APPENDIX A

FILED

JAN 27 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EULANDAS J. FLOWERS, Petitioner-Appellant, v. JAMES KIMBLE, Respondent-Appellee.	No. 19-15116 D.C. No. 2:15-cv-02670-JAT MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
James A. Teilborg, District Judge, Presiding

Argued and Submitted November 16, 2022
Phoenix, Arizona

Before: BYBEE, OWENS, and COLLINS, Circuit Judges.
Partial Concurrence by Judge COLLINS.

Eulandas Jay Flowers appeals the district court's dismissal of Flowers' habeas petition. Flowers seeks post-conviction relief because he was sentenced to natural life for a first-degree murder he committed as a juvenile. Following his sentencing, the Supreme Court held that mandatory life without parole for

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

juveniles violates the Eighth Amendment. *Miller v. Alabama*, 567 U.S. 460, 465 (2012). Nonetheless, the Arizona state court dismissed Flowers' *Miller* claims as procedurally defaulted. Flowers argues that his petition is not procedurally defaulted because the state-court judgment is not independent of federal law and because he is "actually innocent" of a natural-life sentence.[1]

We have jurisdiction under 28 U.S.C. §§ 1291 and 2253. We review a district court's denial of a habeas petition and the conclusion that a claim is procedurally defaulted de novo. *Dixon v. Shinn*, 33 F.4th 1050, 1053 (9th Cir. 2022); *Cooper v. Neven*, 641 F.3d 322, 326 (9th Cir. 2011). We affirm.

1. The parties are familiar with the facts in this case, and we repeat them only as necessary. Flowers argues that his claim is not procedurally defaulted because the ruling from the Arizona Court of Appeals was not based on an independent state-law ground. Flowers is incorrect.

As relevant to this appeal, Flowers brought at least one notice for post-conviction relief that did not state the grounds for relief and was dismissed as

[1] Flowers also asserts other arguments that were not in the district court's certificate of appealability, but we decline to consider those issues. *See* 28 U.S.C. § 2253(c)(2) (a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right."); 9th Cir. R. 22-1 circuit advisory note (we may "decline to address uncertified issues if they are not raised . . . as required by this Rule").

untimely. Flowers then filed an additional notice for post-conviction relief, the first notice invoking *Miller*, and the Maricopa County Superior Court dismissed this notice on the merits.[2] Flowers did not appeal these dismissals.

Flowers then filed a second notice invoking *Miller*, and the Court dismissed it on the merits.[3] Flowers unsuccessfully applied for reconsideration and appealed the dismissal of his second notice invoking *Miller*.

In Flowers' state-court appeal, the Arizona Court of Appeals held that Flowers' claim was procedurally defaulted based on Arizona Rule of Criminal Procedure 32.2(a): "Flowers raised this same issue in his previous post-conviction relief proceeding. Any claim a defendant raised in an earlier post-conviction relief proceeding is precluded." The Arizona Court of Appeals attempted to categorize Flowers' claim to determine whether it fell within one of the enumerated exceptions to the bar on successive petitions and concluded that "[n]one of the exceptions allowed under Rule 32.2.b. apply." But the Court of Appeals never conducted an adjudication on the merits. Rather, the Arizona Court of Appeals

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[2] The Magistrate Judge's report and recommendation calls this notice an "amended" or "second" notice.

[3] Flowers calls this post-conviction notice his "seventh" notice and his "second" invoking *Miller*. The state trial court described this notice as Flowers' "sixth Rule 32 proceeding." The Magistrate Judge's report and recommendation describes this as Flowers' "third notice of post-conviction relief."

focused its analysis on whether Flowers raised his claim properly—not whether *Miller* actually applied or was relevant to his claim for relief. This Court's precedent is clear that a state court can "categorize" a claim that raises a constitutional issue without becoming entangled with the federal Constitution. *See Nitschke v. Belleque*, 680 F.3d 1105, 1110 (9th Cir. 2012). And to the extent that Arizona's procedural rule asks a court to determine whether the federal precedent would apply or change the outcome in the case, the Arizona Court of Appeals never reached the merits of his *Miller* claim: Flowers' subsequent notice relied on the same precedent—*Miller*—as his previous, unsuccessful notice. The Arizona Court of Appeals rejected Flowers' effort to relitigate his *Miller*-based claims on procedural grounds. *See* Ariz. R. Crim. P. 32.2(b). Because the Court of Appeals decision "did not reach the merits" of Flowers' claim and "was clearly and expressly based on state law," it was not "interwoven" with federal law, and federal review of Flowers' *Miller* claim is barred. *See id.* at 1108.

2. Flowers argues that his procedural default should be excused under the fundamental miscarriage of justice exception because he is "actually innocent" of his natural-life sentence. We have never held that actual innocence extends to non-capital sentences outside of the escape-hatch context. *See, e.g.*, *Allen v. Ives (Allen I)*, 950 F.3d 1184, 1189 (9th Cir. 2020) (holding that a defendant can be "actually

innocent" of the career offender provisions sufficient to permit jurisdiction over a § 2241 petition); *Allen v. Ives (Allen II)*, 976 F.3d 863, 869 (9th Cir. 2020) (W. Fletcher, J., concurring in the denial of reh'g en banc) (explaining that *Allen I* only applies when retroactive Supreme Court precedent "[comes] to light after the opportunity to raise it in a § 2255 motion had passed"); *Shepherd v. Unknown Party*, 5 F.4th 1075, 1077 (9th Cir. 2021) (limiting *Allen I* to petitioners who "'received a mandatory sentence under a mandatory sentencing scheme'").

Here, Flowers is not "actually innocent" of natural life because he received the equivalent of a *Miller* hearing. *See Bell v. Uribe*, 748 F.3d 857, 870 (9th Cir. 2014) (when a judge considers "both mitigating and aggravating factors under a sentencing scheme that affords discretion and leniency, there is no violation of *Miller*"). The sentencing judge considered Flowers' age, his ability to appreciate the wrongfulness of his conduct, and the fact that he was intoxicated at the time of the crime. The judge found that Flowers' age was a "mitigating circumstance . . . sufficiently substantial to call for leniency." Despite this mitigating circumstance, however, the sentencing judge found that Flowers was "a danger to the public" and "any chance of marked rehabilitation [wa]s extremely remote." For these reasons, the judge imposed a sentence of natural life. Because the sentencing judge considered Flowers' "youth and its attendant characteristics" and the possibility of

rehabilitation, the judge did all that *Miller* required. *See Jones v. Mississippi*, 141 S. Ct. 1307, 1317–18 (2021). The judge's considerations are sufficient to satisfy *Miller* even though Arizona abolished parole for crimes committed after January 1, 1994. *See Jessup v. Shin,* 31 F.4th 1262, 1266 (9th Cir. 2022) (consideration of juvenile defendant's youth and ability to reform when imposing a life without parole sentence was sufficient to avoid resentencing in light of *Miller*).

Because Flowers is not innocent of his natural-life sentence, his claim remains procedurally defaulted, and we need not reach the merits of his petition.

AFFIRMED.

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Flowers v. Kimble, No. 19-15116

COLLINS, Circuit Judge, concurring in part and concurring in the judgment:

I concur in Section 1 of the court's memorandum disposition, which correctly holds that the Arizona Court of Appeals' May 28, 2015 decision did not address the merits of Flowers' claim under *Miller v. Alabama*, 567 U.S. 460 (2012), when it concluded that Flowers' *Miller* claim was "precluded" by having been raised unsuccessfully in a prior state post-conviction petition. *See State v. Flowers*, 2015 WL 3468204, at *1 (Ariz. Ct. App. May 28, 2015).

The rejection of a second state post-conviction application on preclusion grounds would not ordinarily give rise to a procedural default barring federal review if the prior state court rejection of the claim was on the merits. *See Guillory v. Allen*, 38 F.4th 849, 855–56 (9th Cir. 2022). However, we need not decide whether Flowers' first state post-conviction petition raising a *Miller* claim was rejected on the merits. Flowers failed to appeal that earlier denial, and he thereby failed to exhaust his state remedies with respect to his *Miller* claim. For *that* reason, Flowers has procedurally defaulted his *Miller* claim. *See Guillory*, 38 F.4th at 855 n.5. He therefore must show some basis for overcoming that procedural default.

The only such ground that is included within the certificate of appealability in this case is Flowers' argument that, under the reasoning of *Schlup v. Delo*, 513

U.S. 298 (1995), he should be considered to be "actually innocent" of his life sentence for purposes of excusing his procedural default. I agree with the majority that no such exception is applicable here, but I would rely on different reasoning.

To establish that he is "actually innocent" of his sentence in the *Schlup* sense under our caselaw, Flowers would have to show that some required element needed to make him eligible for his particular sentence under the governing substantive law (here, Arizona law) is missing as a factual matter. *See Sawyer v. Whitley*, 505 U.S. 333, 336 (1992) (holding that, "to show 'actual innocence'" of the death penalty, "one must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law"); *Bousley v. United States*, 523 U.S. 614, 623 (1998) (holding that "'actual innocence' means factual innocence, not mere legal insufficiency"); *Allen v. Ives*, 950 F.3d 1184, 1189–90 (9th Cir. 2020) (holding that "actual innocence" standard would be met if a petitioner's prior conviction was not a "controlled substance offense" that would qualify him for "career offender" sentencing status). Flowers has made no such showing here. His argument is instead that, merely because he allegedly has a valid *Miller* claim, he should be deemed to be actually innocent of his life sentence. This is nothing more than an argument that *Miller* claims should be categorically exempt from procedural default doctrines. I see no basis in *Schlup* or *Allen* for such a rule.

Because Flowers has provided no basis in this appeal for avoiding the procedural default of his *Miller* claim, it was properly rejected by the district court.