreme Court reverses *Wagner*, the defendants in those cases could seek this Court's review.

This Court would be better served by deferring any review of this issue until the outcome of these developments is clear. *See McCray v. New York*, 461 U.S. 961, 963 (1983) (opinion of Stevens, J., with regard to the denial of certiorari) ("allow[ing] the various States to serve as laboratories in which the issue receives further study" will enable this Court "to deal with the issue more wisely at a later date"). Even assuming that current developments in the Arizona Supreme Court do not moot Aguilar's petition, the better vehicle to address the constitutionality of

Arizona statutes would be a decision from the Arizona Supreme Court interpreting and analyzing those statutes, rather than one on federal habeas review.

B. Any error that did occur would be harmless under *Brecht* because Aguilar already received the remedy he would be entitled to pursuant to *Miller*.

As explained above, Aguilar's sentencings complied with *Miller*. But even assuming otherwise, any error that occurred would be harmless because Aguilar received everything he was entitled to under *Miller*—full consideration of his age and age-attendant characteristics by the sentencing court before deciding whether a parole-eligible sentence was appropriate. Pet. App. at 1a–4a. Put differently, if Aguilar were granted new sentencings he would receive: (1) a sentencing at which a judge would choose between LWOP and life with eligibility for parole; (2) actual eligibility for parole after 25 years if sentenced to the lesser option; and (3) individualized consideration of his characteristics, including his youth at the time of the crime. However, he already received each of those things during his prior sentencings.

Thus, Aguilar cannot meet his burden of demonstrating that any error that occurred "'had substantial and injurious effect or influence in determining the [sentencer's imposition of sentence].'" *Brecht*, 328 U.S. at 776 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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