No. 22-6027

IN THE

Supreme Court of the United States

CEDRIC JOSEPH RUE, JR.,
Petitioner,
v.

RYAN THORNELL, DIRECTOR OF THE ARIZONA DEPARTMENT OF CORRECTIONS, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

At the time of Petitioner Cedric Rue's sentencing, Arizona law mandated life without parole (LWOP) for juvenile offenders convicted of first-degree murder. Parole was not allowed under Arizona law. As the State acknowledges, at the time, a sentencing judge's only discretion was limited to whether to allow or forbid the possibility of executive clemency in the future. BIO 9. Such a sentencing scheme cannot be squared with *Miller v. Alabama*, 567 U.S. 460 (2012), which bars such mandatory LWOP sentences for juveniles.

The State argues that Mr. Rue's sentence complied with *Miller* because the sentencing judge considered Mr. Rue's youth in denying him parole. BIO 15. But the State agrees the judge could not grant parole. BIO 9. So such supposed consideration rings hollow.

Miller requires a sentencing scheme that allows the sentencer to consider a juvenile defendant's youth and capacity for rehabilitation when deciding between LWOP and a parole-eligible sentence. 567 U.S. at 472-73, 479-80. But here, the judge had no parole to offer. And in deciding whether to permit clemency, the sentencing scheme focused the judge on evaluating blameworthiness. The judge never considered Mr. Rue's capacity for rehabilitation, as *Miller* requires. Pet. 15-16.

Review is important here because the Ninth Circuit's decision conflicts with both the Pennsylvania Supreme Court's *Batts* decision and the guidance of the Department of Justice (DOJ) regarding *Miller*. Pet. 14-15. If Mr. Rue had been sentenced in Pennsylvania or the federal system, he would have had the right to a *Miller*-compliant resentencing. But according to the Ninth Circuit, he does not.

None of the State's objections to review hold water. The State claims the Court should ignore this case because Arizona has reinstated its parole system, making some individuals who were sentenced to mandatory LWOP now eligible for parole. But this legislation only allowed parole for some of those sentenced in violation of *Miller*, leaving Mr. Rue—and many others like him—without any relief from their unconstitutional sentencing.

Next, the State tries to avoid review by arguing that the Arizona Supreme Court might change course and offer relief to Petitioner and the others incarcerated today based on an unconstitutional sentencing. But at the same time, the State is telling the Arizona Supreme Court to deny Petitioner and others like him any relief.

Finally, the State wrongly suggests that AEDPA forecloses relief. BIO 22-23, 28-29. The State court's erroneous decision that a mandatory LWOP system can comply with *Miller* easily qualifies as an unreasonable application of clearly established law. 28 U.S.C. § 2254(d)(1). And because Mr. Rue has never received a hearing at which the sentencer could meaningfully consider his youth to determine whether to impose a parole-eligible sentence, the error had a "substantial and injurious" impact. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). Nor is Mr. Rue's application time-barred, as the State suggests. BIO 29-31.

For more than a decade now, Arizona has fought to avoid giving Petitioner and numerous others a resentencing hearing they are entitled to under federal law. The State did the same with *Simmons v. South Carolina*, 512 U.S. 154 (1994), avoiding its full implementation for nearly twenty years, until this Court's recent

decision in *Cruz v. Arizona*, 598 U.S. ___, 143 S. Ct. 650 (2023). This Court's review is similarly and urgently needed to ensure that *Miller* applies fully in Arizona, as it does elsewhere.

I. The Decision Below Conflicts with Pennsylvania and Federal Authority.

The State cannot sidestep the clear conflict with *Commonwealth v. Batts*, 66 A.3d 286 (Pa. 2013), and with DOJ's guidance to federal prosecutors. Pet. 14-15.

In *Batts*, state law provided no possibility of parole for a juvenile subject to a life sentence. 66 A.3d at 289. In such circumstances, the court concluded that "*Miller*'s proscription squarely is triggered." *Id.* at 296.

DOJ's position similarly recognizes that where the statutory scheme applicable at sentencing does not permit a parole-eligible sentence for a juvenile, the result is necessarily a mandatory LWOP sentence imposed against a juvenile in violation of *Miller*. Petition for Writ of Certiorari at 17-18, *Jessup v. Thornell* (No. 22-5889) (U.S. Oct. 18, 2022). This simple and square conflict warrants this Court's review.[1]

The State contends that, "[i]n both Pennsylvania and the federal system, only a single sentencing option was available to juvenile homicide offenders prior to *Miller*: LWOP." BIO 24. But in Arizona, the sentencing judge was required to impose an LWOP sentence. The judge could choose between LWOP with the possibility of executive clemency, or LWOP without that possibility, but the fact that two differ-

[1] Contrary to the State's argument (BIO 25 n.9), DOJ's position on *Miller* creates a meaningful conflict of authority. Based on DOJ's directives, if Mr. Rue had been sentenced in the federal system, he would be eligible for *Miller* relief. But because he was sentenced by a state within the Ninth Circuit, he is not.

ent varieties of LWOP were available does not change the reality that both options were LWOP sentences.

The State argues that this case is distinguishable because "the sentencer considered youth and age-related characteristics before finding that a parole-eligible sentence was inappropriate." BIO 23. But as detailed below, Mr. Rue was not provided a *Miller*-compliant hearing where parole was actually an option and where the judge considered his capacity for rehabilitation. *Infra* 6-9.

II. The Sentencing Here Violated *Miller*.

A. The Sentencing Judge Had No Authority To Enter A Parole-Eligible Sentence.

Miller requires that a court sentencing a juvenile have the power to enter a sentence of "life with the possibility of parole" and to consider whether "youth and its attendant characteristics" support a sentence with parole. 567 U.S. at 465 (italics omitted). The sentencing court here had no such authority. As both this Court and the Arizona state courts have recognized, when Mr. Rue was sentenced, Arizona had "abolished parole." *State v. Cruz*, 487 P.3d 991, 994 (Ariz. 2021); *see also Cruz v. Arizona*, 598 U.S. ___, 143 S. Ct. 650, 656 (2023); *Lynch v. Arizona*, 578 U.S. 613, 615-16 (2016) (per curiam); *State v. Vera*, 334 P.3d 754, 758 (Ariz. Ct. App. 2014); *State v. Dansdill*, 443 P.3d 990, 1000 n.10 (Ariz. Ct. App. 2019).

The State acknowledges that Arizona law did not permit the sentencing judge to sentence Mr. Rue to life with the possibility of parole. BIO 9. At the time of his sentencing, the only options for juveniles convicted of first-degree murder in Arizona (aside from capital punishment) were LWOP and LWOP with the possibility of

"release" after twenty-five years. Ariz. Rev. Stat. § 13-703(A) (Supp. 1995). The term "release" referred to the opportunity for a commutation or pardon by the Governor—not parole. *Jessup* Pet. 14-16; *Lynch*, 578 U.S. at 615.

The State's limited view of *Miller* is unfounded. BIO 19-21. *Miller* held that, for a juvenile LWOP sentence to comply with the Eighth Amendment, the sentencing judge must be able to "take into account how children are different," and have the discretion to determine whether "those differences counsel against irrevocably sentencing [the defendant] to a lifetime in prison." 567 U.S. at 480. That the judge has discretion to allow or bar executive clemency is irrelevant under *Miller* where, as here, the judge lacked the discretion to allow *parole*.

Similarly, the State errs when it relies on *Jones v. Mississippi*, 141 S. Ct. 1307, 1321 (2021), to assert that a generically "discretionary sentencing procedure" is all that is required to comply with *Miller*. BIO 18-19. To the contrary, *Jones* reaffirms that the sentencing judge must have the discretion *to impose a with-parole sentence*—precisely what the judge lacked here. 141 S. Ct. at 1313.[2]

Thus, because Arizona's scheme categorically precluded the sentencing judge from considering Mr. Rue's youth and attendant characteristics to determine whether to impose a with-parole sentence, the sentencing scheme plainly and directly contravened *Miller* on its face.

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[2] Although *Jones* was not part of the clearly established law applicable to Mr. Rue's habeas petition, the decision confirms that the state courts unreasonably applied *Miller*. *Contra* BIO 19 n.5.

B. Petitioner Did Not Receive A *Miller*-Compliant Sentencing.

Attempting to avoid review, the State insists that no *Miller* violation occurred because the sentencing judge considered Mr. Rue's age on the way to his conclusion that he should not be eligible for "release." BIO 16-18; App. 3a-4a. But because the only possible sentence for Mr. Rue was LWOP, with or without the possibility of executive clemency, the sentencing judge's observations regarding Mr. Rue's age were irrelevant to whether his sentence violated *Miller*.[3] *Miller* mandates that actual, meaningful individualized consideration of parole be available as an option. 567 U.S. at 477-78. The sentencing judge's considerations when choosing between two varieties of LWOP sentences cannot satisfy that requirement.

Because the law did not permit parole, the sentencing judge never engaged in the required *Miller* inquiry.[4] Under *Miller*, the sentencing judge must consider the possibility of rehabilitation, in light of the youth of the juvenile being sentenced. *Miller*, 567 U.S. at 479. *Miller* explained that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders." *Id.* at 472. The sentencing court, accordingly, must consider the youth of the person being sentenced and whether the juvenile offender could possi-

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[3] Notably, the State does not contend that the possibility of executive clemency qualifies as a "with parole" sentence under *Miller*. Nor can it—as this Court has recognized, executive clemency is not equivalent to parole because it provides no "meaningful" or "realistic opportunity to obtain release." *Graham v. Florida*, 560 U.S. 48, 57, 79, 82 (2010); *see Chaparro v. Shinn*, 459 P.3d 50, 53-54 (Ariz. 2020) (noting the heightened barriers to obtaining executive clemency rather than parole in Arizona).

[4] That the sentencing judge failed to focus on the specified considerations mandated by *Miller* is unsurprising given that Mr. Rue was sentenced *before Miller* was handed down. Pet. 10-11. The sentencing judge here simply had no reason (or power) to perform anything resembling a *Miller* inquiry.

bly have the capacity for change, and whether that supports the entry of a sentence with the option of parole. *Montgomery v. Louisiana*, 577 U.S. 190, 208 (2016).

If the sentencer had (i) possessed the discretion to sentence Mr. Rue to life with parole, and (ii) evaluated his capacity for change in light of his youth, as required by *Miller*, the court's assessment could have been far different. Mr. Rue presented extensive evidence of why his youth should be treated as a mitigating factor, including evidence of severe childhood head injuries; a history of depression involving multiple suicide attempts by the age of fourteen; and a troubled home life. 5 ER 526-29. All these factors indicated that Mr. Rue's offense—which was instigated by his 5-years older codefendant Brian Mackey, who was 21 at the time of the offense, *see* 2 ER 122, 187-88—was born out of the impulsivity and vulnerability to outside pressures that are characteristic of youth. *Miller*, 567 U.S. at 471 (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

Yet the judge failed to consider the possibility of rehabilitation in the future given Mr. Rue's young age, as mandated by *Miller*. The judge justified his decision by stating that "the aggravating factors outweigh the mitigating factors." 2 ER 181. But *Miller* rejected this type of exclusive focus on blameworthiness, explaining that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." 567 U.S. at 472. Instead, *Miller* instructs sentencers to focus on a young of-

fender's capacity for change. *Id.* at 472-73. That did not occur here.[5] Sentencing Mr. Rue to LWOP without any discussion of the strong evidence suggesting his offense did not reflect an incorrigible nature was wholly inconsistent with *Miller*.

The State suggests that all of this was fine because assertedly sentencing judges throughout Arizona were confused and erroneously believed parole remained available. BIO 20-21. But the law was clear—indeed, the State has elsewhere argued that sentencing judges correctly and fully understood parole was abolished. *See* Defendant's Motion For Certification Or Dismissal at 12-13, *Chaparro v. Ryan*, No. 2:19-cv-00650-DWL (D. Ariz. Mar. 27, 2019). And the State cannot point to any evidence in the record suggesting the judge at Mr. Rue's sentencing—who used the correct language in sentencing Mr. Rue to life without reference to "parole," *see* 2 ER 181—misunderstood the law.

And even assuming the judge may have harbored some confusion about state law, this did not result in Mr. Rue receiving a *Miller*-compliant hearing. *Miller*'s focus was on the mandatory nature of the statutory scheme rather than individual sentencers' beliefs. *Miller*, 567 U.S. at 475 (explaining that a "mandatory scheme" is "flawed" because *the scheme itself* "[gives] no significance to 'the character and record of the individual offender'"). If a judge's false belief that she may "impose a pa-

[5] Nor did the sentencing court provide Mr. Rue with an *individualized* consideration of his youth, as *Miller* requires. *Miller*, 567 U.S. at 469 (quoting *Roper*, 543 U.S. at 560). As noted, Mr. Rue was sentenced alongside codefendant William Najar. In considering Mr. Najar's case, the sentencing judge made specific findings regarding his childhood and psychological profile. 2 ER 169, 171. By contrast, as to Mr. Rue, the sentencing judge merely noted that he was sixteen at the time of the offense and that the defense presented evidence regarding underdeveloped prefrontal cortexes in teenagers. 2 ER 178-79.

role-eligible sentence in violation of state law" satisfies *Miller*, then *Miller* would be diluted beyond recognition. *State v. Wagner*, 510 P.3d 1083, 1088 (Ariz. Ct. App. 2022), *review continued* (Feb. 28, 2023).

Indeed, the *Miller* violation here is so blatant that this Court should not only grant certiorari, it should also consider summary reversal.

III. The State's Other Arguments Against Review Cannot Withstand Scrutiny.

1. This case presents a clean and urgently needed opportunity for the Court to reaffirm the simple legal proposition that *Miller* is not satisfied when a parole-eligible sentence is legally impossible and where no *Miller*-compliant hearing was held. The State, however, argues there is no need for review because Arizona has since amended its statutory scheme to reinstate parole for some offenders who were sentenced to LWOP as juveniles. BIO 21-22. This remedy, however, applies only to offenders sentenced to LWOP with the possibility of executive clemency. Ariz. Rev. Stat. § 13-716 (2014). It thus has zero relevance to Mr. Rue and others like him who were sentenced to LWOP without that possibility. Pet. 9.

Under *Miller*, the sentencing judge was required to have the option of parole and was further mandated to consider Mr. Rue's youth and the possibility of rehabilitation in deciding whether to grant a sentence with the possibility of parole. There is no dispute that he was not provided those key requirements. The new legislation does not alter that and does not diminish the need for this Court's review.[6]

[6] The State oddly claims that because this subsequent legislation furnished some juvenile offenders with relief, ruling for Mr. Rue would lead to a nonsensical result under which a juvenile

2. The State also cites *State v. Valencia*, 386 P.3d 392 (Ariz. 2016), as a reason to deny review. BIO 27. While telling this Court that Petitioner could possibly obtain relief under *Valencia*,[7] at the State's urging the Arizona Supreme Court is currently reconsidering *Valencia*. *See State v. Bassett*, No. CR–22–0227–PR. Not only that, the State is actively pressing the Arizona Supreme Court to overrule *Valencia*. *See* State Pet. for Rev. at 3, *State v. Hon. Cooper/Bassett*, No. CR–22–0227–PR (Ariz. Sept. 9, 2022) (urging Ariz. Sup. Ct. to "clarify that *Valencia* was based on an expanded interpretation of *Miller* … that has since been abrogated by *Jones*"). Thus, it is more than a bit disingenuous for the State to hold out *Valencia* to assure this Court that the constitutional wrong here will be remedied.

Moreover, for *Valencia* to aid Mr. Rue, he would have to file in state court a new and additional post-conviction review petition. The State conspicuously has refused to commit to not seeking to dismiss such a successive petition as procedurally barred. Thus, while it holds out *Valencia* as a remedy for the *Miller* violation here, the State is plainly still seeking to bar such relief if Mr. Rue returns to state court. *See* BIO 27-28; Ariz. R. Crim. P. 32.2(a)(2), (b) ("At any time, a court may determine

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serving a parole-eligible sentence has a *Miller* claim. BIO 22 n.7. Not so. Those offenders who received meaningful legislative relief would no longer have *Miller* claims today. But those many juveniles sentenced between 1994 and 2014, like Mr. Rue, serving LWOP sentences, who are *not* subject to the legislative fix still have clear *Miller* claims. The relief afforded through § 13-716 to a subset of the *Miller* violations in Arizona does not excuse other blatant *Miller* violations that remain in place or suggest that they should go unredressed.

[7] In 2016, the Arizona Supreme Court held that juvenile homicide offenders who received a sentence of natural life were entitled to a post-conviction evidentiary hearing to determine whether their crime reflected "transient immaturity," a finding that would entitle them to a sentence of life with the possibility of parole. *Valencia*, 386 P.3d at 210 (citing *Montgomery*, 577 U.S. at 209).

by a preponderance of the evidence that an issue is precluded, even if the State does not raise preclusion.").

3. Next, the State's AEDPA "no prejudice" argument is redundant of its flawed merits argument and provides no basis to deny review. BIO 28-29. The State contends there was no prejudice to support review under AEDPA because Mr. Rue already "received everything he was entitled to under *Miller*." BIO 28. But as discussed above, *supra* 6-9, Mr. Rue never received what *Miller* guarantees: A hearing at which a judge considers his youth to determine whether to impose a with-parole sentence, including consideration of the possibility of rehabilitation. If this Court rules that Mr. Rue is entitled to resentencing, he would receive that hearing and have a meaningful opportunity for parole. Thus, Mr. Rue has shown "actual prejudice" and easily clears AEDPA's requirement of a "substantial and injurious" impact. *Brecht*, 507 U.S. at 637.

4. Finally, there is no merit to the State's claim that this Court should deny review because Mr. Rue's habeas petition was purportedly one day late. BIO 29-31. The magistrate judge properly found the petition timely because equitable tolling was appropriate (*see* 1 ER 19, 4 ER 502), and none of the courts that have considered this case have accepted the State's challenge to this conclusion. *See* App. 1a-4a (Ninth Circuit), App. 6a & n.2 (district court). That issue has long been resolved and forms no part of the decision under review.

CONCLUSION

The Petition should be granted, or the Court should summarily reverse the Ninth Circuit's decision.

Respectfully submitted,

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