No. 23-6110

IN THE

# Supreme Court of the United States

EULANDAS "JAY" FLOWERS,

*Petitioner*,

*vs.*

RYAN THORNELL, Director of the Arizona Department of Corrections,

*Respondent*.

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

## REPLY BRIEF FOR PETITIONER

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## INTRODUCTION

The procedural bar imposed by the Arizona Court of Appeals against merits review of Mr. Flowers's claim under *Miller v. Alabama*, 567 U.S. 460 (2012), is neither independent of federal law nor adequate to support the state court's ruling. To argue that the bar is independent, the first state misreads both Arizona's procedural rules and the state court's decision, and then disregards binding Arizona Supreme Court decisions holding that the bar is interwoven with federal law. And to argue that the bar is adequate to support the judgment, the state ignores how the *Miller* claim was actually litigated in state court. On the adequacy issue, the state further blames Mr. Flowers for defective presentation to the court of appeals. But it does not explain how that court was required to explain at least how his presentation was defective in light of Ninth Circuit caselaw that has never been abrogated, that appears to approve his presentation to that court, and that the Circuit appears to regard as valid in other situations.

Finally, the state's suggestion that this case is not a good vehicle ignores the fact that the life-without-parole sentence was effectively mandatory because Arizona had abolished the parole scheme. *See Miller*, 567 U.S. at 486 n.13. If the court of appeals had correctly concluded that there was no enforceable procedural default, then it would have been free to depart from its other cases in which the limitation on relief set forth in 28 U.S.C. § 2254(d) foreclosed relief under *Miller*.

This Court should grant certiorari.

## ARGUMENT IN REPLY

### 1. The state has not shown how the procedural bar that was applied to Mr. Flowers's *Miller* claim is independent of federal law.

The parties agree on how the Arizona Court of Appeals addressed Mr. Flowers's *Miller* claim. It said that the claim was procedurally barred as previously litigated, *see* Ariz. R. Crim. P. 32.2(a)(2), and that no exception to the bar applied, *see* Ariz. R. Crim. P. 32.2(b). (Pet. at 28–29; BIO at 18–19) Mr. Flowers explained in his petition how this ruling was not independent of federal law. The state has not shown how it was.

Unlike Mr. Flowers, the state fails to grapple with the exceptions allowed under Rule 32.2(b) to the procedural bar that applies to previously-litigated claims. One of those exceptions, set forth in Ariz. R. Crim. P. 32.1(g), is for claims based on a "significant change in the law" that, if applied retroactively to the case, would "probably overturn" the conviction or sentence. The state pretends that the state court's rejection of the claim was based *solely* on the fact that Mr. Flowers had previously litigated that claim, and the exceptions played no part in its ruling. (BIO at 20) But that position does not square with what the state court wrote in its decision—that "[n]one of the exceptions allowed under Rule 32.2.b apply." (Pet. App. at 81a) Consistent with the text of Rule 32.2, the state court plainly considered Rule 32.1(g) when it applied the prior-litigation procedural bar.

The state does not dispute Mr. Flowers's assertion that Arizona caselaw, including *State v. Valencia*, 386 P.3d 392 (Ariz. 2016), *overruled on other grounds by State ex rel. Mitchell v. Cooper*, 535 P.3d 3 (Ariz. 2023), makes a procedural ruling under Rule 32.1(g) depend on the merits

of the underlying claim. (Pet. at 29) Under this Court's caselaw, this feature of Rule 32.1(g) means that it is not independent of federal law. And because applying Rule 32.1(g) was part of the state court's procedural-bar ruling, that ruling likewise was not independent of federal law.

Here the state court expressly said, "None of the exceptions allowed in Rule 32.2.b apply." (Pet. App. at 81a) On its face, then, the state court's decision "fairly appears to rest primarily on federal law or to be interwoven with federal law," and so is not independent of federal law. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2479 n.15 (2020) (quoting *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983)). Arizona law is clear that whether relief is available on a *Miller* claim under Rule 32.1(g) depends on whether *Miller* would "probably overturn" the sentence—in short, the merits of the *Miller* claim. *See Valencia*, 386 P.3d at 395–96. This is not use of federal law "only for the purpose of guidance," such that federal cases "do not themselves compel the result that the court has reached." *Long*, 463 U.S. at 1041 (cited in BIO at 21). It is instead a classic situation where the state-court decision "fairly appears… to be interwoven with the federal law." *Long*, 463 U.S. at 1040.

Finally, the state emphasizes the procedural nature of the state court's ruling on Mr. Flowers's *Miller* claim. (BIO at 17–19) But that ruling cannot be characterized any other way. The pertinent question here is how, in the course of making such a procedural ruling, state and federal law interact (if they do so at all). Whether a "state law determination is characterized as 'entirely dependent on,' 'resting primarily on,' or 'influenced by' a question of federal law, the result is the same: the state law determination is not independent of federal law." *Foster v. Chapman*, 578 U.S. 488, 499 n.4 (2016) (citations omitted). The procedural bar applied to Mr. Flowers's

*Miller* claim was influenced by the merits of that claim, because in order to apply the exception in Rule 32.1(g) the state court had to determine whether *Miller* would "probably overturn" his sentence. The court of appeals fundamentally erred when it concluded otherwise, and this Court should grant review to address this issue.

**2. The state has not shown how the adequacy question was not squarely before the court below, nor has it shown how the procedural bar was adequate to support the denial of Mr. Flowers's claim.**

The lower courts made two rulings on the adequacy question that merit this Court's review. First, the court of appeals refused to address the adequacy question because Mr. Flowers did not comply with its argument-labeling rules, even though he presented a nonfrivolous argument that he had done so and expressly asked to expand the scope of the certificate of appealability in any event. Second, the district court ruled that the Arizona Court of Appeals's surprise procedural-bar ruling was an adequate basis to support the procedural default, even though the procedural bar was not an issue in the case until the state court inserted it *sua sponte* without affording Mr. Flowers notice and an opportunity to respond. The state has not explained how these rulings are unworthy of this Court's review.

**A. The court of appeals should have addressed Mr. Flowers's nonfrivolous argument for reaching the adequacy question, and the state is wrong to contend that it need not have done so.**

In his petition, Mr. Flowers laid out the five-step legal analysis, derived from this Court's cases, that goes into every procedural-default question in habeas cases under

28 U.S.C. § 2254. (Pet. at 16–17) He did the same thing in his opening brief to the court below. (CA9 Op. Br. at 19–20) He did so in service of his argument that, although the district court had certified only two questions in that analysis for appeal, all four of the issues he presented in his opening brief were fairly included in the certificate of appealability. In his petition to this Court, Mr. Flowers showed how the fairly-included argument was not frivolous, because it was based on Ninth Circuit caselaw that has never been abrogated. (Pet. at 18–19) Inasmuch as the court below erred by "disposing of" the two uncertified procedural-default questions "without explanation of any sort" and without "explain[ing] why" considering those questions "was unnecessary," this Court should grant review to correct the court of appeals's gross deviation from acceptable practice. *Corcoran v. Levenhagen*, 558 U.S. 1, 2 (2009) (per curiam).

Before the court of appeals, Mr. Flowers relied on *Jorss v. Gomez*, 311 F.3d 1189 (9th Cir. 2003), as authority for the proposition that other questions in the five-step procedural-default analysis are fairly included within the scope of a certificate of appealability that allows appellate review of a procedural-default ruling. It is true enough, as the state observes (BIO at 24), that *Jorss* involved a question of whether a § 2254 habeas petition was timely filed. But, like the procedural-default analysis, the procedure for determining whether a habeas petition is timely has multiple steps. First, the court must identify the pertinent trigger date. *See* 28 U.S.C. § 2244(d)(1). Second, the court must discount qualifying periods of statutory tolling. *See* 28 U.S.C. § 2244(d)(2); *Pace v. DiGuglielmo*, 544 U.S. 408 (2005). Third, the court must discount any qualifying periods of equitable tolling. *See, e.g.*, *Holland v. Florida*, 560 U.S. 631 (2010). Only by answering these three questions can a federal habeas court determine whether a petition is timely filed. *See*

*Pace*, 544 U.S. at 419 ("Because petitioner filed his federal habeas petition beyond the deadline, and because he was not entitled to statutory or equitable tolling for any of that period, his federal petition is barred by the statute of limitations.").

So in *Jorss* the Ninth Circuit ruled that "a determination of timeliness under the provisions of the statute is a necessary predicate to, and encompassed within, the issue of whether equitable tolling should be applied." 311 F.3d at 1192. In other words, according to Ninth Circuit caselaw, the step-2 question in the timeliness framework is fairly included within the scope of a certificate of appealability that expressly flags only the step-3 question. *See id.* at 1193. Because procedural default likewise involves a multi-step analysis, parallel reasoning would dictate that, under *Jorss*, a question regarding adequacy of a state-law procedural bar is fairly included in a certificate of appealability that (as here) expressly includes only the independence and fundamental-miscarriage-of-justice questions.

Mr. Flowers asked the court of appeals to apply *Jorss*'s reasoning to the procedural-default analysis. The court of appeals refused to answer that question, pointing to the labeling requirements of 9th Cir. R. 22-1(e). As Mr. Flowers pointed out in his petition (Pet. at 19 & n.5), Rule 22-1(e) was enacted *after* the Ninth Circuit decided *Jorss*, and that court has not since published an opinion explaining whether *Jorss*'s fairly-included rule remains valid.[1] Mr. Flowers is not, as the state thinks, asking this

[1] Indeed, just last year the Ninth Circuit relied on *Jorss* to conclude that antecedent procedural questions were fairly included within the scope of a COA that expressly mentioned only the merits of a claim. *See* Order, *Smith v. Shinn*, No. 10-99002 (9th Cir. May 16, 2023) (Dkt. #150).

Court to rule that "the adequacy of a state procedural ruling must also be considered whenever the independence of that ruling is questioned." (BIO at 24) Rather, he contends that because he presented a nonfrivolous argument for extending *Jorss*'s rule to the procedural-default framework, the court of appeals had a duty to either address that question or to explain why doing so was unnecessary—especially because other panels of the Ninth Circuit treat *Jorss* as surviving the enactment of the argument-labeling rule. *See supra* n.1.

There is no meaningful difference between requiring a court of appeals to explain why considering other grounds for relief is unnecessary, *see Corcoran*, 558 U.S. at 2, and requiring a court of appeals to explain why its own rules do not authorize a presentation that its own caselaw appears to authorize. (*See* BIO at 25) Nothing in the state's presentation to this Court explains why there is. This Court need not address the state's broader contention (that federal habeas courts must always address both independence and adequacy) in order to decide that the court of appeals's failure to explain why Mr. Flowers's presentation was improper under its own rules warrants this Court's review.

### B. The state has failed to explain how the surprise procedural-bar ruling was an adequate ground in state law to support procedural default.

In his petition, Mr. Flowers explained that a state-law procedural ruling is not adequate to support a procedural default if the rule applied is not a firmly established and regularly followed feature of state law, or if the ruling violates the notice-and-opportunity-to-respond requirement of due process. (Pet. at 20–22) He acknowledged that discretionary state procedural rules, such as Arizona's rule that allows for surprise procedural-bar rulings, *see*

Ariz. R. Crim. P. 32.2(c) (2015); *State v. Swoopes*, 166 P.3d 945, 948 (Ariz. Ct. App. 2007), can be adequate, but only if state law furnishes standards to guide the exercise of that discretion. (Pet. at 22–23) But Arizona law provides no such standards. (Pet. at 24–25) And insofar as the state as appellee had waived reliance on the prior-litigation procedural bar before the Arizona Court of Appeals, the question whether merits review of Mr. Flowers's *Miller* claim was barred as previously litigated was not in the case until that court inserted it. (Pet. at 23–24)

Rule 32.2(c) provides that a "court may determine" to apply a procedural bar even if the state does not raise that affirmative defense. This is plainly a discretionary rule. *See Biden v. Texas*, 597 U.S. 785, 802 (2022) (explaining that use of "the word 'may' clearly connotes discretion") (quoting *Opati v. Republic of Sudan*, 590 U.S. 418, 428 (2020)). Applying indeterminate rules "in particular circumstances… can supply the requisite clarity" for making the rule adequate to support procedural default. *Walker v. Martin*, 562 U.S. 307, 317 (2011). Mr. Flowers showed in his petition how Arizona law furnishes no guidance to courts on when it is proper for a court to issue a surprise procedural-bar ruling. (Pet. at 25–26) Nothing in the state's presentation explains how Arizona law guides the exercise of the unbounded discretion imparted by the "may determine" language of Rule 32.2(c).

In fact, it is plain that Arizona law provides no such standards. In *Martin* this Court pointed to precedent from the California Supreme Court to conclude that there were sufficient standards to make the discretionary rule adequate to support procedural default. *See Martin*, 562 U.S. at 317 (citing *In re Robbins*, 959 P.2d 311, 317 (Cal. 1998); *In re Gallego*, 959 P.2d 290, 299 (Cal. 1998)). By contrast, Arizona law provides no such guidance for issuing surprise procedural-default rulings. Notably, in

*State v. Peek*, the Arizona Supreme Court said that it would reach the merits of a claim *because* the state had waived reliance on a procedural bar, even as it noted that the rules afford "the court discretion to raise preclusion sua sponte." 195 P.3d 641, 642 (Ariz. 2008). Apart from the state's waiver of the procedural bar, the court in *Peek* characterized the case as "present[ing] a recurring issue of statewide importance on which trial courts have rendered conflicting opinions." *Id.* But these are simply reasons why the court—one of last resort with powers of discretionary review—chose to decide *Peek* at all. *E.g. State v. Diaz*, 224 P.3d 174, 176 (Ariz. 2010) ("We granted review to address a recurring issue of statewide importance that has produced conflicting results in our appellate court."). And in any event, nothing about the reasoning in *Peek* supports the Arizona Court of Appeals's decision here to *enforce* a procedural bar against a postconviction claim in the face of the state's waiver. (*See* Pet. at 25) The requisite clarity in Arizona law is simply lacking.

The state counters that the fact that there exist "state court decisions recognizing and applying the rule" means that the rule is firmly established and regularly followed. (BIO at 27) Along these lines, the state points to the magistrate judge's reliance on a handful of unpublished Arizona decisions that contain surprise procedural-bar rulings. (BIO at 26 (citing Pet. App. at 68a n.3)) But none of these decisions—even assuming they were part of authoritative state law, *cf.* Pet. at 25–26—articulate any standards for exercising the discretion to issue a surprise procedural-bar ruling. All of them simply point to Rule 32.2(c) by itself for the source of the authority to issue such rulings, without also explaining why the court was exercising that discretion in the case before it. A discretionary procedural rule cannot be firmly established and regularly followed—and thus cannot be adequate to

support a procedural default—if state law does not articulate when "the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others." *Martin*, 562 U.S. at 316 (quoting *Beard v. Kindler*, 558 U.S. 53, 60–61 (2009)).

Undaunted, the state further contends that because Rule 32.2(c) exists, that fact alone gave Mr. Flowers sufficient notice of the possibility that the Arizona Court of Appeals might rely on it—instead of the arguments that the parties did or did not include in their filings—to adjudicate his *Miller* claim. (BIO at 27) This contention is unpersuasive. On postconviction review, Arizona's courts of appeal regularly apply other familiar rules of appellate waiver to avoid reaching arguments presented to them. Failure to raise an issue to the postconviction trial court waives it for appellate review. *See State v. Wagstaff*, 775 P.2d 1130, 1135 (Ariz. Ct. App. 1988); *State v. Ramirez*, 616 P.2d 924, 927 (Ariz. Ct. App. 1980). Raising an issue for the first time in a reply brief waives it. *See State v. Lopez*, 221 P.3d 1052, 1054 (Ariz. Ct. App. 2009). But issuing a surprise procedural-bar ruling as authorized by Rule 32.2(c) overrides these other, generally-applicable waiver rules. The lack of standards for exercising discretion under Rule 32.2(c) leaves postconviction litigants in Arizona without notice as to when the familiar appellate-waiver rules will govern and when they will not. This fact as well undermines the state's contention that the mere existence of Rule 32.2(c) makes it adequate.

In short, nothing about either the general or specific application of Rule 32.2(c) here, where the state waived reliance on the prior-litigation procedural bar, afforded Mr. Flowers notice that that bar would be an issue in his case. The state has made no effort to explain how the notice-and-opportunity-to-respond requirement of due process was met here. This Court should grant review to

flesh out this aspect of adequacy jurisprudence. *Cf. Cruz v. Arizona*, 598 U.S. 17, 29 n.2 (2023) (declining to address other arguments why Rule 32.1(g) was inadequate to support the judgment of the Arizona Supreme Court).

**3. This case is a good vehicle for addressing the procedural-default issues because neither the Ninth Circuit nor the Arizona state courts have satisfactorily explained why the life-without-parole sentence here was not mandatory in the sense forbidden by *Miller*.**

Finally, the state suggests that this case is a poor vehicle for addressing the procedural-default issues raised because Mr. Flowers's underlying *Miller* claim lacks merit. (BIO at 28–31) But if the procedural default of his claim is excused, then the limitation on relief set forth in 28 U.S.C. § 2254(d)(1) will not prevent a lower court from finding his sentence to violate *Miller*. *See Rodney v. Filson*, 916 F.3d 1254, 1262 (9th Cir. 2019) (explaining that if "the procedural default of the claims is excused… then AEDPA deference will no longer apply and the claims will be subject to de novo review"). In particular, the lower courts will no longer be bound by *Jessup v. Shinn*, 31 F.4th 1262 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 1755 (2023), to deny relief to Mr. Flowers.

Instead, the lower courts will squarely confront the question whether the sentencing judge, once he decided against imposing a death sentence, had any discretion to make Mr. Flowers eligible for parole, rather than simply release by executive clemency (because parole had been abolished). *See generally Lynch v. Arizona*, 578 U.S. 613, 615 (2016) (per curiam); *Chaparro v. Shinn*, 459 P.3d 50 (Ariz. 2020). This Court has recently assumed that such discretion cures any potential *Miller* problem. *See Jones*

*v. Mississippi*, 593 U.S. 98, 110–12 (2021). In *Miller* this Court suggested that Arizona's abolition of parole made a life-without-parole sentence impermissibly mandatory in first-degree murder cases. *See* 567 U.S. at 486–87 & nn.9, 13, 15. Nevertheless, in *Jessup* the Ninth Circuit, constrained by § 2254(d)(1), concluded that it was not unreasonable to deny a *Miller* claim when the judge purported to exercise discretion to make the defendant eligible for *release* through executive clemency, even if the judge did not have the authority to make him eligible for *parole*. 31 F.4th at 1267. In *Jessup*, the court avoided this Court's suggestion in *Miller* that Arizona had an impermissible mandatory scheme—such that the state-court ruling was "contrary to" *Miller*—by relying on the "unreasonable application" prong of the limitation on relief set forth in § 2254(d)(1).

By contrast here, if the procedural default is excused, the lower courts will not be constrained to deny relief in the way the *Jessup* court was.[2] In 2016, when this Court returned Mr. Flowers's codefendant's *Miller* claim to the Arizona state courts for further proceedings, Justice Sotomayor observed that "the sentencing judge merely noted age as a mitigating circumstance without further discussion." *Tatum v. Arizona*, 580 U.S. 952, 953 (2016) (Sotomayor, J., concurring in decision to grant, vacate, and remand). The mandatory nature of the life-without-parole sentence could have had some effect on the sentencing judge's decision in this case to give short shrift to the substantive requirements of *Miller*. *See Tatum*, 580

[2] Alternatively, the Court may wish to hold this petition until it acts on the petition in *Bassett v. Arizona*, which raises similar merits-based issues on direct review of a state court's ruling, rather than in a case governed by 28 U.S.C. § 2254. *See* Petition for a Writ of Certiorari, *Bassett v. Arizona*, No. 23-830 (U.S. filed Jan. 31, 2024) (response due May 8, 2024).

U.S. at 953 ("On the record before us, none of the sentencing judges addressed the question *Miller* and *Montgomery* require a sentencer to ask: whether the petitioner was among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'") (quoting *Montgomery v. Louisiana*, 577 U.S. 190, 209 (2016)). If this Court should confirm that the procedural default is excused, the lower courts would have some work left to do in deciding whether Mr. Flowers's sentence is unconstitutional.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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