No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

ALFREDO P. GALINDO,

Petitioner,

v.

BRAD CAIN, Superintendent,
Snake River Correctional Institution,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether petitioner's claim that his 300-month sentence violates his Eighth Amendment right to be free from cruel and unusual punishment meets the statutory requirement for the issuance of a certificate of appealability under 28 U.S.C. § 2253(c)(2).

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On Petition For Writ Of Certiorari To

The United States Court Of Appeals

For The Ninth Circuit

The petitioner, Alfredo P. Galindo, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 19th, 2019.

OPINIONS BELOW

The United States District Court for the District of Oregon denied Petitioner's petition for writ of habeas corpus on July 1, 2019. The District Court declined to issue a certificate of appealability. Appendix B. Petitioner timely filed a notice of appeal seeking a certificate of appealability from the United States Court of Appeals for the Ninth Circuit. CR 53. On December 19th, 2019, the United States Court of Appeals for the Ninth Circuit denied a certificate of appealability. Appendix A.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

28 U.S.C. § 2253(c) provides, in relevant part, that:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . . .
>
> (2) A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2254(d) provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted

> with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. Trial Court Proceedings.

In 2010, Petitioner was found guilty, after an Oregon jury trial at which the jury was instructed that only ten jurors need agree to convict, on charges of first-degree sodomy and sexual abuse.

The sentencing court did not delay or hold a separate sentencing hearing, obtain any pre-sentencing report or submissions from the parties, hear argument or objection from defense counsel, nor was there any allocution by Petitioner. The entire sentencing spanned less than a transcript page.

As soon as the court excused the jury, the court said: "What about sentencing?" CR 26-2 at 71. The prosecutor replied, "The State's prepared to proceed, Your Honor." *Id.*

Defense counsel then stated: "Yes, Your Honor. I think the sentence is mandatory in this case." *Id.* However, under the Oregon Supreme Court's decision

in *State v. Rodriguez/Buck*, 347 Or. 46, 217 P.3d 659 (2009), the sentence was not necessarily mandatory.

When the prosecutor explained she was requesting a term of 300 months on the sodomy count, the court asked: "And where do you come up with the 300?" The State responded: "It's the Jessica's Law that was added in 2006 to Ballot Measure 11." *Id.* The State then finished explaining for the record the sentence it was requesting, and the court remarked: "Eighty-seven years old.[1] *Id.*

B. Direct Appeal Proceedings.

Petitioner appealed, challenging his 300-month sentence as plain error under both the state and federal constitutions. *Id.* at 84. The Oregon Court of Appeals affirmed without opinion. *Id.* at 127. Petitioner then filed a petitioner for review by the Oregon Supreme Court, but that court denied review. *Id.* at 114-125.

C. Federal Habeas Corpus Proceedings.

In his petition for a writ of federal habeas corpus, Petitioner claimed, in part, that the trial court violated his Eighth Amendment right to be free from cruel and unusual punishment when it imposed a 300-month sentence. CR 17.

[1] Petitioner was sixty-two years old at the time of trial, so the Court's statement reflects the age he would be upon release from the twenty-five-year term.

On July 1, 2019, the District Court for the District of Oregon denied Petitioner's petition, finding that his Eighth Amendment claim is without merit. Appendix B. On July 2, 2019, Petitioner filed a Notice of Appeal. CR 53.

On December 19th, 2019, the United States Court of Appeals for the Ninth Circuit issued an order of two Circuit Judges denying a certificate of appealability, concluding that Petitioner had "not shown that 'jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right . . . .'" Appendix A.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ of certiorari because the Ninth Circuit's decision conflicts with this Court's guidance in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), and related precedent regarding when a certificate of appealability should issue from a district court's denial of habeas relief.

A. The Certificate of Appealability Standard.

To obtain a certificate of appealability, a habeas petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the petitioner need not demonstrate that he would prevail on the merits. Rather, he "must 'sho[w] reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to

proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)) (alteration in *Miller-El*)).

A certificate of appealability "does not require a showing that the appeal will succeed." *Miller-El*, 537 U.S. at 337. As this Court has explained: "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id*. at 338. In *Slack v. McDaniel*, this Court held that:

> [W]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

529 U.S. at 478.

B. Reasonable Jurists Could Debate Or, For That Matter, Agree that Relief Is Appropriate On Petitioner's Eighth Amendment Claim.

Petitioner's Eighth Amendment claim meets the standard for a certificate of appealability because it is at least "debatable amongst jurists of reason" whether his

300-month sentence was cruel and unusual such that he is entitled to habeas relief. *Miller-El*, 537 U.S. at 336 (quotation marks omitted).

The Eighth Amendment, which applies to the States by virtue of the Fourteenth Amendment, *Robinson v. California*, 370 U.S. 660 (1962), forbids the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. The Eighth Amendment encompasses a "proportionality principle" that applies in cases such as this one. *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991) (Kennedy, J., concurring) ("The Eighth Amendment proportionality principle also applies to noncapital sentences."). As explained in Justice Kennedy's concurrence in *Harmelin*, joined by Justices O'Connor and Souter, there are some tensions in the Supreme Court's precedent in this area, but, "despite these tensions, close analysis of our decisions yields some common principles that give content to the uses and limits of proportionality review." *Harmelin*, 501 U.S. at 997.

Specifically, it is "clearly established" for purposes of section 2254(d)(1) that "[a] gross disproportionality principle is applicable to sentences for terms of years." *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003) ("Through this thicket of Eighth Amendment jurisprudence, one governing legal principle emerges as 'clearly established' under § 2254(d)(1): A gross disproportionality principle is applicable to sentences for terms of years."); *see Solem v. Helm*, 463 U.S. 277, 284-87 (1983)

(noting proportionality principle ingrained in common-law jurisprudence dating back to the Magna Carta and explicitly recognized by the Supreme Court for a century) (citing *Weems v. United States*, 217 U.S. 349 (1910)).

For example, in *Solem*, this Court held that a sentence of life without the possibility of parole imposed pursuant to South Dakota's recidivist statute was "significantly disproportionate" to the triggering crime of uttering a "no account" check for $100. 463 U.S. at 281, 303. This Court thus affirmed the Eighth Circuit's grant of a writ of habeas corpus. *Id.* at 303.

Analysis under this clearly established principle demonstrates that the imposition of a 300-month sentence is grossly disproportionate to Petitioner's conduct, as found by the jury. A number of jurisdictions, including Oregon, enacted various mandatory Jessica's Law punishments for sexual offenses against children following the originally enacted Jessica's Law in Florida. However, although the offense for which the 300-month sentence was imposed in this case is serious, that penalty is significantly harsher than the sentences imposed for other serious crimes in Oregon. For example, the presumptive minimum punishment for the crimes of manslaughter in the first degree, attempted aggravated murder, and solicitation of or conspiracy to commit aggravated murder, is 120 months. ORS 137.700(2)(a)(E), (C). That is a much less severe penalty than the 300-month term imposed in

Petitioner's case. In fact, Petitioner received the same sentence that an individual convicted of murder in the second degree would receive in Oregon. ORS 137.700(2)(a)(A). Thus, the 300-month sentence imposed in Petitioner's case is grossly disproportionate to the offense of conviction.

When a state court has adjudicated a claim on the merits, the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), allows a federal court to grant a writ of habeas corpus when a state court ruling "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(l). If the state court made an unreasonable determination of the facts in light of the evidence presented, habeas relief is also available. 28 U.S.C. § 2254(d)(2). The district court applied the AEDPA standard to Petitioner's claim. Appendix B at 15.

The AEDPA standard is satisfied because the state appellate court's unreasoned affirmation of the imposition of the 300-month sentence was contrary to the Supreme Court's decisions in *Lockyer*, *Solem*, and *Harmelin*, and, to the extent it can be said to have applied those decisions, it was also an unreasonable application thereof. *See also Gonzalez v. Duncan*, 551 F.3d 875 (9th Cir. 2008) (granting habeas corpus relief because imposition of 28 years to life in prison under California's

"three strikes" law for a technical violation of California's sex offender registration law was unconstitutionally disproportionate); *Ramirez v. Castro*, 365 F.3d 755 (9th Cir. 2004) (affirming grant of habeas relief based on finding that sentence of 20 years to life for shoplifting was unconstitutionally disproportionate). Because reasonable jurists could debate, or, for that matter, agree that relief is appropriate on Petitioner's Eighth Amendment claim, the Ninth Circuit's order denying Petitioner's request for a certificate of appealability is contrary to this Court's decision in *Miller-El v. Cockrell*.

C. This Court Should Summarily Reverse The Ninth Circuit's Order.

This Court has authority to "reverse any judgment" brought before it and "remand the cause and direct entry of such appropriate judgment . . . or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106. Summary reversals are "usually reserved by this Court for situations in which the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting); *see, e.g., United States v. Bass*, 536 U.S. 862, 864 (2002) (ordering summary reversal because the decision below was "contrary to" established law); *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (ordering summary reversal); *Leavitt v. Jane L.*, 518 U.S. 137, 145 (1996) (ordering summary reversal where the decision

under review was "plainly wrong"). The Ninth Circuit's order denying Petitioner's request for a certificate of appealability is clearly wrong. Petitioner clearly satisfied the standard for a certificate of appealability. This case warrants summary reversal.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted to review the Ninth Circuit's order denying a certificate of appealability in Petitioner's case.

DATED this 18 day of March, 2020.

s/ Nell Brown
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