In the Supreme Court of the United States

No. 22-____

RICHARD ROJAS, Petitioner

v.

DAVID SHINN, DIRECTOR of the ARIZONA DEPARTMENT OF CORRECTIONS, Respondent

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Richard Rojas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Court of Appeals' opinion affirming the District Court's denial of habeas relief was a memorandum decision and is included in the Appendix at page 1a. The District Court's order

denying relief is not reported but is included in the Appendix at page 10a. The Magistrate Judge's Report and Recommendation recommending relief is also not reported but is included in the Appendix at page 17a.

JURISDICTION

On April 22, 2022, the Ninth Circuit Court of Appeals affirmed the District Court's denial of Petitioner's Petition for Habeas Corpus. (App. 4a). Petitioner filed a Motion for Rehearing *En Banc*, which was denied on May 31, 2022. (App. 5a). By Order dated August 22, 2022, Justice Kagan extended the time for filing this Petition to October 28, 2022 (No. 22A163). Under the terms of that Order, this Petition is timely. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

28 U.S.C. §§ 2254(d):

> 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

1. In 2001, Mr. Rojas was found guilty at trial of two counts of first-degree murder, armed robbery, and conspiracy to commit armed robbery. The crimes were committed when Mr. Rojas was 15 years old with other juveniles. Because the state did not seek the death penalty, the only two possible sentences under Arizona law were (i) "natural" life, without the possibility of any form of release, and (ii) life with the possibility of release by way of commutation or pardon. *State v. Dansdill*, 443 P. 3d 990, 1000 n. 10 (Ariz. Ct. App. 2019); *see also Lynch v. Arizona*, 578 U.S. 613, 615 (2016) (per curiam). Neither of the available sentences under Arizona law provided any possibility of parole.

At sentencing, Mr. Rojas' attorney argued, without further elaboration, that Mr. Rojas was a "young guy" and had been in foster care. Referring to foster care records, he told the court that it was "not difficult to predict" how Mr. Rojas' life would turn out. Mr. Rojas's mother and grandmother asked the court to exercise leniency. The prosecutor argued that Mr. Rojas' crimes were more egregious because he was about the same age as the victims, and that Mr. Rojas had acted immaturely in court proceedings.

However, no evidence was presented with regard to how children were different from adults (in

terms of culpability), how those differences counseled against sentencing Mr. Rojas to life without any possibility of release, or whether the crimes reflected irreparable corruption or transient immaturity; and there is no indication in the record that the sentencing judge considered any of those factors. The sentencing judge's consideration of Mr. Rojas's age consisted of one half of one sentence: "the mitigating circumstances being your age and no prior felony convictions." The entire transcript of the sentencing hearing, including the pronouncement of sentence and a discussion of restitution jurisdiction, consists of 13 pages.

2. Following this Court's decision in *Miller v. Alabama,* 567 U.S. 460 (2012), Mr. Rojas filed a timely *pro se* Notice and Petition for Post-Conviction Relief in the Pinal County Superior Court. On July 9, 2013, that court denied the Petition. Mr. Rojas filed a *pro se* Motion to Reconsider, which was denied.

Mr. Rojas then sought review in the Arizona Court of Appeals. On February 12, 2015, that court granted review but denied relief. (App. 9a) In doing so, the court relied on its plainly mistaken belief that the trial court "knew it had the option to sentence Rojas to natural life or life with a possibility of *parole* after twenty-five years imprisonment." (App. 8a) (emphasis added). And the Court of Appeals

incorrectly concluded that the sentencing judge's bare references to petitioner's "age" and "miserable childhood" showed that he had taken into account how children are different in a manner that complied with *Miller*. (App. 8a)

On July 2, 2015, the Arizona Supreme Court denied review without comment.

3. On May 22, 2015, Mr. Rojas filed a *pro se* petition under 28 U.S.C. §2254, challenging his sentence under *Miller* and the Eighth Amendment. After the State answered, the matter was stayed pending a decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

On February 5, 2018, the United States Magistrate Judge recommended the granting of relief on the ground that the Arizona Court of Appeals' decision reflected an objectively unreasonable application of federal law.

> Here, the trial court did not discuss how children are different. The court did not discuss whether Petitioner's juvenile status counseled against a natural life sentence. Instead, the trial court acknowledged that Petitioner had a "miserable childhood" and found his age and lack of prior felony convictions were mitigating factors. But *Miller* changed the

> way juvenile homicide defendants are sentenced. Ultimately, acknowledging Petitioner's age and miserable childhood is not the same as considering how children are different and whether Petitioner was one of the uncommon juveniles who should be sentenced to natural life in prison. (App. 38a-39a).

The District Court rejected the Magistrate Judge's recommendation and denied the petition. (App.16a). The District Court held that the sentencing judge's mention of Mr. Rojas's age, review of foster care records, and considerations of his "miserable childhood" were sufficient to satisfy the constitutional requirements under *Miller*. (App. 11a).

Mr. Rojas timely appealed the District Court's decision. After the matter was fully briefed in the Court of Appeals, that court ordered the parties to file supplemental briefing addressing the effect, if any, that *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), and *United States v. Briones*, No. 16-10150, 2021 WL 5766311 (9th Cir. Dec. 6, 2021), had on the issues in Mr. Rojas's case.

Following oral argument, in a Memorandum Decision, the Ninth Circuit held that Mr. Rojas's pre-*Miller* sentencing hearing met the constitutional requirements of *Miller*. (App 3a). The court found

that it "was reasonable for the Arizona Supreme Court to interpret *Miller's* command that a sentencing judge consider 'how children are different,' *Miller*, 567 U.S. at 480, as being satisfied when the sentencing judge considered Petitioner's age and unfortunate childhood as mitigating circumstances." (App. 3a)

Citing its discussion of Arizona's statutory scheme in a companion case, *Jessup v. Shinn*, No. 18-16820 (9th Cir. April 21, 2022), the Court of Appeals determined that Arizona's sentencing scheme was not mandatory, apparently because it permitted a sentence of life with the possibility of release by way of commutation or pardon– neither of which qualifies as *parole*. (App. 3a).

Mr. Rojas filed a Petition for Rehearing *En Banc*, which was denied on May 31, 2022. (App. 5a)

REASONS FOR GRANTING THE WRIT

Mr. Rojas received a cursory pre-*Miller* sentencing hearing. The sentencing judge did not consider whether the attendant circumstances of Mr. Rojas's youth suggested a sentence other than natural life. This is not surprising, as no precedent or rule at the time suggested that this was required. The Court of Appeals' decision finding that Mr. Rojas' sentencing nevertheless complied with the

constitutional holding in *Miller* effectively nullifies that holding, which was affirmed in *Jones*. Furthermore, the Court of Appeals' holding that Arizona's statutory scheme was not "mandatory" ignores the critical fact that none of the statutorily permissible sentences involved any possibility of parole. This Court should grant the petition for certiorari, reverse the decision of the Court of Appeals, and remand with instructions to grant the writ and order that Mr. Rojas be sentenced in a manner that complies with *Miller*.

A. The court of appeals incorrectly concluded that Mr. Rojas' perfunctory sentencing hearing complied with *Miller.*

The Court of Appeals decision in this case effectively nullified *Miller*. *Miller* has two constitutional requirements. First, that "mandatory life without parole for those under the age of 18 at the time of their crimes" violates the Eighth Amendment. *Miller,* 567 U.S. at 465. Second, courts must consider how children are different. *Id.* at 480 ("we *require* [a sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.") Both aspects of *Miller* were violated in this case.

Miller itself made it clear that it required more than just recognition of a juvenile defendant's chronological age: *Miller* required sentencing courts to consider "how children are different" in a manner that allowed those courts to distinguish between juveniles whose crimes reflected "transient immaturity" from the rare juveniles whose crimes reflected "irreparable corruption." *Miller*, 567 U.S. at 480. That substantive component of *Miller* was the basis for this Court's subsequent ruling, in *Montgomery*, that *Miller* was retroactive and applied to defendants like Mr. Rojas who were sentenced pre-*Miller:*

> Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.' . . . Because *Miller* determined that sentencing a child to life without parole is excessive for all but "the rare juvenile offender whose crime reflects irreparable corruption,' … it rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status' – that is, juvenile offenders whose crimes reflect the transient immaturity of youth.…As a result, *Miller* announced a substantive rule of

> constitutional law. Like other substantive rules, *Miller* is retroactive because it 'necessarily carr[ies] a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him.'

577 U.S. at. 209-9 (internal citations omitted).

Moreover, *Jones* confirmed *Miller's* mandate "that a sentencer [must] follow a certain process – *considering* an offender's youth and attendant characteristics – before imposing' a life-without parole sentence." *Jones*, 141 S.Ct. at 1311 (quoting *Miller*) And *Jones* reinforced *Miller's* requirement, based on years of developments in youth-sentencing jurisprudence, that before sentencing a juvenile to life without the possibility of parole the sentencer must give youth its due consideration:

> In that process, the sentencer will consider the murderer's diminished culpability and heightened capacity for change. That sentencing procedure ensures that the sentencer affords individualized 'consideration' to, among other things, the defendant's 'chronological age and its hallmark features.'

Jones, 141 S. Ct. at 1316 (internal citations to *Miller* omitted).

Because Mr. Rojas' sentencing occurred in 2001, a decade before *Miller* was decided, it is highly improbable that the sentencing judge would have considered the constitutional requirements laid out in *Miller.* But that does not defeat Mr. Rojas's substantive *Miller* claim. *See Montgomery*, 577 U.S. at 208-9.

Despite this, the Ninth Circuit Court of Appeals held that Mr. Rojas's pre-*Miller* sentencing hearing satisfied *Miller* simply because "the sentencing judge considered Petitioner's age and unfortunate childhood as mitigating circumstances." (App. 3a). This does not amount to the due consideration of "youth and attendant characteristics," to which both *Miller* and *Jones* referred. *See Jones*, 141 S. Ct. at 1311, 1314, 1316; *Miller*, 567 U.S. at 476, 483.

Mr. Rojas' scant sentencing proceeding plainly did not satisfy the Eighth Amendment. *Roper v. Simmons,* 543 U.S. 551 (2005)*, Graham v. Florida,* 560 U.S. 48 (2010), *Miller*, *Montgomery,* and *Jones*, with their particular attention to the unique features of youth, make clear that sentencing hearings for juvenile offenders must include more than what was already likely mentioned in every federal and state Presentence Report prior to the *Miller* decision—a defendant's birthdate. For 40 years this Court has consistently emphasized that

"youth is more than a chronological fact." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). Simply stating the number of years since birth that a defendant lived before he committed his crime does not equate to a sentencer's considering youth and its attendant circumstances or an "offender's age and the wealth of characteristics and circumstances attendant to it." *Jones*, 141 S. Ct. at 1324, 1332. Because this sentence would not pass muster today, it was not constitutional in 2001. By holding otherwise, the Court of Appeals clearly ignored *Miller*—which was held retroactive to defendants like Mr. Rojas in *Montgomery*, and which has since been affirmed by *Jones.*

B. The Court of Appeals incorrectly relied on its ruling in *Jessup* to serve as the foundation for its ruling in Mr. Rojas's case.

The Court of Appeals erred by relying heavily on its decision in *Jessup* as the foundation for its ruling in Mr. Rojas' case because the sentencing hearings in the two cases were vastly different. *See Jessup v. Shinn*, 31 F. 4th 1262, 1264 (9th Cir. 2022)[1]. Mr. Jessup had a much more substantial sentencing hearing at which a licensed

[1] Mr. Jessup has also filed a petition for certiorari. *See* Petition for Certiorari, *Jessup v. Shinn*, 22 A130.

psychologist's testimony about Mr. Jessup's capacity for rehabilitation squarely put Mr. Jessup's attributes as a juvenile offender, including neuropsychological evidence relating to juvenile brain development, at the centerpiece of his sentencing hearing.

No such evidence was presented, let alone considered, at Mr. Rojas' hearing. No expert testified about whether Mr. Rojas had capacity for change and the sentencing judge certainly did not hear evidence related to juvenile brain development and why that may suggest a sentence other than natural life.

C. Arizona's sentencing scheme was unconstitutionally "mandatory" under *Miller*.

Effective January 1, 1994, Arizona abolished parole for all felony offenses. *See* A.R.S. § 41-1604.09 (I); 1993 Ariz. Sess. Laws, Ch. 255, § 88; *see also Lynch v. Arizona*, 578 U.S. 613, 615 (2016) (per curiam) (citing *State v. Lynch*, 357 P.3d 119, 138–39 (Ariz. 2015)); *State v. Vera*, 334 P.3d 754, 758 (Ariz. Ct. App. 2014). That meant that the only available sentences for Mr. Rojas' murder convictions were (i) natural life (i.e., life without any possibility of release), and (ii) life with the possibility of release by way of commutation or pardon. Thus, Arizona law mandated a sentence of life without the possibility

of parole; and this Court has made it clear that the possibility of commutation or pardon is not a constitutionally adequate substitute for the possibility of parole. *Graham v. Florida,* 560 U.S. 48, 74 (2010)*; Solem v. Helm*, 463 U.S. 277, 303 (1983).

The Arizona Court of Appeals disposed of the constitutional problem above by asserting that the sentencing judge "had the option to sentence Rojas to natural life or life with the possibility of parole after twenty five years imprisonment." [COA APP cite] But the problem with that assertion was that it was simply wrong, given Arizona's abolition of parole 15 years earlier. The Arizona Court of Appeals has recently, in a published opinion, clarified that Arizona did have a mandatory life without parole sentencing scheme in place at the time of Mr. Rojas' sentencing. *State v. Wagner*, 253 Ariz. 201¶22, 510 P. 3d 1083, 1087 (Ariz. Ct. App. 2022) (holding that Arizona's statutory scheme did not provide sentencing courts discretion to impose parole-eligible terms, and thus violated *Miller's* prohibition on mandatory life without parole sentencing).

With regard to whether Arizona's sentencing scheme violated *Miller's* procedural rule, the Ninth Circuit's memorandum decision opined as follows:

> Unlike the mandatory state statutes at issue in *Miller*, which prohibited individualized sentencing, Petitioner here received an individualized sentencing hearing during which the judge considered many factors, including Petitioner's youth. The judge nevertheless decided to impose a sentence without any form of release.

(App. 3a). But the problem with that reasoning is that after Mr. Rojas' "individualized sentencing hearing," a sentence of life without the possibility of parole was mandatory in violation of this Court's holding in *Miller*. *See Wagner,* 253 Ariz. at¶22, 510 P. 3d at 1087.

D. Petitioner is entitled to habeas relief under 28 U.S.C. §2254 (d)(1)

Under 28 U.S.C.§ 2254 (d)(1), federal habeas relief is available only if the state court's decision was contrary to, or an unreasonable application of, this Court's precedent. But the preceding paragraphs have shown that the last reasoned decision by a state court—the February 12, 2015, decision by the Arizona Court of Appeals denying state court relief (Appendix C)—was contrary to and an unreasonable application of this Court's substantive and procedural holdings in *Miller*.

That conclusion is especially clear in light of the Arizona Supreme Court's decision in *State v. Valencia*, 386 P.3d 392 (2016) —which was issued over 17 months after the Arizona Supreme Court had denied review in Mr. Rojas's state post-conviction case, and 11 months after this Court's decision in *Montgomery*. The two defendants whose post-conviction cases were consolidated in *Valencia* had been convicted of first-degree murders committed when they were juveniles, and both had been sentenced to "natural" life (without any possibility of release) after hearings at which the sentencing judges had considered their ages – but not the attendant circumstances of youth discussed in *Miller*. 386 P. 3d at 394. On that record, the Arizona Supreme Court ruled that the defendants were entitled, under *Miller*, to be resentenced if they could establish, at an evidentiary hearing, that their crimes did not reflect irreparable corruption. *Id.* at 396. In effect, the Arizona Supreme Court recognized in *Valencia* that its (and the Arizona Court of Appeals') decision in Mr. Rojas' case was contrary to, or an unreasonable application of, this Court's decision in *Miller*.

CONCLUSION

Mr. Rojas has diligently advanced his *Miller* argument for almost ten years and has seen no relief despite not being sentenced in accordance with *Miller* or under a statutory scheme that complied with *Miller*. The petition for certiorari should be granted.

Respectfully submitted,

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2001, Petitioner Rojas was sentenced to consecutive "natural life" sentences for crimes he committed when he was 15 years old. At that time, Arizona law did not permit sentences of life with a possibility of parole. This case presents two questions:

1. Whether Petitioner's sentencing violated the Eighth and Fourteenth Amendments under *Miller v. Alabama*, 567 U.S. 460 (2012), because the sentencing judge failed to consider the attendant circumstances of Petitioner's youth that this Court identified in *Miller*.

2. Whether Petitioner's sentences violate the Eighth and Fourteenth Amendments because sentences of life without any possibility of parole were mandatory under Arizona law.

PARTIES TO THE PROCEEDINGS

The captions of the relevant Orders of the District Court and Court of Appeals (Appendices A, B, D and E) named Charles L. Ryan as respondent (as Director of the Arizona Department of Corrections). However, David Shinn succeeded Charles L. Ryan some years ago, and he should be named as the correct respondent in this case. Consequently, the caption of this Petition names Mr. Shinn as Respondent.

RELATED PROCEEDINGS

Richard Rojas v. Charles Ryan, et al., No. 18-15692 (9th Cir. filed April 20, 2018)

Richard Rojas v. Charles Ryan, et al., No. 2:15-cv-1196-PHX-JJT (JZB) (D. Ariz. filed May 22, 2015)

State of Arizona v. Richard Rojas, CR-15-0085-PR (Ariz. Supreme Ct. filed March 12, 2015)

State of Arizona v. Richard A. Rojas, No. 1 CA-CR 13-0605 PRPC (Ariz. Ct. App. filed Aug. 26, 2013)

State of Arizona v. Richard A. Rojas, No. CR 1999-012663 (Maricopa Co. Super. Ct. filed September 10, 1999)

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