Office of the State Public Defender

Resentencing under People v. Heard

Juveniles serving the functional equivalent of LWOP

People convicted of crimes that were committed when they were under 18 and who were sentenced to serve long sentences that are the equivalent to life without parole can ask to be resentenced. This is a change in the law. To be eligible for resentencing under Penal Code section 1170(d)(1), a person must have been incarcerated for at least 15 years.

The change in the law comes from a case named People v. Heard, and a more recent case named People v. Sorto. These cases are described in the Frequently Asked Questions section and copies of the cases are included with this packet.

WHO CAN USE THE NEW LAW?

To be able to use Penal Code section 1170(d)(1), a person must:

(1) Have been convicted of a crime that was committed before they turned 18.
(2) Have received a long sentence that is equivalent to life without parole, which means that the person has been sentenced to such a long sentence that their sentence is longer than they will likely live.
(3) Have been incarcerated for at least 15 years.
(4) Provide a statement telling the judge about their remorse and rehabilitation.
(5) State that one of the following is true (more than one may apply):

- They were convicted of felony murder or aiding and abetting murder.
- Besides the case they are asking the court to resentence, they do not have a juvenile adjudication for assault or other felony crimes with a significant potential for harm to victims.
- They committed the offense with at least one adult co-defendant.
- They have shown potential for rehabilitation, like taking counseling, education, or vocational programs.

WHO CANNOT USE THE NEW LAW?

The new law does not apply if any of these are true:

- It was pled and proven that the victim was tortured.
- The victim was a law enforcement officer.
- The victim was a firefighter.

WHAT CAN THE JUDGE DO IF THE SENTENCE IS RECALLED?

If the sentence is recalled, the judge can:

- Send the case to juvenile court. Once in juvenile court:

  If the person was 13, 14, or 15 years old when the offense was committed, there would no longer be adult court jurisdiction for the case because of changes in the law made by Senate Bill 1391. Information about Senate Bill 1391 is included in the Frequently Asked Questions section. The person will have to receive a juvenile court disposition and cannot be sent back to adult court.

  If the person was between the ages of 16-17 when the offense was committed, the juvenile court could then hold a transfer hearing (previously called a "fitness hearing") to decide whether to send the person back to adult court.

- Lower the sentence.
- Leave the sentence the same.

The judge is not allowed to make the sentence longer.

WHAT HAPPENS IF THE JUDGE DOES NOT RECALL THE SENTENCE?

If the judge decides to not recall the sentence the first time a petition is filed, you have a right to appeal that decision. To appeal a decision, a document called a Notice of Appeal must be filed within sixty days of the judge's denial. A Notice of Appeal form is included in this packet. The Court of Appeal will then decide if the judge made an error by not recalling the sentence.

In addition to appealing a judge's decision denying the recall of the sentence, individuals can also file another petition after more time is served in custody.

A person can:

- File a second petition after they have been incarcerated for at least 20 years.
- File a third petition after they have been incarcerated for at least 24 years.

HOW DO I GET STARTED?

You should try to talk to an attorney for assistance. Before you or your family pay money for an attorney, you should contact the public defender's office or attorney who helped you with your original case. When you contact the attorney, be sure to tell them how old you were when you were convicted and what sentence you received. A list of contacts is included in this packet.

To ask the court to recall your sentence, you or your attorney will need to file a petition. A petition is a document you send to the court asking for something. A sample petition you can use to try and get into court is attached. The form allows you to ask for a lawyer to represent you. You do not have to use this form.

Included in this packet is an instruction sheet to help you fill out the petition. If you want to use the form, you will need to check the boxes and write in information about your case. Once you have filled out and signed the form, you need to:

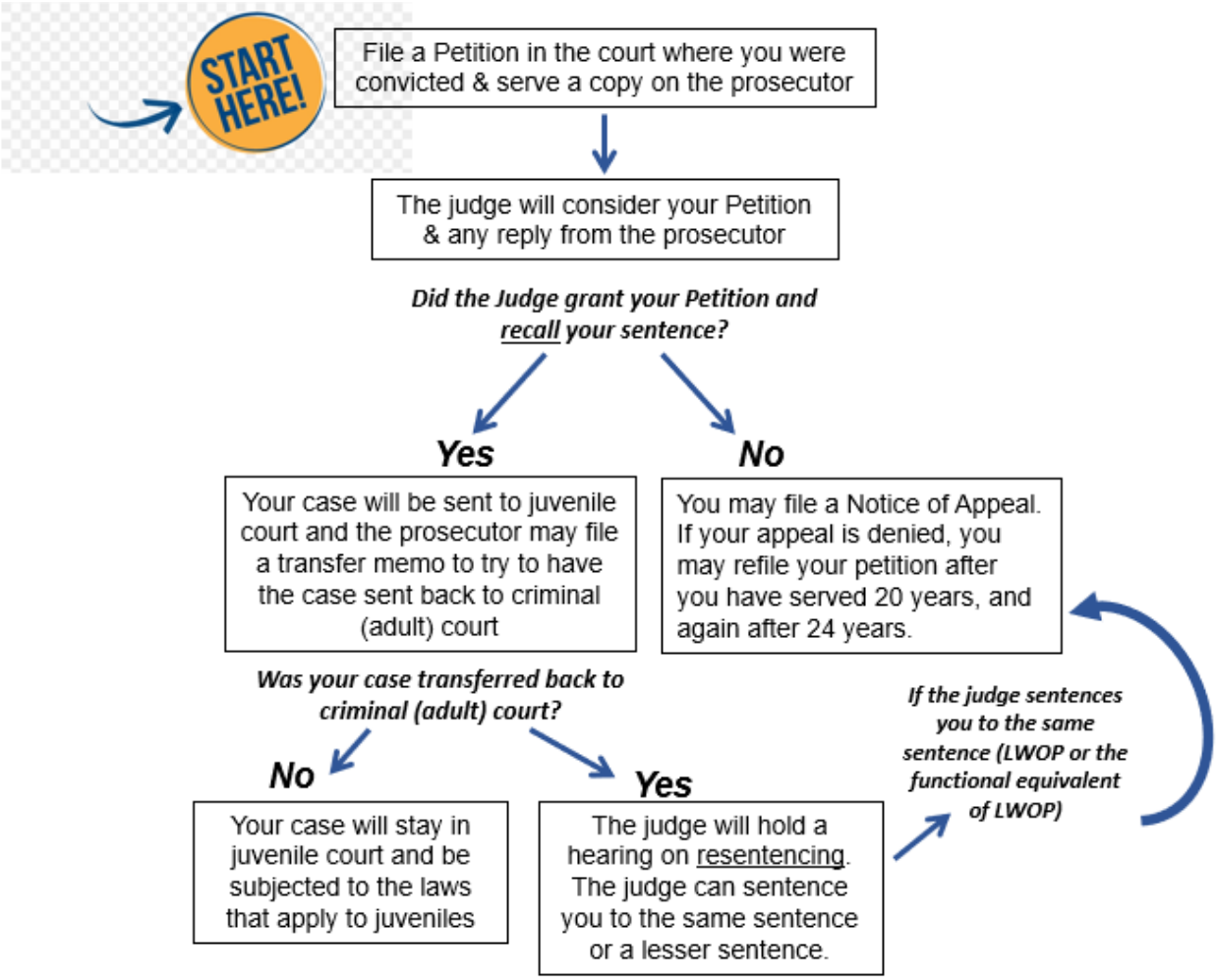
(1) send the original completed form to the court that sentenced you.
(2) send a copy to the district attorney.
(3) send a copy to the attorney or the public defender who represented you.
(4) keep a copy for your records.

Once the Court has accepted your petition, the prosecutor will be given 60 days to file a reply. If the prosecutor needs more time, they can request the court give them additional time to respond if they have good cause. However, the prosecutor is not required to file a response.

WHAT HAPPENS IF I FILED A PETITION AND NEVER HEARD BACK?

If you filed a petition and never heard anything back from the court, be sure to call the criminal clerk in the county where you were convicted to find out what the result was and when the order was made by the judge. This is important to ensure that you are able to file the Notice of Appeal within sixty days of the denial.

Sometimes it is helpful to see a flow chart of the process involved:



CAUTION FOR READERS

The information included in this packet is up to date as of October 2024. However, changes in the law, such as new legislation or recent court decisions, can affect the relief that is available. Please be aware that the law may have changed since this packet was prepared.

FREQUENTLY ASKED QUESTIONS

The following information is not legal advice specific to your case. It is your responsibility to do legal research or contact a lawyer to determine if you are eligible to apply for relief.

Q: What happened in the cases of People v. Heard and People v. Sorto?

A: A person named Frank Heard committed some offenses when he was 15 and 16 years old. The trial court sentenced him to 23 years plus 80 years to life for those offenses. He did not receive life without the possibility of parole, but he argued that it was the "functional equivalent" to life without the possibility of parole because the sentence was so long he would die in prison.

Mr. Heard filed a petition to be resentenced under Penal Code section 1170(d)(1). That Penal Code section allows juveniles who were sentenced to life without the possibility of parole to ask the court to resentence them after they have been incarcerated a minimum of 15 years. The trial court denied Mr. Heard's request because he had not been sentenced to life without the possibility of parole.

Mr. Heard appealed his case. The Court of Appeal decided that if a juvenile was sentenced to the functional equivalent of life without parole they should be able to use Penal Code section 1170(d)(1). The Court of Appeal said that to not allow someone with a lengthy sentence that is equivalent to life without the possibility of parole to use Penal Code section 1170(d)(1) would violate the equal protection of laws guaranteed under the Constitution.

The Court of Appeal said that Mr. Heard was eligible to use Penal Code section 1170(d)(1) even if he was also eligible for youthful parole consideration under Penal Code section 3051.

More recently in August 2024, another Court of Appeal affirmed (agreed with) the reasoning of the Heard court in a case named *People v. Sorto*. Because both those cases agree that individuals serving the functional equivalent of life without parole must be eligible for relief under Penal Code section 1170(d)(1), these decisions are binding on all trial courts in California.

The case citations are: *People v. Heard* (2022) 83 Cal.App.5th 608 and *People v. Sorto* (2024) 104 Cal.App.5th 435.

Q: I think I am eligible. How can this law help me?

A: The new law can help you in a few ways. If you were under the age of 16 when the crime was committed, the judge could transfer your case from adult court back to juvenile court. If you were between the ages of 16-17 when your case was direct filed or transferred to adult court, you could get the benefit of a new transfer hearing. If you were between the ages of 13-15 when the offense was committed, your case must stay in juvenile court where you will receive a juvenile disposition (juvenile sentence).

Q: How long does my sentence need to be to qualify under the new law?

A: The courts have not clearly answered how long a sentence must be to qualify. To be able to use the new law, your sentence must be the functional equivalent to life without parole. It will be up to the judge to decide if your sentence is long enough to qualify.

To give you an idea, the California Supreme Court decided that a sentence of 50 years to life for crimes that were committed when a person was under 18 years old is the functional equivalent to life without parole. It is possible a shorter sentence could also be eligible. If your sentence is over 40 years to life, is a very lengthy determinate sentence, or if you are serving a lengthy sentence and have a health concern that will likely shorten your lifespan, you should try to speak with the attorney who represented you or a public defender.

Q: What must a judge consider during the resentencing hearing?

A: If your case does not stay in juvenile court and instead is sent back to adult court after a new juvenile transfer hearing, the judge in adult court will decide whether to resentence you. In deciding whether to resentence someone, the judge must consider certain factors. Not all of these factors will apply to your case. But, if the factors exist in your case, the judge is required to consider:

- If the person was convicted pursuant to felony murder or aiding and abetting murder laws.
- Whether the person has any juvenile felony adjudications for assault or other crimes with a significant potential for harm to victims.
- Whether the person committed the offense with at least one adult co- defendant.
- If, prior to the offense, the person had insufficient adult support or supervision.
- If, prior to the offense, the person suffered from psychological or physical trauma or significant stress.
- Whether the person has shown the potential for rehabilitation. This includes

participating in rehabilitative, educational, or vocational programs.
- Whether the person has used self-study for improvement.
- Whether the person is remorseful.
- If the person maintained family ties or connects with others through letter writing, calls, or visits.
- Whether the person eliminated contacts with people outside of prison who are involved in crime.
- Whether there have been disciplinary actions in the last 5 years for violent actions where the person was determined to be the aggressor.
- If the person has experienced psychological, physical or childhood trauma, including any abuse, neglect, exploitation, or sexual violence.
- If the person was the victim of intimate partner battery or human trafficking before or at the time of the offense.

Q: Is this new law different from a youthful parole hearing?

A: Yes. Penal Code section 3051 provides for youthful parole hearings. The rules and rights for a youthful parole hearing are different from the law that was changed by the case of People v. Heard and Penal Code section 1170(d)(1). A person could potentially be eligible for relief under both Penal Code section 1170(d)(1) and Penal Code section 3051.

Q: Are behavioral credits included in determining if I have been in custody long enough to file a petition?

A: Behavioral credits are <u>not</u> included in calculating time for Penal Code section 1170(d)(1). To be able to use this new law, you must have been incarcerated for at least 15 years before you file a petition.

Q: I am also eligible for relief under Senate Bill 1437 or Senate Bill 775 (felony murder resentencing). Can I file a petition under Penal Code section 1170(d)(1) too?

A: <u>YOU NEED TO BE EXTREMELY CAREFUL IF YOU ARE ELIGIBLE UNDER BOTH LAWS. YOU SHOULD TRY TO TALK WITH AN ATTORNEY BEFORE FILING A PETITION UNDER PENAL CODE SECTION 1170(d)(1).</u>

Senate Bill 1437 and Senate Bill 775 established a new law that allows resentencing for some people serving terms for murder, attempted murder, or manslaughter. Resentencing is allowed if the conviction was based on the felony murder rule, the natural and probable consequences doctrine or other theory where malice was assigned to a person based solely on that person's participation in a crime. The new law is contained in Penal Code section 1172.6.

Filing a petition under Penal Code section 1170(d)(1) is completely different from filing for relief under Penal Code section 1172.6. Some people will be eligible under both laws. If you have an attorney representing you on a Penal Code section 1172.6 petition, you should talk to them before you file a petition under Penal Code section 1170(d)(1). You do not want to write anything on your Penal Code section 1170(d)(1) petition that could cause problems for your Penal Code section 1172.6 petition. Specifically, what you say in the Penal Code section 1170(d) petition about how you are remorseful could cause problems for your other resentencing petitions. That is why you should talk to an attorney before filing anything.

You should be aware that the statement about remorse that you are required to include in your Penal Code section 1170(d)(1) petition will become part of the record. Both the judge and the prosecutor will have a copy of your statement. If you say something different in the future, like at a parole hearing or in another petition, a judge, a prosecutor, or a parole board commissioner might think you are not being truthful. This could be a reason to deny you relief in some other petition or make you seem unsuitable for parole and prevent or delay your release.

You are strongly encouraged to talk with an attorney before you file a petition. A list with contact information for different offices is included with this packet.

Q: What is Senate Bill 1391?

A: Senate Bill 1391 is a law that was passed in 2019. It changed Welfare and Institutions Code section 707. With the change in the law, prosecutors cannot transfer cases to adult court for people who were 14 or 15 years old at the time a crime was committed. Now, a person must be at least 16 years old to be transferred to adult court.

Q: When should I file the petition for recall of sentence?

A: You can file your petition to recall your sentence after you have been incarcerated for at least 15 years.

There is no deadline to file a petition for recall of sentence.

Q: What documents or information would be helpful to collect?

A: Documents could help support showing the judge your rehabilitation or potential for rehabilitation. You may want to collect documents that show:

- Classes you have taken.
- Any self-study you have completed for improvement.
- Any job training you received.
- Any self-help groups, like alcoholics anonymous or narcotics anonymous, you have participated in.
- Any jobs you have had while in custody.
- Any positive write ups you have received.
- Any religious programs you have participated in.
- Any other documents that show you have the potential for rehabilitation.

Q: I took a deal. Am I eligible if I did not go to trial?

A: Yes. It does not matter if you were convicted after a trial or whether you were convicted through a plea bargain. If the judge determines that you are eligible, the change in the law will apply.

Q: What should I do if the court rejects my petition?

A: If you try to file a petition with the court that is rejected, you should resubmit another petition. Sometimes the court that rejected the petition will let you know what they thought the problem was with the petition. You should fix that part of your petition. If you cannot determine on your own what the problem was, you should try to talk to an attorney.

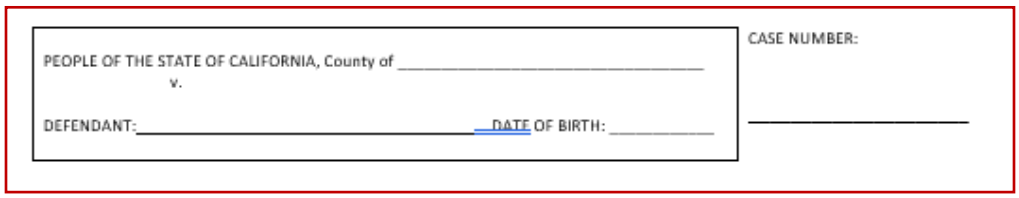
Q: Can I appeal the judge's decision?

A: Yes. If the judge denies your petition to recall your sentence, you can appeal that decision. If the judge grants your petition to recall your sentence, but then resentences you to the functional equivalent of life without parole (meaning your sentence does not change), you can also appeal that decision. To appeal, you must file a notice of appeal within 60 days of the judge's decision.

Once you have an attorney appointed for you, they should file a notice of appeal for you. However, if you receive a form denial (a denial without any hearing) on your petition, make sure to file a notice of appeal. A sample notice of appeal is included in this packet.

How to Fill Out the Sample Petition for Recall & Resentence (Pen. Code §1170(d)(1))

The **top box** on the Petition is for your case information. You must add the county where you were sentenced, your name, date of birth, and your court case number. Providing this information makes sure your petition gets to the right judge and that the court can pull your file.

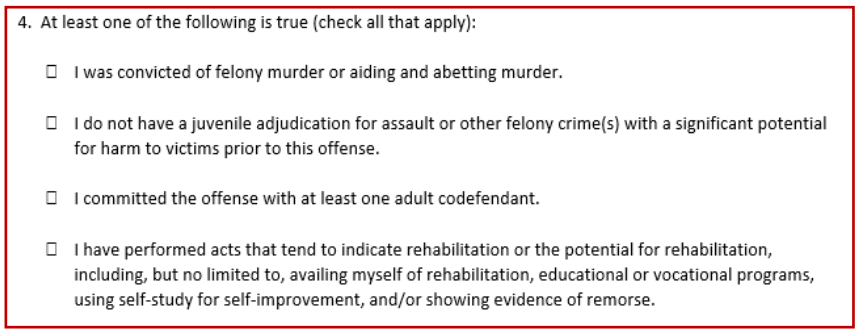

PEOPLE OF THE STATE OF CALIFORNIA, County of _____
v.
DEFENDANT:_____ DATE OF BIRTH: _____
CASE NUMBER:
_____

Line 1 requires your age at the time the crime was committed. You must have been juvenile (younger than 18 years old) to qualify for Pen. Code §1170(d)(1) resentencing. Also check the box next to line 1.

Line 2 requires you to write out your sentence (the number of years to which you were sentenced). Also check the box next to line 2.

Line 3 only requires you to check the box next to line 3. You must have been incarcerated for at least 15 years to qualify for Pen. Code §1170(d)(1) resentencing.

Line 4 begins a list of options that might apply to you and your case. You must check at least 1 of the boxes in this list to qualify for Pen. Code §1170(d)(1) resentencing. For some people, more than one of the options in this list will apply – check the box next to every option that applies to you. It is okay if only one applies.


4. At least one of the following is true (check all that apply):

☐ I was convicted of felony murder or aiding and abetting murder.

☐ I do not have a juvenile adjudication for assault or other felony crime(s) with a significant potential for harm to victims prior to this offense.

☐ I committed the offense with at least one adult codefendant.

☐ I have performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but no limited to, availing myself of rehabilitation, educational or vocational programs, using self-study for self-improvement, and/or showing evidence of remorse.

Line 5 only requires you check the box next to line 5. You can only qualify for Pen. Code §1170(d)(1) resentencing if you were not convicted of torturing the victim in your case, and if the victim was not a member of law enforcement or a firefighter.

Line 6 requires you to check the box next to line 6 and to write out a statement, on separate paper, describing the work you have done towards rehabilitation. There is no length requirement for your statement.

WARNING!!

Do not write about **remorse** until you have spoken with a lawyer. This petition asks the court to appoint an attorney to represent you, and that is the attorney you should speak with about any statement on remorse.

****

In this initial petition, before you have an attorney, you should only write a statement about work you have done towards **rehabilitation**. You may use the two pages provided with this form, or, if you have more to write, you may use as many additional pieces of paper as necessary.

Writing about your **rehabilitation** is straightforward. Consider including:[1]

- Programs completed, including participation in self-help groups or training
- Educational progress, courses taken, degrees earned (including vocational)
- Positive work record, admission to honor dorms, or other accomplishments
- Attendance at church or other religious/spiritual activities
- Participation in charity events or efforts
- Positive chronos from COs or supervisors
- If you are barred from programming, share ways in which you managed to educate yourself, become more self-aware, and any coping skills you've developed to overcome challenges in prison
- Any factors that will ensure against recidivism, such as your parole plan, access to family and community support once released, job prospects or plans for further education

Line 7 only requires you to check the box next to line 7. If you or your family has retained a paid lawyer to litigate your Pen. Code §1170(d)(1) petition, do not check this box. Otherwise, check the box to let the court know you want an attorney appointed to represent you. As of the writing of this reference sheet, it is unclear whether a judge will appoint at attorney immediately upon receiving your petition or only if the recall is granted and your case is scheduled for a resentencing hearing.

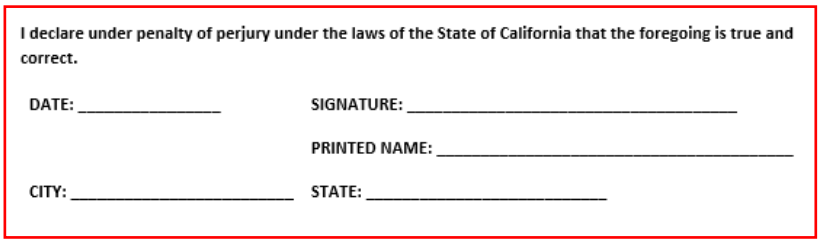
[1] This list is from the Commutation Application Guide created by California Coalition for Women Prisoners, 4400 Market Street, Oakland, CA 94608, info@womenprisoners.org.

Line 8 is the Proof of Service. You must fill out the information for the District Attorney in the county where you were convicted, and you must actually mail a copy of your petition to the same District Attorney. Also check the box next to "Office of the District Attorney".

It is also a good idea to mail a copy of your petition to your trial lawyer (the lawyer that represented you in this case at the superior court level). If you were represented by a public defender attorney, fill in the address for the public defender in the county where you were convicted. Also check the box next to "Office of the Public Defender." A list of contact information for Public Defender offices in the state of California is included.

If you were represented by someone other than a public defender (other indigent defense counsel or a privately retained lawyer) fill in the information beginning with [Trial Attorney Name]. Also check the box next to [Trial Attorney Name].

Finally, you need to sign and date the petition at the bottom of the 2nd page. This signature confirms that you have filled out this Petition truthfully and correctly. Signing here also means you are subject to prosecution for perjury if you intentionally included false information. You also need to print your full name and print the name of the city and state where you signed this petition.


I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATE: _____ SIGNATURE: _____

PRINTED NAME: _____

CITY: _____ STATE: _____

PETITION FOR RECALL AND RESENTENCE

PENAL CODE §1170(D)(1), *PEOPLE V. HEARD* (2022) 85 CAL.APP.5TH 608 and
PEOPLE v. SORTO (2024) 104 CAL.APP.5TH 435

PEOPLE OF THE STATE OF CALIFORNIA, Countyof _____
v.

DEFENDANT:_____DATE OF BIRTH: _____

CASE NUMBER:

_____

Pursuant to *People v. Sorto* (2024) 104 Cal.App.5th 435 and *People v. Heard* (2022) 85 Cal.App.5th 608, I request that my sentence be recalled and that a new sentencing hearing be set.

☐ 1. I was_____years old at the time of my crime.

☐ 2. I was sentenced to_____.

☐ 3. I have been incarcerated for at least 15 years.

4. At least one of the following is true (check all that apply):

- ☐ I was convicted of felony murder or aiding and abetting murder.
- ☐ I do not have a juvenile adjudication for assault or other felony crime(s) with a significant potential for harm to victims prior to this offense.
- ☐ I committed the offense with at least one adult codefendant.
- ☐ I have performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but no limited to, availing myself of rehabilitation, educational or vocational programs, using self-study for self-improvement, and/or showing evidence of remorse.

☐ 5. I was not convicted of torturing the victim (Pen. Code §206), and the victim was not a public safety official, including local, state or federal law enforcement personnel or firefighter.

☐ 6. I have remorse and have worked towards rehabilitation. I have included an initial statement on separate paper. I will supplement this statement, if necessary, upon the advice of counsel once this court appoints an attorney to represent me.

☐ 7. I request that the court appoint an attorney to represent me for this petition. I am indigent.

☐ 8. I have mailed a copy of this Petition to the following:

☐ **Office of the District Attorney**

County of _____

[Street Address]

[City, State, Zip]

☐ **Office of the Public Defender**

County of _____

[Street Address]

[City, State, Zip]

OR

☐ [Trial Attorney Name]

[Firm Name]

[Street Address]

[City, State, Zip]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATE: _____ **SIGNATURE:** _____

PRINTED NAME: _____

CITY: _____ **STATE:** _____

Statement

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: CA ZIP CODE: TELEPHONE NO.: (___)-___-____ FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY*
SUPERIOR COURT OF CALIFORNIA, COUNTY OF	
PEOPLE OF THE STATE OF CALIFORNIA VS. Defendant: Date of birth: _____ Cal. Dept. of Corrections and Rehabilitation No. (if any): _____	
NOTICE OF APPEAL—FELONY (DEFENDANT) **(Pen. Code, §§ 1237, 1237.5, 1538.5(m); Cal. Rules of Court, rule 8.304)**	CASE NUMBER:

NOTICE

- **You must file this form in the SUPERIOR COURT WITHIN 60 DAYS after the court rendered the judgment or made the order you are appealing.**
- **IMPORTANT:** If your appeal challenges the validity of a guilty plea, a no-contest plea, or an admission of a probation violation, you must also complete the Request for Certificate of Probable Cause on page 2 of this form. (Pen. Code, § 1237.5.)

1. Defendant appeals from a judgment rendered or an order made by the superior court.
   NAME of defendant:
   DATE of the order or judgment:

2. Complete either item a. or item b. Do not complete both.

a. If this appeal is after entry of a plea of guilty or no contest or an admission of a probation violation, check all that apply:

(1) ☐ This appeal is based on the sentence or other matters occurring after the plea that do not affect the validity of the plea. (Cal. Rules of Court, rule 8.304(b).)

(2) ☐ This appeal is based on the denial of a motion to suppress evidence under Penal Code section 1538.5.

(3) ☐ This appeal challenges the validity of the plea or admission. *(You must complete the Request for Certificate of Probable Cause on page 2 of this form and submit it to the court for its signature.)*

(4) ☐ Other basis for this appeal *(you must complete the Request for Certificate of Probable Cause on page 2 of this form and submit it to the court for its signature) (specify):*

b. For all other appeals, check one:

(1) ☐ This appeal is after a jury or court trial. (Pen. Code, § 1237(a).)

(2) ☐ This appeal is after a contested violation of probation. (Pen. Code, § 1237(b).)

(3) ☒ Other *(specify)*: Denial of *Heard* resentencing petition is an order made after judgment affecting substantial rights and is appealable under PC section 1237(b) and *Teal v. Superior Court* (2014) 60 Cal.4th 595, 597.

3. ☒ Defendant requests that the court appoint an attorney for this appeal. Defendant ☒ was ☐ was not represented by an appointed attorney in the superior court.

4. Defendant's mailing address is: ☐ same as in attorney box above.
   ☐ as follows:

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF DEFENDANT OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
CR-120 [Rev. January 1, 2017]

NOTICE OF APPEAL—FELONY (DEFENDANT)
(Criminal)

Penal Code, §§ 1237, 1538.5(m);
Cal. Rules of Court, rule 8.304
www.courts.ca.gov

PEOPLE OF THE STATE OF CALIFORNIA VS. Defendant:	CASE NUMBER:

REQUEST FOR CERTIFICATE OF PROBABLE CAUSE

I request a certificate of probable cause. The reasonable constitutional, jurisdictional, or other grounds going to the legality of the guilty plea, no-contest plea, or probation violation admission proceeding are *(specify):*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF DEFENDANT OR ATTORNEY)

COURT ORDER

This Request for Certificate of Probable Cause is *(check one):* ☐ granted ☐ denied.

Date:

JUDGE

Do NOT send these documents to the court. ONLY send them to your attorney.
Always send COPIES and KEEP your originals.

QUICK GUIDE:
DOCUMENTS TO COLLECT AND COPY FOR YOUR ATTORNEY

Documents Establishing Any *Heard* Eligibility Criteria:

**** Attorneys are experiencing lots of delay trying to get records. If you have any of the following records, providing them to your attorney may speed up the process.*

- ☐ Abstract of Judgment (CDCR)
- ☐ Appellate Record: Clerk's Transcripts (CT), Reporter's Transcript (RT), exhibits, briefs, opinion (Appellate attorney/court)
- ☐ Jury instructions used in your trial (should be in CT & RT)
- ☐ Charging Document (Complaint/Information – CDCR should have copy)
- ☐ Documents related to your juvenile record (see detailed list)
- ☐ Probation's Sentencing Recommendation (CDCR)[1]

Education:

- ☐ Certificates from any classes
- ☐ College courses (also known as "educational upgrades")
- ☐ Any self-study courses
- ☐ Any degrees completed
- ☐ List of books, audiobooks, or podcasts that you have enjoyed
- ☐ Book reports you have written
- ☐ Childhood education records (send requests to county education department and particular schools and/or see what loved ones might still have – Individual Education Plans, report cards, old homework assignments)

Job skills:

- ☐ Job training you have received
- ☐ Any jobs you have performed
- ☐ Letters from potential employers (job offer letters)
- ☐ Resume

Medical:

- ☐ Childhood hospital records (from birth until incarceration)
- ☐ Childhood pediatrician records (sometimes your doctor you saw regularly would not be part of a larger hospital)

Personal improvement:

- ☐ Any participation in self-help groups (like A/A or N/A)
- ☐ Anger management counseling
- ☐ Victim awareness programs

[1] These are often WRONG in many ways since they are based on police reports, etc., but they do tend to have a lot of information that may be helpful to you.

- ☐ Any religious programs that you participated in
- ☐ Artwork (poems, drawings or other artwork)
- ☐ Participation in community fundraisers
- ☐ Progress towards paying victim restitution
- ☐ Any positive chronos received (also known as "laudatory chronos")
- ☐ Letters of support from Correctional Officers, wardens and free staff
- ☐ Mentoring roles

Community ties:

- ☐ Support letters from:
  - Family or friends
  - Community-based organizations
  - AA/NA sponsors or support group leaders
  - Currently or formerly incarcerated peers
- ☐ Copies of photographs
  - Showing loved ones that are outside
  - Showing loved ones visiting or supporting you inside
  - Showing events like graduations or other pro-social activities

Plans for release:

Re-entry plan: written description of your outside support network. Include information about:

- Where you will live
- Your job plans
- Support from family and/or friends
- Your plans to obtain valid identification
- Your eligibility for public benefits (MediCal, SSI/SSDI, etc.)
- Plans for mental health or substance abuse counseling.

Try to have Plan A, B, and C – sometimes things don't work out and the court will want to know you have thought through other options.

Relapse prevention plan: written plan (including back-up plans) for what you will do and who you will turn to when you are feeling triggered. This could include a description of your coping skills, plans to participate in counseling, AA/NA or faith communities, and a snapshot of your support network.

How to access to records:

CDCR Records: You can review and make copies of your own CDCR records. This is called an "*Olsen* review" and a request for an "*Olsen* review" of your C-File can be made to your assigned Correctional Counselor (CC). This right to your records comes from section 13030.16 of CDCR's Operations Manual and the case of *Olson v. Pope* (1974) 37 Cal.App.3d 783.

Court Records: If you had an appellate attorney, ask for a copy of the entire record on appeal, all filed briefs, and the appellate court's opinion.

If you cannot contact your appellate attorney or did not have one, ask the trial court. Be aware you may be expected to pay the costs of copies, so you may want to narrow down the documents you are requesting.

Do NOT send these documents to the court. ONLY send them to your attorney.
Always send COPIES and KEEP your originals.

DETAILED GUIDE:
DOCUMENTS TO COLLECT AND COPY FOR YOUR ATTORNEY

Documents Showing *Heard* Eligibility:

**** Attorneys are experiencing long delays trying to get records. If you have or can find any of these listed records, it may be helpful to send copies to your attorney.*

(d)(1)(A) The Basics: Under 18, Minimum Sentence of 40+ years, and 15 Years of Incarceration

- ☐ **Abstract of Judgment (CDCR)**
  - This should include your DOB, the offense date, convictions, sentences (including if they are run concurrently or consecutively), and a calculation of pre-sentence credits that you can then use to calculate how long you have been incarcerated.
  - CDCR should have a copy of this in your file!

(d)(1)(B) Exclusionary Factors: pled and proven torture OR victim was a public safety official/law enforcement/firefighter/etc.

- ☐ **Abstract of Judgment (CDCR)**
  - If torture was pled and proven, it should be documented somewhere. You'll want to look up the specific elements of each crime if you are unsure. You'll also want to check any special circumstances or enhancements that were found true.

- ☐ **Charging Document (CDCR)**
  - A copy of the last charging document filed in court before a verdict was returned should be in your CDCR file (possible names: Information, Amended Information, Second/Third/etc. Amended, Consolidated Information.)

- ☐ **Verdict Forms (CDCR)**

- ☐ **Probation's Sentencing Recommendation (CDCR)**
  - In many cases, a probation officer submits a sentencing report that is filed with the court. This will often include a summary of the police reports in your case, which would often note whether the victim was law enforcement, etc.
  - CDCR should have a copy in your file **IF** one was filed with the court. If CDCR doesn't have it or will not let you make a copy, you can ask the court.

- ☐ **Appellate Opinion (Appellate Attorney)**
  - If you appealed your conviction, the appellate opinion will often have a version of facts. This may be helpful to show the exclusionary factors do not apply to you.
  - You can try to look this up in the law library or you can write your appellate attorney asking for a copy. If you ask your appellate attorney, go ahead and ask for *the entire record on appeal, all briefing, and appellate opinion*.

- ☐ **Transcripts / Jury Instructions (Appellate Attorney/Court)**

Do NOT send these documents to the court. ONLY send them to your attorney.
Always send COPIES and KEEP your originals.

(d)(2) ELIGIBILITY CRITERIA: ONLY NEED ONE OF THESE FOUR

(d)(2)(A) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law.

- ☐ **Abstract of Judgment (CDCR)**
- ☐ **Probation's Sentencing Recommendation (CDCR/Appellate Attorney)**
- ☐ **Jury Instructions (Appellate Attorney / Trial or Appellate Court)**
  - These would be in both the Reporter's Transcript (RT) from when the judge read them out loud to the jury **and** in the Clerk's Transcript (CT).

(d)(2)(B) The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the sentence is being considered for recall.

- ☐ **Probation's Sentencing Recommendation (CDCR)**
  - Should detail any and all prior offenses, including juvenile adjudications.
- ☐ **Other CDCR Forms/Documents**
  - ORPS040A – Arrest History
  - ORPS040B – Arrest Record
  - ORPS047A/B – Prior Confinements
  - ORPS048A – Prior Non-Confinements
- ☐ **Juvenile Record (Each county court)**
  - If you have *any juvenile record*, try to find as much of it as you can. You would want to make a request to each county that you have adjudications from.

(d)(2)(C) The defendant committed the offense with at least one adult codefendant.

- ☐ **Charging Document (CDCR)**
- ☐ **Probation's Sentencing Recommendation (CDCR)**
  - Their summation will often include whether there was an adult co-defendant with you during the commission of the offense.
- ☐ **Transcripts (Appellate Attorney/Court)**
  - Ask for *the entire record on appeal, all briefing, and appellate opinion*.
  - The Clerk's Transcript (CT) or Reporter's Transcript (RT) might have this.
- ☐ **Co-Defendant's Abstract of Judgment (Trial Court)**
  - This is technically a public document, but it is probably best to have a loved one request it from the court because CDCR can have restrictions on what information you can have if your co-defendant is a security threat/flagged in your file.
- ☐ **Appellate Opinion (Appellate Attorney or Appellate Court)**

Do NOT send these documents to the court. ONLY send them to your attorney.
Always send COPIES and KEEP your originals.

(d)(2)(D) The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing themselves of rehabilitative, educational, or vocational programs, if those programs have been available . . . , using self-study for self-improvement, or showing evidence of remorse.

(See Quick Guide)

Here are some standard CDCR documents CDCR you may want to copy:

- *Olson* Review Documents
  - ORPS040A – Arrest History
  - ORPS040B – Arrest Record
  - ORPS047A/B – Prior Confinements
  - ORPS048A – Prior Non-Confinements
  - ISSS003 – Rule Violation Reports
  - IJPS0101A – Inmate Assignment History
  - IJPS010J – Education Progress Record
  - ORPS039 – Certificates/Diplomas Awarded
  - OTCS010 – Legal Status Summary
  - OTCS20B – Court Commitment (contains attorney name)
  - OTCS022B – Sentence Component
  - OTCS022E – Offense Enhancement
- "ERMS Mashup" Documents
  - Probation's Sentencing Recommendation/Report
  - "Minutes" from sentencing
  - Abstract of Judgment
  - Charging Document
  - Verdict Forms
  - Classification Committee Chrono
  - Inmate Discipline Data Chronological Disciplinary Record
  - CDCR 2038 forms: "Rehabilitative Case Plan Study"
  - CDCR-128Bs
  - Certificates!!

County	Office or attorney name	Contact information
Alameda	Alameda County Public Defender	1401 Lakeside Drive #400 Oakland, CA 94612 510-272-6600
Alpine	Kimberly Hunt	99 Water St. Markleeville, CA 96150 530-544-2509
Amador	Fitzgerald, Alvarez & Ciummo, PLC	201 Clinton Rd Ste 202 Jackson, CA 95642-2678 209-223-0877
Butte	Butte Co. Public Defender Consortium	1560 Humboldt Rd, Ste 1 Chico, CA 95928-9101 530-924-6412
Calaveras	Leigh Fleming	265 West St. Charles Street, Ste. 4 San Andreas, CA 95249 209-754-4321
Colusa	Albert Smith	229 5th St Colusa, CA 95932 530-458-8801
Contra Costa	Contra Costa County Public Defender	800 Ferry Street Martinez, CA 94553 925-335-8000
Del Norte	Hoopes Law	508 H Street, Ste. 9 Crescent City, CA 95531-4019 707-951-6901
El Dorado	El Dorado County Public Defender	3976 Durok Road, Ste 104 Shingle Springs, CA 95682 530-621-6440
Fresno	Fresno County Public Defender's Office	2135 Fresno Street, Suite 100 Fresno, CA 93721 559- 600-3546
Glenn	Geoff Dulebohn	323 West Sycamore Street Willows, CA 95988 530-330-7084
Humboldt	Humboldt County Public Defender	1001 4th Street Eureka, CA 95501-0544 707-445-7634
Imperial	Imperial County Public Defender	895 Broadway El Centro, CA 92243 442-265-1705

Inyo	Gerard Harvey	P.O. Box 1701 Bishop, CA 93515 760-264-5580
Inyo	Elizabeth Corpora	308 West Line Street, Suite A Bishop, CA 93514 760-872-8226
Kern	Kern County Public Defender	1315 Truxtun Ave Bakersfield, CA 93301 661-868-4799
Kings	Shani Jenkins	P.O. Box 1464 Visalia, CA 93279 559-747-9540
Lake	Lake County Public Defender	255 N. Forbes St. Lakeport, CA 95453 707-263-0133
Lassen	Tim Prentiss	1702 Placer St. Redding, CA 96001 530-691-0245
Los Angeles	Los Angeles County Public Defender	210 West Temple Street, 19-513 Los Angeles, CA 213-974-2811
Madera	Fitzgerald, Alvarez & Ciummo PLC	123 E Fourth Street Madera, CA 93638 559-673-7227
Marin	Marin County Public Defender	3501 Civic Center Drive, Suite 127 San Rafael, CA 94903 415-473-6321
Mariposa	Neal Douglass	P.O. Box 2131 Mariposa, CA 95338 559-760-5149
Mendocino	Mendocino County Public Defender	175 S School Street Ukiah, CA 95482-4825 707-234-6950
Merced	Merced County Public Defender	1944 M Street Merced, CA 95348 209-385-7692
Modoc	Tom Gifford	113 West North Street Alturas, CA 96101 530-233-3100
Mono	Josh Hillemeier	201 South Warren Street Bishop, CA 93514 530-233-3100

Mono	Sophie Bidet	272 Sierra Manor, Ste D Mammoth Lakes, CA 93546 760-920-6120
Monterey	Monterey County Public Defender	168 W Alisal Street, 2nd Floor Salinas, CA 93901 831-755-5058
Napa	Napa County Public Defender	1127 First Street, Ste B Napa, CA 94559 707-253-4442
Nevada	Nevada County Public Defender	109 N Pine Street Nevada City, CA 95959 530-265-1400
Orange	Orange County Public Defender	801 Civic Center Dr W, Ste 400 Santa Ana, CA 92701-4033 657-251-6090
Placer	Dan Koukol	3785 Placer Corporate Dr., Suite 550 Rocklin, CA 95765 916-644-1100
Plumas	Craig Osborne	P.O. Box 449 Quincy, CA 95971 530-616-8699
Riverside	Riverside County Public defender	4075 Main Street, Suite 100 Riverside, CA 92501 951-955-6000
Sacramento	Sacramento County Public Defender	700 H Street, Suite 2070 Sacramento, CA 95814 916-874-6411
San Benito	Harry Damkar	339 7th St Ste F Hollister, CA 95023 831-638-1900
San Bernardino	San Bernardino County Public Defender	323 West Court Street San Bernardino, CA 92415-0320 909-382-3950
San Diego	San Diego County Public Defender	451 A Street, Suite 900 San Diego, CA 92101 619-338-4700
San Francisco	San Francisco Public Defender	555 7th Street San Francisco, CA 94103 415-553-1671
San Joaquin	San Joaquin County Public Defender	102 S San Joaquin Street #1 Stockton, CA 95202 209-468-2730

San Luis Obispo	San Luis Obispo Defenders	991 Osos Street, Ste A San Luis Obispo, CA 93401 805-541-5715
San Mateo	Private Defender Program	333 Bradford, Suite 200 Redwood City, CA 94063 650-298-4000
Santa Barbara	Santa Barbara County Public Defender	1100 Anacapa Street, 3rd Floor Santa Barbara, CA 93101 805-568-3470
Santa Clara	Santa Clara County Public Defender	120 West Mission Street San Jose, CA 95110 408-299-7700
Santa Cruz	Santa Cruz Public Defender	420 May Avenue Santa Cruz, CA 95060 831-454-5300
Shasta	Shasta County Public Defender	1815 Yuba Street Redding, CA 96001 530-245-7598
Sierra	J. Lon Cooper	P.O. Box 682 Nevada City, CA 95959 530-265-4565
Siskiyou	Siskiyou County Public Defender	320 South Oregon Street Yreka, CA 960697 530-842-8105
Solano	Solano County Public Defender Office	675 Texas Street, Ste 3500 Fairfield, CA 94533 707-784-6700
Sonoma	Sonoma County Public Defender	600 Administration Dr, First Floor, Rm 111 Santa Rosa, CA 95403 707-565-2791
Stanislaus	Stanislaus County Public Defender	1021 I Street, Ste 201 Modesto, CA 95354 209-525-4200
Sutter	Michael Sullinger	604 B Street, Suite 1 Yuba City, CA 95991 530-822-7355
Tehama	Christopher Logan	1248 Washington St. Red Bluff, CA 96080 530-529-4266
Trinity	Lane & Brown	1900 Gold Street Redding, CA 96001 530-768-8529

Tulare	Tulare County Public Defender Office	221 S. Mooney Blvd Visalia, CA 93291 559-636-4500
Tuolumne	Tuolumne County Public Defender	99 N. Washington Street Sonora, CA 95370 209-533-6370
Ventura	Ventura County Public Defender	800 S. Victoria Ave, Room 207 Ventura, CA 93009 805-654-2201
Yolo	Yolo County Public Defender	814 North Street Woodland, CA 95695 530-666-8165
Yuba	Yuba Public Defenders	303 6th Street Marysville, CA 95901 530-741-2331

104 Cal.App.5th 435
Court of Appeal, Second District, Division 3, California.

The PEOPLE, Plaintiff and Respondent,
v.
Eddie SORTO, Defendant and Appellant.

B331652
|
Filed August 21, 2024

Synopsis

Background: Following affirmance of convictions for crimes committed when defendant was 15 years old, including two counts of murder, and sentence of determinate term of 10 years plus an indeterminate term of 130 years to life, 2009 WL 1069169, defendant filed a petition for recall and resentencing. The Superior Court, Los Angeles County, No. VA090994, Lisa S. Coen, J., denied the petition. Petitioner appealed.

Holdings: The Court of Appeal, Egerton, J., held that:

statute creating a recall and resentencing procedure provided meaningful relief even if offender was also statutorily eligible for parole, and

defendant was eligible for relief under statute creating a recall and resentencing procedure since his sentence was functional equivalent of life without the possibility of parole (LWOP).

Reversed and remanded.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

West Codenotes

Recognized as Unconstitutional
Cal. Penal Code § 1170(d)

****627** APPEAL from an order of the Superior Court of Los Angeles County, Lisa S. Coen, Judge. Reversed and remanded. Los Angeles County Super. Ct. No. VA090994

Attorneys and Law Firms

James R. Bostwick, Jr., Claremont, under appointment by the Court of Appeal, for Defendant and Appellant.

Jonathan Grossman, Stockton, and Mi Kim for Pacific Juvenile Defender Center as Amicus Curiae on behalf of Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Noah P. Hill and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.

Opinion

EGERTON, J.

***439 **628** A court sentenced Eddie Sorto to more than 100 years in prison for crimes he committed when he was 15 years old. After serving 15 years of his sentence, Sorto petitioned for recall and resentencing under Penal Code section 1170, subdivision (d) (section 1170(d)).[1] Sorto acknowledged the statute expressly applies only to juvenile offenders sentenced to explicit life without the possibility of parole (LWOP) terms. Nevertheless, he argued equal protection guarantees relief to offenders, like himself, sentenced to long prison terms that are the functional equivalent of LWOP.

About a year before the trial court considered Sorto's petition, the court in *People v. Heard* (2022) 83 Cal.App.5th 608, 299 Cal.Rptr.3d 634 (*Heard*) ***440** held juvenile offenders sentenced to functionally equivalent LWOP terms are entitled to section 1170(d) relief under the constitutional guarantee of equal protection. Despite this authority, the trial court denied Sorto's petition on the ground that he had not been sentenced to an explicit LWOP term. On appeal, Sorto raises the same equal protection argument and urges us to follow *Heard*. The Attorney General argues *Heard* was wrongly decided and is contrary to California Supreme Court precedent.

We reject the Attorney General's arguments and conclude offenders sentenced to functionally equivalent LWOP terms—like Sorto—are entitled to section 1170(d) relief under the constitutional guarantee of equal protection. We also hold parole eligibility under section 3051 does not render those offenders ineligible for relief under section 1170(d). Accordingly, we reverse the trial court's denial of Sorto's petition and remand the case for the court to consider whether Sorto meets the other requirements for relief.

FACTS AND PROCEDURAL BACKGROUND

1. *The convictions and sentence*

Sorto committed a series of crimes against members of a rival gang in August 2005, when he was 15 years old. A jury convicted him of first degree murder (§ 187, subd. (a)), assault (§ 240), second degree murder (§ 187, subd. (a)), and shooting at an occupied motor vehicle (§ 246). The jury also found true multiple-murder and gang-murder special-circumstance allegations (§ 190.2, subd. (a)(3), (22)), as well as various firearm and gang enhancement allegations (§§ 12022.53, subds. (b), (c), (d), 186.22, subd. (b)(1)(C)). The trial court sentenced Sorto to a determinate term of 10 years plus an indeterminate term of 130 years to life.[2]

2. *Sorto's petition for recall and resentencing*

In 2023, Sorto filed a petition for recall and resentencing under section 1170(d), arguing he satisfied all the statutory requirements for relief. Sorto asked the court to recall his sentence and send his case to the juvenile court for a transfer hearing under Proposition 57 (as approved by voters, Gen. Elec. (Nov. 8, 2016)).

Sorto acknowledged that section 1170(d) expressly applies only to juvenile offenders sentenced to explicit LWOP terms. Nevertheless, he argued he is ***441** entitled to relief ****629** because his sentence is the functional equivalent of LWOP. In support, Sorto cited *Heard, supra*, 83 Cal.App.5th 608, 299 Cal.Rptr.3d 634, which held a juvenile offender sentenced to a term that is the functional equivalent of LWOP was eligible for section 1170(d) relief under the guarantee of equal protection.

The People opposed Sorto's petition. Among other things, the People argued Sorto is not serving a functionally equivalent LWOP sentence because he is eligible for parole during his 25th year of incarceration under section 3051. The People also urged the court not to apply *Heard*, arguing it was wrongly decided.

In a reply brief, Sorto argued *Heard* is binding precedent and trial courts are required to follow it.

The court denied Sorto's petition. Without explanation, the court stated it did not find *Heard* to be "on point with our specific factual scenario." The court then explained that, because Sorto is eligible for parole after 25 years under section 3051, he is not serving an LWOP sentence. The court held, "as a matter of law, because the defendant was not sentenced to life without the possibility of parole, he is not entitled to relief under [section 1170(d)]." The court did not directly address Sorto's equal protection argument.

Sorto timely appealed.

DISCUSSION

Sorto argues the trial court erred by denying his section 1170(d) petition because he was not sentenced to an explicit LWOP term. Sorto concedes section 1170(d) expressly applies only to juvenile offenders sentenced to explicit LWOP terms. Nevertheless, he argues the statute violates the equal protection clauses of the federal and state constitutions to the extent it denies relief to juvenile offenders sentenced to the functional equivalent of LWOP.

1. *Equal protection*

The Fourteenth Amendment to the United States Constitution and article 1, section 7 of the California Constitution prohibit the denial of equal protection of the laws. (U.S. Const., 14th Amend., § 1; Cal. Const., art. I, § 7, subd. (a).) "At core, the requirement of equal protection ensures that the government does not treat a group of people unequally without some justification." (*People v. Chatman* (2018) 4 Cal.5th 277, 288, 228 Cal.Rptr.3d 379, 410 P.3d 9 (*Chatman*).)

***442** Where, as here, the challenged law is not based on a suspect classification and does not burden fundamental rights, the law denies equal protection "only if there is no *rational* relationship between a disparity in treatment and some legitimate government purpose." (*Chatman, supra*, 4 Cal.5th at pp. 288–289, 228 Cal.Rptr.3d 379, 410 P.3d 9; see *Heard, supra*, 83 Cal.App.5th at pp. 631–634, 299 Cal.Rptr.3d 634 [applying rational basis review to a claim that section 1170(d) violates equal protection].) Under rational basis review, we presume a classification in a statute is rational until the party challenging it establishes there is no conceivable rational basis for the unequal treatment. (*Chatman*, at p. 289, 228 Cal.Rptr.3d 379, 410 P.3d 9.) "The underlying rationale for a statutory classification need not have been ' "ever actually articulated" ' by lawmakers, and it does not need to ' "be empirically substantiated." ' [Citation.] Nor does the logic

behind a potential justification need to be persuasive or sensible—rather than simply rational." (*Ibid.*)

"This core feature of equal protection sets a high bar before a law is deemed to lack even the minimal rationality necessary ****630** for it to survive constitutional scrutiny. Coupled with a rebuttable presumption that legislation is constitutional, this high bar helps ensure that democratically enacted laws are not invalidated merely based on a court's cursory conclusion that a statute's tradeoffs seem unwise or unfair." (*Chatman, supra*, 4 Cal.5th at p. 289, 228 Cal.Rptr.3d 379, 410 P.3d 9.)

In cases like this one, where the "plaintiffs challenge laws drawing distinctions between identifiable groups or classes of persons, on the basis that the distinctions drawn are inconsistent with equal protection, courts no longer need to ask at the threshold whether the two groups are similarly situated for purposes of the law in question. The only pertinent inquiry is whether the challenged difference in treatment is adequately justified under the applicable standard of review." (*People v. Hardin* (2024) 15 Cal.5th 834, 850–851, 318 Cal.Rptr.3d 513, 543 P.3d 960 (*Hardin*).)

We independently review equal protection claims. (*People v. Morales* (2021) 67 Cal.App.5th 326, 345, 282 Cal.Rptr.3d 151.)

2. *Section 1170(d) and related law*

In *Graham v. Florida* (2010) 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (*Graham*), our nation's high court held the Eighth Amendment prohibits LWOP sentences for juvenile offenders who committed non-homicide offenses. (*Id.* at p. 82, 130 S.Ct. 2011.) In response to *Graham*, the Legislature enacted section 1170(d), creating a recall and resentencing procedure for certain juvenile offenders sentenced to LWOP terms. (See *In re Kirchner* (2017) 2 Cal.5th 1040, 1049–1050, 216 Cal.Rptr.3d 876, 393 P.3d 364 (*Kirchner*).)

***443** Section 1170(d) provides, in relevant part, "[w]hen a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has been incarcerated for at least 15 years, the defendant may submit to the sentencing court a petition for recall and resentencing." (§ 1170, subd. (d)(1)(A).) The petition must include a statement describing the defendant's remorse, identifying any work towards rehabilitation, and stating one of four qualifying circumstances is true. (*Id.*, subd. (d)(2).)

As originally enacted, subdivision (d)(2) of section 1170 directed the trial court to hold a hearing to consider whether to recall a defendant's sentence if the court found, by a preponderance of the evidence, the statements in the petition to be true. (See former § 1170, subd. (d)(2)(E), Stats. 2012, ch. 828, § 2.) In 2016, the Legislature amended the statute to require courts to recall the sentence of any defendant who meets the eligibility criteria. (§ 1170, subd. (d)(5), as amended by Stats. 2016, ch. 867, § 2.1.) The court must then hold a hearing "to resentence the defendant in the same manner as if the defendant had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence." (§ 1170, subd. (d)(5).)

Sometime after the Legislature introduced the legislation that added subdivision (d)(2) to section 1170, the United States Supreme Court decided *Miller v. Alabama* (2012) 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (*Miller*). (See *Kirchner, supra*, 2 Cal.5th at p. 1049, 216 Cal.Rptr.3d 876, 393 P.3d 364.) In *Miller*, the court held the Eighth Amendment prohibits sentencing schemes that mandate LWOP sentences for juvenile offenders convicted of certain homicide offenses. (*Miller*, at p. 465, 132 S.Ct. 2455.)

Two months later, the California Supreme Court held—in ****631** *People v. Caballero* (2012) 55 Cal.4th 262, 145 Cal.Rptr.3d 286, 282 P.3d 291 (*Caballero*)—the prohibition on LWOP sentences for non-homicide juvenile offenders also applies to "term-of-years sentence[s] that amount[ ] to the functional equivalent of a life without parole sentence." (*Id.* at pp. 267–268, 145 Cal.Rptr.3d 286, 282 P.3d 291.) The court explained a sentence is the functional equivalent of LWOP if it includes a "term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy." (*Ibid.*)

In an effort to bring juvenile sentencing into conformity with *Graham*, *Miller*, and *Caballero*, the Legislature enacted section 3051, which went into effect on January 1, 2014. (See Stats. 2013, ch. 312, § 4; *People v. Franklin* (2016) 63 Cal.4th 261, 268, 277, 202 Cal.Rptr.3d 496, 370 P.3d 1053 (*Franklin*).) Section 3051 requires the Board of Parole Hearings to conduct a "youth offender parole hearing" at specified times during the ***444** incarceration of certain youthful offenders. (See § 3051, subds. (a)(1), (b); *Franklin*, at p. 277, 202 Cal.Rptr.3d 496, 370 P.3d 1053.) As relevant to this case, young adult and juvenile offenders convicted of a controlling offense "for which the sentence is a life term of 25 years to life shall be eligible for release on parole at a youth offender parole hearing during the person's 25th year of incarceration." (§ 3051, subd. (b)(3).) As of January 1, 2018, most juvenile

offenders sentenced to explicit LWOP terms are also eligible for parole during their 25th year of incarceration. (§ 3051, subd. (b)(4), as amended by Stats. 2017, ch. 684, § 1.5.)

3. *Section 1170(d)'s exclusion of functionally equivalent LWOP offenders violates equal protection*

a. *The* Heard *decision*

The court in *Heard, supra*, 83 Cal.App.5th 608, 299 Cal.Rptr.3d 634, decided the precise equal protection issue that Sorto raises in this case. In *Heard*, a court had sentenced the defendant to 23 years plus 80 years to life for crimes he committed when he was 15 years old. (*Id.* at p. 612, 299 Cal.Rptr.3d 634.) The defendant petitioned for relief under section 1170(d) after serving 15 years of his sentence. The trial court denied the petition, finding the defendant ineligible for relief because he had not been sentenced to an explicit LWOP term. (*Heard*, at p. 612, 299 Cal.Rptr.3d 634.)

The defendant appealed, raising two arguments. First, he urged the court to interpret section 1170(d) to apply to both explicit LWOP offenders and functionally equivalent LWOP offenders. (*Heard, supra*, 83 Cal.App.5th at p. 612, 299 Cal.Rptr.3d 634.) The court rejected the defendant's interpretation of section 1170(d), holding the plain language of the statute limits relief to explicit LWOP offenders. (*Heard*, at p. 626, 299 Cal.Rptr.3d 634.)

The defendant alternatively argued denying section 1170(d) relief to functionally equivalent LWOP offenders violates the constitutional guarantee of equal protection. (*Heard, supra*, 83 Cal.App.5th at p. 626, 299 Cal.Rptr.3d 634.) Because *Heard* was decided before the Supreme Court clarified the standard for equal protection challenges (see *Hardin, supra*, 15 Cal.5th at pp. 850–851, 318 Cal.Rptr.3d 513, 543 P.3d 960), the court employed a two-step analysis to decide the issue. At the first step, the court concluded the defendant was similarly situated to explicit LWOP offenders. (*Heard*, at p. 628, 299 Cal.Rptr.3d 634.)

The court then turned to the second step of the equal protection analysis, asking whether the Legislature had a rational basis to treat differently explicit LWOP offenders and functionally equivalent ****632** LWOP offenders. (*Heard, supra*, 83 Cal.App.5th at p. 631, 299 Cal.Rptr.3d 634.) According to the court, the "People's sole justification for the differential treatment is that the Legislature 'could have ***445** reasonably concluded that the punishment of [life without parole] imposed on those under age 18 could be excessive and this was an appropriate means of reform by allowing for reconsideration of such a sentence.' " (*Id.* at p. 632, 299 Cal.Rptr.3d 634.) The court rejected this rationale, explaining the same concern applies equally to juvenile offenders sentenced to the functional equivalent of LWOP. (*Ibid.*)

After raising two other possible justifications on its own — but ultimately rejecting both—the court concluded it was "unable to identify a rational basis for making juveniles sentenced to an explicitly designated life without parole term, but not juveniles sentenced to the functional equivalent of life without parole, eligible to petition for resentencing under section 1170, subdivision (d)(1)." (*Heard, supra*, 83 Cal.App.5th at p. 633, 299 Cal.Rptr.3d 634.) As a consequence, the court held denying functionally equivalent LWOP offenders the opportunity to petition for relief under section 1170(d) violates their right to equal protection of the laws. (*Heard*, at pp. 633–634, 299 Cal.Rptr.3d 634.)

The trial court in this case declined to follow *Heard*, stating it was not "on point with our specific factual scenario." It is not clear how the court came to that conclusion, as the facts in this case and the facts in *Heard* are nearly identical in all relevant respects. As with the defendant in *Heard*, a jury convicted Sorto of crimes he committed when he was 15 years old. Also like the defendant in *Heard*, a court sentenced Sorto to an indeterminate life term that provided no meaningful opportunity for parole during his lifetime. As in *Heard*, Sorto filed a petition for recall and resentencing under section 1170(d) after serving 15 years of his sentence, seeking relief on equal protection grounds. Given these similarities, *Heard* is directly on point.

The Attorney General does not attempt to distinguish *Heard* on the facts, and with good reason. Nevertheless, he urges us not to follow *Heard*, asserting it was wrongly decided and is inconsistent with California Supreme Court precedent. Alternatively, the Attorney General proposes additional reasons —which he apparently did not raise in *Heard*—why the Legislature reasonably could have granted relief to explicit LWOP offenders while denying the same relief to functionally equivalent LWOP offenders. We consider his arguments in turn.

b. Heard *is consistent with* Hardin

The Attorney General first argues *Heard* is inconsistent

with *Hardin, supra*, 15 Cal.5th 834, 318 Cal.Rptr.3d 513, 543 P.3d 960, a recent case in which the California Supreme Court considered the constitutionality of section 3051. According to the Attorney General, *Hardin* stands for the proposition that the concept of a "functional equivalent of [LWOP]" sentence should not be extended beyond the Eighth Amendment context.

***446** In *Hardin*, the defendant argued section 3051 violates equal protection by granting relief to young adult offenders sentenced to functionally equivalent LWOP terms, while denying relief to offenders sentenced to explicit LWOP terms. (*Hardin, supra*, 15 Cal.5th at p. 839, 318 Cal.Rptr.3d 513, 543 P.3d 960.) He asserted there is "no reasonable basis to conclude that young adult offenders sentenced to life without parole are more culpable or less deserving of the opportunity for release than other young adult offenders." (*Id.* at p. 858, 318 Cal.Rptr.3d 513, 543 P.3d 960.)

****633** In rejecting the defendant's argument, the California Supreme Court acknowledged it had employed the " 'functional equivalent of a life without parole sentence' " description "in the context of identifying the category of juvenile offenders to whom the Eighth Amendment limitations on life without parole sentences apply." (*Hardin, supra*, 15 Cal.5th at p. 863, 318 Cal.Rptr.3d 513, 543 P.3d 960.) However, the court rejected the idea "that a lengthy term-of-years sentence is necessarily equivalent to a life without parole sentence for all purposes." (*Ibid.*) The court instead concluded it "was not irrational for the Legislature to exclude from youth offender parole eligibility those young adults who have committed special circumstance murder, an offense deemed sufficiently culpable that it merits society's most stringent sanctions." (*Ibid.*)

Contrary to the Attorney General's suggestion, the Supreme Court in *Hardin* did not hold the concept of a functional equivalent of LWOP sentence is relevant *only* in the context of Eighth Amendment challenges. Rather, it simply clarified that explicit LWOP offenders and functionally equivalent LWOP offenders are not identical in all respects and for all purposes. That observation is not inconsistent with *Heard*, as equal protection does not require absolute uniformity between two groups. (See *People v. McKee* (2010) 47 Cal.4th 1172, 1202, 104 Cal.Rptr.3d 427, 223 P.3d 566.) Instead, what matters is whether the differences between the groups reasonably justify the Legislature's decision to afford relief to one, while denying it to the other. (*Ibid.*)

If anything, *Hardin* supports *Heard* on that issue. *Hardin* holds the Legislature reasonably may disfavor explicit LWOP offenders based on the rationale that they are more culpable than functionally equivalent LWOP offenders. (*Hardin, supra*, 15 Cal.5th at pp. 863–864, 318 Cal.Rptr.3d 513, 543 P.3d 960.) In *Heard*—as in our case—the court considered the opposite situation, asking whether it is reasonable to grant relief to explicit LWOP offenders while denying the same relief to functionally equivalent LWOP offenders. (*Heard, supra*, 83 Cal.App.5th at p. 631, 299 Cal.Rptr.3d 634.) Although *Hardin* does not resolve that issue, it nevertheless eliminates one possible justification for the disparate treatment: the relative culpability of each group of offenders.

***447** c. Heard *is consistent with* Franklin

The Attorney General next argues *Heard* "runs roughshod" over the Supreme Court's decision in *Franklin, supra*, 63 Cal.4th 261, 202 Cal.Rptr.3d 496, 370 P.3d 1053.

In *Franklin*, a juvenile offender argued his 50-years-to-life sentence was the functional equivalent of LWOP and was unconstitutional under *Miller, supra*, 567 U.S. 460, 132 S.Ct. 2455. (*Franklin, supra*, 63 Cal.4th at pp. 268, 271–272, 202 Cal.Rptr.3d 496, 370 P.3d 1053.) The Supreme Court declined to consider the issue, holding the enactment of section 3051 rendered it moot. (*Franklin*, at p. 268, 202 Cal.Rptr.3d 496, 370 P.3d 1053.) The court explained that, although the defendant's original sentence continued to apply, section 3051 "superseded" the statutorily mandated sentence and made the defendant eligible for parole after 25 years. (*Franklin*, at p. 278, 202 Cal.Rptr.3d 496, 370 P.3d 1053.) The court concluded, because a 25-years-to-life sentence is not LWOP or its functional equivalent, "no *Miller* claim arises here." (*Id.* at pp. 279–280, 202 Cal.Rptr.3d 496, 370 P.3d 1053.)

The Attorney General argues, under *Franklin*, functionally equivalent LWOP offenders are no longer serving an explicit LWOP sentence or its functional equivalent ****634** given they are eligible for parole after serving 25 years. The Attorney General does not directly argue this renders moot equal protection challenges to section 1170(d). Instead—at least as we understand the argument—he contends it renders offenders like Sorto categorically ineligible for relief under section 1170(d), regardless of whether equal protection requires courts to apply the statute to functionally equivalent LWOP offenders.

The Attorney General made a nearly identical argument in *Heard*, albeit in a different context. In that case, the Attorney General argued the defendant was not similarly situated with explicit LWOP offenders—and was therefore not eligible for relief under section 1170(d)—because

"section 3051 has ' "reformed" ' [the defendant's] sentence so that it is no longer the functional equivalent of life without parole." (*Heard, supra*, 83 Cal.App.5th at p. 628, 299 Cal.Rptr.3d 634.) The court rejected the argument, explaining section 1170(d) does not expressly require that the defendant currently be serving an LWOP sentence. (*Heard*, at pp. 629–630, 299 Cal.Rptr.3d 634.) Instead, it requires only that the defendant "was sentenced" to an LWOP term. (*Id.* at p. 629, 299 Cal.Rptr.3d 634; see § 1170, subd. (d)(1)(A).) The court reasoned, "[a]lthough under *Franklin*, [the defendant's] sentence as it currently operates is no longer the functional equivalent of life without parole, this does not change the fact that the sentence *was* a [functionally equivalent] life without parole sentence at the time it was imposed." (*Heard*, at p. 629, 299 Cal.Rptr.3d 634.)

The court in *People v. Lopez* (2016) 4 Cal.App.5th 649, 208 Cal.Rptr.3d 695 (*Lopez*), interpreted section 1170(d) the same way. *Lopez* concerned two ***448** defendants who were sentenced to LWOP terms for non-homicide crimes they committed as juveniles. After the United States Supreme Court decided *Graham*, the defendants petitioned for habeas corpus relief on Eighth Amendment grounds, and a court reduced their sentences to life with the possibility of parole. The defendants then petitioned for relief under section 1170(d), which the trial court also granted. (*Lopez*, at pp. 652–653, 208 Cal.Rptr.3d 695.) The People appealed, arguing the defendants were not entitled to relief because they were no longer serving LWOP sentences. The Court of Appeal disagreed, explaining the plain language of section 1170(d) requires only that the defendant " 'was sentenced' " to an LWOP term. (*Lopez*, at pp. 653–654, 208 Cal.Rptr.3d 695.) The court noted, if the Legislature "intended to exclude defendants whose LWOP sentence were modified to cure an Eighth Amendment/*Graham* sentencing error, it could have so provided." (*Id.* at p. 655, 208 Cal.Rptr.3d 695.)

This interpretation finds further support in the fact that the Legislature amended section 1170(d) several times after *Lopez* was decided, but it has never clarified that an offender must currently be serving an LWOP term to be eligible for relief. (See, e.g., Stats. 2020, ch. 29, § 15; Stats. 2021, ch. 695, § 5; Stats. 2021, ch. 719, § 2; Stats. 2021, ch. 731, § 1.3; Stats. 2022, ch. 744, § 1.) Nor did the Legislature repeal section 1170(d) after it amended section 3051 to grant most juvenile LWOP offenders a meaningful possibility of parole during their lifetimes. (See § 3051, subd. (b)(4), as amended by Stats. 2017, ch. 684, § 1.5.) Because we may presume the Legislature is aware of existing laws and judicial decisions when it enacts and amends statutes (*Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602, 609, 257 Cal.Rptr. 320, 770 P.2d 732), this history strongly suggests the Legislature agreed with *Lopez*. It also suggests the ****635** Legislature intended section 1170(d) to provide relief in addition to the relief provided under section 3051.

The Attorney General makes no effort to address the statutory language on which the *Heard* and *Lopez* courts relied. Nor does he directly challenge their interpretation of section 1170(d). We agree with *Heard* and *Lopez* that the plain language of section 1170(d) does not require that the defendant currently be serving an LWOP sentence. Accordingly, the fact that section 3051 superseded Sorto's sentence is irrelevant. Instead, it is enough that he "was sentenced" to the functional equivalent of LWOP. (See § 1170, subd. (d)(1).)

d. *Section 1170(d) can provide meaningful relief to functionally equivalent LWOP offenders*

The Attorney General asserts the *Heard* court failed to recognize section 1170(d) cannot provide meaningful relief to functionally equivalent LWOP offenders. According to the Attorney General, the Legislature enacted ***449** section 1170(d) for the sole purpose of converting LWOP sentences into life sentences with the possibility of parole, and the statute "contains no mechanism to shorten or otherwise alter indeterminate sentences that already provide the possibility of parole." Therefore, he argues, functionally equivalent LWOP offenders have already received all the relief section 1170(d) was "intended to confer."

Contrary to the Attorney General's suggestions, section 1170(d) plainly has the potential to grant meaningful relief to functionally equivalent LWOP offenders. This remains true even after the Legislature enacted section 3051. Indeed, the simple fact that offenders like Sorto have filed petitions under section 1170(d)—after already having received relief under section 3051—would seem to refute the Attorney General's contention.

Unlike section 3051—which grants relief by operation of law and without any requirement of additional resentencing procedures (see *Franklin, supra*, 63 Cal.4th at pp. 279–280, 202 Cal.Rptr.3d 496, 370 P.3d 1053)—section 1170(d) requires the court to recall an eligible defendant's sentence and "to resentence the defendant in the same manner as if the defendant had not previously been sentenced." (§ 1170, subd. (d)(5).) This difference is not merely procedural. At resentencing, a trial court has broad discretion to select the term of imprisonment, run sentences concurrently or consecutively, and strike or dismiss enhancements. (See §§ 186.22, subd. (d), 669,

1385, 12022, subd. (f).) Section 3051 provides no comparable relief.

Perhaps more importantly for individuals like Sorto, recall and resentencing also entitles eligible offenders to the benefits of retroactive ameliorative changes to the law. (See *People v. Padilla* (2022) 13 Cal.5th 152, 158, 293 Cal.Rptr.3d 623, 509 P.3d 975.) For example, if the court were to recall Sorto's sentence, his case might be sent to juvenile court under Proposition 57. (See *People v. Montes* (2021) 70 Cal.App.5th 35, 48–49, 285 Cal.Rptr.3d 150 [ordering a defendant's case transferred to juvenile court under Proposition 57 after his sentence was recalled under section 1170(d)].) He also may be entitled to relief under Senate Bill No. 1391 (2017–2018 Reg. Sess.), which prohibits the transfer to criminal court of certain juveniles accused of committing crimes when they were 14 or 15 years old. (See Welf. & Inst. Code, § 707, subd. (a)(1)–(2), as amended by Stats. 2018, ch. 1012, § 1; *O.G. v. Superior Court* (2021) 11 Cal.5th 82, 89, 275 Cal.Rptr.3d 406, 481 P.3d 648.) Although we express no opinion as to whether these laws would apply if the court recalls Sorto's ****636** sentence, the mere possibility is enough to defeat the Attorney General's contention that section 1170(d) lacks a mechanism to grant meaningful relief to functionally equivalent LWOP offenders.

***450** e. *There is no rational basis to treat functionally equivalent LWOP offenders less favorably than explicit LWOP offenders*

The Attorney General alternatively argues the *Heard* court erred in concluding there is no rational basis for section 1170(d)'s disparate treatment of explicit LWOP offenders and functionally equivalent LWOP offenders. The Attorney General proposes several reasons justifying the Legislature's decision to grant relief to the former group, while denying it to the latter. We consider each in turn.

i. Response to *Graham*

First, the Attorney General argues the Legislature reasonably may have limited section 1170(d) relief to explicit LWOP offenders in response to *Graham, supra*, 560 U.S. 48, 130 S.Ct. 2011.

The Attorney General's argument might have some merit if section 1170(d) closely tracked the Supreme Court's holding in that case. It does not. In *Graham*, the high court held the Eighth Amendment bars LWOP sentences for juvenile offenders who committed non-homicide crimes. (*Graham, supra*, 560 U.S. at p. 82, 130 S.Ct. 2011.) Section 1170(d), however, extends relief to all explicit LWOP offenders, not just those who committed non-homicide crimes. In fact, an analysis of section 1170(d) by the Assembly Committee on Appropriations noted that, of the 295 juveniles entitled to relief under the legislation, only three had been sentenced to LWOP for non-homicide crimes. (Assem. Com. on Appropriations, Rep. on Sen. Bill No. 9 (2011–2012 Reg. Sess.) as amended Aug. 15, 2011, p. 3 (Assem. Com. on Appropriations Rep.).)

Because section 1170(d) significantly exceeds *Graham*'s requirements, compliance with that case alone does not provide a sufficient justification for the Legislature's decision not to extend relief to functionally equivalent LWOP offenders. Instead, to survive rational basis review, there must be some reasonable explanation for why the Legislature exceeded *Graham* with respect to non-homicide offenders, but did not exceed *Graham* with respect to functionally equivalent LWOP offenders. The Attorney General suggests none, nor can we conceive of any on our own. In any event, even if compliance with *Graham* justified the disparate treatment at one time, that justification dissipated once the California Supreme Court in *Caballero, supra*, 55 Cal.4th 262, 145 Cal.Rptr.3d 286, 282 P.3d 291, extended *Graham*'s reasoning to functionally equivalent LWOP offenders.

ii. Moral principles

The Attorney General next argues the Legislature reasonably may have provided relief only to explicit LWOP offenders because the absence of any ***451** possibility of parole is a characteristic unique to that group, and condemning minors to die in prison is " 'barbaric.' " (Assem. Com. on Appropriations Rep., at p. 2.)

A desire to avoid condemning minors to die in prison is obviously a valid reason for the Legislature to grant relief to explicit LWOP offenders. However, it does not provide a reason to deny the same relief to functionally equivalent LWOP offenders. By definition, a functionally equivalent LWOP sentence includes a parole eligibility date that falls outside the offender's natural life expectancy. (See *Caballero, supra*, 55 Cal.4th at pp. 267–268, 145 Cal.Rptr.3d 286, 282 P.3d 291.) Therefore, like ****637** an explicit LWOP sentence, a functionally equivalent LWOP sentence provides no meaningful possibility of parole and effectively condemns the offender to die in prison. The Attorney General suggests no reason—nor can we

conceive of any on our own—why it would be barbaric to condemn explicit LWOP offenders to die in prison, but not barbaric to do the same to functionally equivalent LWOP offenders. Accordingly, the fact that an explicit LWOP sentence condemns the offender to die in prison does not provide a rational basis for section 1170(d)'s disparate treatment.

iii. Empirical facts

The Attorney General contends the Legislature reasonably may have provided relief only to explicit LWOP offenders to address empirical facts unique to LWOP sentences. He points to an Assembly Committee analysis that notes (1) the " 'U.S. is the only country in the world that sentences minors to LWOP' "; (2) " 'LWOP for minors provides no deterrent effect on crime and is applied disproportionately to persons of color' "; (3) " '45% of the minors sentenced to LWOP did not personally commit murder, but were convicted of felony murder' "; and (4) " 'over 75% of the youth sentenced to LWOP acted within a group at the time of their crime.' " (Assem. Com. on Appropriations Rep., at p. 3.) The analysis also notes sentencing minors to LWOP terms is " 'counter to principles of cognitive and emotional development in minors, and all but unprecedented in [the] rest of the world.' " (*Id*. at p. 2.)

Once again, although these facts provide a reason to grant relief to explicit LWOP offenders, they do not provide a reason to deny the same relief to functionally equivalent LWOP offenders. There is nothing in the record to support the Attorney General's assertion that these empirical facts pertain *only* to explicit LWOP offenders. Nor does the Attorney General propose any logical reason why that would be the case. For all we know, the same facts apply equally to functionally equivalent LWOP offenders. Absent some reason to expect otherwise, the facts do not provide a rational basis for section 1170(d)'s disparate treatment.

***452** iv. Fiscal concerns

The Attorney General next argues the Legislature reasonably could have limited relief under section 1170(d) in order to restrict the fiscal and administrative burdens of the legislation. The Attorney General points out there were fewer than 300 juvenile offenders serving explicit LWOP sentences at the time the Legislature enacted the statute. He argues it was reasonable to save resources by focusing on that limited group, as opposed to the "vastly larger" population of juvenile offenders serving non-LWOP terms.

Our Supreme Court has explained that "[p]reserving the government's financial integrity and resources is a legitimate state interest." (*Chatman, supra*, 4 Cal.5th at p. 290, 228 Cal.Rptr.3d 379, 410 P.3d 9.) Moreover, equal protection does not require a perfect fit between the legislation's means and the legitimate state interest it is intended to serve. (*Ibid*.) Nevertheless, "an entirely arbitrary decision to withhold a benefit from one subset of people, devoid of any conceivable degree of coherent justification, might not pass rational basis review merely because it decreases the expenditure of resources." (*Id*. at p. 291, 228 Cal.Rptr.3d 379, 410 P.3d 9.) What matters is whether the classification at issue is "a rational means of preserving government resources." (*Ibid*.)

Section 1170(d) fails that test. At the outset, it is not apparent that extending relief to functionally equivalent LWOP offenders ****638** would have a meaningful fiscal impact. The Attorney General asserts the population of juvenile offenders serving non-LWOP life sentences is "vastly larger" than the population of explicit LWOP offenders. While that may be true, Sorto does not seek relief for all juvenile offenders sentenced to indeterminate terms. Rather, he argues only that equal protection guarantees relief for juvenile offenders sentenced to the functional equivalent of LWOP. Although the record does not disclose that group's population, it is reasonable to expect it to be significantly smaller than the total population of juvenile offenders serving indeterminate terms.

Even if the population of functionally equivalent LWOP offenders was relatively large, it is not apparent the government would have reasonably expected to preserve resources by denying them relief. In fact, based on section 1170(d)'s legislative history, it seems the Legislature believed the opposite to be true. (Cf. *Chatman, supra*, 4 Cal.5th at pp. 292–293, 228 Cal.Rptr.3d 379, 410 P.3d 9 [relying on the legislative history of a bill to show the Legislature was reasonably concerned about the legislation's cost].) For example, a Fiscal Summary by the Senate Appropriations Committee noted section 1170(d) may result in net General Fund savings, as its resentencing procedure would likely be less expensive than resolution of a petition for writ of habeas corpus. (Sen. Appropriations Com., Fiscal Summary of Sen. Bill No. 9 (2011–2012 Reg. ***453** Sess.) May 23, 2011, p. 2 (Sen. Appropriations Com. Fiscal Summary).) The summary also estimated that reducing an LWOP sentence to 25 years would result in an average cost savings of $625,000, far outweighing the administrative and court costs of the resentencing procedure.[3] (*Id*. at pp. 2–3.) We see no reason why the same

cost savings would not apply equally to functionally equivalent LWOP offenders. If so, extending relief to that group would likely save government resources, at least in the long term.

The Attorney General notes in passing it is less costly to grant relief to functionally equivalent LWOP offenders under section 3051 than to grant the same group relief under section 1170(d). While that may be true, the Attorney General overlooks the fact that the Legislature also granted section 3051 relief to explicit LWOP offenders. (See § 3051, subd. (b)(4).) That the Legislature did not repeal section 1170(d) after doing so strongly suggests it was not concerned about the legislation's relative cost.

v. Culpability

Finally, the Attorney General contends section 1170(d)'s disparate treatment is warranted by the fact that an explicit LWOP sentence "provides a bright-line test of culpability," while there is no comparable test of culpability for functionally equivalent LWOP sentences.

To the extent the Attorney General is arguing the Legislature may have been concerned that some functionally equivalent LWOP offenders are more culpable than explicit LWOP offenders, the court in *Heard* rejected a similar argument. (See *Heard, supra*, 83 Cal.App.5th at p. 633, 299 Cal.Rptr.3d 634.) As that court explained, because a functionally equivalent LWOP sentence requires multiple convictions, it is conceivable the Legislature considered a functionally equivalent LWOP sentence to be more serious than an explicit ****639** LWOP sentence, which requires only a single conviction. However, the court rejected this as a possible motivation for section 1170(d)'s disparate treatment because the statute does not preclude relief for offenders sentenced to explicit LWOP terms plus additional terms for other offenses and enhancements. (*Heard*, at p. 633, 299 Cal.Rptr.3d 634.) Therefore, the court concluded, the "number of offenses theoretically committed by each group of offenders also fails to justify their disparate treatment." (*Ibid.*)

We agree with the *Heard* court's reasoning, and the circumstances of Sorto's case aptly illustrate the irrationality of using relative culpability to justify section 1170(d)'s disparate treatment. The jury convicted Sorto of ***454** special circumstance first degree murder, which typically results in an LWOP sentence. (See § 190.2, subd. (a).) However, because Sorto was 15 years old when he committed the crime—and presumably less mature and culpable than older offenders—the maximum sentence he could receive was 25 years to life. (See § 190.5, subd. (b).) Had Sorto instead committed the murder when he was older, he likely would have received an LWOP sentence, making him eligible to apply for section 1170(d) relief. In other words, had Sorto committed the exact same crimes but under circumstances indicating he was more culpable, he likely would be eligible for relief. We can conceive of no rational basis that would justify such a seemingly unreasonable result.

To summarize, like the court in *Heard*, we can conceive of no rational basis for section 1170(d)'s disparate treatment of explicit LWOP offenders and functionally equivalent LWOP offenders. (*Heard, supra*, 83 Cal.App.5th at p. 633, 299 Cal.Rptr.3d 634.) Therefore, we agree with the *Heard* court that section 1170(d) violates the constitutional guarantee of equal protection by denying relief to juvenile offenders sentenced to functionally equivalent LWOP terms. (*Heard*, at pp. 633–634, 299 Cal.Rptr.3d 634.) We also agree with the *Heard* court that parole eligibility under section 3051 does not render an offender ineligible for relief under section 1170(d). (*Heard*, at p. 629, 299 Cal.Rptr.3d 634; see *Lopez, supra*, 4 Cal.App.5th at p. 655, 208 Cal.Rptr.3d 695.)

Accordingly, we conclude the trial court erred by denying Sorto's section 1170(d) petition "because [he] was not sentenced to life without the possibility of parole." We express no opinion on whether Sorto has met section 1170(d)'s other requirements. Nor do we express an opinion on what relief the court should grant if it concludes Sorto is eligible for recall and resentencing. On remand, the trial court shall consider those issues for the first time.

DISPOSITION

We reverse the order denying Eddie Sorto's petition for relief under section 1170(d). On remand, the court shall reconsider Sorto's petition in accordance with this opinion.

We concur:

EDMON, P. J.

ADAMS, J.

All Citations

104 Cal.App.5th 435, 324 Cal.Rptr.3d 625

Footnotes

[1] Undesignated statutory references are to the Penal Code.

[2] Although the jury convicted Sorto of first degree special circumstance murder, he was not eligible for an LWOP sentence because he was 15 years old when he committed the crime. (See § 190.5, subd. (b).)

[3] The summary noted the savings would be offset somewhat by parole supervision costs assessed as a condition of the reduced sentence. (Sen. Appropriations Com. Fiscal Summary, at p. 3.) Even with that offset, we suspect the savings would be significant.

83 Cal.App.5th 608
Court of Appeal, Fourth District, Division 1, California.

The PEOPLE, Plaintiff and Respondent,
v.
Frank Eli HEARD, Defendant and Appellant.

D079237
|
Filed September 20, 2022

Synopsis

Background: Following affirmance of his total prison term of 23 years plus 80 years to life for attempted willful, deliberate and premeditated murder for drive-by shooting he committed at age 15, and voluntary manslaughter for homicide he committed after he turned 16, 2009 WL 449636, defendant filed petition for recall and resentencing. The Superior Court, San Diego County, No. SCD193832, John M. Thompson, J., denied petition, and defendant appealed.

Holdings: The Court of Appeal, Do, J., held that:

as matter of first impression, statute permitting juvenile offenders sentenced to life without parole to petition for recall and resentence does not include defendants sentenced to functional equivalent of life without parole;

defendant was not eligible for relief pursuant to statute;

defendant was similarly situated to juvenile offenders sentenced to life without parole;

statute violated equal protection rights of juvenile offenders sentenced to de facto life without parole sentences; and

denial of defendant's petition violated his equal protection rights.

Reversed and remanded.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

West Codenotes

Unconstitutional as Applied
Cal. Penal Code § 1170(d)(1)

****637** APPEAL from an order of the Superior Court of San Diego County, John M. Thompson, Judge. Reversed and remanded with instructions. (Super. Ct. No. SCD193832)

Attorneys and Law Firms

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DO, J.

***612** INTRODUCTION

Frank Eli Heard is serving a sentence of 23 years plus 80 years to life for two counts of attempted willful, deliberate and premeditated murder for a drive-by shooting he committed at age 15, and one count of voluntary manslaughter for a homicide he committed just after he turned 16. After 15 years of incarceration, he petitioned the trial court to recall his sentence and resentence him to a lesser sentence under Penal Code [1] section 1170, former subdivision (d)(2) (now subdivision (d)(1)). Under this provision, a juvenile offender who "was sentenced to imprisonment for life without the possibility of parole" and has been incarcerated for at least 15 years "may submit to the sentencing court a petition for recall and resentencing." (§ 1170, former subd. (d)(2)(A)(i), now subd. (d)(1)(A).) The trial court denied Heard's petition, finding him ineligible for relief because he was not sentenced to an explicitly designated term of life without the possibility of parole.[2]

Heard appeals, presenting two issues of first impression. First, he asserts the resentencing provision should be interpreted to apply not only to juvenile offenders sentenced to explicitly designated terms of life without parole, but also to a juvenile offender, like him, who have been sentenced to multiple terms that are the functional equivalent of life without parole. Second and alternatively, Heard asserts a contrary interpretation of the resentencing

provision would violate his constitutional right to equal protection of the laws. We reject his first contention. Instead, we interpret section 1170, subdivision (d)(1)(A), to limit eligibility to petition for recall and ****638** resentencing to juvenile offenders sentenced to explicitly designated life without parole terms. But we conclude denying juvenile offenders, who were sentenced to the functional equivalent of life without parole, the opportunity to petition for resentencing violates the guarantee of equal protection. We therefore reverse the trial court's order and remand for further proceedings.

***613** FACTUAL AND PROCEDURAL BACKGROUND

I.

Heard's Convictions and Sentence[3]

In January 2005, when Heard was 15 years old, he and three fellow members of the West Coast Crips gang were riding in a car when the front passenger shot at a group of rival Blood gang members on the street. In the volley of bullets, two persons were injured, but not killed. Heard admitted to the police he was in possession of a gun at the time of the shooting. When the gun was recovered, it had Heard's fingerprints on it and was determined to have fired shell casings recovered from the crime scene. The evening of the shooting, Heard bragged to a friend that he "got a slob," which is a derogatory term for a Blood. In a videotape of a party, made a few days before the shooting, Heard was holding what appeared to be the same gun used in the shooting and performing a rap song that glorified a prior killing of Bloods.

In July 2005, less than two weeks after Heard turned 16, witnesses saw him and others walk up to a young man standing on a street corner. After exchanging words with the man, Heard pulled out a handgun and shot him in the head, killing him. It was later determined that Heard believed the victim was on the street corner selling drugs in his gang's territory.[4]

Heard was charged with two counts of attempted willful, deliberate and premeditated murder (§§ 664, 187, subd. (a); counts 1 and 2), and one count of murder (§ 187, subd. (a); count 3). Each offense was alleged to have been ***614** committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)) and with the personal use of a firearm (§ 12022.53, subds. (c), (d), & (e)(1)). Count 3 was severed and Heard went to a jury trial on counts 1 and 2. The jury found him guilty of both counts of attempted murder as charged and found true the firearm use and gang allegations. Heard then entered a plea agreement on count 3, in which he pled guilty to the ****639** lesser included offense of voluntary manslaughter (§ 192, subd. (a)) and admitted a gang enhancement allegation (§ 186.22, subd. (b)(1)), as well as a firearm enhancement (§ 12022.5, subd. (a)).

Heard's sentencing hearing took place in January 2008. In a sentencing memorandum filed before the hearing, Heard argued the imposition of a life sentence would be cruel and unusual punishment in violation of the Eighth Amendment. He urged the court to consider his youth and capacity to mature and change, limited intelligence, and that he was introduced to criminal street gangs as a toddler, when making its sentencing decision. At the sentencing hearing, Heard's trial counsel continued to maintain that it would be unconstitutional to sentence Heard to prison for life.

The trial court disagreed. It found there was "no constitutional infirmity for the imposing of a life sentence for an attempted premeditated murder," and that the Legislature had approved prosecuting juveniles as adults in response to an increase in acts of gang violence by juvenile gang members. The court stated Heard was the "poster child for the legislative intervention with regard to gangs." It concluded there was "no constitutional infirmity in the application of either a life sentence as to the counts or ... life sentences as to the enhancements." The court then sentenced Heard to a total prison term of 23 years plus 80 years to life.[5]

Heard appealed his attempted murder convictions, and this court affirmed the judgment in 2009. (*People v. Heard, supra*, D052492, review denied May 20, 2009, S171378.) Heard filed a petition for a writ of habeas corpus with the superior court, claiming his prison sentence was excessive because he would not be eligible for parole during his lifetime. The superior court denied the petition. Heard then filed a petition for a writ of habeas corpus with this court in 2012, raising again the argument that his sentence was excessive. As we later discuss in further detail, in January 2014, we granted the petition and remanded the case for resentencing. (*In re Heard, supra*, D063181.) In the ***615** intervening years since Heard was sentenced in 2008, a sea change in juvenile sentencing law had occurred, beginning with the United States Supreme Court's decision in *Roper v. Simmons* (2005) 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (*Roper*). We discuss those changes in juvenile sentencing law next, before returning to the procedural history of Heard's case.

II.

Changes in Juvenile Sentencing Law

A. *Decisional Law*

Beginning with *Roper* in 2005, the United States Supreme Court held the Eighth Amendment categorically bars imposition of the death penalty on offenders who were under 18 when their crimes were committed. (*Roper, supra*, 543 U.S. at pp. 578–579, 125 S.Ct. 1183.) In a series of decisions that followed, the United States Supreme Court and California Supreme Court placed further limits on the punishment that may constitutionally be imposed on juvenile offenders. These decisions arose in large part from advances in research ****640** on adolescent brain development, and the related, growing recognition that juveniles "have diminished culpability and greater prospects for reform" and are therefore "constitutionally different from adults for purposes of sentencing." (*Miller v. Alabama* (2012) 567 U.S. 460, 471, 132 S.Ct. 2455, 183 L.Ed.2d 407 (*Miller*), discussing *Roper, supra*, 543 U.S. 551, 125 S.Ct. 1183 and *Graham v. Florida* (2010) 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (*Graham*).)

Five years after *Roper*, the United States Supreme Court held in *Graham* the Eighth Amendment categorically bars the imposition of a sentence of life without parole on a juvenile offender who did not commit homicide. (*Graham, supra*, 560 U.S. at p. 82, 130 S.Ct. 2011.) The *Graham* court observed: "As compared to adults, juveniles have a ' "lack of maturity and an underdeveloped sense of responsibility" '; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.' [Citation.] These salient characteristics mean that '[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' [Citation.] Accordingly, 'juvenile offenders cannot with reliability be classified among the worst offenders.' " (*Id.* at p. 68, 130 S.Ct. 2011.)

The *Graham* court further observed that life without parole is " 'the second most severe penalty permitted by law' " and it is "an especially harsh ***616** punishment for a juvenile [offender]," who "will on average serve more years and a greater percentage of his life in prison than an adult offender." (*Graham, supra*, 560 U.S. at pp. 69, 70, 130 S.Ct. 2011.) It "likened a life without parole sentence for nonhomicide [juvenile] offenders to the death penalty itself, given their youth and the prospect that, as the years progress, juveniles can reform their deficiencies and become contributing members of society." (*People v. Caballero* (2012) 55 Cal.4th 262, 266, 145 Cal.Rptr.3d 286, 282 P.3d 291 (*Cabellero*), citing *Graham*, at pp. 69–70, 130 S.Ct. 2011.) To avoid violating the Eighth Amendment, the high court held that states "need not guarantee the [nonhomicide] offender eventual release" but must provide "some realistic opportunity to obtain release." (*Graham*, at p. 82, 130 S.Ct. 2011.)

In *Miller*, the United States Supreme Court extended *Graham*'s reasoning to homicide cases and held the Eighth Amendment forbids sentencing schemes that make life without parole the mandatory punishment for a juvenile convicted of homicide. (*Miller, supra*, 567 U.S. at p. 489, 132 S.Ct. 2455.) The Court reaffirmed that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." (*Id.* at p. 472, 132 S.Ct. 2455.) It explained that "mandatory penalty schemes ... remov[e] youth from the balance" and "prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes *Graham*'s (and also *Roper*'s) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." (*Id.* at p. 474, 132 S.Ct. 2455.)

The *Miller* court did not extend *Graham*'s categorical ban to homicide cases and foreclose life without parole terms for juvenile homicide offenders, but it held the sentencing court must have discretion to impose a lesser sentence. (*Miller, supra*, 567 U.S. at p. 480, 132 S.Ct. 2455.) The Court outlined mitigating factors relating ****641** to youth that must be considered by the sentencing court before committing a juvenile to prison for life without parole,[6] and cautioned ***617** that the "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."[7] (*Id.* at pp. 477–479, 132 S.Ct. 2455.)

In *Caballero*, the California Supreme Court held that an aggregate 110-year-to-life sentence imposed on a juvenile convicted of nonhomicide offenses contravenes *Graham*'s mandate against cruel and unusual punishment under the Eighth Amendment. (*Caballero, supra*, 55 Cal.4th at pp. 265, 268–269, 145 Cal.Rptr.3d 286, 282 P.3d 291.) In so holding, our high court rejected the People's claim that "a cumulative sentence for distinct crimes does not present a cognizable Eighth Amendment claim" because each individual sentence included the possibility of parole within the juvenile offender's lifetime. (*Id.* at p. 267, 145 Cal.Rptr.3d 286, 282 P.3d 291.) The juvenile offender in *Caballero* was convicted of three counts of attempted

murder, committed for the benefit of a criminal street gang and with the personal use of a firearm. (*Id.* at p. 265, 145 Cal.Rptr.3d 286, 282 P.3d 291.) The Court observed the juvenile "will become parole eligible over 100 years from now." (*Id.* at p. 268, 145 Cal.Rptr.3d 286, 282 P.3d 291 [explaining that under section 3046, subdivision (b), the defendant would be required to serve a minimum of 110 years before becoming parole eligible].) The Court called this a "term-of-years sentence that amounts to the functional equivalent of a life without parole sentence." (*Caballero*, at p. 268, 145 Cal.Rptr.3d 286, 282 P.3d 291.) It then concluded that under *Graham*, "sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." (*Caballero*, at p. 268, 145 Cal.Rptr.3d 286, 282 P.3d 291.)

B. *Statutory Law*

As decisional law on the punishment of juvenile offenders was developing, the Legislature enacted two provisions that are relevant to this case.

1. *Senate Bill No. 9 (2011–2012 Reg. Sess.) (Senate Bill 9) Adds Former Subdivision (d)(2), Now Subdivision (d)(1), to Section 1170*

Effective January 1, 2013, Senate Bill 9 added former subdivision (d)(2) to ****642** section 1170. (See Stats. 2012, ch. 828, § 1.) Senate Bill 9 "was introduced in the Legislature after *Graham*, but before *Miller*" and "was inspired by concerns regarding sentences of life without parole for juvenile offenders." (*Kirchner, supra*, 2 Cal.5th at p. 1049, 216 Cal.Rptr.3d 876, 393 P.3d 364.) It created "a procedural mechanism for resentencing of defendants who were under the age of 18 at ***618** the time of the commission of their offenses and who were given [life without parole] sentences." (*People v. Willover* (2016) 248 Cal.App.4th 302, 310, 203 Cal.Rptr.3d 384.) Under this provision, "[w]hen a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has been incarcerated for at least 15 years, the defendant may submit to the sentencing court a petition for recall and resentencing." (§ 1170, former subd. (d)(2)(A)(i), now subd. (d)(1)(A).)

In the petition, "the defendant must describe his or her remorse, relate his or her work toward rehabilitation, and state that a qualifying circumstance is true." (*Kirchner, supra*, 2 Cal.5th at pp. 1049–1050, 216 Cal.Rptr.3d 876, 393 P.3d 364.) The qualifying circumstances are (1) the defendant "was convicted pursuant to felony murder or aiding and abetting murder provisions of law"; (2) the defendant does not have juvenile felony adjudications for assault or other violent felonies prior to the offense that resulted in the sentence being considered for recall; (3) the defendant committed the offense with at least one adult codefendant; or (4) the defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation. (§ 1170, former subd. (d)(2)(B)(i)–(iv), now subd. (d)(1)(A)–(D).) "If the court finds by a preponderance of the evidence that one or more of the qualifying circumstances in the petition are true, the court must recall the defendant's sentence and hold a hearing to resentence the defendant." (*Kirchner*, at p. 1050, 216 Cal.Rptr.3d 876, 393 P.3d 364.)

At the resentencing hearing, the court is permitted to consider factors enumerated in the statute, along with " 'any other criteria that the court deems relevant to its decision.' " (*Kirchner, supra*, 2 Cal.5th at p. 1050, 216 Cal.Rptr.3d 876, 393 P.3d 364.) "Upon conducting this assessment, '[t]he court shall have the discretion to resentence the defendant in the same manner as if the defendant had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence.' " (*Ibid.*) If the sentence is not recalled or the defendant is resentenced to imprisonment for life without the possibility of parole, the defendant may submit another petition for recall and resentencing after 20 and 24 years of incarceration. (§ 1170, former subd. (d)(2)(H), now subd. (d)(10).)

In *Kirchner*, the California Supreme Court held this statutory resentencing procedure is not adequate to cure *Miller* error. (*Kirchner, supra*, 2 Cal.5th at pp. 1043, 1052–1056, 216 Cal.Rptr.3d 876, 393 P.3d 364.) The Court explained the procedure was "originally ... developed prior to the decision in *Miller*, ... was not designed to provide a remedy for this type of error, and ... is not well suited to serve this purpose." (*Id.* at p. 1052, 216 Cal.Rptr.3d 876, 393 P.3d 364.) It further explained the procedure "provides only a selective and qualified remedy, the application of which is ultimately premised on an inquiry that may, but does not necessarily, overlap with the one demanded under *Miller*." (*Id.* at pp. 1054–1055, 216 Cal.Rptr.3d 876, 393 P.3d 364.)

***619** Since its original enactment, former subdivision (d)(2) of section 1170 has been ****643** modified, but the modifications are relatively minor. Relevant to this appeal, the provision that specifies which defendants are eligible to

file a petition for recall and resentencing (§ 1170, former subd. (d)(2)(A)(i), now subd. (d)(1)(A)) has not been changed. Effective January 1, 2022, subdivision (d)(2) of section 1170 was redesignated as subdivision (d)(1) of section 1170. (Stats. 2021, ch. 731, § 1.3.)

2. *Senate Bill No. 260 (2013-2014 Reg. Sess.) (Senate Bill 260)*

Effective January 1, 2014, Senate Bill 260 added sections 3051, 3046, subdivision (c), and 4801, subdivision (c), to the Penal Code. (Stats. 2013, ch. 312, §§ 3, 4 & 5; see *People v. Franklin* (2016) 63 Cal.4th 261, 276–277, 202 Cal.Rptr.3d 496, 370 P.3d 1053 (*Franklin*) [discussing this history].) Senate Bill 260 was passed "explicitly to bring juvenile sentencing into conformity with *Graham*, *Miller*, and *Caballero*." (*Franklin*, at p. 277, 202 Cal.Rptr.3d 496, 370 P.3d 1053.)

"At the heart of [Senate Bill 260] was the addition of section 3051, which requires the Board [of Parole Hearings (Board)] to conduct a 'youth offender parole hearing' during the 15th, 20th, or 25th year of a juvenile offender's incarceration. [Citation.] The date of the hearing depends on the offender's ' "[c]ontrolling offense," ' which is defined as 'the offense or enhancement for which any sentencing court imposed the longest term of imprisonment.' " (*Franklin, supra*, 63 Cal.4th at p. 277, 202 Cal.Rptr.3d 496, 370 P.3d 1053.) As originally enacted, section 3051 created a schedule of youth offender parole hearings for juvenile offenders sentenced to a determinate term, a life term of less than 25 years to life, or a life term of 25 years to life.[8] (Stats. 2013, ch. 312, § 4; § 3051, subd. (b)(1)–(3).)

In *Franklin*, the California Supreme Court considered the effect of Senate Bill 260 on a juvenile's claim of *Miller* error. The defendant in *Franklin* was 16 years old when he shot and killed another teenager. (*Franklin, supra*, 63 Cal.4th at p. 269, 202 Cal.Rptr.3d 496, 370 P.3d 1053.) He was convicted of first degree murder with a corresponding firearm enhancement, for which he received two consecutive 25-year-to-life terms. (*Id.* at p. 271, 202 Cal.Rptr.3d 496, 370 P.3d 1053.) Our high court held "just as *Graham* applies to sentences that are the 'functional equivalent of a life without parole sentence' [citation], so too does *Miller* apply to such functionally equivalent sentences." (*Id.* at p. 276, 202 Cal.Rptr.3d 496, 370 P.3d 1053.) The Court went on to find, however, that Senate Bill 260 mooted the defendant's Eighth Amendment challenge to his sentence ***620** under *Miller*. It explained that although the defendant remained bound by his original sentence, by operation of Senate Bill 260, the defendant "is now serving a life sentence that includes a meaningful opportunity for release during his 25th year of incarceration. Such a sentence is neither [life without parole] nor its functional equivalent. Because [the defendant] is not serving [a life without parole] sentence or its functional equivalent, no *Miller* claim arises here." (*Franklin*, at pp. 279–280, 202 Cal.Rptr.3d 496, 370 P.3d 1053.)

****644** At the same time, our high court recognized the defendant's sentencing hearing may have resulted in a record that was "incomplete or missing mitigation information [relating to his youth]" because such information was not considered relevant at the time he was sentenced. (*Franklin, supra*, 63 Cal.4th at pp. 282–283, 202 Cal.Rptr.3d 496, 370 P.3d 1053.) Accordingly, it remanded the matter for the trial court to determine "whether [the defendant] was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing," and, if not, to hold a hearing at which the parties could present evidence bearing on "youth-related factors" for later consideration by the Board. (*Id.* at p. 284, 202 Cal.Rptr.3d 496, 370 P.3d 1053.) This hearing is now commonly referred to as a *Franklin* proceeding. (See *In re Cook* (2019) 7 Cal.5th 439, 450, 247 Cal.Rptr.3d 669, 441 P.3d 912.)

Against this backdrop of changes in juvenile sentencing law, we return to Heard's petition for writ of habeas corpus.

III.

Heard's Petition for Writ of Habeas Corpus

As noted, in December 2012, Heard filed a petition for writ of habeas corpus with this court in which he argued his sentence was excessive under the Eighth Amendment. In January 2014, we granted the petition and remanded the case for resentencing. (*In re Heard, supra*, D063181.) Relying on *Graham*, *Miller*, and *Caballero*, we held Heard's sentence was "a de facto life [without parole] sentence," the majority of which was attributable to nonhomicide offenses, and it therefore violated the Eighth Amendment. (*Ibid.*) Lacking the benefit of *Montgomery* and *Franklin*, we rejected the People's contention that Heard's eligibility for a parole hearing under section 3051 negated the need for resentencing.

The People petitioned for review with the California Supreme Court. In April 2014, the Court granted the

petition and deferred action pending the resolution of two other cases (*In re Alatriste*, S214652, and *In re Bonilla*, S214960). In May 2016, while Heard's case was still pending, the California Supreme Court decided *Franklin, supra*, 63 Cal.4th 261, 202 Cal.Rptr.3d 496, 370 P.3d 1053. In August, our high ***621** court transferred Heard's case to this court with directions to vacate our January 2014 disposition and to issue an order to show cause to the secretary of the California Department of Corrections and Rehabilitation (Department of Corrections), returnable to the superior court, why Heard was not entitled to make a record of " 'mitigating evidence tied to his youth.' ([*Franklin, supra*, 63 Cal.4th at pp. 268–269, 283–284, 202 Cal.Rptr.3d 496, 370 P.3d 1053].)" In September 2016, we vacated our opinion in case number D063181 and issued an order to show cause as directed.[9]

Heard received his *Franklin* proceeding in August 2017. After reviewing documents submitted by Heard and the People, the trial court determined it had not received all relevant mitigating evidence at the sentencing hearing.[10] The court ordered the parties' documents to be filed with the court under seal and submitted to the Department of Corrections.

****645** IV.

Heard's Petition for Recall and Resentencing

In March 2021, Heard filed in the trial court a petition for recall and resentencing under section 1170, former subdivision (d)(2)(A). He asserted he was eligible to petition for resentencing because his sentence was a de facto life without parole sentence. He claimed he also met the other statutory criteria for resentencing, including that he had been incarcerated for over 15 years, was 15 years old when he committed the attempted murders, and his co-defendant was an adult at the time of these offenses.[11] Citing exhibits attached to his petition, he also asserted that he was no longer an active gang member, had completed multiple self-help and educational programs in prison, and was working as a mentor to younger inmates.

On June 28, 2021, in a written order, the trial court denied Heard's petition on the ground that he was statutorily ineligible to petition for resentencing. The court reasoned that resentencing under section 1170, former subdivision ***622** (d)(2)(A)(i), was specifically made available only to those defendants "sentenced to imprisonment for LWOP" (i.e., life without parole), and Heard "was not sentenced to imprisonment for LWOP." Heard appealed the trial court's order.[12]

DISCUSSION

Heard challenges the trial court's determination that he is ineligible to petition for recall and resentencing on two grounds that present matters of first impression. First, he contends section 1170, subdivision (d)(1),[13] should be interpreted to apply to juvenile offenders sentenced to the functional equivalent of life without parole. Second, he contends that a contrary interpretation of section 1170, subdivision (d)(1), would violate his constitutional right to equal protection of the laws. Here, we reject Heard's interpretation of section 1170, subdivision (d)(1), but we agree with him that denying juvenile offenders sentenced to the functional equivalent of life without parole the opportunity to petition for resentencing under this provision violates the constitutional guarantee of equal protection of the laws.

I.

Section 1170, Subdivision (d)(1), Limits Eligibility to Petition for Resentencing to Juvenile Offenders Sentenced to Actual Life Without Parole

Heard's first contention presents an issue of statutory interpretation that we ****646** consider de novo. (See *People v. Prunty* (2015) 62 Cal.4th 59, 71, 192 Cal.Rptr.3d 309, 355 P.3d 480.) "[O]ur fundamental task ... is to determine the Legislature's intent so as to effectuate the law's purpose." (*People v. Murphy* (2001) 25 Cal.4th 136, 142, 105 Cal.Rptr.2d 387, 19 P.3d 1129.) "Statutory construction begins with the plain, commonsense meaning of the words in the statute, ' "because it is generally the most reliable indicator of legislative intent and purpose." ' " (*People v. Manzo* (2012) 53 Cal.4th 880, 885, 138 Cal.Rptr.3d 16, 270 P.3d 711.) A statute is not to be read in isolation, but construed in context and " 'with reference to the whole system ***623** of law of which it is a part so that all may be harmonized and have effect.' " (*Landrum v. Superior Court* (1981) 30 Cal.3d 1, 14, 177 Cal.Rptr. 325, 634 P.2d 352.) " 'If there is no ambiguity or uncertainty in the language, the Legislature is presumed to have meant what it said, and we need not resort to legislative history to determine the statute's true meaning.' " (*People v. Skiles* (2011) 51 Cal.4th 1178, 1185, 126 Cal.Rptr.3d 456, 253 P.3d 546.)

In ruling that Heard was ineligible to petition for recall and resentencing, the trial court relied on section 1170, subdivision (d)(1)(A), which states: "When a defendant who was under 18 years of age at the time of the commission of *the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole* has been incarcerated for at least 15 years, the defendant may submit to the sentencing court a petition for recall and resentencing." (Italics added.)

The question is whether this provision, and in particular the italicized text, refers only to defendants sentenced to an explicitly designated term of life without parole, or whether it includes defendants sentenced to multiple terms that in the aggregate constitute the functional equivalent of life without parole. Two aspects of the statutory text suggest eligibility to petition for resentencing is limited to defendants sentenced to an explicitly designated term of life without parole.

First, the phrase "life without the possibility of parole" denotes a specific sentence and is used elsewhere in the Penal Code to specify that punishment as distinct from other punishments. For example, section 190.5, subdivision (b), provides: "The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in Section 190.2 or 190.25 has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, 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." (Italics added.) Similarly, section 3051, subdivision (b), which makes the timing of youth offender parole hearings contingent on the offender's longest term of imprisonment (§ 3051, subd. (a)(2)(B)), has separate provisions that create different parole hearing eligibility dates depending on whether the offender's longest term of imprisonment is "a determinate sentence" (§ 3051, subd. (b)(1)), "a life term of less than 25 years to life" (§ 3051, subd. (b)(2)), "a life term of 25 years to life" (§ 3051, subd. (b)(3)), or "*life without the possibility of parole*" (§ 3051, subd. (b)(4), italics added).

Second, section 1170, subdivision (d)(1)(A), uses the singular when referring to "*the offense* for which the defendant was sentenced to imprisonment for life without the possibility of parole." (§ 1170, subd. (d)(1)(A), italics ***624** added.) For a single offense to result in a life without parole sentence, the sentence must be one of an explicitly designated life without parole. The functional equivalent of life without ****647** parole results only when a defendant receives *multiple sentences for multiple offenses*, or an offense plus one or more enhancements, that add up to a lifelong prison commitment with no realistic opportunity for release. (See, e.g., *Caballero, supra*, 55 Cal.4th at pp. 265, 268–269, 145 Cal.Rptr.3d 286, 282 P.3d 291 [sentence of 110 years to life for three counts of attempted murder plus corresponding firearm enhancements was the functional equivalent of life without parole]; *People v. Contreras* (2018) 4 Cal.5th 349, 356–357, 369, 229 Cal.Rptr.3d 249, 411 P.3d 445 (*Contreras*) [two juveniles sentenced to aggregate terms of 50 years to life and 58 years to life imposed for multiple kidnapping offenses and multiple sexual offenses; held, these sentences were the functional equivalent of life without parole].) The use of the singular when referring to "the offense for which the defendant was sentenced" suggests the Legislature meant an explicitly designated life without parole sentence. (§ 1170, subd. (d)(1)(A).)

Accordingly, the text of the statute does not support Heard's interpretation of it. And even if we were to find ambiguity in the statute's text, its legislative history also fails to assist Heard. As *Kirchner* explained, Senate Bill 9 "was inspired by concerns regarding sentences of life without parole for juvenile offenders." (*Kirchner, supra*, 2 Cal.5th at p. 1049, 216 Cal.Rptr.3d 876, 393 P.3d 364, citing Assem. Com. on Appropriations, Analysis of Sen. Bill 9, as amended Aug. 15, 2011, pp. 3–5.) Although case law has since made clear these concerns apply to offenders sentenced to an explicitly designated life without parole term as well as terms that are functionally equivalent to life without parole, this case law was still nascent when Senate Bill 9 was introduced. Virtually every legislative committee analysis of Senate Bill 9 observed that section 190.5, subdivision (b), permitted juvenile offenders to be sentenced to life without parole for special circumstances murder; other sentencing provisions were not discussed. (See, e.g., Sen. Com. on Public Safety, Analysis of Sen. Bill 9, as introduced Dec. 6, 2010, p. 3; Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill 9, as introduced, pp. 2–3; Assem. Com. on Public Safety, Analysis of Sen. Bill 9, as amended May 27, 2011, pp. 5–6, 9; Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business Analysis of Sen. Bill 9, as amended July 2, 2012, p. 2.) Thus, contemporaneous analyses of Senate Bill 9 tend to show the Legislature, in enacting the resentencing provision, was focused only on creating a remedy for juveniles sentenced to an explicitly designated life without parole term.

The interplay between the relief afforded by Senate Bill 9 and the relief afforded by Senate Bill 260 provides further support for the conclusion that Senate Bill 9 was intended for juvenile offenders sentenced to an explicitly designated life without parole term. As we have discussed, Senate Bill 260, ***625** which created section 3051, was explicitly passed "to bring juvenile sentencing into conformity with *Graham*, *Miller*, and *Caballero*." (*Franklin, supra*, 63

Cal.4th at p. 277, 202 Cal.Rptr.3d 496, 370 P.3d 1053.) And yet as originally enacted, section 3051 provided youth offender parole hearings only to juveniles whose lengthiest sentence was (1) a determinate sentence, (2) "a life term of less than 25 years to life," or (3) "a life term of 25 years to life." (See § 3051, subd. (b)(1)–(3), added by Stats. 2013, ch. 312, § 4.) It was only after the California Supreme Court held in *Kirchner, supra*, 2 Cal.5th 1040, 216 Cal.Rptr.3d 876, 393 P.3d 364 that section 1170, former subdivision (d)(2), now subdivision (d)(1), was inadequate to cure *Miller* error, that the Legislature amended section 3051 to provide ****648** youth offender parole hearings to juvenile offenders sentenced to "life without the possibility of parole." (See § 3051, subd. (b)(4), added by Stats. 2017, ch. 684, § 1.5.) This history, too, demonstrates the resentencing provision was intended for juvenile offenders sentenced to explicitly designated life without parole terms, with section 3051 initially serving as a complementary provision that provided relief only to other juvenile offenders.

All of these considerations lead to the conclusion that eligibility under section 1170, subdivision (d)(1)(A), to petition for recall and resentencing is limited to juvenile offenders sentenced to an explicitly designated life without parole term. Heard offers two reasons why we should construe the statute differently. First, he contends we should "view[ ]" the statute against the "legal landscape" pertaining to juvenile sentencing—a landscape that includes *Miller*, *Franklin*, and *Kirchner*. He essentially asks us to read section 1170, subdivision (d)(1), as though it embodied the principles articulated in these decisions even though it was introduced after them. We are not free to construe a statute so liberally that we change its intended meaning. "[W]e may not ' " ' "rewrite a statute to make it express an intention not expressed therein" ' " ' or one that may be derived from its legislative history." (*People v. Hobbs* (2007) 152 Cal.App.4th 1, 5, 60 Cal.Rptr.3d 685.) "We do not sit as a 'super Legislature.' " (*People v. Flores* (2014) 227 Cal.App.4th 1070, 1074, 174 Cal.Rptr.3d 390.)

Second, Heard contends we should construe section 1170, subdivision (d)(1), so as to avoid an absurd result. The absurd result being that a juvenile sentenced to terms amounting to de facto life without parole is not eligible to petition for resentencing, when a juvenile sentenced to actual life without parole is eligible to petition for resentencing. We disagree this circumstance warrants invoking the absurdity exception of statutory construction. Under the absurdity doctrine, "[a] court is not required to follow the plain meaning of a statute when to do so would frustrate the manifest purpose of the legislation as a whole or otherwise lead to absurd results. [Citations.] However, the absurdity exception requires much more than showing that troubling consequences may potentially result if the statute's plain meaning were followed or that a different approach would have been wiser or better[Citations.] ***626** .... Moreover, our courts have wisely cautioned that the absurdity exception to the plain meaning rule 'should be used most sparingly by the judiciary and only in extreme cases else we violate the separation of powers principle of government.' " (*Switzer v. Wood* (2019) 35 Cal.App.5th 116, 129, 247 Cal.Rptr.3d 114.) It is not unusual for resentencing provisions to exclude categories of offenders. (See *People v. Gonzalez* (2021) 65 Cal.App.5th 420, 434, 279 Cal.Rptr.3d 868 [identifying examples of such provisions].) Interpreting section 1170, subdivision (d)(1)(A), to limit eligibility for resentencing to juveniles sentenced to an explicitly designated life without parole term is not a consequence so extreme that it qualifies as absurd. (Cf. *People v. Morris* (1988) 46 Cal.3d 1, 15, 249 Cal.Rptr. 119, 756 P.2d 843 [applying the absurdity doctrine to avoid construing section 190.4 to require that the robbery underlying a felony murder must be separately charged as an independent substantive offense, lest the statute of limitations applicable to the robbery operate as a bar to the felony murder, which has no statute of limitations], disapproved on other grounds by *In re Sassounian* (1995) 9 Cal.4th 535, 543–545, 37 Cal.Rptr.2d 446, 887 P.2d 527.)

****649** For all of these reasons, we conclude section 1170, subdivision (d)(1)(A), limits eligibility to petition for recall and resentencing to juvenile offenders sentenced to an explicitly designated life without parole term. The trial court's interpretation of the statute was correct, and it did not err in denying Heard's petition for recall and resentencing on this ground.

II.

Denying Juvenile Offenders Like Heard Who Were Sentenced to the Functional Equivalent of Life Without Parole the Opportunity to Petition for Resentencing Violates the Constitutional Guarantee of Equal Protection

Heard contends that if section 1170, subdivision (d)(1), is not interpreted to apply to defendants sentenced to the functional equivalent of life without parole, then it violates his constitutional right to equal protection of the laws. On this, we agree.

The People argue that Heard forfeited the opportunity to raise his equal protection challenge on appeal because he failed to assert it in the trial court. It is true that an equal protection claim "may be forfeited if it is raised for the first

time on appeal." (*People v. Dunley* (2016) 247 Cal.App.4th 1438, 1447, 203 Cal.Rptr.3d 335.) But "application of the forfeiture rule is not automatic." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, 13 Cal.Rptr.3d 786, 90 P.3d 746.) "[A]ppellate courts have discretion to address constitutional ***627** issues raised on appeal" where, as here, "the issue presented is 'a pure question of law' turning on undisputed facts." (*In re Spencer S.* (2009) 176 Cal.App.4th 1315, 1323, 98 Cal.Rptr.3d 477; see *In re Sheena K.* (2007) 40 Cal.4th 875, 888, 55 Cal.Rptr.3d 716, 153 P.3d 282 [defendant's challenge to a probation condition as constitutionally vague and overbroad presented a pure question of law that could be considered for the first time on review]; *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1172–1173, 13 Cal.Rptr.2d 176 [whether to address the constitutionality of a statute for the first time on appeal is a discretionary determination for the reviewing court].) One factor that supports overlooking a forfeiture is when the belatedly raised issue "may return as a habeas corpus petition" (*In re Spencer S.*, at p. 1323, 98 Cal.Rptr.3d 477), which could occur here (see *In re Jones* (2019) 42 Cal.App.5th 477, 480, 255 Cal.Rptr.3d 571 [habeas petition challenging denial of resentencing under section 1170, former subdivision (d)(2)]). We also observe that section 1170, subdivision (d)(10), allows the filing of successive resentencing petitions, so Heard could conceivably raise his equal protection challenge in a later petition if we do not consider it now. So we will exercise our discretion to consider the merits of Heard's equal protection claim.

A. *Heard Is Similarly Situated With the Juvenile Offenders Eligible to Seek Resentencing Under Section 1170, Subdivision (d)(1)*

"The Fourteenth Amendment to the United States Constitution and article I, section 7, subdivision (a) of the California Constitution both prohibit the denial of equal protection of the laws. 'The equal protection guarantees of [both Constitutions] are substantially equivalent and analyzed in a similar fashion.' " (*People v. Cruz* (2012) 207 Cal.App.4th 664, 674, 143 Cal.Rptr.3d 742.) "The concept of equal protection recognizes that persons who are similarly situated with respect to a law's legitimate purposes must be treated equally." (*People v. Brown* (2012) 54 Cal.4th 314, 328, 142 Cal.Rptr.3d 824, 278 P.3d 1182.)

When we are presented with an equal protection claim, we begin by considering ****650** whether the class of persons allegedly subjected to unequal treatment is similarly situated with the class of persons benefited by the challenged law. " ' "The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged." ' " (*People v. Morales* (2016) 63 Cal.4th 399, 408, 203 Cal.Rptr.3d 130, 371 P.3d 592 (*Morales*).) Indeed, "[t]here is always some difference between the two groups which a law treats in an unequal manner since an equal protection claim necessarily asserts that the law in some way ***628** distinguishes between the two groups." (*People v. Nguyen* (1997) 54 Cal.App.4th 705, 714, 63 Cal.Rptr.2d 173.)

Heard protests the fact that juvenile offenders sentenced to an explicitly designated life without parole term can seek resentencing while juvenile offenders sentenced to the functional equivalent of such a sentence cannot. As we have already explained, section 1170, subdivision (d)(1)(A), establishes the threshold eligibility requirements to petition for recall and resentencing. Its only criteria are (1) the defendant "was under 18 years of age at the time of the commission of the offense"; (2) for this offense, the defendant "was sentenced to imprisonment for life without the possibility of parole"; and (3) the defendant "has been incarcerated for at least 15 years." (§ 1170, subd. (d)(1)(A).) If the defendant meets these requirements, he "may submit to the sentencing court a petition for recall and resentencing." (*Ibid.*) Heard meets the first and third criteria; in this regard, he is identically situated with those who are eligible to petition for resentencing. The only difference between him and the defendants to whom this provision applies is that he was sentenced to 23 years plus 80 years to life, rather than life without parole.

Heard argues his sentence constitutes a de facto life without parole sentence and he is thus similarly situated with juveniles sentenced to an explicit term of life without parole. He acknowledges that due to the enactment of section 3051, he will now receive a youth offender parole hearing in his 25th year of incarceration, but points out that following the 2018 amendment of section 3051, juveniles sentenced to an explicit term of life without parole are also entitled to a youth offender parole hearing in their 25th year of incarceration. (Stats. 2017, ch. 684 § 1.5; see § 3051, subd. (b)(3), (4).)

The People disagree that Heard's sentence qualifies as a de facto life without parole sentence. Citing *Franklin, supra*, 63 Cal.4th at page 286, 202 Cal.Rptr.3d 496, 370 P.3d 1053, they contend section 3051 has " 'reformed' " Heard's sentence so that it is no longer the functional equivalent of life without parole. The People additionally argue that "irrespective of section 3051," Heard is not similarly situated with juvenile offenders sentenced to an explicit

term of life without parole. The difference, they claim, is in the crimes committed by each group of offenders.

Here, we conclude Heard is similarly situated for purposes of section 1170, subdivision (d)(1)(A), with those juvenile offenders who are eligible to petition for resentencing. First, we disagree that Heard's eligibility for a youth offender parole hearing under section 3051 undermines the conclusion that his sentence constitutes a de facto life without parole sentence, such that ***629** he is not similarly situated with the juvenile offenders to whom the resentencing provision applies. As another ****651** court has explained, the statutory resentencing provision "uses the phrase '*was sentenced*' and refers to the past." (See *People v. Lopez* (2016) 4 Cal.App.5th 649, 653–654, 208 Cal.Rptr.3d 695, italics added (*Lopez*) [holding that two juveniles, whose life without parole sentences were modified to life with parole in response to a habeas petition, asserting Eighth Amendment error remained eligible to seek resentencing under section 1170, former subdivision (d)(2)(A)(i), because they were originally sentenced to life without parole].) At the time Heard was sentenced, section 3051 had not yet been enacted, and he was required to serve his determinate term plus the full minimum period of confinement of each of his life sentences before becoming parole eligible. (§§ 669, subd. (a), 3046, subd. (b).) Put another way, Heard would have to serve 103 years before becoming parole eligible. Such a sentence constitutes a de facto life without parole sentence. (See *Caballero, supra,* 55 Cal.4th at p. 268, 145 Cal.Rptr.3d 286, 282 P.3d 291 [offender who would not become parole eligible for more than 100 years was sentenced to the functional equivalent of life without parole].)

It is true, as the People contend, that *Franklin* held that because the defendant had become eligible for a youth offender parole hearing in his 25th year of incarceration, he was no longer serving a life without parole sentence or its functional equivalent. (*Franklin, supra,* 63 Cal.4th at pp. 279–280, 202 Cal.Rptr.3d 496, 370 P.3d 1053.) As our high court explained, this was the result of the retroactive operation of section 3051. (*Franklin,* at pp. 278–279, 202 Cal.Rptr.3d 496, 370 P.3d 1053.) The Court further explained, however, that section 3051 did not alter the defendant's original sentence, which continued to remain binding. (*Franklin,* at pp. 279–280, 202 Cal.Rptr.3d 496, 370 P.3d 1053.) Applying the same reasoning here, although the retroactive operation of section 3051 means Heard will receive a youth offender parole hearing in his 25th year of incarceration, his original sentence remains binding. Section 1170, subdivision (d)(1), is a statutory resentencing opportunity, not a cure for *Miller* error. (*Kirchner, supra,* 2 Cal.5th at p. 1056, 216 Cal.Rptr.3d 876, 393 P.3d 364.) Although under *Franklin*, Heard's sentence as it currently operates is no longer the functional equivalent of life without parole, this does not change the fact that the sentence *was* a de facto life without parole sentence at the time it was imposed. Because section 1170, subdivision (d)(1)(A), refers to the "offense for which the defendant *was sentenced* to imprisonment for life without the possibility of parole" (italics added), and Heard was sentenced to the functional equivalent of a life without parole sentence, he is similarly situated with the juvenile offenders whose sentences make them eligible to seek resentencing.

As for the People's claim that the crimes committed by the juvenile offenders eligible to petition for resentencing are different from the crimes committed by those who cannot seek resentencing, we do not find this distinction is relevant. The People rely on *People v. Sanchez* (2020) 48 Cal.App.5th 914, 920, 262 Cal.Rptr.3d 389 (*Sanchez*), which involved an ***630** equal protection challenge to former section 1170.95.[14] At that time, former section 1170.95 provided that "[a] person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the ****652** petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts" if certain specified conditions were met. (See *Sanchez,* at p. 918, 262 Cal.Rptr.3d 389; former § 1170.95, subd. (a), added by Stats. 2018, ch. 1015, § 4.) The defendant in *Sanchez* was convicted of voluntary manslaughter based on an incident in which he and fellow gang members yelled at a rival gang member and the defendant's fellow gang members assaulted the rival, causing him to smash his head on the pavement. (*Sanchez,* at p. 916, 262 Cal.Rptr.3d 389.) He argued that former section 1170.95 violated equal protection by granting relief to defendants convicted of felony murder or murder under a natural and probable consequences theory, but not to defendants convicted of voluntary manslaughter. (*Sanchez,* at p. 917, 262 Cal.Rptr.3d 389.)

The appellate court disagreed. It explained that former section 1170.95 was enacted in conjunction with legislation that "amend[ed] sections 188 and 189 to restrict the scope of first-degree felony murder and to eliminate murder liability based on the natural and probable consequences doctrine," and "create[d] a procedure for offenders previously convicted of felony murder or murder under a natural and probable consequences theory to obtain the benefits of these changes retrospectively." (*Sanchez, supra,* 48 Cal.App.5th at p. 917, 262 Cal.Rptr.3d 389.) The court found the defendant was not similarly situated with those the law was intended to benefit, because he "was 'convicted of voluntary manslaughter, a different crime from murder, which carries a different punishment' " and because "[i]n general, 'offenders who commit different crimes are not similarly situated.' " (*Id.* at p. 920, 262

Cal.Rptr.3d 389.)

The People's reliance on *Sanchez* is misplaced. The equal protection inquiry focuses on whether two groups of people are similarly situated " ' "*for purposes of the law challenged.*" ' " (*Morales, supra*, 63 Cal.4th at p. 408, 203 Cal.Rptr.3d 130, 371 P.3d 592, italics added.) Unlike former section 1170.95, the resentencing provision currently codified at section 1170, subdivision (d)(1), was not enacted in conjunction with legislation that narrowed the scope of theories available to support particular homicide offenses, and its purpose was not to create a procedure for vacating convictions. In stark contrast to former section 1170.95, section 1170, subdivision (d)(1), does not make the defendant's conviction of a particular offense a requirement for seeking resentencing. (See § 1170, subd. (d)(1)(A).) In short, *Sanchez* involved a different ameliorative law with a different purpose and different requirements than the provision at issue in this case. The *Sanchez* court's reasons for finding the ***631** defendant convicted of voluntary manslaughter insufficiently similar to the defendants eligible for relief under former section 1170.95 simply do not apply here.

We conclude that for purposes of section 1170, subdivision (d)(1)(A), Heard is similarly situated with those defendants who are eligible to petition for resentencing.

B. *The Resentencing Provision's Differential Treatment of Juvenile Offenders Sentenced to Life Without Parole and Juvenile Offenders Sentenced to the Functional Equivalent of Life Without Parole Fails Rational Basis Scrutiny*

Next, we must consider whether the disparate treatment of the two categories of juvenile offenders is constitutionally justified. Both sides contend we should answer this question by applying the rational basis test. We agree. "Where a class of criminal defendants is similarly situated to another class of defendants who are ****653** sentenced differently, courts look to determine whether there is a rational basis for the difference." (*People v. Edwards* (2019) 34 Cal.App.5th 183, 195, 246 Cal.Rptr.3d 40.) " 'This standard of rationality does not depend upon whether lawmakers ever actually articulated the purpose they sought to achieve.' " (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881, 183 Cal.Rptr.3d 96, 341 P.3d 1075.) " 'While the realities of the subject matter cannot be completely ignored [citation], a court may engage in " 'rational speculation' " as to the justifications for the legislative choice [citation]. It is immaterial for rational basis review "whether or not" any such speculation has "a foundation in the record." ' [Citation.] To mount a successful rational basis challenge, a party must ' "negative every conceivable basis" ' that might support the disputed statutory disparity." (*Ibid.*) "If a plausible basis exists for the disparity, courts may not second guess its ' "wisdom, fairness, or logic." ' " (*Ibid.*)

Heard contends there is no rational basis for making juvenile offenders sentenced to explicit terms of life without parole eligible for resentencing under section 1170, subdivision (d)(1), while denying the same opportunity to juvenile offenders sentenced to terms that amount to the functional equivalent of life without parole. We agree. The resentencing provision has been called "a legislative 'act of lenity' designed to permit defendants to secure a 'modification downward' of their sentences." (*People v. Gibson* (2016) 2 Cal.App.5th 315, 327, 206 Cal.Rptr.3d 253.) Though apparently initially conceived as a means for reducing the sentence of a juvenile offender sentenced to life without parole to one that provided an opportunity for ***632** parole,[15] section 3051, subdivision (b)(4), now largely fulfills that purpose. (See § 3051, subd. (b)(4).) Even so, the resentencing provision remains operative and available to offenders sentenced to explicit life without parole terms.

We can conceive of no legitimate reason for making juvenile offenders sentenced to explicit life without parole terms eligible to seek resentencing but not juvenile offenders sentenced to the equivalent of a life without parole sentence. Both groups, subject to limited exceptions, are now eligible for youth offender parole hearings.[16] ****654** Heard will receive his youth offender parole hearing after 25 years of incarceration; so will a juvenile offender sentenced to an explicit term of life without parole. (§ 3051, subd. (b)(3), (4).) And yet only the latter group is permitted to petition for resentencing.

The People's sole justification for the differential treatment is that the Legislature "could have reasonably concluded that the punishment of [life without parole] imposed on those under age 18 could be excessive and this was an appropriate means of reform by allowing for reconsideration of such a sentence." But as Heard points out, the same concern applies equally to juveniles sentenced to the functional equivalent of life without parole.

Nor can the differential treatment be justified by differences in the relative culpability of each group. The United States Supreme Court, in addressing the justifications for juvenile punishment, has recognized that a criminal sentence must relate to the culpability of the offender. (See ***633** *Graham, supra*, 560 U.S. at p. 71, 130 S.Ct. 2011.) Resentencing under section 1170, subdivision

(d)(1), is available to juvenile offenders convicted of first degree murder whose cases involve a special circumstances finding. (See § 190.5, subd. (b).) Special circumstances murders are considered "the most heinous acts" proscribed by law. (*In re Nunez* (2009) 173 Cal.App.4th 709, 728, 93 Cal.Rptr.3d 242.) They are "more severe and more deserving of lifetime punishment than nonspecial circumstance first degree murder." (*In re Williams* (2020) 57 Cal.App.5th 427, 436, 271 Cal.Rptr.3d 453.) By contrast, " 'defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers.... Although an offense like robbery or rape is "a serious crime deserving serious punishment," those crimes differ from homicide crimes in a moral sense.' " (*Contreras, supra*, 4 Cal.5th at p. 382, 229 Cal.Rptr.3d 249, 411 P.3d 445, quoting *Graham*, at p. 69, 130 S.Ct. 2011.) Section 1170, subdivision (d)(1), thus has the incongruous effect of extending sentencing leniency exclusively to the category of offenders generally regarded as the least deserving of it. (See *Contreras*, at p. 382, 229 Cal.Rptr.3d 249, 411 P.3d 445 [observing that section 3051, by making juveniles convicted of special circumstances murder eligible for youth offender parole hearings while denying youth offender parole hearings to juvenile One Strike sex offenders, has the "anomalous" effect of "treat[ing] a nonhomicide offense more harshly than special circumstance murder"].) The gravity of the crimes committed by the two groups of juvenile offenders thus fails to explain their differential treatment.

We have also considered whether the Legislature might have viewed a juvenile offender whose multiple offenses cause him to receive a lengthy term-of-years sentence as more culpable, and more deserving of severe punishment, than an offender who commits a single, albeit more serious offense. However, even if one accepts this as a logical premise, it fails when one considers how section 1170, subdivision (d)(1), operates. Although section 1170, subdivision (d)(1), makes a juvenile offender sentenced to an explicit life without parole term eligible to petition for resentencing, nothing in the provision precludes a juvenile who receives that same sentence *plus additional terms imposed for additional offenses or enhancements* from petitioning for resentencing. The number of offenses theoretically committed by each ****655** group of offenders also fails to justify their disparate treatment.

In sum, we are unable to identify a rational basis for making juveniles sentenced to an explicitly designated life without parole term, but not juveniles sentenced to the functional equivalent of life without parole, eligible to petition for resentencing under section 1170, subdivision (d)(1). As a ***634** consequence, denying Heard the opportunity to petition for resentencing under this provision violates his right to equal protection of the laws.[17]

We will therefore reverse the trial court's order denying Heard's petition for recall and resentencing on the ground that his sentence rendered him ineligible to petition for resentencing. Because the trial court denied Heard's petition on this ground, it did not consider the merits of the petition. (See § 1170, subd. (d)(5) [requiring the court to determine whether, "by a preponderance of the evidence that one or more of the statements specified in subparagraphs (A) to (D), inclusive, of paragraph (2) is true"].) Upon remand, the court must consider the merits of the petition and proceed in accordance with section 1170, subdivision (d)(1)'s directives. We express no opinion on the outcome of that proceeding.

DISPOSITION

The June 28, 2021 order denying Heard's petition for recall of sentence and resentencing is reversed. The matter is remanded to the trial court for further proceedings in accordance with this opinion.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.

All Citations

83 Cal.App.5th 608, 299 Cal.Rptr.3d 634, 22 Cal. Daily Op. Serv. 10,073, 2022 Daily Journal D.A.R. 10,066

Footnotes

1 Further unspecified statutory references are to the Penal Code.

[2] For brevity, we subsequently refer to life without the possibility of parole as "life without parole."

[3] Our summary of the underlying factual and procedural background is taken in part from two prior decisions of this court. (*People v. Heard* (Feb. 24, 2009, D052492), 2009 WL 449636 [nonpub. opn.]; *In re Heard* (2014) 223 Cal.App.4th 115, 166 Cal.Rptr.3d 824, review granted April 30, 2014, S216772, matter transferred Aug. 17, 2016, judg. vacated and cause remanded Sept. 12, 2016, D063181.) Although *People v. Heard* is an unpublished opinion, and our published opinion in *In re Heard* was subsequently vacated, we may appropriately rely on them for information about the background of this case. Both opinions were submitted to the trial court as exhibits to Heard's recall and resentencing petition, and on January 13, 2022, this court granted Heard's unopposed request for judicial notice of both opinions as well as the docket in case number D063181 pursuant to California Rules of Court, rule 8.252(a), and Evidence Code sections 452, subdivision (d), and 459. (See, e.g., *Pacific Gas & Electric Co. v. City and County of San Francisco* (2012) 206 Cal.App.4th 897, 907, fn. 10, 142 Cal.Rptr.3d 190 [observing it was appropriate for the appellate court to cite an unpublished decision "to explain the factual background of the case and not as legal authority"]; accord, *Conrad v. Ball Corp.* (1994) 24 Cal.App.4th 439, 443, fn. 2, 29 Cal.Rptr.2d 441.)

[4] Our description of this homicide is taken from the probation report, which was included in the clerk's transcript for this appeal.

[5] On counts 1 and 2, Heard was sentenced to 15 years to life on each attempted premeditated murder and a consecutive 25 years to life for the firearm under section 12022.53, subdivision (d), on each offense. The total term on both counts was 80 years to life. On count 3, Heard was sentenced to nine years for the voluntary manslaughter, plus four years for the firearm under section 12022.5, subdivision (a), another 10 years for the gang enhancement under section 186.22, for a total determinate term of 23 years. The court elected to run the sentences for counts 1, 2, and 3 consecutively.

[6] These factors are: "(1) 'a juvenile offender's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences" '; (2) ' "the family and home environment that surrounds [the juvenile]—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional" '; (3) ' "the circumstances of the homicide offense, including the extent of [the juvenile defendant's] participation in the conduct and the way familial and peer pressures may have affected him" '; (4) 'whether the offender "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys" '; and (5) ' "the possibility of rehabilitation." ' " (*In re Kirchner* (2017) 2 Cal.5th 1040, 1054, 216 Cal.Rptr.3d 876, 393 P.3d 364 (*Kirchner*).)

[7] In *Montgomery v. Louisiana* (2016) 577 U.S. 190, 212, 136 S.Ct. 718, 193 L.Ed.2d 599 (*Montgomery*), the Court held the holding of *Miller* was retroactive because it announced a substantive rule of constitutional law. The *Montgomery* court also held that states could remedy *Miller* error—that is, sentencing a juvenile to life without parole without considering the youth-related mitigating factors outlined in *Miller* (see footnote 6, *ante*)—by giving juvenile homicide offenders parole hearings, rather than resentencing them. (*Montgomery*, at p. 212, 136 S.Ct. 718.)

[8] Section 3051 originally excluded juvenile offenders sentenced to life without parole from receiving youth offender parole hearings. (See *Franklin, supra*, 63 Cal.4th at p. 278, 202 Cal.Rptr.3d 496, 370 P.3d 1053.) After the California Supreme Court held in *Kirchner, supra*, 2 Cal.5th 1040, 216 Cal.Rptr.3d 876, 393 P.3d 364 that section 1170, former subdivision (d)(2), was inadequate to cure *Miller* error, the Legislature amended section 3051 to provide youth offender parole hearings to juvenile offenders sentenced to life without parole. (See § 3051, subd. (b)(4), added by Stats. 2017, ch. 684, § 1.5.)

[9] Because this opinion was vacated, it has no effect as law of the case. (See *Crossroads Investors, L.P. v. Federal National Mortgage Assn.* (2017) 13 Cal.App.5th 757, 773, 222 Cal.Rptr.3d 1.)

[10] On our own motion, we take judicial notice of the trial court's order, which appears on the docket in case number D063181 and is part of our file in that case. (Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a); see *Forbes v. County of San Bernardino* (2002) 101 Cal.App.4th 48, 50–51, 123 Cal.Rptr.2d 721.)

[11] Wade Thomas Mills III, an adult, was in the car with Heard during the drive-by-shooting. He was found in possession of a gun at the time of the shooting, and his gun was also determined to have fired shell cases recovered from the crime scene. He was charged and tried with Heard on the attempted murders in counts 1 and 2, but the jury deadlocked as to Mills on both charges, and the court declared a mistrial as to Mills's case.

[12] The People do not dispute that the trial court's order is an appealable order. (See § 1237, subd. (b) [postconviction orders implicating a defendant's "substantial rights" are appealable]; *Gray v. Superior Court* (2016) 247 Cal.App.4th 1159, 1164, 203 Cal.Rptr.3d 77 ["It is plain that a defendant's 'substantial rights' include personal liberty interests."].)

[13] As we have mentioned, former subdivision (d)(2) of section 1170 was recently redesignated as subdivision (d)(1) of section 1170. (Stats. 2021, ch. 731, § 1.3.) This change took effect on January 1, 2022, while this appeal was pending. (See *ibid.*) Although the parties' appellate briefs refer to this provision by its former designation, we will generally refer to the provision (and the parties' arguments about the provision) using its current designation.

[14] Former section 1170.95 has since been amended and renumbered as section 1172.6. (Stats. 2021, ch. 551, § 2 [amended, effective Jan. 1, 2022]; Stats. 2022, ch. 58, § 10 [amended and renumbered, effective June 30, 2022].)

[15] When a recall petition filed under the authority of section 1170, subdivision (d)(1), is granted, the sentencing court has "the discretion ... to resentence the defendant in the same manner as if the defendant had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence." (§ 1170, subd. (d)(7).) Such provisions have been held to give the resentencing court "jurisdiction to modify *every* aspect of the sentence, and not just the portion subjected to the recall. [Citations.] In this situation, ... the resentencing court may consider 'any pertinent circumstances which have arisen since the prior sentence was imposed.' " (*People v. Buycks* (2018) 5 Cal.5th 857, 893, 236 Cal.Rptr.3d 84, 422 P.3d 531 [discussing recall of sentence under section 1170, former

subdivision (d)]; see *Dix v. Superior Court* (1991) 53 Cal.3d 442, 458, 279 Cal.Rptr. 834, 807 P.2d 1063 [observing that section 1170, former subdivision (d) allowed the trial court, on its own motion, within 120 days of the date of commitment, to " 'recall the sentence and commitment [previously ordered] and resentence the defendant in the same manner as if the defendant had not been sentenced previously' "].) In *Lopez, supra*, 4 Cal.App.5th at pages 652 to 653, 208 Cal.Rptr.3d 695, two juveniles initially sentenced to life without parole were each placed on five years of probation after the trial court granted their petitions for resentencing. As this example reveals, the benefit provided by section 1170, subdivision (d)(1), can extend beyond resentencing the offender to a term that includes the possibility of parole.

16 The Legislature has excluded from relief under section 3051 juvenile offenders sentenced under the Three Strikes Law or the "One Strike" sex offender law. (See § 3051, subd. (h) [stating section 3051 "shall not apply to cases in which sentencing occurs pursuant to Section 1170.12, subdivisions (b) to (i), inclusive, of Section 667, or Section 667.61"].)

17 Heard's equal protection claim appears to embrace the position—a position the People do not address—that the canon of constitutional avoidance requires us to construe section 1170, subdivision (d)(1)(A), to avoid this equal protection violation. To the extent Heard advances this argument, we reject it. The canon of constitutional avoidance applies when a statute " ' "is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part[.]" ' " (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373, 171 Cal.Rptr.3d 421, 324 P.3d 245.) It "is a tool for choosing between competing plausible interpretations of a statutory text" (*Clark v. Suarez Martinez* (2005) 543 U.S. 371, 381, 125 S.Ct. 716, 160 L.Ed.2d 734), "not a method of adjudicating constitutional questions by other means" (*ibid.*). As we have concluded, section 1170, subdivision (d)(1)(A), cannot plausibly be interpreted to apply to juvenile offenders who were not sentenced to an explicitly designated life without parole term. For this reason, the canon of constitutional avoidance does not apply.

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