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THE ROLLBACK IN EXTREME SENTENCES FOR CHILDREN: *GRAHAM*, *MILLER*, AND SB 9

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I. Introduction

This article attempts to make sense of the dramatic changes that have occurred during 2012 in the area of extreme adult sentences for offenses committed by children. We begin with the legacy of the U.S. Supreme Court's decisions in *Roper v. Simmons* (2005) 543 U.S. 551 and *Graham v. Florida* (2010) 560 U.S. 825, which laid the groundwork for *Miller v. Alabama* (2012) 132 S.Ct. 2455, decided in June, and the California Supreme Court's opinion in *People v. Caballero* (2012) 55 Cal.4th 262, decided in August. Along the way we discuss those important cases and their implications. We round up the article with a discussion of Senate Bill 9, effective January 1, 2013.

II. The Legacy: *Roper* and *Graham*

The United States Supreme Court has made it clear that the Eighth Amendment demands that children be treated differently from adults for sentencing purposes. In *Roper v. Simmons* (2005) 543 U.S. 551, 125 S.Ct. 1183 (*Roper*), the Court held that the Eighth Amendment bars capital punishment for children. In *Graham v. Florida* (2010) 560 U.S. 825, 130 S.Ct. 2011 (*Graham*), the Court concluded that the Amendment prohibits a sentence of life without the possibility of parole for a juvenile convicted of a nonhomicide offense.

The Supreme Court ruled in *Graham* that juvenile offenders cannot be sentenced to life without a meaningful and realistic opportunity for re-entry

into society *prior to the expiration of their sentence* for non-homicide offenses. (*Id*. at 2010.) The Court explained:

> The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. . . . Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.
>
> (*Id.* at 2032.)

Graham therefore held that a sentence that provides no "meaningful opportunity to obtain release" before the end of the term is unconstitutional. (*Id.* at 2033.) The Court's reasoning, drawn from *Roper*, was grounded in developmental and scientific research that demonstrates that children are less culpable than adults and possess a greater capacity for rehabilitation, change and growth than adults.

The *Graham* Court noted that three essential characteristics distinguish youth from adults for culpability purposes:

- They have a "lack of maturity and an underdeveloped sense of responsibility";

- They "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure";

- Their characters are "not as well formed."

> "These salient characteristics mean that '[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' Accordingly, 'juvenile offenders cannot with reliability be classified among the worst offenders.'"
>
> (*Id*. at 2026 (quoting *Roper*, 543 U.S. at 569-70, 573).)

Emphasizing these unique developmental characteristics, the Court held that juveniles who do not kill or intend to kill require a distinctive treatment under the Constitution.

III. *Caballero*: Unconstitutionality of "De Facto" LWOP for Attempted Murder and Other Non-Homicide Offenses

People v. Caballero (2012) 55 Cal.4th 262: Although *Graham* itself concerned a literal sentence of life without parole, the California Supreme Court finds that its ban applies equally to a de facto LWOP such as 110 years to life.

- "[S]entencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." (*Id*. at 268.)

- California Supreme Court reads *Graham* as proscribing LWOP for any juvenile convicted of "nonhomicide" offenses, *including attempted murder*. (Virtually no explicit discussion of this point in majority opinion. See Justice Werdegar's concurring opinion (also joined by Justice Liu).)

- Though not explicitly discussed in majority opinion, the decision also effectively rejects any distinction based on the number of non-homicide offenses. (Caballero's 110-to-life sentence consisted of base terms and firearm use enhancements for <u>three</u> attempted murder convictions arising out of single shooting incident.)

<u>Remedy.</u> *Caballero* leaves many questions open as to the precise remedy for a de facto LWOP sentence.

- Per *Graham*, "a state must provide a juvenile offender 'with some realistic opportunity to obtain release' from prison during his or her expected lifetime." (*Id*. at 268.)

- "Under *Graham*'s nonhomicide ruling, the sentencing court must consider all mitigating circumstances attendant in the juvenile's crime

and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board. The Board of Parole Hearings will then determine whether the juvenile offender must be released from prison 'based on demonstrated maturity and rehabilitation.'" (*Id*. at 268-269.)

- "Because every case will be different," the California Supreme Court "will not provide trial courts with a precise time frame for setting these future parole hearings in a nonhomicide case." But the sentence "must provide him or her a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' under *Graham*'s mandate." (*Id*. at 269.)

- The *Caballero* opinion "urge[s] the Legislature to enact legislation establishing a parole eligibility mechanism that provides a defendant serving a de facto life sentence without possibility of parole for nonhomicide crimes that he or she committed as a juvenile with the opportunity to obtain release on a showing of rehabilitation and maturity." (*Id*. at 269, fn 5.)

- The disposition paragraph of the Supreme Court opinion "reverse[s] the judgment of the Court of Appeal and remand[s] the matter for reconsideration in light of this opinion." (*Id*. at 269.)

- However, in the body of the opinion, the Supreme Court states: "Defendants who were sentenced for crimes they committed as juveniles who seek to modify life without parole or equivalent de facto sentences already imposed may file petitions for a writ of habeas corpus in the trial court in order to allow the court to weigh the mitigating evidence in determining the extent of incarceration required before parole hearings." (*Id*. at 269.)

- Justice Werdegar's concurrence (also joined by Justice Liu) noted that the opinion may not provide sufficient "guidance on remand." Because a de facto LWOP sentence for a non-homicide juvenile offense is unconstitutional "at the outset," the appropriate appellate

disposition is to "remand ... with directions to resentence defendant to a term ... that, although undoubtedly lengthy, provides ... a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.' [Citing *Graham*.]" (*Id*. at 273, conc. Op., Werdegar, J.)

- Pending further case law on the subject, counsel should argue that *Caballero requires a remand for resentencing* whenever the issues arises on direct appeal from the sentence, as in *Caballero* itself. The opinion's reference to the availability of relief through superior court habeas petitions should be read as guidance for inmates whose cases are no longer pending on direct appeal. If a case is still on direct review, the appropriate appellate remedy should be a remand for resentencing.

  Some *Caballero* remands so far:

  People v. Alonzo (2nd Dist. Div. 3, B217909, Sept. 27, 2012, unpub.) 2012 WL 4465185: sentence of 160 years to life reversed.

  People v. Johnson et al (2nd Dist. Div. 5, B231891, Oct. 4, 2012, unpub.) 2012 WL 6016462: 96 and 120 years-to-life sentences for two 16 year olds reversed.

  People v. Ramirez (2nd Dist., Div. 4, B220528, Nov. 27, 2012, unpub.) 2012 WL 5921152: 120 year sentence reversed.

  People v. Ross (2nd Dist., Div. 1, B229323, Nov. 20, 2012, unpub.) 2012 WL 5861810: remand for new sentencing hearing for court to consider *whether Caballero* applies to 40 year to life sentence.

IV. *Miller v. Alabama*: Eighth Amendment Bar on Mandatory LWOP for Juvenile Homicide

Miller v. Alabama (2012) 132 S.Ct. 2455: Drawing on the reasoning of the categorical bars in *Roper* and *Graham*, the U.S. Supreme Court holds that ***mandatory* LWOP for juveniles convicted of murder violates the Eight Amendment**.

- "Such a scheme prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change' [citing *Graham*] and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties." (*Miller* at 2460.)

- Ban on mandatory juvenile LWOP, even for murder, represents a "confluence" of two lines of Eighth Amendment authorities:

  (1) *Roper*'s and *Graham*'s holdings regarding the developmental and cognitive differences between adults and minors and the lesser "moral culpability" of juvenile offenders; and

  (2) Longstanding Eighth Amendment standards for capital sentencing of adult offenders, "requiring that sentencing authorities consider the characteristics of the offender and the details of his offense before sentencing him to death." (*Id*. at 2463-2464.)

- Choice of LWOP as punishment for a juvenile's homicide offense similarly requires an individualized sentencing determination. That decision must take into account "the mitigating qualities of youth" and its "hallmark features," including "immaturity, impetuosity, and failure to appreciate risks and consequences." A sentencing court must also weigh the minor's "family and home environment ... from which he cannot usually extricate himself, no matter how brutal or dysfunctional." (*Id*. at 2468.)

- Justices Breyer and Sotomayor would recognize a further, categorical bar on LWOP for any "juvenile offender did not kill or intend to kill" (such as a non-killer felony-murder accomplice). Under reasoning of *Graham* and *Miller* majority opinions, such a juvenile offender "has a twice diminished moral culpability" as compared to an "adult murderer." (*Miller* at 2475-2477 (Breyer, J., concur.))

Miller's Implications for California

Unlike the Alabama and Arkansas statutes struck down in *Miller*, California nominally does not make LWOP "mandatory" for juveniles convicted of special circumstance murder. Under section 190.5(b), where the defendant was 16 or 17 at the time of the offense, the punishment for special

circumstance murder "shall be confinement in the state prison for life without possibility of parole *or, at the discretion of the court*, 25 years to life." (Emphasis added.)

Although section 190.5(b)'s allowance of the possibility of a parole-eligible term of 25 to life does not present a clear-cut "mandatory" LWOP statute, the reasoning of *Miller* provides several potential grounds for challenges to juvenile LWOP terms under California's nominally "discretionary" regimen:

(1) The Unlawful *Guinn* Presumption In Favor of LWOP: Although section 190.5(b) gives a sentencing court "discretion" to sentence a juvenile defendant to 25-to-life rather than LWOP, the statute (as judicially construed) stacks the deck against leniency. Cases consistently construe the statute as establishing a "presumption" in favor of LWOP. (*People v. Guinn* (1994) 28 Cal.App.4th 1130; *People v. Murray* (2012) 203 Cal.App.4th 277, 282; *People v. Blackwell* (2011) 202 Cal.App.4th 144, 159; *People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1089.)

- *Yet the reasoning of* Miller v. Alabama *should require the opposite presumption*: "[G]iven all we have said in *Roper, Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." It should be reserved for "'the rare juvenile offender whose crime reflects irreparable corruption.'" (*Miller* at 2469.) In view of those admonitions, *Miller should require a presumption against LWOP* for any offender under the age of 18.

  - Regardless of whether the sentencing court explicitly referred to the standard for its section 190.5(b) determination, the judge is presumed to have followed California law defining LWOP as the presumptive choice. Because the error appears similar to an erroneous burden of proof, it should *not* be salvageable through harmless error analysis.

  - *People v. Gutierrez* (2nd Dist., Div. 6, Sept. 24, 2012) 209 Cal.App.4th 646: declares section 190.5(b) is not mandatory, and that the sentencing court "was aware of its discretion and declined to impose a more lenient sentence." The opinion

contains no discussion of the presumption established by *Guinn* and other cases. (Review granted Jan. 3, 2012, S206365.)

- *People v. Moffett* (1st Dist., Div. 5, Oct. 12, 2012) 209 Cal.App.4th 1465: Court reverses LWOP sentence for offenses including first degree murder with peace officer murder and felony murder special circumstances, holding (among other things: see (2) below) that the *Guinn* presumption in favor of LWOP is contrary to *Miller*, and was actually applied by the sentencing court in that case. (Review granted Jan. 3, 2012, S206771.)

- *People v. Siackasorn* (3rd Dist., Dec. 7, 2012) __ Cal.App.4th__, 2012 WL 6096567: agrees with *Moffett*, disagrees with *Gutierrez*, listing five reasons why "*Miller* has undercut the *Guinn* interpretation of section 190.5(b), that LWOP is the 'generally mandatory ... [and] presumptive punishment for 16- or 17-year-old special-circumstance murderers.'" (*Id*. at *11, quoting *Guinn*.)

    - Note dissenting opinion from the conclusion that a remand for resentencing is necessary, asserting harmless error analysis applies: *Miller* should not be read "to require the parties to litigate, and the trial court to resolve, each subcategory of factors referenced in Miller that might shed light on a minor's culpability or prospects for reform." (*Siackasorn* at *14 (conc. & dis. opn. of Hoch, J.))

(2) Failure to Consider *Miller*'s Hallmarks of Youth Regarding Lesser Culpability: While the "inverted presumption" argument potentially applies to all or most juvenile LWOPs imposed under section 190.5(b), the failure of a court to consider *Miller* hallmarks of youth at the sentencing hearing require a remand for a new sentencing hearing.

- *People v. Hoffman* (5th Dist. F061127, July 30, 2012, unpub.) 2012 WL 3066392, remanded for a new hearing, where the sentencing court did not place the age- and maturity-related considerations highlighted in *Miller* "at the forefront" of its discretionary

determination. The *Hoffman* sentencing court had looked to traditional aggravating and mitigating circumstances (Cal. Rules of Court, rules 4.421, 4.423). However, "those factors ... cannot supplant the factors deemed paramount in *Miller*: the juvenile's 'chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences,' 'the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional,' 'the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him,' 'that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth – for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys,' and 'the possibility of rehabilitation.'"

- *People v. Rosales* (5th Dist. F061036, Oct. 5, 2012, unpub.) 2012 WL 4749427, ordering new sentencing hearing because "the significance of Rosales's youth for sentencing purposes was never pressed upon the trial court's attention" and "the court's comments at the sentencing hearing contain no indication that it considered the significance of Rosales's youth or any of the matters the Supreme Court [in *Miller*] has now held are relevant." The *Rosales* court also rejected a harmless error analysis in light of unlawful *Guinn* presumption and the fact that "*Miller* undoubtedly casts section 190.5 in a dramatically different light." (*Id*. at *24.)

- *People v. Moffett* (1st Dist., Div. 5, Oct. 12, 2012) 209 Cal.App.4th 1465: Observing that "[o]ther comments by the court at the resentencing hearing convince us that remand is appropriate," *Moffett* noted: "that the trial court placed great reliance on the trauma caused to the robbery victims in this case when determining the appropriate sentence for the murder count. Though appellant's conduct during the robbery bears on whether he was an active participant in and instigator of the criminal conduct that led to the shooting (which in turn bears on whether he was influenced by others), the psychological reactions of the robbery victims do not say much about appellant's maturity, prospects for reform, or mental state with respect to the homicide itself—the factors

paramount under *Miller*." (*Id*. at 1477.) (Review granted Jan. 3, 2012, S206771.)

(3) Categorical Challenge to LWOP for Non-Killer Felony-Murder Aider/Abettor: The *Miller* majority left open whether there should be a "categorical" ban on LWOP for a juvenile accomplice convicted on a felony-murder theory. However, Justices Breyer and Sotomayor would recognize a proscription on LWOP for any juvenile who "neither kills nor intends to kill the victim." (*Miller* at 2475-2477 (Breyer, J., concur.))

- California's felony-murder special circumstance applies to an aider-abettor who does not personally kill, so long as he was a "major participant" in the predicate felony and acted with "reckless disregard for human life." (§ 190.2(d).) The "major participant"/"reckless disregard" formulation derives directly from *Tison v. Arizona* (1987) 481 U.S. 137. Under *Tison*, "reckless disregard" for life is deemed a sufficient predicate for imposition of the death penalty on an adult felony-murder participant.

- As discussed in Justice Breyer's concurrence, "even juveniles who meet the *Tison* standard of 'reckless disregard, may not be eligible for life without parole." Under the reasoning of *Graham v. Florida*, "[t]he only juveniles who constitutionally may be sentenced to [LWOP] are those convicted of homicide offenses who 'kill or intend to kill.'" (*Miller* at 2476 (Breyer, J., concur.))

- The standard California instructions allow a felony-murder special circumstance finding as long as an aider/abettor acted with "reckless disregard," but do not require a finding of specific intent to kill. A "categorical" argument along the lines of Justice Breyer's concurrence provides a potential basis to challenge the LWOP sentence for any juvenile convicted on an aiding/abetting theory (including in cases in which jurors rejected personal weapon use allegations).

- **Categorical Challenge to LWOP:** *Miller* left for another day the question of whether the Eighth Amendment categorically bars LWOP sentences for children convicted of homicide offenses. Two pre-*Miller* cases, *People v. Blackwell* (1st Dist. 2011) 202

Cal.App.4th 144 (cert pending, No. 12-5832) and *People v. Murray* (2nd Dist. 2012) 203 Cal.App.4th 277, held there is no such categorical bar.

(4) State and Federal Proportional Arguments: Both federal and California proportionality standards prohibit punishment that is grossly disproportionate to the crime or the individual culpability of the offender.

- *Miller* explained that the Eighth Amendment's guarantee that individuals will not be subjected to excessive sanctions, "'flows from the basic "precept of justice that punishment for crime should be graduated and proportioned"' to both the offender and the offense." (*Miller* at 2463.) *Miller* held that the problem with mandatory life without parole sentences for juveniles is that it prevented the sentencer from taking account of the central considerations of youth, thereby eviscerating proportionality standards essential to the Eighth Amendment: "By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes *Graham*'s (and also *Roper* 's) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." (*Miller* at 2466.) As children categorically "have diminished culpability and greater prospects for reform, [..] 'they are less deserving of the most severe punishments.'" (*Miller* at 2464.) Thus, a formal and separate proportionality analysis for juveniles, taking into account the central considerations of youth, is essential to proportional arguments under the Eighth Amendment.

- *Dillon* considered solely the nature of the offense and offender in its proportionality analysis, a branch of inquiry which "focuses on the particular person before the court, and asks whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of

mind." (*People v. Dillon* (1983) 34 Cal.3d 441, 479.) *Dillon* found the first degree murder life sentence disproportionate to the youth's individual culpability, finding "at the time of the events herein defendant was an unusually immature youth. He had had no prior trouble with the law, and […] was not the prototype of a hardened criminal who poses a grave threat to society. The shooting in this case was a response to a suddenly developing situation that defendant perceived as putting his life in immediate danger. To be sure, he largely brought the situation on himself, and with hindsight his response might appear unreasonable; but there is ample evidence that because of his immaturity he neither foresaw the risk he was creating nor was able to extricate himself without panicking when that risk seemed to eventuate." (*Dillon* at 487.) The approach in *Dillon* was prescient, in that it anticipated many decades later *Graham*'s and *Miller*'s focus on "the mitigating qualities of youth" and its "hallmark features," including "immaturity, impetuosity, and failure to appreciate risks and consequences."

(5) ***Miller/Caballero* Hybrid Argument:** *Caballero* found that when a child is sentenced to minimum terms that exceed his or her life expectancy, the punishment is the functional equivalent of a life sentence without the possibility of parole. (*Caballero* at 268–269.) The *Caballero* court concluded the sentence violated *Graham*'s Eighth Amendment prohibition on juvenile LWOP for nonhomicide offenses. *Miller*, although a homicide case, made it clear that *Graham*'s consideration of the unique characteristics and vulnerabilities of juveniles is not "crime-specific" and its "reasoning implicates any life-without-parole sentence for a juvenile" even if *Graham's* categorical ban regarding nonhomicide offenses did not. (*Miller* at 2458.)

- *People v. Argeta* (2nd Dist., Div. 4, Nov. 10, 2012) 210 Cal.App.4th 1478: the state conceded, and the court held, that a minimum aggregate sentence of 100 years for codefendant Hernandez, who was 15 years old at the time of the homicide, was the functional equivalent of LWOP under *Caballero*, requiring a remand under *Miller*. (The court rejected the *Miller/Caballero* claim of Argeta, whose crime was committed only 5 months after his 18th birthday.)

- *People v. Thomas* (4th Dist., Div. 1, D057485, Dec. 11, 2012) 2012 WL 6177447: reversed a sentence of 196 years-to-life sentence on *Miller/Caballero* grounds, observing that court's comments at sentencing demonstrated it incorrectly believed the sentence was not a sentence of life without possibility of parole. (*Id*. at *18.)

State habeas: Because *Miller v. Alabama* redefines the constitutional limits for imposition of LWOP on a juvenile offender, its holding should apply to all inmates currently serving such sentences, including cases that have already become "final" on direct review. A full discussion of the retroactivity topic is beyond the scope of these materials, but two points merit brief note:

- State habeas is available to consider a claim based on an intervening change in the law (even where a similar argument had been raised and rejected on appeal, prior to that change). (*In re Harris* (1993) 5 Cal.4th 813, 841; *In re Lucero* (2011) 200 Cal.App.4th 38, 43-45.) A recent California Supreme Court decision confirms that this "change in the law" rationale applies to a cruel-and-unusual punishment claim based on new case law. (See *In re Coley* (2012) 55 Cal.4th 524, 537.)

- *Miller* itself – or more precisely, its companion case – demonstrates that the issue is properly cognizable on post-affirmance collateral review. While *Miller* was a direct appeal, the consolidated companion case, *Jackson v. Hobbs*, arose on a collateral review petition in the Arkansas courts, several years after affirmance of the sentence on direct appeal. (*Miller* at 2461-2462.) Despite those different procedural postures, the Supreme Court vacated the mandatory LWOP terms and remanded for resentencing in both cases. (*Miller* at 2475.)

V. SB 9: A New Statutory Procedure for Reconsideration of Juvenile LWOP Sentences

Senate Bill 9, providing a new statutory procedure for defendants to seek reconsideration of LWOP sentences imposed for crimes committed as

juveniles, went into effect on January 1, 2013. Section 1170(d)(2), establishes a mechanism for a defendant who has served at least 15 years of an LWOP term for an offense as a juvenile to petition the superior court to "recall" and reconsider his sentence. The full text of § 1170(d)(2) is reprinted at the end of these materials.

1170(d)(2) Application and Hearing Process

- **Application:** The "petition for recall and resentencing" must include "the defendant's statement describing his remorse and work toward rehabilitation." (Subd. (d)(2)(B).) The case must come within one of the following categories :
    - (i) conviction based on "felony murder or aiding and abetting murder";
    - (ii) no "prior "juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm....";
    - (iii) commission of the offense "with at least one adult codefendant"; or
    - (iv) acts "that tend to indicate rehabilitation or the potential for rehabilitation" including participation in available "rehabilitative, educational, or vocational programs," "self-study for self-improvement, or showing evidence of remorse."

    The statute explicitly *excludes* offenses in which the defendant "tortured" a victim or in which the victim was a "public safety official," "law enforcement officer," or "firefighter." (Subd. (d)(2)(A)(ii).)

- **Review of the application/granting a recall hearing:** The prosecution may file a reply to the recall petition within 60 days. (Subd. (d)(2)(D)) "If the superior 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...." (Subd. (d)(2)(E)) Notwithstanding the statute's use of a preponderance burden, the superior court will apparently make this factual determination based on a review of the papers, rather than any evidentiary proceeedings.

- **Recall hearing:** The function of a recall hearing is for the superior court to determine, in its "discretion," whether to grant a new sentencing hearing. However, the "recall" hearing contemplated by the statute closely resembles an actual sentencing hearing. The statute includes a non-exclusive list of factors "that the court may consider" in exercising its discretion. These discretionary criteria repeat the same four eligibility categories for the original application (felony-murder or aiding/abetting; no prior violent juvenile adjudications; adult co-defendant; and evidence of rehabilitation), as well as four additional factors (Subd. (d)(2)(F)):
    - (iv) "the defendant had insufficient adult support or supervision and had suffered from psychological or physical trauma, or significant stress";
    - (v) "cognitive limitations due to mental illness, developmental disabilities, or other factors that did not constitute a defense, but influenced the defendant's involvement";
    - (vii) maintenance of "family ties or connections" and elimination of "contact with individuals outside of prison who are currently involved with crime";
    - (viii) "no disciplinary actions for violent activities in the last five years" in which the defendant was the "aggressor."
    - The court may also "consider any other criteria" it "deems relevant," but must "identif[y] them on the record" and state reasons for its findings on their applicability. (Subd. (d)(2)(I).)

- **Resentencing hearing:** If the court does exercise its discretion to recall the sentence, it will then conduct a new hearing to "resentence the defendant in the same manner as if the defendant had not previously been sentenced" (but the new sentence must be no greater than the original one). (Subds. (d)(2)(E) & (d)(2)(G).) This resentencing hearing will evidently be separate from the recall hearing, and victims and victims' family members "shall be notified of the resentencing hearing and shall retain their rights to participate." (Subd. (d)(2)(G).)

- **Subsequent applications:** If the superior court denies the petition to recall the sentence, the defendant has up to two further opportunities to file recall petitions. He may submit another such petition after he has been in custody "for at least 20 years" and may file a "final petition" "after having served 24 years." (Subd. (H))

Initial thoughts and questions: S.B. 9 creates a statutory avenue for inmates to seek reconsideration of LWOP sentences where none previously existed. It is hard to predict at this juncture what proportion of the roughly 300 juvenile LWOP inmates in California may eventually obtain relief under the new section 1170(d)(2) procedure. However, the statute raises a number of procedural and substantive questions.

- **Eligibility:** Most juveniles under LWOP terms will likely come within the four categories listed in § 1170(d)(2)(B). Indeed, category (i) – juveniles convicted of felony murder or as aiders/abettors probably represents the majority of juvenile offenders under such sentences. (Note that, due to the disjunctive formulation, the provision is not restricted to felony-murder aider-abettors. A direct perpetrator convicted under a felony-murder theory should also qualify.)

- **Counsel**: There is no reference to appointment of counsel in the statute. By analogy to habeas corpus, it appears very likely that a superior court will be required to appoint counsel if it actually orders a recall "hearing." These recall hearings appear to blend elements of habeas evidentiary hearings and sentencing hearings, each of which require appointed counsel. (Cf. *In re Clark* (1993) 5 Cal.4th 750, 780 (requiring appointment of habeas counsel upon issuance of OSC). It is much more doubtful, however, that courts will be willing to appoint counsel to assist defendants in preparing § 1170(d)(2) petitions in the first place.

- **Remorse and rehabilitation:** It remains to be seen what the courts will demand of the requisite "defendant's statement describing his or her remorse and work toward rehabilitation." (Subd. (d)(2)(B).) Note that cases reviewing parole denials by the Board of Parole Hearings or the Governor emphasize that "an

inmate need not agree or adopt the official version of a crime in order to demonstrate insight and remorse." *In re Twinn* (2010) 190 Cal.App.4th 447, 466; *In re Sanchez* (Aug. 31, 2012, pub. Oct. 1, 2012; G046189) __ Cal.App.4th __; accord, e.g., *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1491 (no requirement that prisoner must "'admit his guilt or change his story to be found suitable for parole").

- **Discretion to recall sentence:** It remains to be seen what the courts will demand of the requisite "defendant's statement describing his or her remorse and work toward rehabilitation." (Subd. (d)(2)(B).) Note that cases reviewing parole denials by the Board of Parole Hearings or the Governor emphasize that "an inmate need not agree or adopt the official version of a crime in order to demonstrate insight and remorse." (*In re Twinn* (2010) 190 Cal.App.4th 447, 466; *In re Sanchez* (2012) 209 Cal.App.4th 962; accord, e.g., *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1491 (no requirement that prisoner must "'admit his guilt or change his story to be found suitable for parole").)

- **Resentencing:** Notwithstanding the apparent breadth of the court's discretion whether to recall a sentence, its discretion in the later resentencing hearing will be much more limited. Any resentencing will be "conducted in the same manner as if the defendant had not been previously sentenced." (§ 1170(d)(2)(G).) That direction suggests that any new sentencing hearing will again be conducted under the terms of section 190.5(b)(2), including its "presumption" of LWOP.

- **Appeal of denial of petition:** The statute does not specify whether the denial of a § 1170(d)(2) petition (either with or without a hearing) will be appealable. A defendant may not appeal a court's refusal to recall a prison sentence under former § 1170(d) (now § 1170(d)(1)), because there is no right to move for such a recall in the first place. A court may order a conventional 1170(d) recall only on its own motion. (*People v. Pritchett* (1993) 20 Cal.App.4th 190, 194.) However, that rationale should not apply to a section 1170(d)(2) denial: The statute does confer a right to petition for a recall and establishes governing criteria, including that a court "shall" hold a hearing under specified circumstances.

Consequently, the denial of a defendant's § 1170(d)(2) application should be appealable as an order after judgment affecting substantial rights. (§ 1237(b).)

- **Effect on appellate and habeas review of LWOP sentences:** The state, in at least one *Miller* habeas, argues that the petitioner must first exhaust the statutory remedy under section 1170(d)(2) before the court decides the *Miller* claim. However, section 1170(d)(2) does not resolve the constitutional defects in the section 190.5(b) sentencing process, because the "presumption" of LWOP remains in place at any resentencing. Moreover, because § 1170(d)(2) establishes a wholly discretionary reconsideration mechanism, it does not (nor was SB 9 ever intended to) provide a forum for litigation of the constitutional issues raised by *Miller v. Alabama*. Inmates will certainly want to avail themselves of the section 1170(d)(2) procedure after they have served the requisite 15 years, especially if they appears to have strong evidence of the mitigating and rehabilitative factors listed in subd. (d)(2)(F). However, the new statute is best viewed as an additional procedure for reconsideration, directed to a sentencing court's discretion. Direct appeal and habeas remain the proper forums for presentation of the constitutional claims arising from *Miller v. Alabama*.

- **SB 9's applicability to defacto LWOP sentences:** Since section 1170(d)(2) makes no reference to section 190.5, it is arguably ambiguous as whether it is restricted to such sentences or includes de facto LWOP sentences as well. Based on the legislative record, there is a compelling argument that SB 9 was never intended to be limited to formal LWOP. Not to apply 1170(d)(2) to de facto LWOP yields an absurd result: older juvenile offenders sentenced under section190.5(b) for the worst offenses would receive more favorable treatment than younger juvenile offenders who committed lesser offenses.

APPENDIX:
STATUTORY PROCEDURE FOR RECONSIDERATION OF JUVENILE LWOP

New Pen. Code § 1170(d)(2), enacted by S.B. 9 (eff. Jan. 1, 2013)

(2) (A) (i) 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 life without the possibility of parole has served at least 15 years of that sentence, the defendant may submit to the sentencing court a petition for recall and resentencing.
(ii) Notwithstanding clause (i), this paragraph shall not apply to defendants sentenced to life without parole for an offense where the defendant tortured, as described in Section 206, his or her victim or the victim was a public safety official, including any law enforcement personnel mentioned in Chapter 4.5 (commencing with Section 830) of Title 3, or any firefighter as described in Section 245.1, as well as any other officer in any segment of law enforcement who is employed by the federal government, the state, or any of its political subdivisions.
(B) The defendant shall file the original petition with the sentencing court. A copy of the petition shall be served on the agency that prosecuted the case. The petition shall include the defendant's statement that he or she was under 18 years of age at the time of the crime and was sentenced to life in prison without the possibility of parole, the defendant's statement describing his or her remorse and work towards rehabilitation, and the defendant's statement that one of the following is true:
(i) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law.
(ii) 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.
(iii) The defendant committed the offense with at least one adult codefendant.
(iv) 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.
(C) If any of the information required in subparagraph (B) is missing from 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.
(D) 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.
(E) If the court finds by a preponderance of the evidence that the statements in the petition are true, the court shall hold a hearing to consider whether to recall the sentence and commitment 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. Victims, or victim family members if the victim is deceased, shall retain the rights to participate in the hearing.
(F) The factors that the court may consider when determining whether to recall and resentence include, but are not limited to, the following:
(i) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law.
(ii) 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.
(iii) The defendant committed the offense with at least one adult codefendant.
(iv) 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.
(v) 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.
(vi) 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.

(vii) 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.
(viii) 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.
(G) The court shall have the 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. The discretion of the court shall be exercised in consideration of the criteria in subparagraph (B). Victims, 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.
(H) 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. 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.
(I) In addition to the criteria in subparagraph (F), 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.
(J) This subdivision shall have retroactive application.