Delinquency Legal Update: 2016-2017

Sealing

***In re N.R.*, 15 Cal.App. 5th 590 (2017)** filed September 21, 2017
Second District, Los Angeles County

Held: Court's order lifting deferred entry judgment (DEJ) due to appellant's decision to discontinue high school affirmed; order refusing to dismiss the delinquency petition and seal records affirmed under either 786 or 793 [no abuse of discretion].

Facts: April 2015, a section 602 petition was filed alleging that appellant drove a vehicle without the owner's consent. After appellant admitted the allegations of the petition, the court placed him on the Community Detention Program (CDP) so he could "earn the right to have DEJ imposed as opposed to HOP [home on probation]." The court terminated the CDP placement, granted DEJ, and placed appellant on one to three years of DEJ probation. Among other things, appellant's terms of probation required him to attend school every day, maintain at least a grade of C in each class, and "participate in a program to obtain [his] high school diploma or GED."

Defense counsel represented that appellant was willing to attend summer school. Based on this representation, the court lifted DEJ and continued the matter until October 4, 2016 for disposition. If appellant could demonstrate at that hearing that each of his grades had sufficiently improved, the court would grant automatic sealing under section 793.

After several further review hearings in which the appellant failed to demonstrate adequate attendance and grades at school and decided to stop going to school, the court declined to dismiss appellant's delinquency petition and order that his records be sealed under either section 793 or section 786. The court ordered that the previously lifted DEJ remain lifted, sustained the section 602 petition, declared appellant a ward pursuant to the previously imposed terms, and terminated jurisdiction.

Appellant contends the court abused its discretion in refusing to dismiss the section 602 petition and seal his records pursuant to either section 793 or section 786. Specifically, appellant argued that: (1) irrational to punish him for failing to improve his employability by severely reducing his employability; (2) ruling violated the "spirit of the law;" (3) no evidence he willfully failed to comply with T/C requiring him to maintain his grades; and (4) that *In re A.V.* compels 786 dismissal and sealing. Appellant's contentions largely conflate sections 793 and 786. Although the two statutes are similar, they each embody a different procedure.

793: DEJ program "postpones judgment" for an minor who admits the allegations of a 602 petition and waives time for entry of judgment. Upon successful completion of the terms of probation, as defined in section 794, the positive recommendation of the probation department, and the motion of the prosecuting attorney, the court dismisses the charge or charges against the minor. Here, however, because appellant made a deliberate choice to drop out of school, and in light of the correlation between education and future criminality, the court reasonably found he had *not substantially complied* with the terms of his probation such that he was ineligible for a dismissal and sealing under either section 793 or section 786.

786: applies when a ward "satisfactorily completes . . . a term of probation for any offense." (§ 786, subd. (a).); "satisfactory completion" means "substantial compliance," per *In re A.V.* Upon such finding, the court dismisses the petition and orders that all records pertaining to the dismissed petition be sealed. Since evidence supported the court's finding that appellant's failure to maintain his grades and complete his high school education was willful, the court's reliance on that failure as a basis for lifting DEJ was not an abuse of discretion. Judgment affirmed.

***In re I.F*. (2017) 13 Cal.App.5th 679**, filed June 16, 2017; modified July 31, 2017
First District, Marin County

Held: case remanded to apply section 786, the statute governing the sealing of juvenile records enacted prior to the adjudication of defendant's sealing petition. Thus, sealing *and* disclosure order reversed, remanded.

Facts: "defendant" placed on probation when 15-years-old. On December 3, 2014, the juvenile court found that defendant had successfully completed probation, and thus terminated jurisdiction and wardship. Defendant, in turn, filed a petition asking the court to seal his juvenile records pursuant to section 781(a).

On April 1, 2015, a felony complaint was filed charging defendant—now 19—with attempted murder and robbery; on April 27th the prosecutor assigned to the criminal case filed Sec. 827 petition for disclosure of his juvenile records in order to impeach him in his criminal trial.

On October 2nd the juvenile court issued an order denying defendant's petition to seal his juvenile records pursuant to 781 because he had "not satisfactorily completed his rehabilitation" and subsequently granted disclosure to the prosecutor. Defendant appealed.

Several months prior to the juvenile court's orders, on January 1, 2015, section 786 became the operative statute with respect to petitions to seal juvenile delinquency records where, as here, the defendant successfully completes probation. Sec. 786 provided in relevant part: "If the minor satisfactorily completes . . . a term of probation for any offense not listed in subdivision (b) of Section 707, the court shall order the petition dismissed, and the arrest upon which the judgment was deferred shall be deemed not to have occurred. The court shall order sealed all records pertaining to that dismissed petition in the custody of the juvenile court . . . ." Defendant's offense is not listed in 707(b).

The intent of Section 786 was described as follows: "[T]his bill will further the dual purposes of the juvenile justice system: rehabilitation and reintegration, by better ensuring that juveniles have a clear pathway to clearing their records, when in compliance with existing statutory and probationary requirments. The bill recognizes the established role of [the] Juvenile Courts as institutions of reform, not punishment, and will help individuals with juvenile records to find and

hold jobs, and become fully functioning members of society." Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1038.

The court of appeals agreed with defendant that his sealing request should have been considered in light of section 786. After a lengthy discussion about whether the statute was retroactive or prospective, the Court ruled that a statute that establishes rules for the conduct of *pending* litigation without changing the legal consequences of *past* conduct is not made retroactive merely because it draws upon facts existing prior to its enactment. That is, the effect of the statute is "prospective in nature" since it relates to the procedure to be followed in the future.

By enacting 786, the legislature eliminated the requirement of satisfactory rehabilitation and instead mandated *automatic sealing* of a juvenile's records so long as the juvenile completed probation for a non-section 707, subdivision (b) offense—statutory requirements defendant undisputedly met. Thus, because nothing a person might lawfully do before the amendment is unlawful now, and nothing earlier forbidden is now permitted, we conclude application of section 786 must be deemed prospective rather than retroactive.

***In re Jose S.* (2017) 12 Cal.App.5th 1107**, June 21, 2017
Fourth District, San Diego County

Held: juvenile charges—though committed years apart—were part of same "case" within statute for sealing of records, and ADW w/personal use of knife precludes sealing under 781. Affirmed.

Facts: After serving five years of a commitment to California Youth Authority for assault with a deadly weapon and a previously sustained PC 288 offense, in 2015 Jose requested that his juvenile court records be sealed. The court granted the request as to the lesser PC 288 offense, but days later recalled the matter as the court's records system could not accommodate the order to seal only the 2002 petition [the court explained that once the clerk enters the "sealing codes, the entire record is dismissed or abolished" and "everything will be wiped from the system"—

including the 2005 offense—contrary to the court's order]. The court then rescinded the sealing order and set a further hearing to consider Jose's request.

The court concluded it had no authority to seal any of Jose's records because the ADW was not sealing-eligible under section 781 as it is an offense enumerated in section 707(b); section 781 precludes from sealing listed offenses in section 707(b). Jose argued, though, that like the adult context, a juvenile "*case*" must be defined to include only those proceedings that were adjudicated *at the same time*. Thus, since the two crimes committed occurred years apart, were unrelated, and they could not have been properly joined under Penal Code section 954—reinforcing the position that they were separate cases. The AG responded that the court could not seal any part of Jose's records because both "*petitions were part of the same case number and treated as the same case throughout the proceedings*."

The court acknowledged that "the juvenile wardship system and the adult criminal system are two distinct systems, [with] different terminology, and their underlying purposes have a different focus." Thus, the timing of the adjudication of the offenses did not required the juvenile court to conclude they were different cases under section 781. Instead, the Court reasoned that the goals of treatment and rehabilitation are better served if the minor's case history is dealt with as a whole, with each new offense committed by the minor used as a basis for reevaluation of the prior disposition. Because of this principal, "it has long been the practice to file successive juvenile petitions under a single case number. . . . [which] has important practical considerations. It allows the court to keep track of the minor's progress (or lack thereof), to determine whether ordered rehabilitative programs are succeeding or failing and whether new ones should be tried, and to aggregate offenses in order to extend the maximum term of confinement for a new offense where the minor appears to be sliding toward incorrigibility. … The distinctions between the adult criminal and juvenile delinquency systems persuade us that the juvenile court's treatment of both petitions as part of one case for purposes of section 781 is appropriate."

Section 781, on the other hand, while serving "to protect minors from future prejudice resulting from their juvenile records," also recognized the "desirability of eliminating confidentiality in

some juvenile proceedings in order to hold juvenile offenders more accountable…" In Jose's case, the disposition of the second petition—which included the 777 violation for the first petition—supported the conclusion that both petitions were part of the same delinquency "case." If the legislature wanted to permit former wards to expunge only portions of his/her record, it could have expressed that intent clearly.

Note: the Court restated the juvenile court's ability to look beyond the admission to a specific charge in determining whether a 707(b) offense had been committed. Moreover, the Court further found that "the commission of assault with a deadly weapon [under PC 245(a)(1)] encompasses the commission of assault 'by any means of force likely to produce great bodily injury,'" for purposes of 707(b)(14).

***In re Joshua R.* (2017) 7 Cal.App.5th 864** filed January 19, 2017
Fourth District, Orange County

Held: trial court required to destroy minor's record upon completion of probation, *but* not destroy the firearm prohibition until he'd reached 30 years of age. The substantive Penal Code statute [29820] and WIC statute [786] can be harmonized to effect the purposes of each.

Facts: Joshua was declared a ward and kept in his parents' home after admitting misdemeanor offenses of domestic violence battery, harassment by means of an electronic device and two violations of a restraining order. Although Joshua successfully completed probation, the court did not order his records sealed because of an ongoing condition under Penal Code section 29820 that he not own or possess any firearm until the age 30.

Section 786 requires that upon successful completion of probation that the petition be dismissed and the records sealed, so as to allow certain juvenile offenders who have successfully completed probation to lead productive lives without the black mark of a record hanging over their heads for employment and educational purposes. The AG argued that sealing Joshua's records pursuant

to section 786 would impermissibly circumvent section 29820. While the juvenile court framed the issue as a "continuing probation condition," the appellate court found instead that 29820 is a stand-alone statue that applies irrespective of whether Joshua is a ward or on probation.

"If two seemingly inconsistent statutes conflict, the court's role is to harmonize the law." Here, the language of section 29820(d) is controlling as it states that "[t]he juvenile court… shall notify the department of persons subject to this section. *Notwithstanding any other law*, the forms submitted … may be used to determine eligibility to acquire a firearm." The court of appeal concluded that the legislature was presumptively aware of "existing related laws" and intended to "maintain a consistent body of rules." Thus, while the rest of the record requires sealing, i.e., "shall be deemed not to have occurred," the form described in section 29820(d) is exempt from the requirement of destruction for the limited purpose of determining eligibility to acquire a firearm as this will serve the purposes of both laws.

***In re David T*. (2017) 13 Cal.App.5th 866** filed July 26, 2017
First District, Alameda County

Held: order setting aside robbery findings and dismissing juvenile wardship petition rendered petitioner eligible to have juvenile records sealed. Dismissal under section 782 "erased the petition as if it had never existed," and the motion to seal under section 781 must be granted.

Facts: In 1995, appellant was convicted of an armed robbery he committed in 1994 at the age of 17; he spent three-and-a-half years at CYA before being honorably discharged in 2002. In 2016 he—now age 38—petitioned the court for sealing under 781 three prior occasions before filing the instant motion to set aside the robbery findings and dismiss the petition pursuant to section 782. The lower court granted the request to dismiss and seal as it was "in the interest of justice to do so," but refused to seal his juvenile records under section 781. Regarding the dismissal, the

court examined the previous twenty years of appellant's law-abiding life and the impediment to his future potential career as a firefighter and EMT.

In denying appellant's request to have his record sealed, the juvenile court noted that section 781(a)(1)(D) restricted persons aged 14 or older who'd committed a 707(b) offense from having his/her record sealed. Since review here considered interpretation of statute it was conducted as a de novo review, not for abuse of discretion.

The appellate court reviewed sections 781 and 782, including the legislative history for both, and the subsequent effect of Prop. 21 in 2000 in assessing the conflict. The Court reasoned that section 782 was not intended to be limited to the act of terminating jurisdiction, but instead was a "general dismissal statute" akin to PC section 1385 that has the effect of *erasing* a prior adjudication. In getting to the sealing consideration, the Court drew on a criminal decision [*Haro*] that struck a juvenile strike due to the prior 782 dismissal. Like section 1385, the adjudication was treated as if it had never occurred. Consequently, the lower court erred when it denied appellant's request to seal his juvenile record as "there was no longer any robbery finding or sustained petition left to be governed by the limitation in [Section 781].

Note: the Court addressed the "notwithstanding any other provision of law" clause in 781 to be inapplicable as that "term of art" referenced the legislative intent to override all *contrary law*. Here, the act of setting aside and dismissal removed anything left to be governed by 781, and thus there was no conflict between the two statutes.

***In re Dean W*. (2017) 16 Cal.App. 5th 970**, filed November 3, 2017
Fourth District, Orange County

Held: Section 786 entitles the ward to have all juvenile records sealed—including the ward's "*Watson*" acknowledgement of the dangerousness of driving under the influence.

Facts: minor adjudged a ward for violation under Vehicle Code section 23152, driving under the influence. At the time of disposition he signed an advisement pursuant to Vehicle Code section 23593 and *People v. Watson* (1981) 30 Cal.3d 290, 296, which stated: "You are hereby advised that being under the influence of alcohol or drugs, or both, impairs your ability to safely operate/drive a motor vehicle. Therefore, it is extremely dangerous to human life to drive while under the influence of alcohol or drugs, or both. If you continue to drive while under the influence of alcohol or drugs, or both, and, as a result of that driving, someone is killed, you can be charged with murder." The Vehicle Code authorizes prosecutors to use a criminal defendant's acknowledgement of the dangerousness of driving under the influence as evidence of implied malice in a later second-degree murder case. The juvenile court also recited the Watson advisement at the hearing in which wardship was adjudicated.

After successfully completing probation the minor requested that his entire record be sealed under Section 786. The DA argued that sealing the *Watson* advisement would violate public policy and the juvenile court ordered the file sealed with the exception of the advisement.

In analyzing the two statutes—786 and 23593—the Court concluded that the "unambiguous language of [786] means what it says: The juvenile court *shall* seal *all records* relating to the ward's dismissed petition, and *shall* order any law enforcement agency, the probation department, and the DOJ to do the same." In reference to the AG policy argument, the Court suggested that the legislature could fix the problem with "notwithstanding any other law" language identical to that referenced in *Joshua R.*

Having found that the ward in this case successfully completed his probation, the juvenile court did not have the discretion to seal only a portion of the records regarding the ward's case. *However*, section 786(e)(2) gives the juvenile court *discretion* to order sealing of the ward's records that were transmitted to the Department of Motor Vehicles [DMV falls outside of the list of agencies requiring mandatory sealing]. The case is remanded for the juvenile court to exercise its discretion on that issue.

***S.V. v. Superior Court* (2017) 13 Cal.App.5th 1174**, filed July 31, 2017
Fourth District, Orange County

Held: juvenile court erred in inspecting the juvenile's sealed delinquency record pursuant to Section 827 as the "request for disclosure of information" from the sealed record did not fall within one of the eight exceptions set forth in WIC section 786.

Facts: police contacted S.V.—a minor—with adult Harris during a traffic stop. As a result Harris was charged with several felonies, including the "human trafficking" of S.V. A juvenile petition was also filed against S.V., in order to bring her into the system and offer her services. S.V.'s petition was dismissed after six months.

A year after the traffic stop that led to the felony complaint, Harris filed a petition under WIC section 827 requesting information from S.V.'s dependency and delinquency files. S.V. objected to release, arguing that her records had been sealed and section 786 did not contain an exception for release of sealed records pursuant to section 827. After hearing in which the prosecutor joined Harris, the juvenile court ordered portions of the delinquency file redacted and released to Harris finding that it had an obligation to review the files for exculpatory information bearing on S.V.'s veracity; the court stayed release pending S.V.'s filing of a writ of mandate to halt release of information from her delinquency file.

Under a statutory interpretation de novo review the Court noted that to begin with, juvenile court records are, generally, confidential; however, the legislature has created a process by which information from a juvenile record may be obtained. The procedure is set forth in section 827 and generally requires the court to balance the child's best interests against the interest of the person requesting access and the interests of the public.

Apart and aside from the "confidentiality" consideration, juvenile delinquency court records may be *sealed* under sections 781 and 786. Section 781 is a long-standing provision that allows for discretionary sealing of a juvenile delinquency record at the request of the child or probation.

Section 786, on the other hand, was enacted in 2015 and mandates that qualifying juvenile delinquency records be automatically sealed. Both sections 781 and 786 set forth exceptions for inspection of the sealed records. Section 781 sets forth two exceptions to the general rule against inspection of the sealed record and section 786 sets forth eight exceptions.

Here, S.V.'s delinquency record was automatically sealed pursuant to section 786. As a result, Harris' request for access to S.V.'s juvenile record should have been granted only if it fell within one of the eight exceptions to the general rule that sealed records may not be "accessed, inspected, or utilized." Harris' request as a "third-party criminal defendant" to access S.V.'s records did not fall within any of the "clear and unequivocal" exceptions set forth in section 786. The court cited precedent under section 781 from 2007 in which the Board of Parole Hearings wanted the juvenile records for SVP screening; the court denied release as the request did not fall within either statutory exception. See *In re James H.* (2007) 154 Cal.App. 4th 1078

Harris argues that S.V.'s interest in having her sealed records remain confidential is outweighed by his constitutional right to confront the witnesses against him. The court ruled it is up to the legislature to decide whether sealed records should be provided to defendants pursuant to their right to confront and cross examine the witnesses against them; courts may not add/create additional exceptions as was done here. The Court rejected his 6th Amendment arguments, advising it was "in no position to speculate on those matters" and anticipated that the criminal trial court "will make whatever rulings may be necessary to protect defendant's statutory and constitutional rights."

Note: The court referenced *Davis v. Alaska* (1974) 415 U.S. 308, stating that "[t]he State's policy interest in protecting the confidentiality of a juvenile offender cannot require yielding … effective cross-examination … of an adverse witness. The State could have protected [the juvenile] from exposure … by *refraining from using him to make out its case*; the State cannot, consistent with the right of confrontation, require the [defendant] to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records."

***In re G.F.* (2017) 12 Cal.App.5th 1** filed May 30, 2017; modified June 6, 2017
Second District, Ventura County

Held: court required to seal records upon successful completion of supervision program and fact that such supervision under statute that did not require judicial oversight did not support denial of motion to seal record.

Facts: DAO filed a petition alleging that G.F. brought a sharpened letter opener to school. At initial hearing, the prosecutor moved to dismiss the petition to allow the probation department to provide informal supervision services to G.F. The court granted the dismissal, citing section 654 as the basis. G.F. successfully completed informal supervision and requested that his record be sealed pursuant to section 786. The DA objected on the grounds that section 786 only permits cases dismissed under 654.2—not 654—to be sealed. The juvenile court denied G.F.'s motion and G.F. appealed.

The appellate court independently reviews the juvenile court's ruling and looks to the statute to determine the Legislature's intent. Although 786 is intended for minors with a *pending* delinquency petition [and completed a program of supervision]—thus invoking only 654.2—this is so because 654 anticipates no petition being filed. Here, the juvenile court denied the request to seal because the program of informal supervision was pursuant to section 654, rather than 654.2. The appellate court, however, notes that sections 654 and 654.2 are essentially the same in this case. Section 654.2 applies when a petition has been filed, whereas section 654 applies when a petition has *not* been filed.

In this case, a petition was filed but the prosecution moved to dismiss it before a request for supervision under 654.2 could be made; a request that is not supported by the statutory scheme. Nonetheless, *once* a petition is filed it is section 654.2 that governs; the prosecution forfeited the argument that 654.2 is "more restrictive because it is supervised by the court" when it failed to comply with the statutory scheme by dismissing the petition. Moreover, granting G.F.'s request

to seal his record is consistent with the purpose of section 786, which seeks to streamline the process of sealing for juveniles who satisfactorily complete probation.

***In re A.V.* (2017) 11 Cal.App.5th 697**, filed May 12, 2017
First District, Sonoma County

Held: the juvenile court erred when it applied a stricter standard to sealing A.V.'s records than to the decision to dismiss delinquency.

Facts: A.V. was made a ward of the court based on possession of marijuana for sale. Initially, A.V. was granted deferred entry of judgment (DEJ); however, he violated the terms of DEJ and was placed on formal probation. While on formal probation his noncompliance resulted in the filing of two notices of probation violation. Ultimately, A.V. was able to turn around his behavior and comply with the conditions of probation. After nearly two years on some form of supervision, the probation department recommended dismissal of delinquency jurisdiction. The juvenile court queried the parties regarding their positions on sealing A.V.'s record according to Section 786. The prosecution objected, noting that A.V. had failed DEJ and had received two probation violations. The juvenile court agreed with the prosecutor and declined to order sealing pursuant to section 786 but went ahead with dismissal of the delinquency case. A.V. appealed.

The issue is whether a juvenile's compliance with probation can be satisfactory for dismissal *but* unsatisfactory for record-sealing. Section 786 sets forth a "court-initiated procedure for dismissing juvenile delinquency petitions and sealing juvenile records" when a juvenile completes probation for non-707(b) offenses satisfactorily. The definition of "satisfactory completion" is in section 786(c) and establishes that a record should be sealed if there have been no new wardship findings, felony adjudications, or misdemeanor crimes of moral turpitude and the juvenile has complied with the "reasonable orders of supervision." Moreover, "satisfactory completion" is the same as "substantial compliance." This means "compliance with the

substantial or essential requirements of something that satisfies its purpose or objective even though its formal requirements are not complied with."

After a lengthy discussion regarding statutory construction and the legislative history of section 786, the court held that there is no basis for the notion that different standards apply between dismissing delinquency petitions and sealing records. The section sets forth one standard for satisfactory completion of probation, it uses the mandatory term "shall" when describing what should happen when a juvenile satisfactorily completes probation, and uses "dismiss" and "seal" together throughout the statute. Taken together, the plain language of section 786 establishes that same standard of conduct is applied to both dismissal and sealing. Case reversed and remanded with orders to seal A.V.'s juvenile record.

***In re W.R (2017)* 16 Cal.App.5th 1053**, filed November 6, 2017
First District, San Francisco County

Facts: Minor had seven petitions filed between two counties during his probation case. During the course of his probation, one petition was found to not be true while another was dismissed as part of a negotiated disposition. The seventh petition, filed while minor was in juvenile hall awaiting placement, the court found minor not competent and suspended proceedings. His attorney thereafter moved for dismissal under 782 as to that petition, and "successful completion of probation" as to his other matters—along with sealing, per 786. The court granted the 782 dismissal, and ordered the minor's probation "satisfactorily completed."

As to the 786-sealing request, minor's attorney argued that the "case file" referred to the entire juvenile case file as long as the minor satisfactorily completed probation. The DA contended that minor was *never on probation* for the 782-dismissed petition, and the court agreed, only sealing petitions for which the minor had a term of probation—and not mentioning the other petitions that had been dismissed per negotiated disposition or not sustained. The court held that the

phrase "in the case" meant records pertaining to a particular petition—not the entire juvenile court file for the case number at issue.

The court of appeal reviewed the statutory construction of 786 and held that "[v]iewed as a whole, the language used in [section 786] strongly suggests that the records to be sealed are those pertaining to a particular petition: a petition for which probation was imposed and satisfactorily completed or, under [786 (e)(1)], a *prior* petition either *filed* or sustained, and that otherwise appears to the satisfaction of the court to meet the sealing and dismissal criteria described." Section 786, however, does *not* reach a petition that was filed *subsequently* to the last petition for which the minor was placed on probation, and which did not result in a grant of probation. Thus, the juvenile court had discretion under section 786(e)(1) to seal the records pertaining to the petition that was not sustained and to "dismiss" the prior petition which was dismissed as part of an earlier negotiated disposition for which the minor placed on probation. As to the latter, though, the court noted that sealing would be required upon dismissal, citing the reasoning of *G.F.*

As to the last, "interest of justice" dismissed petition, however, the sealing procedure of 786 did not reach as it was filed subsequent to the last petition for which the minor was placed on probation, and it did not result in a grant of probation. As configured, the statute does not authorize sealing of such a dismissed petition. The minor attained the age of 18, though, and the matter was remanded to consider sealing the minor's records under 781 (along with the other determinations, referenced above).

***In re Y.A.* (2016) 246 Cal.App.4th 523**, filed April 14, 2016
Fourth District, San Diego County

Facts: In April of 2013 the minor was adjudged a ward and placed on probation after admitting to a violation of Penal Code section 148(a)(1). In February 2014 a new petition was filed and she admitted to a violation of Penal Code section 69. In May of 2015 wardship was terminated and

the juvenile court found that she successfully completed probation related to the section 69 offense ordered that portion of her records sealed pursuant to section 786. Minor argued that her prior 2013 petition should have been included in the 786-sealing order. The court disagreed and minor appealed.

The court of appeal found that the "plain language of the statute" did not require that it proceed to reviewing legislative intent and noted that *former* section 786 was "unambiguous." That is, there was no reference to *prior* petitions in the statute, but instead only that the petition that is dismissed upon successful completion of probation is sealed. The court further noted that even though the statute was amended to account for *prior* petitions, there was nothing indicated in the legislation that it was meant to be applied retroactively, nor would it assist the minor in this situation as there was nothing in the record to demonstrate that she had "satisfactorily completed" probation for the prior petition. The juvenile court order is affirmed.

***In re J.G.* (2016) 3 Cal.App.5th 521**, filed September 6, 2016
First District, Contra Costa County

Minor appeals the juvenile court's finding that he "unsuccessfully" completed probation because he failed to pay restitution. Wardship was granted due to a residential burglary committed in 2011 when minor was 17 years old; he was placed in a rehabilitation center and completed the program early. Minor's adjustment back in the community was very good and his parole was terminated successfully in December of 2011. Minor remained a ward on probation until 2016, but no review hearings were held between December 2011 and the January 2016 review. At that hearing the probation department asked for termination of wardship as J.G. was now 22. J.G. had no law violations, obtained his GED, and was employed. He had not, however, paid restitution.

At the 2016 hearing J.G. asked for probation to be terminated "dismiss successfully," arguing that unpaid restitution was not a basis for finding unsuccessful completion. DA argued that since

restitution could not be converted to a civil judgment as J.G. was over 21-years, it was an "unfulfilled" condition of probation and thus prevented a finding of "successful completion." The juvenile court sided with DA and terminated probation unsuccessfully. J.G. appealed.

The court of appeal noted that under 786 unpaid restitution "shall not be deemed to constitute unsatisfactory completion" of probation, noting that both the juvenile court and DA had misconstrued the statute based on the clause referring to civil judgments. The court found, as well, that the juvenile court had authority to convert the restitution to a civil judgment past the age of 21—so long as the order of restitution was made during a time in which the court did have jurisdiction—and thus did not need to reach the construction of Section 786. The court ordered reversal and remand, directing dismissal due to "satisfactory completion" and sealing.

Youthful Offender / Sentencing / Due Process Issues

***In re Albert C.* (2017) 3 Cal.5th 483**, filed July 10, 2017
Los Angeles County

The Court considered competency proceedings related to detained juveniles, and acknowledged that like adults, juveniles have a due process right to be free from indefinite commitment if found incompetent to stand trial.

In an effort to protect this right, the Presiding Judge of the Los Angeles County Superior Court, Juvenile Division, issued a protocol addressing the process by which minors are found incompetent and later found to have attained competency. The protocol limits the detention of incompetent minors to 120 days. The Supreme Court granted review to decide whether detention of a minor beyond the protocol 120-day limit without evidence of progress toward attaining competency violates the right to due process and whether a violation of the protocol establishes a presumption of due process violation.

The Court first discussed *Jackson v. Indiana* (1972) 406 U.S. 715 (finding that indefinite detention of incompetent individual violates due process) and *In re Davis* (1973) 8 Cal.3d 798 (holding that criminally charged incompetent persons may be confined no more than a reasonable period of time necessary to determine whether there is a substantial likelihood that s/he will recover capacity in the foreseeable future), and acknowledged that the rules of "reasonableness" apply to detention of juveniles, as well.

Regarding the Los Angeles protocol, the Court held that although trial courts are not barred from adopting such protocols as guidance or as local rules, the Court of Appeal was correct that the protocol itself did *not* presumptively or otherwise define due process. Further, the court declined to decide whether the length of detention in this case violated due process and instead held that any violation was not prejudicial in light of the juvenile court finding of malingering.

A juvenile court's Protocol may serve as useful guidance concerning the placement, detention, and treatment of minors found incompetent in delinquency proceedings. But it does not independently give rise to any claim for relief because it does not by itself have any binding force of law. The Protocol was not adopted as a local rule and because the Protocol was not adopted pursuant to any mechanism vesting it with legal authority, a violation of the Protocol does not, in and of itself, constitute grounds for relief.

To that end, the Court disapproved *Jesus G.*, which held that a violation of Protocol's 120-day limit created a rebuttable presumption that the detention violated due process since the Protocol complied with constitutional requirements and therefore a violation is "presumptively" a violation of constitutional rights. (*In re Jesus G.*, 218 Cal.App.4th 157, 174.) The Court agreed with the Court of Appeal that "the 120-day limit on detention … lacks the force of law and it therefore does not define due process."

However, the Court held that the Court of Appeal erred in concluding that the Protocol's limit on detention conflicts with the holding in *Jackson* and the language of WIC section 709(c [stating that "all proceedings shall remain suspended for a period of time that is no longer than

reasonably necessary to determine whether there is a substantial probability that the minor will attain competency in the foreseeable future."].

Jackson and *Davis* set constitutional limits defining when a detention becomes so lengthy or unjustified as to violate due process, but neither requires any court to make the reasonableness determination strictly on a case-by-case basis, with no presumption, time limit, or general guidance. A protocol, local rule, or state statute may adopt a detention policy that is *more* protective of a juvenile's rights. Thus, trial courts are not precluded from establishing time limits, presumptions, or guidance concerning the detention of incompetent minors, the violation of which may have whatever consequences attend the violation of a local protocol or rule.

Nor does Welfare and Institutions Code section 709 foreclose the adoption of such a protocol or local rule. The statute may be amended in the future; the Judicial Council's Family and Juvenile Law Advisory Committee has recommended changes to the law (Assem. Com. on Appropriations, Analysis of Assem. Bill No. 2695 (2015–2016 Reg. Sess.) as amended Apr. 19, 2016, p. 2), and the parties have informed us of two bills introduced in the current legislative session that would amend it (Assem. Bill No. 689 (2017–2018 Reg. Sess); Assem. Bill No. 935 (2017–2018 Reg. Sess.)—*vetoed*). Section 709 does not authorize, restrict, set limits on, or even mention detention.

***A.T. v. Superior Court of Solano County* (2017) 10 Cal.App.5th 314**, filed March 30, 2017
First District, Solano County

Held: minor's constitutional right to trial precluded the juvenile court from denying release and detaining her for 15 days in order to pressure her to accept a plea bargain, and minor's right to "individualized justice and due process" prevented the judge from finding that mother's neighborhood was too dangerous for pretrial release based on his subjective opinions of the area.

Facts: A.T. was a fourteen old with no prior delinquency history. While riding with her brother and a friend, police pulled them over because the registration of the car was expired. Officers found a small handgun wrapped in a shirt inside a backpack that was inside the trunk. A.T. and the other minors were arrested. At her arraignment, she denied each charge. Despite her youth, lack of prior delinquent history, solid ties to the community, and positive parental support, the juvenile court rejected the probation department's recommendation that she be conditionally released to her mother subject to home supervision. The court joined her case with that of her brother over A.T.'s objection; she believed that her brother would provide exculpatory testimony if he had the opportunity to testify at her separate trial.

At a readiness conference about a week later, the prosecution insisted that a plea offer depend on both minors admitting to the offered charges. A.T. did not want to take the deal and requested that she be released to her mother. The court declined to do so after opining that her mother's neighborhood was unsafe based on his familiarity with Vallejo. A.T. then indicated that she was willing to resolve her case for a misdemeanor. The court then offered that A.T. could be released pending her disposition hearing. A.T. then expressed she preferred to hold off making an admission if she was going to be released. The court then indicated it was no longer willing to grant the probation department discretion to release A.T. At the next hearing, A.T. once more asked for release and the court declined. Immediately after that A.T. changed her plea to admit the misdemeanor and the court ordered discretion to release.

The Supreme Court has recognized that serious concerns arise when codefendants are presented with package-deal plea bargains. These concerns are greatly magnified when the codefendants are minors. In this case, the court found A.T. was under pressure to plead guilty based on considerations bearing no direct relation to whether she was guilty in fact. A.T. indicated she was innocent from the day she was arrested, she wanted to go to trial, and she expected her brother's truthful testimony would exonerate her. The prosecutor's insistence on a package deal however assured this defense would never come to light. In addition, it was apparent that pleading guilty was the only way A.T. had any chance of being released.

The court also failed to make an individualized and evidence-based assessment of A.T.'s fitness for release required for a juvenile based upon the criteria set forth in section 635. The court neglected to recall the presumption against detention, and it may not be ordered unless there is clear proof of the 'urgent necessity' which sections 635 and 636 require. By detaining A.T. based on its own subjective and categorical opinions about downtown Vallejo, the court denied A.T. the "elementary requirements of individualized justice and due process."

Moreover, while the juvenile court also justified detaining A.T. by pointing to the seriousness of the charges against her, the appellate court noted that the nature of the charged offense cannot in itself constitute the basis for detention. The available evidence suggested A.T.'s involvement, if any, in stealing or carrying the gun was minimal. In fact, the prosecutor was willing to dismiss the three serious charges against her in return for her plea to a lone misdemeanor.

The court was directed to consider the motion to withdraw her plea in light of the opinion.

***People v. Phung* (2017) 9 Cal.App.5th 866**, filed March 15, 2017
Fourth District, Orange County

Defendant was 17-years-old when he went to a pool hall with a dozen fellow gang members to confront a rival gang; defendant sat in the back seat of a car out of which a person fired a gun killing one person and injuring another. Defendant was sentenced to an aggregate prison sentence of 40 years to life, consisting of a 15-year-to-life term for second degree murder and a consecutive 25-year-to-life term for vicarious use of a firearm.

Defendant contended that the statutorily mandated imposition of an enhanced 40-year-to-life prison term for second-degree murder as a passive aider-abettor, under a natural and probable consequences theory of criminal liability, based on disturbing the peace—including a 25-year-to-life vicarious gun discharge enhancement—with no statutory discretion for the trial court to consider his age or personal circumstances or passive and nonviolent criminal behavior in

mitigation of the punishment, constituted excessive punishment and violated his constitutional rights under the Eighth and Fourteenth Amendments and article I, section 17 of the California constitution.

Defendant's background was not particularly concerning: he was placed in group home when he was 14 after his mother disappeared, and he was reported to be doing very well at the home. He graduated high school, and was trying to get out the gang lifestyle including getting his tattoos removed. He was first person in his family to receive a high school diploma.

The court noted that under *Franklin* the Eighth Amendment protects a juvenile homicide offender from a mandatory indeterminate sentence, equivalent to LWOP, and while the State need not guarantee the juvenile eventual release, it must provide some realistic, or "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." The Legislature responded to the *Miller, Caballero,* and *Graham* decisions in 2014 by enacting sections 3051 and 4801, establishing a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity. Thus, as defendant is serving a life sentence that includes a "meaningful opportunity" for release during his 25th year of incarceration, his sentence is not LWOP nor its equivalent, and therefore no *Miller* claim arises here.

Alternatively, defendant argues that *Miller* requires that the sentencing judge consider a particular juvenile's youth and special or attendant circumstances, as sentencing factors which may point to the minor's crime reflecting unfortunate yet transient immaturity but not irreparable corruption, and therefore tailor and impose an "individualized sentence." The court explained, however, that the problem with this argument is that in the vast majority of cases, a judge will be unable to determine, *at the time of sentencing*, whether the juvenile offender suffers only from "transient immaturity" as opposed to "irreparable corruption." A child has the capacity to change, and this determination cannot in most cases be achieved at sentencing. Section 3051

establishes the timeframe in which to determine whether a juvenile offender has rehabilitated and gained maturity.

In addition, here the defendant *did* receive individualized sentencing from the trial judge, who expressly and thoroughly considered the defendant's youth, the attendant circumstances in the case, the nature of the crime, his lesser culpability in this case because he was an aider and abettor as opposed to a perpetrator, a juvenile's greater capacity for change and defendant's criminal history. His constitutional challenge therefore lacks merit.

Regarding the Section 654 argument, the court held that defendant's concurrent sentence for the count 3 crime of shooting at an occupied vehicle need not be stayed. Substantial evidence showed a separate intent and objective for murder, attempted murder, and shooting at an occupied vehicle. Judgment affirmed.

***People v. Cervantes* (2017) 9 Cal.App.5th 569**, filed March 9, 2017, modified April 10, 2017
First District, Solano County

Defendant was 14-years-old when he attacked a 13-year-old girl and her 20-month-old brother, the younger siblings of one of his friends. After breaking into their home in the middle of the night, he stabbed them repeatedly as they slept, raped and sodomized the girl, forced her to orally copulate him, and ultimately passed out during the attack. He had been drinking heavily that evening and his defense rested on voluntary intoxication to negate specific intent. He was convicted of 15 charges, including various sex offenses, first-degree burglary, and two counts each of attempted murder, torture, and aggravated mayhem. He received a prison sentence of 50-years-to-life under the one-strike law (PC § 667.61), a consecutive 11-year determinate term for one attempted murder (§§ 187, 664), plus a consecutive life term for the other attempted murder.

Defendant argued that the representation he received was so far below the minimum threshold of constitutionally effective assistance of counsel as to amount to no defense at all. Pointing to

dozens of shortcomings—beginning with an incomplete investigation of his mental state, which he says guaranteed his counsel either had no basis for strategic choices she made or simply failed to recognize choices she should have made—he asks for outright reversal with remand for new trial. The court agreed that there were numerous and serious deficiencies in counsel's performance, enough to undermine confidence in the outcome of the trial on most of the specific intent crimes, and therefore reversed eight of the specific-intent counts. The court affirmed the remaining seven charges, including the convictions for burglary and all of the general intent crimes (four sex offenses, and two counts of ADW).

Regarding retrial, the Court recognized that remand presented novel issues under recently-passed Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Prop 57). Defendant argued Prop 57 requires that the case be remanded for a "fitness hearing" in juvenile court, which he contended had "exclusive jurisdiction" over any trial of the offenses charged in this case until and unless it determines that the case should be transferred to adult criminal court, and further, that remand for retrial on any of the counts for which he was convicted requires vacating all the convictions and retrial of all charges. He argued that Prop 57 is retroactive, but that this result is mandated even applying prospectively to any proceedings on remand *after* a partial reversal. The court did not agree that 57 is retroactive, nor did it believe that partial reversal required all convictions vacated.

But, the court agreed that 57 required remand to the juvenile court for a "fitness hearing" and that the outcome of that hearing will determine which department of the Superior Court—adult criminal court, or juvenile court—will handle any retrial on the reversed counts and sentencing.

Finally, defendant claimed that the sentence imposed is the "functional equivalent" of LWOP and therefore violates the Eighth Amendment under *Graham v. Florida* (2010) 560 U.S. 48, and *People v. Caballero* (2012) 55 Cal.4th 262, 268. Since the sentencing choices made on the affirmed convictions—without considering the reversed charges—could produce an indeterminate life sentence with a lengthy minimum term, the Eighth Amendment issue will be relevant to the proceedings on remand whether his case is handled in adult criminal court or stays

in juvenile court. Thus, the court concluded that a sentence requiring defendant to serve *at least* 66 years in prison before becoming eligible for parole, is constitutionally infirm. Since the term exceeds his life expectancy, it is the "functional equivalent" of LWOP and violates the Eighth Amendment under *Graham* and *Caballero*. Exactly where the constitutional line lies below the 66-years-to-life imposed is not clear—although the court noted that guidance will likely be forthcoming in a case now pending before the Cal. Supreme Court.

In the meantime, the Prop 57 "fitness hearing" will rectify constitutional concerns about the length of whatever term of confinement is imposed on defendant for the convictions affirmed, as well as for any other offenses that may be tried on remand. The court concluded that the voters intended to provide a hearing before sentencing in adult court, as well, reasoning that the word "trial" was ambiguous and under certain contexts has been interpreted to include sentencing; the materials provided to voters suggested they'd understand the meaning to encompass all proceedings in a criminal trial court, including sentencing.

***People v. Sup. Court [Lara]* (2017) 9 Cal.App.5th 753 (*review granted*)**, filed March 13, 2017
Fourth District, Riverside County

On March of 2016, petitioner (the People) initiated a prosecution against real party in interest, a minor, by "direct filing" a criminal complaint against him in adult court under the authority of former section 707(d)(2). Preliminary hearing occurred in May, and an Information was thereafter filed in June charging the minor with aggravated kidnapping, forcible sodomy, and forcible oral copulation.

On November 8, 2016, voters passed Proposition 57, thereby eliminating DA ability to directly file charges against a juvenile in adult court and instead authorized the People to file "a motion to transfer the minor from juvenile court to a court of criminal jurisdiction." On November 16th the minor filed a motion requesting a fitness hearing in juvenile court pursuant to Prop. 57 and

the criminal trial court granted the motion on November 29th. The DA thereafter filed a writ petition arguing that Prop. 57 could not be applied "retroactively."

At the outset the court spent time explaining that its decision was more than a "summary denial" of a mandamus petition, thereby publishing a decision creating "a cause and law of the case" due to the exigent nature of the petitions—the DA had filed nearly identical petitions in a two-week span—and the inadequacy of issuing a summary denial. Thus, without oral argument or an issuance of an order to show cause or an alternative writ, the determined that it had "created a cause and the law of the case" and then turned to the merits of the petition.

The Court of Appeal reiterated that a new statute is presumed to operate prospectively absent an express declaration of retrospectivity and disagreed with the DA contention that the law was applied retroactively here. When a law addresses the conduct of trials, the statute is not made retroactive merely because it draws upon facts existing prior to its enactment. That is, "a law governing the conduct of trials is being applied 'prospectively' when it is applied to a trial occurring after the law's effective date, regardless of when the underlying crime was committed." (*Tapia*) Proposition 57 is a law governing trials and therefore controls procedure to be followed in the future.

The People's position fails because they have not identified how asking them to get the juvenile court's permission before proceeding to a final adjudication in adult court attaches new legal consequences to, or increases a party's liability for, an event, transaction or conduct that was completed before the law's effective date [i.e., "retroactive application"]. As a law of procedure, the *Estrada* rule had no application here [a legislative act mitigating punishment for a particular criminal offense is intended to apply to all non-final judgments].

The express purpose of Proposition 57 requires a judge, not a prosecutor to decide whether juveniles should be tried in adult court. A juvenile offender is not "tried in adult court" merely because the People have filed a complaint against him or her there; rather, "brought to trial" refers to the circumstances attendant when a case is called and ready to be tried to conclusion. Thus, here the DA cannot show that the juvenile had participated in a proceeding in adult court

that meets this criteria to say the law is being applied retroactively. In this case, Proposition 57 is being applied prospectively.

The Court of Appeal published the opinion in recognition of the fact that trial courts may need guidance deciding whether and how to apply Proposition 57 to cases that were directly filed in adult court before its passage. The petition is denied.

***In re Kristopher Kirchner* (2017) 2 Cal.5th 1040**, filed April 24, 2017
San Diego County

Then 16-year-old Kirchner and another juvenile robbed a gun store in 1983. They beat the 59-year-old owner with a metal pipe and the injuries he suffered ultimately led to his death. Kirchner was initially charged in juvenile court but was found fit to be tried in adult court. He was convicted of one count of first degree murder with a special circumstance that he committed the murder while engaged in a robbery and burglary. The California Youth Authority conducted an amenability assessment and determined Kirchner's future criminality could be reduced or eliminated if sentenced to CYA. The judge declined to follow the CYA recommendation and sentenced Kirchner to LWOP. Kirchner filed a writ of habeas corpus in October 2014 after the United States Supreme Court decided *Miller v. Alabama* (2012) 567 U.S. 460, which held that mandatory life without parole for juveniles who have committed certain homicide offenses is unconstitutional. The court of appeal denied Kirchner's petition for habeas relief, holding that Penal Code section 1170(d)(2), which allows inmates who were sentenced to life without parole for crimes committed as a juvenile to apply for a parole hearing, provided an adequate remedy to a *Miller* violation. Kirchner appealed.

Penal Code section 1170(d)(2) was enacted after *Graham v. Florida* (2010) 560 U.S. 48 [holding that the Eighth Amendment prohibited juvenile LWOP for juveniles who committed a crime other than homicide], but before *Miller*. Because section 1170(d)(2) was created prior to *Miller*,

it was not designed to remedy the error that *Miller* sought to address. The Court noted that Section 1170(d)(2) assumes a lawful sentence and does not require consideration of all the *Miller* factors. Moreover, the remedy set forth in section 1170(d)(2) is not available to all inmates sentenced to LWOP for crimes they committed as juveniles. Convictions for specified crimes can make a person ineligible for section 1170(d)(2) relief, as well as inability to meet the minimum pleading requirements set forth in the statute. Finally, and most importantly, section 1170(d)(2) does not mandate consideration of the five factors set forth in *Miller*. Consequently, section 1170(d)(2) does not establish an adequate remedy for *Miller* error and it need not be exhausted before a habeas corpus proceeding seeking resentencing under *Miller* may be initiated.

The judgment of the court of appeal is reversed and remanded with instructions to remand the case to the trial court for a resentencing hearing.

***People v. Jason Berg* (2016) 247 Cal.App.4th 418**, review dismissed due to *Kirchner*
Fourth District, San Diego County

The People appeal the trial court order granting Berg's habeas petition requesting resentencing based on *Miller v. Alabama* and *Montgomery v. Louisiana.* In affirming the trial court, the 4th District court of appeal disagreed with *In re Kirchner* and held that Penal Code section 1170(d)(2) is not a sufficient remedy for *Miller* error.

At the age of 17, Berg pled guilty to murdering a store clerk during a robbery and stabbing a different store clerk during a different robbery. He was sentenced to life without the possibility of parole (LWOP). After the decision in *Miller v. Alabama*, Berg filed a habeas petition seeking that his sentence be vacated and that he be resentenced in accordance with the factors set forth in *Miller*. Over DA objection, the trial court granted the habeas petition. This appeal followed.

The People set forth several arguments, including the argument that *Miller* is not retroactive. The People concede, and the 4th District agrees, that *Miller* is retroactive. The People next argue that

the sentencing court did consider Berg's youth when it sentenced him to LWOP. The 4th District notes that the sentencing court did observe that Berg was young and had a terrible childhood but did not apply any of the *Miller* factors, as set forth in *People v. Gutierrez,* when deciding whether to impose LWOP. As such, Berg must be resentenced so that the *Miller/Gutierrez* factors can be considered.

Finally, the People argue that Penal Code section 1170(d)(2) provides an adequate remedy for *Miller* error. The 4th District disagrees. The court beings by noting that section 1170(d)(2) applies only to *some* defendants who were sentenced to LWOP. Those who tortured the victim or whose victim was a public safety official are not eligible for relief under section 1170(d)(2). There are additional "stringent requirements" in section 1170(d)(2) that further narrow the population entitled to its relief. Not only does section 1170(d)(2) have a limited application but it does not promise parole even for those to whom it applies. *Montgomery* stated that states could remedy a *Miller* violation by extending parole eligibility to defendants serving LWOP sentences – it did not say that "states could remedy *Miller* error by permitting … a statutory procedure that *might* lead to parole eligibility." In this sense, section 1170(d)(2) is inconsistent with Montgomery.

Section 1170(d)(2) is also inconsistent with *People v. Gutierrez* and *People v. Lozano*. Both of these cases held that section 1170(d)(2) did not provide an adequate remedy for those sentenced to LWOP as a juvenile.

The 4th District also points out that section 1170(d)(2) is not only inconsistent with U.S. Supreme Court and California Supreme and appellate court case law, but also the Constitution. "To conclude that a statutory procedure for which the defendant is expressly disqualified affords an adequate remedy for an Eighth Amendment violation would violate basic principles of due process." And if *Kirchner* intended to limit habeas remedies only for those who are not disqualified from filing section 1170(d)(2) petitions, that raises equal protection concerns.

Not surprisingly, the 4th District states that it declines to follow *Kirchner* and holds, for all the reasons stated above, that 1170(d)(2) does not provide an adequate remedy for a defendant seeking collateral relief for *Miller* error.

***People v. Adam Cornejo* (2016) 3 Cal.App.5th 36**, filed September 6, 2016
Third District, Sacramento County

The defendants, Isaac and Adam, and their adult co-defendant were charged with and convicted of murdering a former gang-member and attempting to murder the other passengers in the victim's car. The defendants were sentenced to 120-years-to-life and, on appeal, contend that their sentence is tantamount to life without parole and constitutes cruel and unusual punishment. The court of appeal initially issued an opinion remanding the matter for resentencing but granted rehearing in light of the *Montgomery* decision. In brief, Adam and Isaac were 17 and 16 when they committed the crime at issue. Isaac also suffers from a developmental disability. The court of appeal found that the sentences at issue constitute constructive LWOP and thus, the question is whether the trial court considered the *Miller* factors when it sentenced the two. The trial court record does not indicate whether the trial court considered the *Miller* factors.

During the first argument on the defendant's request for resentencing, the prosecutor argued that Penal Code section 3051, which would allow these defendants to seek parole after during their 25th year of incarceration, rendered resentencing unnecessary. The court of appeal rejected, and continues to reject, that argument. The problem, the court notes, is that Penal Code 3051 is no substitute for the consideration of the individual characteristics of the defendant at sentencing. Under *Miller* the sentencing court was required to consider all the mitigating circumstances of youth before imposing the functional equivalent of LWOP. The court states that "regardless of whether the new statutory scheme enacted by SB 260 [Penal Code 3051] may eventually convert an LWOP sentence to one with possibility of parole, the sentencing court must consider the factors of youth and maturity *when selecting the initial punishment.*"

The dissent argued that section 3051 converted LWOP or functional LWOP into a sentence with the possibility for parole; thus, no need to consider youth-factors before sentencing. The majority countered that section 3051 did not change the sentence to 25-years-to-life; but instead only provided an opportunity for a parole hearing during the 25th year of incarceration. Moreover, the "statutory promise of future correction of a presently unconstitutional sentence does not alleviate the need to remand for resentencing that comports with the 8th amendment." The recent holding in *Montgomery* does not alter this conclusion.

The court of appeal concluded that the substantive rule that applies retroactively to juveniles sentenced to LWOP is that "'life without parole is an excessive sentence for children whose crimes reflect transient immaturity' as opposed to 'irreparable corruption.'" Individualized sentencing at the outset is now required but cannot be applied to those who have already been sentenced to LWOP. That is why a state may remedy the violation by allowing people serving LWOP sentences to be considered for parole. While Penal Code section 3051 gives an opportunity for parole, that opportunity 25 years after imposition of the sentence is not sufficient. Here, as the two were sentenced after *Miller*, the record established that they were afforded sufficient opportunity to make a record regarding their characteristics and circumstances.

***In re Elijah C.* (2016) 248 Cal.App.4th 958**, filed June 30, 2016, modified July 27, 2016
Second District, Los Angeles County

Minor stole an iPod from his friend and instead of filing a petition, the DA gave him an opportunity to participate in their diversion program for first-time, non-violent juvenile offenders. To participate, minor and parents had to sign a contract that contained a provision stating that minor agreed to waive the one year statute of limitations and gave up his right to object on those grounds in a future prosecution. Minor and his parents were not represented by an attorney when they signed the contract.

Elijah failed to comply with the requirements of the program and the DA filed a petition, but more than a year after minor took the iPod. Minor filed a demurrer, which was denied, and he was thereafter made a ward. Minor appealed.

The court of appeal held that the waiver was invalid because minor was not represented by counsel at the time he waived his rights. Until 1996, a defendant could not waive the statute of limitations but in *Cowan v. Superior Court* (1996) 14 Cal.4th 367, the Court held that defendants may expressly waive the statute of limitations for their own benefit as long as the waiver is knowing, intelligent, and voluntary; it is made for the defendant's benefit and after consultation with counsel; and the defendant's waiver does not handicap his defense or contravene public policy.

The attorney general argued that minor's waiver was valid even though he was not represented by counsel because it was knowing and voluntary, and because no petition had been filed so minor did not have a right to counsel. The appellate court disagreed, noting that minor was only 14 at the time he agreed to the waiver and "children are more vulnerable than adults." As to the sixth amendment argument, the court pointed out that counsel is required after charges have been filed because that represents a "critical stage of the prosecution" that has "significant consequences for the accused." Waiving the statute of limitations is also a critical stage of the prosecution that has significant consequences. The diversion program—while well-intentioned—had the effect of short circuiting constitutional protections to which the minor was entitled.

The juvenile court order is reversed and the trial court is ordered to sustain the demurrer.