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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MARIO SALVADOR PADILLA, Defendant and Appellant.	B277715 (Los Angeles County Super. Ct. No. TA051184)

APPEAL from a judgment of the Superior Court of Los Angeles County, John J. Cheroske, Judge. Affirmed.

Jonathan E. Demson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb and Paul M. Roadarmel, Deputy Attorneys General, for Plaintiff and Respondent.

In 1999, appellant Mario Salvador Padilla was convicted of a murder he committed when sixteen years old, and was sentenced to a term of life without the possibility of parole (LWOP). The trial court denied his petition under Penal Code section 1170, subdivision (d)(2) (section 1170(d)(2)), which permits specified defendants sentenced to LWOP terms for murders they committed as juveniles to be resentenced.[1] We reject his challenges to that ruling and affirm.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

This is the third time appellant has appeared before us in litigating his requests to be resentenced. We begin by summarizing the relevant facts regarding those proceedings.

In 1999, a jury convicted appellant of the murder of his mother Gina Castillo (§ 187, subd. (a)) and conspiracy to murder his stepfather Pedro Castillo (§ 182, subd. (a)(1)). The jury found true special-circumstance allegations that the murder was committed in the course of a robbery and while lying in wait (§ 190.2, subds. (15), (17)(A)). The trial court imposed an LWOP term on the murder conviction (§ 190.5, subd. (b)), and imposed and stayed a term of 25 years to life on the conviction for conspiracy to commit murder (§ 654). In an unpublished opinion (*People v. Padilla* (June 1, 2001, B135651)), this court determined there was

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[1] All further statutory references are to the Penal Code.

insufficient evidence to support the lying-in-wait special-circumstance finding, but otherwise affirmed the judgment of conviction.

In *Miller v. Alabama* (2012) 567 U.S. 460, 476-480 (*Miller*), the United States Supreme Court held that the Eighth Amendment of the United States Constitution "forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," and set forth factors controlling the determination whether that penalty may be imposed on such a juvenile. (*Miller, supra,* at p. 479.)

In August 2012, the California Legislature amended section 1170 to add subdivision (d)(2), which creates a postconviction resentencing proceeding for certain defendants serving LWOP terms. (Stats. 2012, ch. 828, § 1, p. 92.) Section 1170(d)(2) states in clause (i) of subparagraph (A) that defendants serving an LWOP term for an offense they committed when under 18 years of age may submit a petition for recall and resentencing after having served 15 years of their sentence. Clause (ii) of subparagraph (A) provides that a defendant is ineligible for recall and resentencing when the offense for which the LWOP term was imposed involved specified circumstances, including that the defendant engaged in torture.

Under section 1170(d)(2), the petition must contain enumerated statements, including a description of the defendant's "remorse and work towards rehabilitation." (§ 1170, subd. (d)(2)(B).) As operative during the pertinent

period, section 1170(d)(2) further provided that if the court found that the statements in the petition were true, the court was required to hold a hearing "to consider whether to recall the sentence and commitment previously ordered and to resentence the defendant . . . ." (Former § 1170, subd. (d)(2)(E).) Under that version of section 1170(d)(2), at the hearing, the court was authorized to recall the sentence and resentence the defendant upon a consideration of factors relating to the circumstances surrounding the defendant's offense, and his or her conduct after it. (Former § 1170, subd. (d)(2)(F).)[2]

In August 2013, appellant filed a petition for recall and resentencing under section 1170(d)(2). When the trial court determined that he was ineligible for resentencing because his offense involved torture, appellant noticed an appeal from the ruling.

In August 2014, while that appeal was pending, appellant filed a petition for writ of habeas corpus in the superior court, seeking resentencing under *Miller*. Later, in July 2015, the trial court conducted a hearing on the petition for writ relief and resentenced appellant to an LWOP term.

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[2] Under section 1170(d)(2), if the court declines to recall the defendant's sentence, the defendant may submit a second petition after having served 20 years of his or her sentence. (§ 1170, subd. (d)(2)(H).) If that petition is unsuccessful, the defendant may submit a third and final petition after having served 24 years of the sentence. (*Ibid.*)

Appellant appealed from that ruling.

In November 2015, we reversed the denial of appellant's section 1170(d)(2) petition and remanded for further proceedings, concluding there was insufficient evidence to support a finding of torture. (*People v. Padilla* (Nov. 20, 2015, B257408) [nonpub. opn.].) In January 2016, prior to any further action below on appellant's section 1170(d)(2) petition, the United States Supreme Court issued its decision in *Montgomery v. Louisiana* (2016) 577 U.S. ___[136 S.Ct. 718, 727, 729, 736] (*Montgomery*), which held that *Miller* set forth a substantive rule that had retroactive application in state collateral review proceedings. In September 2016, following a hearing, the trial court denied appellant's section 1170(d)(2) petition. Appellant noticed the appeal before us from that ruling.

In October 2016, we reversed the denial of appellant's petition for writ relief on the ground that the trial court, in ruling on the petition, exercised its discretion without the guidance provided by *Montgomery*. (*People v. Padilla* (2016) 4 Cal.App.5th 656, 659-660, rev. granted Jan. 25, 2017, S239454.) We concluded that *Montgomery* "significantly recast" *Miller*, and that "under *Montgomery*, *Miller* must be regarded as announcing a substantive rule barring LWOP terms for a specific class of juvenile offenders, namely, those "'whose crimes reflect the transient immaturity of youth,'" not irreparable corruption." (*People v. Padilla, supra,* at p. 672, quoting *Montgomery*, *supra*, 577 U.S. at p. ___ [136 S.Ct. at p. 743].)

DISCUSSION

Appellant contends the trial court erred in denying his petition under section 1170(d)(2). As discussed below, we disagree.

A. *Mootness*

At the threshold of our inquiry, we address respondent's contention that this appeal is moot. Generally, "[a] case is considered moot when 'the question addressed was at one time a live issue in the case,' but has been deprived of life 'because of events occurring after the judicial process was initiated.'" (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1574, quoting *Younger v. Superior Court* (1978) 21 Cal.3d 102, 120.) Thus, "[a] case becomes moot when a court ruling can have no practical impact . . . ." (*Simi Corp. v. Garamendi* (2003) 109 Cal.App.4th 1496, 1503.) However, "whe[n] a court can afford the party at least some relief, even if not all the relief originally requested, the court should not dismiss a case as moot." (*City of Cerritos v. State of California* (2015) 239 Cal.App.4th 1020, 1031.)

Respondent maintains that this appeal was rendered moot by the recent enactment of Senate Bill No. 394 (2017-2018 Reg. Sess.). Because appellant was convicted of first-degree murder, the least severe term for which he is eligible upon resentencing is 25 years to life. (§ 190.5, subd. (b).)[3]

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[3] Under subdivision (b) of section 190.5, the trial court

(*Fn. is continued on the next page.*)

Senate Bill No. 394 amends Penal Code sections 3051 and 4801 to designate juvenile homicide offenders sentenced to LWOP terms eligible for parole during their 25th year of incarceration.[4] Respondent argues that because that legislation operates retroactively, it encompasses appellant, and thus effectively provides the relief he sought, namely, to "reduc[e] his LWOP sentence to 25 years to life in order to be eligible for parole in his 25th year of incarceration."

In view of other recent changes of law, we conclude that this appeal is not moot, as the legislation described above does not give all the relief potentially available to appellant if resentenced. In November 2016, the voters approved Proposition 57, entitled "The Public Safety and Rehabilitation Act of 2016," which modified the procedures for charging juveniles, and amended the California Constitution by adding section 32 to article 1. (*People v.*

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has the discretion to impose an LWOP term on a defendant guilty of first degree murder who was 16 years of age or older at the time of the offense, provided at least one special circumstance was found to be true.

[4] As amended, effective January 1, 2018, subdivision (b)(4) of Penal Code section 3051 will provide that a juvenile offender convicted of an offense "for which the sentence is [LWOP] shall be eligible for release on parole . . . during his or her 25th year of incarceration at a youth offender parole hearing, unless . . . entitled to an earlier parole consideration hearing pursuant to other statutory provisions."

Superior Court (Walker) (2017) 12 Cal.App.5th 687, 690, 694, fn. 8, rev. granted Sept. 13, 2017, S243072.) Among the stated purposes of Proposition 57 is to "'[s]top the revolving door of crime by emphasizing rehabilitation, especially for juveniles.'" (*People v. Superior Court* (*Walker*)*, supra,* at p. 696, quoting Prop. 57, § 2.)

Article 1, section 32 of the California Constitution authorizes the California Department of Corrections and Rehabilitation (CDCR) to award inmates credits for good behavior and adopt appropriate regulations.[5] Under an emergency regulation operative September 21, 2017, conduct credits that "advance" an inmate's initial parole hearing date are now afforded to inmates "sentenced to" an indeterminate term with the possibility of parole -- including those convicted of murder or other violent felonies (§ 667.5, subd. (c)) -- but expressly denied to inmates "sentenced to" LWOP

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[5] Section 32 of article 1 of the California Constitution provides in pertinent part: "(a) The following provisions are hereby enacted to enhance public safety, improve rehabilitation, and avoid the release of prisoners by federal court order, notwithstanding anything in this article or any other provision of law: [¶] . . . [¶] (2) Credit Earning: The [CDCR] shall have authority to award credits earned for good behavior and approved rehabilitative or educational achievements. [¶] (b) The [CDCR] shall adopt regulations in furtherance of these provisions, and the Secretary of the [CDCR] shall certify that these regulations protect and enhance public safety." (Cal. Const., art. 1, §32, subd. (a), par. (2).)

terms. (Cal. Code Regs., tit. 15, § 3043.2, subd. (b)(1), (b)(2).)[6]

Because appellant was sentenced to an LWOP term, the emergency regulation, by its plain language, denies him conduct credits potentially advancing the date of the parole hearing to which he is entitled under the recent amendment to Penal Code section 3051. Accordingly, although it is possible that the CDCR may adopt a regulation in the future

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[6] California Code of Regulations, title 15, section 3043.2 provides in pertinent part: "(b) Notwithstanding any other authority to award or limit credit, effective May 1, 2017, the award of Good Conduct Credit shall . . . advance an inmate's initial parole hearing date . . . if sentenced to an indeterminate term with the possibility of parole pursuant to the following schedule: [¶] (1) No credit shall be awarded to an inmate sentenced to death or a term of life without the possibility of parole; [¶] (2) One day of credit for every four days of incarceration (20%) shall be awarded to an inmate serving a determinate or indeterminate term for a violent felony as defined in Penal Code section 667.5, subdivision (c), unless the inmate qualifies . . . or is statutorily eligible for greater credit . . . ." (Cal. Code Regs., tit. 15, § 3043.2, subd. (b)(1), (b)(2).)

We note that because the regulation was adopted as an emergency measure, it will be repealed by operation of law if the Secretary of the CDCR fails to submit a certificate of compliance by December 20, 2017. (§5058.3; History foll. Cal. Code Regs., tit.15, § 3043.2; see Off. of Admin. Law, Notice of Approval of Emergency Regulatory Action (Dec. 18, 2017), pp. 1-2.)

granting appellant such credits, they are not currently available to him unless he is resentenced to a term of 25 years to life. The appeal before us is therefore not moot. (*Saraswati v. County of San Diego* (2011) 202 Cal.App.4th 917, 925 [statutory amendment did not moot appeal because it did not ensure full and timely relief to appellant].)[7]

B. *Denial of Section 1170(d)(2) Petition*

We turn to the trial court's denial of appellant's section 1170(d)(2) petition.

1. *Governing Principles*

As operative at the time of the challenged ruling, section 1170(d)(2) provided that the trial court, upon finding

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[7] Respondent has directed our attention to a recent decision, namely, *People v. Lozano* (2017) 16 Cal.App.5th 1286. There, the defendant sought relief from his LWOP sentence solely under the Eighth Amendment, on the basis of the grounds set forth in *Miller* and *Montgomery*. (*Lozana, supra,* at pp. 1288-1290.) The appellate court concluded that Senate Bill No. 394 mooted that claim for relief. (*Id.* at p. 1290.) In contrast, appellant requests that he be resentenced to a 25-year-to-life sentence under section 1170, subdivision (d)(2). As explained, such a sentence would entitle him to custody credits under the new regulations established by the CDCR. For that reason, Senate Bill No. 394 does not moot his claim for relief.

certain facts (that the defendant was eligible for relief and that the petition contained specified true statements), was required "to hold a hearing to consider whether to recall the sentence . . . 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." (Former § 1170, subd. (d)(2)(E).) The statute enumerated factors the court was permitted to consider in determining whether to recall the sentence, without restricting the court's consideration to the enumerated factors. (*Id.* at subd. (d)(2)(F).)

Under the applicable version of section 1170(d)(2), the trial court potentially confronted two decisions at the hearing on the petition. Generally, in the context of section 1170, the term "recall" refers to the threshold decision to set aside or abrogate an existing sentence for a sentencing purpose. (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 455, 456-465.) The applicable version of section 1170(d)(2) thus required the trial court first to determine whether recalling the existing sentence was appropriate; if it decided to do so, the statute obliged the court "to resentence the defendant in the same manner as if the defendant had not previously been sentenced," that is, to determine the appropriate sentence for the defendant as a juvenile homicide offender (§ 190.5, subd. (b)). (§ 1170, subd. (d)(2)(E).)

In view of the structure of the applicable version of section 1170(d)(2), courts have held that it neither remedied potential constitutional defects in existing LWOP sentences

imposed on juvenile homicide offenders, nor required a determination whether those sentences were unconstitutional. In *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1386, our Supreme Court concluded that the statute did not eliminate the constitutional concerns regarding the initial imposition of LWOP sentences identified in *Miller*, stating: "A sentence of life without parole . . . remains *fully effective* after the enactment of section 1170(d)(2)." In *People v. Gibson* (2016) 2 Cal.App.5th 315, 329-330, 331 (*Gibson*), the appellate court concluded that the statute, in authorizing the trial court to recall an LWOP sentence, did not "compel a review of the constitutionality of" that sentence under *Miller*.

Here, our inquiry into the trial court's denial of appellant's section 1170(d)(2) petition has a narrow focus. The court's ruling necessarily reflected a decision not to recall appellant's sentence, as the court denied the petition without reaching the question of the appropriate "new sentence" (former § 1170, subd. (d)(2)(E)); furthermore, appellant asserts no challenge to the ruling on the basis of the constitutional grounds identified in *Miller* and *Montgomery*.[8] We therefore examine the relevant principles

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[8] The principal issues relating to the constitutionality of appellant's existing sentence under *Miller* and *Montgomery* are currently before our Supreme Court, which granted review in our decision regarding appellant's petition for writ relief (*People v. Padilla*, *supra*, 4 Cal.App.5th 656, rev.
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regulating the trial court's statutory authority to decline to recall the sentence.

Because the provision authorizing a recall of the sentence used permissive rather that mandatory terms, the statute "confer[red] broad discretion on the trial court in considering relevant factors and determining whether to recall the sentence."[9] (*Gibson*, *supra*, 2 Cal.App.5th at p. 324.) Generally, the factors specified in a governing statute are relevant to a sentencing decision, as are other factors applicable to similar sentencing decisions, if permitted by that statute. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-979 (*Alvarez*).) Thus, in suitable circumstances, the court may consider "'the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.'" (*Id*. at p. 978, quoting *People v. Morales* (1967)

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granted Jan. 25, 2017, S239454).

[9] The current version of section 1170(d)(2) significantly circumscribes the trial court's discretion to decline to recall a sentence, as it provides that upon finding that the defendant is eligible for relief and that the petition contains specified true statements, "the court *shall* recall the sentence . . . and hold a hearing 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." (§ 1170, subd. (d)(2)(E), (d)(2)(B)), italics added.)

252 Cal.App.2d 537, 547.)

Here, the applicable version of section 1170(d)(2) authorized the trial court to consider whether appellant was convicted of felony murder or as an aider-and-abettor; whether appellant had a prior history of violent crime; whether appellant has an adult accomplice; whether appellant lacked adult supervision at the time of the crime; whether appellant suffered from trauma, mental illness, or cognitive limitations; whether appellant had performed "rehabilitative" acts or had shown remorse while incarcerated; whether appellant maintained contact with his or her family; and whether appellant had been disciplined for violent conduct during the previous five years.[10] Because

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10 Former subdivision (d)(2)(F) of section 1170 provides: "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,

(*Fn. is continued on the next page.*)

the statute did not confine the trial court to those factors, the court was permitted to consider others, including factors identified in *Miller*, such as "'the circumstances of the homicide offense, including the extent of [the appellant's] participation in the conduct . . . .'" (*People v. Willover* (2016) 248 Cal.App.4th 302, 323 (*Willover*), quoting *Miller*, *supra*, 567 U.S. at p. 477.) In evaluating the factors, the court "ha[d] discretion to accord different weight to each factor, and its decision [was not] determined by the sheer number of factors on one side or the other." (*Willover, supra*, at p. 323.)

The trial court's decision not to recall the sentence is thus reviewed for an abuse of discretion. (*Gibson*, *supra*, 2 Cal.App.5th at p. 325.) Under this standard, a trial court's

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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."

exercise of discretion will not be disturbed unless the court exercised it in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*Ibid.*)

An instructive application of the principles discussed above is found in *Willover, supra,* 248 Cal.App.4th 302. There, the defendant, at age 17, bought a gun with the announced plan of using it "to rob and kill people and to settle scores with rival gangs." (*Id.* at pp. 306-307.) The defendant and an adult accomplice then drove through an area, discussing committing a robbery. (*Id.* at pp. 307, 316.) The defendant demanded money from two victims and fired nine shots at them, killing one and seriously wounding the other. (*Id.* at p. 307.) Later, when the accomplice said he "'wanted his turn,'" the defendant handed the gun to the accomplice, who fatally shot a pedestrian. (*Id.* at pp. 307-308.) In 1999, after being convicted on two counts of first degree murder and one count of attempted murder, the defendant received an LWOP term. (*Id.* at p. 308.)

Later, the trial court declined to recall and resentence the defendant under the applicable version of section 1170(d)(2), even though it found the existence of several statutory factors favorable to the defendant. (*Willover*, *supra*, 248 Cal.App.4th at p. 306.) Specifically, the court determined that the defendant had no record of violent crimes prior to his offenses; that he had engaged in rehabilitative acts and "'positive behavior'" while incarcerated, resulting in "a lowered classification level";

that he had maintained connections with his family and friends; and that he had not been disciplined for violent conduct during the prior five years. (*Id*. at pp. 316-317, 320-322.) The court further determined that other statutory factors did not support relief, concluding that the defendant had been convicted of one murder as the direct perpetrator; that the adult accomplice had not significantly influenced the defendant to commit the crimes; that the defendant had not lacked adult supervision; and that the defendant did not suffer from any trauma, mental illness, or cognitive limitations, notwithstanding the existence of some evidence that he had used methamphetamines and had a personality disorder. (*Ibid*.) In denying the petition, the trial court placed special emphasis on the circumstances of the offenses, noting that they were "'particularly vi[]c[i]ous . . . , cruel and callous,'" and that the defendant "was 'not a minor or a passive participant' but rather 'the leader of the criminal enterprise that day.'" (*Id*. at p. 317.) Affirming, the appellate court found no abuse of discretion. (*Id*. at p. 324.)

2. *Underlying Proceedings*

Following our prior decision relating to appellant's section 1170(d)(2) petition, he submitted a sentencing memorandum to the trial court, requesting that he be resentenced to a term of 25 years to life.[11] In ruling on

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[11] The memorandum relied on the then-operative version of section 1170(d)(2), as well as *Miller* and *Montgomery*.

appellant's request for resentencing, the trial court had before it the facts established at his trial, as well as evidence regarding his post-conviction conduct and potential for rehabilitation.

a. *Trial Evidence*

In January 1998, appellant was 16 years old and lived with his mother, Gina Castillo, and his stepfather, Pedro Castillo.[12] He shared a bedroom with his baby sister. In that room, Gina and Pedro placed a piggy bank for the baby containing more than $100.

Gina and Pedro forbade appellant to visit his 14-year-old cousin, Samuel Ramirez, who lived with appellant's grandmother. On several occasions, appellant told a schoolmate that he intended to kill his parents because they were strict with him, made him do chores, and would not let him "go out." The schoolmate also heard Ramirez say that "it would be 'cool' to kill" appellant's parents.

During the morning of January 13, 1998, appellant and Ramirez were in an arcade with a friend. Appellant told the friend that he and Ramirez were going to kill Gina because "it was a perfect day to do it." After showing the friend a knife, appellant said that after killing his mother, he intended to take some money.

On the same day, at approximately 2:30 p.m., Los

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[12] As appellant's victims share a surname, we refer to them by their first names.

Angeles County Sheriff's Department deputy sheriffs responded to a 911 call regarding appellant's residence. Inside, they found Gina lying on the floor, suffering from multiple wounds and covered with blood. She told the deputy sheriffs that appellant had inflicted her injuries. Nearby, they found some knives. Later, Pedro discovered that the piggy bank in appellant's bedroom was missing.

Investigating officers interviewed appellant twice shortly after Gina's death. After initially denying involvement in his mother's murder, he provided an account of the crime. Appellant stated that he and Ramirez discussed killing Gina and Pedro for more than a month prior to January 13, 1998. According to appellant, killing his parents was his idea. The idea arose from "frustration" regarding his lack of freedom, as his parents did not "let [him] go out anywhere."

Appellant further stated that on the day of the murder he arose and gave the appearance of leaving for school, but went to an arcade, where he met Ramirez. At approximately 2:25 p.m, they entered appellant's residence, where his mother was seated at a computer table. Although their faces were covered, Gina recognized appellant. When appellant stabbed her with a knife, she struggled and took away the knife. Ramirez secured a second knife and held Gina down, but she broke the second knife. At some point, appellant obtained a third knife from Ramirez and stabbed Gina in the neck and chest. As she struggled with them, she recognized Ramirez and said, "Help me." She also said, "I'm dying."

Because his mother was screaming appellant's name, he put a rag in her mouth. After attacking her, appellant washed his hands and fled with Ramirez.

During the second interview, appellant stated that for three or four weeks, he had planned with Ramirez to kill his mother and stepfather. As part of the plan, they intended to take some money appellant's parents had set aside for his baby sister. He also acknowledged that he and Ramirez contemplated killing three other people in a manner derived from a movie called "Scream," namely, a female schoolmate to whom appellant had sent death threats, as well as another female schoolmate and her boyfriend. Prior to killing his mother, appellant smoked some marijuana. When asked how he felt after the killing, appellant replied, "Terrible, I felt like just killing myself too."

b. *Evaluations of Potential for Rehabilitation and Reports Regarding Post-Conviction Conduct*

Appellant submitted several reports and declarations regarding his family life, personality, and conduct while in prison. According to a social history and assessment prepared with the assistance of Licensed Clinical Social Worker Miya Sumii, prior to the offenses, Gina was "the 'disciplinarian of the household,'" although Pedro sometimes showed his authority over the family. The assessment further stated that appellant was immature at the time of his offenses, as he then "had limited life experiences and limited ability to weigh the risk and consequences of his

actions"; that appellant was subject to fantasies derived from horror movies; and that he killed his mother while under the influence of marijuana. The assessment opined that appellant had "great potential" for rehabilitation, in view of the steps he had taken toward rehabilitation while serving his sentence.

After reviewing records for appellant held by the CDCR, retired associate warden Daniel J. Fulks stated that appellant's disciplinary history was "extremely commendable." Appellant had been discipline-free for all but one of his years of incarceration, and there was no documented criminal or gang activity. According to Fulks, appellant's sole disciplinary violation, which occurred in 2000, was for possession of inmate-manufactured alcohol. Fulks further stated that while incarcerated, appellant had earned his GED and participated in several vocational training programs.

Barry A. Krisberg, a Ph.D. in sociology, opined that appellant exhibited "an excellent capacity to rehabilitate and reintegrate into society." According to Krisberg, appellant had a "remarkable record of good behavior" while imprisoned, was respectful to staff and peers, and "took advantage of every program and self-help opportunity available to him . . . ." Although initially placed in a high-security facility, he had been moved to less restrictive housing "as soon as that was allowable." There was no evidence that appellant displayed significant mental health or substance abuse issues while incarcerated.

In addition to this evidence, appellant submitted declarations from several persons familiar with his religious beliefs. John Pape stated he was a religious volunteer at Central Juvenile Hall, where appellant was once placed. When appellant was moved to prison, Pape maintained contact with him through visits, phone calls, and letters. According to Pape, appellant was an immature 16-year-old when they first met. Since that time, appellant had matured and acquired religious beliefs. Pape opined that appellant's ongoing participation in religious programs reflected "a genuine desire and capacity for rehabilitation . . . ."

David Waagan, a member of the Jehovah's Witnesses, stated that in 2005, he conducted appellant's baptism while appellant was incarcerated at Pelican Bay State Prison. According to Waagan, "[n]ot anyone can be baptized," as an individual must undergo lengthy preparation and demonstrate "progressive changes."

Gerald Gormly and David Griffin, who had contact with appellant at Pelican Bay State Prison as religious volunteers, stated that he demonstrated maturity and sincere religious convictions. Griffin also noted that while in prison, appellant had progressed from "being a non-writer to an excellent writer" and "a great story teller."

c. *Testimony at Hearing on Petition for Writ Relief*

Appellant also provided transcripts of Griffin's and Pape's testimony at the hearing on appellant's petition for

writ of habeas corpus. Griffin stated that in 2006, he had contact with appellant over a period of approximately six months. Appellant had then been baptized as a Jehovah's Witness. Few inmates had done so, as baptism as a Jehovah's Witness required comprehensive knowledge of the Bible. Griffin regarded appellant as a "very sincere" and "very serious" person. Griffin also noted that appellant's grammar, spelling, and writing ability had greatly improved while he was incarcerated. When cross-examined, Griffin acknowledged that he was not a trained psychologist, and that he was unaware of some aspects of appellant's crime, including that appellant had contemplated killing other people in addition to his mother.

Pape testified that he believed appellant's mature conduct to be sincere. During cross-examination, in addition to acknowledging that he had no background in psychology, he stated that he knew only some details of the murder, and was unaware that after the murder, appellant displayed an interest in the movie "Scream," and asked his counselors to secure a copy of its sequel.

d. *Hearing and Ruling*

At the beginning of the hearing on the section 1170(d)(2) petition, the trial court stated that it had reviewed all the submitted evidence, and announced its intention to consider "all the factors," including "[appellant's] home environment, the circumstances of the offense, [and] his actions subsequent to the conviction as it relates to

rehabilitation, remorse, [and] maturity . . . ." Appellant's counsel argued that each statutory factor favored appellant, and that Gina's murder reflected only appellant's immaturity. Respondent maintained that appellant had loving parents, and that his good behavior in prison mirrored the good behavior he displayed before the murder, during which he planned a string of murders.

In denying the petition, the trial court explained that it had relied primarily on the circumstances of Gina's murder, but remarked, "I don't take that to be the case as a whole." After observing that appellant had parental support, that his home life reflected no substance abuse, and that he had no prior history of violence, the court set forth in detail the circumstances of Gina's murder, as well as appellant's plan to kill Pedro and several other people.

Turning to whether appellant had matured and accepted responsibility, the court -- which had presided at appellant's criminal trial -- described appellant's conduct during the hearing as identical to the "bored" conduct he displayed at trial when pictures were shown of his mother's body. The court further explained why it had rejected the testimony from Griffin and Pape, as well as the declaration from Fulks, to the extent they were offered to show that appellant had "changed." The court stated that Griffin's discussions of "spiritual issues" with appellant had rendered Griffin knowledgeable of appellant's improved spelling and syntax, but unaware of the key details of appellant's offenses; that Pape had little to say, other than that

appellant had matured; and that Fulks had never met appellant.

The court concluded: "I don't think [appellant] has done anything to make himself a better person. I think what he has done is just as he did before the murders. He is planning and has planned for some time to try to mold himself into an image that would fool the people that are looking at him. . . . [¶] He hasn't done anything to rehabilitate himself except what he has thought in my opinion would benefit him by getting a better sentence for himself."

3. *Analysis*

We conclude that the trial court did not abuse its discretion in denying the petition. Because the applicable version of section 1170(d)(2) did not require the court to set forth its assessment of each statutory factor, the court was not obliged to state what weight it gave, if any, to certain factors potentially favorable to appellant.[13] (See *People v.*

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[13] We note that the statute mandated only that the court exercise its discretion "in consideration of" four specified factors, namely, whether appellant was convicted of felony murder or as an aider-and-abettor, whether appellant had a prior history of violent crime, whether appellant had an adult accomplice, and whether appellant performed "rehabilitative" acts or showed remorse while incarcerated. (Former § 1170, subd. (d)(2)(G).) Here, the court referred to all four factors.

Lamb (1988) 206 Cal.App.3d 397, 402.) Although the court placed special emphasis on the egregious circumstances of Gina's murder and its finding that appellant had not "changed,'" the court's remarks establish that it necessarily found the existence of other factors unfavorable to appellant, namely, that the defendant had not lacked adult supervision; that he suffered from no material trauma, mental illness, or cognitive limitations; that he was the direct perpetrator of his mother's murder; and that no adult accomplice was involved. In view of *Willover*, the court's determination that Gina's murder was calculated and callous, coupled with the other factors, constituted a sufficient basis for the court's ruling. (*Willover*, *supra*, 248 Cal.App.4th at p. 323.)

Appellant's challenge to the ruling focuses on the trial court's finding that appellant had not "changed." He argues that the court's conclusion that appellant's good conduct while incarcerated was "a calculated and disingenuous campaign" to secure a better sentence was unreasonable, as that conduct began long before *Miller* and section 1170(d)(2) offered the prospect of eventual release. He also contends the ruling denied his due process rights. As explained below, we reject those contentions.

At the outset, we observe that the applicable version of section 1170(d)(2) did not require the court to make any specific finding in determining whether to recall or decline to recall appellant's sentence. Moreover, while authorizing the court to consider various factors, including whether appellant "ha[d] performed acts that tend[ed] to indicate

rehabilitation or the potential for rehabilitation, . . . or [had shown] evidence of remorse" (former § 1170, subd. (d)(2)(F)(vi)), the statute did not mandate recall where evidence of such factors was present. The statute thus permitted the court to deny relief even though it found that the defendant showed rehabilitative acts or remorse. (*Willover*, *supra*, 248 Cal.App.4th at pp. 322-324.) Furthermore, in suitable circumstances, the court was permitted to reject undisputed evidence of good conduct as insufficient to show "genuine remorse or rehabilitation." (*Gibson*, *supra*, 2 Cal.App.5th at pp. 328-329 [affirming trial court's finding of lack of genuine remorse and rehabilitation based on the brevity of the period of good conduct].)

Here, pointing to the submitted evidence and appellant's demeanor during his trial and at the hearing, the trial court concluded that appellant had not "done anything to rehabilitate himself except what he has thought . . . would benefit him by getting a better sentence on the case." Viewed in context, the phrase "a better sentence" cannot reasonably be understood to refer solely to a 25-year-to-life term, as the court was fully apprised that appellant's good conduct predated *Miller* and the enactment of section 1170(d)(2). Rather, the court's comment suggests it believed that appellant sought to achieve better conditions of incarceration, to the extent available. That interpretation is supported by the evidence, as Krisberg's declaration stated that due to appellant's good conduct, he had been moved to less restrictive housing "as soon as that was allowable."

In our view, the trial court reasonably found that appellant had failed to demonstrate a genuine change of attitude, notwithstanding the uncontroverted evidence of his good conduct in prison. As the court noted, appellant planned a series of murders while manifesting an appearance of good conduct; furthermore, the testimony from the two witnesses appellant offered to establish the sincerity of his religious beliefs -- namely, Griffin and Pape -- disclosed that appellant apparently had never reflected on the egregious details of his crimes while talking to them, as they were unaware of those details. Additionally, because the statute did not circumscribe the pertinent factors, the court was permitted to consider appellant's demeanor and conduct at the trial and during the hearing on the section 1170(d)(2) petition.[14] (See *Alvarez*, *supra*, 14 Cal.4th at pp. 977-979.)

In a related contention, appellant maintains that the

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[14] Even had the trial court improperly assessed appellant's acts of rehabilitation and remorse, we would find no reversible error. As explained in *Gibson*, under the applicable version of section 1170(d)(2), an incorrect assessment of a single factor was harmless when the trial court also based its ruling on other factors properly supported in the record. (*Gibson*, *supra*, 2 Cal.App.5th at pp. 328-329.) Here, the court identified the circumstances of Gina's murder as the principal basis for its ruling, and also necessarily found the existence of other factors unfavorable to appellant.

trial court's ruling denied his federal and state rights to due process because it arbitrarily denied him a liberty interest provided by state law (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Hewitt v. Helms* (1983) 459 U.S. 460, 466, overruled on another point in *Sandin v. Conner* (1995) 515 U.S. 472, 483-484; *In re Head* (1983) 147 Cal.App.3d 1125, 1132). That contention fails, as appellant has not shown the trial court contravened state law in ruling on his petition. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1272-1273 & fns. 20, 21.) In sum, the trial court did not err in declining to recall appellant's sentence and resentence him.[15]

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[15] Appellant has requested that upon ordering remand, we direct that further proceedings be heard before a different judge (Code Civ. Proc., § 170.1, subd. (c)). The contention underlying the request is that the trial court, in evaluating whether appellant had "changed," displayed an appearance of bias. In view of our conclusion, it is unnecessary to address the request, as no remand is required. To the extent appellant may seek a reversal of the ruling on the basis of judicial bias, we conclude that the trial court's remarks reflect only its considered assessment of the evidence, and do not demonstrate bias. (*Kreling v. Superior Court* (1944) 25 Cal.2d 305, 310-311 ["It is well settled in this state that the expressions of opinion uttered by a judge, in what he conceives to be a discharge of his official duties, are not evidence of bias or prejudice"]; accord, *People v. Lucas* (2014) 60 Cal.4th 153, 304, disapproved on another ground in *People v. Romero* (2015) 62 Cal.4th 1, 53, fn. 19.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.