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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

EUGENE DIVISION

KIPLAND KINKEL,

Petitioner,

v.

GERALD LONG, Superintendent,
Oregon State Correctional Institution,

Respondent

Case No.: 6:11-cv-6244-AA

PETITIONER'S MOTION FOR RECONSIDERATION (FRCP 59(e))

Certification

Pursuant to LR 7-1, Petitioner conferred with Respondent who opposes this motion.

Motion

Petitioner moves this Court to reconsider its Judgment (ECF No. 45) pursuant to Federal Rule of Civil Procedure 59(e). Specifically, Petitioner contends that this Court's Opinion and Order (ECF No. 148) committed clear error in the analysis of Petitioner's Fourth Ground for Relief. This motion is supported by the attached Memorandum of In Support of Petitioner's Motion for Reconsideration.

DATED: January 14, 2022.

Respectfully submitted,

s/ Thaddeus Betz
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Case No.: 66:11-cv-6244-AA

MEMORANDUM IN SUPPORT OF PETITIONER'S MOTION FOR RECONSIDERATION (FRCP 59(e))

I. Introduction

Pursuant to Federal Rule of Civil Procedure 59(e), Petitioner asks this court to reconsider its Opinion and Order (ECF No. 148) dismissing the habeas corpus petition at issue.

Specifically, Petitioner's Fourth Ground for Relief asserts that the Oregon Supreme Court

unreasonably determined that Petitioner's sentence did not violate the 8th Amendment in sentencing a child to die in prison. In rejecting Petitioner's Fourth Ground for Relief, this court ruled that the recently decided United States Supreme Court case, *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), controls the outcome of this case.

However, such a conclusion is a clear error of law and merits correction under Rule 59(e). The Oregon Supreme Court issued its opinion in Petitioner's case in 2018, whereas *Jones* was decided in 2021. Critically, the Anti-Terrorism and Effective Death Penalty Act (AEDPA) commands that this Court review a habeas corpus petition in light of federal law *at the time* the state court decision was issued. Thus, *Jones* may not be relied upon by this Court. Under that correct rubric, Petitioner is entitled to relief as the Oregon Supreme Court's decision was an unreasonable application of federal law under *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, 577 U.S. 190 (2016).

II. Federal Rule of Civil Procedure 59(e)

Following entry of a final judgment in a matter, a party may seek relief from that judgment under Federal Rule of Civil Procedure 59(e). Rule 59(e) is "appropriate if the district court (1) is presented with newly discovered evidence, (2) committed a clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *Sissko v. Rocha,* 440 F.3d 1145, 1153-54 (9th Cir. 2006). "[A] motion for reconsideration should accomplish two goals: (1) is should demonstrate reasons why the court should reconsider its prior decision and (2) set forth law or facts of a strongly convincing nature to induce the court to reverse its prior decision." *Romtec, et al. v. Oldcastle Precast, Inc.,* No. 08-06297-HO, 2011 WL

690633, at *8 (D. Or. Feb. 16, 2011), *citing Donaldson v. Liberty Mut. Ins. Co.,* 947 F.Supp. 429, 430 (D. Haw. 1996).

III. The Court committed clear error in deciding Petitioner's Fourth Ground for Relief

A. The AEPDA legal standard under 28 U.S.C. § 2254(d)

This Court explained that

> "review of Kinkel's First Amended Petition is governed by the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Under the AEDPA, a federal court may not grant habeas relief regarding any claim 'adjudicated on the merits' in state court, unless the state court ruling 'was contrary to, or involved an unreasonable application of, clearly established Federal law' or 'was based on an unreasonable determinate of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(1), (2).'"

ECF No. 148 at 10 ("Opinion and Order").

The United States Supreme Court has long held that, as contemplated by AEDPA, "clearly established Federal law … is the governing legal principle or principles set forth by the Supreme Court *at the time the state court renders its decision*." *Lockyer v. Andrade,* 538 U.S. 63, 71-72 (2003) (emphasis added); *See Green v. Fisher,* 132 U.S. 34 (2011) (same);*Meras v. Sisto,* 676 F.3d 1184, 1187 (9th Cir. 2012) (applying *Green*); *Bischoff v. Lampert*, No. CIV.02-787-CO, 2005 WL 914741, at *4 (D. Or. Apr. 19, 2005) ("When determining what the clearly established federal law is, federal courts look at the holdings of the United States Supreme Court as of the time of the state court's decision." *Citing Williams v. Taylor,* 529 U.S. 362, 412 (2000)).

An example relevant to this case, in *Harned v. Mills,* No. 6:10-CV-00594-PA, 2013 WL 6115727 * 5 (D. Or. Nov. 14, 2013), a juvenile offender in Oregon who had been sentenced to life without the possibility of parole brought a § 2254 habeas corpus petition arguing that his sentence violated his rights under the Eight Amendment. The juvenile argued that the Supreme

Court's decision in *Graham v. Florida,* 560 U.S. 48 (2010) entitled him to habeas relief. *Id.* The Oregon District Court rejected his claim based on the fact that under § 2254(d)(1), as interpreted in *Green,* "requires the federal courts to focus on what a state court knew and did, and to measure state-court decision against this Court's precedents *as of the time the state court renders its decision.*" *Id.* at 6. The last reasoned state court decision related to the juvenile's Eighth Amendment claim was decided prior to *Graham. Id.* at 6, n. 3 (so stating and clarifying why the juvenile in *Moore v. Biter,* 725 F.3d 1184 (9th Cir. 2013), who litigated a state habeas claim after *Graham was decided*, is distinguishable). Consequently, the District Court held that "the pre-*Graham* balancing test from *Harmelin* [*v. Michigan,* 501 U.S. 957 (1991)] and its progeny applies[,]" *id,* and the court would not allow the petitioner to rely upon Supreme Court caselaw developed subsequent to the state court decision.

B. This Court's analysis is clearly erroneous under AEDPA standards

This Court erred by analyzing Petitioner's Fourth Ground for Relief under an incorrect AEDPA standard. Petitioner asserted that the Oregon Supreme Court's decision was contrary to and involved an unreasonable application of clearly established Federal law, *viz.,* the Eighth Amendment as interpreted by the United States Supreme Court in *Miller v. Alabama,* 567 U.S. 460 (2012) and *Montgomery v. Louisiana,* 577 190, 209-10 (2016). (ECF No. 90 at 23-24; ECF 130 at 56-64). Those were the United States Supreme Court cases establishing the "legal principle or principles set forth … at the time the state court renders its decision." *Lockyer,* 538 U.S. at 71-72 (2003).

Rather than resolve Petitioner's Fourth Ground for Relief in accordance with the "legal principle or principles set forth … at the time the state court renders its decision," this Court relied on the United States Supreme Court's decision in *Jones v. Mississippi,* 141 S.Ct. 1307,

1313 (2021), which was decided well after the Oregon Supreme Court's decision in *Kinkel v. Persson,* 363 Or. 1 (2018), in holding that "the Oregon Supreme Court's decision that Kinkel's aggregate, 112-year sentence does not run afoul of *Miller* or violate the Eighth Amendment was not unreasonable, and habeas relief is denied on Ground Four." (ECF No. 148 at 26). *See also* ECF No. 148 at 26 n. 5 (rejecting Petitioner's argument that the Oregon Supreme Court unreasonably determined the facts as moot "[g]iven the Supreme Court's holding in *Jones*[.]").

To be clear, this Court expressly stated that "*Montgomery* supported the underlying premise of Kinkel's argument – that *Miller* requires a finding of 'irreparable corruption' rather than 'transient immaturity' before the juvenile murder may be sentenced to life without parole" but further found "*Jones* disavowed it." (ECF No. 148 at 22). This Court then explained:

> "After *Jones,* a sentencer may impose a life-without-parole sentence on a juvenile who committed homicide without violating *Miller* or the Eight Amendment, 'but only if the sentence is not mandatory' and 'the sentencer has discretion to consider the "mitigating qualities of youth' and impose a lesser punishment.' *Id.* at 1311, 1314, *see also id.* at 1322 (finding that 'resentencing in Jones's case complied with' the Eighth Amendment 'because the sentence was not mandatory and the trial judge has discretion to impose a lesser punishment in light of Jones's youth.)"

(ECF No. 148 at 23-24). This Court then recognized in the footnote how "[m]embers of the Supreme Court recognized that its holding in *Jones* is at odds with its language in *Montgomery*[,]" however, this Court concluded that "*Jones* is the Supreme Court's last word on *Miller,* and its holding is binding on this Court." (ECF No. 148 at 23 n. 4).

This Court's reliance on *Jones* to deny Petitioner's Fourth Ground for Habeas Relief violated the AEDPA standard of review under § 2254(d). *Jones* was not decided until *after* the Oregon Supreme Court decided *Kinkel. Jones* therefore cannot be considered in evaluating whether the Oregon Supreme Court's decision in *Kinkel v. Persson* was 'was contrary to, or involved an unreasonable application of, clearly established Federal law' or 'was based on an

unreasonable determinate of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(1), (2). *Miller* and *Montgomery* govern this Court's review of that decision and, as this Court acknowledged, under those cases, habeas relief should be granted.

IV. Conclusion

For the foregoing reasons, Petitioner respectfully requests this Court reconsider and reverse its decision denying Plaintiff's Fourth Ground for Relief, and issue an Order granting him habeas corpus relief on that ground.

DATED: January 14, 2022

Respectfully submitted,

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