# Miller Time: The Eighth Amendment Earthquake in Sentencing Law For Juvenile and Youthful Offenders and Its Aftershocks in California

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## Introduction

Tell me you saw this coming during the dark days of criminal appellate practice in the 1990s and early 2000s: a revolution in Eighth Amendment law that alters the way juveniles and other youthful offenders are punished for the most serious kinds of crimes?

I sure didn't see it. I remember the LWOP case I had in the mid- 90's in which my 16 year-old client killed a prostitute with a shotgun after his gang buddies kidnaped and raped the poor victim – a truly horrific crime. He was tried as an adult, charged with special circumstances murder for kidnap and rape in concert, and got an LWOP sentence. He was very young, out of his mind on drugs at the time of the crime, not directly involved in either the kidnap or the rape, and strongly influenced by older gang members. I did what I could for this poor soul. I even had a few good issues, including jury misconduct, but all my claims came to naught. I helped him with his federal habeas too, which also went nowhere.

But I confess, it barely even occurred to me back in 1996-1997 to bring a facial challenge to his LWOP sentence under the Eighth Amendment, or even to claim IAC for not raising an "as-applied" Eighth Amendment challenge. If LWOP was constitutional for a recidivist drug pusher (*Harmelin v. Michigan* (1991) 501 U.S. 957), what chance did my poor client have? A challenge to the ultimate punishment, the death penalty, for an over-16 offender as cruel and unusual had already failed (*Stanford v. Kentucky* (1989) 492 U.S. 361), and there was no reason to think any kind of Eighth Amendment argument had a prayer for the lesser, penultimate sentence of life without parole. Nor was there even the slightest basis to think that the California courts, tilting so far to the right for the past decade-plus, and finding new ways to criminalize and severely punish juvenile offenders, would provide any help with such a challenge. So, it hardly even crossed my

mind.

But a change did come. It began with a big noise somewhat from the side, the landmark U.S. Supreme Court decision in *Atkins v. Virginia* (2002) 536 U.S. 304, finding a per se Eighth Amendment violation for executing a mentally retarded defendant. Three years later, the High Court overturned *Stanford* and held in *Roper v. Simmons* (2005) 543 U.S. 51 that the Eighth Amendment prohibited execution of a defendant who was a juvenile when his crime was committed. Five years after that, the Court in *Graham v. Florida* (2010) 560 U.S. 48 erected a similar Eighth Amendment bright line rule precluding LWOP sentences for non-homicide crimes committed by juveniles. Finally, two years later, the Court extended the ruling in *Graham* to juvenile offenders in homicide cases, holding in *Miller v. Alabama* (2012) 567 U.S. 46 that an LWOP sentence violated the Eighth Amendment for homicides committed by juveniles except in "rare cases" where the crime and criminal demonstrate "irreparable corruption."

A common feature of each of these four landmark Eighth Amendment decisions was a narrow majority of four "liberal" justices and one key swing vote – Justice Anthony Kennedy (sometimes joined by a sixth vote). This remarkable Ronald Reagan appointee – may his health remain good and his determination to stay on the Court remain constant for the next four years – could be called the "Godfather" of this epic chapter of Eighth Amendment jurisprudence, which gives the whole thing something of the quality of a miracle.

The rest of the story, from our point of view, has to do with the way California has responded to these sea changes – at first very cautiously, but, increasingly with a fair measure of substance from both the legislative and judicial branches; mind you, not without the usual portion of half-measures and back-sliding.

This article is my attempt to tell this story, and to help you, as criminal appellate practitioners, to navigate through the shoals of these changes as applied to our clients, current and past, who fit within the categories of these new decisions. But that's not all.

Pursuing my usual goal in a seminar article and presentation, to both inform you and inspire you – or at least annoy you with attempted inspiration – I will try to

encourage you to think of ways to take the "next steps" in helping those of our clients who are not, strictly speaking, covered by these landmark decisions, but who are "almost" there – close, but no cigar, as Groucho Marx put it.

I am thinking generally of youthful offenders 18 and over, and even more specifically of such young offenders with significant mental health issues. As will be explained, the key to the holdings in *Roper*, *Graham*, and *Miller* is not the sanctity of youth under a magical line of their 18th birthday, but rather two very fundamental points about youthful offenders that are central to this revolution in Eighth Amendment jurisprudence. The first is the absence of full development in the brains of juveniles and post-juveniles until roughly the age of *25* (and not 18), and the concomitant lack of maturity and impulse control, combined with susceptibility to influence by others. (See, e.g. *Graham*, *supra*, 560 U.S. at p. 48.) And the second, which goes hand in glove with the foregoing, is the possibility of redemption and rehabilitation for nearly all juvenile offenders, even those committing truly horrific crimes. (*Ibid*.) Obviously, neither of these compelling factors disappears on the 18th birthday, as we can all remember from our late teens and early twenties, and as anyone who has raised kids through these years can attest to.

As of yet, the U.S. Supreme Court has taken no steps into this corollary area of Eighth Amendment law. Fortunately for us and our clients, California has taken some positive small steps in this direction with the enactment of Penal Code sections 3046 and 3051, which give 18 to 22 year old offenders the right to "youthful offender parole hearings," which will be discussed below, and which may, in some circumstances, moot out Eighth Amendment arguments for some offenders. (See *People v. Franklin* (2016) 63 Cal.4th 261, 279-280.)

Still, I argue in Part V below, there is room for pushing Eighth Amendment arguments for offenders in this category. For example, there is no constitutional impediment to either capital sentences or straight LWOP sentences for 18 to 22 year-olds, nor is there any provision for mitigation of punishment for offenders of this age who commit serious sexual offenses. And there is no provision for consideration of mental

disorders, short of insanity or mental retardation, as factors in Eighth Amendment challenges involving youthful offenders.

In my view, this is our new frontier to explore as to both "facial" and "as applied" challenges. The most salient of such challenges will be for clients or inmates with straight LWOP sentences, and other prisoners who are statutorily ineligible for Youthful Offender parole hearings under section 3051 (i.e., Third Strikers or those sentenced under section 667.61, the sex-crime "one-strike" law), since those who are eligible have a *Franklin* problem with any such claims being considered moot (other than giving rise to *Franklin* remands).

But I am getting ahead of myself. Let's start at the beginning, and get back here at the end.

## I. Background Part 1: California Law and Increasing Punitive Measures Against Youthful Offenders Convicted of Most Serious Crimes.

### A. Juvenile Court Law, How it Was, and the Way it Became.

Once upon a time, about when I started practicing criminal appellate law in the early 1980s, there was a pretty solid wall between juvenile crime and adult crime, nearly always around the offender's 18th birthday. If a crime was committed before that dividing line, the minor was within the jurisdiction of the juvenile court; if after, adult court. (See former § 602.)

There was a narrow category of exceptions permitted under Welfare and Institutions Code section 707, which allowed the prosecution to make a "fitness" motion to have the case transferred to adult court. For less serious crimes, there was a presumption of fitness for juvenile court. For the more serious crimes specified in section 707(b), there was a presumption of unfitness for specified serious offenses, including murder. (See Welf. & Inst. § 707, pre-1991 version.)

A 1994 amendment to section 707 added 14 and 15 year olds to the category of persons who could be tried as adults for 707(b) offenses, with a presumption in favor of fitness as to all these crimes except murder, in which there was a presumption of unfitness.

Proposition 21, on the 2000 ballot, did several bad things to juvenile cases. First, it greatly expanded the categories of 707(b) offenses. Second, it undermined the favorable aspects of section 707 by requiring direct filing in adult court for any person over 14 years of age charged with murder or specified sexual offenses. (See § 602(b) after 2000 amendments.) And third, it gave the prosecutor discretion to direct-file in adult court for any section 707(b) offense by a minor 16 or older, and for any crime in which designated bad facts – e.g., use of a firearm, elder victim, gang crime – are present.

B. **LWOP for Juveniles.**

California was a bit ahead of the curve on one point. The 1977 "Briggs Initiative" which expanded the death penalty and increased punishment for murderers, included a provision which precluded imposition of the death penalty for juvenile offenders. (Pen. Code § 190.5, pre-1990 version.) In *People v. Davis* (1981) 29 Cal.3d 814, the California Supreme Court held that juveniles tried as adults for murder could not be charged with special circumstances, and thus were not subject to LWOP sentences.

However, Proposition 115 overruled *Davis* by "[a]llow[ing] minors who are 16 or 17 years of age at the time of the crime and convicted of first-degree murder with special circumstances to be punished by life imprisonment without the possibility of parole." (Prop. 115 Ballot Materials, 1990.) The amended section 190.5 did not mandate an LWOP sentence, giving a judge discretion to alternatively impose a 25 to life sentence. (§ 190.5, subd. (b).)

Things then got worse with the decision in *People v. Guinn* (1994) 28 Cal. App. 4th 1130, which provides us with a good example of how things fared in the bad-old days of the 1990s. Guinn was a juvenile convicted of special circumstance murder and sentenced to LWOP. He contended on appeal that section 190.5(b) was unconstitutional under both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment because it provided no standards for the court to exercise in deciding whether to impose the higher LWOP punishment, arguing that this was akin to a death penalty determination, and could not be done based on a standardless exercise of

discretion. The Court of Appeal stood this argument on its head. While mentioning the Eighth Amendment claim, the court proceeded to ignore it, holding that Guinn had misread the statute as creating a presumption in favor of the 25-to-life sentence, because, as the court interpreted it, section 190.5 actually created a *presumption in favor of LWOP* as the default sentence where special circumstances were proven, with an exercise of discretion by the court required to impose the lower 25 to life alternative sentence.

The holding in *Guinn* was followed by a number of courts and assumed to be the law by all trial courts. (See *People v. Murray* (2012) 203 Cal.App.4th 277, 282; *People v. Blackwell* (2011) 202 Cal.App.4th 144, 159; *People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1089.)

C. **Pre-*Miller* Eighth Amendment Arguments for Juvenile LWOPs.**

Prior to *Graham* and *Miller*, cruel and/or unusual punishment arguments applied to youthful offenders with LWOP sentences basically fell on deaf ears. As noted above, the court in *Guinn* essentially ignored this argument. Worse still, two courts that followed the holding in *Guinn* flatly rejected Eighth Amendment challenges to juvenile LWOPs in murder cases which were raised based on the holding in *Graham*, pointing out that *Graham*, was expressly limited to non-homicide offenses, with each court concluding that the phrase, "unless he committed a homicide . . .", used by the Court in *Graham*, "strongly suggest that to the United States Supreme Court, a no-parole life sentence for juvenile murderers does not violate the Eighth Amendment." (*People v. Murray*, *supra*, 203 Cal.App.4th at p. 284; see also *Blackwell*, *supra*, 202 Cal.App.4th at pp. 156-158.)

This is a perfect example of how California courts, until very recently, have interpreted 8th Amendment case law, i.e., having to be virtually dragged kicking and screaming by an express holding of the U.S. Supreme Court into any kind of recognition of an expanded class of protected persons. What a horrible contrast to an earlier era when California, in cases like *In re Lynch* (1972) 8 Cal.3d 410 and *People v. Dillon* (1983) 34 Cal.3d 441 interpreted our state's own "cruel *or* unusual punishment" provisions of Article I, section 17 of the California Constitution, in ways which provided greater

protections for criminal defendants than the federal constitution.

## II. The Turning of the Tide: From *Roper* to *Montgomery*, Justice Kennedy and the Eighth Amendment Revolution For Youthful Offenders.

### A. The Way it Was: 8th Amendment and Youth Crime in the Bad Not-so-Old Days.

Things were also going poorly in the U.S. Supreme Court. In *Penry v. Lynaugh* (1989) 492 U.S. 302 , a divided Court held that executing a mentally retarded offender did not violate the 8th Amendment. On the same day, a similarly divided Court in *Stanford v. Kentucky, supra*, 492 U.S. 361 rejected the proposition that the Constitution bars capital punishment for juvenile offenders over 15.

There were some rays of hope the previous year, when a 4-vote plurality opinion held that executing an under-16 juvenile offender violated the 8th amendment, with Justice O'Connor concurring in the judgment based on the fact that the Oklahoma statute set no minimum age for capital punishment. (*Thompson v. Oklahoma* (1988) 487 U.S. 815.) The court had earlier held that executing an insane person violated the 8th amendment. (*Ford v. Wainwright* (1986) 477 U.S. 399, 408.)

But in *Stanford*, Justice O'Connor's vote flipped the other way, based on the fact that the law at issue in *Stanford* included express limits based on age. However, her concurrence recognized that "[t]he day may come when there is such general legislative rejection of the execution of 16- or 17-year-old capital murderers that a clear national consensus can be said to have developed . . ." (*Stanford, supra*, 492 U.S. 361 at 381-382), but concluded that it had not yet come.

The plurality opinion in that case – authored by then-recently appointed Justice Scalia (and joined by Justice Kennedy, who filed no separate opinion) – agreed, finding no consensus. (*Id*., at pp. 371-373.) The plurality went much further, concluding that simply showing that there is a "revised national consensus" about the death penalty for juveniles is inadequate without changes in the laws of the states which demonstrate such a consensus. (*Id*., at p. 377-378.)

The *Kennedy* plurality also flatly rejected the pertinence of "an array of

socioscientific evidence concerning the psychological and emotional development of 16- and 17-year-olds . . .", insisting that such evidence can be used to persuade a legislature to change laws, but has no place in Eighth Amendment analysis. (*Id*., at pp. 377-379.) Lastly, Justice Scalia's plurality "emphatically reject[ed]" the defendant's "suggestion that the issues in this case permit us to apply our 'own informed judgment,' . . . regarding the desirability of permitting the death penalty for crimes by 16- and 17-year-olds . . ." (*id*., at p. 378), ridiculing this as an effort to "replaces judges of the law with a committee of philosopher kings." (*Id*., at p. 379.)

A masterful dissent, authored by Justice Brennan, and joined by Justices Blackmun, Marshall, and Stevens, for the first time espoused a bright-line Eighth Amendment rule prohibiting execution of under-18 killers. I commend its reading to you, since it turned out to be a template for the sea change which came a decade and a half later.

### B. Watershed Change, Step One: Prohibition Against Execution of a Mentally Retarded Defendant.

The cycle of change began with *Atkins v. Virginia*, *supra,* 536 U.S. 304, which overruled *Penry*, finding that contemporary standards of decency had "evolved" to reflect support for the notion that executing a mentally retarded defendant was cruel and unusual. There were two critical pieces of this analysis.

First, the 6-vote majority opinion, authored by Justice Stevens with the concurrence of Justices Kennedy and O'Connor, found that since *Penry* there had been a major change in the national consensus about use of the death penalty on mentally retarded defendants, who are now regarded as "categorically less culpable" than the average criminal. (*Id*., at 314-317.) Second, social scientific evidence was marshaled to demonstrate the diminished culpability of such offenders, and their inability to control their behavior based on criminal sanctions. (*Id*., at 318-321.)

Importantly, the decision in *Atkins* rejects the notion that the Court's own independent judgment had no bearing on Eighth Amendment determinations. Expressly dismissing the plurality's contrary conclusion in *Stanford*, which it described as an

aberration, *Atkins* held that "'the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.'" (*Id*., at p. 312, quoting *Coker v. Georgia* (1977) 433 U.S. 584, 597.)

### C. Watershed Change, Step Two: Prohibition of Execution of Juvenile Offenders.

In *Roper v. Simmons*, *supra*, 543 U.S. 551, the Court overruled *Stanford*, holding, in a 5-4 opinion authored by Justice Kennedy, that the 8th and 14th Amendments were violated by executing a convicted murderer who was under 18 when the crime was committed. Marshaling the recent holding in *Atkins* that executing a mentally retarded criminal violated the Eighth Amendment and recent advancements in brain science, the High Court reaffirmed the principle that the independent judgment of the Court is paramount to the central question whether there was a national consensus against the death penalty for juveniles.

Three significant features of the landmark holding in *Roper* have a strong bearing on the anti-LWOP decisions which followed it. First, the Court was willing to find a "national consensus" against the death penalty based not simply on overwhelming agreement of the states, but on an emerging trend of states barring capital punishment of juveniles. (*Id*., at pp. 564-568.) Second, the Court looked to the international community, noting that "the United States is the only country in the world that continues to give official sanction to the juvenile death penalty . . . (*id*., at p. 575), and stating that "the opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." (*Id*., at p. 578.)

Finally, and most significantly for our purposes, the Court turned to the same kind of scientific evidence looked upon as key by the Court in *Atkins* as critical to its assessment of both a national consensus and to the exercise of the Court's independent judgment. Key to this holding and those that followed it are the identification of "[t]hree general differences between juveniles under 18 and adults [which] demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." (*Id*., at

p. 569.) I break them down here by category:

(1) *Lack of Maturity and Responsibility, Resulting in Impulsive and Thoughtless Behavior.* "[A]s any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.' [citations] . . . It has been noted that 'adolescents are overrepresented statistically in virtually every category of reckless behavior.' [citation]." (*Id*., at p. 569.)

(2) *Greater Vulnerability and Susceptibility to Negative, Outside & Peer Pressures*. "[J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. . . . , [which] is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment." (*Ibid*.)

(3) *Character and Personality Traits Not Fully Formed*. "[T]he character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." (*Id*., at p. 570.)

The upshot of these differences, says the Court in *Roper*, is to "render suspect any conclusion that a juvenile falls among the worst offenders." (*Ibid*.) This realization leads to a further point, which follows from these factors: the inability to say that a particular youth is an "irretrievably corrupt individual" who should be subjected to the most serious punishment for crime.

> The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, '[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.'

(*Ibid*., quoting *Johnson v. Texas* (1993) 509 U.S. 350, 368.)

Lastly, in response to a prosecutorial argument that juries should be allowed to consider these factors and decide whether to impose the death penalty, and that it would be "arbitrary and unnecessary to adopt a categorical rule" banning the death penalty for under-18 offenders, Justice Kennedy's opinion forcefully asserted that "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability . . .," pointing out that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." (*Id*., at pp. 572-573.)

I have set forth the foregoing aspects of the holding in *Roper* in some detail because, as will be seen, they are the bases for the expansion of the holding to the LWOP situation in *Graham* and *Miller*.

## D. Youthful Offenders and Non-Capital Crimes: Categorical Eighth Amendment Challenges to LWOP sentences for Youthful Offenders.

### 1. Step One: *Graham v. Florida*, *supra*, 560 U.S. 48 ("*Graham*").

In *Graham*, by a 6 to 3 vote (Justice Sotomayor having replaced Justice O'Connor), the Court held that the Eighth Amendment was violated by imposing a sentence of life without parole (LWOP) on a juvenile offender convicted of a non-homicide crime. This was truly a watershed case in Eighth Amendment jurisprudence, as expressly recognized by Justice Kennedy's majority opinion. For the first time the Court upheld a "categorical" Eighth Amendment challenge to a non-capital class of defendants – under-18 year-olds with life sentences without a chance of parole – blending the categorical approach taken by the Court in challenges to the death penalty with the "proportionality" approach typically taken to challenges to less-than-capital punishments.

The opinion includes a superb statement of the concept of Eighth Amendment "proportionality" as applied to criminal punishment. "For the most part, . . . the Court's precedents consider punishments challenged not as inherently barbaric but as

disproportionate to the crime. The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." (*Graham*., at p. 59, quoting *Weems v. United States*, 217 U.S. 349, 367.)

The opinion then notes that this type of analysis is appropriate for consideration of a *particular* offender's sentence, but not to a *categorical* challenge to a "sentencing practice itself" – i.e., a death sentence for juveniles or mentally ill offenders, as in *Atkins* and *Roper*, or here, LWOP for non-homicide crimes committed by a juvenile offender. The "categorical" challenge requires a different type of inquiry, which is given its clearest statement in Justice Kennedy's opinion.

> In the cases adopting categorical rules the Court . . . first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice," to determine whether there is a national consensus against the sentencing practice at issue. *Roper, supra*, at 563. Next, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose, *Kennedy*, 554 U.S., at 421, the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.

(*Id.*, at p. 564.)

Notable in *Graham* is a retreat from a rigid adherence to legislative enactments of the states as the principal basis for finding a "national consensus" against a particular sentencing practice – a practice which would have been fatal, since 37 states allowed LWOP for non-homicide juvenile offenders. (*Id*., at p. 62.) Instead, the Court focuses on "actual sentencing practices" of states which permit such sentences, which "discloses a consensus against its use." (*Ibid*.)

*Graham* quoted at length from the holding in *Roper* to show the "lessened culpability" of juvenile offenders, citing the three factors noted above to conclude that "a juvenile is not absolved of responsibility for his actions, but his transgression is not as morally reprehensible as that of an adult." (*Id*., at p. 68, internal quotations omitted.) *Graham* takes this a step further, noting that more recent scientific research supports these

factors and makes even clearer the possibility that even the most egregious juvenile offenders can be reformed.

> "[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. See Brief for American Medical Association et al. at 16-24; Brief for American Psychological Association et al. at 22-27. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. *Roper*, 543 U.S., at 570. . . . It remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Ibid*.

(*Graham*, *supra*, 560 U.S. at p. 68.)

*Graham* also relied on the non-homicide character of the crimes at issue in that case, including the constitutional recognition of a "line between homicide and other serious offenses against the individual . . ." which "cannot be compared to murder in their severity and irrevocability . . .", noting that "compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." (*Id*., at p. 69.)

Focusing on the LWOP sentence itself, *Graham* emphasizes several salient points which make such a term impermissible for a juvenile offender. The opinion first notes how prior Eighth Amendment cases distinguish between life sentences with the possibility of parole and those without such possibility (*id*., at p. 70), and then observes the "reality" that with an LWOP sentence "a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender." (*Ibid*.)

The opinion in *Graham* concludes with this very pointed holding:

> The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. 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. 61, emphasis added.)

2. **Step Two: *Miller v. Alabama*, *supra*, 567 U.S. 460.**

This groundbreaking landmark decision, authored by Justice Kagan, represents the pinnacle – thus far – of Eighth Amendment watershed case law on punishment of youthful offenders. *Miller* squarely held that any sentencing scheme which required mandatory life without parole for a juvenile convicted of murder violated the Eighth Amendment because it precluded consideration of his chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences – as factors mitigating punishment. While stopping short of erecting a complete ban of LWOP punishment in homicide cases, *Miller* made it clear that such punishments will violate the Eighth Amendment except in "rare occasions" where the juvenile's crime "reflects irreparable corruption."

*Miller* involved two minor defendants, both of whom were 14 years old when their crimes were committed. The first, Jackson, was convicted of capital murder in 1999 for a robbery felony murder case, and received a mandatory LWOP punishment under Arkansas law. The second, Miller, was convicted of murder in the course of arson committed in 2003 when he and a cohort, both drugged out at the time, killed a man who had bought marijuana from Miller's mother after robbing and burning his trailer down; he was sentenced to a mandatory LWOP sentence under Alabama law. Miller's case came to the Supreme Court on direct review, while Jackson's came after he sought post-appeal state habeas relief based on *Roper* and *Graham*.

In the only brief I have yet written on *Miller*, I quoted at length the California Supreme Court's opinion in *People v. Gutierrez*, *supra*, 58 Cal.4th 1354, the first case from that court to consider LWOP punishments for juveniles murderers, which includes a thorough summary of the reasoning and holding of *Miller*. I will do so here as well, in a somewhat edited fashion.

> In *Miller*, the high court considered whether sentencing schemes mandating life without parole for juveniles convicted of homicide offenses violate the Eighth Amendment. . . . The constitutionality of mandatory life without parole for juvenile homicide offenders, Miller explained, "implicate[s] two strands of

precedent reflecting our concern with proportionate punishment." (*Miller*, *supra*, 132 S. Ct. at p. 2463.)

The first strand of relevant precedent, according to *Miller*, consists of "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty. [Citation.] . . . [Discussion of *Kennedy*, *Atkins*, *Roper*, and *Graham* omitted.]

Focusing extensively on *Roper* and *Graham*, the high court in *Miller* explained that those cases "establish that children are constitutionally different from adults for purposes of sentencing" in three important ways. (*Miller*, *supra*, 132 S. Ct. at p. 2464.) "First, children have a '"lack of maturity and an underdeveloped sense of responsibility,"' leading to recklessness, impulsivity, and heedless risk-taking. [Citation.] Second, children 'are more vulnerable . . . to negative influences and outside pressures,' including from their family and peers; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings. [Citation.] And third, a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].' [Citation.]" (*Ibid*.) For these reasons, "juveniles have diminished culpability and greater prospects for reform," and are thus "'less deserving of the most severe punishments.' [Citation.]" (*Ibid*.)

*Miller* further observed: "Our decisions [in *Roper* and *Graham*] rested not only on common sense – on what 'any parent knows' – but on science and social science as well. [Citation.] In *Roper*, we cited studies showing that '"[o]nly a relatively small proportion of adolescents"' who engage in illegal activity'" develop entrenched patterns of problem behavior."' [Citation.] And in *Graham*, we noted that 'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds' – for example, in 'parts of the brain involved in behavior control.' [Citation.] We reasoned that those findings – of transient rashness, proclivity for risk, and inability to assess consequences – both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his "'deficiencies will be reformed."' [Citation.]" (*Miller*, *supra*, 132 S.Ct. at pp. 2464–2465, fn. omitted.) "The evidence presented to us in these cases indicates that the science and social science supporting Roper's and Graham's conclusions have become even stronger." (*Miller*, 132 S.Ct. at p. 2464, fn. 5; see *ibid*. ["'It is increasingly clear that adolescent brains are not yet fully mature in regions and

systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance'" (quoting brief for Am. Psychological Assn. et al. as amici curiae, p. 4].)

*Miller* went on to explain that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because '"[t]he heart of the retribution rationale"' relates to an offender's blameworthiness, '"the case for retribution is not as strong with a minor as with an adult."' [Citations.] Nor can deterrence do the work in this context, because '"the same characteristics that render juveniles less culpable than adults"' – their immaturity, recklessness, and impetuosity – make them less likely to consider potential punishment. [Citation.] Similarly, incapacitation could not support the life-without-parole sentence in *Graham*: Deciding that a 'juvenile offender forever will be a danger to society' would require 'mak[ing] a judgment that [he] is incorrigible' – but '"incorrigibility is inconsistent with youth."' [Citation.] And for the same reason, rehabilitation could not justify that sentence. Life without parole 'forswears altogether the rehabilitative ideal.' [Citation.] It reflects 'an irrevocable judgment about [an offender's] value and place in society,' at odds with a child's capacity for change." (*Miller*, *supra*, 132 S.Ct. at p. 2465; see *Graham*, *supra*, 560 U.S. at p. 79 ["Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation."].)

* * *

*Miller* then turned to the second strand of relevant precedent. *Graham*, the high court observed, "likened life without parole for juveniles to the death penalty itself. . . ." (*Miller*, *supra*, 132 S.Ct. at p. 2463.) "Life-without-parole terms . . . 'share some characteristics with death sentences that are shared by no other sentences.' [Citation.] Imprisoning an offender until he dies alters the remainder of his life 'by a forfeiture that is irrevocable.' [Citation.] And this lengthiest possible incarceration is an 'especially harsh punishment for a juvenile,' because he will almost inevitably serve 'more years and a greater percentage of his life in prison than an adult offender.' [Citation.] The penalty when imposed on a teenager, as compared with an older person, is therefore 'the same . . . in name only.'" (*Id*., 132 S.Ct. at p. 2466.) "*Graham*'s '[t]reat[ment] [of] juvenile life sentences as analogous to capital punishment,'" the high court explained, makes relevant a line

of precedent "demanding individualized sentencing when imposing the death penalty." (*Id.*, at 132 S.Ct. at p. 2467.)

[S]everal high court decisions "have elaborated on the requirement that capital defendants have an opportunity to advance, and the judge or jury a chance to assess, any mitigating factors, so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses." (*Miller*, *supra*, 132 S.Ct. at p. 2467.) These decisions "insisted . . . that a sentencer have the ability to consider the 'mitigating qualities of youth,'" including the "'transient'" qualities emphasized in *Roper* and *Graham*: "immaturity, irresponsibility, 'impetuousness[,] and recklessness,'" as well as " 'susceptib[ility] to influence and to psychological damage.'" (*Miller*, at 132 S.Ct. at p. 2467.) "In light of Graham's reasoning," *Miller* said, "these decisions too show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders. Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." (*Ibid*.) Just as the failure to consider such factors "would be strictly forbidden" in meting out the death penalty, "*Graham* indicates that a similar rule should apply when a juvenile confronts a sentence of life (and death) in prison." (*Id*. at 132 S.Ct. at p. 2468.)

"To recap: Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences. . . . And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." (*Miller*, *supra*, 132 S.Ct. at p. 2468.)

Based on "the confluence of these two lines of precedent" – which establish that juvenile offenders are less culpable and more susceptible to reform than adults, and that imposition of the harshest punishment on a juvenile requires individualized sentencing that takes into account an offender's "youth (and all that accompanies it)" – the high court in *Miller* held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." (*Miller*, *supra*, 132 S.Ct. at pp. 2464, 2469.)

(*People v. Gutierrez*, *supra*, 58 Cal.4th at 1374-1378.)

A further pair of points by the *Miller* court which followed the above holding bear emphasis. First, the court explained, "[b]y making youth (and all that accompanies it)

irrelevant to imposition of [an LWOP] prison sentence, such a scheme poses too great a risk of disproportionate punishment." (*Miller, supra*, 132 S.Ct. at 2469.)

Second, the high court in *Miller* made a particular point about the rarity of any constitutionally permissible imposition of an LWOP punishment against a juvenile convicted of murder.

> [G]iven all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Roper*, 543 U.S., at 573, *Graham*, 560 U.S., at [68]. Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

(*Miller*, *supra*, 132 S.Ct. at 2469.)

3. ***Montgomery v. Louisiana*** **(2016) __U.S.__ [136 S.Ct. 718, 193 L.Ed.2d 599]**

The last word from the Supreme Court on juvenile LWOP punishment came in *Montgomery*, which held that *Miller* was fully retroactive. In so holding, the Court clarified that the holding in *Miller* was *substantive*, and did not simply require certain procedures to be followed in order to justify an LWOP sentence for a juvenile homicide offender.

> *Miller* . . . did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of "the distinctive attributes of youth." [*Miller,* 132 S.Ct. at 2465].) Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects "'unfortunate yet transient immaturity.'" *Id.*, at 132 S.Ct. 2455, 2469 (quoting *Roper*, 543 U.S., at 573). Because *Miller* determined that sentencing a child to life without parole is excessive for all but "'the rare juvenile offender whose crime reflects irreparable

> corruption,'" 132 S.Ct. 2455, 2469, 183 L. Ed. 2d 407, 424 (quoting *Roper*, *supra*, at 573), it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status" – that is, juvenile offenders whose crimes reflect the transient immaturity of youth. [citation] As a result, *Miller* announced a substantive rule of constitutional law. Like other substantive rules, *Miller* is retroactive because it "'necessarily carr[ies] a significant risk that a defendant'" – here, the vast majority of juvenile offenders – "'faces a punishment that the law cannot impose upon him.'" [citation].

(*Montgomery*, *supra*, 193 L.Ed.2d at 614.)

## III. **California's Response to the Seismic Changes of Graham and Miller**.

We will now turn the page and review California's responses in the past eight years to the sea changes created by *Graham* and *Miller*. I divide the discussion below into legislative changes, on the one hand, and case law, on the other. Please note that this separation makes the review not quite in chronological order.

### A. **Legislative Changes.**

#### 1. **SB9, Penal Code Section 1170(d)(2).**

Surprisingly, the first meaningful response to *Miller* came from the California Legislature, with the passage in 2012 – the same year *Miller* was decided – of SB 9, which created Penal Code section 1170, subdivision (d)(2) (hereafter "section 1170(d)(2)"). I say "surprisingly" only because over the past 30 years we have not been conditioned to expect meaningful sentencing reform to come out of the Legislature. The bill, authored by former State Senator Leland Yee, was originally introduced in December of 2010 – just after *Graham* – and amended several times before ultimately being enacted and signed by the governor.[1]

The new law includes some of the *Graham-Miller* factors, but does not parallel them. It permits a defendant "who was under 18 years of age" when he committed a crime which led to an LWOP sentence to "submit to the sentencing court a petition for

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[1]See Legislative History at http://www.legislature.ca.gov/ cgi-bin/port-postquery?bill_number=sb_9&sess=1112&house=S&author=yee, last checked 2-18-2016.

recall and resentencing" if the defendant "has served at least 15 years of that sentence. . . ." (§ 1170(d)(2)A(i).) Section 1170(d)(2) is expressly declared to "have retroactive application." (§ 1170(d)(2)(J).)

> Subparagraph (B) describes the parameters of the petition to be filed.
>
> The petition shall include the defendant's statement that he or she was under 18 years of age at the time of the crime and was sentenced to life in prison without the possibility of parole, the defendant's statement describing his or her remorse and work towards rehabilitation, and the defendant's statement that one of the following is true:
>
> (i) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law.
>
> (ii) The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the sentence is being considered for recall.
>
> (iii) The defendant committed the offense with at least one adult codefendant.
>
> (iv) The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or showing evidence of remorse.

(§ 1170(d)(2)(B).)

Section 1170(d)(2) creates a two-step procedure for the determination of the petition. Following the filing of the petition and any reply by the prosecution (see para. (D)), the first stage requires the court to assess, by a preponderance of evidence, whether the statements in the petition are true. Once it has made this determination, the court "shall hold a hearing to consider whether to recall the sentence and commitment previously ordered and to resentence the defendant in the same manner as if the defendant had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence." (§ 1170(d)(2)(E).)

A specified, non-exclusive set of factors which "the court may consider in determining whether to recall and resentence" are delineated in subparagraph (F), as

follows:

> (i) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law.
>
> (ii) The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the sentence is being considered for recall.
>
> (iii) The defendant committed the offense with at least one adult codefendant.
>
> (iv) Prior to the offense for which the sentence is being considered for recall, the defendant had insufficient adult support or supervision and had suffered from psychological or physical trauma, or significant stress.
>
> (v) The defendant suffers from cognitive limitations due to mental illness, developmental disabilities, or other factors that did not constitute a defense, but influenced the defendant's involvement in the offense.
>
> (vi) The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or showing evidence of remorse.
>
> (vii) The defendant has maintained family ties or connections with others through letter writing, calls, or visits, or has eliminated contact with individuals outside of prison who are currently involved with crime.
>
> (viii) The defendant has had no disciplinary actions for violent activities in the last five years in which the defendant was determined to be the aggressor.

(§ 1170(d)(2)(F).)

In addition to these specified factors, section 1170(d)(2) permits the court to "consider any other criteria that the court deems relevant to its decision, so long as the court identifies them on the record, provides a statement of reasons for adopting them, and states why the defendant does or does not satisfy the criteria." (§ 1170(d)(2)(H).)

The determination whether to recall the sentence is committed to the discretion of the trial court – with no suggestion of a presumption in favor of resentencing. If the sentence is recalled, the court is given the authority to impose any lawful sentence not greater than the sentence originally imposed. (§ 1170(d)(2)(G).) Presumably, such a new

sentence would have to be something less than an LWOP, but there is no express prohibition against a "virtual LWOP" sentence – say, 100 to life for two murders with a firearm.

One piece of good news about section 1170(d)(2) which favorably distinguishes it from other recent resentencing laws, is that if the court declines to recall the sentence, a defendant is permitted to submit up to three additional resentencing petitions, the first after serving 20 years, the second after serving 24 years, and the final petition "during the 25th year of the defendant's sentence." (§ 1170(d)(2)(H).)

### 2. SB 260 & 261: Penal Code Section 3051 and Youth Offender Parole Hearings.

In addition to the enactment of section 1170(d)(2) for LWOP juvenile offenders, the Legislature took another positive step regarding youthful offenders with sentences short of a straight LWOP term. Starting with SB 260, enacted in 2014, and SB 261, passed two years later, the Legislature provided a new procedure, the "Youth Offender Parole Hearing," codified in section 3051, which was specifically designed to give young offenders with lengthy adult court sentences for the most serious crimes an opportunity to obtain parole earlier than the express limits of their sentences.

The earlier enactment applied only to under-18 offenders. However, the second one, in a landmark move that went beyond the holdings of *Graham* and *Miller*, expanded this class of eligible offenders to include youth whose crimes were committed when they were under 23 years of age. It thus included, for the first time, persons who were aged 18 to 22 in the category of youthful offenders eligible for the term-shortening benefits of the youth offender parole process.

Unlike section 1170(d)(2) and Propositions 36 and 47, section 3051 is not a resentencing law. Rather, it is a parole eligibility provision which makes a youth offender eligible for a hearing and early parole. Eligibility for "release on parole" comes after 15 years of imprisonment for an inmate with a determinate sentence, after 20 years for anyone with a life term short of 25 to life (e.g., second degree murder, aggravated kidnap), and after 25 years for anyone with a term of 25 years to life. (§ 3051, subd. (b).)

Importantly, another provision of the amended parole laws, in subdivision (c) of section 3046, expressly provides that a youth offender found suitable for parole shall be granted parole "regardless of the manner in which the board set release dates . . ." under section 3041 for non-youth offenders. This means that unlike a standard lifer's parole hearing, where the parole board is empowered to calculate a release date that can be well off into the future, a juvenile offender found suitable after a youth offender parole hearing will obtain immediate release.

The good news is that SB 260 and 261, unlike section 1170(d)(2), mandate consideration of the *Miller* "hallmarks of youth" features as part of the parole determination. "When a prisoner committed his or her controlling offense, as defined in subdivision (a) of Section 3051, prior to attaining 23 years of age, the board, in reviewing a prisoner's suitability for parole pursuant to Section 3041.5, shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (§ 4801, subd. (c); see also § 3501, subd. (f) [requiring that "psychological evaluations and risk assessment instruments" must take the same factors into consideration].)

The bad news is that section 3051 excludes persons with a straight LWOP sentence, third-strikers, and anyone with a "One-Strike sentence for sex crimes under section 667.61. (§ 3051, subd. (h).)

### 3. Pending Legislation: SB 394: Automatic Parole Eligibility for Juvenile LWOP Inmates after 25 Years.

Currently pending legislation, authored by Senator Ricardo Lara, would put LWOP inmates into a similar situation as inmates who now get youth offender parole hearings under section 3051, and require a youth offender parole hearing for juvenile LWOP offenders after they have served 25 years.

The proponents of the bill explain that it will streamline the now complicated and time consuming SB 9/1170(d)(2) and habeas corpus proceedings which LWOP offenders now have to bring, and bring California law in compliance with *Miller* and *Montgomery*.

B. **Case Law Responses.**

1. ***Caballero* and the Application of *Graham* to "Virtual LWOPs".**

As anyone who has represented a client with a 96 year sentence knows, there is more than one way to be doomed to spend the rest of your life in prison. It was thus refreshing when the first step forward by the California Supreme Court, in *People v. Caballero* (2012) 55 Cal.4th 262, recognized that the *Graham* Court's prohibition against LWOP sentences for juveniles applies to "virtual LWOP" sentences – as I like to call them -- as much as to formal sentences of life without parole.

To carry out the mandate of *Graham*, the Supreme Court held that "sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that *falls outside the juvenile offender's natural life expectancy* constitutes cruel and unusual punishment in violation of the Eighth Amendment." (*Id.*, at p. 268, emphasis added.) *Caballero* held that a person in that situation has a right to have the sentencing judge "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 . . ." to enable the court to impose a sentence which allows the juvenile offender to seek parole release, and that the parole authorities must "then determine whether the juvenile offender must be released from prison "based on demonstrated maturity and rehabilitation." (*Id.*, at p. 268-269.)[2]

2. ***Gutierrez*: Repudiation of the Presumption in Favor of LWOP, and Recognition of the *Miller* "Hallmarks of Youth" Factors as Critical to Sentencing Determinations For Juvenile Murderers Facing LWOP.**

As narrowly phrased, the holding in *Miller*, that *mandatory* LWOP for juveniles

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[2] *Caballero* also held that juvenile offenders with "already imposed virtual LWOP sentences had a right to seek resentencing by means of a habeas petition (*id.*, at p. 269) – though this turned out to be short-lived, in light of section 3051 as interpreted by the Court in *Franklin*. (See below.)

convicted of murder violates the Eighth Amendment, does not directly affect California law, since, as we have seen, section 190.5 permits a court to exercise discretion and impose a 25 to life punishment which provides a possibility for parole. *People v. Gutierrez* (2014) 58 Cal.4th 1354, the California Supreme Court's first word on the impact of *Miller*, took two favorable steps towards carrying out the mandate of *Miller*. First, *Gutierrez* overruled the *Guinn* court's conclusion there was a presumption in favor of an LWOP sentence under section 190.5, both on principles of statutory construction and Eighth Amendment grounds recognized in *Miller*. Second, *Gutierrez* held that any court facing the decision whether to sentence a juvenile offender to an LWOP term must give careful consideration to the "Hallmarks of Youth" features recognized in *Roper*, *Graham* and *Miller*.

After a lengthy discussion of the holding in *Miller*, much of which is quoted above, the Supreme Court explained why, in addition to principles of statutory construction not pertinent here, *Miller* compelled overturning the holding of *Guinn* and the cases which followed it. "Treating [LWOP] as the default sentence takes the premise in *Miller* that such sentences should be rarities and turns that premise on its head, instead placing the burden on a youthful defendant to affirmatively demonstrate that he or she deserves an opportunity for parole." (*Gutierrez, supra*, at p. 1379.) Noting that in *Miller*, "the high court reasoned that persons under the age of 18, as a category, have distinctive attributes that typically counsel against imposition of life without parole . . ." (*id*., at 1380, citing *Miller*, 132 S.Ct. at 2464-2466), our supreme court explained that while "a sentencing court has discretion under *Miller* to decide on an individualized basis whether a 16- or 17-year-old offender is a "'rare juvenile offender whose crime reflects irreparable corruption . . .' (*id*. at 132 S.Ct. at 2469), to say that all 16 or 17 year olds subject to section 190.5(b) presumptively deserve a sentence of life without parole is in serious tension with *Miller*'s categorical reasoning about the differences between juveniles and adults." (*Gutierrez* at p. 1380.)

Perhaps more importantly, *Gutierrez* made it clear, a year before the high court said so in *Montgomery*, that *Miller* announced a *substantive* Eighth Amendment limit on

LWOP sentences for juvenile killers except in rare cases.

> [T]he trial court must consider all relevant evidence bearing on the "distinctive attributes of youth" discussed in *Miller* and how those attributes"diminish the penological justifications for imposing the harshest sentences on juvenile offenders." (*Miller*, *supra*, . . . 132 S. Ct. at p. 2465.) To be sure, not every factor will necessarily be relevant in every case. * * * But *Miller* "require[s] [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Id*. . . ., 132 S. Ct. at p. 2469.)

(*Gutierrez*, *supra*, 58 Cal.4th 1354 at p. 1390.)

#### 4. ***Franklin*: Recognition that Virtual LWOPs Are Covered by *Miller* and the Impact of Section 3051.**

In *People v. Franklin* (2016) 63 Cal.4th 261, the Supreme Court took one step forward and one step backward in carrying out the mandate of *Miller*. The good news is that the Court followed its prior holding in *Caballero* and recognized that *Miller* – like *Graham* – applied to terms of imprisonment which are the "functional equivalent of a life without parole sentence," entitling homicide offenders to consideration of the *Miller* hallmarks of youth factors and the possibility of rehabilitation before such a term can be imposed. (*Id*., at p. 276.)

The bad news is the Supreme Court's narrow holding that the right to a youth offender parole hearing under SB 260 and 261 effectively mooted out the need for habeas or direct appeal relief for *Miller* error when the sentence is a virtual LWOP because of mandatory life terms – e.g., Mr. Franklin's 50-to-life terms for first degree murder with personal use of a firearm. This is so, the Court reasoned, because the youth offender parole procedure gives him the right to parole consideration after his 25th year of imprisonment, at a hearing at which the *Miller* factors must be considered. (*Id*., at pp. 276-280.)

Finally, in a kind of afterthought ruling, the Supreme Court in *Franklin* remanded the case to the trial court "for the limited purpose of determining whether Franklin was afforded an adequate opportunity to make a record of information that will be relevant to

the Board as it fulfills its statutory obligations under sections 3051 and 4801." (*Id*., at pp. 284, 286-287.) As described by the Court, the goal of such a *Franklin* remand is to create a contemporary record of factors that will be critical to the eventual youth offender parole hearing.

> If the trial court determines that Franklin did not have sufficient opportunity . . ., Franklin may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors. The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to "give great weight to" youth-related factors (§ 4801, subd. (c)) in determining whether the offender is "fit to rejoin society" despite having committed a serious crime "while he was a child in the eyes of the law" (*Graham*, *supra*, 560 U.S. at p. 79).

(*Id*., at 284.)[3]

### 5. The Latest Word: *Kirchner* and the Entitlement to *Miller* Habeas Relief in Straight-LWOP Cases.

Hot off the press as I complete work on this article is our Supreme Court's most recent *Miller* decision*, In re Kirchner* (2017) __ Cal.5th __, 2017 Cal.LEXIS 2998, decided on April 24, 2017. Kirchner, an inmate with a straight LWOP sentence, was ineligible for a youth offender parole hearing, but was qualified to file a resentencing petition under section 1170(d)(2). After Kirchner obtained habeas relief in the trial court pursuant to *Miller*, the Court of Appeal reversed this order, holding that his entitlement to a statutory remedy under section 1170(d)(2) mooted out his habeas claim. The favorable

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[3] This part of the holding in *Franklin* has spawned many such limited remands in virtual LWOP murder cases involving under-23 offenders. (See, e.g., *In re Cook* (2017) 7 Cal.App 5th 393, 398-399, which also holds that habeas corpus is an appropriate forum for seeking and obtaining a *Franklin* remand.)

part of the Court of Appeal decision in *Kirchner* was that it directed that the trial court, when it entertained Kirchner's section 1170(d)(2) petition, was obligated to consider the *Miller* hallmarks of youth factors in determining such a petition. (*Id*., at *7 - *8.)

But the Supreme Court reversed based on its disagreement with the premise that the existence of section 1170(d)(2) had any impact on Kirchner's right to seek habeas relief. Taking a step away from its mootness holding in *Franklin*, the Court in *Kirchner* held that because section 1170(d)(2) did not mandate consideration of the *Miller* factors, and was a statutory mechanism which was unavailable for excluded categories of *Miller*-eligible offenders – e.g., those who commit torture or kill a police officer – it was not an adequate remedy for a *Miller* Eighth Amendment claim.

The holding in *Kirchner* means both that a section 1170(d)(2) petition is not an adequate remedy for *Miller* error, and that a *Miller* habeas petitioner need not "exhaust" this statutory remedy before bringing a habeas petition under *Miller*. A footnote in *Kirchner* suggests that the Supreme Court believed that section 1170(d)(2) should be used only for those rare instances where a sentencing court, having taken into account the *Miller* factors, nonetheless imposes an LWOP sentence. (*Id*., at *29, fn. 12.)

Left unresolved by the Supreme Court's holding in *Kirchner* is the question whether a trial court, when it is entertaining a resentencing petition under section 1170(d)(2), must take the *Miller* hallmarks of youth factors into account when deciding whether to recall and resentence an LWOP offender.[4]

6. **Selected Snapshots of Court of Appeal Case Law.**

Lower Court of Appeal decisions have been all over the place on *Graham* and *Miller* issues, as well as issues concerning section 1170(d)(2). I am only going to highlight a few selected issues in this article and in my presentation.

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[4] This issue is pending in one of my own appeals, *People v. Marquez*, H041796. I argue there that *Miller* is controlling law for any judge looking at a petition for resentencing by a juvenile offender with an LWOP sentence. My briefing is available on request.

### a. When is a Sentence "The Functional Equivalent of an LWOP"?

In *People v. Cervantes* (2017) 9 Cal.App.5th 569, the Court held that a sentence which would require the defendant to remain in prison until he was 80 years old was a functional LWOP, since (a) the life expectancy of a Hispanic male in California born in the mid-1990s was 79 years, and (b) prison is likely to shorten his life expectancy.

### b. Section 1170(d)(2) Recall Petition Case Law

#### i. Application of Abuse of Discretion Standard.

In *People v. Willover* (2016) 248 Cal.App.4th 302, the Sixth District affirmed an order denying a resentencing petition under section 1170(d)(2), applying an abuse of discretion standard to conclude that the court's decision was not arbitrary or capricious. The Court held that even where some of the factors identified in section 1170(d)(2) as favorable to resentencing did apply, others did not. It looked at the "hallmarks of youth" factors identified in *Miller*, which were advanced by the petitioning defendant in support of his petition, but found that the trial court could have properly found that the favorable factors did not predominate, and affirmed the denial order.

The problem with cases like *Willover* lies in the application of an abuse of discretion standard – the most difficult one to overcome on appeal – with respect to a sentencing determination which, if *Miller* is seen to be the controlling legal principle, as *Willover* seems to accept, should have placed the burden on the prosecution to show that the defendant was "the rare juvenile offender whose crime reflects irreparable corruption."

#### ii. Availability of Section 1170(d)(2) Recall Even Where Defendants Resentenced Under *Graham*.

Two inmates given LWOP sentences for aggravated kidnapping committed when they were juveniles, obtained habeas relief under *Graham*. They then petitioned for recall of their sentences under section 1170(d)(2). The Attorney General argued they were precluded from such relief because their sentences had been modified. Division 6 of the Second District disagreed.

> Section 1170, subdivision (d)(2), does not expressly exclude a defendant whose LWOP sentence was modified pursuant to *Graham* before January 1, 2013, i.e., the effective date of section 1170, subdivision (d)(2). If the Legislature, in enacting section 1170, subdivision (d)(2), intended to exclude defendants whose LWOP sentence were modified to cure an Eighth Amendment/Graham sentencing error, it could have so provided.

(*People v. Lopez* (2016) 4 Cal.App 5th 649, 655.) To hold otherwise "would be unfair and would penalize respondents because they exercised their constitutional rights as declared by the United States Supreme Court." (*Id*., at p. 651.)

## IV. Checklists for Appellate Counsel.

### A. What to Do in Current Appeals Involving Juvenile and Under-23 Offenders with LWOP or Virtual LWOP Sentences.

If you are representing a client who committed murder when he (or she) was under 23 years of age, and particularly, under 18 years of age, you are going to want to take a very careful look at the sentencing proceedings in the case. If a "functional equivalent of LWOP" was imposed, you should review the record carefully to determine whether there was a sufficient opportunity, as required by *Franklin*, to make a proper record of the "hallmarks of youth factors." Because, under *Franklin*, any *Miller* claims are going to be mooted out by the right to a parole hearing by the 25th year of imprisonment, this would appear to be the only direct remedy available.

If the client got a straight LWOP sentence, or is statutorily ineligible for a youth offender parole hearing under section 3051, you need to review the sentencing hearing more carefully to make sure that the mandate of *Miller* was complied with by the sentencing court. Thus, you should look *both* to whether there was a sufficient opportunity to make a record of the "hallmarks of youth" factors, *and* whether the trial court's sentencing order reflects the holding in *Miller*, i.e., that an LWOP or virtual LWOP sentence is one that should be imposed sparingly only where the crime and the youthful criminal demonstrate something like irreparable corruption. In both situations, there are likely to be sentencing issues which a careful review can uncover.

Where the client is presumptively eligible for a Youth Offender Parole hearing, and thus precluded under *Franklin* from seeking habeas review under *Miller* or *Graham*, the role of appellate counsel is somewhat narrower but equally important. Even where the sentencing hearing took place after *Franklin*, it should be carefully reviewed to make sure that the trial court took the steps needed to comply with the mandate of *Franklin*, i.e., that there was an "opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to "give great weight to" youth-related factors. . . ." (*Franklin*, *supra*, 63 Cal.4th at p. 284.)

The other matter to look at concerns Proposition 57, a subject which I am not covering here, because my colleague Paul Couenhoven is addressing it in his article and presentation. If the case was prosecuted prior to the 2016 enactment of Proposition 57, an under-18 offender is arguably entitled to a remand for a fitness/transfer hearing in the juvenile court. (Compare *People v. Vela* (2017) __ Cal.App.5th __, 2017 Cal.App.LEXIS 379 [*Estrada* applies to non-final convictions, requiring remand for fitness hearing] to *People v. Cervantes* (2017) 9 Cal.App.5th 569 [Prop. 57 is not retroactive].)

### B. What to Do with Your Older, Final Appeals Involving Juvenile and Under-23 Offenders with LWOP or Virtual LWOP Sentences.

More difficult problems are going to arise in cases which are long final where you represented youngsters who committed homicides or very serious crimes and got LWOP or virtual LWOP sentences. In many of these cases, the client will be contacting you, asking for help or information about habeas petitions, youth offender parole hearings, section 1170(d)(2) petitions, etc. With rare exceptions, there is not much which an appellate attorney can do to assist these folks, unless you are willing to work pro bono, or there is an existing case – e.g., a denied section 1170(d)(2) petition, or a granted habeas petition – which comes up on appeal.

Fortunately, there are some excellent resources out there for inmates and their families. Heidi Rummel, a USC Clinical Law Professor, who heads the Post-Conviction Justice Project and works with Human Rights Watch, has sent me materials or links to

materials which are extremely helpful. These folks were very instrumental in putting together SB 9 (§ 1170(d)(2)) and SB 260 & 261 (§ 3051), and have created helpful, user-friendly guides for inmates and their families. Here are links or descriptions of these guides.

1. **SB 260, 261, Pen. Code § 3051, Youth Offender Parole Guide.** Go to: http://fairsentencingforyouth.org/ ; then click the box called "Youth Offender Parole Guide" and it will guide you to the document.

2. **Miller v. Alabama Primer:** "Miller v. Alabama, Habeas Petition Information for People Sentenced to Life without Parole in California for Crimes Committed under the age of 18 years old." 2013 documents, with update being prepared. (Email me for a copy of this, bill@sdap.org)

3. **SB 9 Primer (Pen. Code § 1170(d)(2))**. "SB 9: Information for People Sentenced to Life without Parole in California for Crimes Committed under the age of 18 years old." Jan. 2013, with update being prepared. (Again, email copy, bill@sdap.org.)

A trickier question concerns those former clients who have not contacted you. The good news is that pretty much every juvenile LWOP in California has been contacted by the good folks at Human Rights Watch. I'm not sure they've found every juvenile with a virtual LWOP. So my best advice is to go back through your old case files and aging memory banks and try to put together a list of every client you have had who fits into these categories. This is a similar exercise to the one that many of us went through after the reform of the Three Strikes law was enacted in Prop. 36. If you have not heard from any of these folks, it's worth a quick letter to see if they are up to speed with what their rights are as to both habeas and the new resentencing or parole procedures.

## V. Pushing the Envelope: Some Thoughts for New and Bolder Challenges Advancing the Principles of *Atkins*, *Roper, Graham,* and *Miller*.

The revolution which has taken place in eliminating or restricting LWOP and virtual LWOP punishment for under-18 offenders has been an extraordinary development. But like every important reform in the criminal justice system, whether from the courts, the electorate, or the legislature, somebody is going to be left out. One of

our challenges as advocates for young offenders, and/or offenders with significant mental health problems, is to think about the Left Behinds of this revolution, and come up with ways to advocate for the same kinds of favorable changes in the law to be made available to them.

### A. **18-24 Year Old Offenders.**

We can say with considerable support in the scientific literature that the "hallmarks of youth" features described in *Roper, Graham*, and *Miller* continue to impact young offenders after the eighteenth birthday. As the Court recognized in *Roper*, "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." (*Roper v. Simmons*, 543 U.S. at p. 573.) *Roper* dodged this truth by focusing on the fact that "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood . . .", and concluded from this that "[i]t is . . . the age at which the line for death eligibility ought to rest." Little is said about this dividing line in the subsequent opinions in *Graham* or *Miller*.

But we should not forget that 18-24 year old offenders, who do not have fully developed brains, and who lack the maturity, judgment, and impulse control of those over the age of 25, are less culpable than their older counterparts for the very same reasons described as to juveniles by the Supreme Court in *Roper*. Thus, punishing them with death or LWOP should give rise to the same kinds of objections as for their under-18 counterparts.

As discussed above, California took a big step toward recognizing this with the passage of SB 261, which expanded the category of young persons eligible for youth offender parole hearings to include those whose crimes were committed between the ages of 18 and 22. But no Eighth Amendment case that I am aware of has held that offenders within this category of youth should be shielded from the ultimate sanction of death or the penultimate one of LWOP. So, this is an area where new pushes would make sense.

### B. **Mental Disorders and LWOP Punishments.**

We also need to consider taking another big step, namely, recognizing a related but

distinct category of offenders who could also potentially be entitled to Eighth Amendment relief. In my view, the same kind of reasoning applied in all the recent Eighth Amendment cases should apply to those suffering from mental disease, disorder, or deficiency short of insanity or mental retardation. Strong arguments can and should be made that the culpability of an offender who is schizophrenic, bi-polar, or of demonstrably low intelligence should be recognized as lesser than those who do not have these serious disabilities, and that crimes committed by those with these kind of grave mental health problems should not fairly subject them to death or LWOP punishment.

In addition to their diminished culpability, imposing these unalterable punishments upon such offenders discounts the possibility of rehabilitation and treatment. Akin to the possibility for reform for juvenile offenders based on maturity and growth which the recent Eighth Amendment cases recognize as critical, here too there exists the possibility that medications, or other developments in mental health treatment regimes, could come into play over time to reverse or ameliorate the factors which contributed to criminality.

### C. Creative Categorical Eighth Amendment Challenges, and Reinvigorating California's "Cruel or Unusual" Punishment Prohibition.

Let me throw out the gauntlet here, and suggest that it is time for us to get creative for our clients in terms of articulating new types of *categorical* challenges under the Eighth Amendment and its California counterpart, Article I, section 17 of the California Constitution. Of course, these challenges will be daunting, and will face obstacles, and are likely to go nowhere in trial courts and intermediate appellate courts. But remember that these same obstacles were faced by the proponents for change in *Atkins*, *Roper*, *Graham* and *Miller*. Each step beyond will suffer defeat, but has a chance to triumph in the U.S. Supreme Court. The same majority which decided *Graham* and *Miller* is still sitting in that Court, and they did not say in *Miller* that they were done. Even Justice Scalia, the staunchest opponent of every single one of these cases, recognized that the Eighth Amendment enforces an evolving standard of what punishments are deemed insupportable based on a national consensus. And as the majority of justices also

recognize, the Court's independent judgment as to what kind of punishment the constitution will allow is also subject to change and evolution.

Thus, in appropriate cases, both trial and appellate counsel should consider making categorical Eighth Amendment challenges to LWOP (and capital) sentences imposed on youthful offenders older than 17. Eighteen and nineteen year-olds would seem to be the first category of such offenders to address – just as, in Eighth Amendment jurisprudence, prohibition of capital punishment first began with offenders under 16, and was later extended to those under 18.

2. **The Importance of Raising California Constitutional Challenges.**

Serious attention has to be paid to the notion of couching any such challenges to sentences in California as both Eighth Amendment challenges and, on independent state grounds, as "cruel or unusual punishment" under Article I, section 17 of the California Constitution. Those of us who have case-law memory going back to the 1970s and 1980s will recall that during the Burger Court years of retreat from Warren Court precedents, the California Supreme Court on many occasions recognized its own constitutional guarantees as providing an independent basis for constitutional remedies beyond what was required under the parallel federal constitutional provisions. Two cases – *In re Lynch*, *supra,* 8 Cal.3d 410 and *People v. Dillon*, *supra*, 34 Cal.3d 441 – did so based on California's analog to the Eighth Amendment.

At one point during the "bad-old-days" of anti-crime initiatives, there was an attempt, in Prop. 115 in 1990, to limit the ability of California courts to rely on their own independent constitutional provisions as providing greater protection in criminal cases. Fortunately, this portion of Prop. 115 was struck down by the Lucas Court in *Raven v. Deukmejian* (1990) 52 Cal.3d 336, which concluded that such a far-reaching change in the law required a *revision* of the state constitution, and not merely an amendment, as is proper to the initiative process. However, while independent state constitutional grounds remained a viable basis for appellate courts to employ, with the change in the electorate and the judiciary during that same time period, such bold judicial construction pretty

much vanished.

But things have changed. So, I am suggesting here that the time is right to revisit these principles. Our state's judiciary appears to be ready to move back into the forefront of the national legal landscape as advocates for individual rights in criminal cases. With the three recent appointees to the California Supreme Court by a Democratic governor, and a decidedly Democratic tilt to California politics for the foreseeable future, one can envision our state courts once again becoming a pioneering force in constitutional decision-making. Thus, any new categorical Eighth Amendment challenges which we put forward should also be framed as violations of the state constitution's prohibition against cruel or unusual punishments.

### D. "As Applied" Disproportionality Challenges and the Role of the Appellate Attorney.

#### 1. The Parameters of Proportionality Review.

Of course, cruel and/or unusual punishment claims don't have to be categorical challenges to a particular sentence as applied to a specified category of offender, as in the line of cases discussed in this article. They are more typically raised in an "as applied" type of argument, based on proportionality principles which take into account both the "nature of the offense and/or the offender, with particular regard to the degree of danger both present to society." (*Dillon*, *supra*, 34 Cal.3d at p. 479, quoting *In re Lynch*, *supra*, 8 Cal.3d at p. 425.) *Dillon* describes how this works under the state constitutional prohibition.

> With respect to "the nature of the offense" . . ., the courts are to consider not only the offense in the abstract -- i.e., as defined by the Legislature -- but also "the facts of the crime in question" (*In re Foss* (1974) 10 Cal.3d 910, 919) -- i.e., the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts.
>
> [T]he courts must also view "the nature of the offender" in the concrete rather than the abstract: although the Legislature can define the offense in general terms, each offender is necessarily an individual. Our opinion in *Lynch*, for

> example, concludes by observing that the punishment in question not only fails to fit the crime, "it does not fit the criminal." (8 Cal.3d at p. 437.) This branch of the inquiry therefore focuses on the particular person before the court, and asks whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind.

(*Dillon*, *supra*, 34 Cal.3d at p. 479.)

Under the Eighth Amendment the "gross disproportionality" principle has been described in many different ways. However, the succinct statement of this principle by the Supreme Court in *Solem v. Helm* (1983) 463 U.S. 277 remains the definitive standard. Summarized succinctly, "proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions. (*Id*., at p. 292.) Notably absent from this standard is a meaningful consideration of the *nature of the offender*, which is a coequal aspect of California's standard. However, *Solem* makes it clear that the "culpability of the offender" is an important factor to consider (*id*., at p. 293), a category of analysis which would take into account youth and mental impairments.

It seems to me that this sort of "as-applied" proportionality analysis provides a most useful avenue for challenging sentences imposed on youthful offenders which do not fit within the constraints of the cases reviewed herein. This leads me to the next two, and final, sub-topics: what kinds of cases this might apply to, and how we, as appellate lawyers, can raise such claims which, by their nature, normally have to be presented in the trial courts.

### 2. **Suggested Areas for Such Claims.**

In my view, as-applied proportionality claims under the state and federal cruel and/or unusual punishment provisions can be used to challenge LWOPs and virtual LWOPs of those who *almost, but not quite*, qualify for sentence relief under *Graham* or

*Miller* and/or youth parole hearings under section 3051. Here are three hypothetical each drawn (sometimes loosely) from actual cases.

**Hypothetical (a): Virtual LWOP Young Robber-Rapist.**

Defendant was 18 years, 4 months old, with borderline mental retardation in terms of his IQ and other intelligence ratings, when he committed a robbery of a convenience store, then raped and sodomized the robbery victim. He gets a virtual LWOP sentence under the One-Strike law for rape, sodomy, kidnap, and robbery.

*Graham* doesn't apply because he is 18. Youth Offender Parole review doesn't apply because he was sentenced pursuant to section 667.61. (§ 3051, subd. (h).) So, a disproportionality cruel and/or unusual punishment argument is the only way to challenge his virtual LWOP sentence.

**Hypothetical (b): LWOP 20-Year Old Killer with PTSD.**

Defendant is 20 years old when he murders a young man who looks like a rival Norteño gang member when the young victim is running towards him. The defendant gets LWOP based on a gang murder and lying in wait. The victim, who is unarmed, is actually running to get out of a Sureño neighborhood, and just happens to run past defendant. Defendant suffers from well-documented, severe post-traumatic stress disorder based on the fact that his brother-in-law was shot dead by a gang rival while defendant was standing next to him, holding the brother-in-law's infant child.

*Miller* doesn't apply because he's 20. And section 3051 does not apply because he got LWOP. (§ 3051, subd. (h).) So again, any challenge has to be made based on disproportionality. This might also be a good case to press a categorical claim to extend *Miller* to youth slightly over 18.

**Hypothetical (c): Psychotic But Not Insane 23 year old Kills Man He Actually Believes, Based on His Delusions, Killed His Father (Who is not Dead)**.

Defendant, a 23-year old who suffers from schizophrenia with delusions, especially when he is off his medications, stalks and shoots dead poor Mr. Johnson, whom he believes murdered his father in cold blood. This belief is entirely delusional,

since his father is alive and well and Mr. Johnson doesn't even know the father or defendant. He is found sane by the jury, and gets 50 to life.

His age makes him ineligible under both *Miller* and section 3051. But the combination of his mental disorder and his age could lead to a good "as-applied" proportionality claim.

These are just some random examples I came up with. You can imagine others with bits and pieces of these facts, e.g., sex crimes with lengthy sentences committed by young offenders with tragic social histories; or murders committed by young men who were themselves brutalized as children, with various combinations of mental deficiencies and/or disorders. You get the point. Think outside the box, and be creative!

### 3. How the Heck Does an Appellate Lawyer Raise Such Issues?

Now that's a good question. The nature of such proportionality challenges requires that they be raised in the trial court, and there is case law which says that such a claim is forfeited if not raised at sentencing. (See, e.g., *People v. DeJesus* (1995) 38 Cal. App. 4th 1, 27.) However, appellate courts have addressed such claims when they can be raised based on the record before them "in order to forestall a subsequent claim of ineffective assistance of counsel." (*Ibid*., citing *People v. Martin* (1995) 32 Cal. App. 4th 656, 661.)

If the court deems the issue to be forfeited, an IAC claim can be advanced either on direct appeal or by means of a separate petition for writ of habeas corpus. Habeas is probably the better route in terms of being able to make a complete record, including mental health reports which are likely to be in trial counsel's file but not likely to be part of the record on appeal, as well as the necessary social background about the offender. My experience with this sort of IAC claim is that a dedicated trial lawyer is typically quite ready to accept that he or she made a mistake by not raising such an issue at sentencing. Even if they don't, if the claim has arguable merit, there can be no conceivable tactical reason for not having raised it in the trial court.

Of course, the other way of approaching this is to persuade trial lawyers to make

these kinds of arguments at sentencing, and to marshal the necessary background information and expert testimony to make it succeed – or at least preserve the issue for appeal. That's what I am going to try to persuade trial lawyers to do when I rewrite this article to address it to trial lawyers, and present this whole set of constitutional challenges to public defender's offices or other trial lawyer goups.

## CONCLUSION

As I was preparing and writing this article, I soon realized that I had bit off more than I could chew. As such, it turned out to be somewhat uneven, with a lot of detail about certain matters and less about others. But I hope it helps you to think about this recent Eighth Amendment revolution involving youth and the most severe punishment, and its repercussions in California that affect our clients.

If anyone reading this article has cases which fit within the rubric of the decisions and laws discussed herein, or has the kind of cutting edge issues discussed in the last part of the article, please feel free to contact me by phone or email to discuss the cases.