SUPREME COURT CRIM. NO. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re JOSE ARMANDO ALATRISTE on Habeas Corpus.	Court of Appeal No. B248072 Los Angles County Superior Court No. BA344055

PETITION FOR REVIEW OF PETITIONER JOSE ARMANDO ALATRISTE FROM THE PUBLISHED DENIAL OF HIS PETITION FOR WRIT OF HABEAS CORPUS BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION TWO

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TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner respectfully requests this Court grant review following the denial of his petition for writ of habeas corpus in a published decision by the Court of Appeal, Second Appellate District, Division Two, on October 29,

2013. A true and correct copy of the published opinion denying the petition for writ of habeas corpus is attached hereto as Attachment A.

ISSUES PRESENTED FOR REVIEW

1. Does the enactment of Senate Bill No. 260 (SB 260), codified as Penal Code section 3051, which provides for a "juvenile opportunity parole hearing" for "any prisoner who was under 18 years of age at the time of his or her controlling offense" render moot any claim that the juvenile offender's sentence violated the Eighth Amendment prohibition on cruel and unusual punishment because the sentence was imposed without consideration of the factors[1] set forth in *Miller vs. Alabama* (2012) 567 U.S. __ [132 S.Ct. 2455] (*Miller*) and did not afford him a meaningful opportunity for release on parole at the time of his initial sentencing hearing?

2. Does SB 260 render moot the question of whether *Miller* applies retroactively to cases that were final on appeal before *Miller* was decided?

3. Does *Miller* apply retroactively to California prisoners such as petitioner who is presently serving a 77 years to life sentence for offenses

[1] The "*Miller* factors" as used herein refer to the hallmark features of youth, as well as the individual defendant's background and upbringing, mental and emotional development, and possibility of rehabilitation. (See *Miller*, *supra*, 567 U.S. ___ [132 S.Ct 2455, 2468].)

committed when he was a minor and whose direct appeal was final at the time *Miller* was decided?[2]

NECESSITY FOR REVIEW

Review by this court is necessary to secure uniformity of decision and to settle important questions of law. (Cal. Rules of Court, rule 8.500(b)(1).)

STATEMENT OF THE CASE AND STATEMENT OF FACTS[3]

In 2009, petitioner Jose Alatriste, was charged in an amended felony information with willful, deliberate and premeditated murder (§ 187, subd. (a)) – count 1; attempted willful, deliberate, and premeditated murder (§§ 664/187, subd. (a)) – counts 2, 4, 6, and 8; and assault with a semiautomatic firearm (§ 245, subd. (b)) – counts 3, 5, 7, and 9. The offenses were alleged to have occurred on July 9, 2007, when petitioner was a minor over 16 years of age. (1CT 260-271; Welf. & Inst. Code, § 707, subd. (d)(1).)

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[2] The Court of Appeal first summarily denied petitioner's petition for writ of habeas corpus raising this exact question on April 29, 2013. On July 17, 2013, in Case Number S210448, this Court granted petitioner's petition for review and remanded the matter back to the Court of Appeal with an order that the Secretary of the Department of Corrections show cause as to why the requested relief should not be granted and why *Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 455] should not be afforded retroactive effect. The published opinion that petitioner now seeks review of refused to reach the merits of either question raised in this Court's order granting review and remand, finding instead that the passage of SB 260 renders the questions moot.

[3] Concurrent with this petition for review, petitioner is filing a request that this Court take judicial notice of the record in the related direct appeal, Case No. B223020, as well as this Court's own files in Case No. S210448. All citations to the record are to the Clerk's Transcript and Reporter's Transcript in Case No. B223020.

As to counts 1 and 2, it was further alleged that petitioner personally used a firearm, discharged a firearm, and discharged a firearm causing death within the meaning of section 12022.53, subdivisions (b), (c), and (d). (1CT 260-263.) As to count 3, it was alleged that petitioner inflicted great body injury causing coma and paralysis within the meaning of section 12022.7, subdivision (b). (1CT 264.) As to counts 3, 5, 7, and 9, it was alleged that petitioner personally used a firearm within the meaning of section 12022.5. (2CT 264-270.) As to all counts, it was alleged that the offense were committed at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members within the meaning of section 186.22, subdivisions (b)(1)(C) or (b)(5). (2CT 260-270.)

Following a jury trial, petitioner was found guilty of murder in count 1 and attempted murder in count 8, and each of the special allegations was found true, with the exception of the personal discharge of a firearm causing great bodily injury or death in count 8. (3CT 632, 642.) The murder was found to be in the second degree, and the attempted murder was found not be to willful, deliberate, and premeditated. (3CT 632, 642.)

Petitioner was also found guilty of assault with a semiautomatic firearm in counts 3 and 9, and all of the special allegations in these count were found true. (3CT 633, 643.)

Petitioner was found not guilty of counts 4, 5, 6 and 7. (2CT 634-641.) The jury did not reach a verdict on count 2, and that count was dismissed at the time of sentencing. (3CT 739.)

Petitioner was sentenced on March 10, 2010. (3CT 740; 4RT 4501.) The total sentence imposed was 77 years to life. As to the murder on count 1, the court sentenced petitioner to an indeterminate term of 40 years to life in state prison consisting of 15 years to life for second degree murder and an additional 25 years to life for the personal discharge of a firearm causing death. (§§ 187, subd. (a); 12022.53, subd. (d); 3CT 740-743) As to count 8, petitioner was sentenced to an additional determinate term of 37 years in prison consisting of the middle term of seven years for the attempted murder, and an additional 20 years for the personal discharge of a firearm (§ 12022.53, subd. (c)), and 10 years for the gang allegation (§ 186.22, subd. (b).) (3CT 742.)

Sentence on counts 3 and 9 was ordered stayed pursuant to section 654, and the remaining allegations in counts 1 and 8 were each ordered stayed. (3CT 742.) He received credit for 972 actual days spent in custody. (4CT

741.) There was no discussion of any sentencing discretion whatsoever, other than as to count 8, and no discussion of petitioner's youth or prospects for rehabilitation. (4RT 4506-4510.)

Petitioner filed a timely notice of appeal on March 10, 2010. (4CT 736.) The Court of Appeal affirmed appellant's conviction in an unpublished decision on December 6, 2011, in Case No. B223020.

A petition for review was filed in this Court which was denied on February 9, 2012, in Case No. S198924.

The United States Supreme Court decided *Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct 2455] on June 25, 2012.

On April 15, 2013, petitioner filed a petition for writ of habeas corpus in the Court of Appeal seeking reversal of his 77 years to life sentence because it violates the United States Constitution's Eighth Amendment ban on cruel and unusual punishment and is contrary to the new rule of law handed down in *Miller,* citing both *People v. Argeta* (2012) Cal.App.4th 1478, 1482, review denied February 20, 2012 (*Argeta*) and *People v. Thomas* (2013) 211 Cal.App.4th 987, 1016, review denied March 27, 2013 (*Thomas*).

On April 29, 2013, the Court of Appeal summarily denied the petition for writ of habeas corpus.

On July 17, 2013, this Court granted review and transferred the matter to the Court of Appeal. The Court of Appeal was ordered to vacate its summary denial dated April 29, 2013, and was further ordered to issue an order to show cause, returnable before that court. The Secretary of the Department of Corrections and Rehabilitation was ordered to show cause, when the matter is placed on calendar, why petitioner was not entitled to relief based on his allegation that his sentence of 77 years to life for crimes committed when he was a juvenile violates the Eighth Amendment's prohibition on cruel and unusual punishment because it offers no meaningful opportunity for release on parole and is a de facto sentence of life without the possibility of parole and why *Miller* should not be accorded retroactive effect.

On October 29, 2013, the Court of Appeal, in a published decision ruled that both issues raised in this Court's July 17, 2013 order were rendered moot by SB 260 and refused to reach the merits of either issue mentioned in this Court's order. (Attachment A.)

This timely petition for review follows.

ARGUMENT

I.

REVIEW SHOULD BE GRANTED TO DETERMINE IF SB 260 CAN RENDER MOOT THE QUESTION OF WHETHER A DEFENDANT'S SENTENCE VIOLATED THE EIGHTH AMENDMENT AS INTERPRETED BY *MILLER* THAT JUVENILE OFFENDERS BE SENTENCED IN A MANNER WHICH PROVIDES A MEANINGFUL OPPORTUNITY TO OBTAIN RELEASE BASED ON DEMONSTRATED MATURITY AND REHABILITATION

In *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*), this Court held that

> sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment. Although proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them **at sentencing** of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future.

(*Id*. at p. 268, emphasis added.) It is now recognized that these same rules apply to juveniles convicted of homicide offenses. (*Miller*, *supra*, 132 S.Ct. at p. 2460.)

Miller concluded that even for juvenile homicide offenders, a mandatory sentence of life imprisonment without the possibility of parole

violates the proportionality requirement of the Eighth Amendment to the United States Constitution because it requires "that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes." (*Miller*, *supra*, 132 S.Ct. at p. 2475.)

The sentence petitioner challenges here did not comply with *Miller's* adjuration that its exercise of discretion in sentencing a juvenile offender must take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

The newly enacted Penal Code section 3051 does nothing to provide any new discretion to a sentencing court and gives a sentencing court no ability to treat children any differently when sentencing them. All the statute does is provide for a "Youthful Offender Parole Hearing" deep in the future. That hearing would once again involve no judicial discretion. That hearing, as governed by the Penal Code section 3051, cannot come any sooner than the 25th year of petitioner's incarceration, assuming the statute even remains on

the books.[4] The statutes does nothing to alter the fact that petitioner's sentence remains "77 years to life."

Newly enacted section 3051, subdivision (b)(3), provides that "any prisoner who was under 18 years of age at the time of his or her controlling offense and who was sentenced to an indeterminate base term of 25 years to life will receive a hearing during the 25th year of incarceration."

Contrary to the Court of Appeal's conclusion that this renders the points raised in the petition for writ of habeas corpus moot, the new law does not comply with the central concern of the *Miller* court, which now requires a sentencing court "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Miller*, *supra*, 567 U.S. at p. ___ [132 S.Ct. at p. 2469].)

Petitioner submits that this Court recognized in *Caballero*, the dictates of *Miller* must be followed **at sentencing**, not years later by a parole board.

> Although proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them **at sentencing** of a meaningful opportunity to

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[4] The Court of Appeal found that there was no "constitutional infirmity in requiring petitioners to serve 20 or 25 years before they have the opportunity to demonstrate that they have been rehabilitated . . . ." (Opn. 8.) Petitioner believes that both he and Mr. Bonilla, whose petition was decided together in joint published opinion, are each subject to no less than 25 years under section 3051 before they may ever have a parole hearing. Each had an offense or enhancement for which the trial court imposed a sentence of 25 years to life. (See section 3051, subd. (a)(2)(b) [defining "controlling offense"].)

> demonstrate their rehabilitation and fitness to reenter society in the future.

(*Caballero*, *supra*, 55 Cal.4th at p. 268, emphasis added.)

The newly enacted statute, while designed to provide an inmate with the opportunity to show he or she has matured over a period of many years and is deserving of the possibility of release through a future parole hearing, does nothing to remedy a sentence that was unconstitutional the outset.

Moreover, there is no guarantee that the statute cannot be altered or removed entirely. Petitioner's sentence remains "77 years to life," and the whims of the electorate and Legislature in enacting, modifying, or withdrawing legislation cannot alter the fact that the judicially imposed sentence he received was unconstitutional at the outset and remains unconstitutional. Petitioner's sentence violated the Eighth Amendment. He must be resentenced by a judge. He cannot be "resentenced" by Legislative action.

In addition to the concerns that the new statute may not even exist years from now, petitioner submits removing the role of the judiciary in resentencing someone in petitioner's position violates the prohibition on separation of powers. "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const., art.

III, § 3.) "The matter of ultimate sentencing is a matter of judicial discretion to be exercised within limits prescribed by the Legislature." (*People v. Superior Court* (1978) 82 Cal.App.3d 909, 916.)

Because there is no guarantee that the new statute will remain on the books 25 years from now, and because all defendants have the right to sentence that does not violate the prohibition against cruel and unusual punishment that is imposed by a judge, petitioner is entitled to judicial remedy of the Eighth Amendment violation at this time. Petitioner is entitled to a new sentencing hearing where he is afforded an opportunity for parole which is part of his judicially imposed sentence and which cannot be removed or altered by changes in legislation.

Nothing in section 3051 requires or allows for the sentencing court to recall a sentence and consider the individualized sentencing factors mandated by *Miller*. The Legislative findings in support of the new statute militate in favor of petitioner being resentenced:

> The Legislature finds and declares that, as stated by the United States Supreme Court in *Miller v. Alabama*, 'only a relatively small proportion of adolescents' who engage in illegal activity 'develop entrenched patterns of problem behavior,' and that 'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," including 'parts of the brain involved in behavior control. The Legislature recognizes that youthfulness both lessens a juvenile's moral culpability and enhances the prospect that, as a youth matures into an adult and neurological

> development occurs, these individuals can become contributing members of society.

(Senate Bill No. 260 (2013-2014 Reg. Sess.)

But the statute does nothing to recall petitioner's sentence or require that he be resentenced. The sentence remains. The new statute only affords him a possible parole hearing after a lengthy term incarceration, if the statute remains law and is not altered. The protections of a judicially mandated future parole hearing are not afforded to a defendant such as petitioner unless he is is resentenced.

The Legislature simply cannot fix a sentence that is unconstitutional and which violated *Miller* at the outset without requiring a new sentencing hearing.

The Court of Appeal observed that "[i]n practice, the directives of *Graham*, *Miller* and *Caballero* have proved challenging for trial courts." (Opn. 5.) Despite what may have been good intentions, what the Legislature has done in enacting section 3051 does not change the fact that a sentence like petitioner's, which did not take into account the *Miller* factors at the time of sentencing, runs afoul of the Eighth Amendment.

This Court appeared to recognize as much in *Caballero*, when it stated that it is the sentencing court which must evaluate factors, such as the defendant's "physical and mental development," in order to determine when

the defendant might attain a sufficient level of maturity to warrant release on parole. (*Caballero*, *supra*, 55 Cal.4th at p. 269.) *Caballero* did not say that this is a task that a sentencing court can delegate to a parole board to be undertaken 25 years later.

In *People v. Ramirez* (2013) 219 Cal.App.4th 655, Division Three of the Fourth Appellate District was recently presented with a parallel argument. There, newly enacted Penal Code section 1170, subdivision (d)(2), which applies in cases where LWOP sentences have been imposed on juvenile offenders, was at issue.

In *Ramirez*, section 1170, subdivision (d)(2) was cited by the Attorney General for the proposition that it ensures that sentencing juveniles to LWOP in California no longer runs afoul of *Miller*. (*Ramirez*, *supra*, 219 Cal.App.4th at pp. 686-687.) To the contrary, the *Ramirez* court found that the statute cannot fix a sentence that is unconstitutional at the outset, and that the enactment of the statute militated in favor of reversing the LWOP and LWOP equivalent sentences imposed. This is so, in part, because "there is no guarantee the provision would still be in effect in roughly 13 years when [Ramirez] might have had his first opportunity to utilize it." (*Ibid*.)

Similarly, unless the sentence imposed on petitioner was itself the product of an exercise of discretion that "'[took] into account how children are

different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison' (*Miller*, *supra*, 567 U.S. at p. __ [132 S.Ct. at p. 2469], fn. omitted)," the sentence is cruel and unusual punishment. (*Ramirez*, *supra*, 219 Cal.App.4th at pp. 683-684.)

Creating a statute such as SB 260 that might allow for parole in the future, should that statute remain on the books, does not alter the fact that the sentence imposed herein violated the Eighth Amendment at the time it was imposed, and that sentence remains in violation of the Eighth Amendment.

The *Ramirez* court rightly found that the enacting of section 1170, subdivision (d)(2)

> supports the conclusion that imposing LWOP sentences on juvenile offenders or imposing lengthy sentences that operate as the functional equivalent of LWOP and preclude the juvenile from obtaining a parole-type review within a reasonable period of time, constitutes cruel and unusual punishment.

(*Ramirez*, *supra*, 219 Cal.App.4th at p. 687.)

Petitioner had the right to have a judge exercise judicial discretion at the time he was sentenced. Legislative action cannot and should not substitute for constitutionally required, individualized sentencing before a judge. Review should be granted, and petitioner should be given a new sentencing hearing.

II.

REVIEW SHOULD BE GRANTED TO DETERMINE IF *MILLER* IS TO BE APPLIED RETROACTIVELY TO DEFENDANTS SUCH AS PETITIONER WHO WERE JUVENILES AT THE TIME OF THEIR OFFENSE AND ARE PRESENTLY SERVING A SENTENCE THAT IS THE FUNCTIONAL EQUIVALENT OF LWOP, BUT WHICH WAS FINAL BEFORE *MILLER* WAS DECIDED[5]

A. Introduction And Procedural Background

Petitioner was born on March 30, 1991, and was 16 years old at the time of his offenses. (3CT 708-709.) He was just under 19 years old when he was sentenced on March 10, 2010, to 77 years to life in prison. (3CT 740-743.) There was no discussion of any sentencing discretion at petitioner's sentencing hearing, and no discussion of the mitigating factors discussed in *Miller*, namely the differences between juveniles and adults "and how those differences counsel against irrevocably sentencing [a juvenile] to a lifetime in prison." (*Miller*, *supra*, 567 U.S. at p. ___ [132 S.Ct. at p. 2469], fn. omitted.) Trial counsel made no objection to the sentence being cruel and unusual, and

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[5] This argument is copied verbatim from the petition for review in Case No. S210448. This Court granted review, but the issues raised herein were never reached on remand. The argument is repeated here to forestall any argument that petitioner has waived or forfeited the argument should he be required to seek redress in federal court and because generally no incorporation by reference is permitted in a petition for review. (Cal. Rules of Court, rule 8.504(e)(3).

no issue relating to cruel and unusual punishment was raised in petitioner's direct appeal.

B. A 77 Years To Life Sentence Without Consideration Of The Factors Outlined In *Miller* Is Unconstitutional

Recent California cases have confirmed that a sentence like petitioner's is the functional equivalent of LWOP and, absent consideration of the factors outlined in *Miller*, requires reversal for resentencing. (See *Thomas, supra*, 211 Cal.App.4th at pp. 1013-1015 [juvenile defendant's sentence of 196 years to life for special circumstances murder and attempted murder reversed and remanded for resentencing because it predated *Miller* and *Caballero*, supra, 55 Cal.4th 262]; *Argeta*, *supra*, 210 Cal.App.4th at pp. 1480-1482 [juvenile defendant's minimum aggregate sentence of 100 years for murder and multiple attempted murders reversed and remanded for resentencing because it predated *Miller* and *Caballero*].)

Petitioner's sentence of 77 years to life is no less the functional equivalent of LWOP than the sentences imposed in *Thomas* and *Argeta*.

Recent case authority states the life expectancy of an "18-year-old American male" is 76 years. (*People v. Mendez* (2010) 188 Cal.App.4th 47, 63 (*Mendez*).) The Centers for Disease Control and Prevention published a report in 2010 entitled "Health, United States, 2010" that indicates the life

expectancy of a male born in 1990 ranges from 64.5 to 72.7 years of age depending on race. In 1997, the Centers for Disease Control and Prevention, National Center for Health Statistics published U.S. Decennial Life Tables for 1989- 1991. At the time that report was published, petitioner was less than six years old. The report predicted his remaining life expectancy to be 62.36 years. (See Centers for Disease Control, U.S. Decennial Life Tables for 1989–91 (1997) table 8. "Life table for males other than white." (<http://www.cdc.gov/nchs/data/lifetables/life89_1_1.pdf> [as of April 30, 2012].)

Thus, petitioner's total life expectancy would normally be somewhere from 64 to 76 years of age, without accounting for the impact of his incarceration. Using any calculation, appellant will be well over 90 years old, if alive, before he could ever be eligible for parole. It is not subject to dispute that life expectancy within prisons and jails is considerably shortened. (See The Commission on Safety and Abuse in America's Prisons, Confronting Confinement (June 2006) p. 11 [discussing persistent problems in U.S. penitentiaries of "prisoner rape, gang violence, the use of excessive force by officers, [and] contagious diseases"] http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf> [as of April 30, 2013.)

Therefore, petitioner's life expectancy in prison is far less than 77 years[6] from the time he was sentenced, and, thus, he has no meaningful prospect of ever facing parole or being released. As such, his sentence is the functional equivalent of LWOP, and because it pre-dated *Miller* and the sentencing court took none of the factors outlined in *Miller* into account, his sentence violates the Constitutional prohibition on cruel and unusual punishment.

Petitioner is aware of the recent decision in *People v. Perez* (2013) 214 Cal.App.4th 49 (*Perez*). In *Perez*, the Court of Appeal, Fourth Appellate District, Division Three found a defendant who was sentenced at age 17 to a sentence of 30 years to life would be eligible for parole at age 47, and, thus, there will be "plenty of time left" for that defendant to have "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Id.* p. 57.)

Contrary to the defendant in *Perez*, petitioner received a sentence of 77 years to life. Petitioner is all but guaranteed to die in prison before he would ever be eligible for parole. He has no meaningful opportunity to obtain release in the future, and his sentence violates the Eighth Amendment's prohibition

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[6] He received 904 days of actual credit at the time of sentencing. If those days are subtracted, petitioner would still have to reach over 93 years of age before ever being eligible for parole.

against cruel and unusual punishment. (*Graham v. Florida* (2010) 560 U.S. ___ [130 S.Ct 2011, 2030].)

Petitioner does not contend that sentences like the one he received are categorically unconstitutional. *Miller* held

> Our decision does not categorically bar a penalty for a class of offenders or type of crime -- as, for example, we did in *Roper* [*v. Simmons* (2005) 543 U.S. 569] or *Graham*. Instead, it mandates only that a sentencer follow a certain process -- considering an offender's youth and attendant characteristics -- before imposing a particular penalty.

(*Miller*, *supra*, 567 U.S. at __ [132 S.Ct. at 2471].) No such procedure was followed here and that is why review should be granted and petitioner's sentence must be reversed.

C. Review Should Be Granted To Answer The Question Of Retroactivity

Petitioner will continue to serve the functional equivalent of LWOP unless and until *Miller* is applied retroactively. Petitioner has found no published California case on point, and it does not appear that this Court has granted review on any case which would answer this important question. Courts from other jurisdictions that have answered this question are in conflict.

At best, there appears to be confusion among legal scholars and the various courts as to whether *Miller* is to be applied retroactively to sentences like petitioner's whose direct appeals are complete. (See *Sentenced to*

Confusion: Miller v. Alabama and the Coming Wave of Eighth Amendment Cases (2012) 20 George Mason L. Rev. 29, fn. 3.)

Petitioner is of the belief that *Miller* announced a watershed new substantive rule of criminal procedure which affects the fundamental fairness of the proceedings, and thus, must be applied retroactively. (*Teague v. Lane* (1989) 489 U.S. 288 (*Teague*).) In *Teague*, the United States Supreme Court held that, as a general rule, "new constitutional rules of criminal procedure" will not be applied retroactively to cases which were final "before the new rules are announced." (*Id*. at p. 310.) "Under *Teague*, the determination whether a constitutional rule of criminal procedure applies to a case on collateral review" requires the court to determine if "the rule is actually 'new.'" (*Beard v. Banks* (2004) 542 U.S. 406, 411 (*Beard*).) "[I]f the rule is new, the court must consider whether [the rule] falls within either of the two exceptions to nonretroactivity." (*Ibid*.)

"A new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a '"watershed rul[e] of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding.'" (*Whorton v. Bockting* (2007) 549 U.S. 406, ___ [127 S. Ct. 1173, 1180].)

Additionally, *Teague*'s more general bar on retroactive application of new rules does not apply to those rules "forbidding punishment 'of certain primary conduct [or to] rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.' [Citations.]" (*Beard*, *supra*, 542 U.S. at pp. 416-417.) It also does not apply to "'"watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding.'" (*Graham v. Collins* (1993) 506 U.S. 461, 478 [113 S.Ct. 892].)

There can be little doubt that the holding of *Miller* must be applied retroactively because its holding is not just "new," but represents a watershed and substantive change in the law implicating the fundamental fairness of the proceedings and also is a new rule prohibiting a certain category of punishment for a class of defendants because of their status.

Courts in other states have either not yet decided[7] this issue or are in conflict as to whether *Miller* is fully retroactive and, pursuant to *Teague*, must be applied on collateral review to cases final before *Miller* was decided. (See, e.g., *State v. Williams*, 2012 IL App (1st) 111145 (Nov. 27, 2012)

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[7] Oral argument on this issue was held before the Supreme Court of Pennsylvania, but as of the filing of this petition for review, no decision has been issued. (See Dana DiFillipo, Pa.'s High Court Grapples with Federal Decision on Sentencing Juveniles, PHILA. DAILY NEWS (Sept. 13, 2012), http://articles.philly.com/2012-09-13/news/33818431_1_mandatory-life-without-parole-sentences-juvenile-lifers-lengthy-sentences, as of April 30, 2013.

[http://www.state.il.us/court/Opinions/AppellateCourt/2012/1stDistrict/1111145.pdf, as of April 30, 2013][Illinois, holding *Miller* is fully retroactive]; *State v. Morfin*, 2012 IL App (1st) 103568 (Nov. 30, 2012)[http://www.state.il.us/court/Opinions/AppellateCourt/2012/1stDistrict/1103568.pdf, as of April 30, 2013 [Illinois, holding same] but see *Geter v. State*, No. 3D12-1736 (Fla. 3rd DCA Sept. 27, 2012) [Florida District Court ruling that *Miller* is not retroactive [http://www.3dca.flcourts.org/Opinions/3D12-1736.pdf, as of April 30, 2013.)

Additionally, petitioner submits that *Miller's* companion case, *Jackson v. Hobbs*, announced a new rule on collateral review; and, thus, the new rule applies retroactively to all similarly situated cases, including petitioner's. Given the United States Supreme Court's application of *Miller* retroactively to cases on collateral review, further analysis under *Teague* and its progeny is not even necessary. This is so because the Court has already answered the question of retroactivity by applying *Miller* to cases on collateral review. In *Miller*, the Court addressed and vacated the sentences of both Evan Miller and Kuntrell Jackson. (*Miller*, *supra*, 132 S.Ct. 2455.) However, while Miller's challenge before the Supreme Court was on direct review, Jackson's conviction, like that of petitioner herein, became final long before the Court's announced its new rule in *Miller*. (*Id*. at p. 2461.) Had *Miller* not applied

retroactively to cases on collateral review, *Jackson* would have been precluded from the relief he was granted. "[O]nce a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." (*Teague*, *supra*, 489 U.S. at p. 300.) Therefore, if a new rule is announced and applied to a defendant on collateral review, like the Court did in *Miller*, that rule is necessarily retroactive. (See also *Tyler v. Cain* (2001) 533 U.S. 656, 663 ["The new rule becomes retroactive, not by the decisions of the lower court, or by the combined action of the Supreme Court and the lower courts, but simply by the actions of the Supreme Court."]

For the reasons explained above, any argument that *Miller* is not to be applied retroactively would be very difficult to make. Yet, the within petition for writ of habeas corpus filed in the Court of Appeal has been denied, and this Court must now weigh in on this important issue. Petitioner has no other adequate remedy.

This Court should grant review to answer this important question of law and give guidance to the lower courts on how to deal with the many individuals like petitioner presently serving unconstitutional sentences.

CONCLUSION

Based on the foregoing, and based on the this Court's prior order granting review in Case No. S210448, this petition for review should be granted.

Dated: November 14, 2013

Respectfully submitted,

ALLEN G. WEINBERG
Attorney for Petitioner
JOSE ARMANDO ALATRISTE

CERTIFICATE OF APPELLATE COUNSEL
PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.504(d)

I, Allen G. Weinberg, appointed counsel for petitioner, hereby certify, pursuant to rule 8.504(d) of the California Rules of Court, that I prepared the foregoing petition for review on behalf of my client, and that the word count for this petition is 5,293 words, which does not include the cover, tables, or attached opinion. This petition therefore complies with the rule, which limits a petition for review to 8,400 words. I declare under penalty of perjury that I prepared this document in Corel WordPerfect, and that this is the word count WordPerfect generated for this document.

Dated: November 14, 2013

Allen G. Weinberg
ALLEN G. WEINBERG
Attorney for Petitioner
JOSE ARMANDO ALATRISTE

ATTACHMENT “A”

PROOF OF SERVICE BY MAIL

I, the undersigned, declare as follows: I am over eighteen (18) years of age and not a party to the within action. My business address is 9454 Wilshire Boulevard, Suite 600, Beverly Hills, California 90212.

On the date indicated below, I served the within

PETITION FOR REVIEW

on each of the following, by placing a true copy thereof in a sealed envelope with postage fully prepaid, in the United States Mail at Beverly Hills, California addressed as follows:

Clerk, Court of Appeal
Second Appellate District, Div. Two
300 S. Spring Street
North Tower, 2nd Floor
Los Angeles, CA 90013-1213

Los Angeles Superior Court
ATTN: Criminal Appeals
210 West Temple Street
Los Angeles, CA 90012

State Attorney General
300 South Spring Street
North Tower, Suite 5001
Los Angeles, CA 90013
[respondent]

California Appellate Project
520 S. Grand Avenue, 4th Floor
Los Angeles, CA 90071

CONFIDENTIAL LEGAL MAIL
Jose Alatriste, AC3987
P.O. Box 3030
Susanville, CA 96127-3030
[appellant]

I declare under the penalty of perjury that the foregoing is true and correct. Executed this 14th day of November, 2013, at Beverly Hills, California.

_____
ALLEN G. WEINBERG