No. 13-10288

IN THE

Supreme Court of the United States

NATALIE DEMOLA, Petitioner,

vs.

JAVIER CAVAZOS, Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondent's Brief in Opposition ("BIO") does not rebut DeMola's showing that this case is worthy of review or that the Ninth Circuit failed to enforce *Miller v. Alabama*'s[1] requirement of individualized sentencing by substituting its own reading of California's juvenile sentencing statute for that of the California state courts. The BIO also does not refute DeMola's showing that, contrary to the Ninth Circuit's conclusion, the sentencing court did not "take into account how children are different" or receive and consider evidence of the "'mitigating qualities of youth.'" *Miller*, 132 S. Ct. at 2467, 2469.

Respondent contends that "the court of appeals did not interpret the applicable sentencing statute in a manner at odds with state authority" and that "[t]he court understood the scope of the sentencing judge's discretion under § 190.5(b) in the same way as the California courts at the time of petitioner's sentencing." BIO at 8. In support of this proposition, Respondent cites *People v. Guinn*, 28 Cal. App. 4th 1130, 1141, 33 Cal. Rptr. 2d 791 (1994), as "holding that § 190.5(b) provides a sentencing judge with 'discretion . . . to choose the less severe sentence of 25 years to life . . . in recognition that some youthful special circumstance murderers might warrant more lenient treatment.'" BIO at 8.

Respondent has quoted parts of two sentences from *Guinn*. The complete sentences support DeMola's position, not Respondent's. The first full sentence states: "We believe Penal Code section 190.5 means, contrary to the apparent presumption of defendant's argument, that 16– or 17–year–olds who commit special circumstance murder *must* be sentenced to LWOP, *unless* the court, in its discretion, finds good reason to choose the less severe sentence of 25 years to life." 33 Cal. Rptr. 2d at 797 (original emphasis). The second says: "The fact that a court

[1] 132 S. Ct. 2455 (2012).

might grant leniency in some cases, in recognition that some youthful special-circumstance murderers might warrant more lenient treatment, does not detract from the generally mandatory imposition of LWOP as the punishment for a youthful special-circumstance murderer." *Id.* The next sentence reads: "In the first instance, therefore, LWOP is the presumptive punishment for 16– or 17–year–old special-circumstance murderers, and the court's discretion is concomitantly circumscribed to that extent." *Id.*

In *People v. Gutierrez*, 58 Cal. 4th 1354, 324 P.3d 245, 255, 171 Cal. Rptr. 3d 421 (2014), the California Supreme Court quoted the above passages from *Guinn* as the springboard for its analysis that the *Guinn* presumption of LWOP is incompatible with *Miller*. The court explained in *Gutierrez* that "[f]or two decades, since *People v. Guinn* (1994) 28 Cal.App.4th 1130, 33 Cal.Rptr.2d 791 (*Guinn*), section 190.5(b) has been construed by our Courts of Appeal and trial courts as creating a presumption in favor of life without parole as the appropriate penalty for juveniles convicted of special circumstance murder." 324 P.3d at 249. The court noted that "*Miller* nowhere suggested that legislatures may presume life without parole to be the proper punishment for entire categories of juvenile offenders or offenses"; interpreted the statute as imposing no presumption of LWOP in order to avoid "serious constitutional concerns under the reasoning of *Miller* and the body of precedent on which *Miller* relied"; and "disapprove[d] *People v. Guinn* . . . and its progeny." *Id.* at 263, 267; DeMola's Petition for Writ of Certiorari ("Pet.") at 14-15.

Respondent asserts that "there is no indication that the use or lack of a presumption made any difference to the sentence actually imposed in this case." BIO at 9. Respondent does not cite any authority for the proposition that DeMola's Eighth Amendment claim is subject to harmless error review. *Miller* did not apply harmless error review to the claims there.

Further, Respondent's confidence is not shared by the California Supreme Court. In *Gutierrez*, in the course of rejecting the State's argument that juvenile LWOP sentences were uncommon in California, the court said that, if anything, "the statistics from *Miller* support *defendants*' point that a statutory presumption in favor of life without parole significantly increases the likelihood that such a sentence will be imposed." 324 P.3d at 265 (emphasis in original). And the court remanded for resentencing even though in both cases before it "the record indicates that the trial court understood it had a degree of discretion in sentencing the defendant." *Id.* at 269-70. It did so because "both courts imposed life without parole at a time when *Guinn* was the prevailing authority" and "neither court made its sentencing decision with awareness of the full scope of discretion conferred by section 190.5(b) or with the guidance set forth in *Miller* and this opinion for the proper exercise of its discretion." *Id.* at 270. "Because the trial courts operated under a governing presumption in favor of life without parole, [the court could not] say with confidence what sentence they would have imposed absent the presumption." *Id.*; Pet. at 16.

In DeMola's case, the trial judge concluded that "based upon the special circumstances, it will be the judgment and sentence of the Court that Miss Demola be sentenced to the state prison for life without the possibility of parole." Pet. App. 170. That doesn't sound like a judge exercising discretion. Further, the probation report reviewed by the judge stated that "[b]ecause the defendant was under the age of 18 at the time of the commission of the crime, the penalty is life in prison without the possibility of parole." *Id.* at 181; *see also id.* at 180 (sections titled "Probation Eligibility" and "Sentencing Data" describe life without parole as mandatory in this case).

Respondent states that "[t]he specific question presented here will arise only in a narrow set of cases including juvenile defendants in California who were

convicted of first degree murder along with a special circumstances finding and were sentenced to life without parole under § 190.5(b) *before* the California Supreme Court's decision in *Gutierrez*. BIO at 10 (original emphasis). But the California Supreme Court explained in *Gutierrez* that § 190.5(b) "applies to a broad and diverse range of first degree murder offenses." 324 P.3d at 263. The court noted that California "account[s] for over 70% or a total of 265 of the 376 life without parole sentences" in 15 states categorized as purportedly allowing some discretion in sentencing, "even though California accounted for only 43% of the combined juvenile population of those 15 states in 2009." *Id.* at 265; *see also* Pet. App. 39 (brief of amici curiae in support of DeMola's petition for rehearing below states that "[d]ue to the 'generally mandatory' nature of Section 190.5(b), more than 309 teenagers have been sentenced to die in prison in California in the past 20 years"). The court concluded that "[t]hese data suggest that a statutory presumption in favor of life without parole makes a significant practical difference." *Gutierrez*, 324 P.3d at 265. The Ninth Circuit opinion here threatens to make *Miller* a dead letter to these hundreds of California prisoners, if not other petitioners throughout the Circuit's jurisdiction.

Respondent states that "[e]ven if the case were remanded for resentencing, it is not likely that petitioner would obtain a sentence of life without parole." BIO at 11. Respondent says that "[w]hile *Miller* identifies other considerations not expressly addressed by the sentencing judge here, petitioner cites no record evidence that would weigh in favor of a more lenient sentence." *Id.* at 12. Respondent's argument makes DeMola's point: The trial court did not receive or consider evidence of the "'mitigating qualities of youth'" required by *Miller*, and DeMola did not receive the individualized sentencing required by *Miller*. 132 S. Ct. at 2467. This is clear from comparing the sentencing considerations identified in *Miller* with the record in this case.

Miller provides a non-exhaustive list of factors for courts sentencing juveniles to consider: (1) the juvenile offender's "chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) the offender's "family and home environment," including evidence that the offender was raised in a brutal or dysfunctional environment; (3) the circumstances of the offense, including whether the defendant was the actual killer or an aider and abettor; (4) whether the offender might have been charged and convicted of a lesser offense if not for incompetencies associated with youth, such as an inability to deal with police officers or an incapacity to assist her own attorney; and (5) the presence or absence of a prior criminal history and the possibility for rehabilitation. 132 S. Ct. at 2468.

Respondent parrots the assertion of the Ninth Circuit opinion that the probation report "contained mitigating evidence related to DeMola's education, health, substance abuse history, and lack of a prior criminal record." Pet. App. 26; BIO at 2, 7. This "mitigating evidence" is listed mostly on a one-page form that is part of the report. Pet. App. 173.

Regarding DeMola's education, the form notes that DeMola completed the 11th grade at Centennial High School and did not graduate high school. *Id.* That's it; nothing regarding any achievements in school or evidence in school records of "immaturity, impetuousity, [or] failure to appreciate risks and consequences." *Miller*, 132 S. Ct. at 2468.

Regarding DeMola's health, the form describes her physical and mental health as "good"; says that she has "no" handicaps; and that she's "Enemic" [sic] and takes "iron pills." Pet. App. 173. There is no mention of DeMola's "family and home environment" or whether that environment was "brutal or dysfunctional," *Miller*, 132 S. Ct. at 2468, this in a case where the defendant was convicted of the first degree murder of her mother. Nor does the report mention how "familial and peer

pressures may have affected" DeMola or any "incompetencies associated with youth" that may have made her unable to deal with police officers or prosecutors or assist her own attorney. *Id.*

Regarding DeMola's substance abuse history, the form places a "Y" next to alcohol and an "N" next to various drugs. Pet. App. 173. It says "N" for her ever being addicted or treated. *Id.*

The text of the report states that a "review of available records reveals no juvenile adjudications or adult criminal convictions." Pet. App. 177.[2] DeMola did not kill the victim; the prosecutor tried her on an aiding and abetting theory. Pet. at 5-6.

Respondent does not contest that neither DeMola nor her lawyer were interviewed for the probation report, nor that at the sentencing hearing her lawyer made no presentation or argument for a sentence less than life-without-parole, but instead just submitted on the record, such as it was. Pet. at 21; Pet. App. 179, 181. The vast bulk of the report is dedicated to reciting the circumstances of the offense, taken from a police report, and reciting several victim impact statements and failed efforts to obtain others. Pet. App. 174-79. The probation report provides no basis to conclude that DeMola received the sentencing consideration required by *Miller*.

Respondent argues that this case is "a poor vehicle for review" because the Court would have to resolve four issues that were never addressed by the courts below. BIO at 12. Respondent's argument provides no good reason to deny certiorari.

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[2] By contrast, one of the offenders in *Miller* had a juvenile arrest history of shoplifting and several incidents of car theft, 132 S. Ct. at 2461; one of the juveniles in *Gutierrez* had four entries in his criminal history, including an assault with a deadly weapon, 324 P.3d at 251-52; and the other "had ten major write-ups in custody for failing to obey the rules, deception, [and] possession of contraband, including alcohol . . . ." *Id.* at 254.

Respondent's first procedural argument is that "there is a potential jurisdictional defect" because the Ninth Circuit never granted a certificate of appealability ("COA") on DeMola's Eighth Amendment claim before adjudicating the claim. BIO at 13. Respondent notes that "[t]here is a division of authority over whether a court of appeals lacks jurisdiction to consider an alternative ground for affirmance advanced by a habeas petitioner" when the State appeals and the petitioner is the appellee on appeal, and that the Court is considering this issue in *Jennings v. Stephens*, No. 13-7211. *Id.* But if the Court holds in *Jennings* that a COA is not required in these circumstances, the lack of a COA here would not be a "jurisdictional defect." And if the Court holds that a COA is required, it should grant, vacate and remand the Ninth Circuit judgment here based on that intervening clarification of the law. *See* BIO at 6 n.3 ("this Court typically employs such [grant, vacate and remand] orders to 'flag' for a lower court 'a particular issue that it does not appear to have fully considered'"); *id.* at 9-10 ("the purpose of a GVR order is to tell 'the lower court to reconsider the entire case in light of the intervening precedent – which may or may not compel a different result'") (citation omitted).

Respondent acknowledges that it did not make this COA argument below and rightly notes that the Ninth Circuit did not raise the issue, either, even though a Ninth Circuit case says that a COA is required in this situation. BIO at 13 n.6. If Respondent was aware of the rule below, it should not be allowed to assert it here now to inoculate the Ninth Circuit judgment from review by this Court. The fact that the Ninth Circuit did not apply its own COA rule to DeMola's Eighth Amendment claim just adds to the perfect storm of events that resulted in its flawed ruling here.

Respondent's second and third arguments merely note retroactivity and "clearly established Federal law"[3] issues that would need to be considered, but acknowledges they do not necessarily prevent DeMola from winning relief. BIO at 14-15. Respondent acknowledges that lower courts have issued conflicting rulings on the "divisive question" of whether *Miller* is retroactive, BIO at 14-15, a fact favoring review.

Respondent's fourth argument is that "petitioner's Eighth Amendment claim also implicates th[e] exhaustion requirement." BIO at 17. Respondent asserts that "[t]he State has not waived th[e] exhaustion requirement" and notes that it raised the issue of exhaustion in its reply brief in the Ninth Circuit. *Id.* However, the Ninth Circuit did not rule that the claim was unexhausted. *Id.* Further, although the Ninth Circuit opinion noted that "[a]ccording to the state, DeMola's claim is also procedurally barred," DeMola showed in her certiorari petition that the state court rejected the State's procedural bar argument and did not impose any bars. Pet. at 26-27. DeMola also demonstrated that Respondent did not raise or attempt to prove a procedural default defense in federal court. *Id.*; Pet. App. 135-37.

Respondent states that "[t]he state courts are open for petitioner to assert [her Eighth Amendment] claim in a state habeas petition." BIO at 17-18. Respondent warns, though, that it "would expect to respond to any state habeas petition by arguing that *Miller* does not apply retroactively on collateral review" and also flags the possibility of asserting other, unidentified arguments. BIO at 18. But even if DeMola returns to state court to seek resentencing relief, without action by this Court the Ninth Circuit opinion will remain on the books to potentially mute *Miller*'s mandate. And, as shown above and in the petition, the "generally mandatory" prescription of LWOP applied to DeMola and hundreds of other

[3] 28 U.S.C. § 2254(d)(1).

California juveniles is no more constitutionally tolerable than the mandatory LWOP statutes struck down in *Miller*, a conclusion effectively recognized by the California Supreme Court in *Gutierrez*.

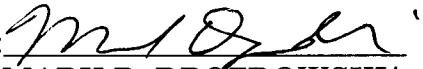
CONCLUSION

For the foregoing reasons, and the reasons stated in her petition, DeMola respectfully requests that the Court grant her petition for a writ of certiorari.

Respectfully submitted,

HILARY POTASHNER
Acting Federal Public Defender

DATED: October 29, 2014

By: 
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CERTIFICATE OF SERVICE

I, Mark R. Drozdowski, a Deputy Federal Public Defender in the Office of the Federal Public Defender who was appointed as counsel for Petitioner under the Criminal Justice Act, 18 U.S.C. § 3006(A)(b), and a member of the Bar of this Court, hereby certify that, pursuant to Supreme Court Rule 29.3, on October 29, 2014, a copy of the **Reply in Support of Petition for Writ of Certiorari** was mailed postage prepaid and electronically mailed to:

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All parties required to be served have been served. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on October 29, 2014 at Los Angeles, California.

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