

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA



SUPREME COURT  
**FILED**

SEP 12 2016

In re KRISTOPHER KIRCHNER  
on Habeas Corpus

No.: S233508

No.: D067920

Frank A. McGuire Clerk

Deputy

(Super. Ct. Nos.  
HC21804, CRN26291)

**PETITIONER'S REPLY BRIEF ON THE MERITS**

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

--oo00oo--

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**SUMMARY**

The legislature intended California Penal Code section 1170, subdivision (d)(2)<sup>1</sup>, to allow juveniles who were *lawfully* determined to be incorrigible to prove the court wrong during their life without parole sentence by rehabilitating themselves. The process under the statute is rigorous, because after a determination of incorrigibility, public safety demands an extreme vetting process. This is too rigorous a process for those juveniles *unlawfully* sentenced to life without parole, because it does not ensure a sentence that was imposed in violation of a juvenile's constitutional rights will ever be corrected.

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<sup>1</sup> All references are to the California Penal code unless otherwise noted.

Additionally, the correctional institutions in California provide limited access to rehabilitative programs, and prisoners who were sentenced to life without parole were given the least priority. Only an appropriately sentenced juvenile offender will be given a meaningful opportunity to rehabilitate because those deemed incorrigible are last in line for any meaningful programming. Juveniles who were illegally sentenced to life without parole, in violation of *Miller*, face much greater hurdles to prove their rehabilitation than those who committed the same crimes but were sentenced to life with the possibility of parole. Thus, an illegal classification of incorrigibility does not provide an equal opportunity to demonstrate rehabilitation, violating any notion of it being a fair measure as to the appropriateness of the classification.

Requiring only some offenders to seek relief via section 1170, subdivision (d)(2), violates the Due Process and Equal Protection Clauses. All juveniles sentenced under a presumption of life without parole and without consideration of the *Miller* factors are entitled to a uniform procedure for relief; a lawful sentence via collateral review.

## **ARGUMENT**

### **I.**

#### **SECTION 1170, SUBDIVISION (d)(2), DOES NOT REMEDY *MILLER* ERROR**

*Miller/Gutierrez/Montgomery* bar a life without parole sentence for all but the rare incorrigible juvenile offender. *Miller* not only set out a list of factors for the court to consider prior to imposing life without parole for a

juvenile offender, but also barred life without parole “...for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.” (*Montgomery v. Louisiana* (2016) \_\_\_ U.S. \_\_\_ [136 S.Ct. 718] (*Montgomery*) at p. 734, interpreting *Miller v. Alabama* (2012) 567 U.S. \_\_\_ [132 S.Ct. 2455] (*Miller*).) Section 1170, subdivision (d)(2), requires an offender demonstrate remorse and rehabilitation along with many other miscellaneous factors in an attempt to receive a resentencing hearing. Respondent acknowledges that section 1170, subdivision (d)(2), gives only “... *reformed* defendants a resentencing hearing.” (Respondent’s Answer Brief on the Merits (ABM) p.7, emphasis added.) However *Miller* and *Montgomery* do not limit their relief to only those offenders deemed “reformed.” (*In re Berg* (2016) 247 Cal.App.4th 418, 442 (petition for review granted on July 27, 2016, S235277).) Since section 1170, subdivision (d)(2), does not ensure that a sentence of life without parole remains for only the rarest of juvenile offenders, it cannot provide “...all the rights demanded by *Miller* and *Montgomery*.” (ABM p.3.)

**A. Post-Conviction Conduct at a *Miller* Resentencing Hearing is Relevant but Not the Controlling Factor.**

Applying *Miller* on collateral review, as directed by the U.S. Supreme Court in *Montgomery*, does not “subvert justice.” *Gutierrez* specifically provides that *amenability* to rehabilitation must be considered at a *Miller* sentencing. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1386–1387 (*Gutierrez*); *People v. Lozano* (2016) 243 Cal.App.4th 1126, 1138; and *In re Berg, supra*, 247 Cal.App.4th at p. 440.) However, the courts in *Graham* and *Gutierrez* recognized that a juvenile offender’s failure to rehabilitate

while serving a sentence with no hope of release will not retroactively justify an LWOP sentence. (*Gutierrez* at p. 1386, citing *Graham v. Florida* (2010) 560 U.S. 48, 73.) Section 1170, subdivision (d)(2) rightly places an enhanced burden of proving remorse and rehabilitation for the lawfully sentenced offender, but it unfairly adds increased burdens on the unlawfully sentenced juvenile offender.

**B. Section 1170, Subdivision (d)(2) Is Not the Constitutional Equivalent of a Miller Resentencing Hearing.**

The *Montgomery* court held *Miller* applies retroactively because there is, "...a grave risk that many are being held in violation of the Constitution." (*Montgomery, supra*, 136 S.Ct at p. 736.) Addressing the dissent's concerns with conducting resentencing hearings years later, the Court suggested states could remedy an illegal life without parole sentence by converting the sentence to life with parole. (*Ibid.*, citing Wyo. Stat. Ann. § 6-10-301(c); *State v. Mares* 2014 WY 126.) This suggested remedy by the majority should not be confused with the holding in *Montgomery* that illegally sentenced juveniles may seek collateral relief.

All juvenile offenders who are sentenced to life without parole are entitled to seek collateral relief, and an immediate opportunity to have their unconstitutional sentence corrected. Respondent states section 1170, subdivision (d)(2), provides relief to "that changed juvenile – now an adult – with a life-*with*-parole sentence." (ABM p. 4.) Section 1170, subdivision (d)(2), places many hurdles in front of a petitioner that may or may not lead to a resentencing hearing, let alone parole eligibility. (*In re Berg, supra*, 247 Cal. App. 4<sup>th</sup> at pp. 436-437.)

Section 1170, subdivision (d)(2), was intended to have courts take a second look at constitutionally sanctioned incorrigibility determinations by examining post-conviction conduct.<sup>2</sup> As the court in *In re Berg*, correctly pointed out, there is nothing in the text of section 1170, subdivision (d)(2) referencing the Legislature’s intent to remedy *Miller* error. (*In re Berg*, *supra*, 247 Cal.App.4th at p. 441.) When the statute was written, the courts had not even recognized *Miller* error; thus the intent of the legislature was to give a second chance to legally sentenced juveniles. The burdens placed on an offender under section 1170, subdivision (d)(2), are “...consistent with the statute's purpose of providing a defendant who is serving a *lawfully* imposed LWOP sentence with the opportunity to obtain a new sentence.” (*Id.* at p. 442.)

In contrast, the Wyoming statute referenced in *Montgomery*; and section 3051, as discussed by this court in *Franklin*; were passed in response to *Miller*. Section 3051 and the Wyoming statute cured the illegal sentences by legally changing the sentences to life with parole at 25 years (or earlier.) (*Montgomery*, *supra*, 136 S.Ct at p. 736; Wyo. Stat. Ann. § 6-10-301(c); *State v. Mares* 2014 WY 126; *People v. Franklin* (2016) 63 Cal.4th 261, 281.) As this court stated in *Franklin*, “section 1170, subdivision (d)(2), has no similar effect on a juvenile offender’s LWOP sentence...” (*Ibid.*) Therefore, *Montgomery* dictates Mr. Kirchner’s sentence can be remedied by one of two means; granting his habeas petition and affording him a *Miller* resentencing hearing or converting his sentence to life with parole.

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<sup>2</sup> (See <[http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201120120SB9](http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201120120SB9)> [as of September 4, 2016] .)

**C. The Unconstitutional Sentence Creates A Classification Resulting in Unequal Opportunities to Rehabilitate.**

Respondent argues “section 1170, subdivision (d)(2), remedies cases on collateral review by accurately providing a retrospective measure of a defendant's capability to change.” (ABM p. 13.) Respondent fails to recognize that a sentence of life without parole results in a prison classification that discourages rehabilitation. Offenders, such as Mr. Kirchner, have been serving a sentence of no hope with little opportunity for rehabilitation for the last 22 years. According to CDCR regulations an inmate serving a sentence of life without the possibility of parole shall not be housed in a facility with a security level lower than Level III, except when authorized by the Departmental Review Board. (See Cal. Code Regs., tit. 15, § 3375.2.)

In 1994, the state prison system was known as the California Department of Corrections. It was not until 2005, that the Department of Corrections underwent a major overhaul and a focus on rehabilitation took place, along with a name change (California Department of Corrections and Rehabilitation) to reflect such changes. (Government Code section 12838, added 2005). Further, it was not until 2012, when the U.S. Supreme Court decided *Miller* and our state legislature passed section 1170, subdivision (d)(2), that offenders such as Mr. Kirchner dared to dream of a possible change in their sentence. This is why the U.S. Supreme Court repeated the admonition, “rehabilitation cannot justify the sentence, as life without parole forswears altogether the rehabilitative ideal.” (*Montgomery, supra*, 136 S.Ct. at p. 733.)

Mr. Kirchner would likely have been sentenced to life with parole. He was 16 years old with no record at the time of the offense, convicted under the theory of felony murder, and had a co-defendant. He was deemed amenable to treatment at California Youth Authority (CYA). CYA warned the court that Mr. Kirchner was unsophisticated and would be unfavorably influenced in a prison population. How accurate is the retrospective measure of Mr. Kirchner's ability to change when he was sentenced to be with adult prisoners who were also classified as incorrigible? The retrospective review of his prison conduct has been unfavorably influenced by his constitutionally deficient sentence.

Mr. Kirchner is being treated unequally under the law due to his illegal sentence, particularly when compared to a properly sentenced individual. Respondent states, "Section 1170, subdivision (d)(2), then, is not just an adequate remedy but also the fairest and most logical one." In order for Respondent's theory to hold true, fundamental fairness would require that Mr. Kirchner have the same opportunities for rehabilitation as a juvenile who was lawfully sentenced. His illegal sentence caused arbitrary discrimination due to his classification of incorrigibility.

"Guarantees of equal protection embodied in the Fourteenth Amendment of the United States Constitution and article I, section 7 of the California Constitution prohibit the state from arbitrarily discriminating among persons subject to its jurisdiction." (*People v. Chavez* (2004) 116 Cal.App.4th 1, 4.) "The constitutional guarantee of equal protection of the laws has been defined to mean that all persons under similar circumstances

are given ‘equal protection and security in the enjoyment of personal and civil rights ... and the prevention and redress of wrongs ...’ [Citation.] The concept ‘compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.’ [Citation.]” (*Pederson v. Superior Court* (2003) 105 Cal.App.4th 931, 939.) “Under the equal protection clause, ‘[a] classification ‘must be reasonable, not arbitrary, and must rest upon some grounds of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’ [Citations.]” (*People v. Wilder* (1995) 33 Cal.App.4th 90; *People v. Rhodes* (2005) 126 Cal.App.4th 1374, 1382-1383.)

To require Mr. Kirchner to demonstrate rehabilitation when he was denied it due to his illegal classification is patently unfair. Only by being resentenced will he be put on equal footing with other life prisoners who are competing for the rehabilitative resources of the CDCR.

## II.

### **BARRING COLLATERAL RELIEF TO A SELECT GROUP OF JUVENILES VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION**

#### **A. Requiring Offenders to Seek Relief Via Section 1170, Subdivision (d)(2) Violates the Eighth Amendment as Defined by *Miller/Gutierrez/Montgomery*.**

The requirements of section 1170, subdivision (d)(2), places many burdens on an offender. The *Kirchner* court recognized those burdens violate *Miller/Gutierrez/Montgomery*. (*In re Kirchner* (2016) 244 Cal.App.4th 1398, 1418.) The *Kirchner* court effectively rewrote section

1170, subdivision (d)(2), by interpreting the statute as shifting the burden to the prosecution in order to find it to be an adequate remedy at law. (*Ibid.*; *People v. Canty* (2004) 32 Cal.4th 1266; *In re Berg*, *supra*, 247 Cal.App.4th at p. 442) Respondent does not address the *Kirchner* court's legal gymnastics, nor Petitioner's claims that the statute's burdens result in continued violations of the Eighth Amendment. The failure to address these issues should constitute waiver. (*People v. Mooc* (2001) 26 Cal.4th 1213, 1233, fn.6.)

**B. Barring Collateral Relief To a Select Group of Offenders Violates Due Process and Equal Protection Under the Fourteenth Amendment.**

Requiring a select group of offenders, those who have served 15 years of their sentence, to seek relief via section 1170, subdivision (d)(2) violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. (*In re Kirchner*, *supra*, 244 Cal.App.4th at p. 1405, fn1.) As the *Berg* court explained:

To conclude that a statutory procedure for which the defendant is expressly disqualified affords an adequate remedy for an Eighth Amendment violation would violate basic principles of due process. On the other hand, if *Kirchner* is intended to limit the habeas corpus remedies only for those defendants who are *not* disqualified from filing a section 1170, subdivision (d)(2) petition, this would raise equal protection concerns.

(*In re Berg*, *supra*, 247 Cal.App.4th at pp. 438-439.)

Why should some offenders be required to seek relief via section 1170, subdivision (d)(2), while others are allowed to seek collateral relief? *Miller* factors are the controlling criteria for any offender currently facing

life without parole and for those who do not qualify via section 1170, subdivision (d)(2). Barring a select class of offenders from seeking collateral relief violates due process and equal protection; Respondent's failure to address these concerns constitutes waiver. (*People v. Mooc, supra*, 26 Cal.4th at p. 1233, fn.6.)

### III.

#### **THE GUTIERREZ COURT REJECTED SECTION 1170, SUBDIVISION (D)(2), AS A LAWFUL CORRECTION OF MILLER ERROR.**

In *Gutierrez*, this Court ruled section 1170, subdivision (d)(2), does not cure a *Miller* error. The Attorney General argued section 1170, subdivision (d)(2), provided juveniles with a meaningful opportunity at parole as defined in a *Miller* footnote. The court responded:

A sentence of life without parole under section 190.5(b) remains *fully effective* after the enactment of section 1170(d)(2). That is why section 1170(d)(2) sets forth a scheme for *recalling* the sentence and *resentencing* the defendant...

Neither *Miller* nor *Graham* indicated that an opportunity to recall a sentence of life without parole 15 to 24 years into the future would somehow make more reliable or justifiable the imposition of that sentence and its underlying judgment of the offender's incorrigibility "at the outset." (citation.)

(*Gutierrez, supra*, 58 Cal.4th at p. 1386.)

The rationale used by this Court when rejecting section 1170, subdivision (d)(2), as a constitutional remedy stands today. (*People v. Franklin, supra*, 63 Cal.4th at pp. 281-282.) The *Kirchner* court erred in disregarding it.

The *Lozano* court did not hesitate to reject the Attorney General's position that section 1170, subdivision (d)(2), was the only lawful remedy available to an illegally sentenced juvenile desiring to present post-conviction conduct at a *Miller* resentencing hearing. (*People v. Lozano, supra*, 243 Cal.App.4th at p. 1138.) Further, in *In re Berg*, the same appellate court as *Kirchner* (including one justice from *Kirchner*, who ultimately rejected his previous position) agreed *Gutierrez's* rejection of section 1170, subdivision (d)(2), as a constitutional remedy for *Miller* error was correct. (*In re Berg, supra*, 247 Cal.App.4th at p. 442, Justice McDonald concurring opinion.)

More recently, *People v. Gibson* stated, "as *Gutierrez* makes clear, section 1170, subdivision (d)(2), is not a substitute for the initial exercise of discretion pursuant to section 190.5 at the initial sentencing, and does not eliminate the constitutional doubts arising from a presumption in favor of LWOP under the pre-*Miller* line of cases." (*People v. Gibson* (Aug. 10, 2016, No. E062624) \_\_\_ Cal. App. 5th \_\_\_ [2016 Cal. App. LEXIS 660], at \*20, citing *Gutierrez, supra*, 54 Cal.4<sup>th</sup> at p. 1385.) The court ruled, in order for Mr. Gibson to receive a lawful sentence as defined by *Miller/Gutierrez*, he must file a petition for writ of habeas corpus. (*Id.* at \*22.) The court in *Kirchner* was wrong to disregard *Gutierrez*.

## CONCLUSION

Section 1170, subdivision (d)(2) offers hope to the lawfully sentenced juvenile offender serving life without parole. However, since it does not

guarantee that only the rare incorrigible offender will continue to serve a life without parole sentence, it does not correct an illegal sentence as defined by *Miller/Gutierrez/Montgomery*. (*Montgomery, supra*, 136 S.Ct. 733-734, 736.) *Miller/Gutierrez/Montgomery* allows a court to consider the potential for rehabilitation; yet, relief is not limited to only the reformed offender as it is under section 1170, subdivision (d)(2). Unlike section 3051 and the Wyoming statute mentioned in dicta in *Montgomery*, section 1170, subdivision (d)(2) was not intended to, and does not, remedy *Miller* error. (See *Montgomery, supra*, 136 S.Ct. at p. 736; *People v. Franklin, supra*, 63 Cal.4th at p. 281; Wyo. Stat. Ann. § 6-10-301(c).) *Miller/Gutierrez/Montgomery* requires these illegal sentences to be remedied by a uniform procedure for relief: either granting a habeas petition and holding a proper *Miller* resentencing hearing, or allowing these individuals to be eligible for parole after 25 years.

*Gutierrez's* reasoning for rejecting section 1170, subdivision (d)(2), as a remedy for *Miller* error remains. (See *In re Berg, supra*; *People v. Lozano, supra*; *People v. Gibson, supra*.)

Requiring a select group of offenders to seek relief via section 1170, subdivision (d)(2) results in continued violations of the Cruel and Unusual Punishment Clause of the Eighth Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

The trial court properly granted Mr. Kirchner's habeas petition. Mr. Kirchner is currently serving an illegal sentence and is entitled to a





**CERTIFICATE OF SERVICE**

*Rule 1.21(c)*

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**Super. Ct No.: HC21804, CRN26291**

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I, Michael A. Owens, declare as follows:

I am employed in the County of San Diego, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 450 "B" Street, Suite 900, San Diego, California 92101-4009, in said County and State.

On September 8, 2016, I served the foregoing document:

***PETITIONER'S REPLY BRIEF ON THE MERITS***

on the parties stated below, by the following means of service:

- BY INTEROFFICE/U.S. MAIL:** Pursuant to Rule 1.21(b), on the above-mentioned date I personally deposited in the United States Mail true and correct copies thereof, each in a separate envelope, postage thereon fully prepaid, addressed to the following [**See Service List**]. .
- BY PERSONAL SERVICE:** On the date of execution of this document, I personally served true and correct copies of the above-mentioned document(s) on each of the following [**See Service List**].
- BY ELECTRONIC SERVICE:** I caused each such document to be transmitted electronically, to the parties indicated below, as authorized by California Rule of Court 8.71, through the TrueFiling service portal. [**See Service List**].
- (STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on 9/8/16

\_\_\_\_\_  
/s/  
Michael A. Owens  
Declarant

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