

No. 22-_____

IN THE
SUPREME COURT OF THE UNITED STATES

Travis Amaral — PETITIONER

(Your Name)

VS.

David Shinn, *et al.* — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Please check the appropriate boxes:

☒ Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

United States District Court for the District of Alabama

☐ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

☐ Petitioner's affidavit or declaration in support of this motion is attached hereto.

☒ Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

☐ The appointment was made under the following provision of law: _____
_____, or

☒ a copy of the order of appointment is appended.

/s/ Jeffrey T. Green

(Signature)

1 JON M. SANDS
Federal Public Defender
2 KEITH J. HILZENDEGER #023685
Assistant Federal Public Defender
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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8 Travis Wade Amaral,

9 Petitioner,

10 vs.

11 Charles L. Ryan, et al.,

12 Respondents.

No. 2:16-cv-594-PHX-JAT (BSB)

**Motion for Appointment of CJA
Counsel Under 18 U.S.C.
§ 3006A(a)(2)(B)**

13 Mr. Amaral is an Arizona state prisoner who is seeking relief from his life sentence under
14 *Miller v. Alabama*, 132 S. Ct. 2455 (2012). He has filed a habeas corpus petition *pro se* (Dkt. #1).
15 This Court has not yet screened his petition or called for a response from the state.

16 On January 25, 2016, the Supreme Court decided *Montgomery v. Louisiana*, 136 S. Ct. 718
17 (2016). The decision in *Montgomery* affects this Court's evaluation of the merits of Mr. Amaral's
18 *Miller* claim, raises the potential for a new defense to that claim based on *Vasquez v. Hillery*, 474
19 U.S. 254 (1986), and does not address how the limitation on relief set forth at 28 U.S.C.
20 § 2254(d) applies to Mr. Amaral's *Miller* claim. The Federal Public Defender has contacted CJA
21 panelist Thomas J. Phalen, Esq., and he is willing to accept appointment to this case if the Court
22 should so order. A proposed form of order is being lodged herewith.

23 "In deciding whether to appoint counsel in a habeas proceeding, the district court must
24 evaluate the likelihood of success on the merits as well as the ability of the petitioner to
25 articulate his claims *pro se* in light of the complexity of the legal issues involved." *Weygandt v.*
26 *Look*, 718 F.2d 952, 954 (9th Cir. 1983). Here, Mr. Amaral can meet both of these criteria.

27 First, Mr. Amaral's *Miller* claim is likely to succeed on the merits. The Arizona Court of
28 Appeals rejected his *Miller* claim because Mr. Amaral was sentenced not to any life term, but

1 instead to an aggregate sentence of 57.5 years to life. (Dkt. #1-5 ECF p.3) This was not, the court
 2 reasoned, the functional equivalent of a life sentence. (Dkt. #1-5 ECF p.3 (citing *State v. Kasic*,
 3 265 P.3d 410, 413–15 (Ariz. Ct. App. 2011)) And even if it were, the court continued, the judge
 4 had discretion to impose concurrent sentences. (Dkt. #1-5 ECF p.3) The sentencing judge took
 5 into account Mr. Amaral’s age and nevertheless chose to impose the sentence it did. (Dkt. #1-5
 6 ECF p.4) Although the Arizona Supreme Court recently issued a published opinion in Mr.
 7 Amaral’s case, *see State v. Amaral*, No. CR 15-0090-PR, 2016 WL 423761 (Ariz. Feb. 4, 2016),
 8 that court expressly declined to address Mr. Amaral’s *Miller* claim.

9 Simply considering Mr. Amaral’s age, standing alone, does not establish that he is one of
 10 the “rarest of juvenile offenders... whose crimes reflect permanent incorrigibility.” *Montgomery*,
 11 136 S. Ct. at 734. *Montgomery* further calls into question the validity of the reasoning in *Bell v.*
 12 *Uribe*, 748 F.3d 857, 869 (9th Cir. 2014), because that case rejected a *Miller* claim based solely
 13 on statutory discretion found in California’s first-degree-murder sentencing scheme, without
 14 regard to *Montgomery*’s permanent-incorrigibility standard.

15 Second, Mr. Amaral will not be able to articulate his claim without the assistance of
 16 counsel, for three reasons:

- 17 • First, Mr. Amaral does not have prior briefing prepared by counsel on which to rely
 18 when defending against the affirmative defenses that the state may assert to defend
 19 against his claims. *Cf. Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012) (explaining that
 20 “‘defendants pursuing first-tier review... are generally ill equipped to represent
 21 themselves’ because they do not have a brief from counsel or an opinion of the court
 22 addressing their claim”) (quoting *Halbert v. Michigan*, 545 U.S. 605, 617 (2005)). In the
 23 wake of *Montgomery*, as applied in the recent decision in *State v. Valencia*, Nos. 2 CA-CR
 24 2015-0151-PR, 2 CA-CR 2015-0182, 2016 WL 1203414 (Ariz. Ct. App. Mar. 28, 2016),
 25 the state has insisted that *Miller* claims are now unexhausted and state prisoners must
 26 return to state court to exhaust *Montgomery* claims. *See Notice of Supplemental*
 27 *Authority, Richard Rojas v. Charles Ryan*, No. 2:15-cv-933-JJT, at 3 (D. Ariz. filed Apr. 8,
 28 2016) (ECF #22). Moreover, Mr. Amaral has no prior briefing on which to rely to argue

1 that the Arizona courts' decision that his sentence is not the functional equivalent of a
 2 life sentence amounts to an unreasonable application of *Miller*, such that this Court may
 3 grant relief under 28 U.S.C. § 2254(d).

- 4 • Second, as an Arizona state prisoner, no legal resources are available to help Mr. Amaral
 5 litigate the procedural issues relating to exhaustion and the limitation on relief under 28
 6 U.S.C. § 2254(d). Department of Corrections policy requires one treatise on
 7 postconviction remedies to be made available in the general library of each prison,¹ with
 8 no provision for extensive, generalized legal research beyond the materials made
 9 available in the prison library. Under these circumstances, Mr. Amaral cannot keep
 10 abreast of developments in this rapidly-changing area of the law—and certainly not in a
 11 manner adequate to meet the state's counseled advocacy against his claim for relief.
- 12 • Third, the paralegal assistance provided by the Department of Corrections is limited to
 13 initial filings, at which stage adversary presentation on procedural defenses is premature.
 14 *Cf. Day v. McDonough*, 547 U.S. 198, 207 n.6 (2006) (pointing out that “information
 15 essential to the time calculation is often absent... until the State has filed, along with its
 16 answer, copies of documents from the state-court proceedings”); *Pliler v. Ford*, 542 U.S.
 17 225, 232 (2004) (“Such calculations [relating to the statute of limitations] depend upon
 18 information contained in documents that do not necessarily accompany [habeas]
 19 petitions.”).

20 Furthermore, apart from Mr. Amaral's ability to litigate on his own behalf, adversary
 21 presentation through counsel would benefit the Court in two ways. First, as a prisoner Mr.
 22 Amaral has no independent access to the state-court record in his case, and the attorney general
 23 has no particular obligation to review the state-court record with a view toward introducing
 24 those parts of the state-court record that an advocate for Mr. Amaral would deem relevant to his
 25 claims. *Cf. R. Governing Sec. 2254 Cases 5(c)* (“The respondent must attach to the answer
 26 parts of the transcript that *the respondent* considers relevant.”) (emphasis added). Appointed
 27

28 ¹ That treatise is Brian Means, *Post-Conviction Remedies*. The policy does not explain how often
 this treatise is updated.

1 counsel would have access to the state-court record and could review it in a light more favorable
 2 to Mr. Amaral. *Cf. Jones v. Wood*, 114 F.3d 1002, 1008 (9th Cir. 1997) (“Where review of the
 3 entire state court record is necessary and the parties have failed to supply the court with that
 4 record, the district court has the duty to obtain that record itself.”). Second, advocacy of Mr.
 5 Amaral’s petition with the assistance of counsel would help this Court to ensure that the
 6 arguments on both sides are fully aired in this case. Those arguments relate not only to the
 7 merits of Mr. Amaral’s *Miller* claim (including how those arguments may be affected by
 8 *Montgomery*), but related questions about whether *Montgomery* may have rendered Mr. Amaral’s
 9 claim unexhausted by fundamentally altering the legal basis of the claim, *see Vasquez v. Hillery*,
 10 474 U.S. 254 (1986), and whether relief is foreclosed under 28 U.S.C. § 2254(d)
 11 notwithstanding the fact that *Miller* is retroactive, *see Greene v. Fisher*, 132 S. Ct. 38 (2012).

12 Moreover, as an incarcerated prisoner, Mr. Amaral is financially eligible for appointment
 13 of counsel. Undersigned counsel has asked Mr. Amaral to fill in and return a financial affidavit,
 14 which will be filed with this Court upon relief.

15 The Federal Public Defender represented Mr. Amaral’s codefendant Gregory Dickens
 16 in his federal habeas proceedings from their inception until his death in 2014. *See* Docket Sheet,
 17 *Gregory Dickens v. Dora Schriro*, No. 2:01-cv-757-PHX-NVW (D. Ariz.). In light of the extensive
 18 nature of the Federal Public Defender’s representation of Mr. Dickens, it is highly likely that
 19 representation of Mr. Amaral would require the Federal Public Defender to take litigation
 20 positions that are materially adverse to Mr. Dickens, thus creating a conflict of interest. *See* Ariz.
 21 R. Prof’l Cond. 1.9(a); *see also* D. Ariz. Civ. R. 83.2(c) (adopting the Arizona Rules of
 22 Professional Conduct for governing the conduct of lawyers before this Court); *Roosevelt*
 23 *Irrigation Dist. v. Salt River Project Agric. Improvement & Power Dist.*, 810 F. Supp. 2d 929, 944
 24 (D. Ariz. 2011) (“The United States District Court for the District of Arizona has adopted the
 25 Arizona Rules of Professional Conduct as its ethical standards.”).

26 For the foregoing reasons, the Federal Public Defender respectfully asks the Court to
 27 appoint CJA panelist Thomas J. Phalen, Esq., to represent Mr. Amaral in this case. Although
 28 Mr. Phalen is not a member of the *district court* CJA panel, he is a member of the appellate panel.

1 In light of Mr. Phalen's substantial experience in litigating postconviction cases before both the
2 state and federal courts, appointing him to this case would be in the interests of justice and
3 judicial economy. *See* D. Ariz. Gen. Ord. 14-05, CJA Plan for the District of Arizona, Appendix
4 I, ¶ I.A.3 (quoting 18 U.S.C. § 3006A(b)).

5 Respectfully submitted:

April 19, 2016.

6 JON M. SANDS
Federal Public Defender

7 *s/Keith J. Hilzendeger*
8 KEITH J. HILZENDEGER
Assistant Federal Public Defender
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10 **CERTIFICATE OF SERVICE**

11 I certify that on April 19, 2016, I caused the foregoing document to be filed with the
12 Clerk of Court for the United States District Court for the District of Arizona using the
13 CM/ECF system. I further certify that all case participants are registered CM/ECF users and
14 that service will be accomplished by the CM/ECF system. I further certify that I sent a copy of
15 this filing by electronic mail to CJA panelist Thomas J. Phalen, Esq.
16

17 *s/Keith J. Hilzendeger*
18 KEITH J. HILZENDEGER
Assistant Federal Public Defender
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6 **IN THE UNITED STATES DISTRICT COURT**
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8 Travis Wade Amaral,

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No. 2:16-cv-594-PHX-JAT (BSB)

ORDER APPOINTING COUNSEL

13 Pursuant to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A(a)(2)(B), the CJA Plan
14 for the District of Arizona, and in the interests of justice under *Weygandt v. Look*, 718 F.2d 952,
15 954 (9th Cir. 1983) (per curiam),

16 IT IS HEREBY ORDERED appointing CJA panelist Thomas J. Phalen, Esq., to
17 represent Petitioner Travis Amaral in this case. Mr. Phalen is authorized to receive payment in
18 connection with this appointment under the applicable CJA regulations.
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