UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Appeal Nos. 14-2737 & 14-2818
(Case No. 2:13-cv-00278-RTR & 2:12-cv-01051-RTR (E.D. Wis.))

EMMANUEL MARTINEZ AND
TIMOTHY VALLEJO,

Petitioners-Appellants,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the Final Judgment in the United States
District Court for the Eastern District of Wisconsin,
the Hon. Rudolph T. Randa, Presiding

BRIEF AND SHORT APPENDIX OF PETITIONERS-APPELLANTS

Amelia L. Bizzaro
BIZZARO LAW LLC
2266 N. Prospect Ave., Suite 310
Milwaukee, Wisconsin 53202
[414] 224-5326

Counsel for the Petitioners-Appellants.

DISCLOSURE STATEMENTS

Emmanual Martinez

Pursuant to FED. R. APP. P. 26.1 and Circuit RULE 26.1, Emmanuel Martinez's attorney informs this Court that Bizzaro Law LLC through Amelia L. Bizzaro represented Petitioner-Appellant Emmanual Martinez, who is a natural person, in the district court. On appeal, Bizzaro Law LLC continues to represent Martinez in this Court.

Dated: March 6, 2015

s/ Amelia L. Bizzaro
Amelia L. Bizzaro

Timothy Vallejo

Pursuant to FED. R. APP. P. 26.1 and Circuit RULE 26.1, Timothy Vallejo's attorney informs this Court that Bizzaro Law LLC through Amelia L. Bizzaro represented Petitioner-Appellant Timothy Vallejo, who is a natural person, in the district court. On appeal, Bizzaro Law LLC continues to represent Martinez in this Court.

Dated: March 6, 2015

s/ Amelia L. Bizzaro
Amelia L. Bizzaro

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Emmanuel Martinez

The case was before the district court as *Martinez v. United States*, 2:13-cv-00278-RTR and was entirely sealed. The district court had jurisdiction over this case under 18 U.S.C. § 2255(a). On October 4, 2013, the court issued a written decision denying Martinez's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255, dismissing the case, and declining to issue a certificate of appealability. Martinez-R.14, App. 1-3.[1] Judgment was entered the same day. Martinez-R.15, App. 4.

Martinez filed a RULE 60(b) motion seeking relief from the judgment on July 7, 2014. Martinez-R.21. The government filed a letter on July 8, 2014 waiving the time limits for filing a notice of appeal. Martinez-R.18. On July 22, 2014, the parties filed a Joint RULE 60(b) Motion for Relief from Judgment. Martinez-R.19. The court granted the joint motion on July 30, 2014 and issued a Second Judgment on the same day. Martinez-R.20, App. 9-10.

Martinez filed a notice of appeal on August 6, 2014. Martinez-R.23. On the same day, he filed a motion for a certificate of appealability in this Court. Martinez-Dkt.3. On October 28, 2104, this Court granted Martinez's motion for a certificate of appealability and consolidated this case with *Vallejo v. United States*. Martinez-Dkt. 15.

The United States Court of Appeals for the Seventh Circuit has jurisdiction under 28 U.S.C. §§ 1291, 2255(d).

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[1] The citations are to the district court record. To distinguish between the appellants, the citations are preferenced by the appellant's name. However, referenes to the underlying criminal case, which was the same for both, is simply to Crim-R.__. Any reference to the documents filed in this Court are to Dkt.__. The __ refers to the assigned ECF number.

Timothy Vallejo

The case was before the district court as *Vallejo v. United States*, 2:12-cv-01051-RTR. The district court had jurisdiction over this case under 18 U.S.C. § 2255(a). On June 25, 2014, the court issued a written decision denying Vallejo's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255, dismissing the case, and declining to issue a certificate of appealability. Vallejo-R.17, App. 5-7. Judgment was entered the same day. Vallejo-R.18, App. 8. No motion to alter judgment was filed and Vallejo filed a notice of appeal on August 16, 2014. Vallejo-R.20.

On August 19, 2014, Vallejo filed a motion for a certificate of appealability in this Court. Vallejo-Dkt.2. On October 28, 2104, this Court granted Vallejo's motion for a certificate of appealability and consolidated this case with *Martinez v. United States*. Dkt. 10.

The United States Court of Appeals for the Seventh Circuit has jurisdiction under 28 U.S.C. §§ 1291, 2255(d).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Emmanuel Martinez and Timothy Vallejo each pleaded guilty to a RICO-murder count for their involvement in the murder of a good samaritan while members of the Latin Kings. At the time they committed the predicate acts, they were not yet 18 years old. In separate sentencing hearings, the district court sentenced them each to life imprisonment.

The ultimate issue in this case is whether the life sentences imposed violate the Eighth Amendment under *Miller v. Alabama*, 132 SCt. 2455 (2012). *Miller* found the automatic imposition of a sentence of life without the possibility of parole for juveniles was unconstitutional. Whether *Miller* applies, entitling Martinez and Vallejo to new sentencing hearings, turns on two questions[2]:

1. Is *Miller* retroactive?
2. Was the life sentence the court imposed was mandatory?

Both questions present issues of first impression in this Circuit. In cases across the country, the Department of Justice has conceded that *Miller* applies retroactively. Martinez and Vallejo expect it to do so here, as well.

The district court below never directly addressed whether *Miller* was retroactive. Martinez-R.14, Vallejo-R.17, App. 1-3, 5-7. Rather, it found that *Miller* did not apply because the life sentences it imposed were not mandatory, but rather the result of a discretionary decision. Martinez-R.14:3, Vallejo-R.17:3, App. 3, 7.

[2] In some cases there is a third question: whether the defendants were younger than age 18 when they committed the crimes. That question is not present here.

STATEMENT OF THE CASE

In 2005, the grand jury indicted 25 people, including Martinez and Vallejo for being members of "a criminal organization known as the Almighty Latin King Nation, Milwaukee Chapter[.]" Crim-R.1501:17. The Milwaukee Latin Kings were primarily a drug trafficking organization that protected and defended the territory it controlled through violence, including murder and attempted murder. Crim-R.1501:17-26. Martinez and Vallejo were members of the 19th Street Kings, a subchapter of the Milwaukee Latin Kings. Crim-R.1194:2, Crim-R.1501:2.

In the early morning hours of April 19, 2003, Kevin Hirschfiled and some friends were on their way home when they stopped at a gas station just outside of Milwaukee. Hirschfield saw a group of people beating another man. Not realizing they were Latin Kings, Hirschfield asked them to stop and intervened in the fight. Crim-R.1194:3, Crim-R.1501:3. In the course of the fight, the beaten man struck Armando Barragan, the leader, or "Inca," of the 19th Street Kings. The 16-year-old Barragan thought Hirschfield threw the punch. *Id.* Pointing at Hirschfield, an incensed Barragan ordered Vallejo, who was 17 years old at the time, to "kill that motherfucker." *Id.* Vallejo fired about five to six times from a .38 revolver and 16-year-old Martinez fired about seven shots at Hirschfield from a 9mm semi-automatic pistol. *Id.* A third person, Mario Banda, also fired shots at Hirschfield. *Id.* Martinez and Vallejo both pleaded guilty to racketeering with Hirschfield's murder as a predicate act. Crim-R.1194, Crim-R.1501.

Martinez's plea agreement included one additional predicate act: the November 28, 2002 attempted murder of Daniel Fonesca. Fonesca and some friends, all members of a rival gang, were in a car stopped at an intersection, presumably in or close to the 19th Street Kings territory when several shots were fired into the car, striking Fonesca in the head. Crim-R.1501:4. Immediately after the shooting, Martinez's uncle saw him run into his grandparents' house to hide the gun and the uncle thought the shooting was gang related. *Id.*

Vallejo's plea agreement included two additional predicate acts: the August 30, 2002 attempted murder of Geremais Hernandez and the July 26, 2003 attempted murder of Jose Rivera. Crim-R.1194:4-5.

Hernandez had just parked in the parking lot of an Open Pantry after driving through the area several times looking for a spot. Crim-R.1194:4. After parking, he heard multiple gunshots and was struck by a bullet while in the car. *Id.* Hernandez identified Vallejo as the shooter and Vallejo admitted as much. Crim-R.1194:4.

Vallejo was with fellow gang member Desmond Cornelius when the two encountered Jose Rivera, a rival gang member. Crim-R.1194:4. Cornelius shot Rivera in the back three times. *Id.* In addition to being members of rival gangs, Cornelius and Rivera had a beef that went back to the previous summer. A few days before the shooting, Cornelius and Rivera were involved in a confrontation and Cornelius had threatened Rivera and his friends. Crim-R.1194:5.

Although Vallejo's plea agreement was filed nearly a year before Martinez's, Martinez's plea and sentencing hearings were first. The day before the sentencing hearing, the government filed a "motion for downward departure." Crim-R.1576, App. 11. In it, the government moved "pursuant to U.S.S.G. 5K1.1 for a zero level reduction in the guideline range, but relief from the statutory minimum, based on the defendant's substantial assistance in the investigation and prosecution of others." Crim-R.1576, App. 11.

At the July 10, 2009 sentencing hearing, the government described Martinez's cooperation and his willingness to testify in general, but also specifically against Barragan "upon his return. The Federal Government and local authorities are actively continuing to attempt to extradite Mr. Barragan from Mexico, and it's my hope that he will stand trial here within the next 2 years for these offenses." Martinez-Sent. Tr. at 4, App. 15. The government asked the district court to sentence Martinez "to a term of imprisonment within the statutory guideline range." *Id.* at 17, App. 28. On the other hand, Martinez's

attorney, Bridget Boyle, asked the district court to consider a sentence "in the range of 20 to 25 years." *Id.* at 21, App. 32.

The district court denied the government's § 5K1.1 motion. "I think that that's more properly the subject of a RULE 35." *Id.* at 23, App. 34. The court sentenced Martinez to life imprisonment. *Id.* at 33. "It is the most serious crime that can be committed." *Id.*

Vallejo's sentencing hearing took place six months later on January 26, 2010. Like Martinez, the government acknowledged Vallejo's cooperation and his willingness to testify, if necessary. Vallejo-Sent. Tr. at 4, App. 51. The government filed no § 5K1.1 motion seeking a downward departure. Instead, the government asked the court to impose "the maximum sentence." *Id.* Vallejo's attorney, Matt Ricci, noted that the only thing that mattered is what Vallejo did. "Both to Mr. Hirschfield, and in other ways, to try and help stop the Latin Kings. So I'm not going to make a specific recommendation at this time." *Id.* at 23, App. 70. In rendering its decision, the district court referenced the sentence it imposed in Martinez's case. "And the same sentence has to be imposed here as was imposed in the case of Mr. Martinez, Emmanuel Martinez. That's the only disposition that I, as a judge, can render in this case, given the analysis that I've conducted." *Id.* at 36, App. 83.

Neither Martinez nor Vallejo appealed their sentences. The prosecutor's hope that Barragan would be prosecuted within two years went unfulfilled, and he remains on the U.S. Marshal's wanted list. *See* U.S. Marshals Service Major Fugitive Cases (available at http://1.usa.gov/1EI2jg5).

On June 25, 2012, the Supreme Court decided *Miller v. Alabama*, 132 S.Ct. 2455 (2012), holding that mandatory life sentences for juveniles are unconstitutional. Based on that case, Vallejo and Martinez each filed *pro se* motions to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255, although they did so at different times. Vallejo-R.1, Martinez-R.1. The district court issued nearly identical decisions (again, at different times) denying both

Martinez's and Vallejo's motions and denying a certificate of appealability. Martinez-R.14, 15, 20, Vallejo-R.17, 18, App. 1-10.

The district court assumed, without specifically deciding, that *Miller* was not retroactive. It focused, as the parties had, on the second issue: whether the life sentenced imposed was mandatory. The court found that it had the discretion to sentence Martinez and Vallejo "anywhere along the sentencing scale *up to life*[,]" and that it "was not required to impose a life sentence." Martinez-R. 14:2, Vallejo-R.17:2, App. 2, 6. (emphasis in original). The district court further found that the RICO statute contains its own sentencing scheme and "merely incorporates" 18 U.S.C. § 1111, the murder statute imposing a mandatory life sentence. *Id.*

Martinez and Vallejo timely appealed and sought a certificate of appealability. Martinez-R.23, Martinez-Dkt. 3, Vallejo-R.20, Vallejo-Dkt. 2. This Court granted the certificate of appealability and consolidated the cases. Martinez-Dkt.15, Vallejo-Dkt. 10.

This Court originally suspended briefing at Martinez's and Vallejo's request when the Supreme Court granted certiorari in *Toca v. Louisiana*, No. 14-6381. Dkt. 21, 23. In that case, the Court was set to decide whether *Miller* was retroactive. However, the case was dismissed when the parties resolved the case. The parties informed this Court of that development and it reinstated briefing. Dkt. 24, 25. This brief timely follows.

SUMMARY OF ARGUMENT

In *Miller v. Alabama*, 132 S.Ct. 2455 (2012), the Supreme Court ruled that the automatic imposition of a sentence of life without the possibility of parole on juvenile offenders violated the Eighth Amendment's prohibition against cruel and unusual punishment. It did not forbid the sentence of life without the possibility of parole. Rather, it rejected the automatic, mandatory imposition of it. But before the sentencing court can impose a life sentence it must consider several factors relating to the unique circumstances of juvenile offenders. *See Miller*, 132 S.Ct. at 2468.

This case is about whether Emmanuel Martinez and Timothy Vallejo, who pleaded guilty to RICO-murder and attempted murder charges, are entitled to new sentencing hearings under *Miller*. For that to be possible, three things must be true: *Miller* must be retroactive, Martinez and Vallejo must have been younger than 18 at the time of the crimes, and the life sentences the court imposed must have been mandatory. In this case, two of the three are not at issue. The Department of Justice, as it has across the country and as it did in the district court below, will concede that *Miller* is retroactive. At the time of the crimes, Martinez was 15 and 16 years old and Vallejo was 16 and 17. The parties' opinions diverge on the third issue: whether the life sentence was mandatory.

The language of the RICO penalty statute is unclear. Martinez and Vallejo's interpretation of the statute is supported by decisions from other courts and is compelled by reading it in context with other similar statutes. Because the life sentence the court imposed on Martinez and Vallejo were mandatory, *Miller* applies and they are entitled to new sentencing hearings.

ARGUMENT

Martinez's and Vallejo's Life Sentences Violate the Eighth Amendment's Prohibition Against Cruel And Unusual Punishment

Pursuant to Martinez's and Vallejo's plea agreements, the parties agreed that the base offense level was 43, life imprisonment. Crim-R.1194, 1501. But life wasn't just the maximum penalty or the advisory sentencing guideline range, it was required by statute. As a result, the court's imposition of life sentences was mandatory and *Miller* applies, requiring new sentencing hearings.

I. *Miller* is Retroactive

Although commonly referred to as "*Miller,*" the case is really the consolidation of two cases: *Miller v. Alabama* and *Jackson v. Hobbs*. In it, the Court evaluated the cases of two 14-year-olds convicted in adult court of murder and sentenced to life without the possibility of parole. *Miller*, 132 S.Ct. at 2460-61. The *Miller* Court concluded that "a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders," *id.* at 2469, is unconstitutional because "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* at 2475.

The Court reached this conclusion by relying heavily on two prior decisions relating to juveniles: *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010). In *Roper*, it forbade the imposition of the death penalty for juveniles, and in *Graham*, it forbade the imposition of life without the possibility of parole for non-homicide offenses committed by juveniles. Unlike *Roper* and *Graham*, however, *Miller* does not forbid the imposition of life without the possibility of parole for juvenile offenders. If forbids the *mandatory* imposition of it. *Id.* at 2466.

The debate about whether *Miller* is retroactive has taken place primarily in state court. State Supreme Courts in Illinois, Iowa, Massachusetts, Mississippi, Nebraska, New Hampshire, South Carolina, Texas, and Wyoming have ruled

that *Miller* is retroactive, while courts in Alabama, Louisiana, Michigan, Minnesota and Pennsylvania have ruled that it is not. *People v. Davis*, 6 N.E.3d 709 (Ill. 2014), *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013), *Diatchenko v. DA*, 1 N.E.3d 270 (Mass. 2013); *Jones v. State*, 122 So.3d 698 (Miss. 2013); *State v. Mantich*, 842 N.W.2d 716 (Neb. 2014), *Petition of State of N.H.*, 103 A.3d 227 (N.H. 2014), *Aiken v. Byars*, 765 S.E.2d 572 (S.C. 2014), *Ex parte Maxwell*, 424 S.W.3d 66 (Tex. Crim. App. 2014), *State v. Mares*, 335 P.3d 487 (Wyo. 2014), *Williams v. State*, 2014 Ala. Crim. App. LEXIS 14, 2014 WL 1392828 (Ala. Crim. App. 2014) (No. CR-12-1862), *Toca v. Louisiana*, 141 So.3d 265 (La. 2014), *People v. Carp,* 852 N.W.2d 801 (Mich. 2014), *Chambers v. State*, 831 N.W.2d 311 (Minn. 2013), *Commonwealth v. Cunningham*, 81 A.3d 1 (Pa. 2013).

Supreme Courts in California, Colorado and Florida are currently considering the issue, and just this week the Connecticut Supreme Court extended *Miller's* application to a discretionary sentence of 100 years. *In re Rainey*, 326 P.3d 251 (Cal. 2014), *Falcon v. Florida,* 137 So.3d 1019 (Fla. June 13, 2013) (No. SC13-865); *Colorado v. Vigil*, 2014 Colo. LEXIS 952 (Colo. Oct. 27, 2014) (No. 14SC495); *State v. Riley*, 2015 Conn. LEXIS 50 (decided March 2015 and officially released March 10, 2015) (No. SC 19109).

This does not mean, however, that federal courts have been immune to the debate. But it has been tempered by the Department of Justice's policy of conceding that *Miller* is retroactive, a position it has taken in cases across the country, mostly in the context of petitioners seeking permission to proceed with a successive petition based on *Miller*. *See In re William*, 759 F.3d 66, 71 (D.C. Cir. 2014); *Evans-Garcia v. United States*, 744 F.3d 235, 238 (1st Cir. 2014); *Wang v. United States*, 2013 U.S. App. LEXIS 20386 (2nd Cir. 2013) (No. 13-2426) (unpublished); *In re Pendleton*, 732 F.3d 280, 282-73 (3d Cir. 2013) (per curiam); *In re Vassel*, 751 F.3d 267, 269 (4th Cir. 2014); *Croft v. Williams,* 773 F.3d 170 (7th Cir. 2014); *Johnson v. United States*, 720 F.3d 720, 720-21 (8th Cir. 2013). In addition, at least two district courts have found *Miller* is retroactive and ordered new sentencing hearings. *See Pete v. United States*, 2014 U.S. Dist. LEXIS 2559 (D. Arix.

2014) (government conceded petitioner was entitled to a new sentencing hearing based on *Miller*); *Alejandro v. United States*, 2013 U.S. Dist. LEXIS 123966, 2013 WL 4574066 (S.D.N.Y. 2013) (same).

Two circuits—the Fifth and the Eleventh—however, have concluded that *Miller* is not retroactive in a similar context. *See Craig v. Cain*, 2013 U.S. App. LEXIS 431, 2013 WL 69128 (5th Cir. 2013) (No. 12-30035) (unpublished) (decision affirming denial of a certificate of appealability); *In re Morgan*, 713 F.3d 1365, 1367-68 (11th Cir. 2013) (denying permission to file a successive § 2255 based on *Miller*). *See also Croft*, 773 F.3d 170 (discussing the split among the circuits).

Only one circuit has directly addressed *Miller's* retroactivity—the Fourth. Yesterday, it issued a decision ruling against it. *See Johnson v. Ponton*, 2015 U.S. App. LEXIS 3481 (4th Cir. 2015) (awaiting publication) (No. 13-7824).

In the instant cases, the government conceded that *Miller* was retroactive in the district court and Martinez and Vallejo expect the government to maintain that position in this Court. Martinez-R.12, Vallejo-R.12.

This Court should join the majority of courts that have addressed this issue and conclude that *Miller* is retroactive. *Miller's* holding is substantive, not procedural, and under *Teague v. Lane*, 489 U.S. 288 (1989), applies retroactively to defendants before the court on collateral review. This Court does not need to conduct a full *Teague* analysis given that one of the defendants in *Miller* was before the court on collateral relief. Kuntrell Jackson's case, which the Court consolidated with Miller, made it to the Supreme Court by way of state habeas. *See Miller*, 132 S.Ct. at 2461-62. As *Teague* instructs: what is good for one is good for all. "[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*, 489 U.S. at 300. By applying the new rule to Jackson, the Court made it clear that the new rule applied retroactively on collateral review.

The Court's decision in *Sumner v. Shuman*, 483 U.S. 66 (1987) supports this interpretation. *Sumner* was decided before *Teague*, so it does not distinguish

between procedural and substantive rules. At issue in *Sumner* was a Nevada statute that mandated the death penalty when an inmate serving a life sentence without the possibility of parole was convicted of murder. *Id*. at 77-78. The *Sumner* Court found that statute unconstitutional, noting that it impermissibly created the risk that the death penalty would be imposed even if mitigating factors existed that would otherwise call for a lesser sentence. *Id*. at 82.

The defendant in *Sumner* was also before the Court on collateral review. *Id*. at 68. By granting him relief, the Court implied that a new rule that does not prohibit a certain sentence in every case, but prohibits the mandatory imposition of that sentence, is a substantive rule, not a procedural one. Because the Supreme Court has likened a sentence of life without the possibility of parole to the death penalty, *Graham*, 560 U.S. at 69, the *Sumner* rule is analogous to the rule announced in *Miller*.

By applying its rule to both defendants—the one there on direct appeal and the one there on collateral review—*Miller* applied its rule evenhandedly as justice and *Teague* require. The rule announced in *Miller* thus applies to Martinez and Vallejo.

If this Court follows the trend of its sister circuits and state courts and finds that *Miller* is retroactive, then the next question is whether it applies to Martinez and Vallejo.

II. Martinez's and Vallejo's Life- Sentences were Mandatory

The indictment charged Martinez and Vallejo with violating the Racketeer Influenced Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c), which makes it a crime to conduct the affairs of an enterprise affecting interstate commerce through a pattern of racketeering activity. While RICO contains its own sentence structure, the penalty is dependant on the underlying racketeering activity, referred to as the predicate act. The maximum penalties for the predicate act are incorporated into the RICO penalty structure. *See* 18 U.S.C. § 1963(a). Here, the predicate crime at issue was first-degree murder.

There are two possible sentences for first-degree murder: life imprisonment or death. 18 U.S.C. § 1111. The mandatory minimum sentence is life imprisonment—the penalty can only be elevated to death if the government undertakes certain steps, which were not at issue in this case. *See* 18 U.S.C. § 3591, *et. seq*.

In these cases, the plea agreements listed the maximum sentence as life imprisonment, but failed to explain that life was also the mandatory minimum sentence. Martinez-R.1501:5-6, Vallejo-R.1194:5-6. Because the life sentences the court imposed were mandatory, Martinez and Vallejo meet the test for the application of *Miller* and are entitled to new sentencing hearings.

A. Under the RICO Penalty Statute, a Conviction for RICO-Murder Mandates a Life Sentence

The penalty structure for RICO is found in 18 U.S.C. § 1963(a), and it is confusing:

> a) Whoever violates any provision of section 1962 of this chapter [18 USCS § 1962] shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law—

Because § 1111 proscribes a life sentence, the statute must be read as: *Whoever violates any provisions of section 1962 of this chapter shall be fined under this title or imprisoned for life.*

Determining whether § 1963(a) mandates a life sentence begins with the language of the statute. *See Treadway v. Gateway Chevrolet Oldsmobile, Inc.*, 362 F.3d 971, 975 (7th Cir. 2004). When interpreting statutes, the court gives "words their plain meaning unless doing so would frustrate the overall purpose of the statutory scheme, lead to absurd results, or contravene clearly expressed legislative intent." *United States v. Vallery*, 437 F.3d 626 (7th Cir. 2006). Where the language of a statute is unambiguous, the court's analysis ends where it began, with the plain meaning of the statute. But "[w]hen there are two plausible but

different interpretations of statutory language, there is ambiguity." *Khan v. United States*, 548 F.3d 549, 556 (7th Cir. 2008).

Statutes cannot be interpreted in isolation. Thus, "the meaning of statutory language, plain or not, depends on context." *Holloway v. United States*, 526 U.S. 1, 7 (1999). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). "Thus, the meaning of a statute may be affected by a related act, especially if that act provides greater specificity on the issue at hand." *Smith v. Zachary*, 255 F.3d 446, 448 (7th Cir. 2001).

Congress enacted RICO as part of the Organized Crime Control Act of 1970. Its purpose was to impose enhanced sanctions on those engaging in racketeering activities. *United Energy Owners Committee, Inc. v. United States Energy Management Systems, Inc.*, 837 F.2d 356 (9th Cir. 1988). In particular, RICO sought to punish "racketeering activity," which includes state offenses involving murder, kidnapping, robbery, arson, and other serious offenses that are punishable "by imprisonment for more than one year[.]" 18 U.S.C. § 1961(1)(A).

In 1984, Congress enacted the Comprehensive Crime Control Act of 1984, which created a new offense: violent crimes in aid of racketeering activity, § 1959. At the same time, Congress enacted a murder-for-hire statute, § 1958. These crimes also carry a minimum penalty of life imprisonment. *See* 18 U.S.C. §§ 1958(a) & 1959(a). Across the board, intentional murder carries a minimum penalty of life imprisonment.

These penalties make sense: murder, as the district court noted at Martinez's sentencing hearing is the gravest of offenses. "The United States still holds firm to the worst offense that you can ever, ever do—and the criminal code reflects it—is to take another person's life." Martinez-Sent. Tr. at 27, App. 38. The Court repeated this sentiment at Vallejo's sentencing hearing. *See* Vallejo-Sent. Tr. at 36, App. 77 (referring to it as "the most serious of crimes"). Thus, Martinez

and Vallejo's interpretation of § 1963(a) is in line with the rest of the criminal code and the sentencing guidelines.

Interpreting the statute to provide a maximum penalty of life (rather than a mandatory one) would go even further than to make RICO-murder an outlier among all other intentional murders. It would also create an absurd result. It would allow for the possibility that gang members who killed a good samaritan on someone else's orders and are convicted of a RICO offense (like Martinez and Vallejo were) could receive a sentence ranging from probation (however remote) to life imprisonment. But gang members who commit the same crime and are convicted of violating § 1959 (violent crimes in aid of racketeering) could receive no sentence lower than life imprisonment. A person who acted alone, with no connection to a criminal enterprise who killed, for example, a gas station attendant during a robbery, could also receive no sentence lower than life imprisonment. Because this irrational result could not have been Congress' intent, this Court should accept Martinez's and Vallejo's interpretation: conviction for RICO-murder is punished by a mandatory sentence of life imprisonment.

Martinez and Vallejo's interpretation of § 1963(a) is in line with the rest of the criminal code and the sentencing guidelines. Intentional murder means the same in federal and Wisconsin state court. *See* 18 U.S.C. § 1111(a) (defining murder as "the unlawful killing of a human being with malice aforethought"); WIS. STAT. § 940.01 (defining first-degree intentional homicide as causing "the death of another human being with intent to kill that person or another.") The crimes are also punished the same: the mandatory minimum penalty is life imprisonment.[3] *See* 18 U.S.C. § 1111(b), WIS. STAT. § 939.50(3)(a).

[3] In state court, the minimum and the maximum penalty is the same because Wisconsin is not a death penalty state. The difference is that in Wisconsin, the sentencing court may, in exercising its discretion, make the defendant parole eligible (and set the date of eligibility) or deny a defendant any eligibility. In federal court, there is no such thing as parole and every life sentence is life without the possibility of parole.

Where RICO is concerned, the base offense level is the greater of 19 or the offense level applicable to the underlying racketeering activity. U.S.S.G. § 2E1.1. The relevant guideline for murder is § 2A1.1, which applies a base offense level of 43. No matter a defendant's criminal history category, a base offense level of 43 equates to life imprisonment. *See also* § 2A1.1, App. Note 2(A) ("[i]n the case of premeditated killing, life imprisonment is the appropriate sentence if a sentence of death is not imposed. A downward departure would not be appropriate in such a case.")

Although this Court has not addressed this issue, other decisions offer guidance. In *United States v. Gonzalez*, 275 F.Supp.2d 483 (S.D.N.Y. 2003), the court evaluated Gonzalez's motion to dismiss counts in a superseding indictment that subjected him to a mandatory sentence of life. "Because racketeering acts five and six (respectively, murder and narcotics conspiracy) carry a maximum sentence of life imprisonment, a conviction on either of the RICO counts will also *necessarily* result in a sentence of life imprisonment." *Id.* at 486 (emphasis in original). *See also United States v. Garcia*, 68 F.Supp.2d 802, 806 (E.D. Mich. 1999) (in a case involving a RICO conspiracy count with predicate acts including murder, the court noted that "[t]he RICO counts carry mandatory life in prison sentences in the event of conviction.")

In *United States v. Franklin*, 663 F.3d 1289 (D.C. Cir. 2011), the defendant alleged his attorney was ineffective for pursuing a concession strategy at trial because any conviction would require a life sentence. "The situation facing Franklin was this: If acquitted on the RICO, [continuing criminal enterprise], and murder counts, he would avoid a mandatory life sentence. But depending on which (if any) other counts he was convicted of, the District Court still might have discretion under the relevant statutes to impose a life sentence. Indeed, the advisory sentencing range under the Sentencing Guidelines could itself rise to life imprisonment even with acquittals on the RICO, CCE, and murder counts."

See Sentence Reform Act of 1984 (abolishing parole for federal offenders who commit offenses on or after November 1, 1987).

Id. at 1290. *See id.* at 1289 ("[w]ithin the multi-county indictment, three counts—the RICO conspiracy, Continuing Criminal Enterprise (or CCE), and murder in aid of racketeering counts—carried mandatory life sentences. *See* 18 U.S.C. § 1959(a)(1); 18 U.S.C. § 1963(a); 21 U.S.C. § 848(b)."). The court rejected Franklin's ineffective assistance of counsel claim, but acknowledged that a life sentence was mandatory for a conviction involving a RICO conspiracy with a predicate act facing life. *Id.* at 1290.

Although *United States v. Capozzi* involved Derek Capozzi's challenge to his conviction and sentence, the case is valuable for its reference to co-defendant Stephen DiCenso. 486 F.3d 711 (1st Cir. 2007). Like Martinez and Vallejo, Stephen DiCenso signed a proffer agreement with the government and participated in several debriefings. Pursuant to a plea agreement, DiCenso (like Martinez and Vallejo) pleaded guilty to a substantive violation of RICO, § 1962(c). *Id.* at 720. DiCenso's predicate acts included conspiracy to murder, attempted murder, and aiding and abetting murder, among others. *Id*. Interpreting the penalty statute the same as Martinez and Vallejo, the parties agreed that DiCenso faced life imprisonment. *Id.* But unlike Martinez and Vallejo, DiCenso's plea agreement spelled it out: his "plea agreement stated that he faced a minimum and maximum punishment of life imprisonment under the information." *Id.* DiCenso's only way out from under the required life imprisonment sentence was through cooperation: his plea agreement provided for the government to make a departure motion for substantial assistance pursuant to § 5K1.1.[4] Capozzi argued that DiCenso's maximum penalty was actually death, and that he should have been able to question DiCenso about the benefit he got (life imprisonment) by cooperating. The *Capozzi* Court agreed with the district court's decision to "prevent Capozzi from questioning DiCenso about the death penalty in the context of the RICO statute, which simply does not provide for it." *Id.*

[4] At the time, the guidelines were mandatory. *Id.*

The Department of Justice itself also recognizes this interpretation of § 1963(a). *See* CRIMINAL RICO: 18 U.S.C. §§ 1961-1968, A MANUAL FOR FEDERAL PROSECUTORS at 155 (5th. Rev. Ed. 2009) (available at http://1.usa.gov/QVjPSS) (of the "three potential interpretations," the first is the possibility that "where a racketeering act provides for a life maximum, a defendant is subject to a mandatory life imprisonment, but not a term of years between 20 years and life.")

B. The Government's Actions in Martinez's Case Demonstrate its Belief that the Mandatory Minimum Sentence was Life Imprisonment

The government seemingly acknowledged that the mandatory minimum sentence was life when it filed "Government's Motion for Downward Departure." Martinez-R.1576, App. 11. In its motion, the government sought a "zero level reduction in the guideline range but relief from the statutory minimum…" R1576. *Id.* Although the motion does not specifically allege it, the only statutory minimum it could be referring to was the mandatory life sentence required by §§ 1963 and 1111.

The district court's denial of the government's § 5K1.1 motion does not mean that Martinez was facing anything less than a mandatory life sentence. While the government's motion was well intentioned, the court could not have sentenced Martinez to anything less than life even if it had granted the motion. That can only be accomplished by a motion filed under 18 U.S.C. § 3553(e). *Compare* § 5K1.1 ("Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court *may depart from the guidelines*") *with* § 3553(e) ("Upon motion of the Government, the court shall have the authority to *impose a sentence below a level established by statute as a minimum sentence* so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense") (emphasis added). *See also* U.S.S.G. § 2A1.1, App. Note 2(A) ("A downward department

from a mandatory statutory term of life imprisonment is permissible only in cases in which the government files a motion for a downward departure for the defendnat's substantial assistance, as provided in 18 U.S.C. § 3553(e)." The § 5K1.1 motion demonstrates the government's position at the time, which is the same as Martinez's and Vallejos's position: they were facing a mandatory life sentence.

CONCLUSION

This Court should join the majority of state courts that have found *Miller* retroactive. It should join a number of its sister circuits who have also found it retroactive, albeit in the context of permitting successive habeas petitions. *Miller*, as the government will concede, is retroactive.

This Court should also find that a conviction for RICO-murder carries a mandatory minimum sentence of life imprisonment. Reading the statute in context with other similar statutes compels this reading. Otherwise, a person charged with murder as a predicate act in a RICO count would be entitled to special treatment, subjecting them to a sentence *up to* life while other people who commit the same crime would be subjected to a mandatory life sentence.

Because the life sentences the court imposed were mandatory, *Miller* applies to Martinez and Vallejo and they are entitled to new sentencing hearings. Accordingly, this Court should reverse the decisions of the district court and remand the cases for new sentencing hearings where the sentencing court must consider the factors outlined in *Miller*.

Dated at Milwaukee, Wisconsin, March 6, 2015.

Respectfully submitted,

BIZZARO LAW LLC
Counsel for Emmanuel Martinez
and Timothy Vallejo, Petitioners-Appellants

Amelia L. Bizzaro
State Bar No. 1045709
2266 N. Prospect Ave, Suite 310
Milwaukee, Wisconsin 53202
[414] 224-5326 [phone]
[414] 255-3484 [fax]
abizzaro@bizzarolaw.com

CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a)(7), counsel certifies compliance with the type-volume limitations of that rule. This brief contains no more than 14,000 words. Specifically, all portions of the brief other than the disclosure statement, table of contents, table of authorities, and certificates of counsel contain 6,212 words, as counted by the word count feature of Microsoft Word 2008 for Mac.

Dated: March 6, 2015

s/ Amelia L. Bizzaro
Amelia L. Bizzaro

CIRCUIT RULE 25 CERTIFICATION

Pursuant to CIRCUIT RULE 25, counsel hereby certifies that versions of this brief and all of the appendix items that are available have been filed electronically.

Dated: March 6, 2015

s/ Amelia L. Bizzaro
Amelia L. Bizzaro

CIRCUIT RULE 30(d) STATEMENT

Counsel for Petitioners-Appellants Emmanuel Martinez and Timothy Vallejo states that all of the materials required by CIRCUIT RULES 30(a) are included in the attached short appendix.

Dated: March 6, 2015

s/ Amelia L. Bizzaro
Amelia L. Bizzaro

CERTIFICATE OF SERVICE

I hereby certify that that on March 6, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that my clients are not CM/ECF users. I have mailed the foregoing document by First Class Mail, postage prepaid or have dispatched it to a third-party commercial carrier for delivery within three calendar days to them.

Dated: March 6, 2015

s/ Amelia L. Bizzaro
Amelia L. Bizzaro

INDEX TO REQUIRED SHORT APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

Case No. 13-C-278
(Criminal Case No. 05-Cr-240)

EMMANUEL MARTINEZ,

Movant.

DECISION AND ORDER

The movant, Emmanuel Martinez ("Martinez"), was sentenced to life in prison by this Court on July 10, 2009 after Martinez pled guilty to a RICO conspiracy along with other defendants. Martinez challenges this disposition by way of 28 U.S.C. § 2255, arguing that said sentence is a violation of the Eighth Amendment to the United States Constitution and *Miller v. Alabama*, 132 S.Ct. 2455 (2012), which held that mandatory life sentences without parole administered to those under the age of 18 violate that Amendment. Martinez concedes that a non-mandatory life sentence passes constitutional scrutiny but argues that because this Court was required to give him a life sentence, it was indeed mandatory and therefore does not pass constitutional muster.

Martinez was convicted of violating 18 U.S.C. §§ 1961 and 1962(d). A RICO count contains its own unique sentencing structure, in that it allows the court to impose

a maximum sentence of 20 years which can be increased if the underlying predicate act carries a maximum sentence that is longer.

Because, argues Martinez, his predicate act was first degree murder—which requires a sentence of life, this Court was required to impose a life sentence and, therefore, violated *Miller*.

The Court disagrees. Under the scheme of sentencing presented by these provisions the Court has the discretion, after analysis of the appropriate sentencing factors, to sentence a juvenile defendant anywhere along the sentencing scale *up to life*. It was not required to impose a life sentence. The RICO statutory formula treats a first degree intentional murder predicate act as a guide for determining what a maximum sentence could be under RICO law, given that predicate act. The RICO statute is not 18 U.S.C. § 1111. They are separate offenses containing different elements. RICO merely incorporates 18 U.S.C. § 1111 to establish a high-end range of sentence for a RICO charge. The Court has the discretion to sentence a defendant anywhere in that range. It did so with Martinez. It was not required to impose the sentence that it did, and therefore Martinez's motion must be denied.

IT IS HEREBY ORDERED THAT:

Martinez's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 [ECF No. 1] is **DENIED**;

The Clerk of Court is directed to enter judgment accordingly; and

The Court declines to issue a certificate of appealability.

Dated at Milwaukee, Wisconsin, this 4th day of October, 2013.

BY THE COURT:

HON. RUDOLPH T. RANDA
U.S. District Judge

AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

EASTERN DISTRICT OF WISCONSIN

JUDGMENT IN A CIVIL CASE

UNITED STATES OF AMERICA,

Plaintiff,

v.

CASE NO. **13–C–278**
(05-Cr-240)

EMMANUEL MARTINEZ,

Movant.

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came on for consideration and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Emmanuel Martinez's petition pursuant to Title 28, United States Code, Section 2255, is **DENIED**.

The Court declines to issue a certificate of appealability.

This action is hereby **DISMISSED.**

October 4, 2013
Date

JON W. SANFILIPPO
Clerk

s/ Cary Biskupic
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. **Case No. 12-C-1051**
(Criminal Case No. 05-Cr-240)

TIMOTHY VALLEJO,

Movant,

DECISION AND ORDER

The Movant, Timothy Vallejo ("Vallejo"), was sentenced to life in prison by this Court on January 26, 2010, after Vallejo pleaded guilty to a RICO conspiracy in violation of 18 U.S.C. §§ 1961 and 1962(d) along with other defendants. (ECF Nos. 1194, 1732.) Vallejo challenges this disposition by way of 28 U.S.C. § 2255, arguing that said sentence is a violation of the Eighth Amendment to the United States Constitution and *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012), which held that mandatory life sentences without parole administered to those under the age of 18 violate that Amendment.

Miller applies if a movant was (1) younger than eighteen years old at the time of the crimes, which Vallejo was; and (2) subject to a mandatory sentence of life in prison without the possibility of parole, which can be determined as a matter of law by reference to legal documents such as statutes, sentencing guidelines, and court

documents. *See Evans-Garcia v. United States*, 744 F.3d 235, 240 (1st Cir. 2014) (citing *Miller*, 132 S. Ct. at 2469).

Vallejo concedes that a non-mandatory life sentence passes constitutional scrutiny but argues that because this Court was required to give him a life sentence, it was indeed mandatory and therefore does not pass constitutional muster. Vallejo was convicted of violating 18 U.S.C. §§ 1961 and 1962(d). A RICO count contains its own unique sentencing structure, in that it allows the court to impose a maximum sentence of 20 years which can be increased if the underlying predicate act carries a maximum sentence that is longer. Because, argues Vallejo, his predicate act was first degree murder — which requires a sentence of life, this Court was required to impose a life sentence and, therefore, violated *Miller*.

The Court disagrees. Under the scheme of sentencing presented by these provisions the Court has the discretion, after analysis of the appropriate sentencing factors, to sentence a juvenile defendant anywhere along the sentencing scale up to life. It was not required to impose a life sentence. The RICO statutory formula treats a first degree intentional murder predicate act as a guide for determining what a maximum sentence could be under RICO law, given that predicate act. The RICO statute is not 18 U.S.C. § 1111. They are separate offenses containing different elements. RICO merely incorporates 18 U.S.C. § 1111 to establish a high-end range of sentence for a RICO charge. The Court has the discretion to sentence a defendant anywhere in that range. It did so with Vallejo. It was not required to impose the

sentence that it did, and therefore Vallejo's motion must be denied.

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

Vallejo's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (ECF No. 1) is **DENIED**;

This action is **DISMISSED**.

The Clerk of Court is **DIRECTED TO ENTER JUDGMENT** accordingly; and

The Court declines to issue a certificate of appealability.

Dated at Milwaukee, Wisconsin, this 25th day of June, 2014.

BY THE COURT:

HON. RUDOLPH T. RANDA
U.S. District Judge

AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

EASTERN DISTRICT OF WISCONSIN

JUDGMENT IN A CIVIL CASE

UNITED STATES OF AMERICA,

Plaintiff,

V.

CASE NUMBER: **12-C-1051**
(05-Cr-240)

TIMOTHY VALLEJO,

Movant.

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came on for consideration and a decision has been rendered.

IT IS ORDERED AND ADJUDGED **that Timothy Vallejo's petition pursuant to Title 28, United States Code, Section 2255, is DENIED.**

The Court declines to issue a certificate of appealability.

This action is hereby DISMISSED.

June 25, 2014
Date

JON W. SANFILIPPO
Clerk

s/ Linda M. Zik
(By) Deputy Clerk

AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

EASTERN DISTRICT OF WISCONSIN

SEALED SECOND JUDGMENT IN A CIVIL CASE

UNITED STATES OF AMERICA,

Plaintiff,

v.

CASE NO. **13–C–278 (05-Cr-240)**

EMMANUEL MARTINEZ,

Movant.

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came on for consideration and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Emmanuel Martinez's petition pursuant to Title 28, United States Code, Section 2255, is **DENIED.**

The Court declines to issue a certificate of appealability.

This action is hereby **DISMISSED.**

July 30, 2014
Date

JON W. SANFILIPPO
Clerk

s/ Cary Biskupic
(By) Deputy Clerk

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United States District Court

Eastern District of Wisconsin

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Case Number: 2:13-cv-00278-RTR *SEALED*
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TEXT ONLY ORDER signed by Judge Rudolph T. Randa on 7/30/2014 GRANTING [19] Joint Rule 60(b) Motion for Relief from Judgment. (cc: via US mail to all counsel) (cb)

2:13-cv-00278-RTR *SEALED* No electronic public notice will be sent because the case/entry is sealed.