

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

ANTONIO M. RAMIREZ, Petitioner,

vs.

CINDY GRIFFITH, Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Antonio Ramirez, a juvenile offender, was convicted of first degree murder and mandatorily sentenced to life without parole without an individualized sentencing hearing in violation of the 8th and 14th Amendments. The Missouri Supreme Court upheld Ramirez' sentence, finding that the state remedied the constitutional violation by enacting a statute that allowed Ramirez to submit a petition for review of his sentence to the parole board after serving 25 years. Can reasonable jurists debate whether a limited parole hearing under Missouri law, where the prisoner has no right to counsel; no right to cross-examine adverse witnesses; and no right to present evidence, provides the type of individualized sentencing hearing mandated by *Miller v. Alabama*, 132 S.Ct. 2455 (2012), and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016)?
2. Does a limited parole hearing under Missouri law, where the prisoner has no right to counsel; no right to cross-examine adverse witnesses; and no right to present evidence, provide the type of individualized sentencing hearing mandated by *Miller* and *Montgomery*?

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review judgment of the court of appeals below denying him a certificate of appealability.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Eighth Circuit denying Ramirez's application for a certificate of appealability and dismissing his appeal appears at Appendix A, and is unpublished.

The judgment of the United States District Court for the Western District of Missouri denying Ramirez's petition for writ of habeas corpus, and the order in support thereof, appear at Appendices C and D, respectively, and are unpublished.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered its judgment denying Ramirez's application for a certificate of appealability and dismissing his appeal on August 3, 2017. (App. A). A timely petition for rehearing and rehearing en banc was denied on October 4, 2017. (App. B).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the United States Constitution, the pertinent text of which follow:

United States Constitution, Amend. VIII:

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

United States Constitution, Amend. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case involves **28 U.S.C. § 2253**, which provides, in relevant part, as follows:

(a) In a habeas corpus proceeding or a proceeding under § 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

. . .

(c)(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 arises out of process issued by a state court; or

(B) the final order in a proceeding under § 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

This case involves **F.R.A.P. 22(b)**, which provides:

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district clerk must send to the court of appeals the certificate (if any) and the statement described in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255 (if any), along with the notice of appeal and the file of the district court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue it.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

This case also involves **Mo. Rev. Stat. § 558.047.1(1) (2016)**, which provides, in relevant part, as follows:

Any person sentenced to a term of imprisonment for life without parole before August 28, 2016, who was under eighteen years of age at the time of the commission of the offense or offenses, may submit to the parole board a petition for review of his or her sentence, regardless of whether the case is final for purposes of appeal, after serving twenty-five (25) years of incarceration on the sentence of life without parole.

STATEMENT OF THE CASE

Antonio Ramirez was convicted by a jury of first-degree murder in violation of Mo. Rev. Stat. § 565.020.1 (1994), for a crime committed when he was 17 years old. Because the State did not seek the death penalty, the judge imposed the only punishment available under the law – life without eligibility for probation or parole. Ramirez was also convicted of armed criminal action for which he received a concurrent life with parole sentence.

In 2012, the Supreme Court issued its opinion in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), holding that a sentencing scheme that mandates a term of “life without parole for those under 18 at the time of their crimes violates the Eighth Amendment’s prohibition on cruel and unusual punishment.” *Id.* at 2460. Thereafter, Ramirez filed a petition for writ of habeas corpus in the Missouri Supreme Court under Mo. Sup. Ct. R. 91, seeking relief from his life without parole

sentence under *Miller*. While Ramirez’ state habeas petition was pending, this Court decided *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), holding that *Miller* applied retroactively to cases on collateral review. *Id.*, at 736.

Following *Montgomery*, the Missouri Supreme Court issued an order sustaining Ramirez’ petition, in part, ruling that he “shall be eligible to apply for parole after serving 25 years’ imprisonment on his sentence of life without parole unless his sentence is otherwise brought into conformity with *Miller* and *Montgomery* by action of the governor, or enactment of necessary legislation.” (App. G). Ramirez sought rehearing, arguing that a parole hearing under Missouri law does not provide the individualized sentencing hearing mandated by *Miller*.

While the petition for rehearing was under submission, the Missouri Legislature passed Senate Bill No. 590, which provides, in relevant part, as follows:

Any person sentenced to a term of imprisonment for life without parole before August 28, 2016, who was under eighteen years of age at the time of the commission of the offense or offenses, may submit to the parole board a petition for a review of his or her sentence, regardless of whether the case is final for purposes of appeal, after serving 25 years of incarceration on the sentence of life without parole.¹

Missouri Governor Jeremiah Nixon signed the bill on July 13, 2016. Shortly thereafter, the Supreme Court of Missouri entered the following order in Ramirez’ case:

On the Court’s own motion, the Court’s March 15, 2016, order is vacated. The motion for rehearing is overruled as moot. The petition is denied. *See* Senate Bill No. 590, 98th General Assembly.

(App. F).

Ramirez then filed a petition in the district court below under 28 U.S.C. § 2254 for a writ of habeas corpus challenging his mandatorily imposed life without parole sentence on the ground that

¹Mo. Rev. Stat. § 558.047.1(1) (2016).

it violates the Eighth and Fourteenth Amendments under *Miller* and *Montgomery*, and that allowing him to petition the parole board for review of his sentence after serving 25 years does not remedy the constitutional violation. On December 2, 2016, United States District Judge Dean Whipple issued an order denying habeas relief. (App. D). Three days later, on December 5, 2016, Judge Whipple entered judgment in accordance with the order. (App. C). As part of its judgment, the district court declined to issue a certificate of appealability. *Id.*

On December 30, 2016, Ramirez filed a timely motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e) in the district court. Said motion was denied on February 2, 2017. On February 24, 2017, Ramirez filed a notice of appeal in the district court along with a motion to proceed *in forma pauperis*. The district court granted the motion, and transmitted the notice of appeal to the United States Court of Appeals for the Eighth Circuit.

Ramirez then filed an application for a certificate of appealability in the Eighth Circuit seeking leave to appeal the district court's denial of his petition for writ of habeas corpus. (App. E). On August 3, 2017, a panel of Eighth Circuit judges issued its order denying Ramirez's application for a certificate of appealability, and dismissing the appeal. (App. A). A timely petition for rehearing en banc, and rehearing by the panel was denied on October 4, 2017. (App. B). This petition follows.

REASONS FOR GRANTING THE WRIT

I.

A writ of certiorari should be granted because reasonable jurists can debate whether allowing a juvenile homicide offender mandatorily sentenced to life without parole in violation of the 8th and 14th Amendments to submit a petition for review to the parole board after serving 25 years of his sentence remedies the constitutional violation where the offender has no right to counsel; no right to cross-examine adverse witnesses; and no right to present evidence at the parole hearing.

Under 28 U.S.C. § 2253(c), a § 2254 habeas applicant has no right to appeal the district court's denial of relief without first obtaining a certificate of appealability. A certificate of appealability will issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To meet this standard, an applicant need only to show "that 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 are '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)), and *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983)).

As this Court recently emphasized in *Buck v. Davis*, 137 S.Ct. 759 (2017), the certificate of appealability inquiry "is not coextensive with a merits analysis". *Id.*, at 773. In determining whether to issue a certificate of appealability, a court of appeals should limit its examination to "a threshold inquiry into the underlying merit of [the] claims" and ask "only if the District Court's decision was debatable." *Id.*, at 774 (quoting *Miller-El*, 537 U.S. at 327, 348). Further, "a court of appeals should not decline the application for a certificate of appealability merely because it believes the applicant will not demonstrate an entitlement to relief." *Miller-El*, 537 U.S. at 337. "[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 would not prevail.” *Id.*, at 338.

***Miller* and *Montgomery* make clear that juvenile homicide offenders serving mandatorily imposed life without parole sentences are entitled to an individualized sentencing hearing.**

Miller and *Montgomery* mandate that states ensure “that prisoners serving sentences of life without parole for offenses committed before the age of 18 have the benefit of an individualized sentencing proceeding that considers their youth and immaturity at the time of the offense.” *Adams v. Alabama*, 136 S.Ct. 1796, 1797 (2016) (Alito, J., concurring). Although *Montgomery* suggested that a state may remedy a *Miller* violation by permitting juvenile offenders to be considered for parole rather than resentencing them, *see Montgomery*, 137 S.Ct. at 736, mere access to a parole hearing does not assure compliance with *Miller*. In order to qualify as an individualized sentencing hearing, the parole hearing must be a proceeding where the juvenile offender has the opportunity to present mitigating evidence to demonstrate why his or her crime represents the immaturity of youth and its attendant circumstances and why, given the offender’s subsequent maturity and rehabilitation, he or she should be released on parole. *Id.* at 732-36.

Reasonable jurists can debate whether a limited parole hearing, such as provided under Missouri Law, provides Ramirez with the individualized sentencing hearing mandated by *Miller* and *Montgomery*.

A parole hearing under Missouri law is extremely limited. An inmate has no right to counsel, *see Mitchell v. Nixon*, 351 S.W.3d 676, 680 (Mo.App. 2011); no right to confront and cross-examine adverse witnesses; no right to offer evidence, *see Ladd v. Board of Probation and Parole*, 299 S.W.3d 33, 38 (Mo.App. 2009); and no right to expert assistance to develop mental health evidence.

While Missouri Senate Bill 590 does direct the parole board to consider many of the youth related concerns identified in *Miller*, see Mo. Rev. Stat. §§ 558.047.5 and 565.033.2 (2016), juvenile homicide offenders serving mandatory life without parole sentences will have no opportunity to develop and present evidence to the parole board showing how their youth, immaturity, impulsivity, and other mitigating factors, including mental health concerns, family and home environment, may have played a role in the offense. Neither will they have an opportunity to present evidence of their subsequent maturity and rehabilitation. Reasonable jurists could debate whether such a proceeding remedies the constitutional violation.²

Furthermore, *Miller* “did not merely impose an ‘individualized sentencing requirement’, it imposed a substantive rule that life without parole is only an appropriate punishment for ‘the rare juvenile offender whose crime reflects irreparable corruption’”. *Adams v. Alabama*, 136 S.Ct. at 1799 (Sotomayer, J., concurring) (quoting *Montgomery*, 136 S.Ct. at 735). Together with *Graham v. Florida*, 560 U.S. 48 (2010), where the Court held that the Eighth Amendment bars life without parole sentences for juvenile non-homicide offenders, *Miller* and *Montgomery* make clear that a juvenile offender, except in the rarest of cases, must have a reasonable opportunity to obtain release based on demonstrated maturity and rehabilitation. This guarantee is non-existent in Missouri where the parole board has “almost unlimited discretion” whether or not to grant parole. *Ingrassia v. Purkett*, 985 F.2d 987, 988 (8th Cir. 1993); Mo. Rev. Stat. § 217.690 (2016).

²Compare Ramirez’ right to a limited parole hearing to the remedy afforded juvenile homicide offenders whose cases were on direct appeal when *Miller* was announced. Those offenders had their life without parole sentences set aside, and their cases remanded for a sentencing hearing where they would have the assistance of counsel, and the necessary resources to develop and present evidence to show that life without parole is not an appropriate sentence in light of their youth and other mitigating factors. See *State v. Hart*, 404 S.W.3d 232, 238-39, 241-42 (Mo. 2013); *State v. Nathan*, 404 S.W.3d 253, 270-71 (Mo. 2013).

The decision below conflicts with those of other federal district courts that have considered the issue of whether a limited parole hearing, as provided in Missouri, provides the individualized sentencing hearing mandated by *Miller* and *Montgomery*.

The United States District Court for the Eastern District of Pennsylvania has opined that merely providing a juvenile homicide offender serving a sentence of life without parole the opportunity to request that the parole board review his or her sentence is insufficient to remedy a *Miller* violation. See *Songster v. Bird*, 201 F.Supp.3d 639, 642 (E.D.Pa. 2016), appeal dismissed No. 16-3496 (3d Cir. Oct. 26, 2016) (passing the buck to the parole board by giving the juvenile offender a chance to have his life without parole sentence reviewed by the board “with its limited resources and lack of sentencing expertise is not a substitute for a judicially imposed sentence . . . reflects an abdication of judicial responsibility and ignores the *Miller* mandate”); see also *Greiman v. Hodges*, 79 F.Supp.3d 933 (S.D.Iowa 2015) (petition alleging that deficiencies in Iowa’s parole board procedures denied Greiman a meaningful opportunity for release stated facts that, if true, warranted relief under *Graham v. Florida*, 560 U.S. 48 (2010)).

Other federal courts have held that the proper remedy for a *Miller* violation is to remand the matter to the state court for resentencing. See *Cessna v. Wetzel*, 2016 WL 3090402 at *2 (N.D.Pa. June 2, 2016) (where the court, in the course of granting habeas relief, noted other federal district courts that have granted habeas relief under *Miller*, and remanded to state court for resentencing); *Trevathan v. Cain*, 2016 WL 1440794 at *2 (E.D. La. March 1 2016), Magistrate’s rpt. and rec. adopted by dist. ct., 2016 WL 1446150 (E.D. La. Apr. 11, 2016) (acknowledging the *Montgomery* dictum, and nonetheless holding that petitioner “is entitled to be resentenced in conformity with

Miller”). These decisions confirm the debatability of Ramirez’s claim, and warrant the issuance of a certificate of appealability.

Conclusion

“The question before this Court is the debatability of the underlying constitution claim, not the resolution of that debate.” *Miller-El*, 537 U.S. at 342. The above-referenced cases holding that limited parole proceedings do not satisfy the individualized sentencing proceeding guaranteed by *Miller*, clearly demonstrate that Ramirez’s claim is debatable among jurists of reason, and that courts could resolve the issues differently. Consequently, a petition for writ of certiorari should be granted and the questions presented resolved by this Court. Alternatively, this Court should grant certiorari, vacate the judgment of the court of appeals below, and the remand the matter for further proceedings consistent with *Miller* and *Montgomery*.

Respectfully submitted,

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