COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S233508

In re KRISTOPHER KIRCHNER on Habeas Corpus

Appeal from the Fourth Appellate District, Division One, Case No. D067920
Superior Court of San Diego County, Case Nos. HC21804, CRN26291
The Honorable Louis R. Hanoian, Judge

ANSWER BRIEF ON THE MERITS

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ISSUE

When a juvenile offender seeks relief from a life-without-parole (LWOP) sentence that has become final, does Penal Code[1] section 1170, subdivision (d)(2), which permits most juvenile offenders to petition for recall of an LWOP sentence imposed pursuant to section 190.5 after 15 years, provide an adequate remedy under *Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 2455] (*Miller*), as recently construed in *Montgomery v. Louisiana* (2016) 577 U.S. ___ [136 S.Ct. 718] (*Montgomery*)?

STATEMENT OF THE CASE AND FACTS

1. Factual and Procedural Background[2]

On April 28, 1993, Kristopher Kirchner, age 16, robbed and beat to death 59-year-old Vista gun shop owner Ross Elvey when he repeatedly crushed Elvey's skull with a metal pipe. Kirchner and his companion, Damien Miller, age 15, left Elvey to die as they gathered as many guns as they could carry and ran.

After a court trial, Kirchner was convicted on March 10, 1994, of first degree murder (§ 187, subd. (a)). The court found true the special circumstance allegation that Kirchner committed the murder while engaged in the commission of a robbery and burglary (§ 190.2, subds. (a)(17)(A) & (a)(17)(G)) and that Kirchner personally used a deadly or dangerous weapon during the commission of the murder (§ 12022, subd. (b)). Kirchner was also convicted of robbery (§ 211) and burglary (§ 459), with allegations that he personally inflicted great bodily injury on Elvey (§ 12022.7) and

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[1] All statutory references are to the Penal Code unless otherwise specified.

[2] The factual and procedural background is taken from the Court of Appeal's opinion and appellant's opening brief in *In re Kirchner* (2016) 244 Cal.App.4th 1398, review granted May 18, 2016, S233508 (*Kirchner*).

personally used a deadly or dangerous weapon (§ 12022.1, subd. (b)). The trial court sentenced Kirchner to LWOP for his murder conviction, plus one year consecutive for the weapon enhancement. The court stayed sentencing on the remaining counts and attendant allegations under section 654. Kirchner filed a notice of appeal, but the appeal was dismissed for failure to file appellant's opening brief.

In 2013, Kirchner filed a petition for writ of habeas corpus challenging his LWOP sentence. The trial court denied the petition, noting the issues raised by Kirchner were then pending before the California Supreme Court in *People v. Gutierrez* (2014) 58 Cal.4th 1354 (*Gutierrez*).

On October 27, 2014, Kirchner filed a second petition for writ of habeas corpus. Kirchner contended his LWOP term violated the constitutional requirements of *Miller* and *Gutierrez* because the sentencing court did not engage in a youth-oriented analysis before imposing LWOP. The superior court issued an order to show cause asking why relief should not be granted. The People's supplemental return argued *Miller* and *Gutierrez* did not apply retroactively and Kirchner was barred from collaterally attacking his sentence. On March 27, 2015, the superior court granted Kirchner's petition. The People filed a timely notice of appeal.

2. Court of Appeal Opinion

On February 23, 2016, Division One of the Fourth District Court of Appeal issued its opinion in *Kirchner*, *supra*, 244 Cal.App.4th 1398, which applied the *Montgomery* decision. *Montgomery* had held *Miller* is retroactive in cases on collateral review. (*Montgomery*, *supra*, 136 S.Ct. at p. 732.) *Montgomery* had also held that a "State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." (*Id.* at p. 736.) The *Kirchner* court analyzed section 1170, subdivision (d)(2)(A)(i), which provides:

> 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.

Applying the holding of *Montgomery*, the court in *Kirchner* held that section 1170, subdivision (d)(2) is an adequate statutory remedy for *Miller* error that must be exhausted before habeas relief may be sought. (*Kirchner*, *supra*, 244 Cal.App.4th at pp. 1416-1419.) "Where a habeas petitioner has an adequate remedy at law, he or she must employ it before seeking writ relief." (*Id.* at p. 1416.)

3. Grant of Review

This court granted defendant's petition for review on May 18, 2016.

SUMMARY OF ARGUMENT

Section 1170, subdivision (d)(2) provides prisoners multiple opportunities to petition for relief by showing they "have since matured," as *Montgomery* requires in cases on collateral review. The statute employs rehabilitation and remorse as a litmus test for the arc of maturity. And rightly so: the "truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change"—is measured most logically by postconviction conduct. (*Montgomery*, *supra*, 136 S.Ct. at p. 736.) This arc of change is codified in section 1170, subdivision (d)(2).

Although section 1170, subdivision (d)(2) does not automatically convert an LWOP sentence into a life-with-parole sentence for all defendants, it provides them with all the rights demanded by *Miller* and *Montgomery*, and it answers whether a murder was the product of transient immaturity or irreparable corruption. Section 1170, subdivision (d)(2) is the appropriate remedy in collateral cases because it allows a sentencing court to consider evidence dating back to a defendant's juvenile status as well as

evidence of actual rehabilitation since the time of the murder.

The only accurate, truthful way to determine whether a juvenile was capable of change two decades ago is to look at the evidence of that very change. The evidence of that change is seen in the arc from the time of the murder to the present. A juvenile whose crimes were a product of transient immaturity will have changed with the passage of time. Section 1170, subdivision (d)(2) provides that changed juvenile—now an adult—with a life-*with*-parole sentence.

Likewise, a juvenile whose crimes were the product of "irreparable corruption" will not have changed over time. Those incapable of change will have proven to be incorrigible and exhibit continued depravity. Because that person's post-murder behavior will prove that the murder was indeed a product of irreparable corruption, he or she will not be resentenced to a life-with-parole sentence.

Because a life-with-parole sentence under section 1170, subdivision (d)(2) depends on whether the defendant "has since matured," it is not only an adequate statutory remedy for *Miller* error, it is exactly the measure *Montgomery* sanctioned for cases on collateral review.

ARGUMENT

I.

SECTION 1170, SUBDIVISION (d)(2) PROVIDES AN ADEQUATE STATUTORY REMEDY FOR *MILLER* ERROR IN CASES ON COLLATERAL REVIEW

A. Section 1170, Subdivision (d)(2) Provides a Meaningful Opportunity for Release as Required on Collateral Review

The United States Supreme Court held in *Montgomery* that a statutory remedy can cure a *Miller* violation. (*Montgomery*, *supra*, 136 S.Ct. at p. 736.) The Court declared:

> Giving *Miller* retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation *by permitting juvenile homicide offenders to be considered for parole*, rather than by resentencing them. See, e.g., Wyo. Stat. Ann. § 6-10-301(c) (2013) (juvenile homicide offenders eligible for parole after 25 years). Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—*and who have since matured*—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.
>
> Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions. *Those prisoners who have shown an inability to reform will continue to serve life sentences*. The opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change.

(*Montgomery, supra*, 136 S.Ct. at p. 736, italics added.)

California's Legislature previously enacted section 1170, subdivision (d)(2), which entitles a defendant sentenced to LWOP for committing special circumstances murder when he was 16-17 years old to apply for a resentencing hearing.

Where a habeas petitioner has an adequate remedy at law, he must exhaust it before seeking habeas relief. (*In re Gandolfo* (1984) 36 Cal.3d 889, 899-900.)

Section 1170, subdivision (d)(2) provides relief to defendants previously sentenced as juveniles to LWOP. Petitions for recall and resentence may be filed after serving 15 years of an LWOP term. (§ 1170, subd. (d)(2).) Even if a defendant's initial petition is denied, section 1170, subdivision (d)(2) gives LWOP defendants multiple chances at parole because it allows them to petition at the 15th, 20th, and 24th years of their

incarceration. (§ 1170, subd. (d)(2)(H).)

All LWOP defendants who were sentenced as juveniles were convicted of special circumstances murder. That crime carries a minimum sentence of 25 years to life. (§ 190.5, subd. (b).) Those who are determined to have been transiently immature and are resentenced under section 1170, subdivision (d)(2) will have a parole hearing at the 25th year of their incarceration. (§ 3051.) Thus, the relief under section 1170, subdivision (d)(2) is obtained before the first available parole hearing.

Kirchner argues, "Anything short of converting Mr. Kirchner's illegal life without parole sentence to life with parole at 25 years cannot stand as a constitutionally sound substitute." He claims section 1170, subdivision (d)(2) is an inadequate remedy because, unlike the Wyoming statute cited in *Montgomery*, it does not automatically bestow a parole hearing upon every defendant serving LWOP. (AOB 13-14.) Although section 1170, subdivision (d)(2) does not automatically convert an LWOP sentence into a life-with-parole sentence for all defendants, it provides them with all the rights demanded by *Miller* and *Montgomery*. A parole hearing is granted once a sentencing court determines that the defendant murdered as a result of transient immaturity. That determination is made through section 1170, subdivision (d)(2). In fact, the statute gives defendants successive opportunities to show they "have since matured," as *Montgomery* requires for collateral case review. (*Montgomery*, *supra*, 136 S.Ct. at p. 736.) Kirchner is currently eligible to petition for relief under section 1170, subdivision (d)(2). He has chosen not to do so.

As required by *Montgomery*, section 1170, subdivision (d)(2) affords a defendant an "opportunity for release." (*Montgomery*, *supra*, 136 S.Ct. at p. 736.) The statute outlines various factors a sentencing court may consider to determine whether to recall and resentence. (§ 1170, subd.

(d)(2)(F)(i)-(viii).) But, crucially, the sentencing court is not limited to the statute's enumerated factors. (§ 1170, subd. (d)(2)(F).) In fact, it "may consider any other criteria that the court deems relevant to its decision ... ." (§ 1170, subd. (d)(2)(I).) Such criteria, even if deemed not already covered by the statute's factors, will include the *Miller* factors. Section 1170, subdivision (d)(2) is the appropriate remedy in collateral cases because it allows a sentencing court to "examine not just the factors existing at the time of the crime, that is, those factors related to the defendant's status as a juvenile, but also the factors relating to the defendant's postconviction conduct and rehabilitation." (*Kirchner*, *supra*, 244 Cal.App.4th at pp. 1416-1417.) In collateral cases, section 1170, subdivision (d)(2) measures whether a defendant who killed long ago was capable of reform; it provides him relief, so he is not "mandated [to] die in prison." (*Miller*, *supra*, 132 S.Ct. at p. 2460.)

B. The Truth of *Miller*'s Central Intuition, that Juveniles Who Commit the Most Heinous Crimes are Capable of Change, is Measured by Postconviction Conduct, Codified in Section 1170, Subdivision (d)(2)

Montgomery provides that, under *Miller* and on collateral review, postconviction conduct must be measured to determine whether a defendant has, in fact, rehabilitated. (*Montgomery*, *supra*, 136 S.Ct. at p. 736.) Evaluation of postconviction conduct fulfills *Miller*'s demand for a meaningful opportunity for release. Specifically, section 1170, subdivision (d)(2) gives reformed defendants a resentencing hearing. It is also important to underscore that the defendants sentenced as juveniles to LWOP who are eligible for collateral relief are a limited group. Approximately 130 currently fall within the parameters of section 1170, subdivision (d)(2) relief. Approximately 100 have not yet reached the 15-year mark. About 35-50 have already had their cases resolved on direct review following *Miller*. (AOB, Appendix A.)

Today's sentencing court cannot turn back time and, for instance, invent a non-existent psychological evaluation of a then-16-year-old Kirchner. The court is limited by the passage of time. The retroactive application of *Miller* does not necessarily demand that collateral cases have the exact same remedy as those on direct appeal. It is impossible to recreate the 16- or 17-year-old defendant at this late stage. What *Montgomery* demands is that all the rights of *Miller* be fulfilled, whatever the method. In collateral cases, the time frame of "at the outset" has long since passed. But the sentencing court now has an advantage: instead of imprecisely *predicting* whether a defendant will rehabilitate, the court has *actual evidence* of rehabilitation or continued depravity.

Section 1170, subdivision (d)(2) embodies, fulfills, and standardizes this advantage. In collateral cases, the presence or lack of maturity can be measured best by postconviction conduct. *Montgomery*'s use of the phrase "have since matured" demands an analysis of the defendant's behavior since the murder. A determination of whether one has "since matured" requires a look at prison behavior to evaluate and understand whether the murder was a product of the presumptive transient immaturity or, instead, irreparable corruption.

Section 1170, subdivision (d)(2) avoids the fiction of resentencing a 39-year-old prisoner like Kirchner as though the two-plus decades of postconviction behavior do not exist. After all, Kirchner has lived more years since he murdered Ross Elvey than before the murder. Because section 1170, subdivision (d)(2) measures actual maturity and rehabilitation, it complies with *Montgomery's* mandate that states resolve *Miller* error on collateral review by answering one question: does the prisoner have an opportunity to demonstrate an ability to reform? (*Montgomery*, *supra*, 136 S.Ct. at p. 736.)

In sum, section 1170, subdivision (d)(2) does not ignore a juvenile's capacity to mature. It measures it. The numerous factors in the statute standardize how courts should remedy *Miller* error in collateral cases. Because section 1170, subdivision (d)(2) relief depends on whether the defendant "has since matured," it is an adequate statutory remedy for *Miller* error in collateral cases.

C. Section 1170, Subdivision (d)(2) Provides a Mechanism for Uniform Application of *Miller* Rights

As noted by Justice Benke in the *Kirchner* opinion, if section 1170, subdivision (d)(2) is deemed to be an inadequate remedy, then a defendant can *select* whether to utilize a section 1170, subdivision (d)(2) petition or a habeas corpus petition. (*Kirchner*, *supra*, 244 Cal.App.4th at p. 1417.) Allowing the defendant to choose would potentially subvert justice. A prisoner who has behaved poorly in prison will choose to file a habeas petition rather than a section 1170, subdivision (d)(2) petition in order to eliminate negative postconviction evidence. With that discretion left to the defendant, a prisoner who has not reformed—and thus whose crime reflects irreparable corruption—might nonetheless be resentenced to 25 years to life if he simply shows that at the time of his original sentencing there was no proof of his incorrigibility. Meanwhile, a prisoner who has behaved well in prison will opt for the much simpler section 1170, subdivision (d)(2) petition, because it permits a court to consider his positive postconviction conduct. (*Ibid.*) This inconsistency will erode the internal integrity necessary to fair and consistent proceedings. (*Ibid.*) Section 1170, subdivision (d)(2) codifies the admissibility of postconviction conduct, whether demonstrative of reform or corruption.

A system that allows a defendant to select his own method of relief—rather than a mandatory resort to section 1170, subdivision (d)(2)—

leads to "mischief," as the Court of Appeal put it. (*Kirchner*, *supra*, 244 Cal.App.4th at p. 1417.) Indeed, without section 1170, subdivision (d)(2) some resentencing courts will admit postconviction conduct and some will not, depending on their interpretation of *Miller*.[3] This inconsistency would erode the internal integrity necessary to fair proceedings. (*Ibid.*) It would also lead to sentences that do not accurately reflect whether the defendant was one who had been capable of change or is irreparably corrupt.

Further, Kirchner claims that, in a post-habeas *Miller* resentencing hearing, "rehabilitation evidence is not the overriding factor in determining whether an offender should be resentenced to life with parole, but it can still be considered by the trial court." He complains that a section 1170, subdivision (d)(2) resentencing hearing violates *Miller* "because it places too much emphasis on postconviction conduct." (AOB 11.) It is unclear how an emphasis on rehabilitation evidence violates *Miller*. But the point of the statutory solution sanctioned by *Montgomery* is that postconviction conduct is the measure of *Miller*'s central intuition that juveniles can change. A 20-year-old sentence cannot now be recreated "at the outset" with the same accuracy as a prospective sentence; evidence surrounding the circumstances of the 16- or 17-year-old juvenile's offense is often unavailable, stale, or incomplete. A resentencing court today cannot truly

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[3] In *People v. Lozano* (2016) 243 Cal.App.4th 1126 (*Lozano*), a case that pre-dated *Montgomery*, a resentencing court excluded postconviction conduct because it interpreted *Miller* and *Gutierrez* as requiring it " 'to go back in time' and sentence Lozano as the facts existed at the time of the original sentencing hearing in 1996." (*Lozano*, *supra*, 243 Cal.App.4th at p. 1132.) The Fifth Division of the Second District Court of Appeal held that "all relevant evidence of amenability to rehabilitation must be considered at a sentencing hearing." (*Id.* at p. 1138.) This rule applies where the defendant brings forth evidence tending to show rehabilitation. It remains open to interpretation whether the People can proffer evidence tending to show irreparable corruption.

assess whether, 20 years ago, a defendant was immature, impetuous, suffered from familial pressure, or was incapable of assisting his own attorneys. Any attempt to recreate the "at the outset" time frame would result in an unsupportable legal fiction. In collateral cases, there is one *Miller* factor that *can* accurately be measured: "the possibility of rehabilitation." (*Miller*, *supra*, 132 S.Ct. at p. 2468.) And the way to measure it is to look at evidence of *actual* rehabilitation. That is exactly what section 1170, subdivision (d)(2) does.

Of course, section 1170, subdivision (d)(2) does more than just measure rehabilitation. Its other factors are related to the defendant's status as a juvenile. (§ 1170, subds. (d)(2)(B)(i)-(iii), (d)(2)(F)(i)-(v), (d)(2)(I).) Furthermore, all *Miller* factors may be considered by a court deciding a section 1170, subdivision (d)(2) petition. As the statute's language states, the court is "not limited to" the enumerated factors and "may consider any other criteria that the court deems relevant ... ." (§ 1170, subds. (d)(2)(F), (d)(2)(I).)

Section 1170, subdivision (d)(2), then, is not just an adequate remedy but also the fairest and most logical one. It is unfair and illogical to both parties to return a 39-year-old defendant to the same status as existed on the day of the original sentencing two decades ago. Both parties benefit from a rounded, truthful, fully-informed hearing. A defendant, now years into his prison sentence, will be assessed under the standardized factors provided by section 1170, subdivision (d)(2). If he has reformed, he will be resentenced. If he has not, he still has the opportunity to demonstrate change over the 10-year course of the petition process.

Kirchner claims that section 1170, subdivision (d)(2) makes it "all but certain that many defendants would be required to continue to serve LWOP sentences without *any* sentencing court ever having considered

whether such defendants were the rare juvenile offender whose crime reflects irreparable corruption." (AOB 15, quoting *People v. Berg* (2016) 247 Cal.App.4th 418, 437, review granted July 27, 2016, S235277, internal quotes omitted, italics in original.) But, section 1170, subdivision (d)(2) does *exactly that*: it forces a sentencing court to determine whether the accrual of evidence over time demonstrates the defendant was capable of change or is irreparably corrupt.

II.

Gutierrez Does Not Foreclose Collateral Relief by Section 1170, Subdivision (d)(2), Because It Applies the Statute Only Prospectively

There remain two categories of juveniles affected by *Miller* and *Montgomery*: (1) those who have yet to be sentenced, and (2) those whose cases are final and who seek collateral relief, like Kirchner. *Montgomery* exists because there were two separate categories. And *Montgomery* held while the second category of juveniles is entitled to relief, the form of relief may be different from that of the first category of juveniles. (*Montgomery*, *supra*,136 S.Ct. at p. 736.) *Gutierrez* held that, from *Miller* forward, no future juvenile special circumstances murderer could be sentenced to LWOP without a *Miller* analysis accounting for his potential to rehabilitate. But it was not until *Montgomery* that the question of "*continued* confinement" was taken up—the question asked on collateral review. (*Kirchner*, *supra*, 244 Cal.App.4th at p. 1419, italics in original.) It makes sense that in this context, *Montgomery* recognized that demonstrated rehabilitation is the litmus test of whether a presently mature prisoner must have been merely transiently immature at age 17 when he murdered his victim.

Kirchner overstates the holding of *Gutierrez*. He claims the court held section 1170, subdivision (d)(2) is not a constitutional remedy—

prospective or retrospective—for juveniles illegally sentenced to LWOP. But that baselessly broadens the court's holding.

As the Court of Appeal in *Kirchner* correctly pointed out, *Gutierrez* arose on direct appeal, rather than collateral review. The question before the *Gutierrez* court was whether, going forward, the presumptive LWOP interpretation of section 190.5, subdivision (b) violates *Miller*; and, whether, going forward, section 190.5, subdivision (b) sentences were even subject to *Miller* in the first place. The Attorney General in *Gutierrez* had argued the sentences were not subject to *Miller* because section 1170, subdivision (d)(2) "converted" the sentences to life with parole sentences. The court in *Gutierrez* rejected that argument. *Gutierrez* found that section 1170, subdivision (d)(2) did not moot constitutional concern where a defendant was sentenced under a presumptive LWOP scheme *at the outset.* Going forward in California, a sentencing court cannot continue to sentence juvenile special circumstance murderers to LWOP without consideration of *Miller* factors by simply justifying that they may get a resentencing hearing in 15 years. *At the outset*, they would still be receiving the unconstitutional sentence. (*Gutierrez*, *supra*, 58 Cal.4th at pp. 1386-1387.)

But in the instant case, the People do not argue that section 1170, subdivision (d)(2) removes the defendants from the ambit of *Miller*. Instead, section 1170, subdivision (d)(2) remedies cases on collateral review by accurately providing a retrospective measure of a defendant's capability to change. Neither *Miller* nor *Gutierrez* addressed the remedy for defendants who were sentenced years ago. *Montgomery* did. *Montgomery* sensibly sanctions evidence of rehabilitation to determine, retrospectively, whether the defendant was indeed capable of change so long ago. Section 1170, subdivision (d)(2) measures that evidence in standardized form. As the Court of Appeal in *Kirchner* stated,

> There is no conflict between the strictly prospective focus of the courts in *Gutierrez* and *Graham* [*v. Florida* (2010) 560 U.S. 48 (130 S.Ct. 2011) (*Graham*)] and the retrospective focus expressly permitted by the court in *Montgomery*. Where, as in *Gutierrez* and *Graham*, the court was directly reviewing the legality of a sentence, its focus was properly prospective and on the requirements of the constitution when a sentencing judge is making a prospective sentencing decision. In contrast, in *Montgomery*, the court was considering the somewhat broader question of the constitutionality of the prisoner's *continued* confinement. (*Montgomery*, *supra*, 193 L.Ed.2d at p. 622) ([*Miller* must be retroactive because of "grave risk that many are being held in violation of the Constitution"].) In that procedural context, it is quite reasonable to permit consideration of a defendant's postconviction conduct, especially in light of the possibility that a defendant's postconviction behavior might show that he or she falls within the very narrow category of incorrigible.

(*Kirchner*, *supra*, 244 Cal.App.4th at p.1419, italics in original.)

Indeed, the procedure under section 1170, subdivision (d)(2) codifies admission of postconviction conduct as the reasonable, reliable measure of retrospectively determining transient immaturity versus irreparable corruption.

Therefore, contrary to Kirchner's argument, *Gutierrez* does not foreclose section 1170, subdivision (d)(2) as a collateral remedy. To the contrary, *Montgomery* calls for a retrospective look at postconviction conduct on collateral review. And section 1170, subdivision (d)(2) epitomizes that demand.

III.

People v. Franklin (2016) 63 Cal.4th 261 (*Franklin*) Does Not Answer Whether Section 1170, Subdivision (d)(2) is a Remedy for *Miller* Error on Collateral Review

This court recently held in *Franklin* that, on direct appeal, section 3051 moots a *Miller* error when a functional LWOP sentence is imposed.

(*Franklin*, *supra*, 63 Cal.4th at p. 268.) Similar to the Attorney General's argument in *Gutierrez*, this court reasoned that section 3051 converted Franklin's sentence to a non-LWOP sentence, so no *Miller* claim arose. (*Franklin*, *supra*, 63 Cal.4th at pp. 281-282.) The high court distinguished section 3051 from section 1170, subdivision (d)(2), noting that section 3051 converted functional LWOP sentences to sentences not subject to the constitutional sentencing demands of *Miller*. (*Ibid.*) As a result, there was no requirement that the lower court evaluate Franklin's incorrigibility at the outset. (*Ibid.*) *Franklin* did not foreclose section 1170, subdivision (d)(2) as an adequate remedy on collateral review for prisoners sentenced as juveniles to LWOP.

CONCLUSION

Accordingly, the People respectfully request that the judgment of the Court of Appeal be affirmed.

Dated: August 18, 2016

Respectfully submitted,

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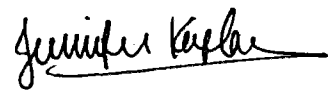

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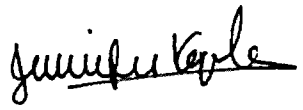

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re KRISTOPHER KIRCHNER on Habeas Corpus	For Court Use Only
	Supreme Court No.: S233508 Court of Appeal No.: D067920 Superior Court Nos.: HC21804, CRN26291

PROOF OF SERVICE

I, the undersigned, declare as follows:

I am employed in the County of San Diego, over eighteen years of age and not a party to the within action. My business address is 330 West Broadway, Suite 860, San Diego, CA 92101.

On August 18, 2016, a member of our office served a copy of the within **ANSWER BRIEF ON THE MERITS** to the interested parties in the within action by placing a true copy thereof enclosed in a sealed envelope, with postage fully prepaid, in the United States Mail, addressed as follows:

Abbey J. Noel
Deputy Public Defender
OFFICE OF THE PRIMARY
PUBLIC DEFENDER
450 B Street, Suite 900
San Diego, CA 92101
Attorneys for Petitioner
Kristopher Kirchner

The Honorable Louis R. Hanoian
Judge of the Superior Court
Department 52
SAN DIEGO SUPERIOR COURT
220 W. Broadway
San Diego, CA 92101

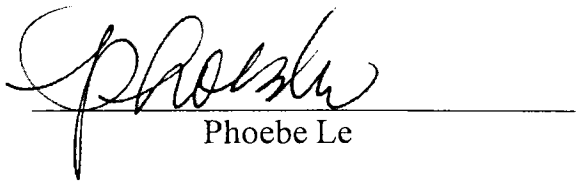
I electronically served the same referenced above document to the following entities:

ATTORNEY GENERAL'S OFFICE: AGSD.DAService@doj.ca.gov
APPELLATE DEFENDERS, INC: eservice-criminal@adi-sandiego.com

I also served the following parties electronically via www.truefiling.com:

COURT OF APPEAL, FOURTH DISTRICT, DIVISION ONE

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on August 18, 2016 at 330 West Broadway, San Diego, CA 92101.



Phoebe Le