APPENDIX

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CEDRIC JOSEPH RUE, Jr., *Petitioner - Appellant*, vs. JULI ROBERTS, Warden, *Respondent - Appellee.*	No. 17-17290 D.C. No. 2:15-cv-2669-PGR MEMORANDUM[*]

Appeal from the United States District Court
for the District of Arizona
Paul G. Rosenblatt, 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.

Cedric Rue was convicted in Arizona state court of various crimes, including first-degree murder. Rue, who

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

was sixteen at the time of the crimes, was sentenced to life without the possibility of parole ("LWOP") for the murder. Rue unsuccessfully sought post-conviction relief in state court, arguing that his sentence violated the Eighth Amendment prohibition against cruel and unusual punishment because of his age when the murder was committed. Rue'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. Rue contends that his LWOP sentence was 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 his sentencing judge did not determine that he was permanently incorrigible. But that argument is foreclosed by *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. Rue's sentencing complied with the rule announced in *Jones*. Arizona law at the time of the sentencing 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). The sentencing judge explicitly considered Rue's age before imposing LWOP. Rue contends that he did not receive an individualized hearing because the judge sentenced him and his co-defendant in a single hearing. But despite the consolidated hearing, the sentencing judge made separate findings as to each. As *Jones* held, the Eighth Amendment requires no more.

3. Rue also argues that his sentence was unconstitutional because the Arizona legislature had in 1993 eliminated parole for crimes committed in 1994 or later, and had 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.[1]

AFFIRMED.

[1] Rue's motion for judicial notice is granted.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Cedric Joseph Rue, Jr., Petitioner, vs. Alfred Ramos, Respondent.	No. CV-15-02669-PHX-PGR (MHB) ORDER

Having considered de novo the Report and Recommendation of Magistrate Judge Burns in light of the respondent's Objections to Report and Recommendation (Doc. 40), the petitioner's Objection to Report and Recommendation of the Magistrate Judge (Doc. 41), and the parties' responses to each other's objections (Docs. 42 and 43), the Court finds that the parties' objections should be overruled, except to the extent set forth herein, because the Magistrate Judge correctly concluded that the petitioner's First Amended Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2254 (Doc. 23) should be denied.[1]

The petitioner is currently serving a sentence of life imprisonment without the possibility of parole due to a conviction for first degree murder; he is also serving

[1] Although this habeas petition is a successive one, the petitioner has received the permission of the Ninth Circuit to file it. *See* Ninth Circuit's Order filed on April 13, 2016 in No. 15-72088.

concurrent lesser sentences for theft and arson. He committed all of these felonies in 1998 when he was 16 years old.

The dispositive issue before the Court is whether the petitioner's life sentence without the possibility of parole violates the Supreme Court's subsequent decision in *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455 (2012).[2] Miller held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 132 S.Ct. at 2469. While the Supreme Court did not categorically bar life sentences without parole for juveniles, it did require the sentencing judge, before imposing such a sentence, "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* The Supreme Court noted that it thought that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon[,]" given the great difficulty of distinguishing between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.*

The Supreme Court, determining that *Miller* had announced a substantive rule of constitutional law, made

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[2] The Magistrate Judge concluded that the petitioner's habeas petition was filed one day late but determined that it was timely filed when equitable tolling was applied. The respondent, while concurring in the Magistrate Judge's recommended dismissal of the habeas petition as meritless, objects to the Magistrate Judge's timeliness analysis on the ground that the petition was filed at least two days late and that equitable tolling cannot properly be applied to make it timely. Since the Court finds that the habeas petition fails on its merits, the Court will presume the correctness of the Magistrate Judge's timeliness determination.

its Miller ruling retroactive to cases on collateral review in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). The Supreme Court noted in *Montgomery* 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. 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.

136 S.Ct. at 734 (internal quotation marks and citations omitted). Because a court may not sentence a juvenile "whose crime reflects transient immaturity to life without parole[,]" the Supreme Court stated that the sentencing court must hold a "hearing where youth and its attendant characteristics are considered as sentencing factors[.]" *Id.* at 735 (internal quotation marks omitted).

The Arizona Court of Appeals, in reviewing the state trial court's dismissal of the petitioner's notice of postconviction relief, concluded in 2015 that the petitioner's sentencing judge properly applied the sentencing standard imposed by *Miller*.[3] The Magistrate

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[3] The state appellate court determined in relevant part as follows:

> … Under *Miller*, before imposing a natural life sentence, a court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," namely the "diminished culpability" of children and their "heightened capacity for change." __ U.S. __, 132 S.Ct. at 2469.
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> In this case, the trial court 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." After considering that evidence, as well as evidence presented at trial and by the state, the

Judge, pursuant to 28 U.S.C. § 2254(d)(1), concluded that this determination by the state appellate court was not "contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." The Court concurs with the Magistrate Judge as to this issue because the record in this action demonstrates that the state trial judge provided the petitioner with the benefit of an individualized sentencing procedure that sufficiently considered his youth and attendant characteristics at the time of his offenses as subsequently required by *Miller*, and did so under a sentencing scheme that did not mandate a natural life sentence but instead afforded the possibility of discretion and leniency. *See Aguilar v. Ryan*, 2017 WL 2119490, at *5 (D.Ariz. May 16, 2017).

A review of the sentencing transcript reveals the following: while the petitioner was sentenced at the same hearing as a co-defendant, the petitioner was given an individualized sentencing; the sentencing judge stated that he had reviewed the petitioner's presentence report, wherein the probation officer noted in relevant part regarding the petitioner's ability to change over time that "[t]he cold-blooded manner in which [the petitioner] committed this crime shows a complete lack of a conscience. Were he ever allowed back into society, it is entirely likely that [the petitioner] would kill again[;]" the judge stated that he had read the report of Dr. Parrish, a psychologist who had evaluated the petitioner in July 2001 through a neuropsychological test battery, which showed in part that the petitioner is likely to be manipulative and impulsive in his behavior and that his impulsivity is a "consistent characteristic" that "is part of his biology[;]"

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court determined a natural life sentence was appropriate. We cannot say *Miller* requires more[.]"

the judge considered in mitigation that the petitioner was sixteen when he committed the murder, as well as the petitioner's argument regarding his underdeveloped prefrontal cortex, and his prior poor family situation; the judge also concluded that the petitioner had not shown any remorse for his crimes, and that the mitigating factors did not substantially affect the petitioner's judgment when he committed the murder. The judge sentenced the petitioner to life without parole only after determining that the aggravating factors outweighed the mitigating factors.

In his objections, the petitioner, acting through his CJA appointed counsel, argues that the Arizona Court of Appeals' decision was contrary to *Miller* because the sentencing judge did not make a substantive determination on the record that the petitioner's crime reflected irreparable corruption. The Court disagrees. Although the sentencing judge did not explicitly state that the petitioner was beyond redemption, the Supreme Court in *Montgomery* made it clear that "*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility." 136 S.Ct. at 735; *see also*, *Aguilar v. Ryan*, 2017 WL 2119490, at *4 ("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.")

The petitioner has also objected to the Magistrate Judge's unelaborated-upon recommendation that no certificate of appealability should be issued because the petitioner has not made a substantial showing of the denial of a constitutional right. The Court concludes that a certificate of appealability should issue regarding the *Miller* issue. As the Supreme Court has recently clarified, the inquiry regarding the issuance of a certificate of

appealability "is not coextensive with a merits analysis" and that the threshold question of whether "jurists of reason could disagree with the district court's resolution of [the applicant's] constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further" should be determined without "full consideration of the factual or legal bases adduced in support of the claims." *Buck v. Davis*, 137 S.Ct. 759, 773 (2017). While the Court concludes that the petitioner's sentencing did not violate the constitutional principles set forth in *Miller*, the Court cannot conclude that jurists of reason could not find the issue to be debatable. Therefore,

IT IS ORDERED that the Magistrate Judge's Report and Recommendation (Doc. 39) is accepted and adopted by the Court to the extent set forth in this Order.

IT IS FURTHER ORDERED that the petitioner's First Amended Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2254 (Doc. 23) is denied and that this action is dismissed with prejudice.

IT IS FURTHER ORDERED that leave to proceed on appeal in forma pauperis is continued pursuant to Fed.R.App.P. 24(3) and Ninth Circuit Rule 4-1(b).

IT IS FURTHER ORDERED that a certificate of appealability shall issue on the questions of whether this habeas action was timely filed and whether the petitioner's sentencing complied with the constitutional requirements set forth in *Miller v. Alabama*, 567 U.S. 460 (2012).

IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment accordingly.

DATED this 8th day of November, 2017.

s/Paul G. Rosenblatt
Paul G. Rosenblatt
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Cedric Joseph Rue, Jr., Petitioner, vs. Alfred Ramos, Respondent.	No. CV-15-02669-PHX-PGR (MHB) REPORT AND RECOMMENDATION

TO THE HONORABLE PAUL G. ROSENBLATT, UNITED STATES DISTRICT JUDGE:

Petitioner Cedric Joseph Rue, Jr., who is represented by attorney Keith Hilzendeger, Assistant Federal Public Defender, has filed an Amended Petition for Writ of Habeas Corpus (hereinafter "amended habeas petition") pursuant to 28 U.S.C. § 2254 (Doc. 23).[1] Respondent filed an Answer on August 9, 2016, and Petitioner filed a Reply September 22, 2016. (Docs. 25, 33.) On September 27, 2016, Petitioner filed a Sealed Notice of Augmentation of State Court record. (Doc. 35.) on January 6, 2017, Respondent filed a Notice re: Supplemental Authority,

[1] This petition is successive, as Petitioner previously filed a habeas petition in this Court, which was ultimately denied. *See*, *Cedric Joseph Rue v. Dora Schriro, et al.*, 08-CV-01738-PGR (MHB). The Ninth Circuit Court of Appeals thereafter granted Petitioner's application for authorization to file a second or successive habeas petition, deeming July 8, 2015, as the filing date. (Doc.12-1 at 4.)

and on February 7, 2017, Petitioner filed a Response. (Docs. 36, 38.)

BACKGROUND

On July 31, 1998, Petitioner and various co-defendants were indicted by an Arizona State grand jury on charges of: (i) First Degree Murder, a class 1 dangerous felony (Count 1); (ii) Conspiracy to Commit First Degree Murder and/or Armed Robbery, a class 1 dangerous felony (Count 2); (iii) Armed Robbery, a class 2 dangerous felony (Count 3); (iv) Theft, a class 3 dangerous felony (Count 4); and (v) Arson of an Occupied Structure, a class 2 felony (Count 5). (Doc.25, Exh. A.) Petitioner was born on April 5, 1982, and thus, on the date of the offenses he was just 16-years old. (Doc. 23 at 5.) On October 15, 2001, following a 15-day trial, the jury found Petitioner guilty of First Degree Murder, Theft, and Arson of a Structure, but not guilty of the remaining offenses. (Doc. 25, Exh. B.) The description of the offenses, as stated by the Arizona Court of Appeals, is as follows:

> 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 offroad driving and target shooting. After arriving they observed an occupied campsite where a red Blazer was parked. One of the 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.
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> Defendant and his friends slept overnight in co-defendant, 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 to 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.
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> 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.
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> 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 pickup. 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.
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> (Doc. 25, Exh. F.)

On December 20, 2001, the court imposed sentence as follows: (i) First Degree Murder (Count 1) – natural life without the possibility of parole; (ii) Theft (Count 3) – 1 year (presumptive), to run concurrently with Counts 1 and 5; (iii) Arson of a Structure (Count 5)– 2.5 years (presumptive), to run concurrently with Counts 1 and 3. (Doc. 25, Exh. D.) On direct review, the Arizona Court of Appeals affirmed Petitioner's convictions by memorandum decision on November 26, 2002. (Doc. 25, Exh. E.) Petitioner thereafter filed a petition for review to the Arizona Supreme Court, which was summarily dismissed

on July 16, 2003 (*Id.* , Exh. F). Petitioner did not file a petition for a writ of certiorari with the United States Supreme Court. (Doc. 12 at 43, ¶12.) Thereafter, Petitioner initiated various postconviction proceedings, that culminated in Petitioner's filing of his first habeas petition, referenced infra. That procedural history is not relevant here, but can be found in this Court's Report and Recommendation, later adopted by the presiding District Judge. *See Cedric Joseph Rue v. Dora Schriro, et al.*, 08-CV-01738-PGR (MHB) (Docs. 14 at 2-4; 19). The Court dismissed Petitioner's habeas petition. (*Id.*)

On June 25, 2012, the United States Supreme Court decided *Miller v. Alabama*, 567 U.S. 460; 132 S.Ct. 2455 (2012), in which the Court recognized for the first time that sentencing juvenile offenders to life without parole, without consideration of certain factors relating to youth, is cruel and unusual punishment under the Eighth Amendment. On June 19, 2013, Petitioner filed a *pro se* Notice of Post-Conviction Relief in the trial court, asserting that *Miller* constituted a significant change in the law that would probably overturn his natural-life sentence, and requested appointment of counsel. (Doc. 25, Exh. S.) On July 8, 2013, the trial court denied relief, finding Petitioner's Notice both "untimely and successive," but nevertheless, elected to address the legal issue:

For the purpose of this order only, the Court shall consider that *Miller* could be a significant change in the law. Defendant asserts *Miller* held juvenile life without parole to be unconstitutional. This is a misreading of *Miller* which does not place a categorical ban on juvenile life sentences without the possibility of parole. Rather, in *Miller*, the Supreme Court ruled that a mandatory life sentence without the possibility of parole was unconstitutional. Hence, the judge or jury must have the

opportunity to consider mitigating circumstances such as age prior to imposing either life with the possibility of parole or the harshest sentence possible for a juvenile, that being natural life without the possibility of parole.

In the instant case, the record demonstrates that the age of the Defendant was found to be a mitigating factor. Even after considering defendant's age as a mitigating factor, the Court chose to sentence him to the term of his natural life. Since the sentence of natural life without the possibility of release was not statutorily mandated and the Court had the discretion to order life with the possibility of parole but chose not to, defendant has failed to demonstrate that *Miller* is a significant change in the law as applied to this case.

(*Id.*, Exh. T.) The court did not address Petitioner's request for the appointment of counsel. (Doc. 25, Exh. T.) On July 23, 2013, the trial court received a Motion for Leave to File Brief of Amicus Curiae in Support of Petitioner's motion for reconsideration, and Brief of Amicus Curiae in Support of Petitioner's motion for consideration. (*Id.*, Exh. U.) The trial court noted that, although "Defendant in this case has yet to file a motion for consideration," the court on its own motion addressed the issues raised, "given proceedings that have been initiated in other matters of similar nature." (*Id.*) The trial court then presumed the retroactivity of *Miller* and determined that the record "is clear that the sentencing judge took into account the age of the defendant as part of the sentencing determination (page 45 of the sentencing transcript)," and that the "requirements regarding mitigation [were] met." (*Id.*)

On review to the Arizona Court of Appeals, Petitioner's petition was supported by Amicus Curiae counsel, the Arizona Justice Project. (Doc. 25, Exh. V.)

The court granted review and denied relief on February 12, 2015. (*Id.*) As to Petitioner and Amicus Curiae counsel's argument that Petitioner's sentence was not *Miller* compliant, the Court held:

> We presume a sentencing court considered any mitigating evidence presented, *State v. Everhart*, 169 Ariz. 404, 407, 819 P.2d 990, 993 (App. 1991), and we leave to the court's sound discretion how much weight to give any such evidence, *State v. Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d 355, 357 (App. 2003). Under *Miller*, before imposing a natural life sentence, a court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," namely the "diminished culpability" of children and their "heightened capacity for change." __ U.S. __, 132 S. Ct. at 2469.
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> In this case, the trial court 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." After considering that evidence, as well as evidence presented at trial and by the state, the court determined a natural life sentence was appropriate. We cannot say *Miller* requires more, and therefore conclude the court did not abuse its discretion in dismissing Rue's notice and denying his subsequent motion for rehearing.
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> (Doc. 25, Exh. V at 7.)

Petitioner's petition for review to the Arizona Supreme Court was denied summarily on July 1, 2015 - the Court of Appeals issued its "mandate"[2] on August 13,

[2]The mandate is a document filed by the Arizona Court of Appeals Clerk of Court, directed to the trial court indicating that "[n]o motion for reconsideration was filed and the time for filing such has expired,"

2015, and the mandate was filed on August 18, 2015. (Doc. 25, Exhs. V at 1, W.) On July 8, 2015, Petitioner, through counsel, filed an Application for Authorization to file a Second or Successive habeas petition in the Ninth Circuit Court of Appeals. (Doc. 12-7.) The Ninth Circuit granted the application and ordered that his "petition shall be deemed filed in the district court on July 8, 2015." (Doc. 12-1, ¶11.) Petitioner raises one issue in his amended habeas petition - that his natural-life sentence is unconstitutional under *Miller*. (Exh. 23 at 9.) Respondent argues that Petitioner's amended habeas petition is untimely because it was filed after the statute of limitation period under the Antiterrorism and Effective Penalty Act of 1996 ("AEDPA") had expired, and in any case, should be denied on the merits.

DISCUSSION

In their Answer, Respondent contends that Petitioner's habeas petition is untimely. The AEDPA imposes a 1-year statute of limitations on federal petitions for writ of habeas corpus filed by state prisoners. *See* 28 U.S.C. § 2244(d)(1). As Petitioner is asserting that the Supreme Court in *Miller* newly recognized that his natural-life sentence is unconstitutional, the AEDPA's 1-year statute of limitations does not begin to run until "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2244(d)(1)(C). This limitations period begins the date the right is recognized, not the date the right was

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"[a] petition for review was filed and DENIED by Order of the Supreme Court of Arizona," and commanding the trial court to "conduct such proceedings as to comply with the accompanying Memorandum Decision of this Court."

made retroactive. *See Dodd v. United States*, 545 U.S. 353, 357 (2005). As *Miller* was decided on June 25, 2012, Petitioner's 1-year limitation period began to run on that date. Petitioner would have had until June 25, 2013 to file his habeas petition.

"The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward" the limitations period. 28 U.S.C. § 2244(d)(2); *see Lott v. Mueller*, 304 F.3d 918, 921 (9th Cir. 2002). A state petition that is not filed however, within the state's required time limit is not "properly filed" and, therefore, the petitioner is not entitled to statutory tolling. *See Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005). "When a postconviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of § 2244(d)(2)." *Id.* at 414.

In Arizona, post-conviction review is pending once a notice of post-conviction relief is filed even though the petition is not filed until later. *See Isley v. Arizona Department of Corrections*, 383 F.3d 1054, 1055-56 (9th Cir. 2004). An application for post-conviction relief is also pending during the intervals between a lower court decision and a review by a higher court. *See Biggs v. Duncan*, 339 F.3d 1045, 1048 (9th Cir. 2003) (citing *Carey v. Saffold*, 536 U.S. 214, 223 (2002)). However, the time between a first and second application for post-conviction relief is not tolled because no application is "pending" during that period. *See Biggs*, 339 F.3d at 1048. Moreover, filing a new petition for postconviction relief does not reinstate a limitations period that ended before the new petition was filed. *See Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003).

Petitioner first raised his *Miller* claim on June 24, 2013, when his third notice of postconviction relief was filed with the court. At that time, 364-days of the 1-year limitations period had elapsed. Petitioner is entitled to statutory tolling during the time the postconviction proceedings were pending. Thus, the time period between June 24, 2013, and July 1, 2015, when the Arizona Supreme Court denied review is not counted toward the statute of limitation. The limitations period began again on July 1, 2015, when the Arizona Supreme Court denied review, and expired on July 2, 2015, making Petitioner's July 8, 2015 filing untimely by 6 days.

Petitioner asserts that his amended habeas petition is only one-day late, because "Arizona applies the prison mailbox rule to pro se filings." (Doc. 33.) The rule sets "the date on which [the petitioner] placed his Rule 32 notice in the prison mail system for delivery to the clerk of the superior court [as] the date on which the period of statutory tolling is deemed to begin." (*Id.*) Petitioner placed his Rule 32 notice containing his *Miller* claim in the prison mail system on June 19, 2013, and thus, applying the prison mailbox rule, only 359 [days] of the 1-year limitations period elapsed since the decision in *Miller*. Respondent does not directly dispute the application of the prison mailbox rule, but asserts that "[t]he superior court, however, determined the petition was filed on June 24, 2013." (Doc. 25 at 9, n. 5).

The Court finds the prison mailbox rule applicable to this case. *See Orpiada v. McDaniel*, 750 F.3d 1086, 1089 (9th Cir. 2014) (stating that state law determines whether the prison mailbox rule applies to the question of statutory tolling); *Houston v. Lack*, 487 U.S. 266, 270-74 (1988) (discussing the mailbox rule in federal proceedings). As such, the Court notes that Petitioner subscribed and swore his Notice of Post-Conviction Relief, raising his

Miller claim, on June 19, 2013. (Doc. 25, Exh. S.) The date of the clerk's office filing stamp is June 25, 2013. (*Id.*) The Court gives no significance to the trial court's statement at the beginning of its order denying relief that "[t]he Court has reviewed Defendant's Notice of Post-Conviction Relief filed on June 24, 2013." (*Id.*, Exh. T.) Contrary to Respondent's assertion, this was more of a prologue than a "finding." Considering that the mailing of the notice from the prison to the clerk's office would likely take at least 3 days, the Court will give Petitioner the benefit of the doubt that he delivered his Notice for mailing on the same date that he signed it, on June 19, 2013.

Thus, Petitioner's amended habeas petition was due 6 days after the Arizona Supreme Court denied review, on July 1, 2013. Petitioner's amended habeas petition is thus 1 day past the expiration of the AEDPA's 1-year statute of limitations, and is thus untimely.[3]

Petitioner asserts that there are two equitable reasons for this Court to excuse his untimeliness: (1) Petitioner was not constitutionally eligible for a life-without-parole sentence, and thus Petitioner qualifies for the actual-innocence exception, and (2) the trial court "irrationally" failed to appoint counsel to assist Petitioner in litigating his *Miller* a failure that supports the equitable tolling of the limitations period. (Doc. 33 at 4.)

A. Innocence of Life-Without-Parole Sentence

The Supreme Court in *McQuiggin v. Perkins*, 133 S.Ct. 1924 (2013), held that actual innocence of a crime can

[3] Respondent asserts that his petition is untimely by 2 days. Whether the habeas petition was untimely by one or two days does not affect this Court's tolling analysis

support an equitable exception to procedural default, and the AEDPA's statute of limitations. "We have recognized, however, that a prisoner otherwise subject to defenses of abusive or successive use of the writ [of habeas corpus] may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence." *Id.* at 1931 (citation and internal quotations omitted). "The text of § 2244(d)(1) contains no clear command countering the courts' equitable authority to invoke the miscarriage of justice exception to overcome expiration of the statute of limitations." *Id.* at 1934. Petitioner asserts that he is "innocent of his sentence" under *Miller*, and therefore he should be entitled to the equitable exception outlined in *Perkins*.

In *Sawyer v. Whitley*, 505 U.S. 333 (1992), the Supreme Court determined that a petitioner who demonstrates by clear and convincing evidence that, but for a constitutional error no reasonable juror would have found petitioner eligible for the death penalty, may bypass procedural bars. The Court analyzed the actual innocence exception "in the setting of capital punishment." *Id.* at 340. The Court rejected defendant's bid to have the Court find error in the presentation of mitigating factors to serve as a basis for an actual innocence of the death penalty. "[T]he 'actual innocence' requirement must focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence that was prevented from being introduced as a result of a claimed constitutional error." *Id.* at 347.

Petitioner acknowledges that in 2004 the Supreme Court in *Dretke v. Haley* declined to address whether the actual innocence exception applies to procedural default of constitutional claims challenging noncapital sentencing error. 541 U.S. 386, 393 (2004); *see also McKay v. U.S.*, 657 F.3d 1190 (11th Cir. 2011) (acknowledging that

Supreme Court has not yet ruled on whether or not the actual innocence exception applies to noncapital sentencing error). He cites two Supreme Court cases decided since *Dretke*, in which the Supreme Court applied Eighth Amendment jurisprudence to foreclose a life without parole sentence on a juvenile offender who was not convicted of a homicide crime, and to foreclose a life without parole sentence on a juvenile without the consideration of factors related to the age of the juvenile. Petitioner argues that, by logical extension, these cases support the application of actual innocence under the Eighth Amendment to noncapital sentencing.

In neither case cited, however, did the Supreme Court consider whether or not the constitutional sentencing violation excused procedural default. *See, Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 132 S.Ct. 2455 (2012). The Court is unpersuaded that the equitable exception outlined in *Perkins* applies to noncapital sentencing, and thus the statute of limitations is not tolled on "actual innocence" of a life without parole sentence.

B. Equitable Tolling

The Ninth Circuit recognizes that the AEDPA's limitations period may be equitably tolled because it is a statute of limitations, not a jurisdictional bar. *See Calderon v. United States Dist. Ct. (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997), *overruled in part on other grounds by Calderon v. United States Dist. Ct. (Kelly)*, 163 F.3d 530, 540 (9th Cir. 1998). Tolling is appropriate when "'extraordinary circumstances' beyond a [petitioner's] control make it impossible to file a petition on time." *Id.*; *see Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002) (stating that "the threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule") (citations omitted);

Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003). "When external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute of limitations may be appropriate." *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999). A petitioner seeking equitable tolling must establish two elements: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace*, 544 U.S. at 418. Petitioner must also establish a "causal connection" between the extraordinary circumstance and his failure to file a timely petition. *See Bryant v. Arizona Attorney General*, 499 F.3d 1056, 1060 (9th Cir. 2007).

A petitioner's *pro se* status, ignorance of the law, lack of representation during the applicable filing period, and temporary incapacity do not constitute extraordinary circumstances justifying equitable tolling. *See, e.g.*, *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006) ("[A] *pro se* petitioner's lack of legal sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling."). Similarly, "the difficulties attendant on prison life, such as transfers between facilities, solitary confinement, lockdowns, restricted access to the law library, and an inability to secure court documents, do not by themselves qualify as extraordinary circumstances" warranting equitable tolling. *See Corrigan v. Barbery*, 371 F.Supp.2d 325, 330 (W.D.N.Y. 2005). Additionally, negligence by counsel has not been found to qualify as extraordinary circumstances justifying equitable tolling. *See, e.g.*, *Miranda*, 292 F.3d at 1067-68 (attorney miscalculation of due date is not a circumstance justifying equitable tolling, even though petitioner filed his petition within time period calculated by the attorney, but 53 days after the correct AEDPA due date; the Court noted it was joining six other circuits in so holding); *Malcom v. Payne*, 281 F.3d 951, 962-63 (9th Cir. 2002) (no equitable tolling

where counsel chose to pursue clemency and limitations period expired during that pursuit); *Frye v. Hickman*, 273 F.3d 1144, 1145-46 (9th Cir. 2001), *cert. denied*, 535 U.S. 1055 (2002) (counsel's general negligence does not warrant equitable tolling).

Petitioner asserts that the trial court failed to appoint counsel to represent Petitioner in his successive post-conviction proceedings, when "[s]tate law appears to have required it," *citing State v. Valencia*, 370 P.3d 124, 125 (Ariz. App. 2016), *vacated by State v. Valencia*, 386 P. 3d. 392 (2016). He also asserts that "over two dozen *Miller* claims presented in successive postconviction proceedings and filed around the same time were assigned to the same judge of the [trial] court - Bruce Cohen." (Doc. 33 at 8.) Petitioner was among them, but was not appointed counsel, when other claimants were. Petitioner provided the Court with three examples of claimants, he asserts were similarly-situated to Petitioner, and who were appointed counsel. Petitioner claims that this failure to appoint counsel constitutes an extraordinary circumstance that entitles him to equitable tolling. If Petitioner had been appointed counsel, he asserts, counsel would have known that Petitioner only had a few days to file his habeas petition after the appellate court denied relief before the statute of limitations would expire.

In *Valencia* (consolidated with *State v. Healer*), the court, in its discussion of the procedural background of the cases, referenced its prior memorandum decisions that held that the trial court erred in dismissing summarily post-conviction relief notices raising *Miller* claims, ordered remand in both cases and ordered that counsel be appointed to represent appellant Healer in further proceedings. *Valencia*, 370 P.3d at 256. The court did not make any new legal pronouncements and thus does not stand for the proposition that the trial court

erred in not appointing Petitioner counsel.[4] And, the Arizona Supreme Court, in vacating the Court of Appeals opinion, did not reference those orders appointing counsel in the earlier appellate decisions.

Petitioner also cites *State v. Endreson*, a case in which Judge Cohen, on August 28, 2013, after noting that defendant Endreson had not yet filed a Notice of PCR, "on its own motion appoint[ed] counsel to review [the] case,… given proceedings that have been initiated in other matters of similar nature and the issues that have been raised." (Doc. 33, Exh. 1.) On August 8, 2013, Judge Cohen appointed counsel to represent defendant Kenneth Laird after receiving a Notice of PCR raising a *Miller* claim. (*Id.*, Exh. 2.) On August 6, 2013, Judge Cohen also appointed counsel to represent defendant Joshua Aston upon receipt of a motion for leave to file a brief of amicus curiae in support of defendant's motion for reconsideration (noting defendant had not filed a motion for reconsideration), finding as in *Endreson*, that "given proceedings that have been initiated in other matters of similar nature and the issues that have been raised," it would address the issues raised and appoint counsel. (*Id.* Exh. 3.) Petitioner does not provide copies of any supporting documents in these cases other than Judge Cohen's minute entries denoting the above. Petitioner

[4] The prior memorandum decisions are unpublished, and thus do not create legal precedent, but may be cited as law of the case. Ariz. R. Sup. Ct. 111(c)(1)(A). In *Valencia*, the appellate court determined that the trial court may summarily dismiss a post-conviction relief petition for failing to comply with Ariz. R. Crim. P. 32.2(b), and in *Healer*, the appellate court found that if the trial court does not make specific findings relating to Rule 32.2(b), it must either appoint a defendant counsel or give defendant the opportunity to make an argument in support of his claim. *State v. Valencia*, 2014 WL 1831046 (Ariz. App., May 6, 2014), *State v. Healer*, 2014 WL 310533 (Ariz. App., January 28, 2014).

asserts that there is "no principled basis" on which counsel was appointed in these 3 cases, and not in his case.

Judge Cohen's minutes, however, do note some distinguishing factors. In the *Endreson* matter, the defendant had been sentenced under a 1970 sentencing scheme which did not give the sentencing judge the option to impose any sentence less than a natural life sentence. *Miller* was clear that with respect to juvenile defendants, this type of statutory scheme is unconstitutional. In *Laird* and *Aston*, the defendants were serving life sentences with the possibility of parole after the service of 25 years, and Judge Cohen noted that "there is no system for release in Arizona at this time."[5] These issues, more clearly supporting relief under *Miller*, were not present in Petitioner's case.

Petitioner also asserts that he acted diligently in filing his habeas petition, in that he filed it within one week of the Arizona Supreme Court's denial of review on July 1, 2015, particularly taking into account the time that it would have taken for the decision to reach him by mail, and considering that July 3, 2016 was a holiday - making it likely that he did not receive the decision before July 6, 2016. His amended habeas petition, however, was filed by counsel with the Federal Defenders' Office, undermining Petitioner's lag in the mailing argument.

This court is not persuaded that *Valencia* supports Petitioner's assertion that he should have been appointed counsel when he filed his successive post-conviction Notice, or that Judge Cohen's appointment of counsel in the three referenced cases supports his assertion that the

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[5] In 2014, Arizona reinstated parole for a juveniles sentenced to life without a possibility of release after a term of years. *See*, A.R.S. § 13-716.

trial court was inconsistent or arbitrary in its appointment of counsel in *Miller* cases, or that the short window in which Petitioner had to filed his habeas petition somehow excuses his tardiness. This Court does find, however, that taking all of these factors together, and finding that Petitioner acted diligently in pursuing his rights under Miller, he is entitled to one day of equitable tolling.[6]

C. Merits

1. AEDPA Standard of Review

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"), a federal court "shall not" grant habeas relief with respect to "any claim that was adjudicated on the merits in State court proceedings" unless the State court decision was (1) contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme Court; or (2) based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *See* 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000) (O'Connor, J., concurring and delivering the opinion of the Court as to the AEDPA standard of review). "When applying these standards, the federal court should review the 'last reasoned decision' by a state court…." *Robinson*

[6]In a lengthy footnote, Respondent asserts that Petitioner's claim is unexhausted "to the extent that [he] argues *Montgomery* changed the law–and that that change applies to this case." (Doc. 25 at 14, fn. 6.) This Court finds that Petitioner does not claim, and this Court does not find, that *Montgomery* "changed the law." The case cited by Respondent in its Notice of Supplemental Authority, *Valencia*, 386 P.3d 392, also does not support Respondent's footnote suggestion that Petitioner has not exhausted his *Miller* claim. Petitioner afforded the state court one full round of review of his *Miller* claim, and his claim is thus, exhausted.

v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004). The summary denial of Petitioner's petition for review by the Arizona Court of Appeals renders the trial court's decision on Petitioner's petition for post-conviction relief the "last reasoned decision" of the state court, subject to this Court's review. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991)("later unexplained orders upholding [a] judgment [rejecting a federal claim]" raises a presumption that the reviewing court "looks through" the summary order to the last reasoned decision).

A state court's decision is "contrary to" clearly established precedent if (1) "the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases," or (2) "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [its] precedent." *Taylor*, 529 U.S. at 405-06. "A state court's decision can involve an 'unreasonable application' of Federal law if it either (1) correctly identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable, or (2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable." *Hernandez v. Small*, 282 F.3d 1132, 1142 (9th Cir. 2002).

Finally, the court may not grant habeas relief upon the finding of error, unless the error had a "substantial and injurious" effect on the fact finder's decision. *Brecht v. Abrahamson*, 507 U.S. 619, 631, 638 (1993).

2. Applicability to Petitioner's *Miller* Claim

The Arizona Court of Appeals presumed that the sentencing court considered any mitigating evidence presented by Petitioner, analyzed the factors identified by the court in imposing sentence, and found that

Petitioner's life without parole sentence comported with Supreme Court guidance as set forth in *Miller*. Petitioner asserts, however that the appellate court's rejection of his Eighth Amendment claim was contrary to *Miller* because the record was devoid of any finding that Petitioner's crime reflected permanent incorrigibility or irreparable corruption. Respondent asserts that the trial court's consideration of Petitioner's age, evidence of his underdeveloped prefrontal cortex, and capacity for change sufficiently satisfied the requirements of *Miller*.

Although the Supreme Court in *Miller* did not foreclose a sentence of life without parole for juvenile offenders, it stated that it should 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." *Miller*, 132 S.Ct. 2469. *Milller* requires more than a mere consideration of the "age" of the defendant to meet constitutional requirements. "Our decision… mandates only that a sentencer follow a certain process - considering an offender's youth and attendant characteristics - before imposing a particular penalty." *Miller*, 132 S.Ct. at 2471. "[W]e require [the sentencing court] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 2469. As the Supreme Court observed, "youth is more than a chronological fact." *Id.* at 2467 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)). The Ninth Circuit has upheld discretionary life without parole sentences for juveniles, but only after finding that the trial court record established that the sentence had complied with *Miller*'s requirement of individualized sentencing. *See Bell v. Uribe*, 748 F.3d 857, 870 (9th Cir. 2013); *cert. denied.*, *DeMola v. Johnson*, 135 S.Ct. 1545 (March 23, 2015) ("In fact, as evident from the transcript

of the sentencing hearing, the trial judge did make an individualized sentencing determination.").

In *Montgomery v. Louisiana*, __ U.S. __, 136 S.Ct. 718, 734 (2016), the Supreme Court found *Miller* to be retroactively applied to cases on collateral review. Although the *Montgomery* Court did not state that sentencing courts must make specific findings, such as "permanent-incorrigibility," or "irreparable corruption," the Court, in its discussion of the substantiveness of *Miller*'s holding (for retroactivity purposes) referenced language from its decision that a life-without-parole sentence should be reserved for "all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery*, 136 S.Ct. at 734. The *Montgomery* Court used interchangeably concepts such as "irretrievable depravity," "irreparable corruption," and "permanent incorrigibility" in its discussion of the retroactivity of *Miller*, but ultimately concluded that *Miller* "did not require trial courts to make a finding of fact regarding a child's incorrigibility." *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.* The *Montgomery* court cautioned however, that the fact that *Miller* "did not impose a formal fact finding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole." *Id.* at 735.

The Court also noted that,

> [a]fter Miller, it will be the rare juvenile offender who can receive [life without parole]. The only difference between *Roper* and *Graham*, on the one hand, and *Miller*, on the other hand, is that *Miller* drew a line between children whose crimes reflect transient

> immaturity and those rare children whose crimes reflect irreparable corruption.
>
> *Id.*

The trial record reflects that after Petitioner was found guilty by the jury, a Presentence Report was prepared by the Pinal County Probation Department. (Doc. 25, Exh. C.) In that Report, the probation officer identified aggravating and mitigating facts as set forth in A.R.S. § 13-703(F) and § 13-703(G). (*Id.* at 13.) The probation officer identified as an aggravating factor that Petitioner "committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value," and as a mitigating factor Petitioner's age. (*Id.*) The probation officer also identified as a mitigating factor the fact that Petitioner had a minor child, and as aggravating factors the presence of accomplices, Petitioner's failure to benefit from past lenient treatment by the court, Petitioner's lengthy prior record as a juvenile, and the fact that Petitioner's actions were unprovoked and/or without reason. (*Id.* at 14-15.) Attached to the presentence report were several letters from family and friends of the victim describing their loss, with several requesting a life without parole sentence.

During the sentencing hearing, the trial court heard from the victim's mother, who described her loss and grief, and requested that a life without parole sentence be imposed. (Doc. 25, Exh. E at 11-12.) Defendant also submitted a report of psychologist Dr. Susan Parrish (Doc. 35, Exh. E.), who ran a neuropsych battery and found Petitioner suffered from impulsivity, and that he can change given his age, and the report of Dr. Mark Wellek, M.D., that indicated a 16-year old's pre-frontal cortex is not fully developed. (Docs. 25, Exh. E at 27; Doc. 35, Exh. F.) Before pronouncing sentence, the sentencing judge indicated that he had reviewed the file, the

presentence report, letters from Petitioner's mother, family and friends, the State's sentencing memorandum, the evidence presented at trial, the evidence presented at the presentence hearing, the fact that Petitioner had spent extensive time in custody, Dr. Parrish's report, Dr. Wellek's report, Petitioner's age at the time of the offense, Petitioner's consumption of alcohol and drugs prior to commission of the offense, Petitioner's argument regarding the underdeveloped prefrontal cortex, and Petitioner's family support. (Doc. 25, Exh. E at 45.) The court found Petitioner's argument that he was remorseful unpersuasive, particularly in light of Petitioner's conduct in going back to the murder scene several days after to have a party and show the victim's grave site to some friends. (*Id.* at 46.) The court further found that the mitigation presented did not substantially affect Petitioner's judgment when he committed the offense. (*Id.* at 47.)

In aggravation, the court found the presence of an accomplice, that the murder was committed in expectation of the receipt of financial gain (an AK-47), the emotional harm to the victim's mother, and the fact that the victim was helpless at the time of the murder. (Doc. 25, Exh. E at 47-48.) The court found that these aggravating factors outweighed the mitigating factors, and supported the court's sentence of life without parole on the murder charge. (*Id.*) The court ordered the sentences on the other two counts of conviction to run concurrently to each other "due to the defendant's age." (*Id.*)

The appellate court determined that the trial court's sentence complied with *Miller*:

> We presume a sentencing court considered any mitigating evidence presented, *State v. Everhart*, 169 Ariz. 404, 407, 819 P.2d 990, 993 (App. 1991), and we leave to the court's sound discretion how much

> weight to give any such evidence, *State v. Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d 355, 357 (App. 2003). Under *Miller*, before imposing a natural life sentence, a court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," namely the "diminished culpability" of children and their "heightened capacity for change." __ U.S. __, 132 S. Ct. at 2469.
>
> In this case, the trial court 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." After considering that evidence, as well as evidence presented at trial and by the state, the court determined a natural life sentence was appropriate. We cannot say *Miller* requires more, and therefore conclude the court did not abuse its discretion in dismissing Rue's notice and denying his subsequent motion for rehearing.
>
> (Doc. 25, Exh. V at 7.)

Petitioner asserts that the appellate court erred in that *Miller*: requires that the sentencing judge "address the juvenile's capacity for change and how [Petitioner]'s crime demonstrate[s] that he would not mature with age." (Doc. 33 at 14.) Petitioner also claims that the record does not demonstrate, as required in *Montgomery*, that Petitioner's crime reflects permanent incorrigibility or irreparable corruption. (*Id.* at 15.) The Supreme Court however, has not mandated those specific findings. "Our decision… mandates only that a sentencer follow a certain process–considering an offender's youth and attendant characteristics–before imposing a particular penalty." *Miller*, 132 S. Ct. at 2471. The Ninth Circuit Court is in accord. *See Bell*, 748 F.3d at 870 ("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*.").

The record in this case demonstrates that the trial judge made the individualized sentencing determination as required by *Miller*, by considering multiple mitigating and aggravating factors, including the age of Petitioner, his capacity to change, factors attendant to youth, the depravity surrounding Petitioner's commission of the offense, and the lack of remorse particularly related to Petitioner's return to the murder scene a week later to party and show friends the victim's makeshift grave. Certainly the sentencing court could have been more explicit in how it weighed Petitioner's capacity for change over time, and could have analyzed/demonstrated how the facts of the crime were not explained in whole or part by the impulsivity/immaturity of youth, especially considering that the sum of the court's considerations resulted in a life sentence for a 16-year-old juvenile. The "lengthiest possible incarceration is an especially harsh punishment for a juvenile, because he will almost inevitably serve more years and a greater percentage of his life in prison than an adult offender." *Miller*, 132 S.Ct. at 2466 (citing *Graham*, 560 U.S., at 70.) Indeed, Petitioner could serve, given current life expectancies, 70 or more years in prison. This "irrevocable forfeiture" of life outside prison walls perhaps deserves more exacting attention to the concerns expressed in *Miller*. It is indeed difficult to reconcile the Supreme Court's painstaking analysis of the attributes of children and their capacity for change, without a requirement that the sentencing court make explicit findings, as was not done in this case, that the murder reflected irreparable corruption, or that this 16-year-old juvenile, had **no** capacity to **ever** reform.

However, based upon this Court's analysis of the text of *Miller*, *Montgomery*, and *Bell*, this Court finds that the

Arizona Court of Appeal's decision affirming Petitioner's sentence was not "contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

CONCLUSION

Having determined that Petitioner's amended habeas petition lacks merit, the Court will recommend that Petitioner's Amended Petition for Writ of Habeas Corpus (Doc. 23) be denied and dismissed with prejudice.

IT IS THEREFORE RECOMMENDED that Petitioner's Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 23) be **DENIED** and **DISMISSED WITH PREJUDICE**.

IT IS FURTHER RECOMMENDED that a Certificate of Appealability and leave to proceed *in forma pauperis* on appeal be **DENIED** because Petitioner has not made a substantial showing of the denial of a constitutional right.

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), 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); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen days within which to file a response to the objections. Pursuant to Rule 7.2, Local Rules of Civil Procedure for the United States District Court for the District of Arizona, objections to the Report and Recommendation may not

exceed seventeen (17) pages in length. Failure timely to file 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 timely to file objections to any factual determinations of the Magistrate Judge will 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* Rule 72, Federal Rules of Civil Procedure.

DATED this 16th day of June, 2017.

s/Michelle H. Burns
Michelle H. Burns
United States Magistrate Judge

APPENDIX D

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

CEDRIC JOSEPH RUE JR.,
Petitioner.

No. 2 CA-CR 2014-0458-PR
Filed February 12, 2015

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
No. CR1998093180
The Honorable Bruce R. Cohen, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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

Cedric Joseph Rue Jr., San Luis
In Propria Persona

Greenberg Traurig, LLP, Phoenix
By Stacy F. Gottlieb
Counsel for Amicus Curiae The Arizona Justice Project

MEMORANDUM DECISION

Judge Howard authored the decision of the Court, in which Presiding Judge Kelly and Judge Vásquez concurred.

H O W A R D, Judge:

¶1 Petitioner Cedric Rue seeks review of the trial court's order dismissing his 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 absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Rue has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Rue was convicted of first-degree murder, theft, and arson. The trial court imposed a natural life sentence on the murder conviction and presumptive and aggravated, concurrent prison sentences for the other convictions. Rue's convictions and sentences were affirmed on appeal. *State v. Rue*, No. 1 CA-CR 02-0053 (memorandum decision filed Nov. 26, 2002).

¶3 Rue initiated a proceeding for post-conviction relief in 2003, which was dismissed when no petition for post-conviction relief was timely filed. No petition for review was timely filed. In 2005, Rue filed another notice of post-conviction relief, which was dismissed summarily by the trial court. The court granted Rue's motion for rehearing and reinstated the proceeding, but ultimately denied relief.

¶4 In 2013, Rue again filed a notice of post-conviction relief, this time maintaining that the United States Supreme Court's decision in *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455 (2012), was a significant change in the law entitling him to relief. The trial court summarily dismissed the notice. Rue filed a motion for rehearing and amicus curiae, The Arizona Justice Project, filed a brief in support of that motion. The court denied the motion.

¶5 On review, Rue and amicus curiae argue *Miller* applies retroactively and entitles Rue to relief. In *Miller*, the Court determined mandatory life sentences for juvenile offenders violated the Eighth Amendment. *Miller*, ___ U.S. at ___, 132 S. Ct. at 2469. Instead, a sentencing court must be able to take into account "the offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at ___, 132 S. Ct. at 2467.

¶6 Rue and amicus curiae contend Arizona's first-degree murder sentencing scheme as a whole is unconstitutional when applied to juvenile defendants and there was no constitutional sentencing option available to the trial court. Indeed, in *State v. Vera*, we determined that because parole had been eliminated and the only possibility of release would be by pardon or commutation, a sentence of life with the possibility of release "was, in effect," a mandatory life sentence "in violation of the rule

announced in *Miller*." 235 Ariz. 571, ¶ 17, 334 P.3d 754 (App. 2014). But we further concluded in *Vera* that the legislature's 2014 enactment of A.R.S. § 13-716 remedied any claim that a life sentence without the possibility of release for a minimum number of calendar years was unconstitutional. *Id.* ¶ 27. That statute provides that a juvenile "who is sentenced to life imprisonment with the possibility of release after serving a minimum number of calendar years" is eligible for parole upon completion of the minimum sentence. § 13-716. Thus, any unconstitutional effect of the original sentencing scheme has been remedied.

¶7 Rue and amicus curiae also contend that, based on *Miller*, imposition of a natural life sentence for a juvenile offender violates the Eighth Amendment. But the *Miller* Court held only that a *mandatory* life sentence violated the Eighth Amendment and expressly declined to address any "argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger." *Miller*, ___ U.S. at ___, 132 S. Ct. at 2469. We decline to extend *Miller*'s holding further than the Supreme Court was willing to extend it. Thus, a natural life sentence with no opportunity for release is permitted if a sentencing court, after considering sentencing factors, could have imposed a lesser sentence. *See id.* at ___, 132 S. Ct. at 2469.

¶8 Rue and amicus curiae maintain, however, that "in light of the lack of any 'presumptive' sentence in the first degree murder sentencing scheme," the mitigating factor of age was not given the necessary weight and the court did not adequately consider Rue's chances for rehabilitation. We disagree. Arizona's sentencing scheme requires a court to "determine whether to impose" a natural life sentence or a sentence without the possibility

of release for twenty-five or thirty-five calendar years only after considering aggravating and mitigating circumstances, including the defendant's age. A.R.S. §§ 13-701; 13-751(A); 13–752(A), (Q)(2). In Rue's case, after doing so, the sentencing court imposed the more severe sentence.

¶9 We presume a sentencing court considered any mitigating evidence presented, *State v. Everhart*, 169 Ariz. 404, 407, 819 P.2d 990, 993 (App. 1991), and we leave to the court's sound discretion how much weight to give any such evidence, *State v. Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d 355, 357 (App. 2003). Under *Miller*, before imposing a natural life sentence, a court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," namely the "diminished culpability" of children and their "heightened capacity for change." ___ U.S. ___, 132 S. Ct. at 2469.

¶10 In this case, the trial court 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." After considering that evidence, as well as evidence presented at trial and by the state, the court determined a natural life sentence was appropriate. We cannot say *Miller* requires more, and therefore conclude the court did not abuse its discretion in dismissing Rue's notice and denying his subsequent motion for rehearing.[1]

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[1] Because we conclude Rue is not entitled to relief in any event, we need not determine whether *Miller* is applicable retroactively to his case under the analysis outlined in *Teague v. Lane*, 489 U.S. 288 (1989).

¶11 For these reasons, although we grant review, we deny relief.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CEDRIC JOSEPH RUE, Jr., Petitioner, vs. LAURA ESCAPULE, Respondent.	No. 15-72088 ORDER

Before: FARRIS, TALLMAN, and BYBEE, Circuit Judges.

The application for authorization to file a second or successive 28 U.S.C. § 2254 habeas petition is granted.

The Clerk shall transfer the petition received on July 8, 2015, to the United States District Court for the District of Arizona. The petition shall be deemed filed in the district court on July 8, 2015.

The Clerk shall also serve on the district court this order, the application, response, and reply.

Upon transfer of the petition, the Clerk shall close this original action.