IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re Leif Taylor,
on habeas corpus.
No. S232037

Petition for Writ of Habeas Corpus
Memorandum of Points and Authorities
(Amended)
(Exhibits filed under separate cover)

Following the denial of relief in
In re Taylor (L.A. Sup. Ct. No. NA018040)
(Hon. Jesse I. Rodriguez);
In re Taylor (Cal. Ct. App. No. B264354).

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PETITION FOR WRIT OF HABEAS CORPUS

INTRODUCTION

1. Petitioner Leif Taylor is serving a sentence of life without the possibility of parole imposed under the improper presumption in favor of these harsh sentences that this Court struck down in *People v. Gutierrez,* 58 Cal. 4th 1354 (2014).

2. Mr. Taylor was convicted under a felony-murder theory of killing a man during the theft of a bicycle. Taylor was 16 years old at the time of the offense.

3. The superior court sentenced Mr. Taylor to what it explicitly referred to as "the presumptive sentence"—life without parole. The court did not take into account the distinctive attributes of youth required by *Gutierrez*: "the immaturity, impetuosity and failure to appreciate risks" inherent in the experience of a 16-year-old, the fact that Taylor had been reared by a single mother who was an alcoholic and who had abandoned him by the time the offense occurred, or the fact that Taylor's older brother (his only sibling) was incarcerated at the time of the offense.

4. Nor did the sentencing court consider that the Youth Authority had determined that Taylor's "actions in the … offense [were] not in character nor consistent with his past behavior," that he was "susceptible to negative peer influence," that he had "the mental and physical capacity [to] change" and that he was "amenable to treatment and training offered by the Youth Authority."

5. Mr. Taylor therefore asks that this Court order the California Department of Corrections and Rehabilitation (CDCR) to show cause and then grant relief so that he may be resentenced under *Gutierrez* and *Miller v. Alabama*, 132 S. Ct. 2455, 2464-68 (2012), to a term that would allow him to seek parole.

6. In addition, Mr. Taylor asks this Court to clarify how the other approximately 255 prisoners who were sentenced to life without parole as juveniles under the improper interpretation of Penal Code § 190.5(b) can file habeas corpus petitions under *Gutierrez*. The vast majority of these individuals are not able to retain counsel to assist them. Clarification of the procedure will make it possible for them to file a simple form petition in superior court that states a *prima facie* case, which will in turn require the court to appoint counsel. With the help of appointed counsel, these prisoners will have a meaningful opportunity to demonstrate that they were improperly sentenced and are thus entitled to habeas relief and resentencing.

7. This Court has issued this type of clarifying opinion in the past after deciding cases that, like *Gutierrez*, made significant changes to California's sentencing law in ways that could benefit prisoners. *See e.g.*, *People v. Fuhrman*, 16 Cal. 4th 930 (1997); *In re Cortez*, 6 Cal. 3d 78 (1971).

JURISDICTION

8. This Court has original jurisdiction over this petition for a writ of habeas corpus. Cal. Const., art. VI, § 10. Mr. Taylor has unsuccessfully sought habeas relief under *Gutierrez* and

Miller in both the superior court and the Court of Appeal, as described below in paragraphs 49-52. He represented himself in those petitions.

PARTIES

9. Petitioner Leif Taylor is a prisoner of the state of California, unlawfully confined at Centinela State Prison. On October 13, 2006, he was sentenced to life without parole for a crime committed on May 31, 1993. Mr. Taylor was born on November 22, 1976, and was 16 years old at the time of the offense. His CDCR number is F-49218.

10. Respondent Raymond Madden is the Warden of Centinela State Prison and the legal custodian of Petitioner Leif Taylor.

11. Respondent Scott Kernan is the Secretary of the Department of Corrections and Rehabilitation. As the Secretary, Mr. Kernan is ultimately responsible for the continued incarceration of the Petitioner and other prisoners serving life without parole sentences in California for crimes they committed as juveniles.

LEGAL BACKGROUND

12. In 1990, Proposition 115 amended Penal Code §190.5(b) to allow juveniles convicted of murder to be sentenced to life without the possibility of parole (LWOP). Section 190.5(b) provides that the penalty for 16- and 17-year-olds convicted of special-circumstance murder "shall be confinement in the state prison for life without the possibility of parole or, at the

discretion of the court, 25 years to life." (All statutory references are to the Penal Code unless otherwise specified.)

13. In 1994, the Court of Appeal held that "16 or 17 year-olds who commit special-circumstance murder *must* be sentenced to LWOP, unless the court, in its discretion, finds good reason to choose the less severe sentence of 25 years to life." *Gutierrez,* 58 Cal. 4th at 1370 (citing *People v. Guinn*, 28 Cal. App. 4th 1130, 1141 (1994)). For 20 years California courts "uniformly" followed this rule, which gave sentencing courts only "circumscribed discretion" to depart from the "generally mandatory" LWOP sentence. *Gutierrez,* 58 Cal. 4th at 1369-70; *Guinn*, 28 Cal. App. 4th at 1141-43.

14. In 2012, the U.S. Supreme Court held that "children are constitutionally different from adults for the purposes of sentencing" and that the Eighth Amendment therefore requires courts to consider a number of youth-related factors before imposing an LWOP sentence for a crime committed by a minor. *Miller*, 132 S. Ct. at 2458, 2464-67.

15. In 2014, this Court disapproved *Guinn* and held that § 190.5(b) does not create a presumption in favor of LWOP. *Gutierrez*, 58 Cal. 4th at 1387. Instead, the statute "authorizes and indeed requires" trial courts to consider the defendant's age, "the wealth of characteristics and circumstances attendant to it," and "how those attributes 'diminish the penological justifications for imposing the harshest sentences on juvenile offenders' before imposing life without parole on a juvenile offender." *Id.* at 1387-88, 1390 (quoting *Miller*, 132 S. Ct. at 2464-68). Only after a

sentencing court has decided on "an individualized basis" that the offender is the "rare juvenile whose crime reflects irreparable corruption," can the court sentence him to LWOP. *Id.* at 1380.

16. *Gutierrez* additionally held that because superior courts are presumed to have followed *Guinn* in applying the improper presumption, cases on appeal in which sentencing occurred while *Guinn* was the law must be remanded for resentencing under the proper standard unless the record "'clearly indicate[s]' that the trial court would have reached the same conclusion" even if it had been aware of the full scope of its discretion and the proper meaning of § 190.5(b). *Id.* at 1391.

17. On January 25, 2016, the U.S. Supreme Court held that *Miller* is fully retroactive because it sets forth a substantive rule prohibiting states from imposing LWOP on "all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016).

FACTUAL BACKGROUND

18. Records provided by the California Department of Corrections and Rehabilitation (CDCR) show that, as of October 2015, 305 individuals were serving LWOP sentences for crimes they committed as minors. Exh. 18 ¶ 5, p. 171 (Declaration of Ioana Tchoukleva).[1] Although the Department withheld

[1] Page citations in exhibits are to the consecutively numbered volume of exhibits, filed under separate cover. Citations to the clerk's or reporter's transcript are to the record in *People v. Taylor*, No. S186801; the relevant portions of those transcripts are included as exhibits to this petition.

information about 16 individuals (citing security reasons), the data it did release shows that of the 289 prisoners whose sentencing dates were provided, approximately 255 were sentenced while *Guinn* was the controlling law. *Id.* ¶¶ 4-8, pp. 170-172; *see also* Exh. 17 ¶¶ 4-5, pp. 166-167 (Declaration of John Mills); Exh. 15, pp. 149-157; Exh. 16, pp. 159-163.

19. *Guinn*'s improper interpretation of § 190.5(b) made California one of five states with the highest number of juveniles sentenced to die behind bars. *See* John R. Mills et al., *Juvenile Life Without Parole in Law and Practice: The End of Superpredator Era Sentencing*, AM. U. L. REV. (forthcoming), Appendix, available at http://ssrn.com/abstract=2663834.

20. The vast majority of prisoners serving juvenile LWOP sentences are indigent and do not have the means to hire private attorneys to assist them in seeking habeas relief under *Gutierrez*. Exh. 19 ¶ 10, pp. 178-179 (Declaration of Human Rights Watch Attorney Elizabeth Calvin).

21. Some efforts have been made by law school clinics, *pro bono* attorneys, and public defender offices in Southern California to file habeas petitions on behalf of indigent prisoners sentenced to LWOP as juveniles. *Id.* ¶¶ 10-12, pp. 178-180. Still, as many as 200 of the approximately 305 prisoners serving juvenile LWOP sentences in California are unrepresented. *Id.* ¶ 13, pp. 180-182.

22. Juvenile offenders serving LWOP generally lack the education, capacity and skills to file petitions on their own. *Id.* ¶ 14, p. 181. Imprisoned before they could finish high school and held in high security prisons with limited access to programming,

many youthful offenders are illiterate and most lack the skills to understand legal substance and procedure. *Id.* ¶¶ 14-15, pp. 181-182.

23. Even though Human Rights Watch and other advocacy organizations have provided prisoners serving juvenile LWOP with information on how to file habeas petitions *pro per*, many of them have not filed. *Id.* ¶¶ 8-9, pp. 177-178. Some prisoners who managed to file petitions on their own have had them summarily dismissed, as was the case with Mr. Taylor.

24. Currently, superior courts may require that habeas petitions filed under *Gutierrez* include the original sentencing record, indicate whether the sentencing court stated it was applying the governing presumption in favor of LWOP, and offer evidence on whether the sentencing court considered the age of the offender and other mitigating factors. *Id.* ¶ 16, p. 182. These requirements create barriers for *pro per* prisoners who may not have access to their sentencing records, and can rarely craft persuasive legal arguments. *Id.*

25. Without assistance of counsel, juvenile offenders serving LWOP often will not be able to show that their sentences violate *Gutierrez* and *Miller*. *Id.* ¶¶ 18, 20, pp. 183-184.

FACTS ABOUT PETITIONER LEIF TAYLOR, THE OFFENSE, AND THE TRIAL

26. The Court of Appeal recounted the events leading up to the offense as follows, viewing the facts in the light most favorable to the judgment:

27. On May 31, 1993, 16-year-old Taylor and another youth named Victor Rodriguez "wanted to steal bicycles to use during the upcoming summer." *People v. Taylor*, No. B195651, 2010 WL 3245282, at *2 (Cal. Ct. App. Aug. 18, 2010). At approximately 11:30 pm that night, they were walking along Ocean Boulevard in Long Beach when they saw a man riding his bicycle toward them. *Id.* The appellate court summarized what happened next:

> As [victim William] Shadden approached, defendant and Rodriguez grabbed the handlebars of his bicycle and knocked him to the ground, near the intersection of Ocean Boulevard and Laverne Avenue. Shadden got up and began to chase defendant. Defendant shot Shadden twice with a .22-caliber automatic handgun. After the first shot, Shadden continued to chase defendant, but after the second, Shadden turned and began to run in the opposite direction.
>
> *Id.*

Mr. Shadden died of his injuries. *Id.*

28. Mr. Taylor was sentenced on January 31, 1995, when *Guinn* was the controlling law, to life without the possibility of parole, which the court described as "the term prescribed by law." Exh. 2, p. 018.

29. On May 10, 2004, the Ninth Circuit Court of Appeals held that police detectives' "coercive and constitutionally unacceptable misconduct overbore Taylor's free will," rendering a

confession he had given involuntary and inadmissible. *Taylor v. Maddox*, 366 F. 3d 992, 1016 (9th Cir. 2004). Describing the remainder of the evidence presented against him as "paper thin," the court ordered that Mr. Taylor be released and retried without use of the confession. *Id.* at 1017.

30. Mr. Taylor was re-tried in January 2006 but the jury deadlocked and the court declared a mistrial. *Taylor*, 2010 WL 3245282, at *1.

31. Mr. Taylor was tried again in June and July 2006. *Id.* The jury was instructed on robbery felony murder. Exh. 4, pp. 037-038 (2 CT 314-315). The prosecution expressly argued "this is a felony murder. The defendant is guilty of first degree murder because it occurred during the commission of a robbery." Exh. 3, pp. 026, 032 (28 RT 10805, 10811). It never argued any other basis for a murder conviction. *See generally id.*, pp. 022-035 (28 RT 10801-10814). The verdict forms are consistent with a conviction based on felony murder. Exh. 5, pp. 040-041 (2 CT 358-359).

32. On July 25, 2006, after six days of deliberation, the jury convicted Mr. Taylor of second-degree robbery and first-degree murder with a robbery special circumstance. *See id.*; *Taylor*, 2010 WL 3245282, at *1. The jury also found a firearm enhancement to be true. Exh. 5, p. 040 (2 CT 358).

33. On October 13, 2006, the trial court sentenced Mr. Taylor to life without the possibility of parole under § 190.5(b), specifically citing *Guinn*, plus a consecutive but stayed

one-year term on the robbery count. Exh. 7, p. 071 (29 RT 12615: 20-26).

34. In imposing this sentence, the superior court stated that under § 190.5(b) and *Guinn*, life without parole for a juvenile convicted of special-circumstance murder was the "presumptive" sentence. Exh. 7, p. 062 (29 RT 12606: 25). It then noted that it could deviate from that sentence only if there were "mitigating reasons that the court finds persuasive." *Id.* (29 RT 12606: 26-28).

35. The sentencing court mentioned two circumstances in mitigation in a single sentence: "the only mitigating circumstance in this case – well, there might be two, that is the defendant's age and the fact that he at least has no prior record that I'm aware of." *Id.*, p. 069 (29 RT 12613: 1-5). It then proceeded to compare the facts of Mr. Taylor's case to the facts of *Guinn*; it imposed LWOP largely because it considered the facts of the two cases to be "amazingly … similar." *Id.*, pp. 068, 068-071 (29 RT 12612, 12613-12615).

36. The sentencing transcript shows that the court failed to consider the youth-related factors in Mr. Taylor's case that *Miller* and *Gutierrez* require. Although the court's file contained information about these factors in a report that the California Youth Authority (CYA) had prepared for the purposes of sentencing after Mr. Taylor's first trial in 1994 (Exh. 1, pp. 002-016), it appears that in 2006 the court was unaware of this report (the report contained information about Taylor's prior arrests for minor offenses, but the sentencing court stated that it had no

information about any criminal history. Exh. 7, p. 069 (29 RT 12613: 4-5)).

37. The court did not mention Taylor's dysfunctional home environment, including evidence of childhood neglect, familial alcohol abuse, and lack of parenting, as mandated by *Gutierrez*. *Compare id.*, p. 067-071 (29 RT 12611-12615), *with Gutierrez*, 58 Cal. 4th at 1389. Nor did the court mention the "hallmark features of youth" that Taylor exhibited, such as "transient rashness, proclivity for risk, and inability to assess consequences." *Gutierrez,* 58 Cal. 4th at 1388. The court did not discuss how Taylor might have been affected by peer pressure from the other youths he had been with that night; for example, two of his friends had already stolen one bicycle that same night. *Taylor*, 2010 WL 3245282, at *2; *see Gutierrez,* 58 Cal. 4th at 1389. The court did not discuss any evidence bearing on the "possibility of rehabilitation." *Id.* at 1389. In fact, the court neglected to consider any of the following key facts and findings provided in the CYA report:

38. Taylor was raised by a single mother who had a "drinking problem," experienced "nervous breakdowns" and often had to be hospitalized; he never knew his father. Exh. 1, pp. 005, 008. His mother was unable to work and had to raise her sons on welfare. *Id.*, p. 008. Taylor and his mother shared a one-bedroom apartment with Taylor's older brother and his child. *Id.* Taylor's older brother was often "in trouble with the law" and was incarcerated by age 25. *Id.*, p. 007.

39. Taylor had to change schools multiple times as his family moved from Long Beach to Ohio, Colorado, and then back to Long Beach. *Id.*, p. 009. He was initially placed in special education courses; by ninth grade, he was enrolled in a continuation school. *Id.* His older brother never completed high school. *Id.*

40. When Taylor was 12, his family settled into a low-income "crime/drug infested" part of Long Beach. *Id.* With no father and a mother who was "unable to provide [him] with supervision, discipline, and guidance," Taylor turned to the streets to search for belonging and "acceptance from his peers." *Id.*, pp. 007-008. He joined a "tagger group" at age 14. *Id.*, p. 009.

41. At the time of the offense, Taylor was living alone. His mother had had a nervous breakdown and had moved to the San Francisco Bay Area. His brother had been arrested. The one-bedroom apartment where Taylor lived had no power and no food. In order to survive, Taylor had started spending a lot of time with his friends who were members of a graffiti tagging group. *Id.*, p. 012.

42. Taylor had three prior arrests for truancy, graffiti, and curfew violation, which the CYA counselors explained "did not indicate violent personality." *Id.*, p. 005. He had no other criminal record. The counselors reported that Taylor had a "dependent personality," lacked "self-esteem and appear[ed] susceptible to negative peer influences," and that his older brother had been "a poor role model" for him. *Id.*, p. 012.

43. Following an eight-week comprehensive psychological study of Mr. Taylor, the CYA evaluators found that he was "immature and irresponsible with a low level of criminal sophistication." *Id.*, p. 006. They recommended that he be placed in an "age appropriate facility" where he could access educational and vocational programs. *Id.*, p. 012. Prior attempts at rehabilitation in his life had been minimal. *Id.*, p. 004.

44. A psychiatric evaluation, completed as part of the CYA study, found "no signs of psychosis or impaired mental functioning" and stressed that Mr. Taylor was committed to changing his lifestyle. *Id.*, p. 016. His goal was to graduate from high school and "obtain a Master's Degree in criminal law or justice." *Id.*, pp. 010, 016.

45. For these reasons, the CYA report concluded, Mr. Taylor has "the mental and physical capacity [to] change" and was "amenable to [the] treatment and training offered by the Youth Authority" to help him do so. *Id.*, pp. 005-006.

POST-TRIAL PROCEDURAL HISTORY

46. On August 18, 2010, Petitioner's sentence was affirmed on direct appeal. *Taylor*, 2010 WL 3245282, at *1 (Cal. Ct. App. Aug. 18, 2010). This Court denied review on December 15, 2010. *People v. Taylor*, No. S186801 (Cal. Dec. 15, 2010).

47. Taylor filed habeas corpus petitions in the superior court, the Court of Appeal, and this Court, all raising the following issues: defense counsel's failure to subject the prosecution's case to meaningful adversarial testing, conviction

obtained by false evidence, cumulative effect of constitutional errors requiring reversal, failure of appellate counsel to raise aforementioned arguments on appeal. All of them were denied. *In re Taylor*, No. NA018040 (L.A. Sup. Ct. May 11, 2011); *In re Taylor*, No. B244031 (Cal. Ct. App. Feb. 14, 2014); *In re Taylor*, No. S218980 (Oct. 15, 2014).

48. On December 15, 2011, Petitioner filed a habeas petition in United States District Court for the Central District of California. Exh. 9, pp. 079-091. The court initially stayed the petition to allow Mr. Taylor to exhaust his claims. On November 10, 2014, the District Court issued an order to show cause. On December 23, 2015, a magistrate judge issued a Report and Recommendation that the petition be denied. *Taylor v. McEwan*, No. CV-11-10393-AG (JC) (C.D. Cal. Dec. 23, 2015).

49. On February 2, 2015, following this Court's 2014 decision in *Gutierrez*, Taylor filed a *pro per* petition for writ of habeas corpus in the Los Angeles Superior Court alleging that his sentence violated *Miller* and *Gutierrez* because it was imposed under an improper and unconstitutional interpretation of § 190.5(b). Exh. 10, pp. 093-107.

50. The Superior Court denied his petition on April 9, 2015, holding that he had failed to state a *prima facie* case for relief. Exh. 11, p. 109 (order denying habeas corpus petition in *In re Taylor*, NA018040 (L.A. Sup. Ct. April 9, 2015)).

51. On May 28, 2015, Petitioner filed a *pro per* habeas petition asserting the same claims in the Second District Court of Appeal. Exh. 12, pp. 112-143. After receiving an informal reply

and response, the court denied the petition on December 16, 2015. Exh. 13, p. 145 (order denying habeas corpus petition in *In re Taylor*, No. B264354 (Cal. Ct. App. May 28, 2015)).

52. On December 22, 2015, Petitioner filed a *pro per* Petition for Rehearing in the Court of Appeal, arguing that *Gutierrez* applies retroactively even if *Miller* does not, and that the court should therefore decide the *Gutierrez* claim even if it was not prepared to decide the *Miller* claim. The Court of Appeal took no action on this petition.

53. On January 21, 2016, Petitioner filed an original *pro per* habeas petition in this Court under the present docket number, along with a letter informing the court that he hoped to retain counsel and file an amended petition. He retained counsel on January 26.

54. These petitions relating to sentencing were timely filed following the changes in the law effected by *Miller*, *Gutierrez*, and *Montgomery*.

CLAIMS

Petitioner Leif Taylor is serving life without the possibility of parole. He was sixteen years old at the time of his commitment offense. His direct appeal is complete, the lower courts have rejected his habeas corpus challenges to his sentence, and he has no adequate remedy other than habeas corpus in this Court:

1. Because Taylor was sentenced under *Guinn*, his sentence was imposed under an incorrect interpretation of Penal Code § 190.5. The record does not clearly indicate that the court

would have imposed LWOP had it understood the full scope of its discretion. To the contrary, had the court properly understood its discretion and duties, it would have imposed a sentence that allows the possibility of parole. Taylor's sentence is therefore unlawful, and he is entitled to resentencing under *People v. Gutierrez*.

2. Because the sentencing court followed *Guinn*, it did not comply with the requirements of *Miller* and *Montgomery*. Taylor's sentence violates the Eighth and Fourteenth Amendments to the United States Constitution. Taking into account his background, lack of serious criminal record, the circumstances of the offense, and his capacity for change, it would have been impossible for a court to deem him the "rare juvenile offender whose crime reflects irreparable corruption" and who deserves to die in prison. *Montgomery*, 136 S. Ct. at 734 (quoting *Miller*, 132 S. Ct. at 2469).

PRAYER FOR RELIEF

For the foregoing reasons, Petitioner respectfully requests that this Court

1. Issue an Order to Show Cause why relief should not be granted;
2. Grant habeas corpus relief and order that Petitioner be resentenced in the superior court;
3. Clarify the standard that lower courts must use to determine whether a habeas corpus petitioner has stated a

prima facie case under *Gutierrez* and is entitled to appointed counsel;

4. Hold that Petitioner is not eligible for juvenile LWOP;
5. Grant any and all other relief necessary for the just resolution of this case.

February 19, 2016 Respectfully submitted,

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Michael T. Risher
Attorney for Petitioner

LIST OF EXHIBITS

The following exhibits are true copies of the documents indicated. They are arranged in chronological order and incorporated by reference into this Petition.

Exhibit 1: January 5, 1995, California Youth Authority Amenability Determination Report, *People v. Taylor* (L.A. Sup. Ct. No. NA018040).

Exhibit 2: January 31, 1995, Sentencing Minute Order, *People v. Taylor* (L.A. Sup. Ct. No. NA018040).

Exhibit 3: July 17, 2006, Prosecution Closing Argument, *People v. Taylor* (L.A. Sup. Ct. No. NA018040).

Exhibit 4: July 19, 2006, Jury Instructions (partial), *People v. Taylor* (L.A. Sup. Ct. No. NA018040).

Exhibit 5: July 24, 2006, Verdict Forms, *People v. Taylor* (L.A. Sup. Ct. No. NA018040).

Exhibit 6: October 13, 2006, Probation Report, *People v. Taylor* (L.A. Sup. Ct. No. NA018040).[2]

Exhibit 7: October 13, 2006, Sentencing Transcript, *People v. Taylor* (L.A. Sup. Ct. No. NA018040).

Exhibit 8: October 13, 2006, Sentencing Minute Order, *People v. Taylor* (L.A. Sup. Ct. No. NA018040).

Exhibit 9: December 15, 2011, Petition for Writ of Habeas Corpus, *Taylor v. McEwan* (C.D. Cal. No. CV 11-10393-AG(JC))

[2] The probation report is not being filed under seal with Mr. Taylor's permission and because it was already openly filed in the Court of Appeal.

Exhibit 10: February 2, 2015, Petition for Writ of Habeas Corpus, *In re Taylor* (L.A. Sup. Ct. No. NA018040)

Exhibit 11: April 9, 2015, Order Denying Writ of Habeas Corpus, *In re Taylor* (L.A. Sup. Ct. No. NA018040).

Exhibit 12: May 28, 2015, Petition for Writ of Habeas Corpus, *In re Taylor* (Cal. Ct. App. No. B264354).

Exhibit 13: December 16, 2015, Order Denying Writ of Habeas Corpus, *In re Taylor* (Cal. Ct. App. No. B264354).

Exhibit 14: October 30, 2015, California Department of Corrections and Rehabilitation Letter in Response to Public Records Act Request 9067.

Exhibit 15: October 30, 2015, CDCR List of Individuals Serving Juvenile LWOP in Response to Public Records Act Request 9067.

Exhibit 16: January 28, 2016, CDCR list of Individuals Serving Juvenile LWOP Converted to Excel and Sorted by Sentencing Date.

Exhibit 17: February 5, 2016, Declaration of John Mills.

Exhibit 18: February 11, 2016, Declaration of Ioana Tchoukleva.

Exhibit 19: February 12, 2016, Declaration of Elizabeth Calvin.

VERIFICATION

I, Michael Risher, declare as follows:

I am an attorney admitted to practice law in the State of California. I am an attorney for Petitioner Leif Taylor and am authorized to file this amended Petition for Writ of Habeas Corpus on his behalf.

Mr. Taylor is incarcerated in Imperial County; my office is in San Francisco County. For this reason, I am making this verification on his behalf and with his permission.

I have read the foregoing Petition for Writ of Habeas Corpus and am informed and believe the allegations therein are true.

I certify under penalty of perjury of the laws of California and of the United States that the foregoing is true and correct.

February 19, 2016

_____

Michael T. Risher

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION

1. Introduction

This Petition presents the following question: how can prisoners who were sentenced to life without the possibility of parole for crimes they committed as juveniles under the presumption in favor of such sentences that this Court recently invalidated obtain relief after their direct appeals have been completed? It also raises the issue of whether those sentences violate the Eighth Amendment's prohibition against cruel and unusual punishment, although the Court need not reach the constitutional issue because it can grant relief on statutory grounds. Finally, it raises the question of whether Petitioner Leif Taylor, who was convicted under a felony-murder theory of killing a man in the course of stealing a bicycle at age 16 and sentenced to life without the possibility of parole, is entitled to resentencing.

From 1994 until 2014, California courts sentenced more than 250 minors to life without the possibility of parole (LWOP) under Penal Code § 190.5(b) using an improper presumption in favor of such sentences established by *People v. Guinn*, 28 Cal. App. 4th 1130, 1141 (1994). But in 2014, this Court held that *Guinn* was wrong and that § 190.5(b), properly interpreted, does not create a presumption in favor of these LWOP sentences. *People v. Gutierrez*, 58 Cal. 4th 1354, 1387 (2014). Under *Gutierrez*, minors sentenced to LWOP while *Guinn* was the

controlling law who are appealing their convictions are entitled to have their sentences vacated and their cases remanded for resentencing unless the record on appeal "'clearly indicate[s]' that the trial court would have reached the same conclusion" even if it had been aware of the full scope of its discretion. *Id.* at 1391.

However, prisoners whose appeals were already completed when *Gutierrez* was decided cannot get relief in this way; instead, they must proceed by way of habeas corpus. But because these prisoners do not have a right to the assistance of counsel in the filing of habeas petitions and because they usually lack the education and legal training to file on their own, the vast majority of them have not been able to access the relief that is available to them under *Gutierrez*. Pet. ¶¶ 22-23 & Exh. 19 ¶¶ 8-9, 14-15, pp. 177-178, 181-182. Although law school clinics, nonprofits, and public defender offices have represented some of these individuals, and attempted to find *pro bono* counsel for others, up to 200 of the approximately 300 inmates serving JWLOP in California are still unrepresented. Pet. ¶ 21 & Exh. 19 ¶¶ 10-13, pp. 178-182. Nearly all of them have been incarcerated since they were teenagers, most have been held in high security prisons, and many suffer from cognitive and mental-health disabilities. Pet. Exh. 19 ¶¶ 14-15, pp. 181-182. Even when they are able to obtain their sentencing transcripts and other records, they are in no position to make cogent arguments that they are entitled to resentencing under *Gutierrez*. Pet. ¶ 22 & Exh. 19 ¶¶ 14-16, pp. 181-182.

In the past, when this Court has issued decisions that, like *Gutierrez*, changed the existing sentencing law in ways that benefit prisoners, it has applied those decisions retroactively and allowed prisoners to request relief through habeas corpus. *See, e.g., People v. Superior Court (Romero)*, 13 Cal. 4th 497, 530 n.13 (1996); *People v. Belmontes*, 34 Cal. 3d 335, 348 (1983); *People v. Tenorio*, 3 Cal. 3d 89, 95 n.2 (1970). It has also explained how prisoners should go about filing these petitions and how courts should address them. *See, e.g.*, *People v. Fuhrman*, 16 Cal. 4th 930, 946 (1997) (procedure for *Romero* relief on habeas corpus); *People v. Belmontes*, 34 Cal. 3d 335, 348 n.8 (1983); *In re Cortez*, 6 Cal. 3d 78, 88-89 (1971) (procedure for *Tenorio* relief on habeas corpus). And it has exercised its "inherent authority to establish rules of judicial procedure" relating to habeas corpus in other contexts as well. *In re Roberts*, 36 Cal. 4th 575, 593-94 (2005) (procedures for challenging parole denial); *cf. In re Walters*, 15 Cal. 3d 738, 744 & n.3 (1975) (An individual "habeas corpus petition is an acceptable vehicle for a general declaration of the procedural rights of individuals" who are similarly situated).

Petitioner here is asking this Court to do the same thing: to hold that *Gutierrez* applies retroactively on collateral review and explain how courts should address habeas petitions raising the issue. More specifically, this Court's ruling in *Gutierrez*—that persons sentenced under *Guinn* are entitled to resentencing unless the record "'clearly indicate[s]' that the trial court would have reached the same conclusion" even if it had been aware of the full scope of its discretion—creates a strong presumption that

individuals sentenced under § 190.5 while *Guinn* was the controlling law are entitled to resentencing. *See Gutierrez*, 58 Cal. 4th at 1391. This means that a habeas petition alleging that the petitioner was sentenced to LWOP for a crime he committed as a juvenile while *Guinn* was controlling is sufficient to show that, as an "initial and tentative" matter, the petitioner "may be entitled to relief." Rule of Court 4.551(c)(1), (3); *In re Large,* 41 Cal. 4th 538, 549 (2007). The court must then issue an order to show cause and appoint counsel if the petitioner is not represented. Rule of Court 4.551(c)(1),(2). It can then, after receiving the People's return and a traverse prepared by the petitioner's lawyer, decide whether relief is appropriate under *Gutierrez*.

This procedure, which comports with established habeas procedure and is similar to those set forth in *Cortez and Fuhrman*, will allow even unsophisticated prisoners to file sufficient habeas petitions using the Judicial Council form, and it will help courts adjudicate these petitions fairly and efficiently. It will also eliminate the need for this Court to decide the question that it was careful to avoid in *Gutierrez*: whether sentences imposed under *Guinn* violate the Eighth Amendment's prohibition against sentencing minors to life without parole without taking youth-related factors into account. *See Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Gutierrez*, 58 Cal. 4th at 1373-74; *see also id.* at 1374-1390 (discussing *Miller*).

Mr. Taylor is also asking the Court to grant relief in his case. He was convicted of killing a man who chased him after

Taylor had stolen the man's bicycle. There was no evidence of premeditation; the prosecutor's theory of the case was that the killing was first-degree murder because it occurred during the commission of a robbery. Taylor was 16 years old at the time of the offense. He had never known his father, his mother had a drinking problem and had effectively abandoned him, and his only sibling was himself involved in criminal activity. Taylor had no juvenile adjudications; the Youth Authority specially determined that he was "susceptible to negative peer influence," that the offense was "not in character nor consistent with his past behavior," that he had "the mental and physical capacity [to] change" and that he was "amenable to treatment and training offered by the Youth Authority." Pet. ¶¶ 4, 42, 43, 45 & Exh. 1, pp. 005-006, 012.

Nevertheless, the court sentenced Taylor to LWOP, based almost entirely on its reading of *Guinn* and what it considered to be the factual similarities between the two cases; it did not consider any factors relating to youth, much less analyze them in the way that *Gutierrez* and *Miller* require. *See Gutierrez*, 58 Cal. 4th at 1388-89; *see also Miller*, 132 S. Ct. at 2468. It is far from clear that it would have imposed the same sentence had it understood its role under *Gutierrez* and the Eighth Amendment; to the contrary, the facts of the offense and the information about Mr. Taylor in the court's file show that he is not the "rare juvenile offender" who is irreparably corrupt and can be sentenced to spend his entire life in prison without any possibility of parole. *Miller*, 132 S. Ct. at 2469.

2. Facts and Procedural History

2.1 Juvenile LWOP in California

Records obtained from the California Department of Corrections and Rehabilitation show that, as of August 2015, there were 305 prisoners serving life without the possibility of parole for crimes they committed as juveniles. Pet. ¶ 18 & Exh. 17 ¶¶ 4-5, pp. 166-167. For 289 of these prisoners, the CDCR provided the dates that they began serving their sentences; for the remaining 16, it refused to provide any information. *Id.* Of those 289, 255 were sentenced at a time *Guinn* was the controlling law. Pet. ¶ 6, 18 & Exh. 18 ¶ 8, pp. 171-172. Because information about the remaining 16 prisoners is not available, the actual number of individuals sentenced under *Guinn* is undoubtedly higher than 255. As this Court noted in *Gutierrez*, California was, under *Guinn*, the only jurisdiction whose discretionary sentencing scheme incorporated a presumption in favor of LWOP; as a result, "the vast majority of discretionary life without parole sentences [were] imposed in California." *Gutierrez*, 58 Cal. 4th at 1383-84.

2.2 Petitioner's three trials, conviction, sentencing, and direct appeal

As the Court of Appeals wrote when it affirmed Mr. Taylor's conviction, viewing the facts in the light most favorable to the judgment, the evidence showed the following: Mr. Taylor was 16 years old at the time of the offense. *People v. Taylor*, No. B195651, 2010 WL 3245282, at *1 (Cal. Ct. App. Aug. 18, 2010). On the night of the crime, he and another youth named Victor

Rodriguez "wanted to steal bicycles to use during the upcoming summer." *Id.* at *2. At approximately 11:30 at night, they were walking along Ocean Boulevard in Long Beach. *Id.* The appellate court summarized what happened next:

> Meanwhile, [the victim William] Shadden was riding his bicycle west on Ocean Boulevard. As defendant and Rodriguez walked east on Ocean Boulevard, they saw Shadden. As Shadden approached, defendant and Rodriguez grabbed the handlebars of his bicycle and knocked him to the ground, near the intersection of Ocean Boulevard and Laverne Avenue. Shadden got up and began to chase defendant. Defendant shot Shadden twice with a .22-caliber automatic handgun. After the first shot, Shadden continued to chase defendant, but after the second, Shadden turned and began to run in the opposite direction.
>
> *Id.*

Mr. Shadden died of his injuries. *Id.*

Mr. Taylor was tried and convicted, but his first conviction was set aside on federal habeas corpus review. *See id.* at *1 (citing *Taylor v. Maddox*, 366 F. 3d 992, 1016 (9th Cir. 2004)). The jury in his second trial was deadlocked and unable to agree upon a verdict. *Id.*

At his third trial he was convicted of first-degree murder and second-degree robbery, with an enhancement for personally using a firearm. *Id.* The court instructed the jury that any "unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission or attempted commission of the crime of Robbery is murder of the first degree." Pet. ¶ 31 & Exh. 4, p. 037. The prosecution characterized the case as "a robbery that went bad" and

repeatedly argued "this is a felony murder. The defendant is guilty of first degree murder because it occurred during the commission of a robbery." Pet. ¶ 31 & Exh. 3, pp. 023, 026-032. It never argued any other basis for a murder conviction. *See generally* Exh. 3, pp. 022-035. The verdict forms are consistent with a conviction based on felony murder. Pet. ¶ 31 & Exh. 5, pp. 040-041.

At the sentencing hearing, the court relied heavily on *Guinn*. It began the discussion of its sentencing discretion by noting that LWOP is "the presumptive sentence" but that it could impose a lesser sentence based on "mitigating reasons that the court finds persuasive." Pet. ¶ 34 & Exh. 7, p. 062. After the prosecution argued that LWOP was appropriate because the facts were similar to those of an appellate case that had upheld an LWOP sentence, the Court stated that "the case is *People v. Guinn*" and that it "had a hi[gh]light on that case as well." Exh. 7, pp. 063, 065. The court then explained that it agreed with the prosecution that *Guinn* was "amazingly … similar to the facts of this case" and that under *Guinn* a defendant like Mr. Taylor is subject to "a sentence of life without the possibility of parole unless there are mitigating circumstances." Pet. ¶ 35, Exh. 7, p. 068. The court then engaged in a detailed discussion of the aggravating factors in *Guinn* and concluded that "99 percent of those factors are present in this case." Exh. 7, p. 071. It therefore imposed a sentence of LWOP for the murder count, as well as a consecutive but stayed 1-year sentence on the robbery count. Pet. ¶ 34 & Exh. 7, p. 071.

The Court of Appeal affirmed the conviction, and this Court denied review. Pet. ¶ 46.

2.3 Petitioner's habeas petitions

Petitioner challenged his conviction in state and federal habeas proceedings; the state petitions were denied, and his federal petition is now pending before the district court in Los Angeles. Pet. ¶¶ 47-48.

In February 2015, Mr. Taylor filed a *pro per* habeas corpus petition in the Los Angeles Superior Court, asserting two distinct claims: that his sentence violated *Gutierrez* and that it violated *Miller*. Pet. ¶ 49 & Exh. 10, pp. 093-107. The court summarily denied the petition without issuing an order to show cause or appointing counsel. The court's order read as follows:

> Assuming the fact alleged in the petition are true, petitioner fails to allege facts establishing a prima facie case for habeas relief. *People v. Duvall* (1995) 9 Cal.4th 464, 474-75.
>
> The sentencing court is fully aware of its discretionary powers in sentencing petitioner.
>
> The court engaged in weighing the mitigating and aggravating factors/circumstances. See 12601 through 12618. Penal Code section 1170(d)(2)(A)(1) that states: "When a defendant who was under 18 years of age at the time of commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has served at least 15 years of that sentence, the defendant may submit to the sentencing court a petition for recall and sentencing."
>
> For all the foreg[o]ing indicated reasons, the petition is denied.
>
> Pet. ¶ 50 & Exh. 11, pp. 109-110.

Taylor then filed a habeas petition in the Court of Appeal, again raising separate *Gutierrez* and *Miller* claims. Pet. ¶ 51, Exh. 12, pp. 112-143. On December 16, 2015, that court denied the petition, noting that the question of whether *Miller* applies retroactively is presently before this Court. Pet. ¶ 51, Exh. 13, p. 145. The court made no reference to Mr. Taylor's *Gutierrez* claim.[3] *Id.*

Mr. Taylor therefore petitions this Court for an original writ of habeas corpus. This petition is timely filed in the wake of *Miller*, *Gutierrez*, and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), which provide the legal basis for the claims. *See Reno*, 55 Cal. 4th at 460-61; *In re Huddleston*, 71 Cal. 2d 1031, 1033-34 (1969) (habeas petition filed two and one-half years after decision establishing new sentencing rule is timely). The changes in the law effected by these cases also excuse any failure to raise these issues in earlier proceedings. *See Reno*, 55 Cal. 4th at 466; *People v. Davis*, 29 Cal. 3d 814, 827 n.5 (1981).

[3] Although the denial states that it is without prejudice to Taylor's filing a petition in superior court or the Court of Appeal if this court holds that he is entitled to relief, that does little more than restate the longstanding rule that a prisoner may file a new petition based on a change in the governing law. *See In re Reno*, 55 Cal. 4th 428, 466 (2012). And in any event, there is no authority for a court to dismiss a habeas corpus petition (with or without prejudice) simply because a case raising some but not all of the issues presented is pending in a higher court; at most, a court in that situation should defer ruling on the petition. *Cf. In re Morgan*, 50 Cal. 4th 932, 942 (2010) (deferring action on condemned inmate's "shell" petition pending appointment of counsel).

3. The Statutory framework, *Guinn*, and *Gutierrez*

In 1990, Proposition 115 amended the Penal Code so that minors convicted of murder with special circumstances could be sentenced to life without the possibility of parole. § 190.5(b); *see Gutierrez*, 58 Cal. 4th at 1370.[4] In 1994, the Court of Appeal held that § 190.5(b) establishes a presumption in favor of LWOP, and that "16 or 17 year-olds who commit special-circumstance murder *must* be sentenced to LWOP, unless the court, in its discretion, finds good reason to choose the less severe sentence of 25 years to life." *Guinn*, 28 Cal. App. 4th at 1141. *Guinn* left courts with only circumscribed discretion to depart from the "generally mandatory" LWOP sentence.[5] *Id.* at 1141-43; *see Gutierrez*, 58 Cal. 4th at 1370. In the two decades following *Guinn*, courts of appeal and trial courts uniformly treated LWOP as the presumptive sentence under § 190.5(b). *Gutierrez*, 58 Cal. 4th at 1369.

In 2012, the US Supreme Court struck down sentencing schemes that impose LWOP for juveniles without allowing proper consideration of "youth and its attendant characteristics." *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012). Two years later, this Court recognized that *Guinn*'s presumption in favor of LWOP "raised serious constitutional concerns under *Miller*" because it

[4] All statutory references are to the Penal Code unless otherwise specified.
[5] "The fact that a court might grant leniency in some cases, in recognition that some youthful special-circumstance murderers might warrant more lenient treatment, did not detract from the generally mandatory imposition of LWOP as the punishment for a youthful special-circumstance murderer." *Guinn*, 28 Cal. App. 4th at 1142.

took "the premise of *Miller* that such sentences should be rarities and turn[ed] 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*, 58 Cal. 4th at 1379, 1387. The court explained that the statutory language of § 190.5(b) gives sentencing courts the discretion to select either 25 years to life or LWOP, with no presumption in favor of LWOP. *Id.* at 1371. This discretion must be guided by the factors set forth in § 190.3, the Rules of Court, and by "any mitigating relevance of 'age and wealth of characteristics attendant to it.'" *Id.* at 1387-88 (quoting *Miller*, 132 S. Ct. at 2467). Sentencing courts "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'" before imposing an LWOP sentence under § 190.5(b). *Id.* at 1390.[6]

This Court thus overruled *Guinn* and held that because superior courts are presumed to have followed *Guinn* in applying the improper presumption,[7] courts hearing appeals of cases in

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[6] Specifically, courts must consider the following five factors: (1) the minor's chronological age and its hallmark features; (2) his family and home environment; (3) the extent of his participation in the offense and the way peer pressure may have affected him; (4) the extent to which the minor's age impeded his ability to participate in the criminal proceedings against him; and (5) the possibility of rehabilitation. *See Gutierrez*, 58 Cal. 4th at 1388-90.

[7] See *Gutierrez*, 58 Cal. 4th at 1390 (explaining that even where a trial court did not explicitly reference the presumption in favor of LWOP, "we presume that the trial court knew and applied the governing law," sentencing the juvenile offender in accordance with the prevailing presumption at the time.)

which sentencing occurred while *Guinn* was the law must be remanded for resentencing unless the record "'clearly indicate[s]' that the trial court would have reached the same conclusion" even if it had been aware of the full scope of its discretion and had applied the correct law. *Id.* at 1391. Applying this standard, it vacated Gutierrez's LWOP sentence even though the sentencing judge had expressly considered age as a mitigating factor and had nevertheless concluded that LWOP was the only appropriate sentence in light of the extreme violence of the offense and the defendant's continuing bad behavior in custody. *Id.* at 1167, 1390-91. *Gutierrez* thus establishes a strong presumption that minors sentenced to LWOP while *Guinn* was controlling are entitled to resentencing.

4. Relevant habeas corpus procedure and the significance of the Order to Show Cause

This Court has fully described our state's habeas corpus procedures in prior cases. *See, e.g., People v. Romero*, 8 Cal. 4th 728, 736-42 (1994). A prisoner initiates the process by filing a verified petition usually in the sentencing court. *See id.* at 737; *see also In re Roberts*, 36 Cal. 4th 575, 587-888, 593-94 (2005). The Court must accept the allegations in the petition as true unless they contradict the court's own records. *In re Serrano*, 10 Cal. 4th 447, 456 (1995); *see* Rule of Court 4.551(c)(1).

After it receives a petition, the court has several options. First, if it believes that the petition should be heard by a superior court in a different county (for example, the sentencing county), it should transfer the action to that county under Rule of Court

4.552 without reaching the merits. *Roberts*, 36 Cal. 4th at 593. If it believes that the petition is wholly without merit because it fails to state facts that may entitle the petitioner to relief, it may summarily deny it. *See Romero,* 8 Cal. 4th at 737. Otherwise, it may ask the government for an informal response or issue an order to show cause (OSC) requiring the government to file a formal response. *See Id.* at 741-42; Rule of Court 4.551(b), (c). In rare instances, it may also issue a writ of habeas corpus, which requires the government to file a formal response and bring the prisoner to court. *See Romero*, 8 Cal. 4th at 738.

Most relevant to this petition are the standard for issuing an order to show cause and the effect of such an order. "An order to show cause is a determination that the petitioner has made a showing that he or she *may* be entitled to relief" by setting forth a *prima facie* case. Rules of Court 4.551(c)(1), (3) (emphasis added); *see id.* 8.385(d) (OSC in appellate court). In determining whether to issue the OSC, the court

> takes petitioner's factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if his or her factual allegations were proved. If so, the court must issue an order to show cause.
>
> Rule of Court 4.551(c)(1)

As this Court has emphasized, this determination "is truly 'preliminary': it is only initial and tentative, and not final and binding." *In re Large,* 41 Cal. 4th 538, 549 (2007) (citation omitted). Thus, a court can issue an OSC and then determine that the allegations of the petition are insufficient as a matter of

law to merit relief. *See In re Sassounian*, 9 Cal. 4th 535, 547 (1995) ("In issuing our order to show cause, we had preliminarily determined that petitioner had carried his burden of allegation as to two claims….[but w]e are now of the opinion that petitioner has failed to carry his burden of allegation as to *any* claim."); *see also In re Serrano*, 10 Cal. 4th at 454-55.

Although issuance of an OSC does not mean that a court must grant relief or even hold an evidentiary hearing, it nevertheless is a critical part of habeas proceedings. First, due process and the Rules of Court require the court to appoint counsel for an indigent prisoner who makes a sufficient showing to justify an OSC. Rules of Court 4.551(c)(2), 8.385(f); *In re Clark,* 5 Cal. 4th 750, 779-80 (1993) ("[I]f a petition attacking the validity of a judgment states a prima facie case … the appointment of counsel is demanded by due process concerns.") (citing *People v. Shipman*, 62 Cal. 2d 226, 231-32 (1965)). Until an OSC issues, non-capital habeas petitioners have no right to appointed counsel because "the ordinary processes of trial and appeal are presumed to result in valid adjudications." *Shipman*, 62 Cal.2d at 232; *see Clark,* 5 Cal. 4th at 779-80. But after a prisoner has pleaded facts showing that he may be entitled to relief, "his claim can no longer be treated as frivolous and he is entitled to have counsel appointed to represent him." *Shipman*, 62 Cal. 2d at 232.[8]

[8] Payment of appointed counsel in these circumstances is authorized by Penal Code § 987.2. *Charlton v. Superior Court*, 93 Cal. App. 3d 858, 862-63 (1979). The court will usually appoint the public defender or, perhaps,

Second, although the court can allow the government to file an informal response to a petition at any time, only issuance of an OSC gives the government a right to file a responsive pleading, called a return, setting forth facts that justify the petitioner's imprisonment. *See Serrano,* 10 Cal. 4th at 455; *Romero*, 8 Cal. 4th at 738-39. This return is roughly analogous to a civil complaint; the prisoner must then file a traverse (also known as a denial, *see* Rule of Court 4.551(e)), which can controvert the government's allegations and add new facts, showing that his imprisonment is unlawful. *See Romero,* 8 Cal. 4th at 738-39. The court then determines whether it can deny or grant relief based on the undisputed facts; if it cannot, it holds an evidentiary hearing. *Id.* at 739-40. The court cannot grant relief without first granting an OSC or, much less commonly, granting the writ itself. *Id.* at 744.

5. Argument

5.1 *Gutierrez* applies retroactively on habeas corpus review.

5.1.1 *This Court applies its sentencing decisions retroactively.*

"Where a court may have been influenced by an erroneous understanding of the scope of its sentencing powers, habeas corpus is a proper remedy to secure reconsideration of the sentence imposed." *People v. Belmontes*, 34 Cal. 3d 335, 348 n.8 (1983) (citations omitted). Thus, when this Court has issued decisions that, like *Gutierrez*, changed California sentencing law

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the lawyer who originally represented the prisoner in the criminal case. *See id*.

in ways that benefit prisoners, it has consistently applied those decisions retroactively and allowed prisoners to request relief through habeas corpus. *See, e.g.*, *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 530 n.13 (1996); *Belmontes*, 34 Cal. 3d at 348 n.8 ("Since our holding…relates only to sentencing and will not require any retrials, it shall have full retroactive effect."); *People v. Navarro*, 7 Cal. 3d 248, 265 n.13 (1972); *People v. Tenorio*, 3 Cal. 3d 89, 95 n.2 (1970); *In re Jackson*, 61 Cal. 2d 500, 505-508 (1964); *see also People v. Hannon,* 5 Cal. 3d 330, 340 n.7 (1971).

Most recently, when this Court held that judges have discretion to dismiss prior felonies under the Three Strikes law, it declared that its

> holding, which relates only to sentencing, is fully retroactive. A defendant serving a sentence under the Three Strikes law imposed by a court that misunderstood the scope of its discretion … may raise the issue on appeal, or, if relief on appeal is no longer available, may file a petition for habeas corpus to secure reconsideration of the sentence.
>
> *Romero*, 13 Cal. 4th at 530 n.13 (citing *Belmontes*, *Tenorio,* and the Three Strikes law).

Giving retroactive effect to decisions that relate only to sentencing does not raise the concerns that may weigh against giving retroactive effect to decisions relating to guilt, such as the need for a whole new and often lengthy jury trial, where the passage of time may make it difficult for the prosecution to locate the witnesses and evidence necessary to prove its case beyond a reasonable doubt. *See In re Johnson*, 3 Cal. 3d 404, 415 (1970) ("entertaining petitions for resentencing is not sufficiently

burdensome to preclude retroactivity") (citing *Tenorio*). Nor does reversing a sentence impair the state's interest in finality in the same way that reversing a conviction does. *Jackson*, 61 Cal. 2d at 505-07 & n.3. In addition, retroactive application is particularly appropriate where granting relief will simply allow the prison system to grant parole in appropriate cases, rather than requiring the release of prisoners. *See Johnson*, 3 Cal. 3d at 415. Here, the only alternative to LWOP under § 190.5(b) is a life sentence with the possibility of parole after 25 years;

Finally, where the sentences at issue are severe and the pool of prisoners who may be entitled to resentencing is "a fixed group" of limited size, this Court has rejected the unfair "paradox that would occur if" eligibility for relief from improper sentencing procedures depended on the date a case became final. *Jackson,* 61 Cal. 2d at 507; *see id.* at 505-08 (applying change to capital sentencing law retroactively). The sentences here are undoubtedly severe, and retroactive application of *Gutierrez* will affect fewer than 300 prisoners. *See State v. Seats*, 865 N.W.2d 545, 557 (Iowa 2015) ("A sentence of life in prison without the possibility of parole for a juvenile is the equivalent of the death penalty …."); *Gutierrez*, 58 Cal. 4th at 1376-77 (also comparing life without parole for juveniles to the death penalty for adults). Like these other sentencing decisions, *Gutierrez* applies retroactively.

5.1.2 Gutierrez *applies retroactively because it corrected an erroneous interpretation of a California statute.*

This Court gives full retroactive effect to decisions that determine "the correct interpretation of a statute," rather than creating a new rule of constitutional law, regardless of whether they involve sentencing errors. *People v. Mutch*, 4 Cal. 3d 389, 394-95 (1971); *see Woosley v. State of California*, 3 Cal. 4th 758, 794 (1992); *People v. Guerra,* 37 Cal. 3d 385, 399 (1984); *see also Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994). Although the holding of *Gutierrez* was influenced by *Miller*, it ultimately rests on this Court's interpretation of § 190.5(b). *See Gutierrez*, 58 Cal. 4th at 1371, 1387. It therefore applies retroactively.

5.1.3 *Applying* Gutierrez *retroactively will avoid a novel constitutional question.*

Applying *Gutierrez* retroactively will eliminate the need for this Court to decide whether sentences imposed under *Guinn* violate *Miller*, as discussed in § 5.5, below. The U.S. Supreme Court has now squarely held that *Miller* itself is retroactive. *Montgomery*, 136 S. Ct. at 718. Thus, if *Gutierrez* did not apply retroactively, courts would have to address the question of whether sentences imposed under *Guinn* violate the Eighth Amendment. Just as this Court in *Gutierrez* construed § 190.5(b) so as to avoid the need to decide this federal constitutional question, it should apply the rule announced in that case retroactively to avoid the same question. *See Gutierrez*, 58 Cal. 4th at 1373-74; *see also Massachusetts v. Upton*, 466 U.S. 727,

735-36 (1984) (Stevens, J., concurring); *W. v. Thomson Newspapers*, 872 P.2d 999, 1006 (Utah 1994).

For these reasons, this Court should hold that prisoners sentenced to LWOP under *Guinn* whose direct appeals are complete may file habeas petitions to challenge the legality of their sentences.

5.2 Courts should issue an order to show cause in every case where a petitioner shows he was sentenced to LWOP under § 190.5 between the date *Guinn* was decided and the date *Gutierrez* came down.

Applying the rules for issuing an OSC to the holding of *Gutierrez* means that petitioners should be entitled to OSCs if their petitions show that they were sentenced between September 26, 1994 (the date of *Guinn*) and May 5, 2014 (the date of *Gutierrez*) to LWOP for crimes they committed as juveniles. *Gutierrez* explains that because superior courts are presumed to have followed *Guinn*'s faulty interpretation of the law, appellate courts hearing direct appeals of juvenile LWOP cases must remand those cases for resentencing unless the record "'clearly indicates' that the trial court would have reached the same conclusion" even if it had been aware of the full scope of its sentencing discretion. *Gutierrez*, 58 Cal. 4th at 1390-91 (citing *Belmontes*, 34 Cal. 3d at 348 n.8; *Romero*, 13 Cal. 4th at 530 n.13) (other citation omitted). On direct appeal, no more procedure is needed, because the prisoner is already represented by counsel and the record—including the transcript of the sentencing hearing and any written statement of reasons—is

already before the court. *See* Rule of Court 8.320(b)(7) (record must include all written opinions), (c)(8) (sentencing transcript).

But in a habeas case, the prisoner will likely have neither counsel nor access to the relevant records. Instead, at the petition stage the court usually will have at most only the rudimentary statement of the Petitioner's position that can fit into Judicial Counsel's form Petition for a Writ of Habeas Corpus, which *pro per* petitioners must generally use. *See* Rules of Court 4.551(a), 8.380(a). And as Elizabeth Calvin of Human Rights Watch explains, prisoners who have been incarcerated for years are unlikely to have access to the records of their sentencing, and those who were convicted as teenagers are unlikely to be learned in the law. Pet. ¶¶ 22, 24 & Exh. 19 ¶¶ 14-16, pp. 181-182. Thus, unlike courts hearing direct appeals of these cases, courts faced with *pro per* habeas petitions will have little assistance in determining whether the sentencing transcript clearly indicates that the trial court would have imposed an LWOP sentence even if it had been aware of the correct law.

Fortunately, *Gutierrez* and long-established habeas law make it clear that a court presented with a petition that simply alleges that the prisoner was sentenced while *Guinn* was the law to LWOP for a crime he committed as a juvenile should issue an OSC and appoint counsel. Because trial courts are presumed to have followed *Guinn* while it was the controlling law, these sentences are presumptively invalid; the government has the burden to show otherwise, and to do so "clearly." *Gutierrez*, 58 Cal. 4th at 1390-91. This means that a prisoner who shows he

was sentenced under *Guinn* has stated sufficient facts to require the court to issue an OSC, and appoint counsel under Rule 4.551(c)(2) and due process. *See People v. Shipman*, 62 Cal. 2d 226, 232 (1965). This is particularly appropriate for unrepresented prisoners, because courts "should "construe *pro se* [habeas] filings liberally, in favor of the *pro se* litigant." *Figuereo-Sanchez v. United States*, 678 F.3d 1203, 1207 (11th Cir. 2012); *see Davis v. Silva*, 511 F.3d 1005, 1009 (9th Cir. 2008).[9]

Once counsel is appointed, the case can proceed in an orderly manner. The government will file its return; the prisoner's lawyer will file a traverse, attaching any relevant court documents that the government did not already provide. The court can then make a fully informed decision as to whether the sentencing court "clearly" would have reached the same result had it fully understood its sentencing discretion. [10]

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[9] This initial determination should be based on the allegations in the petition. *See* Rule of Court 4.551(c)(1). However, if the court's own records conclusively show that the prisoner was not in fact sentenced during the period that *Guinn* was controlling, or was not sentenced LWOP for a crime committed as a juvenile, the court may summarily deny the petition. *See In re Cortez*, 6 Cal. 3d 78, 88-89 (1971).

[10] Because, as discussed below in § 5.5.2, *Guinn* made it impossible for sentencing courts to exercise the discretion that *Miller* and *Gutierrez* require of them, the Court should consider holding that *all* prisoners sentenced under *Guinn* before *Miller* issued are entitled to resentencing. After *Miller*, of course, some courts may have decided that it superseded *Guinn* and thus applied the proper factors. But before then, a court that refused to follow *Guinn* would have "exceeded its jurisdiction." *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 455 (1962).

5.3 This process is consistent with how the Court has previously implemented its opinions that changed sentencing laws

In 1970, this Court struck down as unconstitutional a statute that prohibited courts from dismissing certain sentencing enhancements without the prosecutor's consent. *See People v. Tenorio*, 3 Cal. 3d 89, 95 (1970). Because the "decision relate[d] only to sentencing," the Court held that it would apply retroactively. *Id.* at 95 n.2. The next year, the Court explained how habeas petitions raising a *Tenorio* claim should be filed and reviewed. *In re Cortez*, 6 Cal. 3d 78, 82 (1971). Every prisoner who had had his sentenced enhanced under the statute pre-*Tenorio* could file a habeas petition; "upon receiving the petition, the sentencing court should ascertain from its own records whether petitioner has established a *prima facie* case by showing that he was convicted of a narcotics offense [in that time period], and that his sentence was augmented by virtue" of the enhancement. *Id.* at 88-89. If the court's records "substantiate[d] the allegations," the court had to issue an OSC and appoint counsel for unrepresented petitioners. *Id.* at 89. The court was then to require the government to file a return, obtain a new probation report, and conduct a hearing to determine whether to grant relief. *Id.*

More recently, this Court mandated a similar procedure for prisoners asserting that they had been sentenced under a misinterpretation of the 1994 Three Strikes law. In 1996, this Court held that judges have the authority to dismiss prior strikes. *See People v. Superior Court (Romero)*, 13 Cal. 4th 497, 518, 530 n.13 (1996). The next year, it explained how prisoners

should raise this issue on direct appeal or on habeas corpus. *See People v. Fuhrman*, 16 Cal. 4th 930, 946 & n.10 (1997); *see id.* at 942-43. The Court created a somewhat different procedure than in *Cortez* for two reasons. *See id.* at 946 n.10. First, while before *Tenorio* the law had been clear that courts could not dismiss the sentencing enhancements at issue, before *Romero* it had been unclear whether courts could dismiss strikes. *Compare id.* at 944-45, *with Tenorio*, 3 Cal. 3d at 91 (overruling *People v. Sidener*, 58 Cal. 2d 645 (1962)). Second, the Three Strikes law creates a "norm" that courts will *not* dismiss prior strikes and "carefully circumscribes the trial court's power to depart from this norm." *In re Large*, 41 Cal. 4th 538, 550 (2007); *see Gutierrez*, 58 Cal. 4th at 1382 (decision to dismiss prior strike is so circumscribed as to make decision to do so "extraordinary"). As a result, *Fuhrman* puts the burden on the prisoner—in both direct appeal and on collateral review—to show error, whereas the *Cortez* does not. *Compare Fuhrman*, 16 Cal. 4th at 945-46 & n.10, *with In re Cortez*, 6 Cal. 3d at 88-89.

Here, as in *Cortez*, sentences imposed while *Guinn* was the governing law are presumptively invalid. Thus, as in *Cortez*, a prisoner is entitled to an order to show cause and the appointment of counsel if he establishes that he was sentenced to LWOP for a crime he committed as a juvenile after *Guinn* and before *Gutierrez*.[11]

[11] Issuing an opinion to clarify this process comports not only with *Cortez* and *Fuhrman* but also with this Court's "inherent authority to establish rules of judicial procedure" to ensure that courts will "equitably and

5.4 The Court should issue an order to show cause in Petitioner Taylor's case and grant relief under *Gutierrez*.

Petitioner Taylor is entitled to an OSC because he was sentenced on October 13, 2006, while *Guinn* was the governing law to LWOP for a crime committed when he was 16 years old. *Taylor*, 2010 WL 3245282, at *1. These simple facts are enough for an order to show cause; in addition, the facts of this case require not just an OSC to issue but also that the Court grant habeas relief and order that his case be set for resentencing in accordance with *Gutierrez*.

Taylor is entitled to relief unless the sentencing record "clearly indicates that the trial court would have reached the same conclusion even if it had been aware of [the full scope of its] discretion." *Gutierrez*, 58 Cal. 4th at 1391. Appellate courts can properly make this determination. *See id.* at 1390-91; *see also In re Serrano*, 10 Cal. 4th 447, 457 (1995). Because the superior court did not hold an evidentiary hearing, this Court examines the record de novo. *In re Resendiz*, 25 Cal. 4th 230, 249 (2001) (*abrogated on other grounds by Padilla v. Kentucky*, 559 U.S. 356 (2010)); *Serrano*, 10 Cal. 4th at 457; *cf. Parsons v. Bristol Dev. Co.*, 62 Cal. 2d 861, 865-66 (1965) (appellate court independently interprets written documents).

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efficiently deal with" habeas corpus petitions. *In re Roberts*, 36 Cal. 4th 575, 593 (2005); *cf. In re Walters*, 15 Cal. 3d 738, 744 & n.3 (1975) (An individual "habeas corpus petition is an acceptable vehicle for a general declaration of the procedural rights of individuals" who are similarly situated.).

As noted above, the sentencing court relied heavily on *Guinn*, stating that it had "a hi[gh]light on that case." Pet. ¶ 35 & Exh. 7, p. 065. It began by noting that LWOP was "the presumptive sentence" but that it could impose a lesser sentence based on "mitigating reason that the court finds persuasive." Pet. ¶ 34 & Exh. 7, p. 062. The court then explained that it agreed with the prosecution that the facts of *Guinn* were "amazingly … similar to the facts of this case" and that under *Guinn* a defendant like Mr. Taylor must receive "a sentence of life without the possibility of parole unless there are mitigating circumstances." Exh. 7, p. 068. The court then engaged in a detailed discussion of the aggravating factors in *Guinn* and concluded that "99 percent of those factors are present in this case." *Id.*, p. 071. Although the court mentioned Petitioner's chronological age as a mitigating circumstance, it did not say anything about youth's "hallmark features," Taylor's family or home environment, the extent to which peer pressure played a role in the crime, the extent to which the juvenile's age impeded his ability to participate in the criminal proceedings against him, or the possibility of rehabilitation. *Compare id.*, pp. 069, 067-071 ("only mitigating circumstance[s]" are "defendant's age" and lack of prior record), *with Gutierrez*, 58 Cal. 4th at 1388-89 (listing factors that must be considered).

There is no indication that the court considered that Taylor's youth may have made him "fail[] to appreciate [the] risks and consequences" of having a gun when and his friend went out looking to steal a bike. *Id.* at 1388. This is particularly significant

here, where the shooting occurred while the victim was chasing Mr. Taylor after the robbery and the jury was instructed that even an accidental shooting mandated a first-degree murder conviction. Pet. ¶ 31 & Exh. 4, p. 037; *Taylor*, 2010 WL 3245282, at *2. It is therefore far from "clear" that had the court understood its role as explained in *Gutierrez*, it would have reached the same result; to the contrary, it seems clear that it based its sentencing on *Guinn*, rather than on the proper *Gutierrez* factors.

A comparison with the facts of *Gutierrez* makes this evident. The court that sentenced Mr. Gutierrez never even mentioned *Guinn* or the presumption of LWOP; this Court merely presumed that it had operated under the *Guinn* presumption. *See Gutierrez*, 58 Cal. 4th at 1390. In contrast, the court here expressly relied on the *Guinn* presumption. Pet. ¶ 34 & Exh. 7, p. 062. In *Gutierrez*, the sentencing judge said he had been "concerned through the trial about the defendant's age." *Gutierrez*, 58 Cal. 4th at 1367. Although the court here mentioned Mr. Taylor's age as a mitigating factor, it also seems to have held his youth against him as explaining his lack of prior record. Pet. ¶ 35 & Exh. 7, p. 069. Finally, the court in *Gutierrez* concluded that the "horrific" nature of the crime—Gutierrez had raped his aunt and had stabbed her 28 times—meant that LWOP was "the only thing that the Court [could] do that could redress the amount of violence" inflicted. *Gutierrez*, 58 Cal. 4th at 1366-67. Here, the court's decision to impose LWOP rested mostly on its comparison with the facts of *Guinn*, rather than a finding that

the offense—which the prosecution described as "a robbery that went bad"—was more horrible than other murders. Pet. ¶ 31 & Exh. 3, p. 023; see Pet. ¶ 35 & Exh. 7, pp. 068-071. If Mr. Gutierrez was entitled to a new sentencing hearing, then Mr. Taylor certainly is. Any other result would raise serious constitutional concerns.

Thus, as in *Gutierrez*, it is impossible to "say with confidence what sentence [the trial court] would have imposed absent the presumption." *Gutierrez*, 58 Cal. 4th at 1391. Mr. Taylor is therefore entitled to habeas relief and resentencing that complies with *Gutierrez* and *Miller*.[12]

5.5 Even if Taylor were not entitled to resentencing under *Gutierrez*, he would be entitled to resentencing under *Miller*.

Because this Court can grant relief on statutory grounds, it need not address any constitutional issues. *See Loeffler v. Target Corp.*, 58 Cal. 4th 1081, 1102 (2014); *see also Gutierrez*, 58 Cal. 4th at 1373. However, if the Court does reach the constitutional question, it should hold that sentences imposed under *Guinn* violate the Eight Amendment, and that in particular Petitioner's sentence is unlawful under *Miller*, because the sentencing court, following *Guinn*, failed to take "into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 132 S. Ct. at 2469.

[12] As noted above in footnote 10, every prisoner sentenced under *Guinn* before *Miller* was decided should be entitled to relief under *Gutierrez*.

5.5.1 The U.S. Supreme Court has held that *Miller* applies retroactively.

The U.S. Supreme Court has recently held that state courts must apply *Miller* retroactively. *Montgomery*, 136 S. Ct. at 718, 725 (applying *Miller* retroactively to prisoner sentenced to LWOP more than 40 years ago for a crime committed at age 17); *cf. In re Gomez*, 45 Cal. 4th 650, 655 & n.3 (2009) ("Ordinarily, we will provide a remedy on collateral review of a final judgment if that remedy would be available in the federal courts.").

5.5.2 Sentences imposed under *Guinn* violate the Eighth Amendment because *Guinn* prevented trial courts from properly considering the *Miller* factors.

Life without parole sentences imposed on juvenile offenders under *Guinn* violate the Eight Amendment because *Guinn* prohibited trial courts from exercising the discretion and considering the factors that *Miller* requires.

In *Miller*, the US Supreme Court held that "children are constitutionally different from adults for the purposes of sentencing."[13] *Miller*, 132 S. Ct. at 2464. This holding has two consequences: First, it "bar[s] life without parole … for all but the rarest of juvenile offenders, those whose crimes reflect permanent

[13] The Court stressed these differences result from children's "diminished culpability and greater prospects for reform" and are apparent in three primary ways: (1) they lack maturity, leading to "recklessness, impulsivity, and heedless risk-taking; (2) they are more vulnerable to negative influences and outside pressures, while also lacking the ability to "extricate themselves from ... crime-producing settings"; and (3) their characters are less well-formed and their actions "are less likely to be 'evidence of irretrievable depravity.'" *Miller*, 132 S. Ct. at 2464 (citations omitted); *see also Montgomery*, 136 S. Ct. at 733.

incorrigibility." *Montgomery*, 136 S. Ct. at 734. It thus categorically invalidates sentencing laws that create a "significant risk" that those who do not fall into this category—the "vast majority of juvenile offenders"—can be sentenced to LWOP. *Id.*

Second, to "give[] effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity," the Constitution requires sentencing courts to consider evidence of the following five factors before sentencing a juvenile to LWOP: (1) the minor's chronological age and its hallmark features; (2) his family and home environment; (3) the circumstances of the offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him; (4) the extent to which the juvenile's age impeded his ability to participate in the criminal proceedings against him; and (5) any other information bearing on the possibility of rehabilitation. *Id.* at 735; *see Miller*, 132 S. Ct. at 2468; *see also Gutierrez*, 58 Cal. 4th at 1388. Thus, "*Miller* does more than ban mandatory life sentencing schemes for juveniles; it [additionally] establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered." *Aiken v. Byars*, 765 S.E. 2d 572, 577 (S.C. 2014); *see Montgomery*, 136 S. Ct. at 735 ("A hearing where 'youth and its attendant characteristics' are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not.").

The *Guinn* rule was fundamentally incompatible with *Miller* because it, like mandatory LWOP, created a "significant risk that a defendant—here, the vast majority of juvenile offenders—[could receive] a punishment that the law cannot impose upon him." *Montgomery*, 136 S. Ct. at 734. First, under *Guinn*, LWOP was the rule, not the exception. *See Guinn*, 28 Cal. App. 4th at 1142 (LWOP is "generally mandatory," although courts "might grant leniency in some cases"). "Treating LWOP as the default sentence takes the premise in *Miller* that such sentences should be rarities and turns that premise on its head." *Gutierrez*, 58 Cal. 4th at 1365 (quoting opinion below). In itself, the *Guinn* presumption thus raises "a serious constitutional question under the reasoning of *Miller*." *Id.* at 1381. This question is even more serious after *Montgomery*, where the Court repeatedly emphasized that only the "rarest of juvenile offenders" can be sentenced to LWOP. *Montgomery*, 136 S. Ct. at 734.

Second, *Guinn* prohibited courts from exercising the discretion that *Miller* demands. Under *Guinn*, the court's exercise of discretion to reject an LWOP sentence was "circumscribed" and apparently limited to the factors set forth in the Penal Code and Rules of Court. *Guinn*, 28 Cal. App. 4th at 1144 (holding that these rules provided notice of what factors would be mitigating). Although those rules allow a court to use age and the fact that a defendant was "induced by others to participate in the crime" as mitigating factors, they do not otherwise allow consideration of the five *Miller* factors. *Compare* § 190.3(i) and Rule of Court 4.423(a)(5), *with Miller*, 132 S. Ct. at 2468. As the Supreme Court

has recently made clear, mere consideration of age is not enough under *Miller*: "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.'" *Montgomery*, 136 S. Ct. at 734 (quoting *Miller*).

Moreover, *Guinn* effectively converted age from a mitigating factor to one that could be used in aggravation in two separate ways. First, it held that LWOP could be justified in part *because* a defendant had "chosen" to commit a crime "at a relatively early age." *Guinn*, 28 Cal. App. 4th at 1146. It also indicated that a defendant's age could be used to discount his lack of prior criminal record, reasoning that a young defendant simply "may not have had time to accumulate much of a record." *Id.* This use of age as an aggravating factor is the opposite of what *Miller* requires.

Thus, as courts had held even before *Montgomery*, sentencing schemes that allow courts to sentence a minor to LWOP without considering these factors are unconstitutional. For example, the Supreme Court of South Carolina has held that all minors sentenced to LWOP before *Miller* are entitled to resentencing, even though that state did not have mandatory LWOP. *Aiken,* 765 S.E. 2d at 576-78. This is true even in cases where counsel specifically argued age as a mitigating factor, because *Miller* requires a more specific consideration of the attributes of youth. *See id.* "The absence of this level of inquiry into the characteristics of youth" meant that those sentences

were facially invalid. *Id.* at 577. Other courts have similarly concluded that *Miller* invalidates LWOP sentences imposed under laws that gave the court the discretion to impose a lesser sentence but did not require consideration of the factors identified in *Miller*. *See State v. Seats*, 865 N.W.2d 545, 557-558 (Iowa 2015); *State v.* Riley, 110 A.3d 1205, 1216-17 (Conn. 2015); *Daugherty v. State*, 96 So. 3d 1076, 1079-80 (Fla. Dist. Ct. App. 2012).

The reasoning of these cases applies with even greater force here, because those states did not have *Guinn*'s presumption in favor of LWOP and the stilted view of youth's effect on culpability. *Guinn* effectively foreclosed California courts from ensuring that LWOP was imposed only on "the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery*, 136 S. Ct. at 734. As a result, LWOP sentences imposed under *Guinn* violate the Eighth Amendment.

5.5.3 Petitioner's sentence violates the 8th Amendment because it was imposed pursuant to an unconstitutional presumption and without consideration of the factors required by *Miller*.

Petitioner Taylor's sentence illustrates why sentences imposed under *Guinn* cannot stand.

First, the sentencing court explicitly stated that LWOP was the "presumptive sentence" and then proceeded to sentence Petitioner in accordance with the presumption in *Guinn*. Pet. ¶ 34 & Exh. 7, pp. 062, 068-071. Second, the sentencing court failed to take into account any of the factors that the Eight Amendment mandates courts consider before sentencing a juvenile to a

lifetime in prison. Although the court mentioned Petitioner's chronological age as a mitigating circumstance, it did not say anything about youth's "hallmark features," Taylor's family or home environment, the extent to which peer pressure played a role in the crime, the extent to which the juvenile's age impeded his ability to participate in the criminal proceedings against him, or his capacity for rehabilitation. *Compare* Exh.7, pp. 069, 067-071 ("only mitigating circumstance[s]" are "defendant's age" and lack of prior record), *with Miller*, 132 S. Ct. at 2469. Merely considering a juvenile's age does not satisfy the Eighth Amendment; courts must consider the *Miller* factors. *Montgomery*, 136 S. Ct. at 734 .

The court's failure to do so here is especially significant because the facts of the offense itself suggest that youth played a substantial role. For example, the evidence, viewed most favorably to the prosecution, showed that the shooting occurred only after the victim "got up and began to chase defendant." *Taylor*, 2010 WL 3245282, at *2. But the sentencing court never acknowledged that this could mean that the shooting occurred because a juvenile, who is less able to assess the consequences of his actions, might not have fully appreciated the danger of carrying a loaded gun and might have acted more rashly and impulsively than an adult would when the victim started chasing him. *Miller*, 132 S. Ct at 2464-65.

In addition, the report that the California Youth Authority had prepared for the court following Taylor's initial conviction shows that Taylor was not eligible for LWOP because he was not

one of the "rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *See Montgomery*, 136 S. Ct. at 734. To the contrary, this report explicitly stated that Taylor had "the mental and physical capacity [to] change" and that he was "amenable to treatment and training offered by the Youth Authority." Pet. ¶ 45 & Exh.7, pp. 005-006. It explained that Taylor was "immature and irresponsible with a low level of criminal sophistication" and "that his actions in the instant offense [were] not in character nor consistent with his past behavior." *Compare* Pet. ¶ 43 & Exh.7, pp. 005-006, *with Miller*, 132 S. Ct. at 2459, 2464-65 (children's "lack of maturity" and "underdeveloped sense of responsibility" "lessen a child's 'moral culpability' and enhance the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'") (citations omitted).

The report further revealed that Taylor had grown up in a single-parent home with a mother who was on welfare and "unable to provide [him] with supervision;" his sole sibling—his older brother—was involved in criminal activity and was himself in custody at the time of the offense. Pet. ¶¶ 38, 41 & Exh. 1, p. 008. *Miller* explicitly required courts to consider evidence of lack of adequate parenting, as well as evidence of "the family and home environment that surrounds [the juvenile] and from which he cannot [...] extricate himself." *Miller*, 132 S. Ct. at 2468-69. Contrary to *Miller*'s requirement that the court consider the extent to which "peer pressures may have affected" the juvenile in the commission of the crime, the sentencing court in

Petitioner's case did not see as mitigating circumstances the fact that Petitioner was in the company of six other youth and young adults when the crime occurred and that CYA found him to be "susceptible to negative peer influence." *Compare Miller*, 132 S. Ct. at 2468, *with Taylor*, 2010 WL 3245282, at *2, *and* Pet. ¶ 42, Exh. 1, p. 012.

The facts about Mr. Taylor discussed in the CYA report and the circumstances of the offense itself show that he is simply not "the rare juvenile offender whose crime reflects irreparable corruption." *Montgomery*, 136 S. Ct. 735 (quoting *Miller*, 132 S. Ct. at 2469). The Eighth Amendment therefore bars him from receiving an LWOP sentence. At the very least, he is entitled to resentencing because the sentencing court failed to provide him with a sentencing hearing that "separate[s] those juveniles who may be sentenced to life without parole from those who may not." *Id.*

6. Conclusion

For these reasons, Taylor is entitled to resentencing under *Gutierrez*, *Miller*, and *Montgomery*. Furthermore, the approximately 255 other prisoners who, like him, were sentenced under *Guinn* to LWOP for crimes they committed as minors should be able to obtain an OSC and the appointment of counsel if they can show that they were sentenced under that incorrect rule. Petitioner therefore requests that this Court do the following:

1. Issue an Order to Show Cause why relief should not be granted;
2. Grant relief and order that Petitioner be resentenced in the superior court;
3. Clarify that a habeas corpus petitioner states a *prima facie* case under *Gutierrez* and is entitled to appointed counsel simply by showing that he was sentenced while *Guinn* was the governing law to LWOP for a crime committed as a minor;
4. Hold that Petitioner is not eligible for juvenile LWOP;
5. Grant any and all other relief necessary for the just resolution of this case.

February 19, 2016 Respectfully submitted,

_____

Michael T. Risher
Attorney for Petitioner

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I certify that the text in this Memorandum of Points and Authorities contains 9,755 words, as calculated by Microsoft Word, including footnotes but not the caption, the table of contents, the table of authorities, signature blocks, or this certification.

Dated: February 19, 2016

By: _____
Michael T. Risher