No. 15-8850

IN THE SUPREME COURT OF THE UNITED STATES

BOBBY JERRY TATUM, Petitioner

vs.

STATE OF ARIZONA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

For one straightforward reason, the state urges this Court not to grant Mr. Tatum's petition for certiorari. The state contends that *Miller v. Alabama*, 132 S. Ct. 2455 (2012), held that sentences of life without parole imposed on juveniles who commit homicide offenses violate the Eighth Amendment only when those sentences are the product of a mandatory sentencing scheme, and Arizona does not have a mandatory scheme. However the state's asserted reason for denying Mr. Tatum's petition for certiorari ignores the reasoning behind the holding in *Miller*, and conflicts with the decisions of 17 state courts of last resort. The state's presentation not only fails to acknowledge this conflict, but even goes so far as to predict that the Arizona Supreme Court will agree with its reading of *Miller*. The state's presentation thus confirms that Arizona is an outlier. Accordingly, an opinion from this Court—either a *per curiam* opinion or one that follows after full briefing and oral argument—would help the Arizona align its interpretation of *Miller* with this Court's constitutional rules involving juvenile sentencing.

ARGUMENT IN REPLY

1. The state's position that *Miller* does not apply to Arizona generally, or to people like Mr. Tatum, directly contradicts both *Miller* itself and the decisions of 17 other state courts of last resort.

Miller established one clear principle—before imposing a sentence of life without parole on a juvenile homicide offender, a sentencing judge must make an individualized inquiry to determine whether life without parole is an appropriate punishment because the crime reflects "irreparable corruption" or "permanent

incorrigibility." *Montgomery*, 136 S. Ct. at 734 (citing *Miller*, 132 S. Ct. at 2469). This principle explains why the mandatory sentencing schemes involved in *Miller* violated the Eighth Amendment, because a mandatory sentencing scheme forbids the sentencing judge from conducting this individualized inquiry as a matter of law. *See Miller*, 132 S. Ct. at 2466. This principle is also the central premise of Mr. Tatum's petition for certiorari. Because the sentencing judge did not explain on the record that Mr. Tatum's crime reflected permanent incorrigibility before he imposed a life-without-parole sentence, Mr. Tatum's sentence is unconstitutional. By pointing to the discretion that was available to the sentencing judge and then saying that *Miller* does not apply to Mr. Tatum's sentence, the state fails to meaningfully engage with the important questions that Mr. Tatum (along with six other Arizona state prisoners)[1] has presented to this Court for review.

The state points to a statute enacted by the Arizona legislature in the wake of *Miller*, but that statute provides no relief to Mr. Tatum. In 1993, the Arizona legislature abolished its parole scheme for any crime committed after January 1, 1994. *See* Ariz. Rev. Stat. § 41-1604.09(I)(1). In 2014, in the wake of *Miller*, the Arizona legislature allowed juveniles who had received a life sentence that expressly allowed for the possibility of parole after a certain number of years to have a parole hearing, notwithstanding the 1993 decision to abolish Arizona's parole scheme. *See* Ariz. Rev. Stat. § 13-716. Whether or not the enactment of § 13-

[1] Those other prisoners who are presently before this Court are Bobby Purcell, No. 15-8842; William Najar, No. 15-8878; Jonathan Arias, No. 15-9044; Scott DeShaw, No. 15-9057; Eulandas Flowers, No. 15-9134; and Travis Amaral, No. 15-9187.

716 is an adequate remedy under *Miller* in light of Arizona's abolition of parole, *cf. State v. Vera*, 334 P.3d 754 (Ariz. Ct. App. 2014), it is not an adequate remedy for Mr. Tatum, because § 13-716 does not cover him.

Indeed, the fact that the Arizona legislature had to enact § 13-716 in an effort to comply with *Miller* undermines the state's suggestion that *Miller* does not apply to Arizona. If *Miller* does not apply to Arizona, then the state legislature would not have needed to spend any time in passing § 13-716. In *Vera* the Arizona Court of Appeals said that *without* § 13-716, imposing a sentence of life with the possibility of parole after 25 years would have violated *Miller* because of the 1993 decision to abolish parole. *See* 334 P.3d at 758–59; *see also State v. Randles*, 334 P.3d 750, 752–53 (Ariz. Ct. App. 2014). So even Arizona's state courts recognize that *Miller* affects Arizona's juvenile homicide sentencing scheme.

In his petition, Mr. Tatum showed how, in the wake of *Montgomery*, lower state and federal courts have been applying *Miller*'s individualized-consideration principle to situations where a sentencing judge has discretion to impose a life-without-parole sentence. The state does not directly address this showing, which goes to one of this Court's usual criteria for granting certiorari. *See* Supt. Ct. R. 10(b).

Instead, the state points to all of the times that the Arizona Supreme Court declined discretionary review of a decision to affirm the denial of a *Miller* claim brought by a juvenile offender who is serving a sentence of life without parole, and then suggests *sub silentio* that this means that the Arizona Supreme Court

correctly rejected each of those claims. But the Arizona Supreme Court's "denial of review does not mean that [it] accepted the Court of Appeals' legal analysis or conclusion in those cases." *Calvert v. Farmers Ins. Co. of Ariz.*, 697 P.2d 684, 690 n.5 (Ariz. 1985). And this rejoinder fails to address those 17 state-court decisions that read *Miller* to require individualized consideration before imposing a life-without-parole sentence on a juvenile homicide offender.[2] Just today, in fact, the Florida Supreme Court explained that even under a mandatory sentencing regime, a *Miller* violation "emanates from the United States Supreme Court's command that because children are 'constitutionally different,' the Eighth Amendment requires that sentencing of juvenile offenders be individualized in order to separate the 'rare' juvenile offender whose crime reflects 'irreparable corruption,' from the juvenile offender whose crime reflects 'transient immaturity.'"[3]

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[2] *See Ex parte Henderson*, 144 So. 3d 1262, 1283–84 (Ala. 2013); *Kelley v. Gordon*, 465 S.W.3d 842, 846 (Ark. 2015); *People v. Gutierrez*, 324 P.3d 245, 268–69 (Cal. 2014); *State v. Riley*, 110 A.3d 1205, 1217–18 (Conn. 2013); *Falcon v. State*, 162 So. 3d 954, 963 (Fla. 2015); *Veal v. State*, 784 S.E.2d 203 (Ga. 2016); *People v. Davis*, 6 N.E.3d 709, 723 (Ill. 2014); *Conley v. State*, 972 N.E.2d 864, 875, 877–79 (Ind. 2012) (holding that a 30-page sentencing statement that "detailed and explained its rationale for awarding weight, or affording no weight, to each and every mitigating circumstance proffered" complied with *Miller*); *State v. Null*, 836 N.W.2d 41 (Iowa 2013); *Jones v. State*, 122 So. 3d 698, 703 (Miss. 2013); *State v. Hart*, 404 S.W.3d 232, 238–43 (Mo. 2013); *State v. Mantich*, 842 N.W.2d 716, 732 (Neb. 2014); *State v. Long*, 8 N.E.3d 890, 898–99 (Ohio 2014); *Commonwealth v. Batts*, 66 A.3d 286, 293–97 (Pa. 2013); *Aiken v. Byars*, 765 S.E.2d 572 (S.C. 2014); *Ex parte Maxwell*, 424 S.W.3d 66, 75–76 (Tex. Crim. App. 2014); *Bear Cloud v. State*, 294 P.3d 36, 47–48 (Wyo. 2013).

[3] *Landrum v. State*, No. SC15-1071, slip op. at 16–17 (Fla. Jun. 9, 2016) (quoting first *Miller*, 132 S. Ct. at 2464, and then *Montgomery*, 136 S. Ct. at 734), *available at* <http://www.floridasupremecourt.org/decisions/2016/sc15-1071.pdf>.

The upshot is this—if the state's characterization of the Arizona Supreme Court's treatment of *Miller* claims is correct, then Arizona is an outlier in implementing the dictates of *Miller* and *Montgomery*. This Court accordingly should step in to put Arizona on the proper constitutional path.

2. This Court should intervene now in order to give guidance to the Arizona Supreme Court as it considers the issues presented in this case, because the state predicts that the Arizona Supreme Court will take a minority position that is contrary to the reasoning in *Miller*.

The state also asks this Court to deny Mr. Tatum's petition for certiorari because it disagrees with the outcome in *State v. Valencia*, Nos. 2 CA-CR 2015-0151-PR, 2 CA-CR 2015-0182-PR, 2016 WL 1203414 (Ariz. Ct. App. Mar. 28, 2016). In *Valencia*, another panel of the Arizona Court of Appeals issued a published opinion in which it granted relief under *Miller* and *Montgomery* and ordered new sentencing hearings in two consolidated cases. The state has sought discretionary review of the *Valencia* decision in the Arizona Supreme Court, and predicts not only that review will be granted but that the decision will be reversed because *Miller* does not apply to Arizona's discretionary sentencing scheme. Thus the state appears to concede that whether an Arizona sentencing judge must make an individualized determination before imposing a sentence of life without parole on a juvenile offender is a recurring issue of statewide importance. *See State v. Romero*, 365 P.3d 358, 361 (Ariz. 2016) (explaining that the court granted review to address "a recurring issue of statewide importance").

But by limiting its focus to what it sees as the correctness of the Arizona Supreme Court's approach, the state overlooks that this case in fact presents a

recurring issue of *national* importance. Just over two weeks ago, Justices Alito and Sotomayor issued concurring opinions with respect to the GVR orders in seven Alabama cases, including *Adams v. Alabama*, No. 15-6289, in which they disputed whether the decision to impose a death sentence was the functional equivalent of the individualized consideration required by *Miller* and *Montgomery* as a prelude to a life-without-parole sentence.[4] In the wake of the separate statements in *Adams*, there is no longer any doubt that the questions that Mr. Tatum has presented to this Court for review are important federal questions that this Court should step in and settle in the wake of *Miller* and *Montgomery*.

On an issue of national importance, the state has predicted that the Arizona Supreme Court will take a minority view that rejects this Court's reasoning in *Miller* and conflicts with how 17 other state courts of last resort have read *Miller*. In light of the state's presentation, this Court should issue an opinion—either a *per curiam* opinion that grants, vacates, and remands this case, or an opinion that follows after full briefing and argument—that gives explicit guidance to the Arizona Supreme Court about how to apply *Miller*.

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[4] *Compare Adams v. Alabama*, No. 15-6289, 2016 WL 2945697, at *1 (U.S. May 23, 2016) (Alito, J., concurring with GVR in light of *Montgomery*) ("In cases like this, it can be argued that the original [capital] sentencing jury fulfilled the individualized sentencing requirement that *Miller* subsequently imposed."), *with id.* at *4 (Sotomayor, J., concurring with GVR in light of *Montgomery*) ("That petitioners were once given a death sentence we now know to be constitutionally unacceptable tells us nothing about whether their current life-without-parole sentences are constitutionally acceptable. I see no shortcut: On remand, the lower courts must instead ask the difficult but essential question whether petitioners are among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'") (quoting *Montgomery*, 136 S. Ct. at 734).

CONCLUSION

The petition for writ of certiorari should be granted, the decision of the Arizona Court of Appeals should be vacated, and this case should be remanded for further proceedings in light of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). In the alternative, the Court should grant certiorari and order full briefing and argument.

Respectfully submitted: June 9, 2016.

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