No. 22–6027

In the Supreme Court of the United States

CEDRIC JOSEPH RUE, JR.,
Petitioner,

v.

RYAN THORNELL, Director, Arizona Department of Corrections, Rehabilitation and Reentry, et al.,
Respondent.

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

BRIEF IN OPPOSITION

KRISTIN K. MAYES
Attorney General of Arizona

DANIEL C. BARR
Chief Deputy Attorney General

JOSHUA D. BENDOR
Solicitor General

ALEXANDER W. SAMUELS
Principal Deputy Solicitor General

JEFFREY L. SPARKS
Deputy Solicitor General Section Chief of Capital Litigation

ANDREW STUART REILLY
Assistant Attorney General
(*Counsel of Record*)

OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-4686
Andrew.Reilly@azag.gov

Counsel for Respondents

QUESTION PRESENTED

Miller v. Alabama, 567 U.S. 460, 480 (2012), held that "mandatory penalty schemes" under which juvenile homicide offenders are automatically sentenced to life in prison without the possibility of parole ("LWOP") are impermissible. Instead, under *Miller*, a sentencing judge may only impose LWOP after making a choice to do so, "tak[ing] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Before sentencing Rue to LWOP, Rue's sentencer considered whether a parole-eligible sentence was appropriate in light of his youth and attendant characteristics. Accordingly, the Arizona Court of Appeals rejected Rue's *Miller* claim. The Ninth Circuit found that the holding of the Arizona Court of Appeals was reasonable under 28 U.S.C. § 2254(d).

The question presented is:

Whether the Arizona Court of Appeals' judgment was contrary to *Miller* or an unreasonable application of *Miller* to the facts of this case.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

INTRODUCTION[1]

Petitioner Cedric Rue received LWOP, not because Arizona law dictated such a sentence, but because his sentencer, after taking his youth into account, found that LWOP was the most appropriate sentence. Consistent with *Miller*'s requirements, Rue's sentencer conducted an individualized sentencing that took into account: (1) Rue's youth and attendant characteristics; (2) an expert's opinion that Rue suffered from impulsivity that might change as he aged; (3) another expert's argument regarding the underdeveloped prefrontal cortex of juvenile offenders; (4) Rue's specific background and history, including his drug and alcohol abuse; (5) letters from his family and friends; and (6) the specific facts of Rue's crimes. *See* Pet. App. 33a–34a. Indeed, the entire sentencing hearing concerned whether Rue should receive a parole-eligible sentence or LWOP. *See id.*

Unlike *Miller*, Rue's sentencer did not impose LWOP by default. Instead, the court made a meaningful choice between two sentences after considering Rue's youth and attendant characteristics. As explained further below, the sentencing judge believed the other option was a parole-eligible sentence, and all juveniles sentenced to that other option ultimately received parole-eligible sentences. Rue's sentencing, therefore, complied with *Miller*.

---

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

Rue does not dispute that he received a life-without-parole sentence after his sentencer considered his age and attendant characteristics and found that a parole-eligible sentence was inappropriate. Nor does he dispute that had the lesser sentence been chosen, he would presently be serving a parole-eligible sentence. Because that is all *Miller* requires, he is not entitled to federal habeas relief. Thus, the Ninth Circuit's holding that the Arizona Court of Appeals' decision was not contrary to, or an unreasonable application of, *Miller* was correct and does not warrant this Court's review.

STATEMENT OF THE CASE

1. *Arizona statutory law*. When Rue was sentenced, Arizona's first-degree murder statute "provided two sentencing options for juveniles convicted of first-degree murder: (1) natural life; and (2) life without eligibility for release 'until the completion of the service of twenty-five calendar years if the victim was fifteen or more years of age and thirty-five if the victim was under fifteen years of age.'" *State v. Valencia*, 386 P.3d 392, 394, ¶ 10 (Ariz. 2016) (quoting Ariz. Rev. Stat. § 13–703(A) (Supp. 1995)).[2] Death was a third option, but it was eliminated for juvenile offenders by *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

As for the availability of "release" for those who received a release-eligible sentence, Arizona removed the authority of any agency to implement parole procedures in 1994, and it did not restore this authority until 2014. *Valencia*, 386 P.3d at 394, ¶ 11. Nonetheless, Arizona judges and attorneys remained under the almost universal mistaken impression that parole was an available form of release.[3] As a result, Arizona judges continued to impose sentences providing for parole eligibility during the 20-year period in which parole procedures were not available.

---

[2] There are no material differences between the 1995 statute and the 1998 statute that applied to Rue for the murder he committed in 1998.

[3] For example, the Arizona Supreme Court repeatedly stated that Arizona's first-degree murder statute included parole eligibility. *See State v. Wagner*, 982 P.2d 270, 273, ¶ 11 (Ariz. 1999) ("Arizona's statute … states with clarity that the punishment for committing first degree murder is either death, natural life, or *life in prison with the possibility of parole*.") (emphasis added); *State v. Fell*, 115 P.3d 594, 597–598, ¶¶ 11, 14–15 (Ariz. 2005) ("[W]e today confirm" the accuracy of an earlier statement in 2001 that the statute included "*life imprisonment with the possibility of parole* or imprisonment for 'natural life' without the possibility of release.") (emphasis added).

See, e.g., Katherine Puzauskas & Kevin Morrow, *No Indeterminate Sentencing Without Parole*, 44 Ohio N.U.L. Rev. 263, 288 (2018) ("[S]ince 1994 the Arizona judiciary has sentenced more than two hundred defendants to life imprisonment with a possibility of parole after twenty-five or thirty-five years.").

In 2014, Arizona restored the authority to implement parole procedures for juvenile offenders who received release-eligible sentences: "*Notwithstanding any other la*w, a person who is sentenced to life imprisonment with the possibility of release after serving a minimum number of calendar years for an offense that was committed before the person attained eighteen years of age *is eligible for parole* on completion of service of the minimum sentence, *regardless of whether the offense was committed on or after January 1, 1994*." Ariz. Rev. Stat. § 13–716 (enacted 2014; emphasis added). The change applied to juvenile offenders sentenced between 1994 and 2014. *Id.*

2. *Factual background, trial, and sentencing proceeding.* In 1998, Rue was part of a group of adolescents that callously murdered a man that they happened upon camping in the desert because they wanted his property. Pet. App. 13a–15a. After the victim had befriended them, a codefendant shot the victim in the back of the head with a handgun, and Rue shot him in the face with a shotgun, as he lay on the ground twitching. *Id.* at 14a–15a. The group then used the victim's shovel to bury him in a shallow grave nearby. *Id.* at 15a. Several days later, Rue returned to the scene to have a party and show the victim's grave site to some friends. *Id.* at 34a. Rue was sixteen years old at the time. *Id.* at 2a.

In 2001, following a 15-day trial, a jury found Rue guilty of first-degree murder, theft, and arson. *Id.* at 13a. At sentencing, the court did not impose LWOP automatically. Instead, it considered, among other things, Rue's proffered evidence relating to prefrontal cortex development as it pertains to juvenile offenders, as well as evidence of a "full neuropsych battery" done on Rue that showed he suffered from impulsivity that could change given his age. *Id.* at 18a. After weighing the aggravating and mitigating factors, and considering the facts and circumstances surrounding the murder, the judge found that a parole-eligible sentence was inappropriate and sentenced Rue to LWOP. *Id.* at 17a.

2. *State post-conviction proceedings.* In 2013, Rue sought postconviction relief in state court, arguing that his life-without-parole sentence violated *Miller*. *Id.* at 16a. The superior court denied relief because LWOP had not been statutorily mandated and Rue's sentencer had considered his age and age-related characteristics, as required by Arizona law, before imposing LWOP. *Id.* at 16a–17a. The Arizona Court of Appeals likewise denied relief, explaining that Rue's sentencer had considered his age and age-related characteristics as mitigation before finding that a parole-eligible sentence was inappropriate:

> 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.

Id. at 18a. The Arizona Supreme Court summarily denied further review. *Id.*

3. *Federal habeas proceedings.* In 2015, Rue filed a motion for authorization to file a second or successive habeas petition in the United States Court of Appeals for the Ninth Circuit, requesting permission to raise a *Miller* claim. *See* Pet. at 12. The Ninth Circuit granted the request after this Court issued *Montgomery v. Louisiana*, 577 U.S. 190 (2016), which held that *Miller* applied retroactively. *See id.* The Ninth Circuit further ordered that Rue's petition be deemed filed on July 8, 2015. *See id.*

The magistrate judge first concluded that Rue untimely filed the petition one day after the relevant 1-year limitations period had expired, but she determined Rue "was entitled to one day of equitable tolling" because he "acted diligently in pursuing his rights under *Miller*." Pet. App. 19a–29a. The magistrate judge then recommended denying Rue's *Miller* claim on the merits, concluding that Rue's sentencer had "made the individualized sentencing determination as required by *Miller*" when he considered "multiple mitigating and aggravating factors." *Id.* at 36a. As a result, the Arizona Court of Appeals' denial of Rue's *Miller* claim was not contrary to, or an unreasonable application of, *Miller*. *Id.* at 37a.

Respondents objected to the magistrate judge's equitable-tolling analysis, reasserting that Rue's state-court proceeding remained pending for more than two years and, therefore, Rue was not entitled to equitable tolling because he had two years in which he could have filed a protective petition to prevent any timeliness bar, as this Court has instructed state prisoners to do. *See Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005); *see also Lackey v. Hickman*, 633 F.3d 782, 787 (9th Cir. 2011) ("*Pace* … explicitly advises state prisoners … to file a protective federal petition to avoid a possible timeliness bar."). The district court noted Respondents' objection to the timeliness analysis, but because it agreed that Rue's *Miller* claim failed on the merits, it did not need to resolve the issue and presumed the correctness of the magistrate judge's timeliness determination. Pet. App. at 6a. *See Van Buskirk v. Baldwin*, 265 F.3d 1080, 1083 (9th Cir. 2001) (stating that a court may deny a habeas petition on the merits rather than reaching "the complex questions lurking in the time bar of the AEDPA").

The district court granted Rue's request for a certificate of appealability, and Rue timely appealed the court's decision on the merits. *See* Pet. at 13. Respondents again reasserted that Rue's petition was untimely because he was not entitled to equitable tolling, as the magistrate judge had erroneously held, and argued that the district court's merits decision should be affirmed. The Ninth Circuit issued a memorandum decision that similarly did not resolve Respondents' timeliness argument because Rue's *Miller* claim failed on the merits. Rather, the court: (1) rejected Rue's argument that his sentence was unconstitutional because his

sentencer did not find that he was "permanently incorrigible"; (2) citing *Jessup v. Shinn*, 31 F.4th 1262, 1266 (9th Cir. 2022)[4], concluded that Arizona did not have a mandatory sentencing scheme; and (3) held that Rue had received an individualized sentencing hearing where the sentencer determined that he deserved LWOP. Pet. App. 2a–3a. Thus, Rue's sentencing complied with *Miller*, and the Arizona Court of Appeals' decision was therefore not contrary to, or an unreasonable application of, *Miller*. *Id.* Rue timely filed a petition for writ of certiorari.

[4] A petition for writ of certiorari is currently pending before this Court. *Jessup v Thornell*, No. 22-5889.

REASONS FOR DENYING THE PETITION

The Ninth Circuit correctly held that the Arizona Court of Appeals' ruling was neither contrary to nor an unreasonable application of *Miller*. Rue received an individualized sentencing hearing that satisfied *Miller*'s requirements because his sentencer—fully believing that a parole-eligible sentence could be imposed—considered his youth and attendant circumstances before finding that a parole-eligible sentence was inappropriate. If Rue's sentencer had chosen the lesser option, Rue would be serving a parole-eligible sentence in light of subsequent statutory developments. While undoubtedly unusual, this statutory scheme did not violate *Miller*, which held unconstitutional state laws *mandating* "that each juvenile die in prison even if a judge or jury would have thought that his youth and attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life *with* the possibility of parole) more appropriate." 567 U.S. at 465. At the very least, the Arizona Court of Appeals' decision is not contrary to any clearly-established Supreme Court holding because this Court has never addressed a factual situation similar to the one here.

Additionally, Rue's asserted conflict with a lone state court—the Pennsylvania Supreme Court—is illusory, as is the alleged conflict with the "Department of Justice's guidance to federal prosecutors" regarding federal statutes. Neither involve a situation where the sentencer considered parole-eligibility in light of a defendant's youth and attendant characteristics. Rather, under both the Pennsylvania and federal schemes in effect immediately before

Miller, LWOP sentences were imposed automatically. That is not the case here. And for all those reasons, certiorari is not warranted.

Furthermore, this case is a poor vehicle for this Court's review because developments in state law could potentially moot Rue's petition. Additionally, given that Rue's sentencer actually considered whether he should receive a parole-eligible sentence in light of his youth and attendant circumstances, any theoretical error would be harmless under *Brecht*. And finally, it is undisputed that Rue filed his federal habeas petition after the relevant 1-year limitations period had expired, and Respondents' maintain the magistrate judge incorrectly awarded Rue equitable tolling before considering the merits of Rue's *Miller* claim. The district court and the Ninth Circuit, however, did not reach the timeliness of Rue's habeas petition and, instead, denied the petition on the merits. Nonetheless, Rue may not obtain his requested habeas relief without a court first resolving the issue of the timeliness of his petition. The threshold issue of the petition's timeliness should therefore be addressed before any further review of the merits is granted.

I. The Ninth Circuit Correctly Held That the Arizona Court of Appeals' Decision Was Not Contrary to, Or an Unreasonable Application of, *Miller*.

A. Rue received all that *Miller* demands.

As both the Arizona Court of Appeals and Ninth Circuit correctly held, *Miller*'s requirements were satisfied because Rue received an individualized sentencing hearing where his youth and attendant characteristics were considered before the sentencer decided that Rue should not receive a parole-eligible sentence.

1. *Rue's sentencer did exactly what* **Miller** *mandated: consider youth and attendant characteristics before sentencing a juvenile homicide offender to life in prison without the possibility of parole.*

Before sentencing a juvenile offender to LWOP, *Miller* requires sentencers to conduct an individualized sentencing hearing where they "take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 567 U.S. at 480. *Miller* "mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing [life without parole]." *Id.* at 483.

Rue's sentencer followed that process. Before sentencing Rue, "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.'" Pet. App. 18a. Rue's age was not a cursory or tangential issue and was explicitly found to be a mitigating factor by the trial court. *Id.* at 17a. But after hearing all the evidence and carefully weighing the aggravating and mitigating factors, the court determined that a parole-eligible sentence was inappropriate in the circumstances and sentenced Rue to natural life. *Id.* Rue, therefore, received the very individualized consideration of his youth that *Miller* demands.

Moreover, the fact that Rue was sentenced in a consolidated sentencing hearing with his codefendant does not alter the analysis. Pet. at 15–16. "*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." Pet. App. 2a. (quoting *Jones v. Mississippi*, 141 S. Ct. 1307, 1313 (2021)). "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.* (quoting *Jones*, 141 S. Ct. at 1318). Although Rue was sentenced at a consolidated sentencing hearing, the sentencing judge separately considered Rue's and his codefendant's respective youth and attendant circumstances, and made separate findings as to each, before imposing sentence. *See id.* at 17a–18a. Rue's sentencing, therefore, complied with *Miller*, and any resentencing would merely reconsider the same or similar evidence that he already presented at the sentencing hearing he received years ago. Indeed, Rue has not identified any evidence that he was prevented from presenting at his previous sentencing, so there is no reason to suppose that the result of a new sentencing would be any different.

2. ***The Ninth Circuit correctly applied* Miller *when it found that the Arizona Court of Appeals' ruling was not contrary to, or an unreasonable application of,* Miller.**

This Court recently clarified *Miller*'s reach when it explained that "a discretionary sentencing procedure suffices to ensure individualized consideration of a defendant's youth." *Jones,* 141 S. Ct. at 1321. It explained that "*Miller* mandated '*only* that a sentencer follow a certain process—considering an offender's

youth and attendant characteristics—before imposing' a life-without-parole sentence." *Id.* at 1314 (quoting *Miller*, 567 U.S. at 483) (emphasis added).[5]

The Ninth Circuit correctly followed these principles when it rejected Rue's claim because Rue had already received all that *Miller* requires. *See* Pet. App. at 3a (stating that "Arizona law at the time of the sentencing did not require that LWOP be imposed 'automatically, with no individualized sentencing considerations whatsoever,'" and that "[t]he sentencing judge explicitly considered Rue's age before imposing LWOP."). The Ninth Circuit, therefore, correctly held that the Arizona Court of Appeals' decision to reject Rue's *Miller* claim was not unreasonable.

B. **If Rue's sentencer had selected the lesser sentence, Rue would now be serving a parole-eligible sentence.**

Rue overlooks the above and claims that his sentence nonetheless violated *Miller*, arguing that Arizona had a mandatory sentencing scheme just like the state schemes at issue in *Miller*. *See* Pet. at 14. But unlike Rue, the two *Miller* defendants received automatic LWOP sentences because the state statutory schemes at issue only allowed one option for juvenile homicide offenders. *See* 567 U.S. at 474 ("[T]he mandatory penalty schemes at issue here *prevent* the sentencer from taking account" of the characteristics of youth.) (emphasis added). *Miller* made a point of highlighting that the sentencers in question imposed the sentences

---

[5] Because the state court rendered its decision prior to *Jones*, that decision is not part of the body of clearly-established Supreme Court precedents that bound the state court. *See Greene v. Fisher*, 565 U.S. 34, 38 (2011). However, *Jones* confirms that the Ninth Circuit correctly applied *Miller*.

automatically and by necessity. For example, the Arkansas sentencing judge noted "that 'in view of the verdict, there's only one possible punishment.'" *Id.* at 466 (brackets omitted); *see id.* at 469 (discussing the Alabama sentencing proceeding: "[A] jury found Miller guilty. He was therefore sentenced to life without the possibility of parole").

This is a far cry from the individualized sentencing that Rue received, where his sentencer's focus throughout the proceedings was whether a parole-eligible sentence was appropriate. The apparently universal belief of Arizona judges that parole-eligible sentences were available meant that significant efforts and resources were expended in deciding between the two options. Indeed, here, the entire sentencing hearing concerned the choice between two different sentences. *See* Pet. App. 17a. In any event, Rue does not appear to dispute the availability of two options under Arizona's first-degree murder statute.[6] And the harshest option was thus not imposed automatically or by default. This is because, again, unlike the sentences at issue in *Miller*, the LWOP sentence that Rue received was *not* the only

---

[6] Arizona courts have viewed the lack of available parole procedures at the time of sentencing as an implementation problem that was cured by A.R.S. § 13–716. *See State v. Vera*, 334 P.3d 754, 759–61, ¶¶ 21–22, 26 (Ariz. App. 2014) (explaining that "§ 13–716 does not alter Vera's penalty, create an additional penalty, or change the sentence imposed," and instead "affect[ed] only the implementation of Vera's sentence by establishing his eligibility for parole after he has served the minimum term of twenty-five years"). Although a handful of state appellate decisions have recently questioned this interpretation (and are discussed further below), the Arizona Supreme Court's decision in *Valencia* remains the only binding authority from that court on the topic, and holds that natural life sentences were not "mandatory." *See Valencia*, 386 P.3d at 394, ¶ 11.

available choice. *Miller*, 567 U.S. at 477 (under mandatory sentencing schemes "every juvenile will receive the same sentence as every other").

In arguing that *Miller* was nonetheless violated here, Rue argues that the sentencer's mistaken belief is irrelevant, even if the belief was genuine. The statutorily available options at the time of sentencing, according to Rue, are the beginning and end of the analysis. But while this may typically be the case, it will not always be the case in the unusual circumstance where sentencing judges misunderstand the law. Consider, for example, a state sentencing scheme that plainly provides for two options: (1) LWOP, and (2) life with the possibility of parole after 25 years. Such a scheme on its face surely complies with *Miller*. But what if a sentencing judge mistakenly believed that LWOP was mandatory and acted accordingly at sentencing hearings? Surely *Miller* violations would result, statutory scheme aside.

Moreover, Arizona is not contending here that *Miller* would have been satisfied based on the mistaken beliefs of judges and parties alone. If parole truly was illusory and forever remained unavailable, a *Miller* violation might result. But here, sentencing judges not only believed they were choosing between LWOP and parole-eligible sentences, those juveniles who received the parole-eligible sentences all received parole eligibility within 25 or 35 years by virtue of the 2014 legislative fix. *See* A.R.S. § 13–716. Thus, juveniles like Rue were sentenced by judges who thought parole-eligible sentences were available, and those juveniles who received

the release-eligible option are in fact eligible for parole. The functional outcome is no different than if parole-eligibility had been on the books all along.

Under these circumstances, to conclude that Arizona's scheme was indistinguishable from the mandatory schemes at issue in *Miller* would make little sense. Again, the scheme produced a result where many juveniles received release-eligible sentences that the sentencing judges believed were parole-eligible and that were, in the end, in fact parole-eligible. No "mandatory" scheme could produce this result.[7]

C. The Arizona Court of Appeals ruling does not conflict with any clearly-established Supreme Court law.

The circumstances presented here are fundamentally different—and significantly more complex—than the straightforward mandatory schemes confronted in *Miller*. Nor was the Arizona Court of Appeals' decision contrary to, or an unreasonable application of, *Miller* itself. At bottom, Rue attempts to make Arizona's scheme as straightforward as the schemes confronted in *Miller*, but to do so is to ignore several critical differences. And *Miller* provides no clear answer for the unusual situation where sentencers believe they can impose parole-eligible sentences and those sentences, when imposed, ultimately become parole-eligible.

---

[7] Moreover, it would make no sense to conclude that Arizona's scheme was mandatory for some and not for others, based only on the sentence that the sentencing judge chose. So, if this Court were to conclude that the scheme was mandatory for juveniles like Rue, it might likewise have to conclude the scheme was mandatory for juveniles who are now serving parole-eligible sentences. Setting aside the question of prejudice for a moment, the Court could thus reach a nonsensical result by which a juvenile serving a parole-eligible sentence has a *Miller* claim.

This is fatal to Rue's petition. Habeas relief is warranted only when the state court's ruling was "objectively unreasonable," *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002), and "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement," *Harrington v. Richter*, 562 U.S. 86, 103 (2011). "Where the 'precise contours' of the right remain 'unclear,' state courts enjoy 'broad discretion' in their adjudication of prisoner's claims." *White v. Woodall*, 572 U.S. 415, 424 (2014) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003)); *see also Wright v. Van Patten*, 552 U.S. 120, 126 (2008) ("Because our cases give no clear answer to the question presented, let alone one in [petitioner's] favor, 'it cannot be said that the state court unreasonably applied clearly established Federal law.'") (quoting *Carey v. Musladin*, 549 U.S. 70, 77 (2006)).

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

Contrary to Rue's assertion, there is no conflict between the decision below and the Pennsylvania Supreme Court or "the Department of Justice's guidance to federal prosecutors about how to handle *Miller* claims brought by federal prisoners." *See* Pet. at 14–15. Neither addressed a situation where a defendant received a *Miller*-compliant hearing where the sentencer considered youth and age-related characteristics before finding that a parole-eligible sentence was inappropriate. In both Pennsylvania and the federal system, it was clear to all at the time of the relevant sentencings that only a single sentencing option was available.

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

In *Batts*, the Pennsylvania Supreme Court was not addressing a situation where the defendant had already received a *Miller*-compliant hearing at which the sentencer considered youth and attendant characteristics while deciding between two sentencing options before determining that a parole-eligible sentence was not appropriate. *See Commonwealth v. Batts*, 66 A.3d 286 (Pa. 2013). Similarly, Rue has failed to identify any instructions from the Department of Justice relating to a sentencing proceeding analogous to the *Miller*-compliant one that Rue already received. The alleged conflict is illusory for this reason alone.

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

In both Pennsylvania and the federal system, only a single sentencing option was available to juvenile homicide offenders prior to *Miller*: LWOP. *See* 18 Pa. Cons. Stat. Ann. § 1102 (West 2012) ("A person who has been convicted of a murder of the first degree or of murder of a law enforcement officer of the first degree shall be sentenced to death or to a term of life imprisonment."[8]); 61 Pa. Cons. Stat. Ann. § 6137(a)(1) (West 2012) (providing parole eligibility to any qualifying inmate "except an inmate condemned to death or serving life imprisonment"); *Commonwealth v. Secreti*, 134 A.3d 77, 78 (Pa. Super. 2016) (explaining that the

---

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

juvenile homicide offender was sentenced to "to *automatic* life imprisonment" without consideration of youth or attendant characteristics) (emphasis added); *see Batts*, 66 A.3d at 441; 18 U.S.C.A. § 1111(b) (providing that the punishment for first-degree murder is "death" or "imprisonment for life"); 18 U.S.C.A. § 3591 (recognizing that "no person may be sentenced to death who was less than 18 years of age at the time of the offense").

Differences in the statutory systems explain the different outcomes. *Miller* requires sentencers to have a choice between at least two options so that sentencers may consider whether the defendant's age and attendant circumstances would justify a lesser sentence than LWOP. Pennsylvania and federal sentencers had no such choice and did not believe they did. Accordingly, there is no conflict with the decision below.[9]

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

Another key difference is that Pennsylvania's post-*Miller* remedial statute was explicitly prospective-only. *See Batts*, 66 A.3d at 293 ("The new sentencing statute, by its terms, applies only to minors convicted of murder *on and after the date Miller was issued* (June 25, 2012).") (emphasis added) (citing 18 Pa. Cons. Stat.

---

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

§ 1102.1 (West 2012)); *Commonwealth v. Felder*, 269 A.3d 1232, 1236 n.5 (Pa. 2022) ("[T]he General Assembly has not passed a statute addressing the sentencing of juveniles convicted of first-degree murder pre-*Miller*[.]") (cleaned up). Because sentences imposed prior to *Miller* remained unconstitutionally mandatory, the Pennsylvania Supreme Court held that resentencings were required. *Batts*, 66 A.3d at 297. It was impossible for Pennsylvania to fix pre-*Miller* sentences by making a lesser sentence parole-eligible, as Arizona did. There was no lesser sentence in Pennsylvania prior to *Miller*, as there was in Arizona.

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

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

This case is a poor vehicle for this Court's review because recent developments in state law may moot Rue's petition. Federal habeas law would also prevent relief because any *Miller* error was harmless under *Brecht*. Finally, it is undisputed that Rue's habeas petition was filed after the relevant 1-year limitations period had expired, and Respondents have consistently maintained throughout these proceedings that the magistrate judge's decision to award one day of equitable tolling was erroneous. Neither the district court, nor the Ninth Circuit, addressed

Respondents' argument and, instead, rejected Rue's *Miller* claim on the merits. Rue, therefore, cannot obtain the habeas relief that he requests until the threshold issue of whether his habeas petition is timely is resolved.

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

In 2016, the Arizona Supreme Court held that juvenile homicide offenders sentenced to natural life were entitled to a post-conviction evidentiary hearing where they would "have an opportunity to establish, by a preponderance of the evidence, that their crimes did not reflect irreparable corruption but instead transient immaturity." *Valencia*, 386 P.3d at 396, ¶ 18. The Arizona Supreme Court recently granted review to consider whether such hearings should continue after *Jones*, 141 S. Ct. at 1318–19. *See State v. Hon. Cooper/Bassett,* No. CR–22–0227–PR (oral argument held January 10, 2023). It stayed several other cases raising the same issue. *See*, *e.g.*, *State v. Cabanas*, No. CR–22–0185–PR; *State v. Wagner*, No. CR–22–0156–PR; *State v. Arias*, No. CR–22–0237–PR; and *State v. Odom*, CR–22–0248–PR.

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

Court. If the Arizona Supreme Court reverses *Wagner*, the defendants in those cases could seek this Court's review.

This Court would be better served by deferring any review of this issue until the outcome of *Wagner* is clear. *See McCray v. New York*, 461 U.S. 961, 963 (1983) (opinion of Stevens, J., respecting the denial of certiorari) ("allow[ing] the various States to serve as laboratories in which the issue receives further study" will enable this Court "to deal with the issue more wisely at a later date"). Even assuming that current developments in the Arizona Supreme Court do not moot Rue's petition, the better vehicle to address the constitutionality of Arizona statutes would be a decision from the Arizona Supreme Court interpreting and analyzing those statutes, rather than one from the Ninth Circuit on federal habeas review analyzing an unpublished decision from the Arizona Court of Appeals under AEDPA.

B. Any theoretical error would also be harmless under *Brecht* because Rue already received the remedy prescribed by *Miller*.

As explained above, Rue's sentencing complied with *Miller*. But even assuming otherwise, any theoretical error would be harmless because Rue received everything he was entitled to under *Miller*—full consideration of his youth and attendant characteristics by the sentencing court before deciding whether a parole-eligible sentence was appropriate. Put differently, if Rue were granted a new sentencing he would receive: (1) a sentencing at which a judge would choose between LWOP and life with eligibility for parole; (2) actual eligibility for parole after 25 or 35 years if sentenced to the lesser option; and (3) an individualized consideration of his characteristics, including his youth at the time of the crime. He

already received each of those things during his original sentencing hearing, however. Thus, Rue cannot show any substantial and injurious effect from any theoretical error. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (requiring habeas petitioners to establish "actual prejudice" or that the error "had a substantial and injurious effect or influence in determining the jury's verdict" before they are entitled to relief).

C. Rue's habeas petition is also untimely, which the district court and the Ninth Circuit did not address when they chose to dismiss the petition on the merits.

Finally, it is undisputed that Rue's habeas petition was filed after the relevant 1-year limitations period had expired. The magistrate judge found that the petition was untimely by one day but elected to award Rue one day of equitable tolling because he supposedly "acted diligently in pursuing his rights under *Miller*." Pet. App. 29a. A habeas petitioner's diligence is only half of the relevant inquiry, however.

"To be entitled to equitable tolling, [the habeas petitioner] must show (1) that he has been pursuing his rights diligently; and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Lawrence v. Florida*, 549 U.S. 327, 336 (2007) (internal marks and quotation omitted); *see also Holland v. Florida*, 560 U.S. 631, 644 (2010). The magistrate judge did not find that an extraordinary circumstance stood in Rue's way or that such a circumstance prevented him from timely filing a habeas petition. Thus, the magistrate judge's equitable-tolling analysis is lacking on its face. *See Lawrence*, 549 U.S. at 336; *see*

also, e.g., *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th Cir. 2009) ("To apply the doctrine in 'extraordinary circumstances' necessarily suggests the doctrine's rarity, and the requirement that extraordinary circumstances 'stood in his way' suggests that an external force must cause the untimeliness, rather than … merely 'oversight, miscalculation or negligence on the petitioner's part, all of which would preclude the application of equitable tolling.'") (quoting *Harris v. Carter*, 515 F.3d 1051, 1055 (9th Cir. 2008)).

The magistrate judge's diligence finding is also erroneous. Rue's post-conviction petition remained pending in state court for more than two years. *See* Pet. App. 16a–18a. Rue, therefore, had more than two years in which he could have filed a protective petition that would have prevented any timeliness bar. *See Pace*, 544 U.S. at 416; *see also Lackey*, 633 F.3d at 787 ("*Pace* … explicitly advises state prisoners … to file a protective federal petition to avoid a possible timeliness bar."). Rue did not avail himself of the ability to file a protective petition during that two-year period, despite filing multiple pleadings in state court, choosing instead to wait until after the Arizona Supreme Court declined review to file a habeas petition in the Ninth Circuit. Pet. App. 18a–19a. Consequently, while Rue and his counsel may have acted *quickly* after the supreme court denied review, Rue cannot demonstrate that he acted *diligently* and thus warranted equitable tolling. *See Pace*, 544 U.S. at 416; *see also White v. Martel*, 601 F.3d 882, 884–85 (9th Cir. 2010) (holding that a petitioner failed to make the requisite showing of diligence when he failed to file a protective petition within the limitations period and seek a stay and

abeyance). The magistrate judge's conclusion that Rue's petition was only one day late does not alter the analysis, and the decision to simply award "one day of equitable tolling" because Rue acted quickly after the state supreme court denied review was therefore erroneous. *Cf. United States v. Locke*, 471 U.S. 84, 100–01 (1985) ("If 1-day late filings are acceptable, 10-day late filings might be equally acceptable, and so on in a cascade of exceptions that would engulf the rule erected by the filing deadline … A filing deadline cannot be complied with, substantially or otherwise, by filing late—even by one day.").

Ultimately, the magistrate judge correctly recommended that Rue's habeas petition be denied and dismissed because his *Miller* claim failed on the merits, but erred in first awarding equitable tolling and finding the petition timely. Neither the district court, nor the Ninth Circuit, addressed the timeliness of Rue's petition, exercising their discretion to instead dismiss the petition on the merits. This petition is thus a poor vehicle to review Rue's *Miller* claim because Rue may not obtain his requested relief without first considering the timeliness of his petition. If anything, then, the matter should be remanded with instructions to consider the threshold question of timeliness before any further review of the merits of Rue's *Miller* claim is granted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

KRISTIN K. MAYES
Attorney General
of Arizona

DANIEL C. BARR
Chief Deputy Attorney
General

JOSHUA D. BENDOR
Solicitor General

ALEXANDER W. SAMUELS
Principal Deputy
Solicitor General

JEFFREY L. SPARKS
Deputy Solicitor General/
Section Chief of Capital
Litigation

ANDREW STUART REILLY
Assistant Attorney General
(*Counsel of Record*)

OFFICE OF THE ARIZONA
ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-4686
Andrew.Reilly@azag.gov

Counsel for Respondents