No. 22-

IN THE

Supreme Court of the United States

CEDRIC JOSEPH RUE, JR.,

Petitioner,

vs.

DAVID SHINN, DIRECTOR OF THE ARIZONA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

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

This case presents the following question:

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

PARTIES TO THE PROCEEDING

The petitioner is Cedric Joseph Rue, Jr. He was the appellant in the court of appeals, and the petitioner in the district court.

The respondent is David Shinn, Director of the Arizona Department of Corrections. He is substituted in place of Juli Roberts, the warden of Arizona State Prison Complex-Tucson, where Mr. Rue was incarcerated when he initiated the appeal that is the subject of this petition. *See Durbin v. People of the State of California*, 720 F.3d 1095, 1100 (9th Cir. 2013) (directing substitution of the director of the California Department of Corrections as the respondent in a habeas action under 28 U.S.C. § 2254).

RELATED PROCEEDINGS

- *Rue v. Roberts*, No. 17-17290 (9th Cir. filed Nov. 13, 2017)
- *Rue v. Ramos*, No. 2:15-cv-2669-PHX-DGC (D. Ariz. filed Jul. 8, 2015)
- *Rue v. Escapule*, No. 15-72088 (9th Cir. filed Jul. 8, 2015)
- *Rue v. Ryan*, No. 10-15655 (9th Cir. filed Mar. 26, 2010)
- *Rue v. Schriro*, No. 2:08-cv-1738-PHX-PGR (D. Ariz. filed Sept. 23, 2008)
- *State v. Rue*, No. CR-15-0086-PR (Ariz. filed Mar. 12, 2015)
- *State v. Rue*, No. 2 CA-CR 14-0458-PR (Ariz. Ct. App. filed Dec. 31, 2014)
- *State v. Rue*, No. 1 CA-CR 13-0602 PRPC (Ariz. Ct. App. filed Aug. 22, 2013)
- *State v. Rue*, No. CR-07-0106-PR (Ariz. filed Apr. 16, 2007)
- *State v. Rue*, No. 1 CA-CR 06-0145 PRPC (Ariz. Ct. App. filed Feb. 15, 2006)
- *State v. Rue*, No. 1 CA-CR 04-0304 PRPC (Ariz. Ct. App. filed Apr. 25, 2004)
- *State v. Rue*, No. CR-03-0036-PR (Ariz. filed Jan. 29, 2003)
- *State v. Rue*, No. 1 CA-CR 02-0053 (Ariz. Ct. App. filed Jan. 11, 2002)

- *State v. Rue*, No. CR 1998-093180 (Maricopa Co. Super. Ct. filed Jul. 31, 1998)

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CEDRIC JOSEPH RUE, JR., PETITIONER,

v.

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

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

PETITION FOR A WRIT OF CERTIORARI

Cedric Joseph Rue, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals affirming the district court's decision to deny relief is unreported, but included in the appendix at 1a. The district court's decision to deny relief is unreported, but included in the appendix at 5a. The report and recommendation of the magistrate judge is likewise unreported, but included in the appendix at 12a.

JURISDICTION

The court of appeals entered judgment against Mr. Rue on August 19, 2022. (App. 1a) This petition is timely. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eighth Amendment to the U.S. Constitution:

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

28 U.S.C. § 2254(d):

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

STATEMENT

1. The Arizona Court of Appeals, affirming Mr. Rue's conviction on direct review, described the facts of the crime:

> On June 15, 1998, defendant and four friends drove from Mesa to a location called Bushnell Tanks in the Sycamore Creek area to do some off-road driving and target shooting. After arriving they observed an occupied campsite where a red Blazer was parked. One of defendant's group, Josh Marshall, stated he was going to kill the lone camper at the other campsite and take his Blazer. At the time, Marshall was on the run and wanted to use the Blazer to get out of the state. Marshall later went over to the other campsite armed with a .22 rifle, but returned after a short time and reported that he did not see anyone there.
>
> Defendant and his friends slept overnight in codefendant, William Franklin Najar's, pick-up truck. The following morning, Marshall again stated he was going to kill the other camper and take his truck. Most of the group indicated that they were not interested in being involved, but Brian Mackey stated he would bury the body if he could have any handguns found at the campsite. Marshall and Mackey headed off to kill the camper and the others agreed to wait until they heard gunfire and then drive to the entrance to Bushnell Tanks and meet them. After initially leaving with Marshall, Mackey had a change of heart and returned to wait with the others.
>
> Gunshots later rang out, but they did not sound like they came from the .22 rifle Marshall had with him. The others all agreed to head to the campsite to see if Marshall needed help. When they located Marshall, he explained that he had the camper in his sights, but

when he saw that the camper was using a bong to smoke marijuana, Marshall went over to introduce himself. The camper, Michael Decker, shared his marijuana with Marshall and let him shoot his Glock 9mm pistol and AK-47 rifle.

After hearing Marshall's story, Najar stated that the group should go back and get marijuana from Decker. Decker welcomed the entire group, shared his marijuana, and let them shoot his guns. When defendant saw the AK-47, he told Mackey he wanted the victim's rifle. On several occasions while Decker was facing away from them, both defendant and Najar raised the weapons they were holding and pointed them at the back of Decker's head. A short time later after Decker had emptied the Glock he was firing during his turn at target shooting, Najar took a shooting stance approximately ten feet behind Decker. Najar then shot Decker in the back of the head with a .22 rifle. Decker collapsed on his side and lay on the ground, twitching. After shooting Decker, Najar said "Cedric, shoot him" or "Finish him." Defendant walked towards where Decker was lying and shot him in the face with a .20 gauge shotgun.

Defendant handed Mackey the victim's Glock and Mackey wiped the blood off it. Mackey and Marshall proceeded to drag the victim's body a short distance away and used the victim's shovel to dig a grave and bury him. The others undertook to cover the trail of blood from the victim's body and clean up the campsite. After finishing with the body, the group divided up the victim's property with Mackey keeping the pistol, defendant taking the AK-47, Najar finding and taking the victim's drug stash, and Marshall getting the Blazer.

The group started back to Mesa, but the victim's Blazer being driven by Marshall stopped running after a short distance. Unbeknownst to the them, the

> victim had a "kill switch" on the Blazer to deter thieves. The Blazer was pushed into the desert and defendant threw a smoke grenade into it to set the vehicle on fire. The group headed back to Mesa in defendant's pick-up. When they were arrested, Mackey still had the victim's Glock pistol and defendant had a .380 handgun that he had received in trade for the victim's AK-47.

State v. Rue, No. 1 CA-CR 02-0053, at 2–3 (Ariz. Ct. App. Nov. 26, 2002) (mem.) (C.A. E.R. 186–198).

2. On July 31, 1998, a grand jury in Maricopa County, Arizona, indicted Mr. Rue and three confederates, including Mr. Najar, on the following counts:

- first-degree murder, in violation of Ariz. Rev. Stat. § 13-1105(A), on alternative theories of premeditated murder and felony murder predicated on armed robbery, *see Schad v. Arizona*, 501 U.S. 624 (1991), *overruled in part by Ramos v. Louisiana*, 140 S. Ct. 1390 (2020);
- conspiracy to commit either first-degree murder or armed robbery, in violation of Ariz. Rev. Stat. §§ 13-1001, -1105, and -1904;
- armed robbery, in violation of Ariz. Rev. Stat. § 13-1904;
- theft, in violation of Ariz. Rev. Stat. § 13-1802; and
- arson of an occupied structure, in violation of Ariz. Rev. Stat. § 13-1704.

At the time of the crimes, both boys were 16 years old. The state sought the death penalty, which was a constitutionally authorized punishment at the time. *See Stanford v. Kentucky*, 492 U.S. 361 (1989) (setting the minimum age for death eligibility at 16), *overruled by*

Roper v. Simmons, 543 U.S. 551 (2005) (setting the minimum age for death eligibility at 18).

3. Both boys were tried together. Their defense at trial was to show a lack of premeditation in an effort to persuade the jury to convict on a lesser degree of homicide. In support of that defense, a psychiatrist testified about the adolescent brain and its lesser capacity for impulse control. As "any parent knows and as the scientific and sociological studies… tend to confirm, a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young." *Simmons*, 543 U.S. at 569. On cross-examination, the psychiatrist conceded that he had not examined either boy, but was simply testifying based on the scientific literature.

The jury convicted both boys of murder and theft as a lesser-included offense of armed robbery, and acquitted them of the conspiracy count. The jury also convicted Mr. Rue of arson. In light of the verdict, the state withdrew its request for a death sentence.

4. Both boys were sentenced at the same hearing held on December 20, 2001. In advance of sentencing, Mr. Rue's counsel submitted a report prepared by Dr. Susan Parrish, a psychologist who evaluated Mr. Rue at counsel's request. Dr. Parrish reported that as a younger child, Mr. Rue had suffered at least one head injury, after which he lost consciousness. She noted a juvenile history of shoplifting, curfew violations, and running away from home. She noted his poor academic record and history of using alcohol, marijuana, and LSD. She noted a history of depression and that Mr. Rue had made at least two suicide attempts when he was 14 years old. At the same age, he had been expelled from school for fighting and drug use. In the diagnostic section of the report, she suggested that

Mr. Rue's poor academic performance, troubled home life, drug use, and depression may be the result of his head injuries. She specifically did *not* diagnose him with conduct disorder, a clinical prerequisite for a later diagnosis of antisocial personality disorder as an adult. *See Williams v. Calderon*, 41 F. Supp. 2d 1043, 1055 (C.D. Cal. 1998). During the sentencing hearing, Mr. Rue's counsel said that Dr. Parrish's report "contains a lot of the history [to which] we would give the Court's attention."

In response to the prosecutor's argument in favor of a life-without-parole sentence, Mr. Rue's counsel urged the judge to consider the possibility that Mr. Rue would mature over time. "We don't know what 25 years from now is going to bring, and, clearly, the Court has two options, natural life or the possibility of parole in 25 years." Counsel continued:

> We have a kid that had just turned 16 when this occurred that had been on drugs since age 10, and, again, we presented Dr. Parrish's report, and it seems like almost every 16 and 17-year-old that was involved in this case has that same background and same history.
>
> We don't know what Mr. Rue's going to be like once he's finished his education in DOC and completed his GED, once he's cleaned up and been off drugs for a number of years, once he's become an adult, and, as Dr. Wellek testified, his brain is fully developed.

In light of this possibility for change, defense counsel specifically disputed the presentence report's prediction that it was "entirely likely" Mr. Rue would "kill again" if he were released from prison. Counsel considered that prediction to be premature and unfounded. "[W]e don't know that, and what we're asking this Court to do is not to make that determination yet, but give somebody else that chance 25 years from now," he said.

Mr. Rue's counsel also urged the judge to rely on age as a "clear mitigating factor." This was not just because of the fact that Mr. Rue had "just turned 16" at the time of the crime. "You heard testimony from Dr. Wellek about the prefrontal cortex and how it's not fully developed. In Cedric's case, in addition, you have the report from Dr. Parrish that specifically ran the full neuropsych battery on Cedric and found that he does suffer from impulsivity and, again, that he can change given his age. We ask you to consider that." Dr. Parrish also said in her report that she did consider "impulsivity" as a "consistent characteristic throughout the records" and as "part of his biology."

Defense counsel also touched on the theme of remorse and the difficulty Mr. Rue would have had in credibly expressing remorse during the proceedings. "In these types of cases, Judge, if Cedric gets up and says, 'I'm sorry' right now, the argument goes from the State he's sorry that he got caught and he's sorry that he got convicted. If he doesn't say he's sorry, he's not showing any remorse." Instead, counsel pointed to the circumstances of the murder as an expression of remorse. "What I ask the Court to do is consider what the testimony was, that immediately after the shooting what the look on Cedric's face was. It was basically what did we just do, and, in fact, the quote he said is 'What the hell did we just do?' That shows at the time immediately after that that at some point after it occurred Cedric realized what did we just do. I think that's a clear indication of remorse in thinking that, listen, we just murdered somebody."

Mr. Rue's counsel also pointed to other circumstances of the crime as supporting a sentence that carried the possibility of parole. He said that the murder was senseless in the way that all murders are senseless. He also pointed to the fact that the nature of the crime

escalated quickly, culminating in a killing that "just happened." And he pointed to the fact that the jury acquitted Mr. Rue of armed robbery and conspiracy to commit armed robbery to argue that the motive for the murder was not any expectation of pecuniary gain. "If I could tell you what the motive was for what happened, Judge, I would, but that goes back to the senselessness, and we admit that why this happened or how this happened, well, we now how, but why I don't think we'll ever know other than the fact that these young kids were on drugs and this idea was implanted in their head from Josh and it took off."

The judge imposed life-without-parole sentences on both boys. The judge said that in mitigation, he considered Mr. Rue's age at the time of the offense, the fact that "prior to the offenses being committed he did consume a lot of alcohol and drugs," and "the defendant's argument regarding the underdeveloped prefrontal cortex." But he rejected Mr. Rue's counsel's argument that the circumstances of the crime reflected his remorse. "I also note that immediately after the shooting, after Mr. Rue fired the shotgun at point blank range into Mr. Decker's face, that Mr. Rue joined his accomplices and went about disposing of the body, covering up the blood trail, and collecting the items that they had decided to steal. I do not find the argument persuasive on behalf of defendant in that regard." The judge also said that these mitigating circumstances "do not substantially or did not substantially affect Mr. Rue's judgment when he committed the murder in this case."

The judge also found that other circumstances of the crime were aggravating factors. One such factor was the presence of accomplices, including Mr. Najar. Another was the expectation of pecuniary gain. "I indicated before as to Mr. Najar, Mr. Mackey was to get the handgun, and

he got it; Mr. Rue the AK-47, and he got it; Mr. Najar, the drugs; he got the drugs; and Mr. Marshall was to get the truck, and he got the truck…. I find the thefts were committed as a result of the murder, which was designed to make it easier to take Mr. Decker's property." Other aggravating factors included the emotional harm to the victim's family, the fact that the victim was helpless during the murder, and the senselessness of the killing. Finding that the aggravating factors outweigh the mitigating factors, the judge imposed a sentence of life without parole for Mr. Rue on the murder count, with concurrent terms on the theft and arson counts. He specifically said that Mr. Rue's age was the reason that the sentences would run concurrently.

5. The Arizona Court of Appeals affirmed Mr. Rue's convictions and sentences on direct appeal. The Arizona Supreme Court dismissed a petition for discretionary review. His conviction and sentences became final on October 14, 2003, when the time expired for him to file a petition for certiorari with this Court. *See Clay v. United States*, 537 U.S. 522, 527 (2003).

On September 23, 2008, with the assistance of retained counsel, Mr. Rue filed a federal habeas petition that raised claims not presented here. *Cedric Rue v. Dora Schriro*, No. 2:08-cv-1738-PGR (D. Ariz.). The district court denied the petition on February 23, 2010, and later denied a certificate of appealability. *See United States v. Asrar*, 116 F.3d 1268 (9th Cir. 1997). The Ninth Circuit denied a certificate of appealability on October 27, 2010.

6. On June 19, 2013, Mr. Rue filed a *pro se* notice of postconviction relief with the trial court, in which he flagged this Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), as a "significant change in the law" that would "probably overturn the conviction or sentence."

Ariz. R. Crim. P. 32.1(g). The court dismissed the notice without appointing counsel and without allowing him to file a formal petition for postconviction relief. *See Isley v. Arizona Dep't of Corrections*, 383 F.3d 1054, 1055–56 (9th Cir. 2004) (explaining that the notice of postconviction relief alerts the court for the possible need to appoint counsel and triggers a deadline for filing a petition for postconviction relief). The court reasoned that Arizona law did not make the life-without-parole sentence mandatory and the judge had the discretion to make Mr. Rue eligible for parole but chose not to do so.) On *sua sponte* reconsideration, the court affirmed its denial of relief, additionally noting that the sentencing judge had treated Mr. Rue's age at the time of the crime as a mitigating factor.

The Arizona Court of Appeals affirmed these decisions. It conceded that Arizona's sentencing scheme for first-degree murder might have operated as a mandatory sentencing regime. (App. 41a) But, relying on *State v. Vera*, 334 P.3d 754 (Ariz. Ct. App. 2014), the court said that "any unconstitutional effect of the original sentencing scheme has been remedied" by the enactment, in 2014, of Ariz. Rev. Stat. § 13-716. (App. 42a) That statute makes any juvenile offender sentenced to a term that carries the possibility of "release" eligible for parole. The court further held that the sentencing judge had exercised the discretion that *Miller* required because he "considered evidence relating to prefrontal cortex development, as well as evidence of a 'full neuropsych battery' done on Rue showing 'that he does suffer from impulsivity and… can change given his age." (App. 43a)

The Arizona Supreme Court denied a timely filed petition for review. Mr. Rue did not seek this Court's

review of his *Miller* claim, and the time for him to do so expired on September 29, 2015.[1]

7. On July 8, 2015, Mr. Rue filed in the court of appeals a motion for authorization to file a second or successive habeas petition raising his *Miller* claim. *See* 28 U.S.C. § 2244(b)(2)(A). After this Court held in *Montgomery v. Louisiana*, 577 U.S. 190 (2016), that *Miller* applies retroactively on collateral review, the court of appeals authorized Mr. Rue's successive filing, and ordered that the petition be deemed filed on July 8, 2015.[2]

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[1] This meant that Mr. Rue could not take advantage of this Court's decision in *Montgomery v. Louisiana*, 577 U.S. 190 (2016), to obtain a new sentencing hearing. His codefendant Billy Najar *was* able to do that, however, because the state courts took more time to process his *Miller* claim. In 2016, this Court directed the Arizona Court of Appeals to revisit its denial of Mr. Najar's *Miller* claim in light of *Montgomery*. *See Najar v. Arizona*, 580 U.S. 951 (2016); *see also Tatum v. Arizona*, 580 U.S. 952 (2016) (describing the cases of five *Montgomery* GVRs for Arizona state prisoners). On remand, the state stipulated that Mr. Najar should be resentenced. In the wake of this Court's decision in *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), the state was allowed to withdraw from that stipulation. The propriety of that decision is now pending before the Arizona Supreme Court. *See State v. Najar*, No. CR-22-0084-PR (Ariz. filed Mar. 29, 2022); *see also State v. Purcell*, No. CR-21-0398-PR (Ariz. filed Dec. 29, 2021); *State v. DeShaw*, No. CR-21-0400-PR (Ariz. filed Dec. 29, 2021); *State v. Tatum*, No. CR-22-0104-PR (Ariz. filed Apr. 22, 2022). The Arizona court heard oral argument in *Purcell* and *DeShaw* on October 12, 2022, and is holding the others for a ruling in those two.

[2] As it would happen, the petition was deemed filed one day after the applicable period of limitations expired. *See* 28 U.S.C. § 2244(d)(1)(C). The magistrate judge recommended granting one day of equitable tolling in order to consider the merits of Mr. Rue's *Miller* claim. (App. 29a) The district court adopted this conclusion. (App. 6a) The court of appeals, in affirming the denial of Mr. Rue's habeas petition, treated Mr. Rue's federal petition as timely filed. *Watch also* Oral Argument Video, *Cedric Rue v. Juli Roberts*, No. 17-17290, at 0:58 to 3:05 (9th Cir. Feb. 6, 2019), *available at*

(App. 44a) *See Orona v. United States*, 826 F.3d 1196 (9th Cir. 2016) (per curiam).

A magistrate judge recommended denying Mr. Rue's *Miller* claim. She concluded that the sentencing judge "made the individualized sentencing determination as required by *Miller*" when he considered "multiple mitigating and aggravating factors." (App. 36a) Accordingly, the Arizona Court of Appeals's denial of his *Miller* claim was not an unreasonable application of *Miller*. (App. 37a) The district court agreed with the magistrate judge, adding that the sentence was not mandatory. (App. 8a) It certified the denial of Mr. Rue's claim for appeal.

The court of appeals affirmed. It rejected Mr. Rue's argument that his sentence was unconstitutional because no judge had determined that he was "permanently incorrigible." (App. 2a) Rather, it held that Mr. Rue had received an individualized sentencing hearing at which the judge "assesses" whether the defendant deserves life without parole." (App. 2a–3a (citing *Jessup v. Shinn*, 31 F.4th 1262, 1266 (9th Cir. 2022))) It held that Mr. Rue received an individualized sentencing hearing even though he was sentenced in the same hearing as his codefendant. (App. 3a) It rejected the contention that Arizona had a mandatory sentencing scheme because of the abolition of parole. (App. 3a) Rather, relying on *Jessup*, it held that the sentencing judge's mistaken belief that he had the discretion to allow Mr. Rue to be considered for parole was sufficient under 28 U.S.C. § 2254(d)(1). (App. 3a–4a) *See Jessup*, 31 F.4th at 1267.

<https://youtu.be/OlnTS_NqxYA>. Searching YouTube for the Ninth Circuit case number will also bring up the oral argument video.

REASONS FOR GRANTING THE WRIT

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

1. In affirming the denial of relief here, the court of appeals relied heavily on its decision in *Jessup v. Shinn*, 31 F.4th 1262 (9th Cir. 2022). It specifically relied on the holding in *Jessup* that, notwithstanding the Arizona legislature's abolition of parole, the life-without-parole sentence that Mr. Rue received was not mandatory. (App. 3a) Because, the court of appeals reasoned, the sentencing judge had *some* measure of discretion to impose a sentence other than life without parole, there was no Eighth Amendment violation. (App. 2a–3a)

The reasons for this Court to review these aspects of the court of appeals's decision here are the same as those reasons presented in the petition for certiorari in *Jessup*, No. 22-5889. The court of appeals's holding that Arizona, having abolished its parole scheme, did not create a

mandatory sentencing scheme conflicts with both the holding in *Commonwealth v. Batts*, 66 A.3d 286, 289 (Pa. 2013), and with the Department of Justice's guidance to federal prosecutors about how to handle *Miller* claims brought by federal prisoners, *see, e.g.*, *United States v. Briones*, 929 F.3d 1057, 1061 & n.2 (9th Cir. 2019) (en banc), *vacated and remanded on other grounds*, 141 S. Ct. 2589 (2021). And because Arizona has created a mandatory sentencing scheme, the Arizona Court of Appeals's decision to deny Mr. Rue's *Miller* claim is contrary to clearly established federal law. The fact that the sentencing judge exercised some measure of sentencing discretion is immaterial; Arizona law authoritatively holds that the judge did not have discretion to make Mr. Rue eligible for release *on parole*, discretion that is required under *Miller*. Whether or not the state court's decision unreasonably applied *Miller*, it was contrary to *Miller*, and that suffices for a federal habeas court to grant relief.

2. Apart from the reasons set forth in the *Jessup* petition for granting relief, the court of appeals deviated from the requirements of *Miller* and misapplied AEDPA for reasons specific to Mr. Rue's case. Mr. Rue did not receive an individualized sentencing determination based on *his own* characteristics, background, and role in the crime. *See Runningeagle v. Ryan*, 686 F.3d 758, 778–79 (9th Cir. 2012) (describing the constitutionally required components of a capital sentencing hearing) (quoting *Clemons v. Mississippi*, 494 U.S. 738, 748 (1990); *Lockett v. Ohio*, 438 U.S. 685, 605 (1978)); *see also Miller*, 567 U.S. at 478–79 (applying these requirements to sentencing of juveniles convicted of homicide).

Mr. Rue was sentenced at the same hearing as his codefendant, William Najar. With respect to both boys, the judge never treated any evidence of family back-

ground or role in the offense as mitigating factors. Likewise, the judge never considered how both boys' undisputed capacity for change over time was a mitigating factor. Instead, he treated the "presence of an accomplice" as an aggravating factor in both boys' cases. But one "accomplice" who was "present" for each boy was, in fact, the other boy—Mr. Rue's role in the crime was an aggravating factor for Mr. Najar, and vice versa. The judge likewise treated the expectation of pecuniary gain for both boys as an aggravating factor, relying on the same evidence to conclude that "financial gain was a motive in the commission of the murder," *State v. Hoskins*, 14 P.3d 997, 1017 (Ariz. 2000), evidence that encompassed the motivations of other actors apart from Mr. Rue and Mr. Najar.

Just as in *Jessup*, the sentencing judge here did not exercise the kind of sentencing discretion that *Miller* requires. Under *Miller* the sentencing judge was required not simply to count the number of years a child has lived but to consider his necessarily incomplete formation as a complete person before imposing a sentence of life without parole. But here the sentencing judge conflated features of both boys' backgrounds and participation in the crimes, and discounted undisputed evidence of capacity to change over time, in order to impose a life-without-parole sentence. No fairminded judge would conclude that the sentencing process comported with *Miller*.

The court of appeals misunderstood the full scope of the Eighth Amendment as interpreted in *Miller*. That constitutional error led the court to misapply AEDPA in two ways—by failing to see that the state-court ruling here is contrary to *Miller*, and by unnecessarily (and wrongly) examining whether the ruling was an unreasonable application of *Miller*.

CONCLUSION

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

Respectfully submitted,

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