13-10288

No. 13A1014

IN THE

SUPREME COURT OF THE UNITED STATES

**NATALIE DeMOLA, Petitioner**

**vs.**

**JAVIER CAVAZOS, Acting Warden, Respondent**



**MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

The Petitioner, Natalie DeMola, by her undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed *in forma pauperis*. Petitioner is indigent and was granted leave to proceed *in forma pauperis* by the United States District Court for the Central District of California. The Office of the Federal Public Defender was appointed as counsel for Petitioner in the Ninth Circuit Court of Appeals under the authority of 18 U.S.C. § 3599 and the Criminal Justice Act, 18 U.S.C. § 3006A.

This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender

DATED: May 21, 2014

By _____
*MARK R. DROZDOWSKI
Deputy Federal Public Defender

Attorneys for Petitioner
*Counsel of Record

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Did the Ninth Circuit erroneously fail to enforce *Miller v. Alabama*'s requirement of individualized sentencing by substituting its own reading of California's juvenile sentencing statute for that of California state courts, which at the time of DeMola's sentencing had interpreted the statute as establishing a presumption of life-without-parole for juveniles convicted of special circumstances murder?

2. Is *Miller v. Alabama* retroactive on federal habeas review?

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**STATE STATUTES**

## I.

## ORDERS AND OPINIONS BELOW

The Ninth Circuit's January 21, 2014 order and amended opinion denying DeMola's Eighth Amendment claim under *Miller v. Alabama*, 132 S. Ct. 2455 (2012), and denying her petition for panel rehearing and rehearing en banc is reported at __ F.3d __, 2014 WL 211814, and is attached in the appendix. Petitioner's Appendix ("Pet. App.") 1-28. The Ninth Circuit's prior opinion, issued on September 5, 2013 and reported at 729 F.3d 1052 is attached in the appendix. Pet. App. 80-105. On September 24, 2011, the district court adopted the report and recommendation of the magistrate judge, granted relief on DeMola's juror discharge claim, and declined to adjudicate her Eighth Amendment claim as moot. Pet. App. 109, 121-25. The portion of the unpublished June 8, 2007 California Court of Appeal opinion denying DeMola's Eighth Amendment claim and the California Supreme Court's December 23, 2008 summary denial of DeMola's petition for review are also attached in the Appendix. Pet. App. 142, 148-53.

## II.

## JURISDICTION

In *Bell v. Uribe*, __ F.3d __, 2014 WL 211814 (9th Cir. Jan. 21, 2014), the United States Court of Appeals for the Ninth Circuit issued an order and amended opinion reversing the grant of habeas corpus relief on DeMola's juror discharge claim, denying relief on her Eighth Amendment claim (which had not been adjudicated below), and remanding her remaining unresolved claims. Pet. App. 5-6. The district court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. This Court has

jurisdiction under 28 U.S.C. § 1254(1). On April 10, 2014, Justice Kennedy granted DeMola's request for an extension of time to and including May 21, 2014 to file a petition for a writ of certiorari.

## III.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**U.S. Const., Amend. VIII**

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

**U.S. Const., Amend. XIV, § 1**

"No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

**Title 28 U.S.C. § 2254(a)**

"The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

**Title 28 U.S.C. § 2254(d)**

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

**Cal. Penal Code § 190.5(b)**

"The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in Section 190.2 or 190.25 has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life."

## IV.

## STATEMENT OF THE CASE

### A. Introduction

Natalie DeMola is serving life in prison without the possibility of parole for a murder committed when she was 16 years old. In California state court and below she claimed her sentence violated the Eighth Amendment ban on cruel and unusual punishment. The state court denied her claim on the merits; the district court never adjudicated it or the rest of her claims in light of its grant of relief on her claim that the dismissal of a defense holdout juror violated her Sixth Amendment right to a jury.

After the State appealed, this Court issued *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012), holding "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole ["LWOP"] for juvenile offenders." Rather, sentencing courts must engage in individualized

sentencing, "taking into account the [defendant's] family and home environment," whether the defendant was the actual killer or an accomplice, and the possibility for rehabilitation. *Id.* at 2467-68.

DeMola made a short argument in her answering brief in the Ninth Circuit that the court should affirm on the alternate Eighth Amendment ground under *Miller*, then later argued that a remand was more appropriate given that the district court had never adjudicated the claim and the state court did not have the benefit of *Miller* when it denied it.

A published opinion by a panel of the Ninth Circuit, per the Honorable Richard C. Tallman, Richard R. Clifton and Consuelo M. Callahan, reversed the grant of relief on the juror claim in light of this Court's intervening decision in *Johnson v. Williams*, 133 S. Ct. 1088 (2013), denied relief on the Eighth Amendment claim, and remanded the remaining unresolved claims. Pet. App. 5-6. The panel held that California's sentencing statute is not a mandatory sentencing scheme subject to *Miller*.

In her petition for panel rehearing and rehearing en banc, DeMola showed that the panel's reading of the statute conflicted with the interpretation of California state courts, which had construed the statute as making LWOP "generally mandatory." DeMola explained that the California Supreme Court would soon interpret the statute in light of *Miller*. DeMola also cited a case where, in light of *Miller*, this Court had granted certiorari, vacated judgment, and remanded where a sentence had been issued under the same sentencing statute. The Ninth Circuit denied DeMola's petition and, without mentioning the cases

highlighted by DeMola, reiterated that California's sentencing statute is not subject to *Miller*.

As shown below, certiorari is warranted because the Ninth Circuit has decided an important question of federal law in a way that conflicts with relevant decisions of this Court and has entered a decision that conflicts with decisions of other federal courts of appeals and state courts of last resort. United States Supreme Court Rule 10. More specifically, the opinion overlooks that at the time of DeMola's sentencing, California state courts interpreted the relevant sentencing statute as being "generally mandatory" and creating a "presumption in favor of LWOP," a point reaffirmed by the California Supreme Court's May 5, 2014 opinion in *People v. Gutierrez*, __ P.3d __, 2014 WL 1759582. The opinion also overlooks that DeMola in fact did not receive the individualized sentencing or the exercise of judicial discretion required by *Miller*, that her attorney presented no mitigating evidence or any argument on her behalf, and that the trial judge sentenced her based on the circumstances of the crime and a probation report for which neither DeMola nor her counsel were interviewed.

**B. Trial**

On April 15, 2005, a Riverside County, California jury convicted Natalie DeMola and Terry Bell of the first degree murder of Kim DeMola, Natalie's mother. Pet. App. 6. The prosecution theory was that the 16 year-old Natalie and 17 year-old Bell "wanted [Kim] out of the way so they could carry on their love affair," which Kim disapproved of. RT 1396.[1] The prosecutor argued that Natalie and Bell plotted to kill Kim, that Bell and his friend Christopher Long killed Kim, and that Natalie

[1] "RT" refers to the trial transcript lodged below. Dist. ct. docket no. 15.

was "equally guilty" because "she was part of a conspiracy" and "aided and abetted" the murder. RT 1396, 1408-10, 1424, 1488.

The jury for DeMola and Bell found true the lying-in-wait and torture special circumstance allegations, but found not true the financial gain allegation. Pet. App. 6. Long was tried jointly with DeMola and Bell, had a separate jury, was found guilty of first-degree murder, and was sentenced to 25 years-to-life. Long's jury received evidence of his admission to attacking Kim DeMola. RT 457-64, 1653.

### C. Sentencing

At sentencing, the judge said he had reviewed a probation officer's report. Pet. App. 160. That report states that "defendant was not interviewed" for the report. Pet. App. 181. It also states that defense counsel indicated that he "wished to reserve comment for the sentencing hearing." Pet. App. 179.

Kim DeMola's sister and Kim's other daughter addressed the court and asked for the maximum sentence. Pet. App. 163-67. Defense counsel "submitted" on the record and did not present any evidence or argument. Pet. App. 170. The judge then stated:

> All right. In the matter of Natalie Demola, the Court again has reviewed the documents previously stated by the Court. With reference to Miss Demola, the special circumstances have been found true. And based upon the special circumstances, it will be the judgment and sentence of the Court that Miss Demola be sentenced to the state prison for life without the possibility of parole.

*Id.* The judge then spent three sentences discussing DeMola's participation in the crime. Pet. App. 170-71.

## D. State Appeal

In her opening direct appeal brief, filed in 2006, DeMola argued that "sentencing a sixteen year old as an adult offender, to life without parole, violated . . . the prohibition against cruel and unusual punishment under the Eighth Amendment." Pet. App. 155. DeMola argued that "[a]t a minimum, there should have been an evidentiary hearing to prove that appellant should in fact be punished as harshly as the worst adult offender convicted of the same crime." *Id.* The California Court of Appeal denied the claim in a written opinion, concluding that her sentence did not constitute cruel and unusual punishment. Pet. App. 149-53. DeMola reasserted her Eighth Amendment claim in a petition for review to the California Supreme Court, which was summarily denied. Pet. App. 142, 144-46.

## E. Habeas Proceeding in District Court

DeMola timely filed a *pro se* federal habeas petition. Pet. App. 140. Claim 11 made the same allegations described in the preceding paragraph. Pet. App. 141.

On August 8, 2011, Magistrate Judge Suzanne H. Segal consolidated DeMola and Bell's habeas cases and recommended that relief be granted on their claims that their Sixth Amendment right to trial by jury was violated by the dismissal of the lone holdout defense juror. Pet. App. 131-34. The magistrate judge ruled that relief was required under *Williams v. Cavazos*, 646 F.3d 626 (9th Cir. 2011). The court concluded that it was unnecessary to resolve DeMola's remaining claims and limited its discussion to the juror claim. Pet. App. 133. On September 24, 2011, District Judge Josephine L. Staton adopted the report and granted judgment for DeMola on the juror claim; the court did not adjudicate any other claims. Pet. App. 109, 119-25.

On October 12, 2011, the State appealed. On January 13, 2012, this Court granted the State's certiorari petition in *Cavazos v. Williams*, 132 S. Ct. 1088 (mem.). On June 25, 2012, this Court issued *Miller*. 132 S. Ct. 2455.

**F. The State's Appeal in the Ninth Circuit**

On July 16, 2012, after being relieved from default, the State filed its opening brief challenging the grant of relief on the juror claim. Ninth Circuit docket nos. 22-23. On September 24, 2012, DeMola filed her answering brief. Docket no. 31. The brief argued that the Court should affirm relief on the juror claim. Answering Brief at 14-40. It then made a short argument that the Court should also affirm the judgment "on the Eighth Amendment sentencing claim in light of the intervening Supreme Court authority of *Miller*." *Id.* at 41. DeMola noted that the district court had not ruled on this claim. *Id.* at 4-5, 40.

The State's reply brief, filed on October 18, 2012, spent about one page on the Eighth Amendment claim. Docket no. 37 at 11-12. The State argued that "[t]his is not a claim which was raised in the habeas proceedings, nor was this an issue in the Amended Report and Recommendation." *Id.* at 11. The State argued that "[t]he issue here is based on *Miller v. Alabama*" and "*Miller* cannot apply to this case now." *Id.* According to the State, "[s]ince this claim was not one raised in the proceedings here, Demola would have to return to the California courts to challenge the sentence." *Id.* at 12.

On February 20, 2013, this Court issued *Johnson v. Williams*, 133 S. Ct. 1088, reversing the Ninth Circuit's grant of relief in *Williams v. Cavazos* on the juror discharge claim.

On July 10, 2013, the Ninth Circuit directed the parties to file letter briefs on the impact of *Johnson v. Williams*. Ninth Circuit docket no. 46. On July 26, the court consolidated DeMola's and Bell's appeals "for the purpose of oral argument only" and ordered counsel for DeMola and Bell to share appellees' 15 minutes of argument time. Ninth Circuit docket no. 53.

At argument on August 5, 2013, counsel for the State did not mention the Eighth Amendment claim and no questions were asked about it. Counsel for DeMola began by explaining that he intended to address the Eighth Amendment claim unique to DeMola first (Bell raised no such claim) and then discuss the juror claim before turning argument over to Bell's counsel to continue discussing that claim. The panel asked a question on the juror claim before DeMola's counsel got to the Eighth Amendment claim, and DeMola's counsel's entire time was spent discussing that claim. No questions were asked about the Eighth Amendment claim.

Early in the State's argument, the panel asked if the proper course was to remand the case back to district court. Counsel for the State agreed, with the caveat that the panel hold that under *Williams*, the magistrate judge should evaluate the juror claim under 28 U.S.C. § 2254(d). DeMola's counsel argued that the panel should affirm relief on the juror discharge claim, but that if it was not so inclined, it should remand the case back to district court.

Following up on the discussion at argument about the scope of a remand, and because the Eighth Amendment claim had not been discussed at argument,[2] counsel for DeMola filed a Rule 28(j) letter two days after argument that concluded:

> Although DeMola's Answering Brief argued at pages 40-42 that the Court should grant relief on her Eighth Amendment claim on the basis of *Miller v. Alabama*, 132 S. Ct. 2455 (2012), a remand is appropriate on that claim, too. *Miller* came out after the state and district court judgments here. The state court did not have the benefit of *Miller* when it denied the claim, and the district court never ruled on the claim. A remand would let DeMola resubmit her claim to state court and have it consider her mitigating evidence in deciding whether life without parole is appropriate, as *Miller* requires. The presentation and analysis required by *Miller* have never been done. *Babb v. Lozowsky*, __ F.3d __, 2013 WL 2436532, at *14 (9th Cir. June 6, 2013), recently remanded after reversing habeas relief on one claim to allow the district court to address other unresolved claims.

Ninth Circuit docket no. 60.

## G. The First Ninth Circuit Opinion

One month after argument, the panel issued a 26-page published opinion. Pet. App. 80-105. The majority of the opinion is dedicated to reversing relief on the juror discharge claim in light of *Johnson v. Williams*, 133 S. Ct. 1088. The discussion of the Eighth Amendment claim is at pages 24-26. Pet. App. 103-05. The opinion states that "[i]t is not clear whether *Miller* may be applied retroactively

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[2] Counsel understands that it is his responsibility to discuss issues he believes are important at argument, although it is also important to respond to the Court's questions. Here, the lawyers for petitioners had to share 15 minutes of argument time, whereas in a typical non-capital habeas argument, a petitioner's counsel receives 10 minutes.

on collateral review" and that, "[a]ccording to the state, DeMola's claim is also procedurally barred." Pet. App. 104.[3]

The opinion holds:

> Even assuming, without deciding, that we may apply *Miller* to the present case, DeMola was not sentenced to life without the possibility of parole pursuant to a mandatory sentencing scheme that prohibited the court from taking into account potential mitigating circumstances. California Penal Code § 190.5(b) affords discretion to impose a sentence of 25 years to life imprisonment in recognition that some youthful offenders might warrant more lenient treatment.

Pet. App. 104 (footnote omitted).

The panel based its conclusion solely on its reading of the statute. It quoted the statute as follows:

> The penalty for a defendant found guilty of murder in the first degree, in any case in which one of more special circumstances enumerated in Section 190.2 or 190.25 has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, *at the discretion of the court*, 25 years to life.

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[3] The State never argued in district court that DeMola's Eighth Amendment claim was procedurally defaulted. Pet. App. 135-39 (Respondent's Answer). In its reply brief on appeal, the State argued that "*Miller* cannot apply to this case now" and that "[s]ince this claim was not one raised in the proceedings here, Demola would have to return to the California courts to challenge the sentence." Reply at 11-12 (Ninth Circuit docket no. 37). This is an argument that the claim was never raised in federal court, not that it was raised in some procedurally improper way in state court. On direct state appeal, the State argued that the part of DeMola's claim that her sentence was disproportionate was waived by the failure to raise it in the trial court. Pet. App. 151. The California Court of Appeal rejected this argument and denied DeMola's Eighth Amendment claim on the merits without imposing any procedural bars. Pet. App. 151, 153.

Pet. App. 105 (original emphasis). The next sentence in the Ninth Circuit opinion states: "Accordingly, the sentencing court could take mitigating factors into account when sentencing DeMola. Because the sentence imposed was not mandatory, there is no violation of *Miller*." *Id.* The opinion concludes: "As a result, assuming that DeMola's claim is not procedurally defaulted and that *Miller* even applies retroactively (a question we do not decide), DeMola still cannot establish an Eighth Amendment violation. Her claim for relief fails on this ground." *Id.*

### H. DeMola's Petition for Rehearing and the Panel's Amended Opinion

In her petition for panel rehearing and rehearing en banc, DeMola showed that California state appellate courts had construed the relevant sentencing statute, Cal. Penal Code § 190.5(b), as "establishing a presumption that LWOP is the appropriate term" and making LWOP "generally mandatory" when a juvenile is convicted of murder with a special circumstance. Pet. App. 72. DeMola noted this Court's rule that a state court's interpretation of state law binds federal habeas courts,[4] and that the California Supreme Court would soon opine in two cases (*Gutierrez* and *Moffett*) whether juvenile LWOP sentences under § 190.5(b) violate *Miller*. Pet. App. 71. DeMola also cited this Court's order in *Blackwell v. California*, 133 S. Ct. 837 (2013) (mem.), granting certiorari, vacating judgment, and remanding to the California Court of Appeal for further consideration in light of *Miller* its denial of a claim that an LWOP sentence under § 190.5(b) for a murder committed when the defendant was a juvenile violated the Eighth Amendment. Pet. App. 72.

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[4] Pet. App. 72-73; *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (per curiam).

The Ninth Circuit panel amended its opinion upon denying DeMola's petition for rehearing but retained its dispositive holding on the Eighth Amendment claim that "the California sentencing statute is not a mandatory one subject to the rule announced in *Miller*." Pet. App. 26. According to the panel, "DeMola was not sentenced to life without the possibility of parole pursuant to a mandatory sentencing scheme that did not afford the sentencing judge discretion to consider the specific circumstances of the offender." *Id.* (footnote omitted).

Adding to its prior opinion, the court ruled that "as is evident from the transcript of the sentencing hearing, the trial judge did make an individualized sentencing determination . . . ." *Id.* The court concluded that "[b]ecause the sentencing judge did consider both mitigating and aggravating factors under a sentencing scheme that affords discretion and leniency, there is no violation of *Miller*." Pet. App. 27-28. "As a result," according to the panel, "assuming that DeMola's claim is not procedurally defaulted and that *Miller* applies retroactively (a question we do not decide), DeMola still cannot establish an Eighth Amendment violation. Her claim for relief fails on this ground." Pet. App. 28.

The amended opinion does not mention *Blackwell* or any of the state court cases DeMola cited that construe § 190.5(b).

## I. The Ninth Circuit's Denial of an Unopposed Motion To Stay the Mandate To Allow DeMola Time to File a Certiorari Petition

On January 30, 2014, the Ninth Circuit granted DeMola's request to stay the mandate for 90 days to allow her to determine whether to file a petition for a writ of certiorari. Ninth Circuit docket no. 81. On April 10, 2014, Justice Kennedy granted DeMola's request for a 30-day extension, to and including May 21, 2014, to file a

petition for a writ of certiorari. DeMola's request was based, in part, on the fact that under its internal rules, the California Supreme Court's opinion in *Gutierrez* and *Moffett* was due to be filed no later than May 5, 2014, after the original due date for DeMola's certiorari petition but before the newly-requested due date. On April 18, 2014, DeMola filed an unopposed motion in the Ninth Circuit to further stay the mandate for 30 days (through May 30, 2014) to allow her to file a certiorari petition by the extended deadline granted by Justice Kennedy. DeMola explained in her motion that "[t]he reason for the extension request [in the Supreme Court] was to allow DeMola time to assess the soon-to-be-filed California Supreme Court opinions in two cases addressing the issue that would be central to her petition: Is California Penal Code § 190.5(b) a mandatory sentencing scheme that violates *Miller v. Alabama*, 132 S. Ct. 2455 (2012)." Two court days later, on April 22, the Ninth Circuit denied the unopposed motion. Ninth Circuit docket no. 84. The Ninth Circuit's mandate issued on May 5, 2014. Ninth Circuit docket no. 85.

### J. The California Supreme Court's Decision in *People v. Gutierrez*

On May 5, 2014, the same day the Ninth Circuit's mandate issued, the California Supreme Court construed Cal. Penal Code § 190.5(b), the juvenile sentencing scheme under which DeMola and hundreds of other juvenile offenders were sentenced to LWOP, in light of *Miller*. *People v. Gutierrez*, __ P.3d __, 2014 WL 1759582 (consolidating the appeals of appellants Gutierrez and Moffett). The California Supreme Court acknowledged that "[f]or two decades, since *People v. Guinn* (1994) 28 Cal.App.4th 1130, 33 Cal.Rptr.2d 791 (*Guinn*), section 190.5(b) has been construed by [California] Courts of Appeal and trial courts as creating a

presumption in favor of life without parole as the appropriate penalty for juveniles convicted of special circumstances murder." 2014 WL 1759582, at *1.

The court explained that although § 190.5(b) does not strictly mandate LWOP like the statutes in *Miller*, "in light of *Miller*'s reasoning, a sentence of life without parole under section 190.5(b) would raise serious constitutional concerns if it were imposed pursuant to a statutory presumption in favor of such punishment." 2014 WL 1759582, at *16. The court noted that "*Miller* nowhere suggested that legislatures may presume life without parole to be the proper punishment for entire categories of juvenile offenders or offenses." *Id.* at *18. Accordingly, a "presumption in favor of life without parole for a subgroup of juveniles who commit any one of a subgroup of crimes would raise a serious constitutional question under *Miller*." *Id.* "'Treating life without parole as the default sentence takes the premise of *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.'" *Id.* (quoting the California Court of Appeal opinion in appellant Moffett's case).

Applying the rule that, when possible, courts should construe statutes to avoid constitutional infirmities, the California Supreme Court interpreted § 190.5(b) as "confer[ring] discretion on the sentencing court to impose either life without parole or a term of 25 years to life on a 16- or 17-year old juvenile convicted of special circumstances murder, with no presumption in favor of life without parole." *Id.* at *23. In light of its holding, the court disapproved of *Guinn* and its pre-*Miller* progeny that had established this presumption. *Id.* The court explained that it understood "*Miller* to require a sentencing court to admit and consider

relevant evidence of" (1) "a juvenile offender's 'chronological age and its hallmark features -- among them, immaturity, impetuosity, and failure to appreciate risks and consequences'"; (2) the offender's family and home environment, including "evidence of childhood abuse or neglect, familial drug or alcohol abuse, lack of adequate parenting or education, prior exposure to violence, and susceptibility to psychological damage or emotional disturbance"; (3) the circumstances of the offense, including whether the defendant was the actual killer or an aider and abettor; (4) whether the offender might have been charged and convicted of a lessor offense if not for incompetencies associated with youth, such as an inability to deal with police officers or an incapacity to assist her own attorney; and (5) the presence or absence of a prior criminal history and the possibility for rehabilitation. *Id.* at *24-25 (citations to *Miller* omitted).

The court remanded for resentencing. *Id.* at 26. Like DeMola, both defendants had been sentenced before *Miller*. *Id.* The court noted that although "[i]n each case, the record indicates that the trial court understood it had a degree of discretion in sentencing the defendant," "both courts imposed life without parole at a time when *Guinn* was the prevailing authority." *Id.* "[N]either court made its sentencing decision with awareness of the full scope of discretion conferred by section 190.5(b) or with the guidance set forth in *Miller* and this opinion for the proper exercise of its discretion." *Id.* "Because the trial courts operated under a governing presumption in favor of life without parole, [the California Supreme Court could not] say with confidence what sentence they would have imposed absent the presumption." *Id.*

## V.

## REASONS FOR GRANTING THE WRIT

### A. The Ninth Circuit Erroneously Denied DeMola's Eighth Amendment Claim and Failed to Enforce *Miller*'s Individualized Sentencing Requirement Because It Substituted Its Own Reading of California's Sentencing Statute for the State Court Interpretation at the Time DeMola Was Sentenced

DeMola has emphasized the process by which the Ninth Circuit reached its Eighth Amendment ruling because its faulty process contributed to its erroneous conclusion. In short, the Ninth Circuit rushed to decide the claim without the benefit of adequate briefing and argument (or a decision by the district court below) on the impact of this Court's new *Miller* ruling, and without regard to state court opinions undermining its conclusion.

The juror discharge claim was the only claim adjudicated by the district court and was the focus of the State's appeal in the Ninth Circuit. Neither the magistrate judge nor the district court ruled on DeMola's Eighth Amendment claim. *Miller* came out after this case was on appeal in the Ninth Circuit. DeMola briefly argued in her answering brief that this Court could affirm the judgment on the basis of her Eighth Amendment claim, and the State briefly responded to that argument. Neither party briefed the important questions of whether California Penal Code § 190.5(b) violates *Miller* or whether *Miller* is retroactive. The Eighth Amendment claim was never substantively discussed at oral argument. The panel thus decided an important question regarding the applicability of new Supreme Court precedent involving an interpretation of a state statute in a vacuum, without the benefit of

briefing, argument, or a lower court decision discussing the claim. Indeed, the claim was not even adjudicated in district court. Deciding such an important issue in this manner is contrary to Supreme Court and Ninth Circuit caselaw and sound principles of appellate review.

For example, in *Detrich v. Ryan*, the Ninth Circuit explained that:

> A standard practice, in habeas and non-habeas cases alike, is to remand to the district court for a decision in the first instance without requiring any special justification for so doing. In cases where there is little doubt about the correct answer, we will sometimes decide an issue in the first instance rather than remand to the district court. But our general assumption is that we operate more effectively as a reviewing court than as a court of first instance.

740 F.3d 1237, 1248-49 (2013) (en banc), *cert. pet. filed*, 82 USLW 3474 (Nov. 26, 2013); *see also infra* at 22-23.

The Ninth Circuit compounded its error by ignoring the cases DeMola cited in her petition for rehearing from this Court and California state courts showing that it had wrongly denied her Eighth Amendment claim. DeMola explained that in *People v. Moffett,* the California Court of Appeal held that the state sentencing statute "has been judicially construed to establish a presumption that LWOP is the appropriate term for a 16- or 17-year-old defendant." 148 Cal. Rptr. 3d 47, 55 (2012). Pet. App. 72. DeMola quoted the court's analysis that "[a] presumption in favor of LWOP, such as that applied in this case, is contrary to the spirit, if not the letter, of *Miller* . . . ." *Id.* "Treating LWOP as the default sentence takes the premise of *Miller* that such sentences should be rarities and turns that premise on its head . . . ." *Id.* DeMola noted that published opinions by the California Court of Appeal in other cases similarly described LWOP as being "generally mandatory"

under § 190.5(b). *Id.* (citing *People v. Guinn*, 33 Cal. Rptr. 2d 791, 797 (1994); *People v. Murray*, 136 Cal. Rptr. 3d 820, 825 (2012) (LWOP is the "presumptive" sentence)); *see also* Pet. App. 29-55 (amicus brief supporting rehearing).

DeMola's petition for rehearing also emphasized that in *Blackwell v. California*, 133 S. Ct. 837 (2013) (mem.), this Court granted certiorari, vacated judgment, and remanded to the California Court of Appeal for further consideration in light of *Miller* its denial of a claim that an LWOP sentence under § 190.5(b) violated the Eighth Amendment.

The amended panel opinion does not mention these cases, or how California state courts have construed § 190.5(b) at all. Instead, the amended opinion reaffirmed that the panel based its holding on its own reading of the statute, uninformed by state court interpretations. But as DeMola explained in her petition for rehearing, how California appellate courts have interpreted § 190.5(b) is important in federal habeas. DeMola cited *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (per curiam), for the point that this Court has "repeatedly held that a state court's interpretation of state law . . . binds a federal court sitting in habeas corpus." Pet. App. 73. This Court made the same point in *Miller*, when it stated that it would abide by the interpretation of Arkansas state courts that its sentencing statute mandated LWOP over a contrary assertion by state officials in the case before it. *Miller*, 132 S. Ct. at 2462 n.2; *see also Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (stating in habeas corpus appeal that this Court has "repeatedly held that state courts are the ultimate expositors of state law" "and that we are bound by their constructions except in extreme circumstances not present here") (footnote omitted).

This is the fundamental error committed by the Ninth Circuit: it substituted its own judgment of the meaning of the California sentencing statute, based merely on its reading of the statute's language, for the longstanding, uniform, contrary, and "binding in federal habeas" interpretations by California state courts. As a result, the Ninth Circuit wrongly failed to give effect to *Miller*'s requirement of individualized sentencing for juvenile offenders facing LWOP sentences.

The California Supreme Court's opinion in *Gutierrez* -- issued after the Ninth Circuit denied rehearing and the same day the Ninth Circuit mandate issued -- affirmed the showing DeMola made in her rehearing petition -- that at the time of her sentencing, § 190.5(b) had a presumption in favor of LWOP that is inconsistent with *Miller*. The California Supreme Court read the presumption out of the statute in order to make the statute comply with *Miller*. DeMola is similarly situated to the defendants in *Gutierrez*: sentenced to LWOP for a crime committed as a juvenile under a presumption in favor of LWOP that is inconsistent with *Miller* and which deprived her of the individualized sentencing and exercise of judicial discretion required by *Miller*. She is entitled to the same relief: resentencing consistent with *Miller*.

Although the panel opinion does not decide the retroactivity issue, a remand would allow the district court to decide that important question with the benefit of briefing. The panel opinion cites one retroactivity case, *In re Morgan*, 713 F.3d 1365 (2013), in which the Eleventh Circuit found *Miller* not retroactive. Pet. App. 26. As shown below, many other courts have found *Miller* retroactive on collateral review. *Infra* at 23-25. Some of these cases were cited in the petition for rehearing

and the supporting amicus briefs (*see, e.g.*, Pet. App. 73), but the amended panel opinion does not mention them.

The amended panel opinion states that the trial record shows that DeMola in fact received individualized sentencing. But the trial record shows that defense counsel did not present, and the sentencing court did not consider, mitigating factors for DeMola. The court said that "based upon the special circumstances, it will be the judgment and sentence of the Court that Miss Demola be sentenced to the state prison for life without the possibility of parole." The court said it had reviewed DeMola's probation report, but DeMola was not interviewed for the report. The report states her lawyer indicated that he "wished to reserve comment for the sentencing hearing." At sentencing, though, counsel made no presentation or argument for a sentence less than LWOP but just "submitted" on the record. This may well reflect an understanding that LWOP was effectively mandatory under 190.5(b). Regardless, DeMola did not in fact receive the sentencing hearing required by *Miller*, and the sentencing court did not exercise the discretion *Miller* requires.

The panel opinion notes DeMola's post-argument 28(j) letter, and states that "[w]e will not permit after argument a preemptive withdrawal of a claim that was fully raised, briefed, and argued before our court. Withdrawal at this stage would waste judicial time and resources already expended addressing this claim." Pet. App. 5-6. But as shown above, the Eighth Amendment claim was not "fully raised, briefed, and argued" in the Ninth Circuit or in the district court. Counsel intended to say at argument that a remand on the Eighth Amendment claim was the best course notwithstanding his argument in the answering brief that the Court should

affirm on the alternate Eighth Amendment ground. By then it was clear that given the still-undeveloped state of the law (conflicting rulings on *Miller*'s retroactivity, no opinion yet from the California Supreme Court interpreting 190.5(b) in light of *Miller*), the lack of a district court ruling on the claim, and the lack of briefing of key issues on appeal, a remand was appropriate. The answering brief was filed just three months after *Miller* and over 10 months before argument. And although the panel requested briefing on the impact of this Court's new *Johnson v. Williams* opinion on the juror discharge claim, it did not ask for further briefing on the impact of the Court's new *Miller* opinion on the Eighth Amendment claim. To the panel, its reading the California statute was enough to dispose of the claim, regardless of opinions by this Court (*Blackwell*) or California state courts indicating that the California sentencing statute ran afoul of *Miller*.

### B. *Miller* Is Retroactive on Federal Habeas Review

Because DeMola's state court judgment became final before *Miller* issued, she can obtain federal habeas relief on the basis of *Miller* only if *Miller* applies retroactively on collateral review. The district court did not adjudicate DeMola's Eighth Amendment claim, finding it moot in light of the grant of relief on the juror discharge claim.[5] The Ninth Circuit did not decide the retroactivity question; the issue was not briefed in the Ninth Circuit until the petition for rehearing stage. A remand on the retroactivity question is therefore appropriate in these circumstances. *Boumediene v. Bush*, 553 U.S. 723, 772 (2008) (describing this "Court's practice of declining to address issues left unresolved in earlier

[5] *Miller* came out after the district court entered judgment.

proceedings" absent "'exceptional' circumstances"); *Hinton v. Alabama*, 134 S. Ct. 1081, 1090 (2014) ("Because no court has yet evaluated the prejudice question by applying the proper inquiry to the facts of the case, we remand the case for reconsideration of whether Hinton's attorney's deficient performance was prejudicial under *Strickland*."). Alternatively, because the lower courts have issued conflicting opinions on the question of *Miller*'s retroactivity, certiorari is also warranted to resolve this important issue.[6] As shown below, the better reasoned conclusion is that *Miller* is retroactive.

At the heart of retroactivity analysis is the determination whether a case announces a new rule. *Diatchenko v. District Attorney*, 1 N.E. 2d 270 278 (Mass. 2013). A "case announces a new constitutional rule of criminal procedure if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 489 U.S. 288, 301 (1989) (original emphasis). Under *Teague* and its progeny, "[w]hen a decision of this Court results in a 'new rule,' that rule applies to all criminal cases still pending on direct review." *Schriro v. Summerlin*, 542 U.S. 348, 351. "As to convictions that are already final, however, the rule applies only in limited circumstances. New *substantive* rules generally apply retroactively"; new procedural rules generally do not. *Id.* at 351-52 (original emphasis). "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Id.* at 353. In addition to substantive rules, "'watershed rules of criminal procedure' implicating the

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[6] *Cunningham v. Pennsylvania*, No. 13A713, also presents the question whether *Miller* applies on collateral review.

fundamental fairness and accuracy of the criminal proceeding" also apply retroactively. *Summerlin*, 542 U.S. at 355.

The majority of state high courts to have ruled on the issue have held that *Miller* establishes a substantive rule that applies retroactively on collateral review. *See, e.g., Ex Parte Maxwell,* 424 S.W.3d 66, 67 (Tex. Crim. App. 2014); *State v. Mantich*, __ N.W.2d __, 287 Neb. 320, 342 (Neb. 2013); *Diatchenko,* 1 N.E.3d 270 (Mass. 2013); *State v. Ragland*, 836 N.W.2d 107, 114-17 (Iowa 2013); *Jones v. State* 122 So. 3d 698, 703 (Miss. 2013); *see also In re Rainey,* 168 Cal. Rptr. 3d 719, 720, 724 (Cal. Ct. App. 2014) (finding *Miller* retroactive, granting habeas relief, and ordering resentencing)*; People v. Morfin*, 981 N.E.2d 1010 (Ill. App. Ct.) (2012); *but see Commonwealth v. Cunningham*, 81 A.3d 1 (Pa. 2013); *Chambers v. State*, 831 N.W.2d 311, 328 (Minn. 2013); *State v. Tate*, __ So.3d __, No. 2012-OK-2763, 2013 WL 5912118, at *6 (La. Nov. 5, 2013).

In addition, the United States Government has taken the position that *Miller* is retroactive. *See, e.g., Johnson v. United States*, 720 F.3d 720, 721 (8th Cir. 2013) (per curiam).

Further, at least four federal circuit courts have granted leave to file a second or successive habeas corpus petition raising a claim based on *Miller*, holding that the petitioners made a prima facie showing that *Miller* is retroactive. *See, e.g, In re Pendleton*, 732 F.3d 280, 282-83 (3rd Cir. 2013) (citing unpublished cases from the Second and Fourth Circuits and *Johnson, supra*, 720 F.3d 720 (8th Cir.)); *but see In re Morgan*, 713 F.3d 1365 (11th Cir. 2013) (*Miller* not retroactive); *Craig v. Cain*, No. 12-30035, 2013 WL 69128 (5th Cir. Jan. 4, 2013) (per curiam) (same).

And in *Miller* itself, this Court granted relief for a petitioner, Kuntrell Jackson, who challenged the denial of his Eighth Amendment claim by the Arkansas Supreme Court in state habeas. *Miller*, 132 S. Ct. at 2461. Jackson's judgment had become final on direct review in the mid-2000s, well before *Miller*. *Id.*; *Jackson v. State*, 194 S.W.3d 757 (2004). The Court vacated the judgment of the state habeas court and remanded for further proceedings not inconsistent with its opinion. *Id.* at 2475. It would not have done so if *Miller* were not retroactive on collateral review.

Lower courts have been clearly correct in concluding that *Miller* is retroactive. First, *Miller* sets forth a new rule. Prior to this Court's decision in *Miller*, judicial precedent did not compel the conclusion that it was unconstitutional to impose a mandatory sentence of LWOP on a juvenile homicide offender. *See, e.g.*, *Diatchenko*, 1 N.E.3d at 278-79.

Second, *Miller*'s new rule is substantive. "The rule explicitly forecloses the imposition of a certain category of punishment -- mandatory life in prison without the possibility of parole -- on a specific class of defendants: those individuals under the age of eighteen when they commit the crime of murder." *Id.* at 281; *see also Mantich*, 842 N.W.2d at 727; *Jones*, 122 So.3d at 702. "'*Miller* says that it is beyond the authority of the criminal law to impose a mandatory sentence of life without parole" on juvenile offenders. *Mantich*, 842 N.W.2d at 728. *Miller* thus "did more than change procedures; it held that the government cannot constitutionally impose a punishment. As a substantive change in law in the law which puts matters outside the scope of the government's powers, the holding should apply retroactively.'"

Finally, the lower courts have been right to conclude that their holding that *Miller* is retroactive is supported by the fact *Miller* "retroactively applied the rule that it was announcing in that case to the defendant in the companion case [Kuntrell Jackson] who was before the Court on collateral review." *Diatchenko*, 1 N.E.3d at 281; *see also Mantich*, 842 N.W.2d at 728 (noting that it and three other jurisdictions "have reasoned that the [*Miller*] court's equal treatment of the two defendants [one on direct appeal and one challenging a state habeas denial] is a factor that must be considered in the retroactivity analysis"). As this Court stated in *Teague*, "once 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." 489 U.S. at 300.

## VI.

## DeMOLA'S CLAIM IS NOT DEFAULTED

The amended Ninth Circuit opinion states that Respondent asserts that DeMola's Eighth Amendment claim is procedurally barred. Pet. App. 26. The Ninth Circuit did not rule on the issue, but instead stated that "assuming that DeMola's claim is not procedurally defaulted," she loses anyway because California's sentencing statute is not subject to *Miller*. Pet. App. 27-28. Because the state courts did not find DeMola's claim procedurally barred, and because Respondent did not raise, much less prove, a procedural default defense in district court, DeMola's claim is not defaulted.

As shown above, the California Court of Appeal rejected Respondent's claim that DeMola's Eighth Amendment claim was procedurally barred in state court, and it denied the claim solely on the merits. *Supra* at 11 n.3. The California Supreme

Court summarily denied DeMola's petition for review without comment; it did not impose any procedural bars. Pet. App. 142. Thus, there is no state bar to enforce.

Respondent's behavior in district court affirms this. Procedural default is an affirmative defense. *Gray v. Netherland*, 518 U.S. 152, 165 (1996). "[T]he state must plead, and it follows, prove the default." *Bennett v. Mueller*, 322 F.3d 573, 585 (9th Cir. 2003). In his answer in district court, Respondent did not assert a procedural default defense to DeMola's claim. *Supra* at 11 n.3. He did not try to prove a procedural default defense whatsover. Assuming Respondent tried to belatedly assert such a defense on appeal, the claim is waived. More fundamentally, it is without basis -- there is no state bar to enforce.

## VII.

## CONCLUSION

For the foregoing reasons, DeMola respectfully requests that the Court grant her petition for a writ of certiorari.

Respectfully submitted,

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DATED: May 21, 2014

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No. 13A1014

IN THE

SUPREME COURT OF THE UNITED STATES

**NATALIE DeMOLA, PETITIONER**

**v.**

**JAVIER CAVAZOS, Acting Warden, RESPONDENT**

## CERTIFICATE OF SERVICE

I, Mark R. Drozdowski, a Deputy Federal Public Defender in the Office of the Federal Public Defender who was appointed as counsel for Petitioner under the Criminal Justice Act, 18 U.S.C. § 3006(A), and a member of the Bar of this Court, hereby certifies that, pursuant to Supreme Court Rule 29.3, on May 21, 2014, a copy of the **Motion for Leave to Proceed *in Forma Pauperis*, and Petition for Writ of Certiorari** was mailed postage prepaid, and electronically mailed to:

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All parties required to be served have been served. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 21, 2014 at Los Angeles, California.

*MARK R. DROZDOWSKI
*Counsel for Petitioner