No. 22-35096

UNITED STATES COURT OF APPEALS

FOR THE

NINTH CIRCUIT

KIPLAND KINKEL,

Petitioner-Appellant,

v.

GERALD LONG,

Respondent-Appellee.

Appeal from the United States District Court

for the District of Oregon

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional & Statutory Provisions

Rules

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 2254. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 2253. The district court dismissed Mr. Kinkel's petition for habeas corpus in its entirely on January 6, 2022, in an order that disposed of all claims. Excerpts of Record (ER) 1-ER-9. The district granted a certificate of appealability only for Grounds Three, Four, and Five 1-ER 40. On June 16, 2022, the district court denied reconsideration. 1-ER 1. Mr. Kinkel filed a notice of appeal on February 1, 2022. 2-ER-74. *See also* 1-ER-72 (filing Notice of Intent to Prosecute Appeal).

ISSUES PRESENTED FOR REVIEW

1. Is the state court's decision rejecting Kinkel's claim that his 112 year sentence is unconstitutional under *Miller v. Alabama*, 567 U.S. 460 (2012), and related cases, an unreasonable application of clearly established federal law and an unreasonable determination of facts at the time of the state court's decision?

2. Does the Antiterrorism and Effective Death Penalty Act ("AEDPA") bar consideration of the Supreme Court's decision in *Jones v. Mississippi*, 141 S. Ct. 1307 (2021) because it was not clearly established Federal law the time Oregon adjudicated Kinkle's Eighth Amendment claim?

3. Is Kinkel's 87 year aggregate sentence for nonhomicide crimes unconstitutional under *Graham v. Florida,* 560 U.S. 48 (2010)?

4. Has Kinkel satisfied his burden of showing that the state court's rejection of his claim, that his plea is unconstitutional because it was involuntary made, involved an unreasonable application of clearly established federal law at the time of the state court's decision?

STATEMENT OF THE CASE

I. Nature Of the Case

This is an appeal from the orders and judgments, entered on January 6 and June 16, 2022, which dismissed Mr. Kinkel's habeas corpus petition. 2-ER 72, 74.

II. State Court Proceedings

A. Kinkel's Indictment

On June 11, 1998, when Kinkel was 15 years old, a grand jury in Lane County, Oregon, indicted Kinkel with: Aggravated Murder (4 counts); Attempted Aggravated Murder with a Firearm (25 counts); Attempted Aggravated Murder (1 count); Assault in the First Degree with a Firearm (6 counts); Assault in the Second Degree with a Firearm (18 counts); Unlawful Manufacture of a Destructive Device (1 count); Unlawful Possession of a Destructive Device (1 count); Unlawful Possession of a Short-Barreled Shotgun (1 count); and Theft in the First Degree (1 count). 8-ER-1699. Notwithstanding his youth, Oregon law at that time required that Kinkel be "prosecuted as an adult in criminal court." Or. Rev. Stat. § 137.707 (1998).[1]

[1] The most serious crime, Aggravated Murder, required a presumptive sentence of life without the possibility of parole, Or. Rev. Stat. § 163.150(2)(a) (1998).

B. Pre-Trial and Plea Agreement

The Oregon Supreme Court described the factual background of relevant pre-trial proceedings as follows:

> Before trial, petitioner moved to dismiss the aggravated murder charges, arguing that "[t]he possibility of a sentence of life in prison without the possibility of parole for a fifteen year old convicted of murder constitutes cruel and unusual punishment in violation of * * * the Eighth Amendment to the U.S. Constitution." The arguments that petitioner advanced in the memorandum in support of his motion paralleled the arguments that the United States Supreme Court later found persuasive in *Miller*; that is, he argued that the prohibition on sentencing a 15-year old to death should be extended to life without the possibility of parole because of the immaturity of juveniles and their possibility for change. Based on that argument, petitioner asked the sentencing court to declare Oregon's aggravated murder statutes "unconstitutional insofar as these statutes extend the possibility of a true-life sentence [a life sentence without the possibility of parole] to a fifteen year old convicted of aggravated murder." The sentencing court denied petitioner's [Eight Amendment argument], and petitioner entered into the plea agreement.
>
> As part of that agreement, petitioner pled guilty to the lesser included offenses of murder and attempted murder. Under Oregon law, his plea meant that petitioner admitted intentionally killing the four people whom he shot and intending to kill the nearly two dozen students whom he shot and wounded and the one student whom he attempted to shoot. Additionally, petitioner stated as part of his plea that, "[b]y permitting the Court to enter a guilty plea on my behalf, I knowingly waive the defenses of mental disease or defect, extreme emotional disturbance, or diminished capacity."
>
> The plea petition recites that petitioner was aware that, as a result of his plea, the trial court was "bound and shall impose a 300 month sentence (25 years) on each [of the four convictions of murder] with those sentences to be served concurrently." Regarding the remaining 26 counts of attempted murder, petitioner acknowledged that he would receive a mandatory sentence of 90 months on each count, that the trial

> court was not bound to order that the sentences be served concurrently, and that each side was free to argue for consecutive or concurrent sentences.

Kinkel v. Persson, 363 Or. 1, 6–7, 417 P.3d 401 (2018) (footnotes omitted) (*Kinkel II*) (1-ER-41). *See also* 8-ER-1685 (plea petition), 8-ER-1647 (plea hearing transcript)).[2]

C. Sentencing

Kinkel's sentencing spanned six days, starting on November 2, 1999. The sole issue was to determine "whether sentences on the 26 attempted murder charges should be concurrent or consecutive." *Kinkel II*, 363 Or. at 7. As relevant here, the Oregon Supreme Court described how Kinkel's counsel argued again

> that the trial court should consider his youth when imposing his sentence. More specifically, he incorporated the arguments that he previously had made against imposing a life sentence without possibility of parole for aggravated murder and contended that those same considerations applied equally to imposing consecutive sentences that were equivalent to a life sentence without the possibility of parole. In making that argument, petitioner's counsel advanced virtually the same arguments that later informed the Court's decision in *Miller*; that is, he argued that *Thompson v. Oklahoma*, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed. 2d 702 (1988), which had categorically prohibited imposing the death penalty on juveniles under 16 years of age, should be extended to aggregate sentences imposed on a juvenile that were equivalent to a life sentence without the possibility of parole.

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[2] As part of the plea agreement, Kinkel was required to agree to *State v. McLain*, 158 Or. App. 419, 974 P.2d 727 (1999) "appl[ying], regardless of whether the case is ultimately reversed on appeal or is legislatively changed." 8-ER-1697. *McLain* held the Oregon Board of Parole did not have the authority to parole an offender convicted of Murder after 1989. *Id.* at 425.

Kinkel II, 363 Or. at 8.

Kinkel's counsel presented mitigating evidence in greater detail concerning the Kinkel's conduct and character. Witnesses testified about Kinkel's family and documented a history of mental illness. 5-ER-794 to 6-ER-1199. While Kinkel was awaiting trial in the Lane County Jail, a corrections supervisor recounted that Kinkel displayed a "genuine response" of sadness, demonstrated remorse, and did not believe he was the type of offender who required a life sentence. 6-ER 1092. Dr. Konkel, a pediatric neurologist, provided testimony that Kinkel had a "developmental" abnormality, which could affect behavior, and that his prognosis was "hopeful." 6-ER-1133 to 6-ER-1140. Dr. Konkel went on to point out that up to 90 percent of individuals in Kinkel's circumstance receive a positive response from medication. 6-ER-1141.

Kinkel also presented the testimony of a pediatric psychiatrist and pediatric psychologists. Dr. Sack, a psychiatrist, cautioned that youth of Kinkel's age are in a "developmental process" and are "not fixed." 6-ER-1247. Dr. Sack concluded Kinkel's condition is treatable and would be expected to be "safely returned to the community." 6-ER-1260. Dr. Bolstad similarly testified that Kinkel could be expected to respond positively to treatment and "be pretty normal." 5-ER-972 Notably, Dr. Bolstad expressed optimism for Kinkel's rehabilitation as the condition can change; indeed his symptoms were "still immature" and in the "early stage…"

5-ER-973. Thus, Kinkel's symptoms, which motivated his crime, were related to the maturation process.

On November 9, 1999, the prosecution compared Kinkel to an adult offender, arguing that "Kip Kinkel ranks with some of the most notorious criminal in our history, names like Ted Bundy, Timothy McVeigh, Jeffrey Dahmer, John Wayne Gacy." 7-ER-1578. The prosecution argued that Kinkel's "so-called" mental illness was a ruse and the "essence of Kip Kinkel[]" is "[f]rom a very early age, * * * a very nasty, violent, easy-to-frustrate and easy-to-anger boy." 7-ER-1531. The prosecution recommended "a sentence of 220 years. Kip Kinkel must die in prison. He must never be allowed to walk free." 7-ER-1542.

On November 10, 1999, the court imposed a 112-year sentence. *Kinkel II,* 363 Or. at 9-10 (describing sentencing findings). The sentencing court began by emphasizing that, in considering an appropriate sentence, it viewed the possible reformation of any defendant, adult or otherwise, was not of paramount consideration: "the protection of society in general was to be of more importance than the possible reformation or rehabilitation of any individual defendant." 8-ER-1622. Failing to distinguish between children and adults, the sentencing court went on to compare Mr. Kinkel's offenses to an adult's in discussing how a true life term would be constitutionally proportional. 8-ER-1622. The court recognized that "it lacked the flexibility to 'structure any kind of long-range conditional sentence'" but

that "even if it had that authority, it would not be appropriate to exercise it." 8-ER-1625. Ultimately, the court structured Kinkel's sentence "to account for each of the wounded * * * and for Kinkel to know that there was a price to be paid for each person hit by his bullets." 8-ER-1625. Kinkel's counsel objected under the Eighth Amendment to the sentencing court imposing a life without parole sentence, which the court "noted." 8-ER-1628.

E. Direct Appeal Proceedings

Kinkel challenged his sentence on direct appeal arguing, as relevant here, that his "true-life sentence violates the Eighth Amendment's ban on cruel and unusual punishment, for it is 'grossly disproportionate' to the crime." *Kinkel II,* 363 Or. at 11 (quoting *Harmelin v. Michigan,* 501 U.S. 957 (1991)). The Court of Appeals rejected Kinkel's argument holding, in part, that the sentencing court concluded that "protection of society from this defendant was of utmost importance." *State v. Kinkel,* 184 Or. App. 277, 56 P.3d 463, *rev. den.* 335 Or. 142 (2002).

F. First-Post Conviction Proceedings

On December 18, 2003, Kinkel sought post-conviction relief in state court. Kinkel claimed, among other things, that his acceptance of the plea agreement was not knowing and voluntary. *Kinkel v. Lawhead,* 240 Or. App. 403, 414, 246 P.3d 746, *rev den*, 350 Or. 408 (2011) (*Kinkel I*) (1-ER-64). The circuit court denied relief. *Id.*

On January 12, 2011, the Court of Appeals affirmed the circuit court in a written decision. *Kinkel I.,* 240 Or. App. 403. As relevant to this appeal, the Court of Appeals rejected Kinkel's argument that his plea was not knowing and voluntary. *Id.* at 414–15. The Oregon Supreme Court denied review. *Kinkel v. Lawhead,* 350 Or. 408 (2011).

G. Second Post-Conviction Proceedings

On March 27, 2013, Kinkel filed a successive petition for post-conviction relief challenging his sentence under in *Miller* and *Graham*. *Kinkel II,* 363 Or. at 11. The trial court rejected that argument, ultimately concluding that the post-conviction court ruled that Or. Rev. Stat. § 138.550(3) procedurally barred relief because Kinkel could have reasonably raised his ground for relief in his original post-conviction petition. *Id.* at 11. Thus, Kinkel was denied the opportunity to present any evidence to a trial court about his 1999 sentence.

Kinkel appealed the post-conviction court's judgment. *Kinkel II,* 363 Or. at 11. The Court of Appeals affirmed the post-conviction court's judgment, but it did so based on a related procedural statute, Or. Rev. Stat. § 138.550(2). *Kinkel v. Persson,* 276 Or. App. 427, 367 P.3d 956 (2016). That court found Kinkel had raised an Eighth Amendment claim, similar to his *Miller* claim, on direct appeal in 2002 and was therefore barred under Or. Rev. Stat. § 138.550(2). *Id*. at 956.

The Oregon Supreme Court granted Kinkel's petition for review. *Kinkel v. Persson,* 359 Or. 525, 379 P.3d 525 (2016). The Oregon Supreme Court affirmed the decision of the Court of Appeals and judgment of the circuit court but on a ground neither briefed nor argued by the parties. That court decided not to "resolve the parties' procedural arguments," concluding "that the Court of Appeals decision may be affirmed on an alternative ground[:]" that Kinkel's "Eighth Amendment challenge to his sentence fails on the merits." *Kinkel II,* 363 Or. at 12-13.

The Oregon Supreme Court initially described Kinkel's merits argument under the Eighth Amendment to be "that the categorical rule announced in *Miller* applies to his aggregate sentence." *Id.* at 13. The court "described two lines of Eighth Amendment authority" *Id.* at 13. First, the court "describe[d] briefly the proportionality analysis in [*Roper v. Simmons,* 543 U.S. 551 (2005), *Miller,* and *Graham*] before describing a separate line of Eighth Amendment cases regarding aggregate sentences[.]" *Id*. at 14. The court concluded "[t]he holdings in *Miller* and *Graham* do not compel the categorical rule that petitioner urges." *Id*. at 19. The court "recognize[d], as petitioner and the state argue, other courts have divided over whether and how *Miller* and *Graham* apply to aggregate sentences for multiple crimes." *Id.* at 22. The court concluded that it would "strike a middle ground between those two extremes." *Kinkel II,* 363 Or. at 22 (footnote omitted; emphasis added).

Although the Oregon Supreme Court arrived at this conclusion it expressly declined to resolve Mr. Kinkle's case on the issue of whether his aggregate sentences violated the Eighth Amendment. *Id.* at 24 ("It might be possible to uphold petitioner's sentence against the Eighth Amendment challenge based solely on the number and magnitude of his crimes. However, we need not go that far to decide this case[.]"). Instead, that court resolved Kinkel's case on the merits acknowledging that the Eighth Amendment bars a true life penalty for a "class of defendants because of their status—that is, juvenile offenders whose crimes reflect the transient immaturity of youth". 363 Or. at 16 (citing *Montgomery v. Louisiana*, 577 U.S. 190, 208 (2016)) (internal citations and quotations omitted). The court then undertook a retrospective analysis of whether the 1999 sentencing court's findings supported his life without parole sentence under *Miller*. *Id* at 24 ("The sentencing court's findings in this case persuade us that petitioner comes within the class of juveniles who, as *Miller* recognized, may be sentenced to life without the possibility of parole for a homicide.")

In reaching that conclusion, the court first observed that, under *Miller*, "the Eighth Amendment permits sentencing a juvenile to life without possibly for a single homicide if that crime reflects irreparable corruption rather than the transience of youth." *Kinkel II*, 363 Or. at 24 (citing *Miller*, 567 U.S. at 479). The court then explained how the distinction between a juvenile's crime reflecting irreparable

corruption rather than the transience of youth has its origin in *Roper,* but that *Miller* informs how that determination can be made. *Id*. at 26. The court summarized:

> As the foregoing discussion makes clear, the transience of youth—the recognition that most juvenile crimes are attributable to traits that will disappear or significantly diminish as a youthful offender ages—is the primary characteristic that justifies a constitutional distinction between the permissible punishment for a juvenile and an adult whose crimes are otherwise identical. As *Miller* explained and *Montgomery* confirmed, if a single juvenile homicide reflects the transience of youth, the possibility of reformation is too great for life without possibility of parole to be constitutionally permissible. *Montgomery*, 136 S.Ct. at 734. However, when the traits that led to the commission of the homicide are fixed or irreparable, rather than transient, then that characteristic no longer bars imposition of a life sentence without possibility of parole for a single homicide. Additionally, the homicide must reflect a level of corruption sufficient to impose life without possibility of parole on a juvenile.

Kinkel II, 363 Or. at 26-27 (footnote omitted; citations omitted).

The court then applied its *Miller/Montgomery* two prong standard "to the trial court findings[,]" and concluded that "the findings that the trial court made bring Kinkel within the class of juveniles who, as *Miller* recognized, may be sentenced to life without the possibility of parole." *Id*. at 27. First, with respect to the transience of youth, the Oregon Supreme Court asserted:

> The trial court accepted, as petitioner's medical experts had testified, that petitioner suffered from a schizoaffective disorder that motivated him to commit his crimes, and the court agreed that petitioner's disorder was not a function of his youth—*i.e.*, his condition could be treated but never cured. The sentencing court agreed that, if petitioner's disorder were untreated or inadequately treated, petitioner "remained dangerous." Specifically, the sentencing court agreed with petitioner's expert that "there is no cure for [petitioner's] condition, that

> he should never be released without appropriate medication and—I quote—'an awful lot of structure and appropriate support services arranged for him.' "
>
> Those findings are inconsistent with a determination that petitioner's crimes "reflect the transient immaturity of youth." *Montgomery*, 136 S.Ct. at 734 (summarizing why life without possibility of parole is constitutionally impermissible when applied to most juveniles). Rather, as petitioner's experts testified and the sentencing court found, petitioner's crimes reflect a deep-seated psychological problem that will not diminish as petitioner matures.

Kinkel II, 363 Or. at 27-28 (footnote omitted).

As for the second prong, irreparable depravity, the court concluded:

> [W]e think no person reasonably could dispute, that petitioner's actions are the sort of heinous crimes that, if committed by an adult, would reflect an "irretrievably depraved character," *see Roper*, 543 U.S. at 570, 125 S.Ct. 1183, or "irreparable corruption," *see Miller*, 567 U.S. at 480, 132 S.Ct. 2455. And as *Miller* recognized, the "most heinous murders" or "worst types of murders," even when committed by a juvenile, can evidence irreparable corruption. 567 U.S. at 480 n. 8, 132 S.Ct. 2455 (internal quotation marks and citation omitted). * * *

Kinkel II, 363 Or. at 28.

H. Writ of Certiorari

Kinkel timely filed a *pro se* Writ of Certiorari, which the United States Supreme Court denied. *Kinkel v. Laney,* 139 S.Ct. 789 (2019).

III. Federal District Court Proceedings

Kinkel timely filed a petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus. 8-ER-1712. After the Oregon Supreme Court resolved his successive post-conviction petition, he filed a First Amended Petition for a Writ of Habeas Corpus

("Amended Petition"). 2-ER-80. Overall, Kinkel raised Seven Grounds challenging his conviction and sentence. The district court rejected all of Kinkel's grounds for habeas corpus relief and denied Kinkel's petition. 1- ER-9. As noted above, Kinkel sought reconsideration under Fed R. Civ. P. 29(e) on the basis that the district court's committed clear error in the analysis of his Fourth Ground for Relief in its Opinion and Order, which the district court denied. 1-ER-1. The district court issued a Certificate of Appealability with respect to Grounds Three, Four, and Five but denied a certificate for the other four Grounds. 1-ER-8.

STANDARD OF REVIEW

This Court "review[s] *de novo* a district court's decision to grant or deny a state prisoner's petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254." *Gill v. Ayers,* 342 F3d 911, 917 (9th Cir. 2003).

This § 2254 habeas corpus petition is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Under AEDPA, habeas relief may not be granted unless the state court's decision was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(1), (2). This Court applies the deferential review

under AEDPA to the last reasoned state court decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803–04 (1991).

SUMMARY OF ARGUMENT

In May of 1998, 15 year old Kipland Kinkel suffered from an undiagnosed schizoaffective disorder. In a tragic 24-hour time span that month, in psychosis, he killed his parents, two classmates, and injured many others. For this, he was indicted for aggravated murder, attempted murder, and other offenses.

In 1998, Oregon mandated that any child 15 years or older automatically be charged as an adult and be exposed to any number of mandatory penalties. Likewise, at that time, the Eighth Amendment jurisprudence drew no distinction between the criminal punishment of children and adults. Indeed, in 1998, consistent with the Eighth Amendment, a child could be put to death, a child could be incarcerated for life for non-homicide offenses, and a child could be automatically sentenced to life imprisonment with release for homicide. Of course, all of these practices have since been barred under the Eighth Amendment as the Supreme Court came to recognize that "children are constitutionally different from adults for purposes of sentencing" and "those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 567 U.S. at 471.

It was in this context that Mr. Kinkel plead guilty to four counts of murder and 26 counts of attempted murder. His lawyers at the time argued that the Eighth

Amendment should bar the most serious penalty, true life in prison, but the sentencing court did not recognize any Eighth Amendment boundary to any sentence. In fact, the sentencing court recognized Kinkel's positive prognosis for reform and that he could be safely returned to the community. However, as the Supreme Court's Eighth Amendment jurisprudence had not yet recognized the attendant characteristics of youth as even barring the death penalty for some children, the court simply sentenced Kinkel to a term of 112 years without possibility for release in order to "account for each of the wounded." 8-ER-1625.

After *Miller* was decided, Kinkel sought state post-conviction relief from his sentence. A post-conviction trial court dismissed Kinkel's petition finding that he could have raised his *Miller* based arguments in an earlier post-conviction petition before *Miller* had been decided. Thus, Kinkel never was permitted, after *Miller* or *Montgomery*, to make a substantive legal or factual argument to a trial level post-conviction court as to why his sentence violated the Eighth Amendment.

Despite this procedural decision, the Oregon Supreme Court reached the merits of Mr. Kinkel's case in 2019. That court held, in light of *Miller* and *Montgomery*, that Kinkel's sentence did not offend the Eighth Amendment because the sentencing court determined that Kinkel's crimes were not the product of the transience of youth, but instead, were the result of a mental illness. Thus, the Oregon Supreme Court held that the Eighth Amendment would permit lifetime

imprisonment for a child, so long as the child was severely mentally ill, even if that illness was manageable and developmental in nature. Put differently, the Oregon Supreme Court holding permits a sentencing court to sidestep a *Miller* analysis altogether if a child suffers from an incurable mental illness.

Of course, the 1999 sentencing court made no such findings as to whether Kinkel's crimes were the motivated by transient immaturity. Given the pre-*Miller* chronology of the sentencing proceeding, it would have felt no need to. Just the same, there is no indication the court recognized how the attendant characteristics of youth counsel against a true life sentence, as *Miller* instructs. Nor did the sentencing court adhere to the core substantive right of *Miller*, as reaffirmed in *Jones*—a life without parole sentence for a child whose crime reflects transient immaturity "is disproportionate under the Eighth Amendment." *Jones v. Mississippi*, 141 S. Ct. at 1315 n. 2 (2021). Again, a 1999 sentencing court would have felt no need to recognize any substantive right boundaries to its sentencing as it as it rejected the notion that the Eighth Amendment would pose any barriers in sentencing a child.

Without question, the Oregon Supreme Court's decision was both an unreasonable application of law and an unreasonable determination of fact and earns no deference under the AEDPA. Mr. Kinkel's sentence violates the Eighth amendment because the sentencing court failed to adhere to the instructions in *Miller* and its progeny.

Kinkel's sentence further violates the Eighth Amendment under *Graham,* which bars the imposition of a true life sentence for nonhomicide crimes. The Oregon Supreme Court never addressed the merits of Kinkel's *Graham* claim. As a result, this court analyzes the issue without deference. Kinkel was sentenced to over 80 years for nonhomicide offenses. He will die in prison under such a sentence in contradiction of *Graham*.

Last, Kinkel is entitled to habeas relief as his plea was involuntary. When Kinkel was a 15 year old child, after he committed his crimes, he was placed on antipsychotic medications while awaiting trial in the county jail. At his lawyer's instructions, he was removed from this medication and began experiencing auditory hallucinations as well as a deep paranoia of being in court. In this state of mind, he entered a plea of guilty which the trial court accepted after asking 19 yes or no questions. The only question Kinkel did not answer was whether he was of sound mind and on any medications. Instead, his attorney answered that question for him.

The State court analyzed voluntariness under the wrong legal standard—requiring this court to conduct an independent analysis. Clearly, a 15 year old child, diagnosed with a psychotic disorder for which he has been denied his medication, and who has a profound and deep fear of trial, cannot be said to have voluntarily waived his right to a trial.

For each of these reasons, this court should grant habeas corpus relief.

ARGUMENT

I. Kinkel's Sentence Violates the Eighth And Fourteenth Amendments.

A. Clearly Established Federal Law at the Time of the Oregon Supreme Court's Decision in Kinkel II: Miller and Montgomery.

In 2012, the Supreme Court held in *Miller* "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders." 567 U.S. at 479. *Miller* was built on the Court's decisions in *Roper* and *Graham*, which established that juvenile offenders are not eligible for capital sentences and that the Eighth Amendment precludes LWOP sentences for juveniles who commit non-homicide crimes. *Miller,* 567 U.S. at 470. These decisions reflect the understanding that "children are constitutionally different from adults for purposes of sentencing." *Id*. at 471. The Supreme Court in *Miller* further developed these constitutional principles, requiring that, even when the most serious crimes are at issue, courts "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id*. at 480.[3]

[3] *Miller* identified several characteristics of youth: (1) difficulty appreciating risks; (2) inability to escape dysfunctional home environments; (3) susceptibility to familial and peer pressure; (4) inability to deal competently with law enforcement or the justice system; and (5) potential for rehabilitation. *Miller*, 567 U.S. at 477-78.

The Court did not outright "foreclose a sentencer's ability to [impose LWOP on juveniles] in homicide cases," but required that the sentencer be able to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to lifetime in prison." *Id.* at 480. "The Court characterized this as a 'individualized consideration' and stated that 'appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon'" *Crespin v. Ryan,* 46 F.3d 803, 407 (9th Cir. 2022).

In 2016, the Supreme Court made *Miller* retroactive in *Montgomery*. "*Montgomery* emphasized that [*Miller*] is not only procedural, but substantive. *Crespin,* 46 F3d at 807 (citing *Montgomery,* 577 U.S. at 209). "Reinforcing the language of *Miller,* the Court stated that [life without the possibility of parole ("LWOP") is inappropriate 'for all but the rarest of juvenile offenders.'" *Id.* This Court explained:

> *Montgomery* stressed that a sentencer must not only "consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence," *id.* at 209–10, 136 S.Ct. 718, but also the offender's capacity for change, and that LWOP should only be imposed on an offender "whose crimes reflect permanent incorrigibility," *id.* at 209, 136 S.Ct. 718, not on "a child whose crime reflects unfortunate yet transient immaturity," *id.* at 208, 136 S.Ct. 718 (cleaned up).

Crespin, 46 F.3d at 807-808. *See also Tatum v. Arizona,* 580 U.S. __, 137 S. Ct. 11 (2016) (Sotomayor, J., concurring) (reversing several cases under *Miller* involving

juveniles serving aggregate sentences for multiple homicide and non-homicide crimes).

After *Kinkel II* was decided, the United States Supreme Court decided *Jones*, a case it had taken for the express purpose of clarifying "how to interpret *Miller* and *Montgomery*." 141 S. Ct. at 1313. *Jones* involved a juvenile who had been resentenced following *Miller*. *Id.* After the sentencing court considered Jones' youth and other factors "relevant to the child's culpability," the sentencing judge "determined that life without parole remained the appropriate sentence for Jones." *Id.* Jones appealed arguing that the sentencing court was required under *Miller* to make separate factual findings that "the defendant was permanently incorrigible" before imposing a sentence of life without the possibility of parole. *Id.* The Supreme Court rejected that argument holding that *Miller* did not require such findings. *Id.* at 1311. This court described how the Court in *Jones* held that

> the *Miller* Court mandated "only that a sentencer follow a certain process— considering an offender's youth and attendant characteristics—before imposing" a life-without-parole sentence. *Id.,* at 483, 132 S.Ct. 2455. In that process, the sentencer will consider the murderer's "diminished culpability and heightened capacity for change." *Id.,* at 479, 132 S.Ct. 2455. That sentencing procedure ensures that the sentencer affords individualized "consideration" to, among other things, the defendant's "chronological age and its hallmark features." *Id.*, at 477, 132 S.Ct. 2455.

Crespin, 46 F.4th at 810. This Court explained how *Jones* "narrowed the potential sweep of [*Miller* and *Montgomery*]." *Id.* at 808. *See also* 1-ER-30, 31 n. 4. (district

court stating that *Jones* "disavowed" and was at "odds" with language in *Montgomery*). However, the Court in *Jones* reaffirmed from *Miller* that:

> That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment.

Jones, 141 S. Ct. at 1315 n. 2.

The AEDPA bars the court from considering *Jones* in this case. The United States Supreme Court defined "clearly established Federal law, as determined by the Supreme Court of the United States," in 28 U.S.C. § 2254(d) to encompass "the holdings . . . of this Court's decisions *as of the time of the relevant state-court decisions*." *Williams v. Taylor,* 529 U.S. 362, 412 (2000) (emphasis added). The Supreme Court made clear in that clearly established federal law, under AEDPA, does not include decisions of the Supreme Court made after the time of the last reasoned state court decision. *Greene v. Fisher,* 565 U.S. 34 (2011); *see also Thompson v. Runnels,* 705 F.3d 1089, 1096 (9th Cir. 2013) (explaining that *Greene* "confirm[s]" that Supreme Court precedent at the time the state court renders its decision governs § 2254(d)(1) review). *Jones* was decided after the Oregon Supreme Court denied relief in *Kinkel II* in 2018. Therefore, under 28 U.S.C. § 2254(d), *Jones* should not be considered.

However, this Court's decisions are not consistent on whether *Jones* can be considered under the AEDPA when a state court decision on the merits occurred

prior to it. *See Jessup v. Shinn,* 31 F.4th 1262, 1266 (9th Cir. 2022) ("[B]ecause [*Montgomery* and *Jones*] came after the state court denied relief to Petitioner, we do not consider them as part of our AEDPA review." (*Greene,* 565 U.S. at 38)); *but see Crespin,* 46 F.4th at 808 (considering *Jones* after state-court decision); *United States v. Briones,* 35 F.4th 1150, 1152 (2022) (considering *Jones* on remand from Supreme Court). Kinkel asserts that this Court should not consider *Jones*, but even if it does, Kinkel's sentence remains unconstitutional even under *Jones*.

B. The Oregon Supreme Court's Decision In *Kinkel II* Was An Unreasonable Application Of *Miller, Montgomery*, and *Jones.*

1. Unreasonable Application of Law

The Oregon Supreme Court's merits decision was an objectively unreasonable application of law under 28 U.S.C. § 2254(d) review for two reasons. See *Williams*, 529 U.S. at 407–08 (The state court's decision results in an unreasonable application of clearly established federal law when the court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case.")

First, the Oregon Supreme Court misapplied *Miller* when it determined that transient immaturity, as understood in *Miller,* could not include a youth whose crime was motivated by an incurable but treatable mental illness. That proposition is completely inconsistent with *Miller*. The Supreme Court in *Miller* expressly recognized that a youth's mental illness is among the factors, connected to maturation and development, that serve to mitigate a sentence. The *Miller* Court's

discussion of why the sentencer must have the ability to consider the "mitigating qualities of youth," explained how "[youth] is a moment and 'condition of life when a person may be most susceptible to influence and *psychological damage*.'" *Miller,* 567 U.S. at 476 (quoting *Eddings v. Oklahoma,* 455 U.S. 104, 115 (1982)). The *Miller* court explained:

> *Eddings* is especially on point. There, a 16–year–old shot a police officer point-blank and killed him. We invalidated his death sentence because the judge did not consider evidence of his neglectful and violent family background (including his mother's drug abuse and his father's physical abuse) and his emotional disturbance. We found that evidence "particularly relevant"—more so than it would have been in the case of an adult offender. 455 U.S., at 115, 102 S.Ct. 869. **We held: "[J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered" in assessing his culpability.** *Id*., at 116, 102 S.Ct. 869.

Miller, 567 U.S. at 476 (emphasis added). In rejecting the death penalty in *Eddings,* the United States Supreme Court did not distinguish the individual's youth from his mental condition; the Supreme Court was concerned with the death penalty being imposed "for the crime of murder upon an emotionally disturbed youth with a disturbed child's immaturity." *Eddings,* 455 U.S. at 116.

To be sure, *Kinkel II* stands for the proposition that *Miller's* protective framework does not apply to a child whose crime was motivated by a manageable but incurable mental illness. The Oregon Supreme Court, in fact, stated: "while petitioner's psychological problems are relevant mitigation evidence, which the

sentencing court considered, they are not the sort of concerns that led to the categorical sentencing limitations announced in *Roper, Miller,* and *Graham*." *Kinkel II*, 363 Or. at 29. The distinction the court made was that Kinkel's mental illness would not diminish as he ages and was thus unrelated to his youth – "they are independent of and separate from the concerns that animated the Court's Eighth Amendment holdings in *Roper, Miller,* and *Graham*." *Id*.

The court's distinction is wholly unreasonable under *Miller*. A juvenile's mental illness is part of their "qualities of youth." *See Kinkel II*, 363 Or. at 419 (Egan, J., dissenting) (discussing how it is inseparable and disagreeing with the majority that "petitioner's mental disorder was solely, to the exclusion of any role of petitioner's youth, responsible for his crimes."); *People v. Bennett*, 335 Mich. App. 409, 417, 966 N.W.2d 768, 772 (2021) ("It is beyond dispute that the "qualities of youth" encapsulated in the *Miller* factors include untreated mental illness born of an abusive childhood or exacerbated by living in an abusive home."). Indeed, Kinkel's medical doctors hedged their diagnosis because his youth made it impossible to make a complete diagnosis. 5-ER-973 (Dr. Bolstad testifying that Kinkel's illness is "still immature" and in "early stages").

The real mitigating concern in a *Miller* and *Montgomery* analysis is whether that mental condition, which motivated the crime, could be or has been treated. Kinkel's experts universally found that his mental condition, described by one expert

as "developmental," was treatable and that he was capable of rehabilitation. *See Kinkel II,* 363 Or. at 33 ("[T]he experts testified that Kinkel's psychosis was treatable with medication and supervision and that he could be a candidate for release.");[4] As *Miller* was understood prior to *Jones*, that finding precluded a determination of permanent incorrigibility. *See Briones,* 929 F.3d at 1066 ("[A] juvenile defendant who is capable of change or rehabilitation is not permanently incorrigible or irreparably corrupt[.]")

Second, *Kinkel II* is an unreasonable application of *Miller* because, in 1999, the sentencing court expressly rejected that the Eighth Amendment, as later interpreted in *Miller*, governed Kinkel's sentencing. That is, the trial court in 1999

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[4] Judge Egan wrote in his dissent in *Kinkel II*:

> [T]he evidence supports a conclusion that disregard for human life was a temporary product of petitioner's mental disorder. The conditional statements made by the expert witnesses that petitioner would remain dangerous if he did not accept treatment also mean that petitioner would not be dangerous unless he did not receive treatment for his mental disorder. Therefore, the danger—the risk produced from a disregard for human life—can also be treated. If there is evidence that the condition causing his dangerousness or corruption can be treated, then that corruption is conditional and cannot be considered irreparable. The fear of the danger of petitioner without treatment does not allow for a determination that he is irreparably corrupt when the expert testimony resoundingly supported the idea that petitioner can be safely released under certain circumstances.

Kinkel II, 363 Or at 37 (Egan, J., dissenting) (emphasis in original).

rejected Kinkel's Eighth Amendment argument which "paralleled the arguments that the United States Supreme Court later found persuasive in *Miller* . . .." *Kinkel II,* 363 Or. at 404. After the trial court rejected that argument, Kinkel "entered into a plea agreement[]" that barred parole, and he was subsequently sentenced to a penalty that will "span a greater length than [his] life expectancy[.]" *Kinkel,* 184 Or. App. at 291; *see also* 8-ER-1626 (sentencing court stating: "The total sentence by my calculation at least is 111.67 years, which is more than anyone will ever serve.").[5] Accordingly, the trial court imposed a sentence on Kinkel having adjudged that the Eighth Amendment, as later interpreted in *Miller*, did not restrict or even inform its authority to impose a life without parole sentence on a 15-year-old child.

This historic fact in Kinkel's case should be dispositive of his Eighth Amendment challenge to his sentence based on *Miller*. There can be no better evidence that a sentencing court did not apply the procedural or substantive rule announced in *Miller* than from the undisputed fact that the sentencing court –before

[5] Just like the scheme in *Miller*, Oregon's mandatory prosecution of juveniles "as adults" under Measure 11, and the applicable mandatory sentencing scheme which prevents "flexibility to structure any kind of long-range condition sentence," "prevent[ed] the sentencer from taking account [mitigating qualities of youth as a] central consideration[.]" *Miller*, 567 U.S. at 474. *See State v. Link*, 297 Or. App. 126, 143, *rev on other grounds*, 367 Or. 625 (2021) (""[T]he clear intent of Measure 11 was to remove the considerations of the characteristics of youth for juveniles accused of the most serious crimes and to limit the range of sentencing options to the same penalties that could be imposed on an adult offender.").

and after sentencing – rejected "virtually the same arguments that later informed [the United States Supreme Court's] decision in *Miller*[.]" *Kinkel II*, 363 Or. at 9.

Assuming *Jones* applies to Kinkel's case, *Kinkel II* remains an unreasonable application of the Eighth Amendment. First, *Jones* reiterates that Miller requires a procedural component to put affect to a substantive right. That substantive right is repeated in *Jones*: "to sentence a child whose crime reflects transient immaturity to life without parole * * * is disproportionate under the Eighth Amendment." *Jones*, 141 S. Ct. at 1315 n.2 (citing *Miller*, 577 U.S. at 211). Very plainly, Kinkel's crimes were inextricably linked to an emerging and developmental mental disorder. Any attempt to segregate Kinkel's mental diseases from the qualities attendant to youth is an unreasonable application of law.

Second, Kinkel was deprived of the very procedure required by the Eighth Amendment. *Jones* specified that *Miller* mandates that the "sentencer follow[ed] a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Jones,* 141 S Ct at 1311. "[T]hat process," the Supreme Court in *Jones* explained, required the "sentencer [to] consider the murderer's 'diminished culpability and heightened capacity for change.'" *Jones,* 141 S. Ct. at 1316. As explained above, that process never occurred for Kinkel because the sentencing court rejected that the Eighth Amendment's required consideration of his youth in that way. In the absence of that constitutional requirement, Oregon

law mandated Kinkel to be sentenced as if he were an adult. Or. Rev. Stat. § 137.707(1) (1998); *see Miller,* 567 U.S. at 474 ("[T]he imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."). Thus, this procedural deprivation is an additional unreasonable application of *Miller*.

Third, the Oregon Supreme Court's decision in *Kinkel II* misapplied *Miller* and *Montgomery* under the lens of *Jones*. Specifically, that court examined the 1999 "sentencing court's findings" to determine whether "petitioner's crimes 'reflect the transient immaturity of youth.'" 363 Or. at 28 (quoting *Montgomery*, 136 S. Ct. at 734). The court also evaluated whether Kinkel's "actions are the sort of heinous crimes that, if committed by an adult, would reflect an 'irretrievably depraved character' . . . or 'irreparable corruption[.]" *Id.* at 28 (quoting *Roper,* 543 U.S. at 570 and *Miller,* 567 U.S. at 480). Those considerations are irrelevant under *Jones*' narrowing of *Miller*. The Court in *Jones* rejected that *Miller* and *Montgomery* required the sentencing court make an explicit or even implicit findings of permanent incorrigibility. *Jones,* 141 S. Ct. at 1313.

2. Unreasonable Determination of Facts

The Oregon Supreme Court's decision was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(2). *See Taylor v. Maddox,* 366 F.3d 992, 1000 (9th Cir. 2004), *abrogated on other*

grounds by Murry v. Schriro, 745 F.3d 984, 999-1000 (2014) (describing "flavors" of challenges to state-court factfinding under 2254(d)(2)).

The state court fact finding process itself was defective. *Taylor,* 366 F.3d at 1001. The Oregon Supreme Court in *Kinkel II* made "evidentiary findings without holding a hearing" to give Kinkel "an opportunity to present evidence." *Id.* at 1001. That court, *sua sponte*, evaluated the 1999 sentencing court record and drew factual conclusions in making a retrospective *Miller* determination that Kinkel's crime reflected permanent incorrigibility. *Miller's* procedural component entitled Kinkel to "[a] hearing where 'youth and its attendant characteristics' are considered as sentencing factors' in order to 'separate those juveniles who may be sentenced to life without parole from those who may not.'" *See Montgomery,* 136 S. Ct. at 736 (quoting *Miller*, 567 U.S. at 465). Kinkel has never had a meaningful opportunity to be heard and present evidence on how as a youth offender he is different than an adult and how his youth counsels "against irrevocably sentencing them to a lifetime in prison." *Miller*, 567 U.S. at 480. The sentencer rejected that Kinkel's youth mattered under the Eighth Amendment and his sentencing proceeding occurred under that erroneous interpretation of the law.

The second unreasonable determination of facts is that court "misstated the record in making [its] findings." *Taylor,* 366 F.3d at 1001. The court found:

> The trial court accepted, and petitioner's medical experts had testified, that petitioner suffered from a schizoaffective disorder that motivated

> him to commit his crimes, and the court agreed that petitioner's disorder was not a function of his youth – *i.e.*, his condition could be treated but never cured.

Kinkel II, 363 Or. at 28. That court also found:

> [A]s petitioner's experts testified and the sentencing court found, petitioner's crimes reflect a deep-seated psychological problem that will not diminish as petitioner matures.

Id. at 28.

Neither of these findings are supported by the record; nothing therein supports a claim that the sentencing court explicitly or implicitly "agree[d] that petitioner's disorder was not a function of his youth." The illogical leap the Oregon Supreme Court makes is from the finding that Kinkel's mental illness is incurable (which medical experts said) to the conclusion that his illness is therefore not a "function of his youth." That connection does not exist in law or fact.

Indeed, the opposite uncontroverted facts were presented at Kinkel's 1999 sentencing proceeding. All of the experts discussed Kinkel's illness in terms of his youth. When asked if it was easy to diagnose fifteen- and sixteen-year-olds, Dr. William Sack, child and adolescent psychiatrist, testified that:

> A. * * * Fifteen- and sixteen-year olds are in the process of -- they're in a developmental process, and they are an emerging adult, and so symptom pictures can change. And they are not a fixed -- that's why we avoid -- we tend to avoid making personality diagnoses with adolescents because they don't yet have a formed personality. So teenagers are emerging adults, but their symptom profiles can change as they continue to develop.

> Q. So as I understand it, the full extent of the pathology hasn't revealed itself and onset doesn't occur until into adulthood; is that a fair statement?
>
> A. I think that's a fair statement, yes.

6-ER-1247.

Dr. Richard J. Konkol, pediatric neurologist, testified about adolescent brain development and how, in his medical opinion, Kinkel likely has a lesion in his frontal and temporal lobes impairing his cognitive and emotional functioning. Dkt. No. 24-4 at 84-87. He testified that Kinkel' brain functioning problems were "developmental." 6-ER-1133.

Dr. Orin Bolstad, child psychologist, testified that Kinkel had a psychotic disorder, that he is "relatively young for the onset of schizophrenia . . . it might be a little bit presumptuous to offer a definitive diagnosis about him at this young age." 5-ER-879. He further testified that it is "tricky" to diagnose adolescents, that "sometimes their diagnoses merge and blend over time." 5-ER-879.

Thus, the uncontroverted evidence presented by several experts, which the sentencing court referred to as "impressive," 8-ER-1623, established that Kinkel's illness and challenges were developmental in nature and not fixed.

Further, none of the experts testified – and the court did not find - that Kinkel's mental illness "will not diminish as petitioner matures." Every doctor who evaluated Kinkel concluded that his mental health condition was treatable. 5-ER-978 (Dr.

Bolstad, child psychologist: "It's treatable."); 6-ER-1257 (Dr. Sack: "Well, his illness is a treatable condition."); 6-ER-1270 (Dr. Sack: "This is a treatable condition. . . . But I think I can be optimistic."); 6-ER-1140 (Dr. Konkol: "Based on my experience, with children who I've had similar to Kip . . . I would be hopeful.") As noted above, Dr. Sack and Dr. Bolstad also both testified that they could not give an accurate diagnosis because of Kinkel's youth.

3. District Court's Decision Below Wrongly Decided Kinkel's *Miller* Claim.

The district court's decision misstated Kinkle's *Miller* argument and it failed to address whether the Oregon Supreme Court's decision was objectively unreasonable in light of *Jones*. After correctly framing Kinkel's argument, 1-ER-29, that court inexplicably stated that the "underlying premise of Kinkel's argument [was] that *Miller* requires a fin ding of 'irreparable corruption' rather than 'transient immaturity' before a juvenile murderer may be sentenced to life without parole * * *." 1-ER-30. That was not Kinkel's "underlying premise" much less his argument as shown by the briefing and district court's opinion. *See* 2-ER-77 ("Petitioner's *Miller* Claim"). That "underlying premise" was how the Oregon Supreme Court decided Kinkel's *Miller* claim in *Kinkel II*, which, prior to *Jones,* was what *Montgomery* appeared to require. If it was the wrong standard to evaluate whether a sentence complied with *Miller,* then the district court should have concluded that the

Oregon Supreme Court's decision was an unreasonable application of clearly established law under 28 U.S.C. § 2254(d).

More importantly, the district court's decision, by misstating Kinkel's "underlying premise," ultimately never addressed Kinkel's core argument for why his sentence violated *Miller*: the 1999 sentencing court repeatedly *rejected* Kinkel's argument that the Eighth Amendment, as understood in *Miller*, required consideration of "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller,* 567 U.S. at 480. In concluding that *Jones* was satisfied by the 1999 sentencing court consideration of Kinkel's "youth, his psychological problems, and positive aspects of its [*sic*] character," the district court ignored how those "considerations" were explicitly not viewed by the sentencing court in the context in which *Miller* requires youth to be viewed. *See Jones,* 141 S Ct. at 1316 (quoting *Miller,* 567 U.S. at 477 and *Montgomery,* 577 U.S. at 210) (sentencer to consider "chronological age and [] hallmark features," as well as their "diminished culpability and heightened capacity for change").[6]

[6] Consideration of youth in the abstract and not within the context of Miller is like viewing text without context. It is simply meaningless data. Even worse, it allows the sentencer to ascribe negative value to youth. *See, e.g*, *Roper*, 543 U.S. at 558 (prosecutor telling jury "Age, he says. Thing about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary.")

Another problem with the district court's decision is that it cited to testimony presented at Kinkel's sentencing as evidence that his youth was considered. 1-ER-32. Yet that same testimony was relied upon by the Oregon Supreme Court as evidence that Kinkel's mental illness was a separate concern from his youth, that is, it was not part of "the transient immaturity of his youth." *Kinkel II,* 363 Or at 27-28 (citations omitted)). The flip-flopping on the meaning of the 1999 testimony at Kinkel's sentencing is *ad hoc* and arbitrary to say the least.

Essentially, both the Oregon Supreme Court and the district court committed the same basic legal error in their respective analyses of Kinkel's *Miller* claim. Those courts examined the 1999 sentencing record to determine whether (district court) and how (*Kinkel II*) Kinkel's youth was considered without recognizing that the sentencing court in 1999 rejected the argument that the Eighth Amendment required youth and its attendant characteristics to be considered as mitigating evidence, as *Miller* required. No reasonable jurist would conclude that a sentencing court that expressly rejected an argument "that paralleled the arguments that the United States Supreme Court later found persuasive in *Miller* . . . that * * * the prohibition on sentencing a 15-year-old to death should be extended to life without the possibility of parole because of the immaturity of juveniles and their possibility for change," *Kinkel II,* 363 Or. at 404, nevertheless adhered to *Miller* when it subsequently

sentenced a youth to die in prison. Although *Jones* "narrowed" *Miller* and *Montgomery*, it did not permit such an absurd application of *Miller*.

The Court in *Jones* recognized that "if a sentencer considering life without parole for a murderer who was under 18 expressly refuses as a matter of law to consider the defendant's youth . . . than a defendant might be able to raise an Eighth Amendment claim under the Court's precedents." *Jones,* 141 S. Ct. at 1320 n. 7. Here, the 1999 sentencing court, as a matter of law, refused to consider Kinkel's youth in the way *Miller*, over ten years later, required. That decision deprived Kinkel of his rights under the Eighth and Fourteenth Amendments to the United States Constitution to have his youth meaningfully and properly considered before the state sentenced him to die in prison.

II. Kinkel's 87-Year Sentence for Non-Homicide Crimes Violates the Eighth And Fourteenth Amendments.

A. Clearly Established Federal Law at the Time of the Oregon Supreme Court's Decision in *Kinkel II*: *Graham*.

In 2010, the United States Supreme Court in *Graham* held that the Eighth Amendment prohibits states from sentencing a juvenile offender to life in prison without the possibility of parole for nonhomicide crimes. 560 U.S. 48, 75 (2010).

B. Kinkel's *Graham* Claim

Kinkel was 15 years old when he committed his crimes. Of the 26 counts of attempted murder, the sentencing court imposed an 87 year consecutive sentence. There is no mechanism for release onto parole during that time period. *See* Or. Rev. Stat. § 137.707(2) (1998) (prohibiting "release onto post-prison supervision or any form of temporary leave from custody"). Indeed, because Kinkel had accepted a plea agreement for his homicide crimes which included a sentence that the court was bound to follow, the only crimes for which the sentencing court exercised its discretion was for Kinkel's nonhomicide crimes.

Kinkel has specifically argued throughout the lower court proceedings that his 87 year consecutive sentences for nonhomicide crimes violated *Graham.* He also relied on *Moore v. Biter,* 725 F.3d 1184 (9th Cir. 2013) to argue that his consecutive, term of years sentence did not exclude him from *Graham's* categorical bar on such a sentence. Like *Moore*, Kinkel's consecutive incarceration term leave him no hope

for parole or release. For these reasons, Kinkel's sentence violates the Eighth Amendment under *Graham* and *Moore*.

C. The State Court's Decision Is Not Entitled to Deference under AEDPA.

The Oregon Supreme Court did not reach the merits of Kinkel's *Graham* claim. Instead, that court addressed Kinkel's sentence as an aggregate of homicide and nonhomicide crimes under *Miller* and *Montgomery. Kinkel II,* 363 Or. at 3. It ignored his separate argument under *Graham* strictly challenging his 87 year consecutive sentences for nonhomicide crimes. Deference under the AEDPA is therefore not warranted and independent review is required. *Himes v. Thompson,* 336 F.3d 848, 853 (9th Cir. 2003) ("Independent review of the record is not *de novo* review of the constitutional issue, but rather, the only method by which [a court] can determine whether a silent state court decision is objectively unreasonable.").

The district court however read *Kinkel II* differently and incorrectly. The district court first concluded that "[t]he Oregon Supreme Court rejected [Kinkel's *Graham*] claim, finding 'that the nature and number' of his crimes 'distinguished his aggregate sentence from the aggregate sentences that other courts have found inconsistent with *Miller* and *Graham*.'" 1-ER-34 (quoting *Kinkel II*, 363 Or at 22). The district court then found that "the Oregon Supreme Court's decision was not an unreasonable application of *Graham*." 1-ER-34.

But the Oregon Supreme Court did not address Kinkel's claim under *Graham* that his nonhomicide crimes, standing alone, prohibited an 87 year sentence in which he had not possibility of parole. And the Oregon Supreme Court expressly declined to decide whether Kinkel's aggregate sentence for murder and nonhomicide crimes violated the Eighth Amendment. *Kinkel II*, 363 Or. at 24 ("[W]e need not go that far to decide this case."). More importantly, this Court has explicitly held that *Graham* applies to aggregate sentences and it rejected the very argument the district court relied upon to deny Kinkel's *Graham* claim. *See Moore,* 725 F.3d at 1192 ("*Graham* thus applies to both sentences."). The district court was not free to ignore this Court's holding in *Moore. See also Tatum*, 137 S. Ct. at 14 (Alito, J. *dissenting*) (describing aggregate sentences for juveniles convicted of homicide and nonhomicide crimes reversed under *Miller*).

The district court also found that it was unclear whether Kinkel's Attempted Murder convictions "qualify as non-homicide offenses for which a juvenile offender may not be sentenced to life without parole." 1-ER-35. Citing *dicta* from *Graham,* the district court distinguished Kinkel's crime because it involved homicide and nonhomicide crimes. 1-ER-35. The district court then concluded that "[g]iven the Supreme Court's distinction between juveniles who do "not kill or intend to kill" and those who do, it is not clearly established that *Graham* prohibits the aggregate

87-year sentence Kinkel received for his twenty-six Attempted Murder convictions." 1-ER-36.

A similar district court holding was rejected by the Tenth Circuit Court of Appeals in *Rainer v. Hansen,* 952 F.3d 1203 (10th Cir. 2020). That court rejected that the same language in *Graham* quoted by the district court here represented a complete statement of *Graham's* holding. *Id.* at 1207. Instead, the court in *Rainer* held that in *Graham*

> [t]he Court * * * relied on the broad understanding of "homicide," distinguishing between crimes based on whether they caused death. Given this context, we conclude that the *Graham* Court was using the term "homicide" to refer to crimes causing the victim's death.

Id. at 1207. The court in *Rainer* then looked to Colorado's version of attempted first-degree murder and concluded that it "does not require the victim's death." *Id.,* at 1208. As such, that court concluded that *Graham* applied to the juvenile's aggregate sentences totaling 224 years in prison. *Id.*

The same reasoning applies here. Kinkel's 87 year sentence for Attempted Murder with a Firearm under Or. Rev. Stat. § 137.707(4)(a)(C) (1998) was not a crime that resulted in a person's death. *See* Or. Rev. Stat. § 161.405(1) (1998) ("A person is guilty of an attempt to commit a crime when the person intentionally engages in conduct which constitutes a substantial step toward commission of the crime."). And "criminal homicide" is defined as act that is "committed intentionally" which "causes the death of a person other than one of the participants." Or. Rev.

Stat. § 163.115(1)(a)-(b) (1998). Like the Colorado statute examined in *Rainer,* Oregon's attempted murder statute does not require that the crime caused the victim's death. Therefore, the district court's reasoning is flawed; *Graham* applies to Kinkel's 87 year sentence for his nonhomicide crimes.

III. Kinkel's Guilty Plea Was Not Voluntary In Violation of the Fourteenth Amendment

A. The Voluntariness Standard

The Due Process Clause of the United States Constitution requires that a waiver of a defendant's trial rights through the entry of a guilty plea must be done knowingly and voluntarily. *Boykin v. Alabama,* 395 U.S. 238 (1969); *McCarthy v. United States,* 394 U.S. 459 (1969). A guilty plea that is not made voluntarily and knowingly violates due process. *Brady v. United States,* 397 U.S. 742, 748 (1970).

The longstanding test to determine the validity of a guilty plea is "'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" *Parke v. Raley*, 506 U.S. 20, 29 (1992) (quoting *North Carolina v. Alford,* 400 U.S. 25, 31 (1970)). When making this determination, "[t]he voluntariness of [the] * * * plea can be determined only by considering all of the relevant circumstances surrounding it." *Brady,* 397 U.S. at 749; *Boykin,* 395 U.S

242-44.[7] *See Iaea v. Sunn,* 800 F.2d 861, 866 (9th Cir. 1986) (where coercion is alleged, the Ninth Circuit examines "subjective state of mind" and the "constitutional acceptability of the external forces inducing guilty plea.").

The test for competency is distinct from voluntariness. *See Godinez v. Moran*, 509 U.S. 389, 400(1993) ("In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary.")

In reviewing attacks on the voluntariness of the plea, there is no more adequate substitute for demonstrating the voluntariness of the waiver than "the record at the time the plea is entered." *McCarthy,* 394 U.S. at 470. Statements by a defendant and counsel during a plea hearing, as well as any findings made by the trial court, constitute a "formidable barrier in any subsequent collateral proceedings." *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977). While formidable, the Court in *Blackledge* explained it "is not invariably insurmountable." *Id*. (footnote citing example cases omitted).[8]

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[7] In *Boykin*, the constitutional safeguards discussed in McCarthy were applied to the states. 395 U.S. at 242-43. *Boykin* contemplates that a dialogue be conducted on the record to establish that the waiver of constitutional rights is knowing and voluntary.

[8] The Court in *Blackledge* cited to *Machibroda v. United States*, 368 U.S. 487 (1962) and *Fontaine v. United States*, 411 U.S. 213 (1973), as "indisputably teach[ing]" that the plea and sentencing record is not insurmountable. *Fontaine*

B. Kinkel's Voluntary Plea Claim

In the state courts, Kinkel argued that his unique, severe paranoid schizophrenia – for which his medication had been suspended but remained active during the period leading up to his agreement to plead guilty, as reflected in the various records and testimony introduced at the post-conviction trial – rendered him incapable of choosing to go to trial and thus his guilty plea was made involuntarily. Here, the circumstances surrounding the plea showing it was involuntarily made are: (1) the testimony from Kinkel's medical experts about his mental illness; (2) events before the plea hearing; (4) settlement proceedings; and (3) the change of plea hearing colloquy.

1. Kinkel's Medical Experts' Testimony Regarding His Mental Illness

All of the medical experts agreed that the Kinkel was seriously mentally ill both at the time of the crime and at sentencing. *See* 3-ER-155; 3-ER-275; 4-ER-422, 447-448. The state's experts questioned whether Kinkel was incompetent at the time he decided to accept the state's plea offer, but they did not dispute that he was seriously mentally ill or that his condition was deteriorating shortly before he was presented with the state's plea offer.

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involved allegations that his plea had been coerced, in part, by mental illness, requiring examination of matters outside the hearing record. Id. at 74.

Dr. Sack described Kinkel as "terrified of being labeled mentally ill." 3-ER-278. He explained that Kinkel "desperately wanted to be mentally normal and not to be seen as mentally ill." 3-ER-300. Kinkel could not rationally weigh his options because, as a result of his mental illness, "he was not going to go to the state hospital," and "nobody was going to see that he was nuts." 3-ER-301, 302. "He didn't have the capacity to do that (decide on a plea offer) because of his attitude toward mental illness and being frightened of being in a state hospital." 3- ER-314.

Dr. Sack testified that because Kinkel was very secretive and paranoid about his illness and was so good at covering it up, neither his counsel nor the trial court would have been aware of the severity of his illness by merely observing him. 3-ER-284, 285. Kinkel's particular illness, paranoid schizophrenia, is a type of schizophrenia which leaves most cognitive functions intact, thereby allowing seriously ill individuals to look intact on the surface but to be seriously ill. 3-ER-328. Thus, even though his outward presentation appeared normal, without scrutiny, Dr. Sack believes that Kinkel was not able to enter a voluntary plea: "He didn't have the capacity to do that because of his mental illness," including "being frightened of being in a state mental hospital." 3-ER-314.

Dr. Bolstad helped explain that Kinkel's predisposition to plead guilty was due to his serious mental illness. He concurred that the Kinkel did not want to be identified as crazy or different. 3-ER-170. Ironically, his paranoid schizophrenia

made him want to conceal his illness. 3-ER-170. Kinkel's excellence at hiding his illness was the one unique thing about his otherwise classic paranoid schizophrenia; *i.e.*, he is "remarkably good at presenting well," so much so that others may believe him to be perfectly "normal." 3-ER-212. Dr. Bolstad explained that, despite his serious illness, Kinkel is "very logical but not necessarily rational." 3-ER-218. He can be logical, even in active psychosis. 3-ER-245. Paranoid schizophrenics are logical and possess tightly organized thinking, but they work from irrational assumptions, such as Kinkel's delusion that the government planted a chip in his brain that caused his voices. 3-ER-205.

A suggestion of mental illness would cause Kinkel to become extremely anxious and aroused. 3-ER-171. That is why, according to Dr. Bolstad, he hid the voices from his therapist for three years, even though he wanted to know what was causing them. 3-ER-172, 173. Kinkel even hid things from his lawyers and psychiatric experts because he feared the public knowing he was mentally ill. *Id.*

Dr. Bolstad explained that this irrational thinking led Kinkel to oppose the possibility of going to the state mental hospital. 3-ER-174, 175. "Most people in his situation would appreciate having an alternative, more compassionate and sympathetic rationale for what they did, as in guilty but insane, and I think most would prefer going to the Oregon State Hospital over going to prison." 3-ER-222. If

he were to be sent to the State Hospital, though, Kinkel believed he would be viewed by everyone as being mentally ill. 3-ER-185, 186.[9]

Dr. Bolstad summed up the reason why Kinkel's plea was involuntary: his mental illness dictated that his "mission in life at that time was to avoid going to court." 3-ER-247. Kinkel had, in the words of Dr. Bolstad, a "prominent and dominating fear" of being in trial, 3-ER-188, and an "irrational fear of going to court," 3-ER-236. He feared that his angry, loud voices would "gang up on him." 3-ER-263. This irrational fear was "part and parcel of his mental illness." 3-ER-236. He had "very severe delusions about the courtroom process." 3-ER-246. Dr. Bolstad opined that Kinkel's decision to accept the plea offer was not made on "rational grounds" but due to his "mental illness." 3-ER-263.

The state presented no evidence controverting these core contentions about Kinkel's illness. Dr. Johnson, the state's expert, was "confident that Kip does hear hallucinations – auditory hallucinations." 4-ER-447, 448. None of the state's experts disputed that Kinkel's illness controlled his decision to enter a plea deal.

2. Events Leading to Guilty Plea

On July 2, 1999, at his counsel's direction, Kinkel stopped taking his antipsychotic medication. 1-ER-64, 65; 3-ER-280, 281. Between July 1999 and

[9] Kinkel viewed his own mental illness immaturely as the equivalent of mental retardation. 3-ER-18.

September 1999, Kinkel's "symptoms—auditory hallucinations and severe depression—became more intense due to the withdrawal of the antipsychotic medications and the stress of the impending trial." 1-ER-65. Two days prior to accepting the plea offer, Kinkel was "curled up in a ball * * * having panic disorder." 3-ER-215. On September 21, 1999, Kinkel's antipsychotic medication was resumed but, as his medical expert testified, the effects of that medication "take[s] two weeks before they have an impact." 3-ER-281.

3. Judicial Settlement Proceedings

On September 23, 1999, days before the scheduled trial, the parties held a judicial settlement conference. Kinkel did not participate personally in the judicial settlement conference, but his lawyers were able to consult with him. 1-ER-65 Trial counsel told Kinkel there was no chance the jury would give "either the Not Guilty but Insane or Life with Possibility of Parole[.]" 4-ER-551. Trial counsel was of the opinion that although he'd never had "a more compelling mental defense[,]" the separate incidents and the "ambiguous" nature of his diagnosis "that typically has an adult onset" made it difficult. 4-ER-545. Trial counsel explained his opinion as to why the State Hospital was not an option for Kinkel "[i]t's not a very nice place. The facilities are terrible, the care is sometimes nonexistent[.]" 4- ER-550.

Two offers were presented to Kinkel. The first was a determinate 25-year term on the four aggravated murder charges, a guilty plea on the attempted

aggravated murder charges with open sentencing on those charges. 4-ER-547, 548. The second offer was for a determinate sentence of 50 years. 4-ER-548. Counsel recommended to Kinkel that he accept the first offer because the sentencing judge was his "favorite judge in the courthouse for sentencing[.]" 4-ER-548, 549. Kinkel accepted the first offer.

4. Plea Hearing Colloquy

At the plea colloquy, the court asked Kinkel, who was then a 16-year-old child, ninety (90) yes/no questions to ensure he understood and was voluntarily waiving his constitutional rights and entering a plea of guilt. 8-ER-1647. On every one of the ninety 90 questions, Kinkel responded by saying "yes" or "no." The court made no effort to engage Kinkel on any of his answers.

Although the court was aware that Kinkel's counsel had asserted a mental illness defense, the court never inquired into the nature of Kinkel's mental illness. In fact, in the one instance during the plea colloquy where the court questioned Kinkel's current mental state, his counsel interjected and did so for him:

> THE COURT: Paragraph (5): My mind is clear, and I am not sick. I am not under the influence of alcohol or drugs that would affect my ability to understand the contents of this Plea Petition or proceedings associated with this petition. Is that correct?
>
> MR. SABITT: That is correct, your Honor. And the record should be clear that he has recently taken the prescription

> medications Zyprexa, which is an antipsychotic, and Ativan, which is a tranquilizer.
>
> We've discussed this with him. It does not affect his ability to reason, his ability to understand the proceedings that are before the court. He has not initialed that paragraph. With that understanding, he's prepared to do that, your honor.
>
> THE COURT: Is that correct, Mr. Kinkel?
>
> MR. KINKEL: Yes.

8-ER-1653, 1654.

Thus, although the court was aware that Kinkel was mentally ill and alerted to the fact that Kinkel was taking an antipsychotic medication and a tranquilizer, the court made no other inquiry about Kinkel's mental health, including questioning the nature of the illness requiring medication, in accepting his admission that "[m]y mind is clear and I am not sick." The court further allowed Kinkel's counsel to vouch – upon counsel's own prompting – for Kinkel's waiver and to endorse "his ability to reason[.]" Because of that interference, Kinkel's affirmative answer could have been to one of four questions: the correctness of the paragraph 5; the medication he was taking; that his counsel discussed it with him; or whether he was prepared to initial paragraph 5 "with that understanding."

Sixteen-year-old children are not normally on antipsychotic medication and tranquilizers. If a child is on such medication, presumably it is being taking because

the child is mentally ill. A competent court would have at least made some effort to discern Kinkel's mental illness or the nature of the medication, rather than move past the question with seeming indifference. *See United States v. Carter,* 795 F.3d 947 (9th Cir. 2015) (holding that "if a district court learns that a defendant is under the influence of some medication, it has a duty to determine, at a minimum, what type of drug the defendant has taken and whether the drug is affecting the defendant's mental state."). The fact that Kinkel was a 16-year-old child should have been enough for the court to be concerned about his one-word answers. *See generally J.D.B. v. North Carolina*, 564 U.S. 261, 297 (2011) ("The voluntariness inquiry is flexible and accommodating by nature, and the Court's precedents already make clear that "special care" must be exercised in applying the voluntariness test where the confession of a "mere child" is at issue.")

Absent further inquiry by the court, the record shows only that Kinkel's one-word answers during the plea colloquy were given while he was under the influence of an antipsychotic drug and a tranquilizer. His counsel vouched for that fact. The fact he was on such medication is evidence that he was suffering from – as all medical experts agreed – a severe mental illness that required such medication so that he was capable of functioning. However, no medical expert was consulted or assessed Kinkel while on his medication *at the time of the plea* to offer any opinion about whether the medication was sufficient to understand and make a decision as

to the specific plea offer. 4-ER-544. That was the only reliable and responsible way to ensure Kinkel's waiver of rights was voluntary. *See, e.g., Ward v. Sterns,* 334 F.3d 696 (7th Cir. 2003) (waiver of rights for defendant with brain injury required court to be exercise "extraordinary patience in extracting" waiver or rights). As both state and Kinkel's experts agreed, the symptoms of Kinkel's mental illness could be difficult to detect. Yet counsel did not ever even ask Kinkel on the day of the plea whether he was hearing voices that day, 4-ER-544. the most telling symptom of his illness.

In sum, Kinkel's guilty plea was not voluntary. It was a product of his undisputed severe mental illness, one that is not disputed by the state, at a time when it was at its zenith due to the removal of his antipsychotic medications by his attorneys. He did not have the rational ability to choose whether to waive his rights or accept a guilty plea. Thus, Kinkel's waiver of rights and guilty plea were not voluntary because they were compelled – not chosen - by his mental illness.

C. The State Court's Decision Is Not Entitled To Deference.

This court should not give deference under the AEDPA to the Oregon Court of Appeals decision in *Kinkel I,* 240 Or. App. 403. The Court of Appeals did not address the actual merits of the claim. *See* 28 U.S.C. § 2254(d)(1). While the Oregon Court of Appeals correctly identified *Brady* as the controlling legal authority for deciding whether Kinkel's guilty plea was voluntary, *Kinkel I,* 240 Or. App. at 414,

it relied entirely upon the post-conviction court's findings made under the wrong legal standard. The post-conviction court rejected Kinkel's voluntariness argument based on the legal standard for determining mental competency under *Pate v. Robinson,* 383 U.S. 375 (1966) and not on *Brady's* voluntary-plea standard. Dkt. No. 23-3 at 192 (Findings of Fact and Conclusions of Law). As a consequence, the Court of Appeals' denial of Kinkel's voluntary plea argument is premised on a post-conviction court decision that never addressed *Brady* or the standard articulated therein. Consequently, it did not address the actual merits of the claim or, alternatively, relied on the wrong legal standard (*Pate*) to resolve the *Brady* claim. *See, e.g., Davis v. Sec'y for the Dep't of Corr.,* 341 F.3d 1310 (11th Cir. 2003) (state court's failure to address correct legal standard warrants *de novo* review

Here, because the Oregon Court of Appeals relied entirely on the post-conviction court's decision, which was based on *Pate* – an incompetency standard – it failed to reach the merits of his *Brady* claim or it applied the wrong legal standard. In either event, this Court has no "merits" decision to defer to under AEDPA. *De novo* review is the appropriate standard.

Should this Court determine that AEDPA deference is required, relief is still available because the Oregon Court of Appeals' decision was objectively unreasonable under 28 U.S.C. § 2254(2)(d) as interpreted in *Taylor*.

First, the Oregon Court of Appeals decision was based on an unreasonable determination of the facts in light of the evidence presented. Because the Oregon Court of Appeals resolution of the *Brady* argument was based on the post-conviction court's factual findings under *Pate,* its decision was a misapprehension of the correct legal standard. *See Taylor*, 366 F.3d at 1001 ("When the state court makes factual findings under a misapprehension as to the correct legal standard * * * the resulting factual determination will be unreasonable and no presumption of correctness can attach to it.").

Second, the finding of the Court of Appeals that "[t]he post-conviction court found that Kinkel's condition, in fact, did not interfere with his ability to make a knowing and voluntary decision[,]" misapprehended and misstated the record. *Kinkel I,* 240 Or. App. at 715. As set forth above, the post-conviction never determined that Kinkel's mental illness "did not interfere with his ability to make knowing and voluntary decision." And to the extent the post-conviction court made any finding about his mental illness, it was in the context of determining mental competency to aid and assist. *See Taylor,* 366 F.3d at 1001 (no deference where state court fact-finding process is defective where record is misstated).

CONCLUSION

Kinkel respectfully requests the district court's judgment be reversed, and this case remanded with instructions to enter judgment granting relief on all of Kinkel's habeas claims.

DATED: October 30, 2022

Respectfully submitted,

/s/ *Thaddeus Betz*
THADDEUS BETZ

/s/ *Marsha Levick*
MARSHA LEVICK

Attorneys for Petitioner-Appellant.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KIPLAND KINKEL,	)	
	)	
Petitioner-Appellant,	)	CA No. 22-35096
	)	
v.	)	
	)	
GERALD LONG,	)	
	)	
Respondent-Appellee,	)	

CERTIFICATE OF RELATED CASES

I, Thaddeus Betz, undersigned counsel of record for Petitioner-Appellant, Kipland Kinkel, state pursuant to Ninth Circuit Court of Appeals Rule 28-2.6, that I know of no other cases that should be deemed related.

DATED: October 30, 2022

/s/ *Thaddeus Betz*
THADDEUS BETZ

Attorney for Petitioner-Appellant

IN THE UNITED STATES COURT OF APPEALS

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KIPLAND KINKEL,	)	
	)	
Petitioner-Appellant,	)	CA No. 22-35096
	)	
v.	)	
	)	
GERALD LONG,	)	
	)	
Respondent-Appellee,	)	

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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1. The brief is within the limitations set out in Fed. R. App. P 32(7)(B)(I), which allows no more than 14,000 words. The brief contains 13922 words, excluding portions exempted under the FRAP.

2. This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced type face using Word 2019 in 14-point Times New Roman font.

DATED: October 30, 2022

/s/ *Thaddeus Betz*
THADDEUS BETZ

Attorney for Petitioner-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2022, I electronically filed the foregoing Appellant's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Thaddeus Betz*
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