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In re KRISTOPHER KIRCHNER on Habeas
Corpus

No.: S233508

No.: D067920

(Super. Ct. Nos.
HC21804, CRN26291)

PETITIONER'S OPENING BRIEF ON THE MERITS

**From the Court of Appeal,
Fourth District Division One,
Reversing the Trial Court's Grant of Petitioner's Habeas Corpus
Petition**

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re Berg (2016) 247 Cal.App.4th 418¹, also create a split of authority in light of *People v. Lozano* (2016) 243 Cal.App.4th 1126?

STATEMENT OF THE CASE AND FACTS

On April 28, 1993, Mr. Kirchner, age 16, and Mr. Damien Miller, age 15, robbed a gun store in Vista, owned by Ross Elvey. Once inside the store, Mr. Kirchner hit 59-year-old Mr. Elvey with a metal pipe causing severe trauma that ultimately resulted in Mr. Elvey's death 40 days later. (Clerk's Transcript (C.T.) pp. 90-94.)

Mr. Kirchner was initially charged in juvenile court. (C.T. pp. 85-87.) At a hearing under Welfare and Institutions Code section 707, Mr. Kirchner presented evidence he had no prior criminal record, grew up in an abusive household and in a neighborhood riddled with gang violence. Additionally, Mr. Kirchner suffered several head injuries as a child and was the victim of several violent attacks in his gang-ridden neighborhood. Further, Mr. Kirchner suffered from Attention Deficit Hyperactivity Disorder (ADHD) and depression. His depression was severe and led him to attempt suicide at age 14 and again at age 16. (C.T. pp. 89-110.) The juvenile court, however, found Mr. Kirchner unfit to be prosecuted as a juvenile and he was charged as an adult. (C.T. p. 112.)

On October 26, 1993, an Information was filed in Superior Court alleging murder in the first degree, California Penal Code section 187, subd. (a)², with allegations he personally used a deadly weapon (Pen. Code §

¹ The split of authority is a fairly included issue since it occurred after the petition for review was submitted. (Cal. Rule of Court 8.520.)

² All references are to the California Penal Code unless otherwise stated.

12022, subd. (b)), and committed murder during the commission of a burglary and robbery (Pen. Code §190.2, subd. (a)(17)). He was also charged with robbery, (Pen. Code § 211), with allegations of personal use of a deadly weapon (Pen. Code § 12022, subd. (b)) and personal infliction of great bodily injury (Pen. Code § 12022.7). A third count alleged he committed burglary (Pen. Code § 459), with allegations of personal use of a deadly weapon (Pen. Code § 12022, subd. (b)) and personal infliction of great bodily injury (Pen. Code § 12022.7). Lastly, the Information alleged Mr. Kirchner committed assault with a firearm (Pen. Code § 245, subd. (a)(2)) with an allegation of personal use of a handgun (Pen. Code § 12022.5). (C.T. pp. 114-116.)

During a bench trial, Mr. Kirchner moved to strike the special circumstance allegation that he committed the murder while engaged in the commission of a robbery and burglary (Pen. Code § 190.2, subd. (a)(17)). Mr. Kirchner argued the imposition of the sentence of life without the possibility of parole that he faced under Penal Code section 190.5 would constitute a violation of the United States Constitution's Eighth Amendment. The court denied this motion, agreeing with the prosecution that since death sentences were constitutionally permissible for 16- and 17-year-olds, a juvenile life without parole sentence is also permissible.

On March 10, 1994, Mr. Kirchner was found guilty of one count of first degree murder (Pen. Code, § 187, subd. (a)) and the special circumstance allegation that he committed the murder while engaged in the commission of a robbery and burglary (Pen. Code, § 190.2, subd. (a)(17)(A), (G)), and that he personally used a deadly or dangerous weapon during the commission of the murder (Pen. Code, § 12022, subd. (b)). Mr. Kirchner was also convicted

of one count of robbery (Pen. Code, § 211) and one count of burglary (Pen. Code, § 459), with allegations as to each offense that he personally inflicted great bodily injury (Pen. Code, § 12022.7) and personally used a deadly or dangerous weapon (Pen. Code, § 12022, subd. (b)). (C.T. pp. 237-239.)

The trial court remanded Mr. Kirchner to the California Youth Authority (CYA) pursuant to Welfare and Institutions Code section 707.2 in order to determine his amenability to the training and treatment offered by that agency. While there, he was evaluated by members of the interdisciplinary team, including a psychologist. Their reports described Mr. Kirchner as unsophisticated, vulnerable to peer influences, and likely to have his criminal behavior exacerbated if he were sentenced to adult prison. The CYA concluded there was a reasonable probability that Mr. Kirchner's likelihood to commit further crimes could be reduced or eliminated within the available confinement time if sentenced as a juvenile. (C.T. pp. 243-259.)

Citing the nature of the offense, the trial court declined to follow the recommendation of the CYA and, on September 15, 1994, sentenced Mr. Kirchner to life without parole for the murder conviction, plus a consecutive year for the weapon enhancement. The court stayed sentencing on the remaining counts and attendant allegations pursuant to Penal Code section 654. (C.T. pp. 66-67.) Mr. Kirchner filed a notice of appeal, but his appeal was dismissed after an opening brief was not filed on his behalf. (C.T. p. 261-262.)

In 2013, after the Supreme Court decided *Miller*, Mr. Kirchner filed a writ of habeas corpus that was denied. The denial preceded this Court's decision in *Gutierrez*.

Mr. Kirchner filed a second writ of habeas corpus in October 2014 contending his sentence violated the Eighth Amendment as defined by *Miller* and *Gutierrez*. On March 27, 2015, the superior court granted Mr. Kirchner's petition and the district attorney appealed.

On June 29, 2015, the district attorney filed their opening brief and reiterated that the holdings in *Miller/Gutierrez* did not apply retroactively to a collateral attack on the sentence imposed. On July 28, 2015, Mr. Kirchner filed a response, arguing that the U.S. Supreme Court and California Supreme Court's rulings in *Miller/Gutierrez* dictated a substantive rule that should be applied on collateral review. On October 29, 2015, the court of appeal requested additional briefing regarding whether California courts have traditionally used the rules laid out by *Teague v. Lane* (1989) 489 U.S. 288 and *Schriro v. Summerlin* (2004) 542 U.S. 348 to determine whether to grant collateral review. Both parties answered this question in the affirmative.

At oral argument on December 16, 2015, the court of appeal asked whether Penal Code section 1170, subdivision (d)(2) presented an adequate remedy at law. They pondered whether requiring juveniles to seek relief via Penal Code section 1170, subdivision (d)(2) would ensure the re-sentencing court considered the defendant's post-sentence conduct in prison.

On January 25, 2016, the U.S. Supreme Court decided *Montgomery v. Louisiana* (2016) ___ U.S. ___ [136 S.Ct. 718] (*Montgomery*), holding that their decision in *Miller* applies retroactively. On January 26, 2016, the court of appeal requested letter briefing regarding the effect of *Montgomery* on the issues in the case. The court specifically asked the parties to address Penal Code section 1170, subdivision (d)(2) and the language from *Montgomery*

referencing the Wyoming statute that converts juvenile life without parole sentences to life with parole at 25 years without a re-sentencing hearing. Mr. Kirchner submitted a letter brief on February 1, 2016, arguing Penal Code section 1170, subdivision (d)(2) did not present an adequate remedy at law.

On February 23, 2016, the court of appeal issued a published decision, reversing the grant of Mr. Kirchner's habeas petition with directions that Mr. Kirchner, and any other juvenile illegally sentenced to life without parole who has served 15 years of his sentence, must seek relief via Penal Code section 1170, subdivision (d)(2).

On April 4, 2016, Mr. Kirchner petitioned this Court for review. Review was granted on May 18, 2016.

ARGUMENT

California has approximately 300 juvenile offenders serving an illegal sentence of life without parole.³ These juveniles were sentenced under a presumption of life without parole and without consideration of the *Miller* factors. The U.S. Supreme Court has declared these illegally sentenced juveniles are entitled to collateral review. (*Montgomery v. Louisiana, supra*, 136 S.Ct. at p. 735.) "...[W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." (*Id.* at p. 729.) Because the holdings in *Miller* and *Roper* reaffirm that sentencing a child to life without parole is excessive and unconstitutional for all but the rare juvenile offender, *Miller* announced a new substantive rule. (*Id.* at pp. 733-734.) The

³ See Appendix A where approximately six offenders out of 289 provided by CDCR received an LWOP sentence after this court decided *Gutierrez*.

superior court correctly determined Mr. Kirchner is serving an illegal sentence and granted habeas relief.

As this Court held, Penal Code section 1170, subdivision (d)(2) is not an adequate remedy for juvenile offenders illegally sentenced to life without parole and it should not be their only means of seeking a legal sentence. (*People v. Gutierrez, supra*, 58 Cal.4th at 1387, *People v. Lozano, supra*, 243 Cal.App.4th at 1138, *In re Berg, supra*, 247 Cal.App.4th at 436.) Requiring a select group of offenders to seek relief via Penal Code section 1170, subdivision (d)(2) violates their constitutional rights to be free from cruel and unusual punishment under the Eighth Amendment and their rights to due process and equal protection under the Fourteenth Amendment.

I.

PENAL CODE SECTION 1170, SUBDIVISION (d)(2) DOES NOT PROVIDE AN ADEQUATE REMEDY FOR THE CONSTITUTIONAL VIOLATIONS OF MILLER/GUTIERREZ

In *Montgomery*, the U.S. Supreme Court held the ruling in *Miller* applies retroactively. (*Montgomery, supra*, 136 S.Ct. at p. 736.) “*Miller*’s conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders raises a grave risk that many are being held in violation of the Constitution.” (*Ibid.*) *In re Kirchner* distorted the holding of *Montgomery* when it stated a “...process by which the defendant is given a fair opportunity to be considered for parole,” would satisfy *Miller*. (*In re Kirchner, supra*, 244 Cal.App.4th at pp. 1413-1414.) In a recent split of authority, the *Berg* court observed “...section 1170, subdivision (d)(2) affords many defendants sentenced to LWOP in violation of *Miller* none of

the rights set forth in *Miller* and *Montgomery*...” (*In re Berg*, *supra*, 247 Cal.App.4th at p. 439.) Because Penal Code section 1170, subdivision (d)(2) does not satisfy the constitutional requirements set out in *Miller/Gutierrez/Montgomery*, the Fourth District Court of Appeal’s ruling fails to correct Mr. Kirchner’s illegal sentence.

A. *Gutierrez* Correctly Held that Penal Code Section 1170, Subdivision (d)(2) Is Not a Constitutional Remedy for Juveniles Illegally Sentenced to LWOP.

This Court expressly rejected Penal Code section 1170, subdivision (d)(2) as a constitutional remedy. (*Gutierrez*, *supra*, 58 Cal.4th at p. 1387.) *Gutierrez* properly examined Penal Code section 1170, subdivision (d)(2) and found it did not satisfy *Miller*. (*Ibid.*) Although Penal Code section 1170, subdivision (d)(2) provides a *potential* mechanism for re-sentencing after serving 15 to 24 years, the convicted still has an effective sentence of life without the possibility of parole. (*Id.* at p. 1386.)⁴ Ultimately *Gutierrez* held:

In sum, construing section 190.5(b) to establish a presumption in favor of life without parole raises serious constitutional concerns under the reasoning of *Miller* and the body of precedent on which *Miller* relied. **The recent enactment of section Penal Code section 1170, subdivision (d)(2) does not eliminate those concerns.**

(*Id.* at p. 1387, emphasis added.)

The *Kirchner* court defied this Court’s invalidation of Penal Code section 1170, subdivision (d)(2), opining the *Gutierrez* court was only

⁴ Penal Code section 1170, subdivision (d)(2), presents an option to a select group of **legally** sentenced juveniles who are determined to be “incorrigible” after a proper *Miller/Gutierrez* sentencing hearing. (*In re Berg*, *supra*, 247 Cal.App.4th at 442.)

concerned with the, "...strictly prospective focus of the courts in *Gutierrez* and *Graham*...." (*In re Kirchner*, *supra*, 244 Cal.App.4th at p. 1419.) But, the holding in *Gutierrez* does not draw a distinction between direct appeal and collateral review cases. Instead, *Gutierrez* details why Penal Code section 1170, subdivision (d)(2) fails to address the juveniles' unconstitutional sentences. (*In re Berg*, *supra*, 247 Cal.App.4th at p. 442.) "Thus, the *Kirchner* court's conclusion that section 1170, subdivision (d)(2) does provide an adequate remedy for a *Miller* violation conflicts with *Gutierrez*." (*Ibid.*)

The *Kirchner* court's focus on the admissibility of post-conviction conduct at a *Miller* resentencing hearing was unnecessary. Addressing *Montgomery*'s dissent (specifically the potential difficulty of conducting sentencing hearings after decades have passed), the court opined, "Arguably, in the absence of mandatory resort to section 1170, subdivision (d)(2), a defendant whose post-conviction conduct would not warrant an opportunity for parole would nonetheless be entitled to a new sentence upon a showing that at the time of his or her original sentencing there had been no proof of his or her incorrigibility." (*In re Kirchner*, *supra*, 244 Cal.App.4th at p. 1417.) The *Kirchner* court's desire to permit post-conviction conduct during re-sentencing caused it to ignore controlling case law. (*Id.* at p. 1417.)

However, the *Kirchner* court's concerns are unfounded because controlling case law already permits the admissibility of post-sentence behavior at *Miller* re-sentencing hearings. "... [T]here is nothing in *Miller*, *Gutierrez*, or *Montgomery* that suggests, much less states, that a trial court is precluded from considering evidence of a defendant's postconviction conduct

in conducting a resentencing as a remedy for *Miller* error.” (*In re Berg*, *supra*, 247 Cal.App.4th at p. 440.) “*Gutierrez* effectively disposes of this contention in its recognition that amenability to rehabilitation *must* be considered at sentencing before imposition of an LWOP sentence.” (*Id.* at p. 441, citing *Gutierrez*, *supra*, 58 Cal.4th at pp. 1386–1387 and *People v. Lozano*, *supra*, 243 Cal.App.4th at p. 1138, emphasis added.) *Montgomery* reiterated this position by considering the petitioner’s evolution from a troubled, misguided youth to a model member of the prison community—the petitioner’s submissions demonstrated rehabilitation. (*Montgomery*, *supra*, 136 S.Ct. at p. 736.)

At a *Miller* resentencing hearing, unlike a Penal Code section 1170, subdivision (d)(2) petition, rehabilitation evidence is not the overriding factor in determining whether an offender should be resentenced to life with parole, but it can still be considered by the trial court. (*Miller*, *supra*, 132 S.Ct. 2455 (slip.op., at p. 10), quoting *Graham*, *supra*, at p. 74; *Gutierrez*, *supra*, 58 Cal.4th at pp. 1388-1389.) However, a juvenile offender’s failure to rehabilitate while serving a sentence with no hope of release cannot retroactively justify imposition of the sentence, because the sentence was still disproportionate at the outset. (*People v. Gutierrez*, *supra*, 58 Cal.4th at p. 1386, citing *Graham*, *supra*, 560 U.S. at p. 73.) Thus, the *Kirchner* court’s concern that Mr. Kirchner’s subsequent conduct in prison would not be considered by the courts at a re-sentencing hearing is misguided and violates the spirit of *Miller* because it places too much emphasis on post-conviction conduct.

B. Unlike the Wyoming statute and Penal Code 3051, Penal Code Section 1170, Subdivision (d)(2) Does Not Supply An Adequate Remedy.

The Fourth District Court of Appeal relied upon dicta from the *Montgomery* Court that referenced a Wyoming statute that legally changes a juvenile's sentence from life without parole to life with parole at 25 years. (Wyo. Stat. Ann. § 6-10-301(c).). The Wyoming Supreme Court held in *State v. Mares* 2014 WY 126 that defendant's life without parole sentence was, as a matter of law, converted to life with the possibility of parole in 25 years. All juveniles serving life without parole in Wyoming were now eligible for parole at 25 years. In contrast, the potential relief provided by Penal Code section 1170, subdivision (d)(2) is not automatic and thus (unlike the Wyoming statute) does not cure the constitutional infirmity for all offenders serving illegal life without parole sentences.

This Court recently held Penal Code section 3051, like Wyoming's statute, had a similar effect on a juvenile sentenced to 50 to life. In *People v. Franklin* (May 26, 2016, No. S217699) 2016 LEXIS 3592, this Court held "the Legislature has effected this change by operation of law, with no additional resentencing procedure required." (*Id.* at p.*25.) When *Franklin* relied on *Gutierrez*'s rejection of Penal Code section 1170, subdivision (d)(2) as an argument for why Penal Code section 3051 did not satisfy the constitutional requirements of *Miller* and *Caballero*, this Court pointed out the crucial differences in the statutes and the many hurdles that a juvenile offender faces when seeking resentencing pursuant to Penal Code section 1170, subdivision (d)(2). (*Id.* at p.*30.)

Gutierrez was sentenced under a scheme that presumed his incorrigibility "at the outset," and the resulting sentence

would remain in effect unless and until he filed a successful petition for recall. (*Gutierrez, supra*, 58 Cal.4th at p. 1386–1387; see *id.* at p. 1386 [“A sentence of life without parole under section 190.5(b) remains *fully effective* after the enactment of section 1170(d)(2).”].) Franklin is not subject to a sentence that presumes his incorrigibility; by operation of law, he is entitled to a parole hearing and possible release after 25 years of incarceration.

(*Id.* at pp.*31-32.)

Further, the Wyoming statute and Penal Code section 3051 were passed in response to *Miller* and other relevant juvenile caselaw in an attempt to correct illegal sentences of juveniles.⁵ The same cannot be said for Penal Code section 1170, subdivision (d)(2). Penal Code section 1170, subdivision (d)(2) was proposed to the legislature in December of 2010. A review of the legislative history demonstrates that it was not, nor could it possibly have been, submitted as a remedy to the U.S. Supreme Court’s decision in *Miller* or *Montgomery*.⁶ As the court in *Berg* correctly pointed out, there is nothing in the text of Penal Code section 1170, subdivision (d)(2) referencing the Legislature’s intent to remedy *Miller* error. (*In re Berg, supra*, 247 Cal.App.4th at p. 441.)

Montgomery makes clear that petitioners like Mr. Kirchner are entitled to habeas corpus relief. Anything short of converting Mr. Kirchner’s illegal

⁵ (See 2013 Wy. HB 23, and <http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140SB260> [as of June 15, 2016] .)

⁶ (See <http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201120120SB9> [as of June 15, 2016] .)

life without parole sentence to life with parole at 25 years cannot stand as a constitutionally sound substitute.

C. Penal Code Section 1170, Subdivision (d)(2) Places an Unconstitutional Burden on Offenders to Obtain Their *Miller* Rights, Violating Their Right to be Free from Cruel and Unusual Punishment Under the Eighth Amendment of the U.S. Constitution.

A thorough analysis of Penal Code section 1170, subdivision (d)(2) shows that it cannot satisfy the Eighth Amendment constitutional requirements of *Miller/Montgomery/Gutierrez*. The *Kirchner* court's assertion that "the People bear the burden" at any hearing is contrary to the plain language of the statute; and the court's analysis violated the rules of statutory construction. (*In re Kirchner, supra*, 244 Cal.App.4th at p. 1418; *People v. Canty* (2004) 32 Cal.4th 1266, *In re Berg, supra*, 247 Cal.App.4th at p. 442.)

The statute specifically places burdens on the petitioner: Under subparagraph (A)(i), "...the defendant may submit to the sentencing court a petition for recall and resentencing. " Under subparagraph (B), "The defendant shall file the original petition with the sentencing court" and "the defendant's statement describing his or her remorse and work towards rehabilitation, and the defendant's statement that one of the following is true." Under (E), "If the court finds by a preponderance of the evidence that the statements in the petition are true, the court shall hold a hearing to consider whether to recall the sentence and commitment..." Section (F) of the statute places the burden on defendant to prove a litany of post-conviction factors such as seeking rehabilitation, maintaining family ties and a lack of

disciplinary actions for violence in the past five years. (See Pen. Code § 1170, subdivision (d)(2).)

When applying for a sentencing hearing under Penal Code section 1170, subdivision (d)(2), the defendant must demonstrate rehabilitation and remorse along with many other restrictive criteria. The court is instructed to exercise its discretion with those limiting criteria in mind. (Pen. Code § 1170, subd. (d)(2)(G).) These limitations make it "...all but certain that many defendants would be required to continue to serve LWOP sentences without *any* sentencing court ever having considered whether such defendants were the 'rare juvenile offender[s] whose crime reflects irreparable corruption,' as is required." (*In re Berg, supra*, 247 Cal.App.4th at p. 437, citing *Montgomery, supra*, 136 S.Ct. at p. 724.) The limitations placed on the court by an Penal Code section 1170, subdivision (d)(2) petition renders it an inadequate remedy at law.

In contrast, the sole question in granting a habeas petition under *Miller/Montgomery/Gutierrez*, is whether the defendant was sentenced under an unlawful presumption of life without parole and/or whether the *Miller* factors were not properly considered. If that question is answered in the affirmative, the court must recall the illegal sentence and conduct a new sentencing hearing. At the re-sentencing hearing, the court shall consider five factors as dictated by *Miller/Gutierrez*: "(1) the inherent impact of the juvenile's age on his culpability; (2) the juvenile's home and family environment; (3) the circumstances of the homicide offense; (4) the juvenile's ability to deal with law enforcement officers and prosecutors as well as effectively assist in his own defense; and (5) the **possibility** of

rehabilitation.” (*People v. Chavez* (2014) 228 Cal.App.4th 18, 32; citing *Gutierrez, supra*, 58 Cal.4th at pp. 1389–1390, emphasis added.) These five factors are markedly different from the various criteria an offender must meet to earn a re-sentencing hearing under Penal Code section 1170, subdivision (d)(2).

The extensive list of required elements in Penal Code section 1170, subdivision (d)(2) is among the many reasons *In re Kirchner* erroneously determined that this statute satisfies the Eighth Amendment as defined by *Miller/Montgomery/Gutierrez*. Specifically, neither the U.S. Supreme Court nor the California Supreme Court requires a showing of remorse, rehabilitation, or confinement for at least 15 years to demonstrate that a life without parole sentence is illegal. Rather, the focus is on the “**potential** for rehabilitation.” (*Miller v. Alabama, supra*, 132 S.Ct. at p. 2468, emphasis added.)

“Further, section 1170, subdivision (d)(2) requires *all* prisoners seeking to obtain resentencing for *Miller* error under the statute to prevail in a separate collateral proceeding before obtaining *any* of the rights guaranteed by *Miller* and *Montgomery*.” (*In re Berg, supra*, 247 Cal.App.4th at pp.439-440.) Merely affording a particular class of offenders a “chance at a chance” at parole is not sufficient to address juveniles serving an illegal sentence of life without parole. (*Montgomery v. Louisiana, supra*, 136 S.Ct. at p. 736.)

D. The Holding in *In re Kirchner* Violates Due Process and Equal Protection Under the Fourteenth Amendment.

Every juvenile in the State of California sentenced prior to *Miller* and *Gutierrez* is potentially serving an illegal sentence. (*Montgomery v.*

Louisiana, supra, 136 S.Ct. at pp. 733-734, See Appendix A.) Adopting Penal Code section 1170, subdivision (d)(2) as their sole remedy abrogates their ability to seek relief for their illegal sentence. The effect of *In re Kirchner* is an outright bar for those who murdered a peace officer, a public official, a firefighter, committed torture, and/or cannot show remorse or rehabilitation (i.e., those claiming their innocence). (Pen. Code, § 1170, subd. (d)(2)(ii) and (B).) Penal Code section 1170, subdivision (d)(2) would bar Mr. Montgomery himself, who shot and killed a deputy sheriff at age 17, from re-sentencing in California. (*Montgomery, supra*, 136 S.Ct. at p. 725.) Requiring other offenders who have served 15 or more years of their illegal life without parole sentence to seek relief under Penal Code section 1170, subdivision (d)(2) violates due process and equal protection rights under the Fourteenth Amendment.

To conclude that a statutory procedure for which the defendant is expressly disqualified affords an adequate remedy for an Eighth Amendment violation would violate basic principles of due process. On the other hand, if *Kirchner* is intended to limit the habeas corpus remedies only for those defendants who are *not* disqualified from filing a section 1170, subdivision (d)(2) petition, this would raise equal protection concerns.

(*In re Berg, supra*, 247 Cal.App.4th at pp. 438-439.)

The *Kirchner* court does not address why some offenders should be afforded a *Miller* hearing and those who have served at least 15 years in custody should be required to petition the court under Penal Code section 1170, subdivision (d)(2). In fact, its holding creates more questions than answers: What of those offenders who have served over 24 years of their

sentence? What of those offenders who have missed their first two chances at petitioning the court under Penal Code section 1170, subdivision (d)(2)? What of those offenders who have petitioned under Penal Code section 1170, subdivision (d)(2) and were not afforded release? Must they wait until their next available petitioning date, if there is one left? What of those who are statutorily banned from seeking relief under Penal Code section 1170, subdivision (d)(2)? What of those offenders who have served 14 years of their illegal sentence, is their post-conviction behavior excluded at a *Miller* re-sentencing? (Pen. Code, § 1170, subd. (d)(2)(A)(ii) and (B).) How is a court to determine whether a defendant has shown remorse (especially if an offender still claims his innocence)? How is a court to determine whether a defendant has shown efforts at rehabilitation? If a defendant cannot show either of these things, his petition will fail from the outset and he will not be awarded a re-sentencing hearing. (Pen. Code § 1170, subd. (d)(2)(B) and (G).)

The court in *In re Kirchner* announced a rule that violates the due process and equal protection clause of the U.S. Constitution. (*In re Berg, supra*, 246 Cal.App.4th at pp. 438-439.)

II.

***IN RE KIRCHNER* CREATES A SPLIT OF AUTHORITY IN THE LOWER COURTS AND WITHIN THE FOURTH DISTRICT COURT OF APPEAL**

There is split of authority between different appellate divisions, but more importantly there is also a split within the same appellate division, since one justice has reversed his prior concurrence with *In re Kirchner*. (*In re Berg, supra*, 247 Cal.App.4th at p. 442, Justice McDonald concurring

opinion.) In his concurring opinion, Justice McDonald wrote: “I concur in the opinion and write separately to acknowledge that after considerable reflection, although I signed the opinion in *In re Kirchner* (2016) 244 Cal.App.4th 1398, I agree with the opinion in this case including its provisions that are inconsistent with *In re Kirchner*.” (*Ibid.*) The court in *Berg* acknowledged the rarity of disagreeing with their colleagues; however, stated that there were good reasons for disagreeing with them, as is most clearly seen in Justice McDonald’s change of opinion. (*Id.* at p. 442, footnote 12.)

In re Berg rejected every contention proposed by the court in *Kirchner*. The *Berg* court opined that the ruling in *Kirchner* would result in continued violations of *Miller*, *Gutierrez*, and *Montgomery*.

The actual remedy authorized in *Montgomery*, extending parole eligibility, provides an adequate remedy for *Miller* error because it is the defendant’s ineligibility for parole that is the harm suffered by juvenile defendants sentenced to LWOP. In contrast, providing a defendant with the opportunity to file a petition under section 1170, subdivision (d)(2) that may *or may not* lead to the imposition of a new sentence containing a period of parole clearly does not guarantee such relief.

(*In re Berg*, *supra*, 247 Cal.App.4th at pp. 436-437.)

The *Berg* court strongly criticized the *Kirchner* opinion. The court cited several reasons for rejecting *Kirchner*: this Court had already rejected Penal Code section 1170, subdivision (d)(2) in *Gutierrez*, the *Lozano* court had done the same and was not cited in *Kirchner*, and the plain language of Penal Code section 1170, subdivision (d)(2) cannot be rewritten to place the

burden on the prosecution. (*In re Berg*, *supra*, 247 Cal.App.4th at pp. 437-439.) The *Berg* court acknowledged that on all constitutional levels *Kirchner*'s decision failed to provide an adequate remedy at law for juveniles illegally sentenced to life without parole. "Thus, as Berg correctly argues in his supplemental brief, 'Mr. Berg must be granted a resentencing hearing where the five *Miller* factors [outlined in *Gutierrez*] are the controlling factors before the sentencing court, not the miscellaneous factors dictated in ... section 1170, subdivision (d)(2).'" (*Id.* at p. 439.)

Kirchner also created a split of authority in the courts of appeal by holding that post-conviction conduct can only be considered by a court conducting a re-sentencing hearing under Penal Code section 1170, subdivision (d)(2). In *People v. Lozano*, the Second District Court of Appeal reiterated this Court's holding in *Gutierrez* and rejected the Attorney General's argument that Ms. Lozano could only present post-conviction conduct at an Penal Code section 1170, subdivision (d)(2) re-sentencing hearing. (*People v. Lozano*, *supra*, 243 Cal.App.4th at p. 1138.) The Second District dismissed this argument as having been thoroughly rejected by the California Supreme Court in *Gutierrez*. (*Ibid.*)

The *Lozano* court held post-conviction behavior can be relevant and admissible at a *Miller/Gutierrez* re-sentencing. In the *Lozano* case, Ms. Lozano was 16 years old in 1996 when she participated in the murder of a 13-year-old girl and was sentenced to life without parole. (*People v. Lozano*, *supra*, 243 Cal.App.4th at pp. 1129-1130.) In 2015, the court held a re-sentencing hearing pursuant to *Miller/Gutierrez* and refused to admit evidence of her rehabilitation in prison. (*Id.* at p. 1132.) The Second District

Court of Appeal reversed this decision by the trial court and held the California Supreme Court in *Gutierrez* specifically found the sentencing court must consider any evidence or other information in the record that supported a possibility of rehabilitation. (*Id.* at pp. 1137-1138, citing *Gutierrez, supra*, 58 Cal.4th at p. 1390.) It further held section 1170, subdivision (d)(2) is not exclusive, nor is it a substitute for the Eighth Amendment right to a sentencing hearing that would consider amenability towards rehabilitation. (*Lozano* at p. 1138.) Thus, *Lozano* correctly applied this Court's holding in *Gutierrez*. The *Kirchner* court did not.

III.

***IN RE KIRCHNER* CONTRAVENES CALIFORNIA LAW THAT HAS TRADITIONALLY GRANTED HABEAS CORPUS RELIEF TO OFFENDERS SERVING AN ILLEGAL SENTENCE.**

The court in *Kirchner* refused to follow a long line of precedent dictating that habeas corpus relief is the proper remedy for an illegal sentence. Habeas corpus review is the proper remedy when a court imposed an illegal sentence. (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn.8.) California courts have traditionally applied habeas corpus relief when this Court has issued decisions changing sentencing laws because giving retroactive effect to changes in sentencing law is not overly burdensome on the courts. (See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530, fn.13; *Belmontes, supra*, 34 Cal.3d at p. 348, fn.8; *People v. Navarro* (1972) 7 Cal.3d 248, 265, fn. 13; *People v. Tenorio* (1970) 3 Cal.3d 89, 95, fn.2; *In re Jackson* (1964) 61 Cal.2d 500, 505-508; *People v. Hannon* (1971) 5 Cal.3d 330, 340 fn.7, and *In re Johnson* (1970) 3 Cal.3d 404, 415.)

The appellate court misapplied the holding from *In re Gandolfo*

(1984) 36 Cal.3d 889 to justify their reasoning that Penal Code section 1170, subdivision (d)(2) is an adequate remedy at law for Mr. Kirchner. (*In re Kirchner*, *supra*, 244 Cal.App.4th at p. 1416.) Unlike the instant case, the *Gandolfo* court dealt with a person seeking relief from a conservatorship order that was subject to review every six months under the Lanterman-Petris-Short Act (LPS Act). The *Gandolfo* court cautioned that the conservatee would still be entitled to habeas relief if the limitations of the statutory review were shown to be inadequate. (*In re Gandolfo*, at pp. 899-900.) As discussed in greater detail below, the rationale in *Gandolfo* should not be applied to an illegal criminal sentence, because the “relief” afforded to a defendant under Penal Code section 1170, subdivision (d)(2) is grossly inadequate and cannot pass constitutional muster (*People v. Gutierrez*, *supra*, 58 Cal.4th at p. 1387.)

IV.

THE TRIAL COURT PROPERLY GRANTED MR. KIRCHNER’S HABEAS PETITION UNDER *MILLER/GUTIERREZ*

The trial court properly found Mr. Kirchner was serving an illegal sentence under *Miller/Gutierrez* and granted his habeas petition. Both the superior court and Fourth District Court of Appeal agree Mr. Kirchner was illegally sentenced to life without parole in 1994. But the Fourth District Court of Appeal’s insistence that Mr. Kirchner seek potential relief via Penal Code section 1170, subdivision (d)(2) does not relieve him from serving an illegal sentence. (*In re Kirchner*, *supra*, 244 Cal.App.4th at p. 1419.)

A. *Montgomery v. Louisiana* Held the Decisions in *Miller* and *Gutierrez* Are Retroactive.

On January 25, 2016, the U.S. Supreme Court held their decision in *Miller v. Alabama, supra*, 132 S.Ct. 2455, applies retroactively to juveniles serving life without parole and that collateral review is the proper avenue to correct this illegal sentence. (*Montgomery v. Louisiana, supra*, 136 S.Ct. 718.) Mr. Montgomery was serving a sentence of life without parole for killing a deputy sheriff in Baton Rouge, Louisiana in 1963, at age 17. (*Id.* at p. 725.) After the Supreme Court's decision in *Miller*, Mr. Montgomery sought collateral relief and the Louisiana courts refused to apply the decision in *Miller* retroactively. (*Id.* at p. 726.) In *Montgomery*, the Supreme Court ruled, "...when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." (*Id.* at p. 729.)

The *Montgomery* court reiterated the foundations for their decision in *Miller*: "*Miller* took as its starting premise the principle established in *Roper* and *Graham* that 'children are constitutionally different from adults for purposes of sentencing.' " (*Montgomery v. Louisiana, supra*, 136 S.Ct. at p. 733, citing *Miller, supra*, 132 S.Ct. at p. 2464, citing *Roper v. Simmons* (2004) 543 U.S. 551, 569-570 (*Roper*), and *Graham v. Florida* (2010) 560 U.S. 48, 68 (*Graham*).). "Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and goes far beyond the manner of determining a defendant's sentence." (*Montgomery* at pp. 732-733.) The Court affirmed the holdings in *Miller*, that a mere reference to youth was not enough, the trial court must actually consider the distinctive attributes of youth. (*Id.* at p. 734, citing *Miller, supra*, 132 S.Ct. at p. 2465.)

Because a juvenile offender whose crimes reflect the transient immaturity of youth faces a punishment that the law cannot impose upon him, *Miller* announced a new substantive constitutional rule of law that requires retroactive application. (*Montgomery v. Louisiana, supra*, 136 S.Ct. at p. 734.) The trial court did not give due deference to the *Miller* factors, thus Mr. Kirchner is serving an unconstitutional sentence. Retroactive effect is appropriate through California's collateral review proceedings. (See *Teague v. Lane, supra*, 489 U.S. 288; *Schriro v. Summerlin, supra*, 542 U.S. 348; *Montgomery, supra*, 136 S.Ct. at p. 731.)

Faced with the constitutional concerns raised in *Miller*, this Court affirmed in *Gutierrez* that the presumption of sentencing a juvenile to life without parole under Penal Code section 190.5 was unconstitutional. "In light of *Miller's* reasoning, a sentence of life without parole under section 190.5, subdivision (b) would raise serious constitutional concerns if it were imposed pursuant to a statutory presumption in favor of such punishment." (*People v. Gutierrez, supra*, 58 Cal.4th at p. 1379.) "The distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, *even when they commit terrible crimes.*" (*Id.* at p. 1380 emphasis added by the court, citing *Miller, supra*, 132 S.Ct. at p. 2465.) This presumption was not remedied by the sentencing court's power to consider an individualized sentencing for the youth since serious constitutional issues arise when the court is "...presuming '[i]n the first instance' that life without parole is the appropriate sentence for special circumstance murder committed by a 16- or 17-year-old juvenile." (*Id.* at p. 1382, citing *People v. Guinn* (1994) 28 Cal.App.4th 1130, 1142.)

Although, Mr. Kirchner was sentenced two weeks prior to this Court's decision in *Guinn*, the trial court gave little or no weight to the *Miller* factors at Mr. Kirchner's sentencing hearing. Mr. Kirchner was sentenced primarily due to the circumstances of the offense. Instead of addressing the *Miller* factors, the court reasoned the U.S. Supreme Court had not ruled out imposition of the death penalty on a juvenile, thus a sentence of life without parole would be constitutional. The trial court failed to address Mr. Kirchner's lack of a prior record, the violence he suffered as a child in his home and neighborhood, his head injuries, his diagnosis for ADHD and depression, or his two suicide attempts. More importantly, the court ignored the recommendation by CYA that there was a reasonable possibility that he could be rehabilitated within the jurisdiction time available.

The court sentenced Mr. Kirchner to what has now been deemed an illegal sentence of life without parole. Because the trial court and the court of appeal both determined Mr. Kirchner is serving an illegal sentence, he is entitled to collateral relief.

CONCLUSION

The trial court properly granted Mr. Kirchner's habeas petition. Binding authority from the U.S. Supreme Court ruled that mandatory life without parole for a juvenile offender violates the Eighth Amendment. The *Montgomery* court clarified that the *Miller* ruling is retroactive and applies to offenders such as Mr. Kirchner who have properly sought collateral relief. This Court's decision in *Gutierrez* rightly determined that Penal Code section 1170, subdivision (d)(2) fails to satisfy the constitutional mandate announced in *Miller*. (*People v. Gutierrez, supra*; *People v. Lozano, supra*, *In re Berg*,

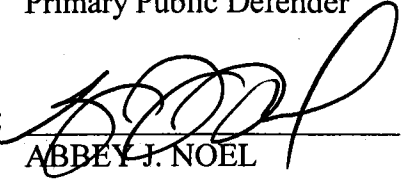
supra.) *In re Kirchner* was wrongly decided and if allowed to stand will result in continued Eighth Amendment and Fourteenth Amendment violations to hundreds of juveniles illegally sentenced to life without parole. Clarity from this Court is necessary to resolve the split of authority within the courts of appeal in *In re Berg, supra*, and *People v. Lozano, supra*. Mr. Kirchner is currently serving an illegal sentence and is entitled to a resentencing hearing or, in the alternative, to be resentenced to life *with* the possibility of parole.

Dated: June 17, 2016

Respectfully submitted,

RANDY MIZE
Primary Public Defender

By:


ABBEY J. NOEL
Deputy Public Defender

Attorneys for Petitioner
KRISTOPHER KIRCHNER

CERTIFICATE OF WORD COUNT

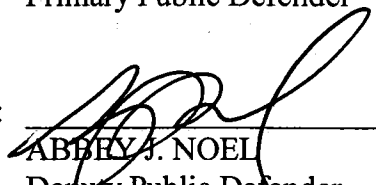
I, ABBEY J. NOEL, hereby certify that based on the software in the word processor program, the word count for this document is 6,386 words.

Dated: 6/17/16

Respectfully submitted,

RANDY MIZE
Primary Public Defender

By:



ABBIE J. NOEL
Deputy Public Defender

Attorneys for Petitioner
KRISTOPHER KIRCHNER

CERTIFICATE OF SERVICE

Rule 1.21(c)

CASE NAME: *In re Kirchner*
Supreme Ct. No.: S233508
Ct. Appeal 4th DCA, Div. 1 No.: D067920
Super. Ct No.: HC21804, CRN26291

I, Michael A. Owens, declare as follows:

I am employed in the County of San Diego, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 450 "B" Street, Suite 900, San Diego, California 92101, in said County and State.

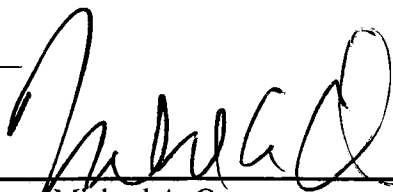
On June 17, 2016, I served the foregoing document:

PETITIONER'S OPENING BRIEF ON THE MERITS

on the parties stated below, by the following means of service:

- ☒ **BY INTEROFFICE MAIL:** Pursuant to Rule 1.21(b), on the above-mentioned date I personally deposited in the United States Mail true and correct copies thereof, each in a separate envelope, postage thereon fully prepaid, addressed to the following [See Service List].
- ☒ **BY PERSONAL SERVICE:** On the date of execution of this document, I personally served true and correct copies of the above-mentioned document(s) on each of the following [See Service List].
- ☒ **BY ELECTRONIC SERVICE:** From my e-mail account at Michael.Owens@sdcounty.ca.gov, I caused each such document to be transmitted electronically, to the parties and websites indicated, authorized under California Rules of Court, Rule 8.71. [See Service List].
- ☐ **BY E-MAIL:** On the above-mentioned date, I caused a true copy of said document to be emailed to said parties' e-mail addresses as indicated on the attached Service List. (Rules of Court, Rule 2.251(c)(1))
- ☒ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on 6/17/16



Michael A. Owens
Declarant

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Clerk of the Superior Court
Judge Hanoian

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Mr. KRISTOPHER KIRCHNER
(through counsel)

Appendix A

Data Analysis Unit
Estimates and Statistical Analysis Section
Offender Information Services Branch

Department of Corrections and Rehabilitation
State of California
October 2015

Name	Offense Date	Sentence Begin Date	Age at Offense	County of Conviction	Institution
ROBINSON, AARON	05/24/2004	08/28/2009	16	Los Angeles	Salinas Valley State Prison
SAM, SAVIN	11/29/2003	09/29/2009	18	Santa Clara	High Desert State Prison
SOTO, MARIO	08/17/2005	09/29/2009	17	Riverside	High Desert State Prison
UY, BATTANY	02/08/2008	10/09/2009	17	San Joaquin	California Correctional Center
KUPPSCH, RONALD	02/28/2003	10/09/2009	16	Los Angeles	North Kern State Prison
ATLAS, TYSON	04/22/2006	10/29/2009	16	San Bernardino	Ironwood State Prison
MILTON, ANTHONY	12/02/2003	12/04/2009	17	Alameda	Calipatria State Prison
RUSSELL, DANIEL	04/16/2006	11/16/2009	16	Sacramento	Kern Valley State Prison
PEARSON, CALVIN	04/15/2006	11/16/2009	16	Sacramento	High Desert State Prison
GUILLIN, JOSE	05/23/2008	12/01/2009	17	Los Angeles	California Medical Facility
CARRASCO, ANGEL	03/12/2008	12/31/2009	17	Tulare	Centinel State Prison
HOFFMAN, KYLE	08/04/2008	10/08/2010	16	Kern	California Correctional Institution
BLACKWELL, BRADLEY	02/07/2007	04/20/2010	17	Sonoma	Kern Valley State Prison
HERNANDEZ, ANTHONY	01/12/2008	04/12/2010	17	Los Angeles	High Desert State Prison
THOMAS, EDWARD	08/14/2004	06/15/2010	17	San Diego	High Desert State Prison
DAVIS, DEVIN	05/11/2007	05/26/2010	17	Los Angeles	California State Prison, Corcoran
SIACKASORN, JIMMY	12/19/2007	06/25/2010	16	Sacramento	Pelican Bay State Prison
SILVA, JESSE	06/08/2008	06/18/2010	16	Los Angeles	Calipatria State Prison
PEREZ, JESSE	07/19/2008	07/30/2010	17	Kern	High Desert State Prison
ABELLA, FRANK	06/07/2008	09/07/2010	17	Sacramento	Kern Valley State Prison
LEWIS, JERRETT	06/09/2007	09/17/2010	17	Riverside	Ironwood State Prison
RUIZ, IGNACIO	01/19/2008	09/29/2010	16	Orange	North Kern State Prison
PALAFIX, LUIS	08/04/2008	06/07/2013	16	Kern	Calipatria State Prison
STRATIS, CHRISTOPHER	03/19/2008	12/14/2010	17	Los Angeles	California State Prison, Los Angeles County
AYALA, OTRAM	12/17/2006	12/08/2010	17	Orange	California Medical Facility
RAMIREZ, LUIS	08/27/2007	02/18/2011	16	Orange	North Kern State Prison
LUCERO, NATHAN	02/18/2006	04/05/2011	17	Riverside	Pelican Bay State Prison
ORTEGA, LUIS	11/04/2007	04/06/2011	17	Ventura	Pelican Bay State Prison
ROLDAN, JUAN	12/17/2006	04/13/2011	16	Orange	Pelican Bay State Prison
CARDENAS, JOSE	12/09/2007	09/08/2011	17	San Joaquin	Centinel State Prison
MERAZ, VICTOR	05/27/2007	08/17/2011	16	Ventura	Kern Valley State Prison
ROJAS, ORLANDO	03/28/2007	10/05/2011	17	Santa Clara	Calipatria State Prison
MARQUEZ, VICTOR	06/02/2009	10/28/2014	17	Tulare	Kern Valley State Prison
MCCUTCHEW, KAYL	06/28/2009	12/15/2011	17	Contra Costa	California State Prison, Corcoran
DUBOSE, CARLOS	08/22/2009	12/15/2011	17	San Bernardino	California State Prison, Los Angeles County
MURRAY, DEJON	03/26/2010	12/20/2011	17	Sacramento	Centinel State Prison

These data values may differ from those previously published due to database updates.

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OUTPUT: W:\OISB\DAU\Projects\DAU08\Ad Hoc\2015-10\Under 18 LWOPS with Sentence Data

000001

Data Analysis Unit
Estimates and Statistical Analysis Section
Offender Information Services Branch

Department of Corrections and Rehabilitation
State of California
October 2015

Name	Offense Date	Sentence Begin Date	Age at Offense	County of Conviction	Institution
CHAVEZ, LEOPOLDO	09/25/1993	05/18/2012	17	San Diego	California Institution for Men
ELIAS, EDWARD	09/25/1993	06/25/2012	17	San Diego	California Institution for Men
GOMEZ, DAVID	12/14/2009	09/25/2012	16	San Bernardino	California State Prison, Los Angeles County
MOSES, DAVID	04/14/2010	11/02/2012	17	Kern	California Medical Facility
BIBIANO, VICTOR	09/20/2008	12/21/2012	17	Los Angeles	Calipatria State Prison
MERAZ, JUAN	09/20/2009	12/21/2012	16	Los Angeles	Kern Valley State Prison
SEE, TONY	06/08/2011	12/27/2012	17	Tulare	North Kern State Prison
ABRAM, KEVIN	09/13/2008	04/18/2013	17	Marin	California Correctional Center
PEREZ, CHRISTIAN	10/01/2004	05/08/2013	17	Los Angeles	San Quentin State Prison
SALDANA, JOSE	07/26/2011	06/07/2013	17	Kings	RJ Donovan Correctional Facility
Tran, Truc	02/24/1995	07/24/2013	17	Orange	Calipatria State Prison
GUZMAN, MANUEL	05/30/2011	11/01/2013	17	Riverside	California State Prison, Los Angeles County
SPEAKER, CHRISTIAN	10/19/2010	11/21/2013	17	Santa Cruz	Kern Valley State Prison
RENTERIA, JOSE	08/02/2008	12/11/2013	17	Los Angeles	California State Prison, Corcoran
GALLARDO, GIOVANNI	10/15/2011	02/19/2014	16	Los Angeles	RJ Donovan Correctional Facility
VALLES, RAYMOND	03/31/2012	08/06/2014	17	San Joaquin	High Desert State Prison
LLAMAS, AURELIO	01/17/2009	08/12/2014	17	Tulare	Centinelia State Prison
CASTANEDA, JESUS	10/20/2012	12/16/2014	17	Tulare	Salinas Valley State Prison
SANTANA, EDGAR	03/19/2010	02/27/2015	16	Los Angeles	Calipatria State Prison
MENDOZA, JOHNNY	09/25/2010	06/23/2015	17	Los Angeles	North Kern State Prison
MCGHEE, DIAMONTE	10/31/2011	07/10/2015	17	Los Angeles	California Institution for Men
MARQUEZ, GONZALO	03/15/1981	10/03/1984	18	Los Angeles	Pelican Bay State Prison
COX, JOHN	12/20/1983	08/03/1985	17	Santa Clara	RJ Donovan Correctional Facility
HENDERSON, PHILLIP	01/11/1982	08/11/1986	10	San Francisco	Mule Creek State Prison
JIMENEZ, SALVADOR	04/16/2004	02/02/2006	17	Sonoma	California State Prison, Sacramento
KAK, RATTANAK	10/10/2003	01/20/2006	16	San Joaquin	Salinas Valley State Prison
LOPEZ, GERARDO	10/02/2002	06/30/2006	17	Orange	Centinelia State Prison
CRISLER, ROBERT	09/05/2004	07/05/2006	17	Sacramento	High Desert State Prison
GARZA, JULIAN	08/29/2005	08/11/2006	17	Kern	High Desert State Prison
SESSING, NATHAN	12/03/2004	09/06/2006	17	Ventura	California Substance Abuse Treatment Facility
DYLESKI, SCOTT	10/15/2005	10/31/2006	16	Contra Costa	California State Prison, Corcoran
O'BRIEN, SEAN	02/26/2003	11/01/2006	16	El Dorado	California State Prison, Corcoran
CUELLAR, EDWARD	05/11/2005	10/24/2006	16	Riverside	Kern Valley State Prison
TAYLOR, LEIF	05/31/1993	10/31/2006	16	Los Angeles	Centinelia State Prison
VANG, COMDY	04/02/2005	11/17/2006	17	San Joaquin	Pleasant Valley State Prison
GALVEZ, DAVID	03/20/2005	11/07/2006	16	Los Angeles	Centinelia State Prison

These data values may differ from those previously published due to database updates.

REFERENCE: W:\OTIS\DAU\SAS\DAU06\Ad_Hoc\2015-10\Under18 LWOPS - Rev DC

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000002

Data Analysis Unit
Estimates and Statistical Analysis Section
Offender Information Services Branch

Department of Corrections and Rehabilitation
State of California
October 2015

Name	Offense Date	Sentence Begin Date	Age at Offense	County of Conviction	Institution
DIAZ, JOHN	05/08/2004	12/08/2006	16	Los Angeles	Kern Valley State Prison
ISAYEV, MAKSIM	10/04/2005	04/18/2007	17	Sacramento	California Substance Abuse Treatment Facility
RIVERA, SAUL	02/02/2005	03/02/2007	16	Los Angeles	Ironwood State Prison
BENSON, JIMMY	09/25/2004	03/23/2007	17	San Joaquin	California Correctional Institution
SIORDIA, FREDDY	10/02/2005	03/08/2007	16	Butte	High Desert State Prison
MONDRAGON, GIANCARLO	08/23/2003	07/20/2007	17	Orange	California State Prison, Los Angeles County
GARCIA, DAVID	05/19/2006	10/18/2007	17	Tulare	California State Prison, Corcoran
RHONE, JAMAL	10/28/2004	12/11/2007	16	San Bernardino	California State Prison, Los Angeles County
MARTINEZ, ISAAC	06/28/2012	01/03/2013	22	Los Angeles	Salinas Valley State Prison
SOLIS, JUAN	01/29/2006	12/20/2007	16	Los Angeles	Centinela State Prison
MURRAY, CHRISTOPHER	04/03/2006	11/20/2007	17	Los Angeles	California State Prison, Los Angeles County
RIVERA, FERNANDO	01/27/2004	12/28/2007	16	Riverside	Calipatria State Prison
CONTRERAS, ANDRES	03/27/2005	01/25/2008	16	Tulare	California Correctional Institution
SANDOVAL, RODOLFO	05/05/2004	01/30/2008	17	Ventura	High Desert State Prison
BUNN, REGINALD	03/09/2006	01/30/2008	17	Sacramento	California State Prison, Corcoran
MINOR, ANTONIO	03/09/2006	01/30/2008	17	Sacramento	California State Prison, Corcoran
AVENDANO, DIEGO	12/02/2004	02/07/2008	17	Los Angeles	California Correctional Institution
SEE, LAVANG	10/01/2006	06/05/2008	16	Tulare	Salinas Valley State Prison
ALFRED, EVAN	06/27/2007	09/22/2008	16	Los Angeles	California State Prison, Corcoran
SOTO-ENRIQUEZ, MIGUEL	06/11/2006	06/17/2008	16	Sacramento	Deuel Vocational Institution
COTTON, JOHNNY	04/23/2006	06/17/2008	17	Sacramento	North Kern State Prison
DONALD, DEONTE	01/06/2003	06/23/2008	17	Alameda	California State Prison, Solano
SEE, CHAWA	10/01/2006	07/03/2008	16	Tulare	California State Prison, Corcoran
CRUZ, EDWIN	04/08/2007	07/29/2008	17	Los Angeles	California State Prison, Los Angeles County
FLORES, RALPH	05/14/1999	09/17/2008	17	Los Angeles	San Quentin State Prison
PEREZ, DANIEL	07/26/2005	09/03/2008	17	Sacramento	Salinas Valley State Prison
MOFFETT, ANDREW	04/23/2005	07/26/2011	17	Contra Costa	Salinas Valley State Prison
GALLEGOS, GEORGE	10/29/2006	10/21/2008	16	Los Angeles	California State Prison, Los Angeles County
ZAVALA, EDGAR	01/13/2007	10/17/2008	17	Kern	Kern Valley State Prison
MYERS, ROBERT	08/14/2004	11/24/2008	17	San Diego	California State Prison, Sacramento
TAEOTUI, PENIFOTI	12/20/2006	01/26/2009	16	San Diego	Calipatria State Prison
SUAREZ, JOSE	05/15/2006	02/18/2009	16	Orange	High Desert State Prison
SALCIDO, MARCOS	11/14/2007	03/10/2009	17	Los Angeles	Ironwood State Prison
FERNANDEZ, JOHN	08/16/2007	03/05/2009	17	Tulare	California State Prison, Sacramento
CUELLAR, STEVEN	11/02/2006	04/07/2009	16	Los Angeles	California State Prison, Los Angeles County
WHITE, CHRISTOPHER	03/16/2005	05/27/2009	17	San Bernardino	California Substance Abuse Treatment Facility

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Data Analysis Unit
Estimates and Statistical Analysis Section
Offender Information Services Branch

Department of Corrections and Rehabilitation
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Name	Offense Date	Sentence Begin Date	Age at Offense	County of Conviction	Institution
GAONO, MEKI	12/20/2006	06/30/2009	17	San Diego	Calipatria State Prison
ADDERLEY, DUKWAN	04/15/2006	06/10/2009	16	Los Angeles	Kern Valley State Prison
RAMOS, OSVALDO	04/08/2007	06/17/2009	16	Los Angeles	RJ Donovan Correctional Facility
BAUTISTA, LUIS	08/27/2007	07/16/2009	17	Fresno	Salinas Valley State Prison
HEARN, RALPH	07/23/1990	12/19/1991	16	Los Angeles	Kern Valley State Prison
LYNCH, DAVID	07/23/1990	01/15/1992	16	Los Angeles	California State Prison, Corcoran
THROOP, EDWARD	04/07/1991	04/08/1992	17	Ventura	California Substance Abuse Treatment Facility
MORA, OSCAR	04/10/1991	09/30/1992	16	Los Angeles	Calipatria State Prison
LULU, FAFETA	02/12/1991	01/06/1993	16	Los Angeles	California State Prison, Los Angeles County
ADKINS, DAVID	03/21/1991	04/07/1993	16	Los Angeles	Pleasant Valley State Prison
GUINN, ANA	10/19/1990	04/29/1993	17	Riverside	California State Prison, Sacramento
GARNICA, JOSE	08/06/1991	08/23/1993	17	San Bernardino	Calipatria State Prison
PAYTON, DESMOND	05/04/1992	08/11/1993	16	San Diego	Calipatria Institution for Men
GINES, MICHAEL	10/04/1992	08/13/1993	16	Kern	California Correctional Institution
ESPINOZA, CANDE	07/05/1990	08/24/1993	17	Los Angeles	Pelican Bay State Prison
HOBLEY, LEON	06/08/1991	09/15/1993	17	Los Angeles	California Substance Abuse Treatment Facility
JONES, KEVIN	03/03/1992	10/27/1993	17	Los Angeles	Wasco State Prison
RUSSELL, MICHAEL	08/27/1992	01/31/1996	17	Kern	California State Prison, Los Angeles County
SANCHEZ, BENIGNO	04/19/1992	11/04/1993	17	Tulare	Kern Valley State Prison
UTERA, FERNANDO	10/03/1991	02/16/1994	16	Los Angeles	Pleasant Valley State Prison
DONINGUEZ, MARVIN	10/12/1991	12/15/1993	16	Los Angeles	California Correctional Institution
PEREZ, FRANCISCO	06/17/1992	01/07/1994	17	Los Angeles	High Desert State Prison
MOORE, DEANDRE	12/03/1991	02/09/1994	16	San Mateo	North Kern State Prison
RUSSELL, ATHAIN	12/03/1991	02/09/1994	16	San Mateo	Kern Valley State Prison
SPANN, TROY	03/28/1992	03/09/1994	16	Los Angeles	Kern Valley State Prison
PULIDO, MICHAEL	05/24/1992	04/06/1994	16	San Mateo	Salinas Valley State Prison
FLORES, FABIAN	12/12/1992	06/18/1994	16	Riverside	Kern Valley State Prison
HER, CHA	04/09/1993	10/18/1994	16	San Joaquin	Pleasant Valley State Prison
KIRCHNER, KRISTOPHER	04/28/1993	11/08/1994	16	San Diego	Pelican Bay State Prison
SEIDEL, DAVID	11/26/1991	11/10/1994	16	San Bernardino	Centinel State Prison
RUSK, DANIEL	09/17/1993	07/06/1995	16	Solano	California State Prison, Corcoran
WARD, RAYMOND	10/14/1993	07/27/1995	17	Sacramento	Ironwood State Prison
DAVIS, MICHAEL	06/01/1993	07/21/1995	17	San Bernardino	Mule Creek State Prison
CURTIS, ELLIS	09/21/1993	08/10/1995	17	Sacramento	California State Prison, Solano
BONILLA, RENE	02/04/1992	08/02/1995	17	Los Angeles	Mule Creek State Prison
COOK, EDWARD	08/21/1994	09/22/1995	16	Kern	Mule Creek State Prison

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Estimates and Statistical Analysis Section
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Name	Offense Date	Sentence Begin Date	Age at Offense	County of Conviction	Institution
BIVENS, JAMES	10/29/1993	10/11/1995	17	Los Angeles	California State Prison, Los Angeles County
THOMPSON, MARIYA	04/15/1994	10/27/1995	16	Kern	Salinas Valley State Prison
PHIM, VIRET	01/11/1994	12/25/1995	17	Stanislaus	Ironwood State Prison
TATE, IRVIN	01/28/1993	12/28/1995	16	Los Angeles	Kern Valley State Prison
SHOWELL, FRANK	03/16/1993	01/05/1996	17	Los Angeles	California State Prison, Sacramento
CASTILLO, DUSTY	01/14/1993	01/23/1996	16	Los Angeles	California State Prison, Corcoran
SANCHEZ, LUIS	09/13/1994	05/20/2015	16	Fresno	California State Prison, Los Angeles County
LOPEZ, RAMON	09/13/1994	02/28/1996	17	Fresno	Mule Creek State Prison
JONES, ANTONIO	11/15/1994	02/28/1996	17	Los Angeles	California State Prison, Corcoran
BAZE, GARY	07/28/1995	04/08/1996	17	Los Angeles	Calipatria State Prison
RAMIREZ, ROBERT	06/09/1995	04/15/1996	17	Los Angeles	Centinela State Prison
NILAKOUT, THONGXAY	05/16/1994	04/26/1996	17	Riverside	Ironwood State Prison
DRAYTON, ROBERT	09/28/1995	06/05/1996	16	Sacramento	California State Prison, Solano
HERNANDEZ, LARRY	06/09/1995	06/17/1996	16	Los Angeles	California State Prison, Sacramento
WHITE, BOBBY	08/22/1995	06/19/1996	17	Los Angeles	Mule Creek State Prison
VELTZ, ARMANDO	03/02/1995	06/20/1996	17	Solano	Pelican Bay State Prison
HODGE, RICHARD	08/09/1993	07/24/1996	17	Los Angeles	California State Prison, Solano
READY, ISSACH	10/01/1994	07/29/1996	16	Sacramento	High Desert State Prison
MAEA, MAUTU	10/01/1993	07/31/1996	16	San Francisco	Pelican Bay State Prison
GOMEZ, LOUIS	11/11/1994	08/08/1996	16	Los Angeles	Pelican Bay State Prison
WILLIAMS, GARY	08/28/1994	08/22/1996	16	San Bernardino	North Kern State Prison
WILSON, DERRICK	08/22/1995	09/23/1996	17	Los Angeles	High Desert State Prison
DELUNA, DWAYNE	10/23/1994	10/17/1996	17	Sacramento	Kern Valley State Prison
JONES, JOHN	10/20/1995	10/21/1996	17	Los Angeles	California State Prison, Los Angeles County
OZAETA, JAIME	04/22/1995	11/12/1996	17	Los Angeles	Kern Valley State Prison
BANGES, RYAN	12/15/1992	11/22/1996	17	Riverside	High Desert State Prison
GOMEZ, ALEJANDRO	09/29/1995	11/21/1996	17	Fresno	Salinas Valley State Prison
JOHNSON, KENNY	12/02/1993	12/03/1996	16	Los Angeles	Kern Valley State Prison
BOUNPRASEUTH, BOUPHA	03/04/1995	12/05/1996	17	Los Angeles	Pleasant Valley State Prison
ASKEW, DAVID	11/18/1993	12/13/1996	16	Los Angeles	California State Prison, Los Angeles County
GARCIA, JUAN	06/18/1994	12/09/1996	17	Los Angeles	Kern Valley State Prison
GIBSON, CLIFTON	06/08/1994	12/26/1996	17	San Bernardino	California State Prison, Los Angeles County
COROTHERS, DONTE	12/26/1995	02/20/1997	17	San Diego	California Substance Abuse Treatment Facility
JAMES, JAWAD	02/02/1995	02/18/1997	16	Los Angeles	Ironwood State Prison
GUY, GLEN	06/07/1995	03/04/1997	17	San Bernardino	California State Prison, Sacramento
BRYANT, RITCH	11/25/1995	12/21/1999	16	Los Angeles	High Desert State Prison

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Name	Offense Date	Sentence Begin Date	Age at Offense	County of Conviction	Institution
BRASH, LOUIE	05/13/1995	04/17/1997	16	Los Angeles	California State Prison, Los Angeles County
OSORIO, FRANK	11/21/1995	04/30/1997	17	Sacramento	Ironwood State Prison
HAWKINS, TRAVIS	08/27/1994	04/23/1997	16	Riverside	Pelican Bay State Prison
GALLEGOS, ASHLEY	08/27/1994	04/25/1997	17	Riverside	Centinel State Prison
BERG, JASON	05/23/1996	07/08/1997	17	San Diego	Kern Valley State Prison
WALLACE, JILES	11/16/1994	08/04/1997	17	Sacramento	High Desert State Prison
SANCHEZ, EDWARD	01/24/1994	08/20/1997	16	Sacramento	California State Prison, Sacramento
VIKTOR, JARRED	09/23/1995	11/17/1997	16	San Diego	Salinas Valley State Prison
SALINAS, JOEL	11/17/1996	08/16/1999	17	Los Angeles	California Correctional Institution
JONES, ERIK	09/12/1996	02/06/1998	17	Los Angeles	Mule Creek State Prison
MORALES, ROBERT	06/30/1995	11/06/2008	17	Los Angeles	Salinas Valley State Prison
TZUL, DAMIAN	07/27/1992	03/11/1998	16	Los Angeles	Pelican Bay State Prison
COTTE, LAWRENCE	11/14/1996	03/12/1998	16	Los Angeles	High Desert State Prison
DREBERT, MICHAEL	12/09/1995	03/19/1998	17	Los Angeles	California Correctional Institution
CAMARENA, ERIC	06/29/1996	04/03/1998	17	Los Angeles	Centinela State Prison
LOPEZ, FERNANDO	10/11/1991	04/16/1998	16	Los Angeles	Kern Valley State Prison
SHAEED, HANEEF	03/12/1994	07/02/1998	16	San Diego	Ironwood State Prison
RAMAZZINI, NATHAN	07/15/1997	07/24/1998	16	Colusa	High Desert State Prison
HARRING, DAVID	11/18/1997	08/07/1998	17	Kern	Kern Valley State Prison
JOSHUA, EGNACIO	06/28/1997	08/13/1998	17	San Joaquin	California State Prison, Corcoran
RODRIGUEZ, ROMAN	10/06/1996	09/04/1998	17	Orange	Centinela State Prison
YSLAS, MICHAEL	10/06/1996	09/04/1998	17	Orange	RJ Donovan Correctional Facility
WINN, SAMONT	09/23/1997	09/02/1998	17	Los Angeles	California Substance Abuse Treatment Facility
SECREASE, SHANNON	09/15/1996	09/24/1998	17	Solano	California State Prison, Solano
LOPEZ, RICARDO	04/12/1996	10/07/1998	17	Los Angeles	Salinas Valley State Prison
LEOPOLD, CARL	12/01/1996	10/19/1998	17	Alameda	California State Prison, Solano
NEVAREZ, ANDREW	07/23/1997	11/02/1998	17	Kings	Pleasant Valley State Prison
JIMENEZ, RAYMOND	07/23/1997	11/02/1998	17	Kings	Salinas Valley State Prison
RUIZ, EDGARDO	07/29/1995	12/23/1998	17	Santa Clara	Pleasant Valley State Prison
AYALA, ROY	07/26/1997	01/08/1999	17	Stanislaus	Mule Creek State Prison
MCUFFY, MAJURA	06/17/1995	01/06/1999	16	Los Angeles	California State Prison, Los Angeles County
DREYER, HENRY	01/29/1998	03/25/1999	17	San Diego	Salinas Valley State Prison
WHITLOW, DANIEL	01/29/1998	02/11/2003	17	San Diego	California State Prison, Los Angeles County
TOSCANO, JUAN	06/11/1998	03/29/1998	17	Los Angeles	Calipatria State Prison
PALENCIA, BENJAMIN	11/23/1997	03/25/1999	17	Los Angeles	Kern Valley State Prison
SALAZAR, MAGDALENO	11/06/1991	03/22/1999	17	Los Angeles	San Quentin State Prison

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Data Analysis Unit
Estimates and Statistical Analysis Section
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Name	Offense Date	Sentence Begin Date	Age at Offense	County of Conviction	Institution
WILLOVER, NORMAN	01/31/1998	04/19/1999	17	Monterey	North Kern State Prison
NUTH, KIMORAN	08/01/1995	04/29/1999	16	Los Angeles	Centinel State Prison
MONCADO, CHRISTOPHER	07/29/1995	05/19/1999	17	Los Angeles	California State Prison, Sacramento
RUELAS, ANGEL	09/19/1997	07/15/2013	17	Monterey	Pleasant Valley State Prison
BRAZILE, BRIAN	07/22/1997	07/29/1999	16	San Bernardino	California State Prison, Los Angeles County
PADILLA, MARIO	01/13/1998	08/02/1999	16	Los Angeles	Wasco State Prison
RATNEY, CLYDE	10/31/1996	08/25/1999	16	Contra Costa	North Kern State Prison
MCINNIS, RAYMOND	03/04/1998	09/16/1999	16	Los Angeles	Centinel State Prison
THOMPSON, BERTRAND	07/12/1995	12/29/1999	17	San Joaquin	Ironwood State Prison
CHAVEZ, MARCOS	11/29/1997	09/16/1999	17	Tulare	Pelican Bay State Prison
BARROSO, DENNIS	09/30/1998	09/21/1999	16	Los Angeles	Pelican Bay State Prison
GUZMAN, JAIME	11/23/1997	10/14/1999	16	Tulare	Salinas Valley State Prison
CASTILLE, CLEMETH	11/11/1996	01/03/2000	17	Alameda	California State Prison, Solano
SHIELDS, RAMON	11/11/1996	01/03/2000	17	Alameda	Deuel Vocational Institution
JOHNSON, MARCUS	06/12/1997	10/19/2000	16	Los Angeles	California State Prison, Corcoran
BRACAMONTES, CHRISTIAN	05/09/1998	02/18/2000	16	Riverside	High Desert State Prison
PINENTEL, FRANCISCO	07/21/1999	03/17/2000	17	Kern	Kern Valley State Prison
ROWE, ELIJAH	04/22/1999	05/18/2000	17	San Diego	Kern Valley State Prison
HERNANDEZ, THOMAS	02/21/1999	07/19/2000	17	Sacramento	California State Prison, Sacramento
BARNES, ROMAN	01/05/1999	09/28/2000	16	San Bernardino	Centinel State Prison
WATSON, KHARY	10/01/1994	12/28/2009	17	San Diego	RJ Donovan Correctional Facility
SAWNS, ALEXANDER	04/02/1997	02/06/2001	16	San Bernardino	Centinel State Prison
VALDEZ, MARIANO	11/04/1998	02/09/2001	17	Riverside	California State Prison, Corcoran
JOHNSTON, JASON	02/19/1999	02/09/2001	17	Riverside	Centinel State Prison
SNYDER, LEE	03/24/1998	03/21/2001	17	Contra Costa	High Desert State Prison
ROGERS, TONY	04/20/1996	03/29/2001	17	San Bernardino	California State Prison, Los Angeles County
ARANDA, ALFONSO	06/20/1999	04/23/2001	17	Los Angeles	California State Prison, Los Angeles County
HAYGOOD, DOEN	12/07/1999	05/21/2001	16	San Diego	RJ Donovan Correctional Facility
ZAVALA, JOSE	06/09/1999	05/21/2001	17	Los Angeles	Calipatria State Prison
HARPER, JARRETT	01/08/2000	05/23/2001	17	Los Angeles	California State Prison, Los Angeles County
JOHNSON, TARAY	07/27/1998	06/27/2001	17	Los Angeles	Calipatria State Prison
ROBINSON, TRAYON	04/14/2000	02/20/2002	17	Los Angeles	Ironwood State Prison
CARROLL, MAURICE	05/16/2000	04/17/2002	17	Los Angeles	Ironwood State Prison
GAINES, JOE	07/21/2001	07/26/2002	17	Los Angeles	Salinas Valley State Prison
GOMEZ, RICARDO	02/03/2001	08/08/2002	17	Los Angeles	Ironwood State Prison
CERNAS, HUGO	10/05/2001	04/27/2005	17	Fresno	Salinas Valley State Prison

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Data Analysis Unit
 Estimates and Statistical Analysis Section
 Offender Information Services Branch

Department of Corrections and Rehabilitation
 State of California
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Name	Offense Date	Sentence Begin Date	Age at Offense	County of Conviction	Institution
HANSEN, BRAE	06/19/2007	07/08/2009	17	San Diego	Central California Women's Facility

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