No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

JOVAN MCCLENTON,

Petitioner

v.

STATE OF CALIFORNIA,

Respondent.

_____

On Petition for Writ of Certiorari
To the Court of Appeal of the State of California,
Second Appellate District, Division Four

_____

PETITION FOR WRIT OF CERTIORARI

RICARDO D. GARCÍA, LOS ANGELES COUNTY PUBLIC DEFENDER
Leslie B. Ringold, Deputy Public Defender*
19-513 Clara Shortridge Foltz Criminal Justice Center
210 West Temple Street
Los Angeles, California 90012
Telephone No.: (213) 974-5078
Email: LRingold@pubdef.lacounty.gov
Counsel for Petitioner

*Counsel of Record

QUESTION PRESENTED

Is *de novo* resentencing required where lengthy, fully determinate sentences, primarily based on the discretion of the trial court, were imposed on juvenile offenders without consideration of the "hallmark features of youth" set forth by this Court in *Miller v. Alabama* (2012) 567 U.S. 460[132 S. Ct. 2455] (*Miller*)?

PARTIES TO THE PROCEEDING

Petitioner/Defendant below, is Jovan McClenton.

Respondent/Plaintiff below is the Court of Appeal of the State of California, Second Appellate District, Division Four, Office of the Attorney General, Los Angeles, California, the Honorable Lisa B. Lench, Judge, Los Angeles Superior Court of the State of California, the People of the State of California, Jackie Lacey, District Attorney for the County of Los Angeles, and/or her representatives.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

FEDERAL CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution

United State Code

STATE STATUTES

OTHER AUTHORITIES

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jovan McClenton respectfully petitions this Court for a writ of certiorari to review the judgment of the Court of Appeal of the State of California, Second Appellate District, Division Four, from which review was denied by the Supreme Court of California.

OPINIONS BELOW

The Court of Appeal of the State of California, Second Appellate District, Division Four, in an unreported Order, denied Mr. McClenton's petition for writ of habeas corpus as moot, based on California Penal Code Section 3051. (App. A). This denial followed the denial of Mr. McClenton's petition by the Los Angeles Superior

Court. (App. B). By unreported Order the California Supreme Court denied review. (App. C).

JURISDICTION

The Court of Appeal of the State of California, Second Appellate District, Division Four, denied Mr. McClenton's petition for habeas corpus by Order on November 15, 2018, Case No. B293648, stating that "[T]he petition for writ of habeas corpus filed November 6, 2018, has been read and considered and is denied as moot under Penal Code section 3051." (App. A). This petition and Order from the Court of Appeal followed the denial of Mr. McClenton's petition by the Honorable Lisa B. Lench of the Los Angeles Superior Court on September 6th , 2018, Case No. BA 104610. (App. B). On January 30, 2019, the Supreme Court of California denied Mr. McClenton's petition for review, Case No. S252751.(App. C). This Court has jurisdiction from a final decision of the highest court in the State of California under 28 USC Section 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE AND FACTS

Petitioner Jovan McClenton was 17 years old in 1994 when he was alleged to have committed numerous nonhomicide offenses against multiple victims on two different dates. In each case, a co-suspect was present and personally participated in aspects of the crimes. In 1995, following a court trial, Mr. McClenton was

convicted in Los Angeles Superior Court Case No. BA104610 of almost all of the alleged counts and sentenced to a fully determinate term of 196 years, 4 months in state prison based primarily on discretionary sentencing statutes; indeed, approximately 158 years in prison of that sentence was completely pursuant to the trial court's exercise of its discretion.

On October 2, 2012, after denials of previous petitions by either the Los Angeles Superior Court or the California Court of Appeal, Mr. McClenton filed the Petition for Writ of Habeas Corpus in Los Angeles Superior Court that is the basis for the instant proceedings. In this Petition Mr. McClenton asserted that his "sentence of 196 years and 4 months is illegal, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution as determined under *Apprendi; Cunningham*; and *Graham v. Florida* and therefore requires re-sentencing to conform to those rulings."[1] Following informal responses submitted by the parties, on January 4, 2013, the Los Angeles Superior Court issued an Order to Show Cause regarding the Petition. (App. D) The Order specified that:

> [I]n particular, Respondent is ordered to show cause why petitioner, who was sentenced on May 3, 1995 to a term of 194 years and 4 months in prison for crime she committed as a juvenile, is not entitled to be resentenced. (See *People v. Caballero* (2012) 55 Cal.4th 262; *People v. Argeta* (2012) 210 Cal.App.4th 1478.) The court finds that Petitioner has not established a prima facie case for relief as to any other issues." (App. D)

[1] *See* record below, In Re Jovan McClenton, Petition for Writ of Habeas Corpus, In the Court of Appeal of the State of California, Second Appellate District, Division Four, Exhibit I, p. 172.

By this Order the Court also appointed the Office of the Public Defender for Los Angeles County to represent petitioner. *Ibid*[2]

Extensive litigation followed. Though Respondent conceded that petitioner's sentence constituted functional or *de facto* life without the possibility of parole, Respondent denied that petitioner was entitled to be resentenced, arguing that the parole mechanism set forth in Senate Bill 260, which amended California Penal Code Section 3051[3] (App. E), provided him with a constitutionally sufficient opportunity for release, thus rendering moot petitioner's Eighth Amendment claim.

In all the proceedings below, petitioner consistently and clearly maintained this analysis was in error, arguing that Section 3051, and, thereafter, the statute's interpretation and application by the California Supreme Court in *People v. Franklin* (2016) 63 Cal. 4th 261 (*Franklin*), did not render his Eighth Amendment claim moot and that *de novo* resentencing was required so that *Miller's* "hallmark factors of youth" could be properly applied by the court in exercising its significant discretion and a constitutionally proportionate sentence imposed. Petitioner also argued, in sum, that this parole legislation could not fulfill the duty of the judiciary to impose a constitutional sentence as required and did not constitute a "meaningful opportunity for release."

[2] A certified copy of the January 4, 2013 minute order of the Court summarizing this Order is also included in Appendix D.

[3] All further references are to the California Penal Code, unless otherwise indicated.

First, in his Denial, filed February 20, 2014,[4] Petitioner reasserted his Eighth Amendment claim, citing *Graham v. Florida* (2010) 560 U.S. 48 [130 S. Ct. 2011, 176 L.Ed. 2d 825] (*Graham*), *Miller v. Alabama* (2012) 567 U.S. ____[132 S. Ct. 2455, 183 L.Ed. 2d 407] (*Miller)*, and *People v. Caballero* (2012), 55 Cal. 4th 262 (*Caballero*). Petitioner alleged that because he was a juvenile at the time these nonhomicide crimes were committed, the determinate sentence of 196 years, 4 months in state prison, which constituted the functional equivalent of a sentence of life in prison without the possibility of parole, was unconstitutional pursuant to *Graham* and *Caballero* (2012) 55 Cal. 4th 262 (*Caballero*) and, accordingly, resentencing was mandatory. At that resentencing hearing, petitioner argued, the trial court must consider and weigh the mitigating circumstances of youth and petitioner's individualized personal circumstances and mental development at the time of the crime. Petitioner denied that the duty of a trial court to render a constitutionally permissible sentence in this case could ever be extinguished or replaced by an administrative post-sentence process.

In his Supplemental briefing in this case, filed January 20th, 2018,[5] petitioner maintained his Eighth Amendment claim pursuant to *Graham, Miller, Caballero* and other cases. Petitioner also argued that this Court's opinion in *Montgomery v. Louisiana* (2016) _____U.S._____ ,[136 S. Ct. 718] (*Montgomery*), as

[4] *See* record below, In Re Jovan McClenton, Petition for Writ of Habeas Corpus, In the Court of Appeal of the State of California, Second Appellate District, Division Four, Exhibit R, p. 302.

[5] *See* record below, In Re Jovan McClenton, Petition for Writ of Habeas Corpus, In the Court of Appeal of the State of California, Second Appellate District, Division Four, Exhibit Y, p. 694.

discussed below, affirmed his position that *de novo* resentencing was required so that the trial court could now properly exercise its discretion at sentencing by considering and applying *Miller's* "hallmark features of youth."

In this briefing petitioner responded to Respondent's Second Amended Return and detailed that petitioner's sentence was substantially, indeed overwhelmingly, the result of the original trial court's exercise of discretion in 1995, with discretionary sentencing choices accounting for approximately 158 years of the 196 year, 4 month sentence, a term imposed prior to the advancement of science, our society, and the recent sea change in the law concerning juvenile defendants emanating pursuant to the opinions and findings of this High Court that juveniles, as a *class*, now must be understood as fundamentally different from adults.

Petitioner continued in this briefing to reject Respondent's argument that his Eighth Amendment claim was moot pursuant to the California youth offender parole eligibility statute Section 3051. Petitioner discussed the holdings in *Roper, Graham, Miller* and California cases applying them, as well as the holding of this Court in *Montgomery* that *Miller* had announced a substantive rule of constitutional law and thus was retroactive. Petitioner then discussed *Montgomery* in detail, including its holding regarding that defendant's mandatory life without parole sentence and the parole eligibility statute from the State of Wyoming this Court cited as an example of a viable remedy, contrasting that statute with California's Section 3051.

In this briefing petitioner also discussed in detail the Supreme Court of California's opinion in *Franklin*, where the Court found that Section 3051 rendered a *Miller* claim moot for a defendant who had been sentenced as a juvenile to a lengthy *mandatory indeterminate* term. Petitioner argued that the discussion of the record below in that case by the *Franklin* Court, as well as the explicit language of the holding, made clear that the holding was limited to lengthy, *mandatory* sentences:

> Our mootness holding is limited to circumstances where, as here, section 3051 entitles an inmate to a youth offender parole hearing against the backdrop of an otherwise lengthy *mandatory* sentence. We express no view on *Miller* claims by juvenile offenders who are ineligible for such a hearing under 3051, subdivision (h), or who are serving lengthy sentences imposed under *discretionary* rather than mandatory sentencing statues (e*mphasis added*). *Franklin*, *supra*, 63 Cal. 4th at p. 280.

Petitioner thus argued that his Eighth Amendment *Miller* was clearly not rendered moot by Franklin or Section 3051 and was expressly preserved.

To the contrary, petitioner argued, Eighth Amendment *Miller* claims regarding lengthy *discretionary* sentences are not rendered moot. Statutory sentencing schemes which provide the opportunity for a trial court to exercise its *discretion* to create and impose lengthy periods of incarceration for juveniles now, pursuant to *Miller* and *Montgomery*, require that this discretion be exercised anew so that trial courts may properly consider and apply evidence regarding *Miller's* "hallmark features of youth" and thus impose a constitutional, proportionate

sentence. In this briefing petitioner also maintained his position that Section 3051 did not afford petitioner with a "meaningful opportunity for release."

On June 18, 2018, Respondent replied by letter to petitioner's Supplemental Briefing. Thereafter, on August 2nd, 2018, pursuant to stipulation between the parties reflected in the record of these proceedings, Respondent agreed that petitioner's mandatory minimum sentence in this case is 38 years in state prison.[6] In his Second Supplemental Briefing, filed August 16, 2018,[7] petitioner discussed this stipulation, and continued to assert his claim that he is entitled to *de novo* resentencing in this case pursuant to the Eighth Amendment and *Miller* and its progeny. Petitioner noted that Respondent's stipulation that the mandatory minimum sentence in this case is 38 years in state prison is, in sum, a concession that the sentence he received of 196 years, 4 months, was overwhelming based on the trial court's exercise of discretion. That is, the trial court's exercise of discretion in 1995 resulted in the imposition of an additional 158 years, 4 months in state prison, without the trial court having the benefit of the uncontroverted science regarding adolescent development reflected in our nation's new juvenile

[6] As reflected in the proceedings below, certain counts included in this mandatory minimum computation are based on "in concert" allegations charged in one of the incidents in this case – that is, offenses where petitioner was found guilty of crimes personally and solely committed by another juvenile who was prosecuted separately in juvenile court regarding these allegations. As petitioner noted below, *Miller's* "hallmark features of youth" may cause constitutionally significant disproportionality concerns regarding the continued viability of those mandatory sentencing statutes and sentence terms, an issue which petitioner argued could also be addressed at a *de novo* sentencing proceeding.

[7] *See* record below, In Re Jovan McClenton, Petition for Writ of Habeas Corpus, In the Court of Appeal of the State of California, Second Appellate District, Division Four, Exhibit CC, p. 1250.

jurisprudence. In this briefing petitioner also maintained his position that his lengthy discretionary sentence was excluded from *Franklin's* mootness holding.

Hearing on Mr. McClenton's petition in the trial court was conducted on September 6, 2018. At this proceeding, as reflected in the Reporter's Transcript of Proceedings (App. B), counsel for petitioner argued consistently with the briefing below, citing *Miller* and noting the additional significance of the ability of the court to exercise overwhelming discretion in this case because the sentence in petitioner's case is a fully determinate term. That is, counsel argued, in sum, because of what a determinate sentence promises by its nature, and given Respondent's concession that the mandatory minimum sentence in this case is 38 years in state prison, the Court's exercise of discretion at a *de novo* resentencing proceeding in this case could result in petitioner gaining release from custody based on his sentence, irrespective of whether he would be granted parole pursuant to the provisions of Section 3051.

At the conclusion of the hearing, the trial court denied the petition and request for *de novo* resentencing, finding that Section 3051 is Mr. McClenton's exclusive remedy.[8] In its ruling, the trial court agreed that, regarding the sentence imposed on Mr. McClenton in 1995, "everything over 38 years was discretionary." (App. B, p. 7).

[8] In addition to this ruling, the trial also noted that counsel for petitioner is afforded the opportunity to conduct a "*Franklin* hearing," when counsel is prepared for that proceeding, so that counsel may make and preserve a record of *Miller's* youth-related factors in this case for consideration by the parole board at future proceedings pursuant to Section 3051.The record below reflects previous agreement between the parties and Orders of the Court regarding this issue. *See also Franklin, supra.*

Petitioner then filed a Petition for Writ of Habeas Corpus in the Court of Appeal of the State of California, arguing consistently with the proceedings in the trial court that his original sentence was unconstitutional, that the overwhelming majority of his lengthy determinate term was imposed pursuant to the exercise of discretion by the trial court in 1995 prior to the sea change in our knowledge and jurisprudence regarding juvenile offenders, and accordingly that he was therefore entitled to a *de novo* resentencing hearing to permit proper consideration and application of *Miller's* "hallmark features of youth." Petitioner also maintained his position that his length discretionary sentence was excluded from *Franklin's* mootness holding which, by its clear terms, applied only to individuals with lengthy mandatory sentences.

On November 15th, 2018, the California Court of Appeal of the State of California, Second Appellate District, Division Four, denied Mr. McClenton's petition for habeas corpus in an unreported Order, stating that "[T]he petition for writ of habeas corpus filed November 6, 2018, has been read and considered and is denied as moot under Penal Code section 3051." (App. A.)

On November 28, 2018, petitioner then filed a Petition for Review in the Supreme Court of the State of California.[9] Petitioner again reasserted his Eighth Amendment *Miller* claim in the context of the lengthy, determinate sentence

[9] This filing was pursuant to the Supreme Court of California granting permission for the filing of an untimely petition for review, following submission of an Application for Relief from Default filed on behalf of Petitioner. The Declaration in support of that Application discussing the significant prejudice Mr. McClenton would suffer if his Petition for Review was not accepted included the

imposed primarily under discretionary rather than mandatory sentencing statutes, seeking review from the Supreme Court regarding whether, as had been found below, California parole provision Section 3051 rendered that claim moot. Petitioner explained that "[R]eview is necessary because the logic of *Miller* and its progeny demand a *de novo* sentencing hearing for a juvenile offender who received a *fully determinate, lengthy discretionary* sentence for nonhomicide offenses without consideration by the sentencing court of the "hallmark features of youth."[10] (*emphasis in original*). In this Petition for Review petitioner also stated:

> [T]his court must determine whether the mere opportunity for a parole hearing provides an adequate remedy for an unconstitutional sentence where a *de novo* sentencing hearing conducted in light of *Miller* could actually guarantee release within a juvenile offender's natural life. Both the superior court and the Court of Appeal erred in finding such adequacy. The crucial difference is the real world possibility of release from custody provided by *de novo* resentencing for inmates with discretionary, determin[ate] (sic) terms.[11]

The California Supreme Court denied review on January 30th, 2019. (App. C).[12]

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statement "[T]his could be his last opportunity to raise an Eighth Amendment claim regarding his nearly 200-year prison sentence for offenses he committed as a juvenile."

[10] *See* Record of Proceedings below, In Re Jovan McClenton, Petition for Review, p. 7.

[11] *See* Record of Proceedings below, In Re Jovan McClenton, Petition for Review, p. 23

[12] Another proceeding in this case, unrelated to the subject of the petition that is the basis for this Petition for Writ of Certiorari, is still pending in the trial court. On March 26th, 2019, counsel filed a motion on behalf of petitioner seeking to transfer this case back to juvenile court for a new juvenile transfer hearing pursuant to California Proposition 57 and *People v. Garcia* (2018) 30 Cal. App. 5th 316, arguing, in sum, that petitioner is entitled to a new hearing, pursuant to the new rules and burden of proof, to determine whether he is a fit subject for the juvenile court to retain jurisdiction in this case. Hearing on that motion is now set for May 20th, 2019.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE WHETHER *DE NOVO* RESENTENCING IS REQUIRED WHEN JUVENILE OFFENDERS WERE SENTENCED TO LENGTHY DETERMINATE, DISCRETIONARY TERMS WITHOUT CONSIDERATION OF MILLER'S "HALLMARK FEATURES OF YOUTH" SO THAT THE DISCRETION OF THE SENTENCING COURT MAY NOW BE PROPERLY INFORMED BY THOSE FACTORS AS REQUIRED BY THE EIGHTH AMENDMENT AND PRINCIPLES OF PROPORTIONALITY.

A. Introduction and Background

As detailed below and in this petition, petitioner's sentence -- a fully determinate term of 196 years, 4 months in state prison -- constitutes the functional equivalent of life without parole. Because petitioner was convicted of exclusively nonhomicide offenses committed when he was a juvenile, his sentence is unconstitutional pursuant to the holding of this Court in *Graham* and the holding of the Supreme Court of California in *Caballero*. This sentence was imposed in 1995, overwhelming pursuant to the discretion afforded and exercised by the sentencing court, without consideration of *Miller's* "hallmark features of youth." The minimum sentence Mr. McClenton could have received -- 38 years in prison -- would have been well within his anticipated life span, meaning that he could have received a date certain for his release irrespective of any exercise of discretion by parole authorities.

Mr. McClenton's case, and others like it across our country, are fundamentally different than *mandatory, indeterminate* sentences where a defendant and his counsel could be advised at a *de novo* resentencing hearing that the court had "no choice" regarding the sizeable mandatory punishment term.

Rather, because Mr. McClenton's potential punishment is pursuant to discretionary sentencing statutes with, at most, a mandatory minimum determinate sentence of 38 years in prison, a court conducting a *de novo* resentencing proceeding would instead be able, and indeed would be required, to consider and impose the appropriate, proportionate sentence informed by the science underlying adolescent brain and behavioral development.

Moreover, for all those in our country like Mr. McClenton, presently imprisoned exclusively as a result of lengthy determinate terms imposed by that exercise of the trial court's discretion without consideration of the *Miller* factors, a *de novo* resentencing proceeding could have real consequences and result in release from custody during natural life, irrespective of any youth offender parole proceeding. A *de novo* resentencing proceeding in cases like these, including petitioner's, is thus required for the sentence to be proportionate as required by the Eighth Amendment pursuant to *Miller* and *Montgomery*.

B. Eighth Amendment Proportionality Requires Trial Courts To Properly Consider and Apply Miller's "Hallmark Features of Youth" When Imposing Discretionary Sentences on Juveniles

In issuing *Miller,* its antecedents, and subsequent decisions, the United States Supreme Court fundamentally changed jurisprudence regarding juvenile offenders based on the opinions of numerous experts that, except in the rarest of circumstances, juveniles have the capacity to change, even when they have committed heinous offenses. As the brains of juveniles develop so too do their behavioral and emotional controls. The condition of immaturity is understood as

transient and amenable to rehabilitation. Our criminal justice system is now required to act with a recognition of these scientific realities.

In issuing a flat ban on life without parole in nonhomicide cases, *Graham* noted that notwithstanding the heinous nature of certain nonhomicide offenses,

> [T]he Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers (*citations omitted*). There is a line "between homicide and other serious violent offenses against the individual" (*citation omitted*). Serious nonhomicide crimes "may be devastating in their harm . . . but 'in terms of moral depravity and of the injury to the person and to the public,' . . . they cannot be compared to murder in their 'severity and irrevocability'(*citations omitted*) This is because "[l]ife is over for the victim of the murderer," but for the victim of even a very serious nonhomicide crime, "life . . . is not over and normally is not beyond repair." Although an offense like robbery or rape is "a serious crime deserving serious punishment" (*citations omitted*), those crimes differ from homicide crimes in a moral sense.
>
> It follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis.
>
> *Graham, supra,* 560 U.S. at 69.

Trial courts making sentencing decisions about juvenile offenders must now exercise their discretion informed by the "hallmark features of youth" set forth in *Miller;* that is, "[i]mposition of a State's most severe penalties on a juvenile offender cannot proceed as though they were not children." *Miller, supra,* 567 U.S. at p. 474. As *Miller* explained, "*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished

culpability and greater prospects for reform . . . 'they are less deserving of the most severe punishments.' " *Id.* at 471, quoting *Graham*, *supra* 560 U.S., at 68.

> First, children have a "lack of maturity and an underdeveloped sense of responsibility," leading to recklessness, impulsivity, and heedless risk-taking *(citation omitted*). Second, children "are more vulnerable ... to negative influences and outside pressures," including from their family and peers; they have limited "control ... over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings (*citation omitted*). And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]." *Ibid.*

The *Miller* Court also noted that G*raham's* findings regarding the unique issues concerning the moral culpability of children in a nonhomicide case also applied in the context of homicide offenses:

> To be sure, *Graham*'s flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm (citations omitted). But none of what it said about children--about their distinctive (and transitory) mental traits and environmental vulnerabilities--is crime-specific**.** Those features are evident in the same way, and to the same degree, when (as in both cases here) a botched robbery turns into a killing. So *Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses.
>
> *Id.* at 473.

Miller's analysis about the diminished culpability of juveniles and their enhanced capacity for change make clear that without consideration of the "hallmark features of youth" by the sentencer there is an unconstitutional risk

for a disproportionate punishment to be imposed on juvenile offenders, in violation of the Eighth Amendment.

The requirement that a court must duly consider the *Miller* factors when exercising its discretion in order to impose a sentence on juvenile offenders that is proportionate within the meaning of the Eighth Amendment has now been firmly made retroactive by *Montgomery* which held that *Miller* had announced a substantive rule of law. "Substantive rules, then, set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose. It follows that when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful." *(Montgomery, supra,* 136 S.Ct. at pp. 729-730.) A sentence of a lifetime in prison, the *Montgomery* court states, is a disproportionate sentence for all but the rarest of children, and "[p]rotection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and goes far beyond the manner of determining a defendant's sentence." *(Id.* at pp. 732-733; citing *Graham, supra,* 560 U.S. at 59.). While *Miller* and *Montgomery* both concerned life without parole sentences for homicide offenses, Petitioner submits that the reasoning of these opinions clearly applies to his almost 200 year functional life without parole sentence for nonhomicide crimes.

As this High Court explained in *Montgomery:*

> *Miller,* then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of "the distinctive attributes of youth" (c*itations omitted*). Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity' (c*itations omitted*). Because *Miller* determined that sentencing a child to life without parole is excessive for all but the "rare juvenile offender whose crime reflects irreparable corruption" (c*itations omitted*), it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status" – that is, juvenile offenders whose crimes reflect the transient immaturity of youth.
>
> *Id.* at p. 734.

It is not enough to merely consider a child's chronological youth in selecting a sentence. Rather, the sentencer must actually consider as mitigation the characteristics and circumstances of youth and may only impose a life without parole sentence on a juvenile if it is shown, as *Miller* held, that he or she "exhibits such irretrievable depravity that rehabilitation is impossible (*Id.* at 733) [or is] . . . the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id.* at 734.

As *Montgomery* explained,

> [t]hese considerations underlay the Court's holding in *Miller* that mandatory life-without-parole sentences for children "pos[e] too great a risk of disproportionate punishment. " *Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*citation omitted*). The Court recognized that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life

> without parole is justified. But in light of "children's diminished culpability and heightened capacity for change, *Miller* made clear that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." (citations omitted). *Id*. at 733.

The *Montgomery* Court thus describes that *Miller* has both a substantive and procedural impact on the judiciary's responsibility to effectuate a constitutional sentence, explaining that:

> [a] hearing where "youth and its attendant characteristics" are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not (*citations omitted*). The hearing does not replace but rather gives effect to *Miller's* substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity. *Id*. at 735.

In *Montgomery,* the defendant was convicted when he was 17 years old of killing a deputy sheriff in Louisiana, a crime for which a sentence of life without the possibility of parole was mandatory. This Court's holding specifically addressed this mandatory sentence and the actions required of our judicial system to remedy like punishments.

To implement this remedy, the *Montgomery* Court noted that "[w]hen a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirements to avoid intrusion more than necessary upon the States' sovereign administration of their criminal justice system," explaining that the Court will ". . . [l]eave to the State[s] the task of developing appropriate ways to enforce the constitutional

restriction upon execution of sentences." *Ibid*. However, this Court also clearly noted that there are limits to these independent actions by States:

> Fidelity to this important principle of federalism, however, should not be construed to demean the substantive character of the federal right at issue. That *Miller* did not impose a formal factfinding requirement does not leave State 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 (citations omitted). *Ibid.*

With this backdrop Petitioner respectfully submits that the *Montgomery* Court held that in certain instances parole statutes may remedy a *Miller* violation by providing an opportunity for evaluation by a parole board of the growth and maturity of a juvenile serving a mandatory life without parole sentence. "Giving *Miller* retroactive effect, this Court said, " . . .does not require states to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than resentencing them. *Id*. at 736.

However, petitioner submits, lengthy determinate sentences imposed pursuant to primarily discretionary choices by the sentencer should be understood as precisely the type of case where *de novo* resentencing is constitutionally required to uphold "the substantive character of the federal right at issue." *Id*. at 735. Specific action by the judicial branch of our country is necessary in the context of lengthy determinate primarily discretionary

sentencing to ensure the proper evaluation of individual culpability and effectuate moral sentencing.

That is, the duty of the judicial branch of our government to ensure that a constitutional sentence is imposed at the outset cannot be abrogated to the legislative or executive branch of our government in the context of lengthy determinate, discretionary sentences where there are clear implications for an individual's freedom from custody and likewise for the principles set forth in *Miller* and by the Eighth Amendment's prohibition on disproportionate sentences.

C. Petitioner's Sentence was Pursuant to Primarily Discretionary State Sentencing Schemes Which Specifically Implicate *Miller's* "Hallmark Features of Youth" by their Very Language and the Findings of Prominent Experts in Adolescent Development.

As discussed in Petitioner's Supplemental Briefing in the trial court, in 1995, when Petitioner's sentence was imposed, the original sentencing court was required by the applicable statutory sentencing schemes to exercise its discretion regarding the majority of sentencing choices in this case, but lacked the requisite scientific information about adolescent brain and behavioral development to permit it to accurately do so. Based on the scientific literature, as the *Miller* jurisprudence reflects, adolescents and adults are now generally understood as significantly developmentally different: adolescents, for example, are understood to be much more impulsive as compared to adults, more short-sighted and focused on rewards

rather than avoiding punishment,[13] and to be less capable of reflecting and considering alternatives than adults,[14] especially when in the presence of peers[15] or in emotionally charged contexts.[16] This information was included in Petitioner's briefing below and is consistent with the expert scientific findings relied on by this High Court in *Roper, Graham, Miller* and *Montgomery*.

BJ Casey, *et.al.,* summarizes the new scientific findings on p. 2. of their publication for the MacArthur Foundation[17]:

> Neuroscience has evaluated adolescent behavior and researchers have found, in sum, that different regions of the adolescent brain, and the functional connections among them, develop along distinct timelines, resulting in asymmetry among different brain systems. The emotional centers develop relatively easily, making adolescents highly responsive to emotional and social stimuli. By contrast, brain regions that regulate self-

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[13] *See e.g.* Shulman & Cauffman, *Reward-Biased Risk Appraisal and Its Relation to Juvenile Versus Adult Crime* (2013) Law and Human Behavior, Vol 37, No. 6, 412-423; Cauffman & Shulman, Steinberg, Claus & Banich, and Graham, *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, Developmental Psychology (2010), Vol. 46, No. 1, 193-207; and Shulman & Cauffman, *Deciding in the Dark: Age Differences in Intuitive Risk Judgment*, Developmental Psychology (2014), Vol. 50, No. 1, 167-177.

[14] *See e.g.* Steinberg, Cauffman, Woolard, Graham and Banich, *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA Flip-Flop*, (2009) American Psychologist, Vol 64, No. 7, 583-594.

[15] *See e.g.* Gardner & Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, (2005) Developmental Psychology, Vol. 5, No. 4, 625-635; O'Brien, Albert, Chein and Steinberg, *Adolescents Prefer More Immediate Rewards When In the Presence of their Peers*, (2011) Journal of Research on Adolescence ,Vol. 21, No. 4, 747-753; and Chein, Albert, O'Brien, Uckert and Steinberg (2011), *Peers increase adolescent risk taking by enhancing activity in the brain's reward circuitry*, Developmental Science Vol 14, No. 2, F1-F10.

[16] Dreyfuss, Caudle, Drysdale, Johnston, Cohen, Somerville, Galvan, Tottenham, Hare, & Casey, (2014)*Teens Impulsively React rather than Retreat from Threat*, 36 Developmental Neuroscience, 220-227.

[17] *See* Casey, Bonnie, Davis, Faigman, Hoffman, Jones, Mantague, Morse, Raiche, Richeson, Scott, and Steinberg, (2017) *How Should Justice Policy Treat Young Offenders?*: Knowledge Brief of the MacArthur Foundation Research Network on Law and Neuroscience.

> control, such as the prefrontal cortex, take a while to catch up and continue to develop even beyond adolescence.
>
> The differential pace of development in these systems can lead to an imbalance in communication among them, allowing those regions that support rational behavior to be overpowered by brain centers involved in emotion. This finding explains the pattern behavioral scientists had previously described: adolescents, especially in emotionally charged contexts or in the presence of peers, are more apt than adults to be impulsive, to disregard future consequences, and to take risks. *Id*.

Because of the discretion afforded by the sentencing statutes and rules applicable to Petitioner's case, the discretion of a *de novo* resentencing court would clearly now be able to be informed by this evidence. For example, pursuant to Sections 1170 and 1170.1 (App. F), Section 667.6 (c) (App. G), and the California Rules of Court (App. H), the sentencing court is explicitly required to properly exercise its discretion to determine whether to select the low, middle or high punishment term for each count in order to impose punishment and may determine whether the selected term should be imposed consecutively to, or concurrently with, other terms. Pursuant to the first prong of Section 667.6 (d) (App. H), the court was required to impose a mandatory minimum determinate sentence in this case of, at most, 38 years in prison, as set forth by the August 2nd, 2018 stipulation of the parties reflected in the record below. Accordingly, the vast majority of Mr. McClenton's sentence in this case – approximately 158 years – was imposed exclusively pursuant to the exercise of discretion by the trial court.

It is important to note that in addition to the application of the "hallmark features of youth" for the initial discretionary choices required to be made by the trial court at sentencing in this case, certain heightened discretionary sentencing

choices required in this case – essentially assessing the extent of the criminal intentions of the offender – specifically implicate *Miller's* core principles.

For example, the significant decision that a sentencing court is required to make pursuant to the second prong of Section 667.6(d) (App. H), whether the court finds the existence of a condition precedent required for significantly enhanced punishment for multiple offenses committed by a defendant against a single victim, explicitly requires evaluation of the mental state of the defendant at the time of the conduct:

> In determining whether crimes against a single victim were committed on separate occasions under this subdivision, *the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior*.... (Pen. Code § 667.6 (1994) *(emphasis added)* (App. H)

Section 667.6(d) thus specifically requires that a sentencing court evaluate whether a defendant "had a reasonable opportunity to reflect" about his own conduct as the gravamen for whether full sentence terms for each sex offense committed against a single victim will be required to be imposed consecutively. Whether a juvenile offender "had a reasonable opportunity to reflect" specifically requires an understanding and analysis of the very same issues of adolescent development discussed in *Roper, Graham, Miller, Montgomery,* and related case law.

In the trial court proceedings below, Petitioner requested the opportunity for an evidentiary hearing so that an expert in adolescent development, Elizabeth E.

Cauffman, Ph.D., who was involved in the preparation of the *amici* briefing presented to this Court in *Roper* and *Miller,* could present for the trial court's consideration this relevant scientific testimony concerning adolescent development. As petitioner explained, Dr. Cauffman would be able to provide evidence, in the form of scientific information, regarding the normative changes during adolescence, about how the presence of peers and emotionally charged situations serve to heighten risk-taking behavior in adolescents as compared to adults, that adolescent decision-making generally focuses more on seeking rewards rather than avoiding punishments as compared to adults, as well as other developmental phenomenon associated with adolescence including brain development, cognition, and emotional development.

Petitioner submits that the core principles and evidence regarding adolescent development relied on for the landmark rulings in *Roper, Graham, Miller* and *Montgomery* should not only be applied to discretionary decision-making by sentencing courts today, but must also be applied in *de novo* resentencing hearings across our country where judicial discretion was previously exercised without that vital and uncontroverted information, yet that discretion was primarily the basis for the sentencing choices imposed. Just as the particular applicable sentencing statutes in the instant case also demonstrate that discretionary sentencing schemes must now be applied anew, informed by the "hallmark features of youth," in order to be proportionate as required by the Eighth Amendment, sentencing schemes across our country may well have also relied on

evaluation of the defendant's mental state when sentencers exercised discretion and thus require the same remedy.

D. *De Novo* Resentencing Could Have Significant Consequences For Inmates Presently Sentenced to Determinate, De Facto Life Without Parole Terms Pursuant to Discretionary Sentencing Statutes

Unlike with mandatory indeterminate sentencing schemes, inmates previously sentenced to lengthy *determinate* terms pursuant to *discretionary* sentencing statutes without consideration of *Miller's* "hallmark features of youth" are unconstitutionally denied the real possibility of a significant change in their opportunity for release from custody if they are not now afforded the opportunity for *de novo* resentencing where those principles are applied.

Determinate sentences provide a guaranteed release date. That is, a determinate sentence guarantees a defendant a release date that is not dependent on any action by any parole board. As the court explained in *Terhune v. Superior Court* (1998) 65 Cal.App.4th 864:

> When a defendant is serving an indeterminate prison term, the Board is vested with power to rescind or postpone his or her parole date for cause (*citations omitted*). But under the determinate sentencing law, the Legislature has decreed that "[a]t the expiration of a term of imprisonment ... imposed pursuant to Section 1170 or at the expiration of a term reduced pursuant to Section 2931, if applicable, the inmate shall be released on parole for a period not exceeding three years, unless the parole authority for good cause waives parole and discharges the inmate from custody of the department" (*citations omitted*). Describing this language as "a mandatory 'kick-out' provision," the Supreme Court has stated, "The Board of Prison Terms has

> no discretion to grant or withhold ... parole to a prisoner who has served a determinate term." *(Terhune, supra,* 65 Cal.App.4th at 873-874 (*citations omitted*).

When a sentencing scheme exclusively provides for a determinate sentence primarily pursuant to the exercise of discretion, application of the "hallmark features of youth" by a sentencing court at a *de novo* proceeding can thus have actual and significant potential consequences for petitioner and can provide for his actual release from custody during his natural life independent of Section 3051 or any other statute that provides only for parole consideration and the possibility of release.

As currently composed, petitioner's sentence provides that the guaranteed release date will occur after he has died. But that could change – and a guaranteed release date could be within his expected life span – if he were resentenced in light of *Miller*. While Mr. McClenton is eligible for a parole hearing pursuant to Penal Code Section 3051, if that legislation remains in effect, these parole proceedings do not guarantee that he will ever be released.

Petitioner is exclusively subject to a fully determinate sentence pursuant to his convictions in this case, with a mandatory minimum sentence that is, at most, 38 years in state prison. These circumstances make this case, and cases like it, very different -- and the argument for *de novo* resentencing all the more compelling for petitioner and other similarly situated prisoners.

The crucial issue for inmates with lengthy determinate, discretionary sentences is the real world possibility of release from custody that is provided by

de novo resentencing and the imposition of a constitutional, proportionate sentence pursuant to the Eighth Amendment. All lengthy, determinate sentences previously imposed on juvenile offenders across our country that were primarily based on discretionary choices by the sentencing court without consideration of the *Miller* factors will be controlled by a decision on this issue.

Accordingly, this Court should grant this petition for a writ of certiorari and remand the case with directions that the original sentence be vacated and the Los Angeles Superior Court conduct *de novo* sentencing proceedings in accordance with the Eighth Amendment and the instructions set forth in *Miller*, *Graham*, and *Montgomery* so that a proportionate sentence may be imposed.

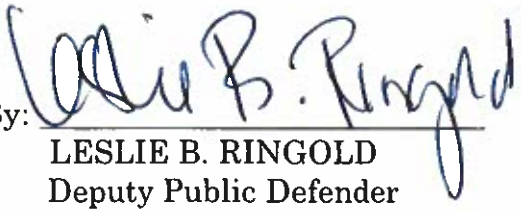
CONCLUSION

For all the reasons set forth above, Jovan McClenton respectfully asks this Court to grant certiorari.

Dated: April 30, 2019

Respectfully submitted,

RICARDO D. GARCÍA, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

By: 

LESLIE B. RINGOLD
Deputy Public Defender
(State Bar No. 118837)

Attorneys for Petitioner