

No. 17-5725
IN THE
SUPREME COURT OF THE UNITED STATES

RAFAEL SANTOS, Petitioner,
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Illinois

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF OF PETITIONER

Clarification of Question Presented

The State misstates the question presented by Rafael Santos in this petition. Whereas the State frames the question as whether there is a *categorical* bar to discretionary sentencing of a juvenile convicted of homicide to life without parole or to a sentence functionally equivalent to life without parole, (AG Brief in Opposition, p. ii), the petitioner has not posed that question to this Court.

Rather, the question is whether, as the Illinois appellate court found, *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455, 2464-65 (2012), bars only a trial court's imposition of a mandatory *de jure* or *de facto* natural life sentence on a juvenile, but has no application to a discretionary *de facto* life sentence without parole. As a subsection, a question is also raised whether, before a discretionary natural life sentence is constitutionally permitted, must a sentencing court in exercising that discretion meet the requirements of this Court's precedent and make findings, as suggested in *Miller* and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), that would indicate the commission of the offense was or was not a function of the transient characteristics of youth, and whether the child was of such an incorrigible character that such a harsh sentence meets constitutional muster.

With that clarification in mind, the next matter to address is the State's claims that this Court does not have jurisdiction to address the issues raised in this case. The State posits two bases for what it claims is a lack of jurisdiction: (1) that the question presented (as defined by the State) was not presented in the courts of Illinois so that it would be "not pressed or passed upon" by the State courts; and (2) that the issue

(again as defined by the State) was found to be waived by the appellate court so there is an adequate and independent state ground that precludes jurisdiction in this Court. (AG Brief in Opposition, pps. 9-11)

To the extent that the State has misstated the question presented, it is true that Rafael did not present that issue to the courts of Illinois. However, the question as raised by Rafael was, indeed, presented to the State courts and incorporated within a sentencing argument challenging the discretion of the sentencing court to impose a 70-year *de facto* life sentence without parole without having made appropriate findings as suggested in *Miller* and *Montgomery*. (Petition for Leave to Appeal, pps. 2, 12-17; Second Petition for Leave to Appeal, pps. 3-4, 12-20) The State cites *Illinois v. Gates*, 462 U.S. 213, 217-219 (1983), for the proposition that this Court lacks jurisdiction when a federal question has not been “pressed or passed upon” in the state courts. (AG Brief in Opposition, p. 10). However, as your Honors have noted, the “not pressed or passed upon” rule is written in the disjunctive. *United States v. Williams*, 504 U.S. 36, 41-45 (1992) (rejecting the respondent’s challenge to the case on the basis the issue had not been pressed or passed upon in the lower courts; discussing the rule). Because the issue as raised by Rafael here was pressed in the state courts, this Court has jurisdiction. This aspect of the State’s challenge to this Court’s jurisdiction should, therefore, be rejected.

As to the waiver issue, it is true the Second District Appellate Court, in a ruling issued upon remand by the Illinois Supreme Court, found that the issue – again as misstated by the State – was waived. *People v. Santos*, 2016 IL App (2d) 120839-UB, ¶14. In response to the appellate court’s finding, Rafael filed a petition for rehearing

in which he argued what is also the reply to the State's claim now: The sentencing issue that was raised in Rafael's direct appeal challenged the *de facto* life sentence on the basis that the sentencing court had failed to make the findings, as suggested in *Miller*, concerning Rafael's status as a youth and his potential for rehabilitation. (Opening Brief on Direct Appeal, p. i, 13; Petition for Rehearing, p. 2) While there was an error in Rafael's direct appeal brief that indicated a "stand-alone" issue questioning the constitutionality of the sentence under *Miller* was being raised, (Opening Brief on Direct Appeal, p. 1), that issue was, instead, incorporated into the sentence argument raised as the second issue.

As part of that sentencing issue, Rafael did, in fact, argue the sentence was an improper *de facto* life sentence without parole. His argument cited *Roper v. Simmons*, 543 U.S. 551 (2005), *Miller*, and *Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010), and contended that the circuit court failed to properly consider those rehabilitative factors, discussed at length in *Roper*, *Graham* and *Miller*, that are particularly relevant to adolescents charged with serious offenses. (Opening Brief on Direct Appeal, pps. 15-17) The constitutional argument established in *Miller* – finding that a *mandatory* natural life sentence, as applied to juveniles, violates the Eighth Amendment – was not raised by Rafael. Rather, his sentencing issue was premised on the very factors which *Roper*, *Graham*, *Miller*, and *People v. Reyes*, 2016 IL 119271, found have been given inadequate consideration by sentencing courts – those being the relevant attributes of youth – and, thus, his sentence was unconstitutionally imposed. The issue, notwithstanding the incorrect finding by the appellate court, was not, and is not, waived.

Further, this Court has held that, for the “independent and adequate State grounds” rule to apply, the State court judgment must rest on a state law ground that is “both ‘independent’ of the merits of the federal claim *and* an ‘adequate’ basis for the court's decision.” *Foster v. Chatman*, ___ U.S. ___, 136 S.Ct. 1737, 1745, 195 L.Ed.2d 184 (2016), *citing Harris v. Reed*, 489 U.S. 255, 260 (1989) (emphasis added). As noted, the finding of waiver by the appellate court was incorrect where the issue was, in fact, raised and incorporated into Rafael’s sentencing issue. An incorrect finding of waiver cannot be an “adequate” basis for the appellate court’s decision. Because the appellate court’s finding was not “adequate,” this Court can exercise jurisdiction over this case. The State’s claim of lack of jurisdiction on this basis, then, should be rejected.

The State goes on to argue against the grant of certiorari because it claims there is no split of authority, writing that “[n]o court has held that the federal Constitution prescribes the categorical ban petitioner seeks.” (AG Brief in Opposition, p. 11) Again, the petitioner is not seeking a categorical ban – that is not the question that has been posed to this Court. The petitioner discussed the split in authority relevant to this petition at pages 21 to 22 and again at pages 25 through 27 of his petition for certiorari. He respectfully refers your Honors to those pages as response to the State’s claim and asks that it be rejected.

The State further argues against grant of this petition, claiming that the petition “discusses two additional legal issues” under *Miller* that, it argues, are not fairly included in the question presented. (AG Brief in Opposition, pps. 12-13) To the contrary, what the State identifies as “additional legal issues” are actually the issues upon which the petition rests. It is the State that has misidentified the issue before

this Court. The petitioner, therefore, asks your Honors to reject this aspect of the State's objections as well.

The State argues, further, that certiorari should not be granted where the Illinois Supreme Court has very recently decided the issue raised here – whether *Miller* applies to discretionary life sentences without parole imposed on juveniles. In *People v. Holman*, 2017 IL 120655, the Illinois Supreme Court did, after noting the jurisdictions that have held that *Miller* applies only to mandatory life sentences imposed upon juveniles, find that *Miller* applies to discretionary life sentences without parole imposed on juveniles. 2017 IL 120655, ¶40. The court went on to explain, again addressing various sister state courts' attempts to clarify the situation, the application of *Miller* and *Montgomery* to such cases. 2017 IL 120655, ¶¶41-46.

The petitioner is relieved that the Illinois Supreme Court has accepted that the characteristics of youth should play an integral role in the imposition of such weighty sentences upon juveniles. However, because the court did not issue its decision until September of 2017, after Rafael had filed his petition with this Court, and after he waited five years for the trial for this offense and another five years while directly challenging the sentence which he has been ordered to serve, Rafael has yet to see any relief.

The State posits that because, prior to the filing of this petition for certiorari, Rafael filed a collateral challenge to his conviction and sentence that remains pending, including a *Miller* challenge to his sentence, that he “may” be able to obtain relief in the state court. However, the State seemingly concedes that relief may only be obtained *if* counsel appointed to represent him on his *pro se* post-conviction petition

amends the petition to continue to include the issue and “presumably” the court hearing the petition “address[es]” this issue. (AG Brief in Opposition, pps. 15-16) Of course it is equally possible that counsel appointed to represent Rafael in the collateral challenge will omit the sentencing claim because it is pending before this Court. Or it is also possible that the court hearing the collateral challenge may consider the issue, if included in any amended post-conviction petition, and reject it finding, perhaps, that *Holman* should not be retroactively applied.

In short, Rafael is still directly challenging his sentence as being the result of an unconstitutional abuse of discretion due to the failure of the sentencing court to properly consider those factors this Court identified in *Miller* and *Montgomery*. The Illinois appellate court issued a final ruling finding that *Miller* has no application to discretionary *de facto* life sentences. *Santos*, 2017 IL App (2d) 120839-UB, ¶¶13,15. This Court has jurisdiction to review and correct that ruling. This Court’s resolution of this issue may be Rafael’s last opportunity to see the wrong redressed.

The ambiguity presented by the post-conviction collateral challenge proceedings is not something upon which Rafael needs to gamble. There is no procedural bar preventing Rafael from seeking relief requested here while at the same time collaterally challenging his conviction. This Court can, for the reasons set forth here and in his initial petition, grant certiorari and go on to grant relief in the form of a new sentencing hearing at which the proper factors under *Miller* and *Montgomery* will be considered. Rafael Santos prays that this Honorable Court grant the petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, the petitioner, Rafael Santos, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Supreme Court.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Lilién', with a long horizontal flourish extending to the right.

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