IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re KRISTOPHER KIRCHNER on Habeas Corpus	No.: S233508 No.: D067920 (Super. Ct. Nos. HC21804, CRN26291)

MOTION FOR JUDICIAL NOTICE

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

--oo0O0oo--

RANDY MIZE, Chief Deputy
Office of the Primary Public Defender
County of San Diego
ABBEY J. NOEL
State Bar #239258
Deputy Public Defender
250 East Main Street, Sixth Floor
El Cajon, CA 92020
(619) 441-4804

Attorneys for Petitioner
KRISTOPHER KIRCHNER

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re KRISTOPHER KIRCHNER on Habeas Corpus	No.: S233508 No.: D067920 (Super. Ct. Nos. HC21804, CRN26291)

MOTION FOR JUDICIAL NOTICE

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

--ooOOoo--

RANDY MIZE, Chief Deputy
Office of the Primary Public Defender
County of San Diego
ABBEY J. NOEL
State Bar #239258
Deputy Public Defender
250 East Main Street, Sixth Floor
El Cajon, CA 92020
(619) 441-4804

Attorneys for Petitioner
KRISTOPHER KIRCHNER

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re KRISTOPHER KIRCHNER on Habeas Corpus	No.: S233508 Ct. App. No.: D067920 (Super. Ct. Nos. HC21804, CRN26291) **MOTION FOR JUDICIAL NOTICE**

Pursuant to Rules 8.520(g) and 8.252(a) of the California Rules of Court, and Evidence Code sections 452 and 459, Petitioner hereby moves this Court for an order to take judicial notice of the following documents:

Senate Committee on Public Safety, Analysis of Senate Bill No. 9 (2011-2012 Reg. Sess.) April 4, 2011, a true and correct copy of which is attached hereto as Exhibit A.

Assembly Committee on Appropriations, Analysis of Sen. Bill No. 9 (2011-2012 Reg. Sess.) August 15, 2011, a true and correct copy of which is attached hereto as Exhibit B.

Senate Com. On Appropriations, Fiscal Summary of Sen. Bill No. 9

(2011-2012 Reg. Sess.) May 26, 2011, a true and correct copy of which is attached hereto as Exhibit C.

Assembly Committee on Public Safety, Analysis of Sen. Bill No. 9 (2011-2012 Reg. Sess.) May 27, 2011, a true and correct copy of which is attached hereto as Exhibit D.

Senate Bill No. 9 enacted Penal Code section 1170, subdivision (d)(2). Judicial notice of the legislative committee analysis of Senate Bill No. 9 is relevant because the parties differ in their interpretations of whether it provides an adequate remedy at law pursuant to *Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 2455] as interpreted by *Montgomery v. Louisiana* (2016) ___U.S.___ [136 S.Ct. 718]. To the extent that this difference creates ambiguity regarding the meaning and effect of section 1170, subdivision (d)(2), legislative history may be considered in determining the correct interpretation based on the intent of the Legislature.

The matter to be noticed was not presented to the trial court or the court of appeal.

The matter to be noticed relates to proceedings occurring after the order of judgment that is the subject of the petition.

The matter to be noticed is not in the record. Copies of the matter to be noticed have been served and filed as attachments to this motion.

This motion is based on the accompanying supporting memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

This motion seeks judicial notice of analysis of Senate Bill No. 9 by legislative committees. Judicial notice is the appropriate procedure for bringing this matter before the Court. (Evid. Code §§ 452(c), 459.) This item is relevant to the petition because the proper interpretation of the scope of Penal Code section 1170, subdivision (d)(2) is at issue.

The Respondent claims that Penal Code section 1170, subdivision (d)(2) presents an adequate remedy at law for juveniles serving an unlawful sentence as defined by *Miller* and *Montgomery*. However, Petitioner maintains that it does not, nor was it intended to address the concerns of *Miller,* much less *Montgomery*. To the extent that the conflicting postitions render section 1170, subdivision (d)(2) ambiguous, legislative history may be considered. (*That v. Alders Maintenance Ass'n* (2012) 206 Cal. App. 4th 1419, 1428.)

Judicially noticeable legislative history includes legislative committee reports and analyses. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal. App. 4th 26, 32; Evid. Code § 452.) However, the court need not determine whether a statute is ambiguous in granting a motion for judicial notice of legislative history; this is an issue for the court in ruling on the merits. (*Id.* at p. 30.) True and correct copies of analyses of Senate Bill No. 9 prepared for legislative committee are attached hereto as Exhibit A-D.

For the foregoing reasons, Petitioner, Kristopher Kirchner, respectfully requests that the Court grant this motion for judicial notice.

Dated: September 7, 2016

Respectfully submitted,

RANDY MIZE
Primary Public Defender

By: /s/
ABBEY J. NOEL
Deputy Public Defender

Attorneys for Petitioner
KRISTOPHER KIRCHNER

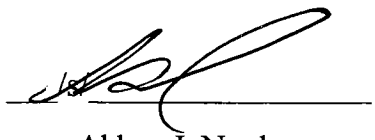
DECLARATION OF ABBEY J. NOEL

I, Abbey J. Noel, declare as follows:

1. I am the attorney of record for Mr. Kristopher Kirchner, Petitioner.
2. I received electronic copies of Exhibits A-D from counsel for Human Rights Watch, Steven S. Kimball.
3. I am informed and believe that attached Exhibit A is a true and correct copy of Sen. Com. On Public Safety, Analysis of Senate Bill No. 9 (Reg. Sess. 2011-2012) April 4, 2011.
4. I am informed and believe that attached Exhibit B is a true and correct copy of Assembly Committee on Appropriations, Analysis of Sen. Bill No. 9 (2011-2012 Reg. Sess.) August 15, 2011.
5. I am informed and believe that attached Exhibit C is a true and correct copy of Senate Comm. on Appropriations, Fiscal Summary of Sen. Bill No. 9 (2011-2012 Reg. Sess.) May 26, 2011.
6. I am informed and believe that attached Exhibit D is a true and correct copy of Assembly Committee on Public Safety, Analysis of Sen. Bill No. 9 (2011-2012 Reg. Sess.) May 27, 2011.

I declare under the penalty of perjury under the laws of the State of California that I am informed and believe that the foregoing is true and correct. Executed at San Diego, California.

September 7, 2016



Abbey J. Noel

PROPOSED ORDER

The motion of Petitioner for judicial notice is granted. The Court takes judicial notice of Senate Committee on Public Safety, Analysis of Senate Bill No. 9 (2011-2012 Reg. Sess.) April 5, 2011; Assembly Committee on Appropriations, Analysis of Sen. Bill No. 9 (2011-2012 Reg. Sess.) August 15, 2011; Senate Com. On Appropriations, Fiscal Summary of Sen. Bill No. 9 (2011-2012 Reg. Sess.) May 26, 2011; Assembly Committee on Public Safety, Analysis of Sen. Bill No. 9 (2011-2012 Reg. Sess.) May 27, 2011.

Date: _____

_____
Chief Justice

EXHIBIT A

SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2011-2012 Regular Session

S B 9

SB 9 (Yee)
As Introduced December 6, 2010
Hearing date: April 5, 2011
Penal Code
MK:mc

SENTENCING

HISTORY

Source: Human Rights Watch; National Center for Youth Law

Prior Legislation: SB 399 (Yee) – failed; Assembly Floor 2010
SB 999 (Yee) – 2008; died on the Senate floor
SB 1223 (Kuehl) – 2004; died on Assembly Suspense

Support: Advancement Project; American Civil Liberties Union; American Federation of State, County and Municipal Employees; American Probation and Parole Association; American Psychiatric Association; Bar Association of San Francisco; Books Not Bars, Ella Baker Center for Human Rights; Buddhist Peace Fellowship; California Attorneys for Criminal Justice; California Catholic Conference; California Church IMPACT; California Coalition for Women Prisoners; California Communities United Institute; California National Organization for Women; California Public Defenders Association; California Psychiatric Association; Californians United for Responsible Budget; Campaign for the Fair Sentencing of Youth; Center for Juvenile Law and Policy, Loyola Law School; Center on Juvenile & Criminal Justice; Christy L. Fraser, A Law Corporation – Minor Differences, a film; Child Welfare League of America; Children's Advocacy Institute; Children's Defense Fund; Commonweal; Disability Rights Legal Center; Everychild Foundation (Los Angeles); Equal Justice Initiative; Feminist Majority and National Center for Women and Policing; Friends Committee on Legislation of California; Hayward Burns Institute; Healing Justice Coalition; Human Rights Advocates; John Burton Foundation for Children Without Homes; Just Detention Institute; Justice Now; Justice Policy Institute; Juvenile Law Center; Law Office of the Alternate Public Defender for Los Angeles County; Legal Defense Fund; Legal Services for Children; Legal Services for Prisoners with Children; Life Support Alliance,

(More)

Rancho Cordova; Lutheran Office of Public Policy – California; NAACP Legal Defense and Educational Fund; National African American Drug Policy Coalition; National Juvenile Justice Network; National Offices of the United Church of Christ; Office of Restorative Justice of the Archdiocese of Los Angeles; Pacific Juvenile Defender Center; Prison Law Office; Progressive Christians Uniting; Public Counsel Law Center; Sacred Heart Church, Rancho Cucamonga; Sentencing Project; Sisters of St. Joseph of Orange; St. Mark Presbyterian Church, Newport Beach, Peace and Justice Commission; United Church of Christ National Justice and Witness Ministries; United Methodist Church, California-Nevada Conference; University of San Francisco School of Law, Center for Law and Global Justice; University of Southern California, Gould School of Law, The Post-Conviction Justice Project; Youth Justice Coalition; Youth Law Center; Dolores Mission Catholic Church, Los Angeles – 7 individuals; Professors from law schools and universities throughout California and the United States – 150 individuals; thousands of other individuals

Opposition: Association for Los Angeles Deputy Sheriffs; California District Attorneys Association; Crime Victims United of California; Crime Victims Action Alliance; Los Angeles Police Protective League; National Organization of Victims of Juvenile Lifers; Office of the District Attorney of Sacramento County, Jan Scully; Peace Officers Research Association of California

KEY ISSUE

SHOULD A PRISONER WHO WAS UNDER 18 YEARS OF AGE AT THE TIME OF COMMITTING AN OFFENSE FOR WHICH THE PRISONER WAS SENTENCED TO LIFE WITHOUT THE POSSIBILITY OF PAROLE BE PERMITTED TO SUBMIT A PETITION FOR RECALL AND RE-SENTENCING TO THE SENTENCING COURT?

PURPOSE

The purpose of this bill is to authorize a prisoner who was under 18 years of age at the time of committing an offense for which the prisoner was sentenced to life without the possibility of parole (LWOP) to submit a petition for recall and re-sentencing to the sentencing court, as specified.

(More)

Under current law, minors age 14 and older can be subject to prosecution in adult criminal court depending upon their alleged offense and their criminal offense history. (Welfare and Institutions Code ("WIC") §§ 602(b); 707).) Current law contains three discrete mechanisms for remanding minors to adult criminal court for prosecution:

- Statutory or legislative waiver requires that minors 14 years of age or older who are alleged to have committed specified murder and sex offenses be prosecuted in adult criminal court (i.e., the juvenile court has no jurisdiction over these cases) (WIC § 602 (a));
- Prosecutorial waiver gives prosecutors the discretion to file cases against minors 14 and older, depending upon their age, alleged offense and offense history, in juvenile or adult criminal court (WIC § 707 (d)); and
- Judicial waiver gives courts the discretion to evaluate whether a minor is unfit for juvenile court based on specified criteria and applicable rebuttable presumptions. (WIC § 707 (a), (b) and (c).)

Under current law, if a prosecution is commenced against a minor as a criminal case as a "direct file" case – that is, through either statutory waiver or prosecutorial waiver – and the minor is convicted of a "direct file" offense, the minor is required to be sentenced as an adult. (Penal Code § 1170.17 (a).) Minors who have been convicted in criminal court of lesser offenses for which they still would have been eligible for transfer to adult court may be able to seek a juvenile disposition instead of a criminal sentence through a post-conviction fitness proceeding. (Penal Code § 1170.17 (b) and (c).) Minors who are convicted in adult criminal court of offenses for which they would not have been eligible for adult court prosecution had a petition first been filed in juvenile court are subject to a juvenile disposition. (Penal Code §§ 1170.17 (d); 1170.19.)

Under current law, these post-conviction proceedings are not available to minors who are convicted after they have been remanded to criminal court from the juvenile court pursuant to Welfare and Institutions Code Section 707 (a) or (c).

Existing law provides that notwithstanding any other law, the death penalty shall not be imposed upon any person who is under the age of 18 at the time of the commission of the crime. The burden of proof as to the age of such person shall be upon the defendant. (Penal Code § 190.5 (a).)

Existing law provides 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, 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 in confinement in the state prison for life without the possibility of parole (LWOP) or, at the discretion of the court, 25 years to life. (Penal Code § 190.5 (b).)

Existing law provides for sentencing which includes a term of imprisonment in the state prison, as specified. Existing law provides that "(n)othing in this article shall affect any provision of law

(More)

that imposes the death penalty, that authorizes or restricts the granting of probation or suspending the execution or imposition of sentence, or expressly provides for imprisonment in the state prison for life." (Penal Code § 1170.)

This bill provides that when a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for LWOP has served at least 10 years of that sentence, the defendant may submit to the sentencing court a petition for recall and re-sentencing, provided that defendants who have served 10 or more years as of January 1, 2012, shall not be permitted to submit a petition for recall and re-sentencing pursuant to this subdivision until they have served 15 years.

This bill provides that defendants who have served 15 or more years, but less than 25 years as of January 1, 2010, be permitted to submit a petition for recall and re-sentencing as follows:

- Those defendants who entered custody prior to July 1, 1993, may submit a petition in 2012.
- Those defendants who entered custody on or after July 1, 1993, but prior to January 1, 1994, may submit a petition in 2013.
- Those defendants who entered custody on or after January 1, 1994, but prior to July 1, 1994, may submit a petition in 2014.
- Those defendants who entered custody on or after July 1, 1994, but prior to January 1, 1995, may submit a petition in 2015.

This bill provides that the defendant serve the original petition with the sentencing court and a copy of the petition shall be served on the agency that prosecuted the case.

This bill provides that the petition shall include the defendant's statement that he or she was under 18 years of age at the time of the crime, was sentenced to LWOP, and that one of the following was true:

- The defendant was convicted pursuant to felony murder or aiding and abetting murder.
- The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the sentence is being considered for recall.
- The defendant committed the offense with at least one adult codefendant.
- The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or taking action that demonstrates the presence of remorse.

This bill provides that if any of the information required to petition the court for a hearing is missing from the petition, or if proof of service on the prosecuting agency is not provided, the

(More)

court shall return the petition to the person and advise him or her that the matter cannot be considered without the missing information.

This bill states a reply to the petition, if any, shall be filed with the court within 60 days of the date on which the prosecuting agency is served with the motion, unless a continuance is granted for good cause.

This bill provides that if the court finds by a preponderance of the evidence that the statements in the petition are true, or if no reply to the petition is filed, the court shall hold a hearing to consider whether to recall the sentence and commitment previously ordered and to re-sentence the defendant in the same manner as if the defendant had not been previously sentenced, provided that the new sentence, if any, is not greater than the initial sentence. Victims, or victim family members if the victim is deceased, shall retain the rights to participate in the hearing.

This bill states that the factors that the court may consider when determining whether to recall and resentence include, but are not limited to:

- The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law.
- The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the sentence is being considered for recall.
- The defendant committed the offense with at least one adult codefendant.
- Prior to the offense for which the sentence is being considered for recall, the defendant had insufficient adult support or supervision and had suffered from psychological or physical trauma, or significant stress.
- The defendant suffers from cognitive limitations due to mental illness, developmental disabilities, or other factors that did not constitute a defense, but influenced the defendant's involvement in the offense.
- The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or showing evidence of remorse.
- The defendant has maintained family ties or connections with others through letter writing, calls, or visits, or has eliminated contact with individuals outside of prison who are currently involved with crime.
- The defendant has had no disciplinary actions for violent activities in the last five years in which the defendant was determined to be the aggressor.

This bill states the court shall have the discretion to recall the sentence and commitment previously ordered and to re-sentence the defendant in the same manner as if the defendant had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence.

(More)

This bill mandates the court, in exercising its discretion, must consider the criteria listed above. Victims, or victim family members if the victim is deceased, shall be notified of the re-sentencing hearing and shall retain their rights to participate in the hearing.

This bill states that if the sentence is not recalled, the defendant may submit another petition for recall and re-sentencing to the sentencing court when the defendant has been committed to the custody of the department for at least 15 years, or if not granted, after 20 years, or if not granted, after 24 years, and a final petition may be submitted and the response to that petition shall be determined during the 25th year of the defendant's sentence.

This bill provides that in addition to the criteria specified above, the court may consider any other criteria that the court deems relevant to its decision, so long as the court identifies them on the record, provides a statement of reasons for adopting them, and states why the defendant does or does not satisfy the criteria.

This bill states that the provisions of this bill shall apply retroactively.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the last several years, severe overcrowding in California's prisons has been the focus of evolving and expensive litigation. As these cases have progressed, prison conditions have continued to be assailed, and the scrutiny of the federal courts over California's prisons has intensified.

On June 30, 2005, in a class action lawsuit filed four years earlier, the United States District Court for the Northern District of California established a Receivership to take control of the delivery of medical services to all California state prisoners confined by the California Department of Corrections and Rehabilitation ("CDCR"). In December of 2006, plaintiffs in two federal lawsuits against CDCR sought a court-ordered limit on the prison population pursuant to the federal Prison Litigation Reform Act. On January 12, 2010, a three-judge federal panel issued an order requiring California to reduce its inmate population to 137.5 percent of design capacity -- a reduction at that time of roughly 40,000 inmates -- within two years. The court stayed implementation of its ruling pending the state's appeal to the U.S. Supreme Court.

On Monday, June 14, 2010, the U.S. Supreme Court agreed to hear the state's appeal of this order and, on Tuesday, November 30, 2010, the Court heard oral arguments. A decision is expected as early as this spring.

In response to the unresolved prison capacity crisis, in early 2007 the Senate Committee on Public Safety began holding legislative proposals which could further exacerbate prison overcrowding through new or expanded felony prosecutions.

This bill does not appear to aggravate the prison overcrowding crisis described above.

(More)

COMMENTS

1. Need for This Bill

According to the author:

> Under existing California law, youth under the age of 18 years old are sentenced to life in prison without the possibility of parole. There is no system of review for these cases. The use of this sentence for juveniles 1) ignores neuroscience and well-accepted understandings of adolescent development; 2) is a practice that is in violation of international law and out of step with international norms; and 3) in California, it is a policy that is applied unjustly. Youth are different from adults. While they should be held accountable for their actions, even those who commit serious crimes should have the opportunity to prove they have matured and changed.

2. Convicted Juveniles in State Institutions

The number of adult inmates currently in prison who were convicted as minors is not known. According to data from the Division of Juvenile Justice (DJJ), as of December 31, 2008, there were 152 minors convicted in adult court housed in facilities operated by DJJ.

According to the federal Office of Juvenile Justice and Delinquency Prevention, nationwide data indicates the number of delinquency cases judicially waived to criminal court grew 70% between 1985 and 1994 and then declined 54% through 2000. Between 2001 and 2005, the number of judicially waived delinquency cases increased 7%.[1] In 2007, 583 minors were reported to the Department of Justice as having been convicted in adult criminal court; of those, 302 were sentenced to prison or the Division of Juvenile Facilities.[2]

3. Trying Juveniles in Adult Court

Throughout the 1990s, California's juvenile law was altered to expand the scope of juvenile offenders who would be eligible for prosecution in adult criminal court.[3] These changes culminated with the passage of Proposition 21 on March 7, 2000, which expanded the kinds of juvenile cases outside the scope of the juvenile court (thus requiring prosecution in criminal court), and made it procedurally easier for prosecutors to pursue criminal charges against minors 14 years of age and older in criminal court.[4]

---

[1] *See online Statistical Briefing Book, Juveniles in Court* (http://ojjdp.ncjrs.org/ojstatbb/njcda/pdf/jcs2005.pdf.)
[2] *See online Juvenile Justice in California 2007* (http://ag.ca.gov/cjsc/publications/misc/jj07/preface.pdf.)
[3] *See, e.g.*, AB 560 (Peace) (Ch. 453, Stats. 1994) (lowered the minimum age at which minors would be eligible for prosecution in adult court from age 16 to 14); SB 334 (Alpert) (Ch. 996, Stats. 1999) (removed juvenile court discretion for special circumstance murder or sex crimes alleged to be committed by a minor 16 or older who has felony priors, as specified).
[4] These mechanisms are described above, in the *Purpose* section of this analysis, and are set forth in Welfare and Institutions Code §§ 602 (b) and 707.

(More)

The movement to prosecute a broader range of juvenile offenses in criminal court has been a national phenomenon. As explained in one legal commentary:

> For over two decades, legislatures across the nation have enacted a variety of laws and policies to criminalize delinquency by relocating adolescent offenders from the juvenile to the adult court. More recently, the U.S. Senate passed legislation to "get tough" on juvenile crime by promoting the transfer of adolescents to criminal court, and providing funds to facilitate state efforts to do the same. This legislation threatens to accelerate a trend that began with the passage of New York State's Juvenile Offender Law in 1978 and continues today even as juvenile crime rates have fallen dramatically. Since 1990, nearly every state and the federal system have expanded the use of adult adjudication and punishment for adolescent offenders. Some states have expanded the number of cases eligible for judicial waiver, and still others have reassigned the burden of proof for waiver hearings from the prosecutor (seeking to waive a case to criminal court) to the defense counsel (seeking to deny waiver). Some state legislatures have excluded specific offenses from juvenile court jurisdiction. Other states permit prosecutorial choice of forum between concurrent jurisdictions.[5]

4. Adolescent Development and Legal Culpability

The creation of the modern juvenile court, now over 100 years ago, was rooted in the idea that adolescents, who are not fully developed or mature, are less culpable than adults.[6] As explained below, this viewpoint is not completely compatible with the "adult crime for adult time" philosophy that emerged in the 1990s:

> The common law assumed that adolescents are less culpable than adults, and the juvenile court institutionalized this notion both jurisprudentially and statutorily. That is, the juvenile court offered a punishment discount for adolescents punished as juveniles, relative to the punishment given to adults. This discount is rooted in the belief that serious crimes committed by young offenders may reflect developmental deficiencies in autonomy and social judgment, suggesting a reduction in their culpability and, in turn, their punishment liability. . . .

---

[5] *Symposium: Children, Crime, and Consequences: Juvenile Justice in America: Punishment, Proportionality, and Jurisdictional Transfer of Adolescent Offenders: A Test of the Leniency Gap Hypothesis* (Aaron Kupchik, Jeffrey Fagan, and Akiva Liberman) (14 Stan. L. & Pol'y Rev 57 (2003) (footnotes omitted).)

[6] *See* Jill M. Ward, *Deterrence's Difficulty Magnified: The Importance of Adolescent Development in Assessing the Deterrence Value of Transferring Juveniles to Adult Court*, 7 UC Davis Juv. L. & Pol'y 253, 257 (Summer 2003) ("Embracing the recognition that children are different from adults, the first separate court for juveniles was established in the United States in 1899. The court's key principles espoused the following four ideas: (1) children have different needs than adults and need adult protection and guidance; (2) children have constitutional human rights and need adult involvement to ensure those rights; (3) almost all children can be rehabilitated; and (4) children are everyone's responsibility. This rehabilitative approach to the juvenile court grew rapidly, and by 1925, forty-six states, three territories and the District of Columbia had created separate juvenile courts." (footnotes omitted))

(More)

> Recent developments in transfer law often express the preference of penal proportionality over the common law assumptions of reduced culpability of adolescent offenders. In this view, the traditional preoccupation with rehabilitation in the juvenile court, with its limitations on punishment opportunities, deprecates the moral seriousness of crimes and offers inadequate retribution. Proponents of harsher punishments for adolescents argue that punishments that are disproportionately lenient compared to the severity of the adjudicated offense also undermine both the specific and general deterrent effects of legal sanctions.
>
> These developments reflect the presumption in modern juvenile justice law that those who commit crimes and are remanded to the criminal court, or even those who are charged with such crimes, are fully culpable for their acts. This legal threshold clashes with emerging empirical evidence on the immaturity of adolescents with respect to both their ability to make informed and nuanced judgments about their behavior, as well as their moral development. By ignoring these indicia of reduced culpability, the new transfer or waiver policies offend the common law doctrine of incapacity.[7]

Researchers in the science of human development, however, generally agree that from a developmental standpoint, an adolescent is not an adult:

> The evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable . . . Indeed, age 21 or 22 would be closer to the "biological" age of maturity.[8]

Some scholars argue that the unique nature of adolescent development affect considerations of both culpability and deterrence when measuring the value and suitability of imposing adult criminal sanctions on juveniles:

> The culpability analysis of juvenile impulsiveness and risk-taking implicitly embraces the developmental notion that some forms of adolescent behavior are the result of a not yet fully formed ability to control impulses. In effect, young people do not have the same capacity for self-control as adults and this should be considered a mitigating factor when assessing culpability. Similarly, the proclivity of adolescents to take risks and act on a whim skews the traditional deterrence calculus for the adolescent actor. Adolescents are not likely to recognize all possible options and therefore, their preference prioritization may

---

[7] *Id.*
[8] *Adolescent Brain Development and Legal Culpability*, American Bar Assn. Criminal Justice Section, Juvenile Justice Center (Winter 2003), quoting Dr. Ruben C. Gur, neuropsychologist and Professor at the University of Pennsylvania.

(More)

be completely tilted toward outcomes that they expect will provide immediate gratification but that do not actually maximize their utility.[9]

5. Murder with Special Circumstances

Only a juvenile convicted of first-degree murder with special circumstances, as specified, may be sentenced to a term of LWOP. First-degree murder is defined as all murder perpetrated by means of a destructive device or explosive; a weapon of mass destruction; knowing use of ammunition designed primarily to penetrate metal or armor; poison; lying in wait; torture; or by any other kind of willful, deliberate, and premeditated killing; or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking; or any act punishable as a violent sex offense, as specified; or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death. (Penal Code § 189.)

One of the enumerated special circumstances must be shown in addition to the elements of first-degree murder in order to sentence a defendant to a term of LWOP. Special circumstances include intentional murder carried out for financial gain; the defendant has a previous conviction for murder; multiple charges of murder in the same case; murder committed by means of a destructive device; murder committed for the purpose of avoiding arrest or to perpetrate an escape from custody; murder of a peace officer, firefighter or federal law enforcement officer, as specified; murder for the purposes of silencing or retaliating against a witness; murder of a prosecutor, judge or juror in an attempt to prevent the performance of official duties; the murder is especially heinous, as specified; the defendant committed the murder while lying in wait; the victim was killed because of his or her race, color, religion, nationality, or country of origin; the murder was committed while the defendant was engaged in a felony, as specified; the murder involved torture; the victim was murdered by poison; the defendant committed the murder by discharging a firearm from vehicle, and; the defendant committed murder as an active participant in a criminal street gang and the murder was carried out for the benefit of the gang. (Penal Code § 190.2(a)(1) to (22).)

In 2005, the United States Supreme Court ruled persons who were under the age of 18 at the time of the offense are ineligible for the death penalty. (*Roper vs. Simmons* (2005) 543 U.S. 551.) Penal Code Section 190.5 codified the holding of *Roper* and stated the penalty for a person 16 to 18 years of age convicted of first-degree murder with special circumstances is either LWOP or 25-years-to-life. (Penal Code §190.5(b).)

6. Process to Recall Sentence

This bill sets up a process for a person who was sentenced as a juvenile to LWOP to petition the sentencing court to recall the sentence. The person must allege specified facts in the petition and

[9] Ward, *supra*, note 6, at 267 (footnotes omitted).

serve the petition on the agency that prosecuted the case. If the court finds the facts to be true by preponderance, the court shall order a hearing to consider the recall of the sentence. Victim's family members retain the right to be heard in the hearing. The bill specifies what the court shall consider when determining whether to recall the sentence. The court has the discretion to recall and re-sentence the defendant in the same manner as the original sentencing court. If the petition is denied, the person can re-petition once every five years until their 25th year of custody.

7. Support

Human Rights Watch supports this "modest and narrowly focused piece of legislation" stating:

> First, the sentence of life without parole was created for the worst criminal offenders, who are deemed to have no possibility of rehabilitation. In Roper v. Simmons, 543 U.S. 551, 561 (2005), the US Supreme Court found that the differences between youth and adults render suspect any conclusion that a youth falls among the worst offenders. Neuroscience reveals that the process of cognitive brain development, including the formation of impulse control and decision-making skills, continues into early adulthood-well beyond age 18. The fact that juveniles are still developing their identities and abilities to think and plan ahead, the Court found, means that even a heinous crime committed by a juvenile is not "evidence of an irretrievably depraved character."
>
> Moreover in California, life without parole is not reserved for youth who commit the worst crimes or who show signs of being irredeemable criminals. An estimated 45 percent of California youth sentenced to life without parole for involvement in murder did not actually kill the victim. Many were convicted of felony murder or for aiding and abetting because they acted as lookouts or participated in another felony during which the murder unexpected occurred. In addition, in many cases California has treated the youth worse than similarly-situated adult offenders.
>
> ****
>
> Second, we are deeply concerned that racial discrimination enters into the determination of which youth serve life without parole sentences, and which youth enjoy the possibility of release. California's sentencing of black youth to life without parole reveals the worst racial disparities of any state in the nation.
>
> ****
>
> Third, international law requires youth under age 18 to be treated differently than adults when accused of a crime. Criminal systems must take into account a child or youth's age, and promote the child's reintegration and constructive role in society. Life sentences are the antithesis of this mandate.
>
> ****

(More)

Passage of this bill would help bring California into compliance with international law and standards of justice. The bill recognizes that youth are different from adults and requires opportunities for rehabilitation that reflect their unique ability to change.

8. Opposition

The California District Attorneys Association opposes this bill stating:

> To be clear, the universe of inmates to which this bill would apply is comprised almost exclusively of persons who were convicted of first degree murder with one or more special circumstances and who were 16 or 17 years old at the time of the offense. Existing law properly recognizes the fact that there are juveniles who commit special circumstances murder and that LWOP is an appropriate sentence in many, if not most, of those cases. At the same time, the statute acknowledges the possibility of a rare exception and grants judicial discretion to impose a lesser sentence of 25 years to life. We agree with the propriety of existing law in this regard and therefore oppose any effort, whether overt or veiled, to substantially weaken the statutory response to special circumstances murder committed by specified juveniles.
>
> In addition to our general concern with the intent of this bill, we take issue with the specific sentence recall process contained therein. Under one scenario contemplated by the measure, a petitioner found by the court to have been under the age of 18 at the time of the offense that resulted in his or her LWOP sentence could qualify for a resentencing hearing solely on the basis that the petitioner has performed acts that tend to indicate rehabilitation, or the potential for rehabilitation, or has shown evidence of remorse. Creating the potential for an LWOP sentence to be reduced by setting such a low standard for eligibility is an affront to justice and disrespectful of the victims of these crimes.
>
> Proponents are already pointing to Governor Schwarzenegger's recent commutation of Sara Kruzan's LWOP sentence for first degree murder during a robbery to 25 years to life as evidence that SB 9 should be enacted. We would argue however, that this grant of clemency only hurts the supporters' case. The current process, which generally affords criminal defendants the right to appeal, file a writ of habeas corpus, and ultimately seek executive clemency, and the Governor's action relative to the latter rebut the proponents' assertion that the system requires alteration.

****

EXHIBIT B

Date of Hearing: August 17, 2011

ASSEMBLY COMMITTEE ON APPROPRIATIONS
Felipe Fuentes, Chair

SB 9 (Yee) – As Amended: August 15, 2011

Policy Committee: Public Safety Vote: 5-2

Urgency: No State Mandated Local Program: No Reimbursable:

SUMMARY

This bill authorizes a person who was under 18 years of age at the time of committing an offense for which the person was sentenced to life without the possibility of parole (LWOP) to petition the court for re-sentencing, as specified. Specifically, this bill:

1) Provides that when a defendant who, was under 18 years of age at the time of the commission of the offense (only first-degree murder with special circumstances carries a LWOP sentence for juveniles in California) for which the defendant was sentenced to LWOP, has served at least 15 years, the defendant may submit to the sentencing court a petition for recall and re-sentencing.

2) Requires the petition for hearing to include the defendant's statement that one of the following is true:

   a) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions.

   b) The defendant has no juvenile felony adjudications for assault or other felonies with a significant potential for personal harm to victims prior to the murder conviction.

   c) The defendant committed the offense with at least one adult co-defendant.

   d) The defendant has performed acts that indicate potential for rehabilitation, including participating in educational, or vocational programs and showing evidence of remorse.

3) Provides 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 previously ordered and to re-sentence the defendant in the same manner as if the defendant had not been previously sentenced, provided that the new sentence is not greater than the original sentence. (This means that if the court opts to re-sentence, the maximum sentence would be 25-years-to-life, with a 25-year minimum, though priors and circumstances could increase the 25-year minimum, and the offender would still require approval of the parole board before release.)

4) Specifies that victims, or family members if the victim is deceased, retain the right to participate in the hearing.

5) Specifies the factors the court may consider when determining whether to recall and re-sentence include, but are not limited to:

a) The defendant was convicted pursuant to felony murder or aiding and abetting murder.

b) The defendant committed the murder with at least one adult co-defendant.

c) The defendant has no juvenile felony adjudications for assault or other felonies with a significant potential for personal harm to victims prior to the murder conviction.

d) Prior to the murder conviction, the defendant had insufficient adult support or supervision and suffered from psychological or physical trauma.

e) The defendant suffers from cognitive limitations due to mental illness, developmental disabilities, or other factors.

f) The defendant has performed acts that indicate the potential for rehabilitation, including participating in rehabilitative, educational, or vocational programs.

g) The defendant has had no disciplinary actions for violent activities in the last five years.

6) States that if the sentence is not recalled, the defendant may submit another petition for re-sentencing to the court when the defendant has been committed to the custody of the department for at least 20 years. If not granted at this second hearing, the defendant may submit a final petition after 24 years.

7) Applies retroactively.

FISCAL EFFECT

1) Minor absorbable annual GF costs to the state trial courts, likely less than $20,000 per year, to review and respond to re-sentencing petitions, and to hold re-sentencing hearings for petitions deemed eligible. This assumes an average of about 20 petitions per year, and an average of about five hearings, at a cost of about $2,000 per hearing.

   These costs should be offset to a degree by an accompanying reduction in writs of Habeas Corpus, by which inmates challenge their convictions and /or sentences.

2) Potentially moderate annual out-year GF savings to the extent inmates are re-sentenced from LWOP to life with the possibility of parole. For example, if two inmates per year are re-sentenced annually and end up serving 30 years rather than life, with the first re-sentenced inmates leaving prison in 2027, the annual savings of about $190,000 per ward, will increase annually, reaching about $7 million in 2047.

COMMENTS

1) Rationale. The authors and supporters contend sentencing minors to die in prison is barbaric, counter to principles of cognitive and emotional development in minors, and all but unprecedented in rest of the world. This bill, rather than prohibiting LWOP for minors, simply authorizes a judicial process for reviewing and re-sentencing. Re-sentencing, should it occur, would result in a life sentence, but one with the possibility of parole, based on the evaluation of the Board of Parole Hearings. Offenders would still serve decades in prison.

The author states the U.S. is the only country in the world that sentences minors to LWOP. The author further contends LWOP for minors provides no deterrent effect on crime and is applied disproportionately to persons of color.

According to the author, while LWOP for minors should be reserved for the most heinous criminals, according to Human Rights Watch analyses, 45% of the minors sentenced to LWOP did not personally commit murder, but were convicted of felony murder - as accomplices in a felony during which a murder was committed.

The author states, "Youth are different from adults and should be evaluated differently than adults, but the legal process often does not take this into account. Recent developments in brain science have proven that youth are far more influenced by group behavior than the same individuals will be as adults. It is now widely established that the adolescent brain has not yet fully developed the ability to comprehend consequences and control impulses. Teens tend to act in concert with and be influenced by others, and do things in the presence of peers they would never do alone. Unsurprisingly, over 75% of the youth sentenced to LWOP acted within a group at the time of their crime."

2) Minors serving LWOP in California. The only offense that can result in LWOP for minors in California is first degree murder with special circumstances, and it is limited to 16 and 17-year-olds. (In 2005, the U.S. Supreme Court ruled that persons under the age of 18 at the time of the crime may not be executed.) As of June 2011, according to Department of Corrections and Rehabilitation (CDCR) data, 295 persons were serving LWOP who were convicted of a murder committed before the age of 18. Of this total, 172 were 17, 121 were 16, and two were 15. (It is not clear how these 15-year-olds received LWOP.) In terms of ethnicity, 43% are Latino, 31% are Black, 13% are White, 1% are Asian/Pacific Islander and the balance are listed as "other." Six are female.

3) Last year the U.S. Supreme Court banned LWOP for minors for crimes not involving murder. In *Graham v Florida*, the court ruled that the Eight Amendment's ban on cruel and unusual punishment does not permit a juvenile offender to be sentenced to LWOP for a non-homicidal crime. In California this decision applies to kidnapping for ranson, for which three persons are currently serving LWOP.

4) Cognitive and emotional developmental of minors differs from adults. The creation of the modern juvenile court over 100 years ago was rooted in the idea that adolescents, who are not fully developed or mature, are less culpable than adults. This viewpoint, however, is increasingly incompatible with the tough on crime philosophy that emerged in the 1990s.

According to *Deterrence's Difficulty Magnified: The Importance of Adolescent Development in Assessing the Deterrence Value of Transferring Juveniles to Adult Court*, UC Davis Journal of Juvenile Law & Policy, Vol. 7, 2003: "The common law assumed that adolescents are less culpable than adults, and the juvenile court institutionalized this notion both jurisprudentially and statutorily. That is, the juvenile court offered a punishment discount for adolescents punished as juveniles, relative to the punishment given to adults. This discount is rooted in the belief that serious crimes committed by young offenders may reflect developmental deficiencies in autonomy and social judgment, suggesting a reduction in their culpability and, in turn, their punishment liability ....

"These developments reflect the presumption in modern juvenile justice law that those who commit crimes and are remanded to the criminal court, or even those who are charged with

such crimes, are fully culpable for their acts. This legal threshold clashes with emerging empirical evidence on the immaturity of adolescents with respect to both their ability to make informed and nuanced judgments about their behavior, as well as their moral development. By ignoring these indicia of reduced culpability, the new transfer or waiver policies offend the common law doctrine of incapacity."

5) LWOP for minors violates international law, according to a 2007 report "Sentencing Our Children to Die in Prison," by the Center for Law and Global Justice and The Frank C. Newman International Human Rights Law Clinic at the University of San Francisco School of Law, "LWOP for minors violates customary international law, binding all nations and is expressly prohibited under any circumstance by Article 37 of the U.N. Convention on the Rights of the Child, ratified by all countries of the world except the U.S. and Somalia. Trying children as adults and imposing a life without parole sentence is also a violation of Article 24 of the International Covenant on Civil and Political Rights and could be considered cruel, unusual or degrading treatment under the Convention Against Torture."

6) Support includes a long list of human rights, social justice, civil liberties and religious organizations, as well as the defense bar and several psychiatric associations.

   a) Human Rights Watch: "As one of the world's leading independent organizations dedicated to protecting human rights, Human Rights Watch seeks to protect the human right of all people. We stand with victims and activists to prevent discrimination, uphold political freedom, protect people from inhumane conduct, and bring offenders to justice. We oppose LWOP for youth in California because they are disproportionate (particularly so given recent scientific research), racially discriminatory, and a violation of international law...

   "Moreover in California, LWOP is not reserved for youth who commit the worst crimes or who show signs of being irredeemable criminals. Forty-five percent of California youth sentenced to LWOP for involvement in a murder did not actually kill the victim. Many were convicted of felony murder, or for aiding and abetting, because they acted as lookouts or participated in another felony during which the murder took place. In addition, in many cases, California has actually treated its youth worse than similarly situated adult offenders. In nearly 70 percent of cases reported to Human Rights Watch in which the youth acted with others, at least one codefendant was adult. Our survey responses revealed that in 56 percent of these cases, the adult received a more lenient sentence than the juvenile."

   b) The American and California Psychiatric Associations, and the Academy of Child & Adolescent Psychiatry state that adolescents are cognitively and emotionally less mature than adults, less able than adults to consider the consequences of their behavior, and therefore more easily swayed by peers. Studies of this population consistently demonstrate a high incidence of mental disorder, serious brain injuries, substance abuse, and learning disabilities, which may predispose to aggressive or violent behaviors.

   According to the Academy, "The U.S. is the only country in the world that sentences kids to LWOP. Every country in the world – except for the U.S. – has condemned the use of LWOP sentences for youth. Because tier brains are still developing into their early 20's, youth have a much greater capacity for rehabilitation than adults. SB 9 would allow

people who were sentenced as minors to prove themselves changed as adults and to submit a petition to the sentencing court to reconsider their sentence."

7) Opposition includes a number of law enforcement and victim organizations.

   a) CA District Attorneys Association: "Existing law properly recognizes the fact that there are juveniles who commit special circumstances murder and that LWOP is an appropriate sentence in many, if not most, of the cases. At the same time, the statute acknowledges the possibility of a rare exception and grants judicial discretion to impose a lesser sentence of 25-years-to-life. We agree with the propriety of existing law in this regard and therefore oppose any effort, whether overt or veiled, to substantially weaken the statutory response to special circumstances murder committed by specified juveniles."

   b) California Narcotics Officers' Association and California Police Chiefs Association: "To add yet another cycle of procedures where families of crime victims must continuously revisit the murders of their lost ones is to pile cruelty on top of anguish."

8) Amendments. The bill includes a rather convoluted phase-in of petition eligibility timing that is unnecessary; the author will propose amendments to simplify and clarify.

   Also, current chaptering amendments, which cover AB 109 (criminal justice realignment), should also reference AB 520 and/or SB 576 regarding the ongoing *Cunningham* fix to the determinate sentencing triads.

9) Prior Legislation:

   a) SB 399 (Yee), 2010, was almost identical to SB 9, and failed passage on the Assembly Floor.

   b) SB 999 (Yee), 2007, eliminated LWOP for a defendant under the age of 18 years of age and was not heard on the Senate Floor.

   c) SB 1223 (Kuehl), 2004, authorized a court to review the sentence of a person convicted as a minor in adult criminal court and sentenced to state prison after the person served 10 years or reached age 25. SB 1223 was held on this committee's Suspense File.

Analysis Prepared by: Geoff Long / APPR. / (916) 319-2081

EXHIBIT C

Senate Appropriations Committee Fiscal Summary
Senator Christine Kehoe, Chair

SB 9 (Yee)

Hearing Date: 05/26/2011 **Amended:** As Introduced
Consultant: Jolie Onodera **Policy Vote:** Public Safety 5-2

BILL SUMMARY: SB 9 would authorize an inmate who was under 18 years of age at the time of committing an offense for which the inmate was sentenced to life without the possibility of parole (LWOP) to submit a petition to the court for recall and resentencing. This bill is retroactive, and staggers the filing dates for eligible inmates to petition the court. This bill establishes certain criteria that must be met in order to hold a hearing, and provides that a new sentence, if any, shall not be greater than the initial sentence.

Fiscal Impact (in thousands)

Major Provisions	2011-12	2012-13	2013-14	Fund
Resentencing hearings	Up to $52	Up to $64	Up to $90	General*
Case-processing/admin	Unknown, likely minor			General*
Petitioner transportation	Minor, absorbable			General
Reduced sentences	Unknown, potential cost savings of up to $25 per inmate per year			General

*Trial Court Trust Fund

STAFF COMMENTS: SUSPENSE FILE.

This bill authorizes the 293 inmates serving LWOP in California who were juveniles at the time they committed the crime for which they are serving LWOP to petition the court for a recall and resentencing. This bill allows up to three petitions to be filed for inmates who entered custody prior to January 1, 1996. The initial petition may be filed between 2012 and 2015, as specified, with subsequent eligibility to file after 20 and 24 years in custody. Inmates who have served at least ten but less than 15 years as of January 1, 2012, will be eligible to file petitions after 15, 20, and 24 years in custody. Inmates who entered custody after January 1, 2002 (less than ten years in custody as of January 1, 2012), are eligible to submit a petition after 10, 15, 20, and 24 years in custody.

Based on data from the Department of Corrections and Rehabilitation, there are 47 eligible inmates statewide who entered custody prior to 1996 whose eligibility to submit a petition will be staggered. There will also be a phase-in of inmates who entered custody after 1996 who will be eligible to submit a petition as they reach 15 years served of their sentence beginning in 2011-12. Further, a phase-in of inmates who reach ten years in custody will be eligible to file a petition beginning in 2011-12. If resentencing is not granted under the initial petition, inmates may file another petition as specified above.

This bill staggers petition eligibility, resulting in approximately 26 eligible to file petitions in fiscal year 2011-12, 32 eligible in 2012-13, and 45 eligible in 2013-14 across the state. It cannot be known with certainty how many eligible inmates will file petitions in the fiscal year in which they first become eligible, since the burden is on the inmates to prepare appeal documents and petition the court. In future years, the potential number of eligible petitioners will be greater as inmates reaching 10, 15, 20, and 24 years in custody may be eligible to petition in the same year.

This bill does not require the court to hold a hearing for every petition received. If the court finds by a preponderance of the evidence that the statements in the petition are true, a hearing shall be held to consider whether to recall and resentence the defendant.

The increased court workload to handle petitions from ineligible inmates is expected to be minor. For eligible petitioners, local courts anticipate processing these petitions would require two court hearings - one hearing to recall the original sentencing and set a resentencing hearing (approximately one hour of court time), and a second hearing to issue findings and enter a judgment on the resentencing (two hours of court time). According to the Judicial Council, three hours of court time is estimated to cost approximately $2,000 for judge, court staff, and security. The exact cost cannot be determined because it relies on the number of eligible petitions filed and the degree of concentration in a single county.

Judicial Council also indicates that this bill would increase courts' workload, contribute to existing backlogs, and exacerbate the need for additional resources. The exact amount and cost of increased workload and backlog exacerbation could not be determined because it depends on the number of petitions filed and hearings held. It is also unclear which specific superior courts would receive the petitions allowed under the provisions of this bill.

The court will also incur expenses to notify the victims or victims' family members regarding the resentencing hearing, as they have the right to participate. The court may not have contact information readily available, and this would likely lead to ongoing administrative costs.

Staff notes, however that under current law any inmate can submit a petition to the court. This bill simplifies the process for a small group of specified inmates to petition the court, which may result in individuals submitting petitions that might not have otherwise done so. However, there are no restrictions on Habeas Corpus petitions, which are used by inmates to challenge their conviction, sentence, or both. For those who would have submitted Habeas Corpus petitions, this bill would likely offer a less expensive alternative, as it involves only a resentencing hearing, and no potential for a new trial.

It cannot be known how many of the 293 inmates serving LWOP for crimes committed as juveniles will file Habeas Corpus petitions, but there is a possibility of General Fund savings if eligible individuals petition under the provisions of this bill in lieu of submitting a Habeas Corpus petition. Staff notes that although the California 4th Circuit Court of Appeals decision, *In re Nunez* (April 30, 2009, G040377), overturned the sentence of

one of these inmates on 8th amendment grounds of cruel and unusual punishment, this decision has not resulted in a large increase in Habeas Corpus petitions filed to date.

There is also a potential for future cost savings if any petitioner receives a reduced sentence. If a juvenile were sentenced to LWOP at age 16, he would likely live in prison for more than 50 years, at a marginal cost of $25,000 annually. If one such sentence were reduced to 25 years, there would be an average cost savings of $625,000 over 25 years. Those cost savings would be offset to some degree by any parole supervision costs assessed as a condition of the reduced sentence.

Prior Legislation. SB 399 (Yee) 2009 was substantially similar to this bill, but failed on the Assembly Floor.

EXHIBIT D

Date of Hearing: July 5, 2011
Counsel: Stella Choe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Tom Ammiano, Chair

SB 9 (Yee) – As Amended: May 27, 2011

REVISED

SUMMARY: Authorizes a prisoner who was under 18 years of age at the time of committing an offense for which the prisoner was sentenced to life without the possibility of parole (LWOP) to submit a petition for recall and resentencing to the sentencing court, as specified. Specifically, this bill:

1) Provides that when a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime. At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation to dispute facts in the record or the probation officer's report, or to present additional facts. The court shall set forth on the record the facts and reasons for imposing the upper or lower term.

2) Provides that when a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment to LWOP has served at least 15 years of that sentence, the defendant may submit to the sentencing court a petition for recall and re-sentencing, provided that defendants who entered custody on or after January 1, 1992, but prior to July 1, 2002, shall be permitted to submit a petition for recall and resentencing only as follows:

   a) Those defendants who entered custody prior to January 1, 1994 may submit a petition in the 2011-12 fiscal year;

   b) Those defendants who entered custody on or after January 1, 1994, but prior to January 1, 1995, may submit a petition in the 2012-13 fiscal year;

   c) Those defendants who entered custody on or after January 1, 1995, but prior to January 1, 1996. And those who entered custody on or after January 1, 2000, but prior to January 1, 2001, may submit a petition in the 2013-14 fiscal year;

   d) Those defendants who entered custody on or after January 1, 1996, but prior to July 1, 1996, and those who entered custody on or after January 1, 2001, but prior to May 1, 2001, may submit a petition in the 2014-15 fiscal year;

   e) Those defendants who entered custody on or after July 1, 1996, but prior to January 1, 1997, and those who entered custody on or after May 1, 2001, but prior to January 1,

2002, may submit a petition in the 2015-16 fiscal year;

f) Those defendants who entered custody on or after January 1, 1997, but prior to July 1, 1997, and those who entered custody on or after January 1, 2002, but prior to July 1, 2002, may submit a petition in the 2016-17 fiscal year;

g) Those defendants who entered custody on or after July 1, 1997, but prior to January 1, 1998, may submit a petition in the 2017-18 fiscal year;

h) Those defendants who entered custody on or after January 1, 1998, but prior to July 1, 1998, may submit a petition in the 2018-19 fiscal year;

i) Those defendants who entered custody on or after July 1, 1998, but prior to January 1, 1999, may submit a petition in the 2019-20 fiscal year;

j) Those defendants who entered custody on or after January 1, 1999, but prior to July 1, 1999, may submit a petition in the 2020-21 fiscal year; and,

k) Those defendants who entered custody on or after July 1, 1999, but prior to January 1, 2000, may submit a petition in the 2021-22 fiscal year.

3) Provides that if recall and resentencing is not granted under a petition filed by a defendant who entered custody on or after January 1, 1992, but prior to January 1, 2000, the defendant may submit a second and final petition after having served 24 years. The final petition may be submitted, and the response to that petition shall be determined, during the 25th year of the defendant's sentence.

4) Provides that if recall and resentencing is not granted under a petition filed by a defendant who entered custody on or after January 1, 2000, but prior to July 1, 2002, the defendant may submit another petition to the sentencing court when the defendant has been committed to the custody of the Department of Corrections and Rehabilitation for at least 20 years. If recall and resentencing is not granted under that petition, the defendant may file another petition after having served 24 years. The final petition may be submitted and the response to that petition shall be determined during the 25th year of the defendant's sentence.

5) Requires the petition to include a statement from the defendant that he or she was under the age of 18 at the time of the crime and was sentenced to LWOP, describe his or her remorse and work towards rehabilitation, and that one of the following is true:

a) The defendant was convicted of felony murder or aiding and abetting murder provisions of law;

b) The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the sentence is being considered for recall;

c) The defendant committed the offense with at least one adult codefendant; or,

d) The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself or rehabilitative, educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or showing evidence of remorse.

6) Requires the original petition to be filed with the sentencing court and a copy of the petition to be served on the agency that prosecuted the case.

7) Provides that if any of the information required to be included in the petition or if proof of service on the prosecuting agency is not provided, the court shall return the petition to the defendant and advise the defendant that the matter cannot be considered without the missing information.

8) States that a reply to the petition, if any, shall be filed with the court within 60 days of the date on which the prosecuting agency was served with the petition, unless a continuance is granted for good cause.

9) Provides that 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 previously ordered and to resentence the defendant in the same manner as if the defendant had not been previously sentenced, provided that the new sentence, if any, is not greater than the initial sentence. Victims, or victim family members if the victim is deceased, shall retain the rights to participate in the hearing.

10) Provides factors the court may consider when determining whether to recall and resentence include, but are not limited to, the following:

a) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law.

b) The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the sentence is being considered for recall.

c) The defendant committed the offense with at least one adult codefendant.

d) Prior to the offense for which the sentence is being considered for recall, the defendant had insufficient adult support or supervision and had suffered from psychological or physical trauma, or significant stress.

e) The defendant suffers from cognitive limitations due to mental illness, developmental disabilities, or other factors that did not constitute a defense, but influenced the defendant's involvement in the offense.

f) The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or showing

evidence of remorse.

g) The defendant has maintained family ties or connections with others through letter writing, calls, or visits, or has eliminated contact with individuals outside of prison who are involved with crime.

h) The defendant has had no disciplinary actions for violent activities in the last five years in which the defendant was determined to be the aggressor.

11) States that the court shall have discretion to recall the sentence and commitment previously ordered and to resentence the defendant in the same manner as if the defendant had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence.

12) Mandates the court, in exercising its discretion, must consider the criteria listed above. Victim, or victim family members if the victim is deceased, shall be notified of the resentencing hearing and shall retain their rights to participate in the hearing.

13) States that if the sentence is not recalled, the defendant may submit another petition for recall and resentencing to the sentencing court when the defendant has been committed to the custody of the department for at least 20 years; and if not granted after 20 years, the defendant may file another petition after having served 24 years. The final petition may be submitted, and the response to that petition shall be determined, during the 25th year of the defendant's sentence.

14) Provides that in addition to the criteria specified above, the court may consider any other criteria that the court deems relevant to its decision, so long as the court identifies them on the record, provides a statement of reasons for adopting them, and states why the defendant does or does not satisfy the criteria.

15) States that this bill shall have retroactive application.

EXISTING LAW:

1) States the Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances. The Legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion. [Penal Code Section 1170(a)(1).]

2) States in any case in which the punishment prescribed by statute for a person convicted of a public offense is a term of imprisonment in the state prison of any specification of three time periods, the court shall sentence the defendant to one of the terms of imprisonment specified unless the convicted person is given any other disposition provided by law, including a fine, jail, probation, or the suspension of imposition or execution of sentence or is sentenced pursuant existing law, or because he or she had committed his or her crime prior to July 1,

1977. In sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council. The court, unless it determines that there are circumstances in mitigation of the punishment prescribed, shall also impose any other term that it is required by law to impose as an additional term. Nothing in this article shall affect any provision of law that imposes the death penalty, that authorizes or restricts the granting of probation or suspending the execution or imposition of sentence, or expressly provides for imprisonment in the state prison for life. In any case in which the amount of pre-imprisonment credit under existing provision of law is equal to or exceeds any sentence imposed pursuant to this chapter, the entire sentence shall be deemed to have been served and the defendant shall not be actually delivered to the custody of the secretary. The court shall advise the defendant that he or she shall serve a period of parole and order the defendant to report to the parole office closest to the defendant's last legal residence, unless the in-custody credits equal the total sentence, including both confinement time and the period of parole. The sentence shall be deemed a separate prior prison term under laws related to prior prison terms, and a copy of the judgment and other necessary documentation shall be forwarded to the secretary. [Penal Code Section 1170(a)(3).]

3) States that when a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation. In determining the appropriate term, the court may consider the record in the case, the probation officer's report, other reports, including reports received pursuant to Section 1203.03 of the Penal Code, and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected and the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. A term of imprisonment shall not be specified if imposition of sentence is suspended. [Penal Code Section 1170(b).]

4) Requires the court to state the reasons for its sentence choice on the record at the time of sentencing. The court shall also inform the defendant that as part of the sentence after expiration of the term he or she may be on parole for a period as provided in provisions of law related to parole. [Penal Code Section 1170(c).]

5) States that when a defendant subject to existing law related to sentencing has been sentenced to be imprisoned in the state prison and has been committed to the custody of the secretary, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary or the Board of Parole Hearings, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. The resentence under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. Credit shall be given for time served. [Penal Code Section 1170(d).]

6) States that 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 existing law has been found to be true, 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. [Penal Code Section 190.5(b).]

7) States that any person who is alleged, when he or she was 14 years of age or older, to have committed murder or one of the specified sex offenses, shall be prosecuted under the general law in a court of criminal jurisdiction. [Welfare & Institution Code (WIC) Section 602(b).]

8) States that with regard to a minor alleged to be a person described provisions of law related to juvenile delinquency by reason of the violation, when he or she was 14 years of age or older, of any of the offenses listed existing law, upon motion of the petitioner made prior to the attachment of jeopardy the court shall cause the probation officer to investigate and submit a report on the behavioral patterns and social history of the minor being considered for a determination of unfitness. Following submission and consideration of the report, and of any other relevant evidence that the petitioner or the minor may wish to submit, the minor shall be presumed to be not a fit and proper subject to be dealt with under the juvenile court law unless the juvenile court concludes, based upon evidence, which evidence may be of extenuating or mitigating circumstances, that the minor would be amenable to the care, treatment, and training program available through the facilities of the juvenile court based upon an evaluation of each of the following criteria:

   a) The degree of criminal sophistication exhibited by the minor.

   b) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction.

   c) The minor's previous delinquent history.

   d) Success of previous attempts by the juvenile court to rehabilitate the minor.

   e) The circumstances and gravity of the offenses alleged in the petition to have been committed by the minor. [WIC Section 707(c).]

9) Provides that a minor within the jurisdiction of the juvenile delinquency court may be sentenced to the Department of Juvenile Facilities or tried as an adult, as specified, if he or she has been charged with one of the following: murder; arson, as specified; robbery; rape with force, violence, or threat of great bodily harm; sodomy by force, violence, duress, menace, or threat of great bodily harm; a lewd or lascivious act on a person under the age of 14; oral copulation by force, violence, duress, menace, or threat of great bodily harm; forcible sexual penetration, as specified; kidnapping for ransom; kidnapping for purposes of robbery; kidnapping with bodily harm; attempted murder; assault with a firearm or destructive device; assault by any means of force likely to produce great bodily injury; discharge of a firearm into an inhabited or occupied building; a specified violent crime against a person over the age of 60; use of a firearm in a crime, as specified; a felony offense in which the minor personally used a weapon specified in existing law; a felony offense of intimidating or dissuading a witness; manufacturing, compounding, or selling one-half ounce

or more of a salt or solution of a depressant listed as a controlled substance; a violent felony or gang crime, as specified; escape, by the use of force or violence, from a county juvenile hall, home, ranch, camp, or forestry camp, as specified, if great bodily injury is intentionally inflicted upon an employee of the juvenile facility during the commission of the escape; torture; aggravated mayhem; carjacking, while armed with a dangerous or deadly weapon; kidnapping for purposes of sexual assault; kidnapping during the commission of a carjacking; discharging a firearm into a vehicle, as specified, or; voluntary manslaughter. [WIC Section 707(b)(1) to (28).]

10) Allows a prosecuting agency to file an accusatory pleading in a court of criminal jurisdiction, without a motion or hearing, against a minor, who was 16 years of age or older at the time of committing one of the enumerated offenses listed above, if the minor has previously been found to be a ward of juvenile court for a violation of a felony offense when he or she was 14 years of age or older. [WIC Section 707(d)(3).]

FISCAL EFFECT: Unknown

COMMENTS:

1) Author's Statement: According to the author, "Under existing California law, youth under the age of 18 years old are sentenced to life in prison without the possibility of parole. There is no system of review for these cases. The use of this sentence for juveniles 1) ignores neuroscience and well-accepted understandings of adolescent development; 2) is a practice that is in violation of international law and out of step with international norms; and 3) in California, it is a policy that is applied unjustly. Youth are different from adults. While they should be held accountable for their actions, even those who commit serious crimes should have the opportunity to prove they have matured and changed."

2) Background: According to the background provided by the author, "Sentencing juveniles to life in prison without parole ignores the fact that young people's brains and identities are still developing. The sentence of life without parole is a sentence intended for the worst of the worst criminals and crimes. As such, it is inappropriate for juveniles. People under the age of 18 have a unique capacity to change and rehabilitate. The United States Supreme Court recognized that youth are different from adults when it noted that three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot be reliably classified among the worst offenders: 1) juveniles' susceptibility to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult; 2) juvenile's own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment; and 3) the reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.

"The sentence of life without parole is imposed in an unjust manner in California. California has one of the worst records in the nation for racial disparity in the imposition of life without parole for juveniles. African American youth are sentenced to life without parole at over 18 times the rate of white youth. Hispanic youth are sentenced to life without parole five times more often than white youth.

"In a research relying on multiple sources, Human Rights Watch examined California juvenile life without parole cases. It estimates that 45 percent of youth offenders serving life without parole were convicted of murder but were not the ones to actually commit the murder. This is possible under California's "felony murder" statute, a law which holds participants in a felony responsible for a murder that happens, even if they did not plan or expect a murder to occur.

"Youth are different from adults and should be evaluated differently than adults, but the legal process often does not take this into account. Recent developments in brain science have proven that youth are far more influenced by group behavior than the same individuals will be as adults. Teens tend to act in concert with and be influenced by others, and do things in the presence of peers they would never do alone. The power of peer influence decreases with age, and what a youth does in a group is often quite different than the choices he or she will make when older. Unsurprisingly, over 75% of the youth sentenced to life without parole acted within a group at the time of their crime.

"In addition, many California youth sentenced to life without parole were acting under the influence of an adult. In nearly 70 percent of cases reported to Human Rights Watch in which the youth was not acting alone, at least one codefendant was an adult. Survey responses reveal that in 56 percent of those cases the adult received a lower sentence than the juvenile.

"In addition, in a national study an estimated 59% of youth sentenced to life without parole are first-time offenders with no criminal history.

"There is no evidence that the use of life without parole sentences deter crime. The US Supreme Court Supreme Court stated, 'As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles...' If the death penalty has no deterrent value, it is difficult to imagine that a lesser penalty of life without parole would have more of a deterrent value. With regard to juvenile life without parole, the evidence indicates that life without parole sentences provide no deterrent effect. Additionally, it is now recognized that the adolescent brain is still developing an ability to comprehend consequences and control impulses. This makes it all the less likely that the specter of a harsh sentence will affect juvenile's behavior.

"SB 9 will add guidelines to the existing Penal Code that currently permits resentencing. Senate Bill 9 would allow a person who was under 18 years of age at the time of committing an offense for which the person was sentenced to life without the possibility of parole to, after serving between 15 and 25 years in prison, petition the court for re-sentencing. If a re-sentencing hearing is granted, the court would have the discretion whether to re-sentence the petitioner to a lower sentence or let the juvenile life without parole sentence remain. If granted a lower sentence, the petitioner must still serve the minimum sentence and obtain approval of the parole board and the Governor prior to parole. Even if the youth receives a resentencing hearing, there is no guarantee he or she would receive a new sentence, or achieve parole if resentenced.

"Recognizing that teenagers are still maturing at the time of their original sentencing, and recognizing that our legal process sometimes results in unfair sentences, this Act creates specific criteria and an intense, three-part review process that would result in the possibility

of a lesser sentence for those offenders whose crimes were less than their sentence might have warranted and who have proven themselves to have changed as adults."

3) Existing Law Related to Sentencing Juvenile Offenders: The passage of Proposition 21 on March 7, 2000 expanded the types of juvenile cases outside the scope of the juvenile court (thus, requiring prosecution in criminal court) and made it procedurally easier for prosecutors to pursue criminal charges against minors 14 years of age and older in criminal court. The movement to prosecute a broader range of juvenile offenses in criminal court has been a national trend. As explained in one legal commentary:

"For over two decades, legislatures across the nation have enacted a variety of laws and policies to criminalize delinquency by relocating adolescent offenders from the juvenile to the adult court. More recently, the United States Senate passed legislation to 'get tough' on juvenile crime by promoting the transfer of adolescents to criminal court, and providing funds to facilitate state efforts to do the same. This legislation threatens to accelerate a trend that began with the passage of New York State's Juvenile Offender Law in 1978 and continues today even as juvenile crime rates have fallen dramatically. Since 1990, nearly every state and the federal system have expanded the use of adult adjudication and punishment for adolescent offenders. Some states have expanded the number of cases eligible for judicial waiver, and still others have reassigned the burden of proof for waiver hearings from the prosecutor (seeking to waive a case to criminal court) to the defense counsel (seeking to deny waiver). Some state legislatures have excluded specific offenses from juvenile court jurisdiction. Other states permit prosecutorial choice of forum between concurrent jurisdictions." [Symposium: *Children, Crime, and Consequences: Juvenile Justice In America: Punishment, Proportionality, and Jurisdictional Transfer of Adolescent Offenders: A Test of the Leniency Gap Hypothesis*, (2003) 14 Stan. L. & Policy Rev 57.]

Courts have interpreted statute to conclude when sentencing a juvenile defendant 14 or 15 years of age tried as an adult for murder, the maximum penalty is 25-years-to-life. Only where the juvenile defendant is 16 or 17 years of age and convicted of first-degree murder where one of the enumerated special circumstances are found to be true, may the court choose between 25-years-to-life or LWOP. [*See* Penal Code Section 190.2(a); Penal Code Section 190.5(a-b); WIC Section 602(a), and; *People vs. Demirdjian* (2006) 144 Cal.App.4th 10, 17]

4) Murder with Special Circumstances: Only a juvenile convicted of first-degree murder with special circumstances, as specified, may be sentenced to a term of LWOP or, in the alternative, a term of years sentence of 25-years-to-life. [*See* Penal Code Section 190.5(b), *Graham v. Florida* (2010) 130 S.Ct. 2011.] First-degree murder is defined as all murder perpetrated by means of a destructive device or explosive; a weapon of mass destruction; knowing use of ammunition designed primarily to penetrate metal or armor; poison; lying in wait; torture; or by any other kind of willful, deliberate, and premeditated killing; or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking; or any act punishable as a violent sex offense, as specified; or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death. (Penal Code Section 189.)

One of the enumerated special circumstances must be shown in addition to the elements of

first-degree murder in order to sentence a defendant to a term of LWOP. Special circumstances include intentional murder carried out for financial gain; the defendant has a previous conviction for murder; multiple charges of murder in the same case; murder committed by means of a destructive device; murder committed for the purpose of avoiding arrest or to perpetrate an escape from custody; murder of a peace officer, firefighter or federal law enforcement officer, as specified; murder for the purposes of silencing or retaliating against a witness; murder of a prosecutor, judge or juror in an attempt to prevent the performance of official duties; the murder is especially heinous, as specified; the defendant committed the murder while lying in wait; the victim was killed because of his or her race, color, religion, nationality, or county of origin; the murder was committed while the defendant was engaged in a felony, as specified; the murder involved torture; the victim was murdered by poison; the defendant committed the murder by discharging a firearm from vehicle, and; the defendant committed murder as an active participant in a criminal street gang and the murder was carried out for the benefit of the gang. [Penal Code Section 190.2(a)(1) to (22).]

5) LWOP: Review of Existing Case Law: In 2005, the United States Supreme Court ruled that persons who were under the age of 18 at the time of the offense are ineligible for the death penalty. [*Roper vs. Simmons* (2005) 543 U.S. 551.] Penal Code Section 190.5 codified the holding of *Roper* and stated the penalty for a person 16 to 18 years of age convicted of first-degree murder with special circumstances is either LWOP or 25-years-to-life. [Penal Code Section 190.5(b).]

In 2010, the United States Supreme Court ruled that it is unconstitutional to sentence a youth who did not commit homicide to LWOP. [*See Graham, supra*, 130 S.Ct. 2011.] The Court discussed the fundamental differences between a juvenile and adult offender and reasserted its findings from the *Roper* case, *supra*, that juveniles have lessened culpability than adults due to those differences. The Court stated that "life without parole is an especially harsh punishment for a juvenile," noting that a juvenile offender "will on average serve more years and a greater percentage of his life in prison than an adult offender." [*Graham, supra*, 130 S.Ct. at 2016.] However, the Court stressed that "while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society." (*Id.* at pg. 2031.)

In a recent case, the California Fourth District Court of Appeal ruled that a juvenile's term of years sentence for a nonhomicide offense is cruel and unusual punishment where the sentence amounts to life in prison without parole. (*People v. J.I.A.* (June 8, 2011) __ Cal.App.4th __ [11 D.A.R. 8327].) Citing the *Graham* case, *supra*, the Court stated that in sentencing a juvenile under the age of 16 for a nonhomicide offense, the State must give the juvenile "some *meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.*" (*Id.* at pg. 12.) The Court found that while the juvenile did not receive a sentence of LWOP, "it is a de facto LWOP sentence because he is not eligible for parole until about the time he is expected to die. The trial court's sentence effectively deprives J.A. of any meaningful opportunity to obtain release regardless of his rehabilitative efforts while

incarcerated." (*Id.* at pg. 17.)

6) Arguments in Support:

a) According to the University of San Francisco School of Law's Center for Global Law & Justice, "Youth who commit crimes should be held accountable. However, when California condemns a young person to a life behind bars, it utterly disregards the human capacity for rehabilitation and ignores the very real physical and psychological differences between children and adults recognized by the world over. Punishment should reflect the capacity of young people to change and mature. SB 9 would ensure that youth offenders would face severe punishment for their crimes, but they would have the chance to work toward parole if they can show they have rehabilitated."

b) According to the Pacific Juvenile Defender Center, "By creating a court review process to review life without parole for crimes committed by minor children, SB 9 represents a more humane, sensible, and proportionate sentencing approach. Child offenders would still face severe punishment and lengthy prison terms for committing horrible crimes. However, SB 9 would offer an opportunity for redemption. The bill will motivate child offenders to seek rehabilitation since they would be given an opportunity to ask for 25 years to life after serving at least 10 years of their commitment."

c) According to Books Not Bars, "The United States is the only country in the world that imposes life without parole on youth under the age of 18 years old. This extreme punishment is a violation of international law and fundamental human rights. In California, racial disparities in the use of this sentence are among the worst in the county: black youth are sentenced to life without parole at a per capita rate that is 18 times that for white youth. Finally, adult codefendants charged in the same cases are getting lower sentences, and the opportunity for parole. In 56% of the cases in which a youth sentenced to life without parole had an adult codefendant, the adult received a lesser sentence than the youth. Sentencing adolescents to life without parole is outdated, out of step with the rest of the world, and unfair in its application. California should lead the nation in addressing these inequities. We therefore urge your support for this important legislation."

7) Arguments in Opposition:

a) According to the California Narcotics Officers' Association and the California Police Chiefs Association, "Under current law, both the prosecutor and the court have the ability to make an independent determination as to whether to try the defendant as an adult in the first place and whether to seek special circumstance finding, at all. The seeking of a special circumstance finding must be proven in an adversarial process with the ultimate decision being made by a jury. Even after that determination is made, the court has ultimate authority to impose a sentence of life with the possibility of parole if the court believes that to be the appropriate sentence. And finally, the Governor retains his/her power of commutation. In other words, those who are sentenced to life without the possibility of parole are those who have committed the most heinous crimes with a spirit of total remorselessness. To add yet another cycle of procedures where families of crime victims must continuously revisit the murders of their lost ones is to pile cruelty on top of

anguish."

b) According to the California District Attorneys Association, "In addition to our general concern with the intent of this bill, we take issue with the specific sentence recall process contained therein. Under one scenario contemplated by the measure, a petitioner found by the court to have been under the age of 18 at the time of the offense that resulted in his or her LWOP sentence could qualify for a resentencing hearing solely on the basis that the petitioner has performed acts that tend to indicate rehabilitation, or the potential for rehabilitation, or has shown evidence of remorse. Creating the potential for an LWOP sentence to be reduced by setting such a low standard for eligibility is an affront to justice and disrespectful of the victims of these crimes."

8) Prior Legislation:

a) SB 399 (Yee), of the 2009-10 Legislative Session, was substantially similar to this bill. SB 399 failed passage on Assembly Floor.

b) SB 999 (Yee), of the 2007-08 Legislative Session, eliminates the LWOP sentence thus making the sentence for first-degree murder with special circumstances by a defendant under 18 years of age 25-years-to-life. SB 999 failed passage on Senate Floor.

c) SB 1223 (Kuehl), of the 2003-04 Legislative Session, authorizes a court to review the sentence of a person convicted as a minor in adult criminal court and sentenced to state prison after the person has either served 10 years or attained the age of 25. SB 1223 failed passage in Assembly Appropriations Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Human Rights Watch, Children's Rights Division (Sponsor)
Advancement Project
Alliance for a Better District 6
American Civil Liberties Union
American Federation of State, County and Municipal Employees
American Probation and Parole Association
American Psychiatric Association
Bar Association of San Francisco
Books Not Bars (An Ella Baker Center for Human Rights Campaign)
Buddhist Peace Fellowship
California Attorneys for Criminal Justice
California Catholic Conference, Inc.
California Church Impact
California Coalition for Women Prisoners
California Committees United Institute
California Mental Health Directors Association
California National Organization for Women
California Psychiatric Association
California Public Defenders Association

California-Nevada Annual Conference of the United Methodist Church
Californians United for a Responsible Budget
Campaign for the Fair Sentencing of Youth
Center for Global Law & Justice at University of San Francisco School of Law
Center for Juvenile Law and Policy at Loyola Law School
Child Welfare League of America
Children's Advocacy Institute
Children's Defense Fund
Commonweal
Disability Rights California
Disability Rights Legal Center
District Attorney, City and County of San Francisco
Equal Justice Initiative
Everychild Foundation
Feminist Majority & National Center for Women and Policing
Friends Committee on Legislation of California
Healing Justice Coalition
Human Rights Advocates
International Community Corrections Association
John Burton Foundation for Children Without Homes
Just Detention International
Justice Now
Justice Policy Institute
Juvenile Law Center
Law Offices of the Los Angeles County Alternate Public Defender
Legal Services for Children
Legal Services for Prisoners with Children
Life Support Alliance
Los Angeles County Democratic Party
Lutheran Office of Public Policy – California
NAACP Legal Defense and Education Fund, Inc.
National African American Drug Policy Coalition, Inc.
National Alliance on Mental Illness California
National Center for Lesbian Rights
National Center for Youth Law
Office of Restorative Justice of the Archdiocese of Los Angeles
Pacific Juvenile Defender Center
Post-Conviction Law Justice Project at University of Southern California Gould School of Law
Prison Fellowship
Prison Law Office
Progressive Christians Uniting
Public Counsel Law Center
Sacramento Lorenzo Patiflo League of United Latin American Citizens Council
Sisters of St. Joseph of Orange
Southern Poverty Law Center
St. Mark Presbyterian Church, Peace and Justice Commission
The Sentencing Project
United Church of Christ
W. Haywood Burns Institute

Youth Justice Coalition
Youth Law Center
1,879 private individuals

Opposition

California Association of Highway Patrolmen
California District Attorneys Association
California Narcotic Officers' Association
California Police Chiefs Association
California State Sheriffs Association
Crime Victims Action Alliance
Crime Victims United of California
Los Angeles County District Attorney's Office
Los Angeles Police Protective League
Peace Officers Research Association of California
Sacramento County District Attorney's Office
One private individual

Analysis Prepared by: Stella Choe / PUB. S. / (916) 319-3744

CERTIFICATE OF SERVICE

Rule 1.21(c)

CASE NAME: *In re Kirchner*
Case 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 92101-4009, in said County and State.

On September 7, 2016, I served the foregoing document:

MOTION FOR JUDICIAL NOTICE

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**: I caused each such document to be transmitted electronically, to the parties indicated below, as authorized by California Rule of Court 8.71, through the TrueFiling service portal. **[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 9/6/2016

/s/ Michael A. Owens
Declarant

SERVICE LIST

Clerk of the Superior Court
Judge Lewis R. Hanoian
c/o JUDICIAL SERVICES
220 W. Broadway
San Diego, Ca 92101-3409
Phone: (619) 450-5500
appeals.central@sdcourt.ca.gov
(*TrueFiling electronic service*)

Court of Appeals – 4th DCA. Div. 1
Attn: Clerk of the Court
750 "B" Street, Suite 300
San Diego, CA 92101
Phone: (619) 744-0760
(TrueFiling electronic service)

Bonnie Dumanis
San Diego County District Attorney
Attn: Appellate Division
330 W. Broadway, 8th Floor
San Diego, CA 92101
Phone: (619) 531-3544
da.appellate@sdcda.org
(TrueFiling electronic service)

Kamala D. Harris
California Attorney General
Attn: Appellate Division
110 West 'A' Street, Suite 1100
San Diego, CA 92101
Phone: (619) 645-2001
sdag.docketing@doj.ca.gov
(TrueFiling electronic service)

Mr. KRISTOPHER KIRCHNER
(*through counsel*)