IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION _____

In re _____, **Petitioner,** **On Habeas Corpus.**	**No.** **(Prior Appeal No. _____)** **(_____ County**

PETITION FOR WRIT OF HABEAS CORPUS

Attorney Name, Address, Phone
Attorneys for Petitioner

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

_____APPELLATE DISTRICT, DIVISION _____

In re _____, Petitioner, On Habeas Corpus.	No. (Prior Appeal No. _____) (_____ County

PETITION FOR A WRIT OF HABEAS CORPUS

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION ____:

_____, through his attorney, petitions for a writ of habeas corpus and by this verified petition states as follows:

1. Petitioner is unlawfully restrained of his liberty in _____ State Prison, by the warden and the director of the California Department of Corrections and Rehabilitation.

2. As more fully set out in his accompanying Memorandum of Points and Authorities (Memorandum), petitioner contends that his sentence of life without possibility of parole (LWOP) for a homicide offense committed as a juvenile constitutes cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution, pursuant to *Miller v. Alabama* (2012) 567 U.S. __, 132 S.Ct. 2455.

(Claims I-III; Memorandum Parts II-IV.) Petitioner also contends that this punishment represents "cruel or unusual" punishment under Article I, section 17, of the California Constitution, pursuant to *People v. Dillon* (1984) 34 Cal.3d 441, and other authorities. (Claim IV; Memorandum Part V.)

Procedural History

3. Petitioner was convicted in _____ County Superior Court No. _____ of first-degree murder with the special circumstance of _____ (Pen. Code § 190.2(a)(*)).[1] At the time of the homicide, petitioner was __ years old. On _____, the superior court sentenced petitioner to LWOP, pursuant to section 190.5(b).

4. On _____, this Court affirmed the judgment on direct appeal. (No. _____.) {**Include if applicable:** In that opinion, the Court rejected a "cruel and unusual punishment" challenge to the LWOP sentence, pursuant to then-extant case law.}

5. The U.S. Supreme Court's recent opinion in *Miller v. Alabama* (2012) 567 U.S. __, 132 S.Ct. 2455, requires re-examination of the constitutionality of petitioner's sentence, including the validity of the statutory procedure by which the sentencing court selected that punishment under section 190.5(b) and the adequacy of the sentencing court's consideration of the distinctive mitigating features of youth addressed in the *Miller* opinion. Specifically, petitioner challenges his LWOP sentence on the following specific grounds:

Claim I: Section 190.5(b)'s Unconstitutional Presumption of LWOP.

[1] Statutory references are to the Penal Code, unless otherwise noted.

6. Petitioner's LWOP sentence violates the Eighth Amendment because the sentencing court selected that punishment, rather than 25 years to life, under the constraint of section 190.5(b), which makes LWOP the "generally mandatory" "presumptive punishment" for a special circumstance murder committed by a 16- or 17-year-old. (*People. Guinn* (1994) 28 Cal.App.4th 1130, 1141-1143.)

7. Section 190.5(b), as judicially construed, allows a sentencing court only limited or "circumscribed" discretion to depart from that presumption and choose the parole-eligible option of 25 to life. Section 190.5(b)'s "generally mandatory" presumption of LWOP for a juvenile homicide violates the principles of *Miller v. Alabama* (2012) 132 S.Ct. 2455, 2467, that such sentences must be "uncommon" and reserved for the "rare juvenile offender whose crime reflects irreparable corruption."

8. A recent First District opinion has found the section 190.5(b) presumption of LWOP contrary to the principles of *Miller v. Alabama* on exactly this ground: "Treating LWOP as the default sentence takes the premise in *Miller* that such sentences should be rarities and turns that premise on its head, instead placing the burden on a youthful defendant to affirmatively demonstrate that he or she deserves an opportunity for parole." (*People v. Moffett* (Oct. 12, 2012; A133032) __ Cal.App.4th __ (slip opn., p. 12) [2012 WL 4841338]

9. The *Moffett* opinion vacated the LWOP term and remanded for resentencing. Because the trial court's choice of LWOP as petitioner's punishment was the product of the same unconstitutional

presumption, this Court should adopt the same remedy here. Because *Miller* requires that LWOP sentences for juveniles must be "uncommon" and "rare," the sentencing court on remand should apply a presumption in favor of a parole-eligible term of 25 years to life.

10. Petitioner incorporates by reference Part II of the accompanying Memorandum for further discussion of this claim.

Claim II: Sentencing Court's Failure to Consider "Hallmark Features" of Youth, As Required by *Miller v. Alabama*.

11. Petitioner is entitled to resentencing on the further ground that the sentencing court failed to give paramount consideration to the "hallmark features" of youth, which render a juvenile offender such as petitioner substantially less culpable than an adult.

12. *Miller v. Alabama* "require[s] [a sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison. [Fn.]" (*Miller*, 132 S.Ct.at 2469.) The decision "mandates only that a sentencer follow a certain process – considering an offender's youth and attendant characteristics – before imposing a certain penalty." (*Id*. at 2471.)

13. *Miller* requires that a court focus its sentencing inquiry on the "'mitigating features of youth'" in determining whether the minor is that "'rare juvenile offender whose crime reflects irreparable corruption." (*Miller*, 132 S.Ct. at 2468-2469.) The sentencing court must give paramount weight to the specific "hallmark features" of youth, delineated in *Miller*. These developmental characteristics

include "immaturity, impetuosity, and failure to appreciate risks and consequences." (*Id*. at 2468.) The court must recognize the "transience" of youthful recklessness and a juvenile offender's greater "capacity for change" and prospects for rehabilitation. (*Id*. at 2467-2468 & fn. 7.)

14. *Miller* also requires that the sentencing court give due weight to the mitigating effect of background and environmental circumstances which may have contributed to the minor's offense, including the role of "familial and peer pressures." The court must ""tak[e] into account the family and home environment that surrounds [the minor] – and from which he usually cannot extricate himself – no matter how brutal or dysfunctional." (*Miller*, 132 S.Ct. at 2468.)

15. The sentencing court here violated *Miller* in failing to give adequate consideration and weight to these "hallmark features" of youth in its choice of LWOP rather than 25-to-life under section 190.5(b). {**Include if applicable:** The court relied primarily on the perceived aggravating circumstances of the current offense in imposing LWOP.} The court did not explicitly and thoroughly consider the developmental, psychological, and family background factors, which the Supreme Court has instructed must be preeminent in the sentencing inquiry.

16. A Florida reviewing court recently remanded for resentencing under similar circumstances, where the sentencing court had not explicitly considered those developmental factors in sentencing a juvenile to LWOP rather than a parole-eligible option. The reviewing court directed the sentencing court to "expressly consider whether any of

the numerous 'distinctive attributes of youth' referenced in *Miller* apply in this case so as to diminish the "'penological justifications' for imposing a life-without-parole sentence upon appellant." (*Daugherty v. State* (Flor. App. Sept. 5, 2012) __ So.3d __ [2012 WL 3822108 at *3].)

17. Because the sentencing court here also failed to explicitly consider the factors which *Miller* prescribes must be at the forefront of the sentencing inquiry, this Court should adopt a similar remand remedy here. This Court should should direct the sentencing court to explicitly consider those "distinctive attributes" of youth, as well as the impact of petitioner's family background and other environmental circumstances.

18. Petitioner incorporates by reference Part III of the accompanying Memorandum for further discussion of this claim.

{Following claim to be included <u>only</u> if juvenile was convicted as a felony/murder aider/abettor. If <u>not</u> within that category, omit claim and proceed to state constitutional argument.}

Claim III: Categorical Bar on LWOP for an Aider/Abettor Who Did Not Kill or Intend to Kill.

19. Petitioner is categorically ineligible for LWOP because he did not "kill or intend to kill," as required by *Graham v. Florida* (2010) 560 U.S. __, 130 S.Ct. 2011. "[W]hen 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* at 2027; accord *Miller v. Alabama*, 132 S.Ct. at 2468.)

20. *Graham*'s categorical bar is applicable here because petitioner did

not personally kill or intend to kill. He was tried and convicted as an aider-abettor to felony-murder. **{Elaborate. Indicate if petitioner was tried only as aider/abettor. If case was tried on alternative direct perpetrator and aiding theories, indicate jury's rejection of or deadlock on personal weapon use allegations and any other indicia of jurors' reliance on aiding/abetting.}**

21. *Graham*'s reasoning on the diminished culpability of juvenile offenders applies where "a botched robbery turns into a killing." *(Miller v. Alabama*, 132 S.Ct. at 2465.) Like a juvenile convicted of a non-homicide offense, an aider-abettor to felony-murder who does not personally kill has "twice diminished moral culpability." (*Id.* at 2468.)

22. The majority in *Miller* left open the question of a possible categorical bar on juvenile LWOP, because it found that the mandatory character of the state statutes there violated the Eighth Amendment.

23. In a separate concurrence, Justice Breyer (joined by Justice Sotomayor), explained: "Given *Graham* 's reasoning, the kinds of homicide that can subject a juvenile offender to life without parole must exclude instances where the juvenile himself neither kills nor intends to kill the victim." (*Miller*, 132 S.Ct. at 2475-2476 (Breyer, J., concur.).)

24. Petitioner is categorically ineligible for LWOP because he did not personally kill the victim. Nor was there any finding of specific intent to kill. Pursuant to section 190.2(d), the standard jury instructions in petitioner's trial allowed a circumstance finding, so

long as he was a "major participant" in the underlying felony and acted "with reckless indifference to human life." (**{Indicate which version (CALJIC or CALCRIM), if known.}** CALJIC 8.80.1; CALCRIM 703.)

25. As outlined in Justice Breyer's *Miller* concurrence: "[E]ven juveniles who meet the ... standard of 'reckless disregard' may not be eligible for life without parole. Rather, *Graham* dictates a clear rule: The only juveniles who may constitutionally be sentenced to life without parole are those convicted of homicide offenses who 'kill or intend to kill.'" (*Miller*, 132 S.Ct. at 2475-2476 (Breyer, J., concur.).)

26. Because there was no jury finding either that petitioner personally killed the victim or that he acted with specific intent to kill, this Court should find petitioner categorically ineligible for LWOP, pursuant to *Graham v. Florida* and *Miller v. Alabama*. This Court should order petitioner's sentence reduced to the parole-eligible alternative of 25-to-life. (§ 190.5(b).)

27. Petitioner incorporates by reference Part IV of the accompanying Memorandum for further discussion of this claim.

Claim IV: "Cruel or Unusual Punishment" Under Article I, § 17, of the California Constitution.

28. Petitioner's LWOP sentence for a homicide committed as a juvenile constitutes "cruel or unusual punishment" in violation of Article I, section 17, of the California Constitution.

29. The California Supreme Court has outlined three inquiries for assessing the proportionality of a punishment: "(1) the nature of the

offense and defendant's background, (2) the punishment for more serious offenses, or (3) punishment for similar offenses in other jurisdictions." ((*In re Nunez* (2009) 173 Cal.App.4th 709, 725, summarizing *In re Lynch* (1972) 8 Cal.3d 410, 425-427, and *People v. Dillon* (1983) 34 Cal.3d 441, 477-489.) "The petitioner need not establish all three factors – *one may be sufficient* [citation] ...." (*Nunez* at 725 (emphasis added).)

30. The state proportionality analysis "focuses on ... the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Dillon*, 34 Cal.3d at 479.) The modern scientific and social science research discussed in *Graham v. Florida* and *Miller v. Alabama* strongly support a finding of disproportionality under the California test. Immaturity, recklessness, and an inability to foresee and evaluate consequences are inherent in youth. But these are "transient" characteristics, and juvenile offenders are capable of change and rehabilitation.

31. In *Dillon*, the California Supreme Court found a 25-to-life term disproportionate to the culpability of a 17-year-old who intentionally shot the victim during an attempted theft, in view of his "immaturity," inability to foresee "the risk he was creating," and panic. (*Id*. at 487.) Petitioner's LWOP sentence is far onerous than the 25-to-life term found excessive in *Dillon*. In view of the modern scientific evidence canvassed in *Graham* and *Miller*, there is still greater cause than in *Dillon* for finding LWOP grossly disproportionate to petitioner's individual culpability.

32. Petitioner's LWOP punishment for felony-murder is also disproportionate in comparison with the punishments in California "for more serious crimes." (*Dillon*, 34 Cal.3d at 487 fn. 38.) "[A] carefully planned murder executed in cold blood after calm and mature deliberations [fn.]" is "the most aggravated form of homicide known to our law." (*Id*. at 487.) But a "carefully planned murder" such as that is subject to the considerably lesser punishment of 25-to-life, rather than LWOP, because premeditation is not a separate special circumstance. (Cf. § 190.2(a).)

33. Petitioner's LWOP sentence is the same as the punishment for much more aggravated homicides (*Dillon*, 34 Cal.3d at 487 fn. 38), such as those involving as torture, use of a destructive device, murder-for-hire, multiple murders, or killings of judges, prosecutors, witnesses, or police officers. (Cf. § 190.2(a).)

34. **Include only if juvenile convicted of felony-murder based on robbery or burglary:** {Even among felony-murders, petitioner's theft-related predicate felony involves far less inherent violence, cruelty, or callousness than other qualifying offenses, such as mayhem, rape, child molestation, kidnapping, arson, or train-wrecking, which receive the same punishment. (Cf. § 190.2(a)(17).)}

35. Although consideration of other jurisdictions' laws is not necessary to a disproportionality finding under the state constitution (*Dillon*, 34 Cal.3d at 488 fn. 38; *Nunez*, 173 Cal.App.4th at 731 fn. 7), that factor too demonstrates petitioner's sentence is excessive. LWOP for a juvenile offender is contrary to the "international consensus,"

as reflected in international human rights law and the practices of other nations. (See *Graham v. Florida*, 130 S.Ct. at 2033-2034.)

36. In view of the modern scientific and social science research reviewed in *Graham* and *Miller*, the choice of LWOP for petitioner's crimes violates Article I, section 17 of the California Constitution. Specifically, petitioner contends that each of the defects addressed in his preceding federal constitutional claims also renders his sentence disproportionate under the state constitution. These include:

a. section 190.5(b)'s designation of this extreme punishment as the "generally mandatory," "presumptive" sentence;

b. the sentencing court's failure to give adequate consideration to the distinctive developmental and psychological characteristics of petitioner's youth and the mitigating circumstances of his family background and environment; and

c. the disproportionality of life-without-parole for any aider/abettor who did not personally kill or intend to kill.

37. Petitioner incorporates by reference Part V of the accompanying Memorandum for further discussion of this claim.

Concluding Habeas Allegations

38. Petitioner has no adequate remedy at law for presentation of these cruel and unusual punishment claims because his conviction and sentence were previously affirmed on appeal.

39. This Court previously rejected a cruel and unusual punishment claim, based on then-extant case law, in its opinion on petitioner's prior direct appeal, No. _____.

40. These cruel and unusual punishment claims are properly cognizable in this post-affirmance habeas corpus petition, because they are based on an intervening change in the law – the U.S. Supreme Court's recent opinion in *Miller v. Alabama* (2012) 132 S.Ct. 2455. (*In re Coley* (2012) 55 Cal.4th 524, 537 (applicability of "change in law" exception to cruel and unusual punishment claims).)

41. Petitioner has filed this habeas corpus petition promptly after learning of the potential applicability of *Miller v. Alabama* to his LWOP sentence. Moreover, habeas procedural limitations generally do not apply to petitions alleging "excessive punishment" in violation of the Constitution. (*In re Nunez* (2009) 173 Cal.App.4th 709, 723-724; *In re Huffman* (1986) 42 Cal.3d 552, 555.)

42. **Include if challenge to LWOP raised in prior appeal:** {This habeas corpus petition is properly brought in this Court in the first instance because this Court previously considered challenges to the LWOP sentence in deciding petitioner's direct appeal, No. _____. Because the petition's claims implicate this Court's prior opinion, the petition is more appropriately addressed to this Court, rather than the superior court. (See *In re Kler* (2010) 188 Cal.App.4th 1399, 1403-1404 & fn. 3.)}

43. Review in this Court is appropriate because the petition raises issues of first impression concerning the constitutionality of California's juvenile LWOP procedure (§ 190.5(b)), in light of *Miller v. Alabama*. These questions are better addressed by a reviewing court in order to give necessary guidance to lower courts. (Cf. *In re Moss* (1985) 175 Cal.App.3d 913, 922.)

44. Petitioner incorporates by reference Parts I and VI of the accompanying Memorandum for further discussion of the cognizability of these claims on habeas corpus and the propriety of this Court's exercise of its original jurisdiction in the first instance.

45. Petitioner incorporates by reference Parts II-V of the accompanying Memorandum for further discussion of the merits of his constitutional claims. Petitioner also incorporates by reference the exhibits accompanying this petition.

46. Petitioner requests this Court to take judicial notice of the record in his prior appeal, No. ____.

Appointment of Counsel and Issuance of OSC

47. Petitioner has prepared and submitted this habeas corpus petition without the benefit of appointed counsel. Petitioner has relied, in part, on generic arguments concerning the import of *Miller v. Alabama* on California juvenile LWOP sentences.

48. Petitioner recognizes the necessity for further development of these arguments with reference to the specific circumstances of petitioner's case and background. Concurrently with this petition, petitioner is filing a motion for appointment of counsel. A reviewing court must appoint counsel on a habeas petition upon issuance of an order to show cause (OSC) (*In re Clark* (1993) 5 Cal.4th 750, 780), and the court has discretion to appoint counsel at an earlier stage in the interest of justice. Petitioner respectfully ask this Court to appoint counsel at the earliest opportunity to ensure full legal and factual development of these claims with the assistance of counsel.

49. This petition states a prima facie case for relief as to each of its

claims. Accordingly, petitioner respectfully asks this Court to issue an OSC returnable before itself.

Prayer for Relief

For the foregoing reasons, petitioner _____ respectfully asks this Court:

a. To take judicial notice of the appellate record in petitioner's prior appeal, No. _____;

b. To appoint counsel at the earliest opportunity for all further proceedings in this habeas proceeding

c. To order the Director of the California Department of Corrections & Rehabilitation to show cause why petitioner's LWOP sentence should not be reversed and remanded for resentencing;

d. To order the filing of a Return and a Traverse, and to conduct any further proceedings the Court considers necessary;

e. Upon the completion of those proceedings, to grant a writ of habeas corpus, vacating petitioner's LWOP sentence;

f. To order any additional relief appropriate in the interests of justice.

DATE: _____ Respectfully submitted,

_____

Attorney for Petitioner

VERIFICATION

I, _____, declare:

I am a member of the Bar of the State of California. I am the attorney for petitioner _____. I am making this verification on his behalf because petitioner is incarcerated outside of this county and because the matters alleged here are more within my knowledge than his. The allegations of this petition are true of my own knowledge or are based on the exhibits accompanying this petition and/or on the appellate record in petitioner's previous direct appeal, No. _____.

I have read the foregoing petition and hereby verify that the facts alleged are true of my own personal knowledge or are supported by citations to the accompanying exhibits or to the appellate record and case file in _____.

I certify under penalty of perjury that the foregoing is true and correct. Executed on _____, at _____, California.

_____

Attorney for Petitioner