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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

In re ALEXIS AGUILAR,  
  
on Habeas Corpus.

H040784  
(Monterey County  
Super. Ct. No. HC7945)

**I. INTRODUCTION**

Petitioner Alexis Aguilar was convicted of first degree murder (Pen. Code, § 187, subd. (a))<sup>1</sup> and active participation in a criminal street gang (§ 186.22, subd. (a)) during jury trials held in 2008 and 2009. As to the murder conviction, the jury found true allegations that petitioner personally used and discharged a firearm, causing death (§§ 12022.5, subd. (a), 12022.53, subd. (d)) and an allegation that he committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). As to the conviction of active participation in a criminal street gang, the trial court found true the allegation that petitioner used a firearm in the commission of the offense. (§ 12022.5, subd. (a).)

The trial court sentenced petitioner, who was 17 years old at the time he committed the offenses, to an aggregate term of 56 years to life, which included consecutive terms of 25 years to life for the murder and the allegation that petitioner personally discharged a firearm causing death, a consecutive two-year term for active

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

participation in a criminal street gang, and a consecutive four-year term for the firearm use allegation associated with that count. Petitioner appealed his convictions and this court affirmed the judgment. (*People v. Aguilar* (Jan. 27, 2011, H034072) [nonpub. opn.]<sup>2</sup>)

In the present petition for a writ of habeas corpus, petitioner contends he is entitled to be resentenced. He contends that his 56 years-to-life sentence represents a de facto life without possibility of parole (LWOP) term in violation of the United States Supreme Court decision in *Miller v. Alabama* (2012) 567 U.S. \_\_ [132 S.Ct. 2455] (*Miller*), which held that “mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on ‘cruel and unusual punishments.’” (*Id.* at p. \_\_ [132 S.Ct. at p. 2460].) For reasons that we shall explain, we will vacate petitioner’s sentence and remand the matter for resentencing.

## II. BACKGROUND

### A. *Facts of the Underlying Offenses*<sup>3</sup>

At about 8:00 p.m. on the evening of March 4, 2007, Jose Mexicano, a Sureño gang member, went to find his son, who was playing soccer with friends at a field near Acosta Plaza in Salinas. Acosta Plaza was located in territory claimed by a Norteño gang named Salinas Acosta Plaza (SAP), of which petitioner was a member.

After locating his son, Mexicano and his son began walking back to Mexicano’s parents’ apartment. Petitioner began walking behind them. Petitioner said, “Aey,” which caused them to turn around. Petitioner told Mexicano to take off his blue Yankees hat and told Mexicano’s son to leave. Mexicano and his son both ran. Petitioner fired five shots and then fled. Mexicano’s son ran for help. Mexicano was discovered on the ground at the scene of the shooting and taken to the hospital, where he was declared dead.

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<sup>2</sup> Petitioner’s request for judicial notice of the appellate record and this court’s opinion in petitioner’s direct appeal is granted.

<sup>3</sup> The factual background is taken from *People v. Aguilar, supra*, H034072.

Rey L., who was associated with SAP, testified that after the shooting, petitioner said that he needed to get rid of a gun, then gave Rey a .38-caliber revolver wrapped in a towel. Petitioner explained that he had let someone “have it,” which Rey understood to refer to a shooting. A bullet recovered from Mexicano’s chest was from a .38- or .357-caliber handgun.

Israel R., a member of SAP, testified that petitioner had stopped by his residence the night of the crime, sounding out of breath. Petitioner told Israel that someone “just got smoked in the hood.” Petitioner first denied being involved but later admitted being the shooter.

Police searched petitioner’s house and seized, among other things, a photograph of someone wearing a memorial jacket on the back of which was stitched, “In Love And Memory Of Jose Mexicano Dec. 31, 1981-Mar. 4, 2007.” A gang expert explained that gang members often keep memorial-type memorabilia of enemies who have been killed, and he opined that petitioner’s photograph constituted a “trophy” of Mexicano’s killing.

***B. Convictions, Sentencing, and Appeal***

At a jury trial held in 2008, petitioner was convicted of active participation in a criminal street gang (§ 186.22, subd. (a)) but a mistrial was declared as to the charge of first degree murder (§ 187, subd. (a)) and two other counts, which were later dismissed. The jury was also unable to reach a verdict on the allegation that petitioner used a firearm in the commission of the gang offense. (§ 12022.5, subd. (a)).

At a second jury trial held in 2009, petitioner was convicted of first degree murder (§ 187, subd. (a)), and the jury found true allegations that petitioner personally used and discharged a firearm causing death (§§ 12022.5, subd. (a), 12022.53, subd. (d)) and an allegation that he committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). Petitioner waived jury trial as to the allegation that he used a firearm in the commission of the gang offense, and the trial court found that allegation true. (§ 12022.5, subd. (a).)

On March 26, 2009, petitioner was sentenced to an aggregate term of 56 years to life, which included a term of 25 years to life for the murder conviction, a consecutive term of 25 years to life for the associated allegation that petitioner personally used and discharged a firearm causing death, a consecutive two-year term for active participation in a criminal street gang, and a consecutive four-year term for the associated firearm use allegation. At the time of sentencing, petitioner had 730 days of actual presentence conduct credit.

Petitioner appealed his convictions to this court. On January 27, 2011, this court affirmed the judgment. (*People v. Aguilar, supra*, H034072.)

### **C. Habeas Petitions**

On January 22, 2014, the trial court denied petitioner's habeas corpus petition seeking relief under *Miller, supra*, 567 U.S. \_\_ [132 S.Ct. 2455]. On March 13, 2014, petitioner filed a petition for writ of habeas corpus in this court. On October 23, 2014, this court issued an order to show cause and appointed counsel for petitioner. The Attorney General subsequently filed a return, and petitioner thereafter filed a traverse.

## **III. DISCUSSION**

Petitioner contends that his sentence of 56 years to life constitutes "a de facto LWOP term that was imposed pursuant to a mandatory sentencing scheme," in violation of *Miller, supra*, 567 U.S. at \_\_ [132 S.Ct. 2455].

The Attorney General contends that petitioner is not entitled to be resentenced, for three reasons. First, the Attorney General argues that the Legislature's enactment of section 3051 renders petitioner's claim moot, because that statute provides a meaningful opportunity for petitioner to obtain release, effectively rendering his sentence *not* a de facto LWOP sentence. Second, the Attorney General argues that *Miller* is not retroactive, and therefore that relief is not available on collateral review. Third, the Attorney General argues that petitioner's sentence of 56 years to life is not a de facto LWOP sentence

because he will have an opportunity for parole at about age 73, which is “well within his natural life expectancy.”<sup>4</sup>

**A. *Graham, Miller, and Caballero***

In *Graham v. Florida* (2010) 560 U.S. 48, 74 (*Graham*), the United States Supreme Court held that the Eighth Amendment prohibits imposition of a life without the possibility of parole sentence for juvenile nonhomicide offenders. *Graham* recognized that such a sentence is especially harsh for a juvenile offender who will spend more years and a greater percentage of his or her life in prison than a similarly sentenced adult. (*Id.* at p. 70.) *Graham* concluded that a nonhomicide juvenile offender is entitled to a sentence that provides “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” (*Id.* at p. 75.) “A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.” (*Id.* at p. 82.)

Two years later, the United States Supreme Court ruled that “mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on ‘cruel and unusual punishments.’ ” (*Miller, supra*, 567 U.S. at p. \_\_ [132 S.Ct. at p. 2460].) In *Miller*, the Court explained that its prior cases, including *Graham*, had “establish[ed] that children are constitutionally different from adults for purposes of sentencing.” (*Id.* at p. \_\_ [132 S.Ct. at p. 2464].) Specifically,

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<sup>4</sup> In *In re Alatraste* (2013) 220 Cal.App.4th 1232, review granted February 19, 2014, S214652, and *In re Bonilla* (2013) 220 Cal.App.4th 1232, review granted February 19, 2014, S214960, the California Supreme Court may consider all of these issues: whether section 3051 renders moot a claim that a juvenile’s life sentence violates the Eighth Amendment, whether *Miller* applies retroactively on habeas corpus to a prisoner who was a juvenile at the time of the commitment offense, and whether a term of imprisonment of 77 years to life or 50 years to life is the functional equivalent of life without possibility of parole.

“juveniles have diminished culpability and greater prospects for reform,” making them “ ‘less deserving of the most severe punishments.’ ” (*Ibid.*)

In *Miller*, the issue arose in two companion cases, both involving 14-year-old defendants, Jackson and Miller, who were convicted of murder and sentenced to LWOP. (*Miller, supra*, 567 U.S. at p. \_\_\_ [132 S.Ct. at p. 2460].) Jackson’s case arose on appeal from the dismissal of a petition for writ of habeas corpus; Miller’s case arose on direct appeal. (*Id.* at p. \_\_\_ [132 S.Ct. at pp. 2461-2463].)

The *Miller* court summarized its holding as follows: “Mandatory life without parole for a juvenile precludes consideration of his [or her] chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him [or her]—and from which he [or she] cannot usually extricate himself [or herself]—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his [or her] participation in the conduct and the way familial and peer pressures may have affected him [or her]. Indeed, it ignores that he [or she] might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his [or her] inability to deal with police officers or prosecutors (including on a plea agreement) or his [or her] incapacity to assist his [or her] own attorneys. [Citations.] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.” (*Miller, supra*, 567 U.S. at p. \_\_\_ [132 S.Ct. at p. 2468].)

While *Miller* held “that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders,” the court did not decide “that the Eighth Amendment requires a categorical bar on life without parole for juveniles . . . .” (*Miller, supra*, 567 U.S. at p. \_\_\_ [132 S.Ct. at p. 2469].) However, the court indicated it believed that LWOP sentences for juveniles would be “uncommon” and limited to “ ‘the rare juvenile offender whose crime reflects irreparable corruption.’ ”

[Citations.]” (*Ibid.*) The court specified that before such a sentence is imposed on a juvenile in a homicide case, the sentencing court must “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” (*Ibid.*, fn. omitted.)

In *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*), the California Supreme Court held—in the context of a juvenile non-homicide offense—that a sentence of “a term of years with a parole eligibility date that falls outside the juvenile offender’s natural life expectancy” is the “functional equivalent” of an LWOP sentence. (*Id.* at p. 268.) The court held that “*Graham*’s ‘flat ban’ on life without parole sentences applies to all nonhomicide cases involving juvenile offenders, including [a] term-of-years sentence that amounts to the functional equivalent of a life without parole sentence.” (*Id.* at pp. 267-268)<sup>5</sup>

The term imposed in *Caballero* was 110 years to life. (*Caballero, supra*, 55 Cal.4th at p. 265.) The defendant had been convicted of three counts of attempted murder, and the jury had found true various enhancement allegations. (*Ibid.*) The defendant’s sentence was comprised of consecutive terms for the attempted murders and firearm enhancements. The *Caballero* court explained that the “functional equivalent” of an LWOP sentence is one in which the parole eligibility date “falls outside the juvenile offender’s natural life expectancy,” such that the juvenile offender has no “meaningful

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<sup>5</sup> Courts from other jurisdictions have split on the question of whether *Graham* and *Miller* apply to “consecutive, fixed terms resulting in an aggregate sentence that exceeds the defendant’s life expectancy.” (*Bunch v. Smith* (6th Cir. 2012) 685 F.3d 546, 552; compare *State v. Brown* (La. 2013) 118 So.3d 332, 341 [“In our view, *Graham* does not prohibit consecutive term of year sentences for multiple offenses committed while a defendant was under the age of 18, even if they might exceed a defendant’s lifetime”] with *Henry v. State* (Fla., Mar. 19, 2015) \_\_ So.3d \_\_ [2015 Fla. Lexis 533, \*10] [“*Graham* is implicated when a juvenile nonhomicide offender’s sentence does not afford any ‘meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation’ ”].)

opportunity to demonstrate [his or her] rehabilitation and fitness to reenter society.” (*Id.* at p. 268.)

The *Caballero* court explained how its holding would apply when a juvenile offender is facing a potential de facto LWOP sentence: “Although proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future. 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.’ [Citation.]” (*Caballero, supra*, 55 Cal.4th at pp. 268-269.)

The *Caballero* court also explained how its holding would apply to juvenile offenders who were previously sentenced to LWOP or de facto LWOP sentences: “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 writs 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.” (*Caballero, supra*, 55 Cal.4th at p. 269.)

**B. Does Section 3051 Render Moot Petitioner’s Claim?**

After the *Miller* and *Caballero* cases were decided, the Legislature enacted section 3051, which, inter alia, requires the Board of Parole Hearings to conduct youth offender parole hearings and makes youth offenders eligible for release on parole by at least the 25th year of incarceration. The Legislature specified that the purpose of the new

statute was “to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with [*Caballero* and *Miller*].” (Sen. Bill No. 260 (2013-2014 Reg. Sess.) ch. 312, § 1.)

As noted, the Attorney General asserts that section 3051 renders moot petitioner’s cruel and unusual punishment claim because it provides a “meaningful opportunity for release on parole” during petitioner’s lifetime. Petitioner disagrees. He argues that section 3051 is “insufficient to address the concerns set forth in *Miller* and *Graham*,” because at the time petitioner will become eligible for parole under that statute, “there would be no reliable way to measure his cognitive abilities, maturity, and other youth factors at the time he committed his offense 25 years earlier.” Petitioner contends that “[a]n accurate evaluation of the youth factors in *Miller* and *Graham* can only be done at the time of the initial sentencing hearing – not 25 years in the future.” He also contends that “there is no guarantee that the statute will not be altered or removed entirely before petitioner is eligible for parole.”

We conclude that the enactment of section 3051 does not render petitioner’s claim moot. *Caballero* establishes that it is the trial court’s role to consider “all mitigating circumstances attendant in the juvenile’s crime and life,” thus enabling the Board of Parole Hearings to later determine “whether the juvenile offender must be released from prison ‘based on demonstrated maturity and rehabilitation.’ [Citation.]” (*Caballero, supra*, 55 Cal.4th at pp. 268-269.) Likewise, *Miller* establishes that the sentencing court must consider particular factors prior to imposing sentence. (*Miller, supra*, 567 U.S. at p. \_\_ [132 S.Ct. at p. 2468].) In cases like this, where sentencing preceded *Miller*, the trial court generally will not have developed the *Miller* facts, which would not only be pertinent to the appropriate sentence but helpful to the Board of Parole Hearings when it

makes the later determination of whether the defendant has demonstrated sufficient maturity and rehabilitation to warrant release on parole.

Our conclusion is buttressed by the California Supreme Court's resolution of a similar issue in *People v. Gutierrez* (2014) 58 Cal.4th 1354 (*Gutierrez*). In *Gutierrez*, the court considered the impact of *Miller* on section 190.5, subdivision (b), which had previously been interpreted "as establishing a presumption in favor of life without parole for juvenile offenders who were 16 years of age or older when they committed special circumstance murder." (*Gutierrez, supra*, at p. 1369.) The California Supreme Court concluded that "section 190.5[, subdivision ](b), properly construed, confers discretion on a trial court to sentence a 16- or 17-year-old juvenile convicted of special circumstance murder to life without parole or to 25 years to life, with no presumption in favor of life without parole." (*Id.* at p. 1360.) The *Gutierrez* court further held that "consideration of the *Miller* factors" is required when a sentencing court is determining whether to impose an LWOP sentence pursuant to section 190.5, subdivision (b). (*Gutierrez, supra*, at p. 1387.)

The *Gutierrez* court considered whether section 1170, subdivision (d)(2) provided a substitute for the resentencing process mandated by *Miller*. (*Gutierrez, supra*, 58 Cal.4th at p. 1386.) Section 1170, subdivision (d)(2) provides a procedural mechanism for resentencing to defendants who were under the age of 18 at the time of the commission of their offenses and who were given LWOP sentences. If the defendant has served at least 15 years of the LWOP sentence, he or she may "submit to the sentencing court a petition for recall and resentencing" (§ 1170, subd. (d)(2)(A)(i)), so long as the LWOP sentence was not imposed for certain enumerated offenses (*id.*, subd. (d)(2)(A)(ii)).

The *Gutierrez* court rejected the Attorney General's argument that the "potential mechanism for resentencing" provided by section 1170, subdivision (d)(2) "mean[s] that the initial sentence 'is thus no longer effectively a sentence of life without

the possibility of parole.’ ” (*Gutierrez, supra*, 58 Cal.4th at p. 1386.) The *Gutierrez* court reasoned: “A sentence of life without parole under section 190.5[, subdivision ](b) remains *fully effective* after the enactment of section 1170[, subdivision ](d)(2). That is why section 1170[, subdivision ](d)(2) sets forth a scheme for *recalling* the sentence and *resentencing* the defendant.” (*Ibid.*)

The *Gutierrez* court further rejected the Attorney General’s claim that section 1170, subdivision (d)(2) “removes life without parole sentences for juvenile offenders from the ambit of *Miller*’s concerns because the statute provides a meaningful opportunity for such offenders to obtain release.” (*Gutierrez, supra*, 58 Cal.4th at p. 1386.) The court held that what *Miller* required for juvenile offenders sentenced to LWOP was not a “ ‘meaningful opportunity to obtain release’ ” but a sentencing court’s exercise of discretion “ ‘at the outset.’ ” (*Ibid.*)

Based on our careful review of *Miller*, *Caballero*, and *Gutierrez*, we conclude that the enactment of section 3051 does not render moot petitioner’s claim that his sentence is a de facto LWOP sentence that violates the Eighth Amendment.

### **C. *Is Miller Retroactive?***

The Attorney General next argues that petitioner is not entitled to relief by way of a petition for writ of habeas corpus because *Miller* is not retroactive. This court recently held that *Miller* is retroactive—that “under *Miller*, habeas corpus relief is available in a case that is no longer pending on direct appeal.” (*In re Willover* (2015) \_\_\_ Cal.App.4th \_\_\_, \_\_\_ [2015 Cal.App. Lexis 322, \*14] (*Willover*).)

In *Willover*, we applied the retroactivity test of *Teague v. Lane* (1989) 489 U.S. 288, as refined by *Schriro v. Summerlin* (2004) 542 U.S. 348 (*Schriro*), in which the United States Supreme Court “defined the key distinction in the retroactivity analysis as whether the new rule is substantive or procedural.” (*Willover, supra*, \_\_\_ Cal.App.4th at p. \_\_\_ [2015 Cal.App. Lexis 322 at p. \*15].) We agreed with other courts “that have found *Miller* to be a new substantive rule rather than a new procedural rule.” (*Id.* at p. \_\_\_

[2015 Cal.App. Lexis 322 at p. \*20].) We explained: “The *Miller* case effectively ‘alter[ed] the range of conduct or the class of persons that the law punishes’ (*Schriro, supra*, 542 U.S. at p. 353), in that it barred LWOP sentences for juvenile homicide offenders unless the sentencing court determines, after a consideration of a number of case-specific substantive factors, that the defendant is ‘ “the rare juvenile offender whose crime reflects irreparable corruption . . .” [citations]’ (*Miller, supra*, 567 U.S. at p. \_\_\_ [132 S.Ct. at p. 2469]). *Miller* did not simply set forth a new rule regulating ‘the *manner of determining* the defendant’s culpability,’ but a rule that sets forth the specific considerations to be made during a sentencing decision. (*Schriro, supra*, 542 U.S. at p. 353.)” (*Willover, supra*, \_\_\_ Cal.App.4th at p. \_\_\_ [2015 Cal.App. Lexis322 at pp. \*20-21].)

In *Willover*, we also agreed “with the courts finding it significant that *Miller* granted relief in the companion case, *Jackson v. Hobbs*, which arose on collateral review.” (*Willover, supra*, \_\_\_ Cal.App.4th at p. \_\_\_ [2015 Cal.App. Lexis 322 at p. \*21].) We explained: “While the Supreme Court did not analyze the issue, it did direct that the defendant in *Jackson* be given a new sentencing hearing. (See *Miller, supra*, 567 U.S. at p. \_\_\_ [132 S.Ct. at p. 2475].) ‘There would have been no reason for the Court to direct such an outcome if it did not view the *Miller* rule as applying retroactively to cases on collateral review.’ [Citation.] And, as another out-of-state court noted, it would be incongruous ‘to refuse to apply the rule announced in *Miller* to a defendant before us on collateral review when the Court has already applied the rule to a defendant before it on collateral review.’ [Citations.]” (*Willover, supra*, \_\_\_ Cal.App.4th at p. \_\_\_ [2015 Cal.App. Lexis 322 at pp. \*21-22].)

As we held in *Willover, supra*, \_\_\_ Cal.App.4th at p. \_\_\_ [2015 Cal.App. Lexis 322 at p. \*22], “*Miller’s* new rules concerning the imposition of LWOP sentences on juvenile homicide offenders are retroactive.”

***D. Is a sentence of 56 years to life a “de facto” LWOP sentence?***

Petitioner’s sentence of 56 years to life will make him first eligible for parole when he is approximately age 73. He claims his sentence is a de facto LWOP sentence because he is not expected to live much longer than age 73. The Attorney General contends that petitioner’s sentence is not a de facto life sentence because age 73 is “well within his natural life expectancy.”

Petitioner was born on June 16, 1989. He cites to a report indicating that the average life expectancy for a male born in 1990 was 71.8 years at the time of birth. Petitioner also cites to a report indicating that in 1997, when he was seven years old, the remaining life expectancy for a non-white male was 68.4 years, meaning that at that time, he was expected to live until about age 74. Finally, petitioner cites to a report stating that due to conditions of prison confinement, inmates are significantly less healthy than the general population. Petitioner contends that because he will be living in prison, his life expectancy will therefore likely be “considerably shortened.”

The Attorney General argues that petitioner’s life expectancy could be as high as 79.3 years, based on different statistics. The Attorney General cites to data tables stating that at birth in 1989, a male was expected to live until age 71.7, while in 2010, a Hispanic 20-year-old male was expected to live until age 79.3.

Petitioner’s reliance on data regarding his life expectancy at the time of his birth is misplaced. The determination of whether a juvenile offender is facing a sentence that will not provide him or her with “a meaningful opportunity to demonstrate rehabilitation and fitness to reenter society” (*Caballero, supra*, 55 Cal.4th at p. 268) should be made at the time of sentencing. Thus, the determination of whether a particular sentence is a de facto LWOP sentence may be based in part upon life expectancy data concerning the number of years the juvenile is expected to live *at the time of sentencing*. According to the life expectancy tables that the parties cite, life expectancy increases as a person ages,

and thus petitioner's life expectancy at birth was shorter than his life expectancy at the time of sentencing, when he was 19 years old.

In 2009, a 20-year-old male would be expected to live another 56.9 years, and a 20-year-old Hispanic male would be expected to live another 59.5 years. (National Center for Health Statistics, Center for Disease Control, National Vital Statistics Reports (January 6, 2014) table A, vol. 62, No. 7.) Petitioner was 19 years, nine months old at the time of his sentencing hearing on March 26, 2009. At that time, he would have been expected to live until about age 76 or, if he is Hispanic, about age 79.<sup>6</sup> (See also *People v. Mendez* (2010) 188 Cal.App.4th 47, 63 [in 2010, life expectancy for an 18-year-old American male was 76 years].) Thus, at the time of sentencing, petitioner's first parole opportunity fell only about three to six years before his expected death, without accounting for any reduction in life expectancy due to the health effects of spending 56 years incarcerated.

As noted above, the *Caballero* court indicated that the "functional equivalent" of an LWOP sentence is one in which the juvenile offender has no "meaningful opportunity to demonstrate [his or her] rehabilitation and fitness to reenter society." (*Caballero, supra*, 55 Cal.4th at p. 268.) Here, although petitioner might be eligible for parole a few years before the end of his life expectancy, his sentence does not give him a *meaningful* opportunity to obtain release based on demonstrated maturity and rehabilitation (*Graham, supra*, 560 U.S. at p. 75; *Caballero, supra*, at p. 268), and his sentence "disregards the possibility of rehabilitation" (*Miller, supra*, 567 U.S. at p. \_\_ [132 S.Ct. at p. 2468]). Petitioner's sentence is therefore a de facto LWOP sentence. A juvenile who is not eligible for parole until about the time he is expected to die does not have a meaningful or realistic opportunity for release, "no matter what he might do to demonstrate that the bad

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<sup>6</sup> Petitioner has a Hispanic last name but the record does not reveal whether he is in fact Hispanic.

acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes.” (*Graham, supra*, 560 U.S.at p. 79.)

Because petitioner’s sentence of 56 years to life is a de facto LWOP sentence, we conclude he is entitled to resentencing under *Graham, Miller*, and *Caballero*.

#### **IV. DISPOSITION**

Petitioner’s sentence is vacated and the matter is remanded for resentencing.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MIHARA, J.

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MÁRQUEZ, J.