

APPENDIX A

SUPREME COURT
FILED

Court of Appeal, Fourth Appellate District, Division One - No. D076370

NOV 13 2019

Jorge Navarrete Clerk

S258260

Deputy

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JOSE NOGALES on Habeas Corpus.

The petition for review is denied. Petitioner's claim under *Miller v. Alabama* (2012) 567 U.S. 460 is denied as moot under *People v. Franklin* (2016) 63 Cal.4th 261. (See *Harrington v. Richter* (2011) 562 U.S. 86, citing *Ylst v. Nunnemaker* (1991) 501 U.S. 797, 803.)

CANTIL-SAKAUYE

Chief Justice

APPENDIX B

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Court of Appeal
Fourth Appellate District

FILED ELECTRONICALLY

09/06/2019

Kevin J. Lane, Clerk
By: Alissa Galvez

In re JOSE NOGALES

on

Habeas Corpus.

D076370

(San Diego County
Super. Ct. Nos. SCD208418 &
HC17920)

THE COURT:

The petition for writ of habeas corpus has been considered by Justices Huffman, Haller, and O'Rourke. Judicial notice is taken of the opinion filed in appeal No. D054174.

In 2007, when Jose Nogales was 14 years old, he and fellow gang member Carlos Humberto Carrasco committed a drive-by shooting in rival gang territory. Carrasco drove the vehicle and Nogales fired several shots at a residence, killing two people standing outside. A jury found Nogales guilty of two counts of second degree murder and one count of shooting at an inhabited dwelling and found true attached firearm and gang enhancement allegations. The trial court sentenced Nogales in 2008 to prison for 80 years to life. On appeal, this court rejected Nogales's claim the evidence was insufficient to support his convictions, modified the amount of the court security fee, and affirmed the judgment as modified. (*People v. Carrasco* (July 13, 2010, D054174) [nonpub. opn.]) The Supreme Court of California denied Nogales's petition for review on November 10, 2010.

Effective January 1, 2019, Senate Bill No. 1391 (S.B. No. 1391) repealed the authority of a district attorney to move to transfer a minor from juvenile court to a court of criminal jurisdiction in a case in which the minor is alleged to have committed murder or another specified serious offense when the minor was 14 or 15 years old, unless the minor was not apprehended before juvenile court jurisdiction terminated. (Welf. & Inst. Code, § 707, as amended by Stats. 2018, ch. 1012, § 1; see *People v. Superior Court (K.L.)* (2019) 36 Cal.App.5th 529, 536-538 [discussing amendments to Welf. & Inst. Code, § 707].)

By the present petition, Nogales contends S.B. No. 1391 applies retroactively and requires immediate transfer of his case to the juvenile court with an order directing his release from prison. He further contends not to apply S.B. No. 1391 retroactively to his case would violate his right to the equal protection of the laws. (U.S. Const., 14th Amend.,

§ 1; Cal. Const., art. I, § 7, subd. (a).) Nogales further contends his prison sentence of 80 years to life violates constitutional prohibitions against cruel and/or unusual punishment (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17); the violation is not cured by the youth offender parole hearing statute, which makes him eligible for parole during his 25th year of incarceration (Pen. Code, § 3051, subd. (a)(2)(B), (3)); and the sentence must be vacated.

Nogales is not entitled to the benefits of S.B. No. 1391. As an ameliorative change, the legislation applies to cases in which the crimes were committed before its effective date, but only if the judgment of conviction was not yet final on the effective date. (*In re Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*); see *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 303-304 [ameliorative amendments to Welf. & Inst. Code, § 707 made by Prop. 57 apply to cases pending on appeal when amendments took effect]; *People v. Castellero* (2019) 33 Cal.App.5th 393, 399-400 [S.B. No. 1391 applies to cases pending on appeal when it took effect].) "[T]he *Estrada* holding does not apply to cases where, as here, the judgment became final prior to enactment of the ameliorative law." (*In re Moreno* (1976) 58 Cal.App.3d 740, 742.) Nogales's judgment became final in February 2011, when the time to petition the United States Supreme Court for a writ of certiorari expired. (*People v. Smith* (2015) 234 Cal.App.4th 1460, 1465; *In re Pine* (1977) 66 Cal.App.3d 593, 595-596.) Not to apply S.B. No. 1391 to prisoners like Nogales whose judgments were final before the legislation took effect does not deny them the equal protection of the laws. "Equal protection is not denied where an amendatory statute reducing a penalty is not applied to persons whose convictions were final before the effective date of the ameliorative amendment." (*In re Moreno, supra*, at p. 743; see *Sperry & Hutchinson Co. v. Rhodes* (1911) 220 U.S. 502, 505 ["the 14th Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time"]; *Baker v. Superior Court* (1984) 35 Cal.3d 663, 668 ["'A refusal to apply a statute retroactively does not violate the Fourteenth Amendment.'"].)

Nogales' challenge to his prison sentence as cruel and/or unusual punishment is procedurally barred. Asserted more than a decade after Nogales was sentenced with no explanation for the delay, the challenge is barred as untimely. (*In re Reno* (2012) 55 Cal.4th 428, 459-460; *In re Swain* (1949) 34 Cal.2d 300, 302.) The challenge is further barred because it could have been, but was not, asserted appeal. (*In re Reno, supra*, at p. 490; *In re Dixon* (1953) 41 Cal.2d 756, 759.) In any event, the enactment of the youth offender parole hearing statute provides Nogales the possibility of release from prison after 25 years of incarceration and renders moot his constitutional challenge to the length of his prison sentence. (*In re Franklin* (2016) 63 Cal.4th 261, 268.)

The petition is denied.

HUFFMAN, Acting P. J.

Copies to: All parties