No. 15-8842

IN THE SUPREME COURT OF THE UNITED STATES

BOBBY CHARLES PURCELL,

PETITIONER,

VS.

STATE OF ARIZONA,

RESPONDENT.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

In *Miller v. Alabama*, __ U.S. __, 132 S. Ct. 2455, 2469 (2012), this Court held "that the Eighth Amendment forbids a sentencing scheme that **mandates** life in prison without possibility of parole for juvenile offenders." (Emphasis added). This Court explicitly declined to consider an argument that "the Eighth Amendment requires a categorical bar on life without parole sentences for juveniles." *Id.*

In *Montgomery v. Louisiana*, __ U.S. __, 136 S. Ct. 718, 732 (2016), this Court held that *Miller*'s prohibition on **mandatory** life without parole sentences for juvenile offenders announced a new substantive rule that is retroactive in cases on collateral review.

When Petitioner murdered two people in 1998, Arizona law provided a sentencing scheme for a first-degree murder conviction which vested in the trial court the discretion to impose one of two non-death sentencing options—specifically, ***either*** a natural life sentence without possibility of parole ***or*** a life sentence with parole eligibility after service of a minimum number of calendar years.

I. Has Petitioner shown a compelling reason for this Court to grant certiorari to review, under *Miller* and *Montgomery*, his challenge to his non-mandatory discretionarily-imposed natural life sentence?

II. Has Petitioner shown a compelling reason for this Court to grant certiorari where the Arizona Supreme Court has repeatedly declined to review lower court decisions correctly finding that *Miller* does not apply to Arizona's statutory discretionary sentencing scheme?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

DECISION BELOW 1

STATEMENT OF JURISDICTION 1

PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 6

I. PETITIONER CANNOT ESTABLISH THAT HE IS ENTITLED TO REVIEW UNDER MILLER AND MONTGOMERY BECAUSE UNDER ARIZONA LAW HIS NATURAL LIFE SENTENCES WERE NOT MANDATORY 6

II. THE ARIZONA SUPREME COURT HAS REPEATEDLY DECLINED REVIEW OF LOWER COURT DECISIONS CORRECTLY FINDING THAT MILLER DOES NOT APPLY TO ARIZONA'S DISCRETIONARY SENTENCING SCHEME 8

CONCLUSION 10

APPENDIX A: Transcript of Aggravation/Mitigation Hearing, *State v. Purcell*, CR98-08705 (Maricopa County Superior Court, September 10, 1999) A-1

APPENDIX B: Transcript of Sentencing Hearing, *State v. Purcell*, CR98-08705 (Maricopa County Superior Court, December 20, 2001) A-82

TABLE OF AUTHORITIES

PAGE

CASES

Graham v. Florida,
560 U.S. 48 (2010) 7

Miller v. Alabama,
__ U.S. __, 132 S. Ct. 2455 (2012) 4, 5, 6, 7, 8, 9

Montgomery v. Louisiana,
__ U.S. __, 136 S. Ct. 718 (2016) 6, 7, 8, 9

Roper v. Simmons,
543 U.S. 551 (2005) 6, 7

State v. Bolt,
689 P.2d 519 (1984) 8

State v. Bustos,
2015 WL 3623640 (Ariz. App. June 9, 2015), *rev'd* Oct. 8, 2015 9

State v. Jessup,
2015 WL 1605349 (Ariz. App. Apr. 9, 2015), *rev'd* Oct. 27, 2015 9

State v. Purcell,
18 P.3d 113 (Ariz. App. 2001) 3, 4

State v. Purcell,
No. 1 CA–CR 13–0614 PRPC, 2015 WL 2453192 (Ariz. App. May 21, 2015) 1, 5

State v. Rojas,
2015 WL 632135 (Ariz. App. Feb. 12, 2015), *rev'd* July 1, 2015 9

State v. Rue,
2015 WL 707022 (Ariz. App. Feb. 12, 2015) , *rev'd* July 1, 2015 9

State v. Shrum,
203 P.3d 1175 (Ariz. 2009) 2

State v. Valencia,
No. 2 CA-CR 2015-0151-PR, 2016 WL 1203414 (Ariz. Ct. App. Mar. 28, 2016) 8, 9

State v. Vera,
334 P.3d 754 (Ariz. App. 2014) 7

State v. Wagner,
2015 WL 1395226 (Ariz. App. Mar. 26, 2015), *rev'd* Oct. 27, 2015 9

STATUTES

28 U.S.C. § 1257(a) 1

A.R.S. § 13–703(A) (1998) 1, 5, 6

A.R.S. § 13-1105 1
A.R.S. § 13–703(B) 3
A.R.S. § 13–703(B) (1998) 1
A.R.S. § 13–703(E) (1998) 2
A.R.S. § 13–703(E) and (G) 4
A.R.S. § 13–716 6
A.R.S. 13–703(G) (1998) 2

RULES

Ariz. R. Crim. P. 32 4
Ariz. R. Crim. P. 32.1 2
Ariz. R. Crim. P. 32.1(a) 4, 5
Ariz. R. Crim. P. 32.1(d), (e), (f), (g) or (h) 3
Ariz. R. Crim. P. 32.1(e) 4, 5
Ariz. R. Crim. P. 32.1(g) 4, 5
Ariz. R. Crim. P. 32.2 2
Ariz. R. Crim. P. 32.4 3
Ariz. R. Crim. P. 32.4(a) 5
U.S. Sup. Ct. R. 10 ..... 1, 6
U.S. Sup. Ct. R. 10(b), (c) 6
U.S. Sup. Ct. R. 13(1), (3) 1

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VIII 5, 6, 7
U.S. Const. art. III, § 2 1

DECISION BELOW

In an unpublished memorandum decision issued on May 21, 2015, the Arizona Court of Appeals denied Petitioner's claim for post-conviction relief. *See State v. Purcell,* No. 1 CA–CR 13–0614 PRPC, 2015 WL 2453192 (Ariz. App. May 21, 2015). (Petitioner's Appendix A-1.) On January 5, 2016, the Arizona Supreme Court summarily denied further review. (Petitioner's Appendix A-76.)

STATEMENT OF JURISDICTION

Petitioner timely filed the instant Petition for Writ of Certiorari within 90 days of the Arizona Supreme Court's order denying review. *See* U.S. SUP. CT. R. 13(1), (3). This Court has jurisdiction under Article III, Section § 2 of the United States Constitution; 28 U.S.C. § 1257(a); and Rule 10 of the Rules of the United States Supreme Court.

PROVISIONS INVOLVED

A.R.S. § 13–703(A) (1998) provides:

> A person guilty of first degree murder as defined in § 13-1105 shall suffer death or imprisonment in the custody of the state department of corrections for life as determined and in accordance with the procedures provided in subsections B through G of this section. If the court imposes a life sentence, the court may order that the defendant not be released on any basis for the remainder of the defendant's natural life. An order sentencing the defendant to natural life is not subject to commutation or parole, work furlough or work release. If the court does not sentence the defendant to natural life, the defendant shall not be released on any basis until the completion of the service of twenty-five calendar years if the victim was fifteen or more years of age and thirty-five years if the victim was under fifteen years of age.

A.R.S. § 13–703(B) (1998) provides:

> When a defendant is found guilty of or pleads guilty to first degree murder as defined in § 13-1105, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge in the event of the death, resignation, incapacity or disqualification of the judge who presided at the trial or before whom the guilty plea was entered, shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances included in subsections F and G of this section, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone. The court alone shall make all factual

determinations required by this section or the constitution of the United States or this state.

A.R.S. § 13–703(E) (1998) provides:

In determining whether to impose a sentence of death or life imprisonment, the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

A.R.S. 13–703(G) (1998) provides:

Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.
2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.
3. The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.
4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.
5. The defendant's age.

Rule 32.1, Ariz. R. Crim. P., Scope of Post-Conviction Remedy:

Subject to the limitations of Rule 32.2, any person who has been convicted of, or sentenced for, a criminal offense may, without payment of any fee, institute a proceeding to secure appropriate relief .

* * *

Grounds for relief are:

* * *

(g) There has been a significant change in the law that if determined to apply to defendant's case . . . would probably overturn the defendant's conviction or sentence.[1]

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1. For purposes of this rule, the Arizona Supreme Court has construed "a significant change in the law" as requiring "some transformative event," "a clear break from the past." *State v. Shrum*, 203 P.3d 1175, 1178 (Ariz. 2009),

Rule 32.4, Ariz. R. Crim. P., **Commencement of Post-Conviction Proceedings:**

> (a) Form, Filing and Service of Petition. A proceeding is commenced by timely filing a notice of post-conviction relief with the court in which the conviction occurred.... In all other non-capital cases, the notice must be filed within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the order and mandate in the direct appeal, whichever is the later. ... Any notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h).

STATEMENT OF THE CASE

The following facts are taken from the Arizona Court of Appeals opinion in *State v. Purcell,* 18 P.3d 113 (Ariz. App. 2001).

> On the evening of June 6, 1998, Purcell was a passenger in a vehicle when it passed a group of young people. Purcell, a member of the Westside Phoeniquera street gang, flashed a gang sign, whereupon several of these teenagers waved. Apparently believing, though, that they had flashed the sign of a rival gang, Purcell told the driver of the car to stop. When the driver obeyed, Purcell got out of the vehicle, carrying a sawed-off shotgun, yelled "Westside Phoeniquera" to the group, fired one shot, got back in the car and told the driver to leave. The shot killed two of the teenagers and injured a third.
>
> Arrested two days later, Purcell admitted firing the shot. He was charged with two counts of first-degree (premeditated) murder, class 1 felonies, nine counts of attempted first-degree murder, class 2 felonies, aggravated assault, a class 3 felony, and misconduct involving weapons, a class 4 felony. All but the misconduct were charged as dangerous offenses, and the State gave notice that it intended to seek the death penalty.
>
> At trial, Purcell admitted that he had fired the shot. The only issues were whether he had intended to kill anyone and whether he had committed the act with premeditation.
>
> Purcell was found by a jury to be guilty as charged.

Id. at 116, ¶¶ 2–5.

Because the State alleged the death penalty, an aggravation/mitigation hearing was held pursuant to A.R.S. § 13–703(B) on September 10, 1999. (State's Appendix A.) Three of Petitioner's family members and a former "boot camp" social worker/counselor spoke about Petitioner's family background and personal characteristics. (*Id.* at A-22–A-50.) Dr. Phillip Esplin, a psychologist,

testified on Petitioner's behalf, having reviewed Petitioner's prior psychological evaluations, counseling records, school records, and juvenile court dispositions. (*Id.* at A-51–A-66.) Defense counsel submitted a report prepared by a mitigation specialist, along with a sentencing memorandum and an "amicus brief" filed by Amnesty International. (*Id.* at A-66–A-68.) Defense counsel vigorously urged the trial court to impose the least onerous sentence of life imprisonment. (*Id.* at A-77–A-79.)

At the sentencing hearing held on September 17, 1999, the trial court considered both statutory and non-statutory mitigating factors pursuant to A.R.S. § 13–703(E) and (G), including but not limited to, Petitioner's age of 17 years, lack of family support, and amenability to rehabilitation based on the opinions of four experts. (State's Appendix B at A-89–A92.) Based on all of the information presented at trial and at sentencing, the trial court declined to impose the death penalty and, in its discretion, sentenced Petitioner to two consecutive natural life terms in prison on the first-degree murder convictions. (*Id.* at A-94.)

On direct appeal, the Arizona Court of Appeals affirmed all of the convictions and all but one of the sentences, remanding the conviction for misconduct involving weapons for resentencing. *Purcell,* 18 P.3d at 124, ¶ 37. The Arizona Supreme Court summarily denied review on October 3, 2001. The court of appeals filed its mandate on November 1, 2001.

Thirteen years after the mandate issued, Petitioner acting *pro* se initiated a post-conviction relief ("PCR") proceeding by filing an untimely PCR petition pursuant to Rule 32 of the Arizona Rules of Criminal Procedure in June 2013. He raised three claims for relief: under Rule 32.1(a), he claimed that he received ineffective assistance of counsel; under Rule 32.1(e), he claimed to have "newly discovered" facts that may have impacted his sentence; and under Rule 32.1(g), he claimed that *Miller* was a significant change in the law that if determined to apply to his case would probably

overturn his sentence. (Petitioner's Appendix A-9.) On July 8, 2013, the trial court summarily dismissed Petitioner's untimely PCR proceeding, finding that Petitioner's ineffective assistance of counsel claim under Rule 32.1(a) was time barred under Rule 32.4(a); that Petitioner's alleged "newly discovered" facts failed to state a colorable claim for relief under Rule 32.1(e); and that he was not entitled to relief under Rule 32.1(g) because *Miller* did not apply to him since his "sentence of natural life was not statutorily mandated." (Petitioner's Appendix A-4–A-5.) On August 1, 2013, the trial court denied a motion for reconsideration on his Rule 32.1(g) *Miller* claim. (Petitioner's Appendix A-7–A-8.)

Petitioner sought review of the trial court's ruling by filing a petition for review by the Arizona Court of Appeals. (*Id.* at A-39.) By memorandum decision, the court of appeals granted review but denied relief. *State v. Purcell,* No. 1 CA–CR 13–0614 PRPC, 2015 WL 2453192 (Ariz. App. May 21, 2015) (*Id.* at A-1.) Although the court of appeals assumed *arguendo* that *Miller* applied retroactively, it nevertheless denied relief. The court of appeals stated:

> *Miller* prohibits mandatory life sentences without the possibility of parole for juvenile offenders. [132 S. Ct.] at 2460. **Purcell's sentences to natural life were not mandatory.** The trial court knew it had the option to sentence Purcell to natural life or life with a possibility of parole after twenty-five years' imprisonment. Ariz.Rev.Stat. (A.R.S.) § 13–703(A) (1998).

(*Id.* at A-3, ¶ 4) (Emphasis added.)

The court of appeals declined Petitioner's invitation to review his sentence under Eighth Amendment jurisprudence because Petitioner failed to raise that claim in the trial court. (*Id.* at ¶ 5.) Moreover, even if Petitioner had raised a free-standing constitutional claim under Rule 32.1(a) in the trial court, that claim was procedurally time barred under Rule 32.4(a).

On January 5, 2016, the Arizona Supreme Court summarily denied further review. (*Id.* at A-76.)

REASONS FOR DENYING THE WRIT

Certiorari review "is not a matter of right, but of judicial discretion." U.S. Sup. Ct. R. 10. Accordingly, this Court grants certiorari "only for compelling reasons," including that a "state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals," has decided an important and unsettled question of federal law, or has decided an important federal question in a manner that conflicts with this Court's precedent. U.S. Sup. Ct. R. 10(b), (c).

I. PETITIONER CANNOT ESTABLISH THAT HE IS ENTITLED TO REVIEW UNDER *MILLER* AND *MONTGOMERY* BECAUSE UNDER ARIZONA LAW HIS NATURAL LIFE SENTENCES WERE NOT MANDATORY.

In *Miller*, this Court held "that the Eighth Amendment forbids a sentencing scheme that **mandates** life in prison without possibility of parole for juvenile offenders." 132 S. Ct. at 2469 (Emphasis added). This Court explicitly declined to consider an argument that "the Eighth Amendment requires a categorical bar on life without parole sentences for juveniles." *Id.*

In *Montgomery*, this Court held that *Miller*'s prohibition on **mandatory** life without parole sentences for juvenile offenders announced a new substantive rule that is retroactive in cases on collateral review. 136 S. Ct. at 732.

When Petitioner murdered his two victims in 1998, A.R.S. § 13–703(A) then in effect provided three[2] sentencing options for first-degree murder: death, natural life without the possibility

2. While the statute itself provided three sentencing options—death, natural life, or life—any person under the age of 18 became ineligible for the death penalty after the United States Supreme Court issued its opinion in *Roper v. Simmons*, 543 U.S. 551 (2005), which categorically barred the death penalty for juvenile offenders.

of parole, or life with the possibility of parole upon completion of service of 25 calendar years.[3] At that time, as now, Arizona's sentencing scheme required the trial court to consider statutory aggravating factors and both statutory and non-statutory mitigating factors—including but not limited to such factors as the defendant's age and any aspect of the defendant's character, propensities or record, as well as any of the circumstances of the offense—before exercising its discretion to choose one of the two available sentencing options. Because a natural life sentence for juvenile homicide offenders was not mandatory, and because the trial court was already required to consider mitigating factors, including age and its attendant circumstances, *Miller*'s prohibition against mandatory life without parole sentences simply does not apply to Arizona law. Moreover, Arizona's statutory sentencing scheme required the trial court to conduct sentencing hearings and to consider individualized mitigating factors, a procedure that goes beyond that required by *Miller*. See *Montgomery*, 136 S. Ct at 735 (acknowledging that Miller does not require trial courts to make a finding of fact regarding a child's incorrigibility, and leaving to the States the task of developing "attendant procedural requirement[s].)"

Petitioner's arguments rest on the fatally flawed premise that *Miller* and *Montgomery* apply to discretionary sentencing schemes, such as Arizona's. To the contrary, *Miller*'s prohibition on life without parole sentences is limited to those that are mandatorily imposed on juveniles under state law. And that conclusion is clear from *Miller*'s reasoning. After revisiting *Roper* and *Graham v. Florida*, 560 U.S. 48, 68 (2010), this Court stated in *Miller* that "[s]uch mandatory penalties, **by their nature**, preclude a sentencer from taking account of an offender's age and the wealth of

3. Although the Arizona Legislature had abolished parole for offenses committed after January 1, 1994, in 2014 it enacted A.R.S. § 13–716 which provides for parole eligibility for juvenile offenders sentenced to life after serving a minimum number of calendar years, without regard to the date the offense was committed. *State v. Vera*, 334 P.3d 754, 756–61 (Ariz. App. 2014).

characteristics and circumstances attendant to it" and, thus held that the Eight Amendment forbids such mandatory sentencing schemes. 132 S. Ct. at 2467, 2469. In *Montgomery*, the only substantive question before this Court was whether *Miller*'s prohibition on mandatory life without parole sentences for juvenile offenders announced a new substantive rule that applies retroactively to final convictions, which this Court answered in the affirmative. 132 S. Ct. at 732. "Giving *Miller* retroactive effect," this Court explained, "does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received **mandatory** life without parole." *Id.* at 736 (emphasis added.) Thus, it is clear that *Montgomery* did not expand *Miller*'s rule to encompass discretionary sentencing schemes, which, **by *their* nature**, require a sentencer to take account of an offender's age and the wealth of characteristics and circumstances attendant to it.

Because neither *Miller* nor *Montgomery* apply to Arizona's discretionary sentencing scheme applicable to juvenile homicide offenders, Petitioner has failed to show a compelling reason for this Court to grant certiorari.

II. THE ARIZONA SUPREME COURT HAS REPEATEDLY DECLINED REVIEW OF LOWER COURT DECISIONS CORRECTLY FINDING THAT *MILLER* DOES NOT APPLY TO ARIZONA'S DISCRETIONARY SENTENCING SCHEME.

Petitioner's reliance on the recent Arizona Court of Appeals' decision in *State v. Valencia*, No. 2 CA-CR 2015-0151-PR, 2016 WL 1203414 (Ariz. Ct. App. Mar. 28, 2016) is unavailing. (Petition at 12–14.) *Montgomery* did not expand *Miller* to encompass non-mandatory discretionarily-imposed natural life sentences, so the fact that *Miller* now applies retroactively on collateral review is of no consequence in Arizona because Arizona law does not mandate *any* particular sentence for a first-degree murder conviction for juvenile offenders. While States are entitled to offer broader protections than that which is required under the federal constitution (*see, e.g., State v. Bolt*, 689 P.2d

519, 524 (1984) (holding that as a matter of state law officers may not make a warrantless entry of a home in the absence of exigent circumstances or other necessity)), the Arizona Supreme Court has not extended *Miller* to Arizona's discretionary sentencing scheme.[4] Thus, the court of appeals' decision in *Valencia*, applying *Montgomery* to Arizona's discretionary sentencing scheme, constitutes an error of law and is subject to reversal by the Arizona Supreme Court. In fact, on May 27, 2016, the State filed its petition for review by the Arizona Supreme Court challenging that decision. Since the Arizona Supreme Court has had ample opportunity to apply *Miller* to Arizona law—but has declined review in every case presented to it, as it did in Petitioner's case—the likelihood of success on the merits of the State's petition for review is substantial. Petitioner's reliance on that wrongly-decided case is not a compelling reason for this Court to grant certiorari.

4 *See, e.g., State v. Rue*, 2015 WL 707022 (Ariz. App. Feb. 12, 2015), *rev'd* July 1, 2015; *State v. Rojas*, 2015 WL 632135 (Ariz. App. Feb. 12, 2015), *rev'd* July 1, 2015; *State v. Wagner*, 2015 WL 1395226 (Ariz. App. Mar. 26, 2015), *rev'd* Oct. 27, 2015; *State v. Jessup*, 2015 WL 1605349 (Ariz. App. Apr. 9, 2015), *rev'd* Oct. 27, 2015; and *State v. Bustos*, 2015 WL 3623640 (Ariz. App. June 9, 2015), *rev'd* Oct. 8, 2015.

CONCLUSION

Based on the foregoing authorities and arguments, Respondent respectfully requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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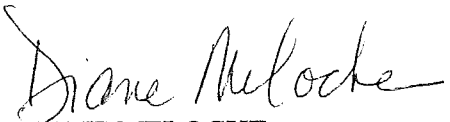

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