Practice Memo

LWOP AND SENTENCES AMOUNTING TO LWOP IN YOUTH CASES: CRUEL AND UNUSUAL PUNISHMENT

(Last rev. March 2023)

LEAD CASES

Graham: In *Graham v. Florida* (2010) 560 U.S. 48 (*Graham*), the United States Supreme Court held that imposing a life without parole (LWOP) sentence on a juvenile who committed a nonhomicide offense is cruel and unusual punishment in violation of the Eighth Amendment. It relied on findings that minors have diminished capacity and greater opportunity for rehabilitation than do adults. (See also *In re Nunez* (2009) 173 Cal.App.4th 709 [LWOP for kidnapping for ransom by 14 year old is cruel and unusual].)

Miller: In *Miller v. Alabama* (2012) 567 U.S. 460 (*Miller*), the high court further held that mandatory LWOP sentences for minors under age 18 at the time of a homicide is cruel and unusual punishment. The decision relied on two main areas of law: (1) *Graham* and kin and (2) cases beginning with *Woodson v. North Carolina* (1976) 428 U.S. 280, which allow a death sentence to be imposed only after considering the characteristics of the offender and offense. "Mitigating qualities of youth" is one such characteristic. (*Miller, supra,* at p. 476, quoting *Johnson v. Texas* (1993) 509 U. S. 350, 367.)

Caballero: In *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*), the California Supreme Court held that, under *Graham* and *Miller*, a 110-year-to-life sentence for three attempted murders committed when the defendant was a minor is cruel and unusual punishment under the Eighth Amendment. A juvenile offender must have a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" – i.e., eligibility for parole some time during the person's natural life expectancy. (*Id*. at p. 269; see also *People v. Mendez* (2010) 188 Cal.App.4th 47, 62-68 [84-year-to-life sentence imposed on minor for nonhomicide offense is cruel and unusual punishment].)

Gutierrez: *People v. Gutierrez* (2014) 58 Cal.4th 1354 (*Gutierrez*) interpreted Penal Code[1] section 190.5, subdivision (b) [penalty for persons under 18 years of age] as allowing the free exercise of discretion between LWOP and 25 years to life in sentencing for a special circumstance murder committed by a juvenile, unencumbered by a presumption in favor of LWOP. This interpretation avoids the post-*Miller* "constitutional doubt" created by a presumption. The court overruled *People v. Guinn* (1994) 28 Cal.App.4th 1130 and cases applying it. Further, the court ruled that the trial court must consider the full range of relevant factors, as laid out by *Miller*. These include the

[1] All statutory references are to the Penal Code unless otherwise indicated.

defendant's youthfulness, background, role in the offense, ability to deal with the legal system, and potential for rehabilitation.

Franklin: In *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*), the California Supreme Court held the enactment of sections 3051 and 4801 satisfied the requirement of *Graham-Miller-Caballero* that a defendant who was a minor at the time of an offense have a reasonable opportunity to gain release during his or her natural lifetime, because it required that the defendant receive a parole hearing during his or her 25th year of incarceration. (*Id.* at p. 268.) The court remanded to the trial court to determine whether the defendant had an adequate opportunity at trial to make a record of mitigating evidence tied to his youth. (*Id.* at p. 269.) Such a record would play a major role at any youth parole hearing under section 3051.

Cook: *In re Cook* (2019) 7 Cal.5th 439 (*Cook*) clarified that a defendant whose case is final must file a motion in the superior court pursuant to section 1203.01, not a petition for writ of habeas corpus, to obtain a *Franklin* proceeding.

Delgado: In *People v. Delgado* (2022) 78 Cal.App.5th 95 (*Delgado*), Division Three of the Fourth District Court of Appeal extended *Franklin* proceedings to defendants who are not statutorily eligible for a youth parole hearing under section 3051. The court determined that this entitlement lies in section 4801, subdivision (c), which was enacted in conjunction with section 3051. The Attorney General agreed. (The court rejected the defendant's argument that he was similarly situated, for equal protection purposes, with youth offenders who are eligible under section 3051.) The *Delgado* court reversed and remanded for a *Franklin* proceeding.

APPLYING THESE CASES IN PRACTICE

Defendants who are entitled to an eventual youth parole hearing under section 3051

For defendants entitled to an eventual youth parole hearing under section 3051, several issues that had been on review before *Franklin* seem to have gone away. For these defendants, the following questions are arguably no longer relevant:

- Failure to apply *Miller*'s various mitigating characteristics of youth at the original sentencing. (See *Montgomery v. Louisiana* (2016) 577 U.S. 190, 212 ["A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them."].)

- Whether a given lengthy sentence is the functional equivalent of LWOP. (See *Franklin*, *supra*, 63 Cal.4th at p. 268 [youth parole hearing scheme rendered moot

the question of whether the defendant's 50-year-to-life sentence was functionally equivalent to LWOP].)

The retroactivity of *Gutierrez-Caballero* has been resolved, anyway: *Montgomery v. Louisiana*, *supra*, 577 U.S. at page 206 held *Miller* retroactive as a substantive provision of law. (See also *People v. Berg* (2016) 247 Cal.App.4th 418.)

Attorneys with youthful clients who will eventually receive a parole hearing should consider whether a *Franklin* proceeding under section 1203.01 to preserve evidence is likely to be beneficial. (See *People v. Medrano* (2019) 40 Cal.App.5th 961, 967-968 & fn. 9 [defendant who failed to make a record of youth-related evidence at sentencing forfeited the right to remand for a *Franklin* proceeding; the appellate court affirmed without prejudice to defendant filing a section 1203.01 motion].)

Defendants who are <u>not</u> entitled to an eventual youth parole hearing under section 3051

Some defendants are categorically ineligible for a youth parole hearing under the terms of section 3051. That statute provides in relevant part:

> (h) This section 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, or to cases in which an individual is sentenced to life in prison without the possibility of parole for a controlling offense that was committed after the person had attained 18 years of age. This section shall not apply to an individual to whom this section would otherwise apply, but who, subsequent to attaining 26 years of age, commits an additional crime for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison.

For defendants in the listed categories, several issues are still remaining after *Franklin*. In *People v. Contreras* (2018) 4 Cal.5th 349, for example, the California Supreme Court held sentences of 50 years to life and 58 years to life imposed on two juvenile nonhomicide offenders, who were convicted of kidnapping and sexual offenses, violated the Eighth Amendment. Even if their parole eligibility dates were within their expected life spans, confinement with no possibility of release until the end of their lives was unlikely to allow for reintegration and gave defendants little incentive to become responsible individuals. (*Id*. at pp. 367-368.) Thus, 50 years to life was functionally equivalent to LWOP, an especially harsh punishment for a juvenile. (*Id*. at p. 369.)

Another possible, more case-specific issue may be that the trial court did not consider the constitutionally mandated individualized factors identified in *Miller*, including the defendant's youthfulness, background, role in the crime, ability to deal with the legal

system, and potential for rehabilitation. (*People v. Gutierrez*, *supra*, 58 Cal.4th at pp. 1387-1390.) Under *Franklin*, this issue is mooted for 3051-eligible defendants, but the issue could still arise for ineligible defendants. (See, e.g., *People v. Carter* (2018) 26 Cal.App.5th 985.) However, as noted above, *Delgado* extended *Franklin* proceedings to those whose parole proceedings come within sections 4801 and 3041.5.

Some appellate courts have held that excluding youthful offenders sentenced under the Three Strikes law from youth parole hearing eligibility does not violate equal protection. (See, e.g., *People v. Moore* (2021) 68 Cal.App.5th 856, 861-864; *People v. Wilkes* (2020) 46 Cal.App.5th 1159.)

In *People v. Montelongo* (2020) 55 Cal.App.5th 1016, the Second District, Division Seven held that LWOP imposed on an 18 year old convicted of special circumstance murder did not constitute cruel and unusual punishment. (*Id*. at pp. 1030-1032.) The court declined to address the appellant's further claim that his sentence violated equal protection, as the claim was not raised until the reply brief. (*Id*. at p. 1030, fn. 8.) The California Supreme Court denied review (S265597), but Justice Liu filed a concurring statement. Justice Liu wrote to underscore that section 3051 stood in tension with *Miller*, insofar as the statute excluded individuals sentenced to LWOP for offenses committed when they were 18 to 25 years old. Justice Liu explained the mitigating aspects of youth identified in *Miller* applied until age 25, regardless of the offense committed. The Second District, Division Seven later agreed, holding in *People v. Hardin* (2022) 84 Cal.App.5th 273 (review granted Jan. 11, 2023, S277487) that it violates equal protection to exclude young adult offenders (ages 18 to 25) sentenced to LWOP — but not young adult offenders sentenced to parole-eligible life terms — from youth parole hearing eligibility. (But see, e.g., *People v. Acosta* (2021) 60 Cal.App.5th 769, 777-781 [section 3051 does not violate equal protection because there is a rational basis for treating young adult LWOP offenders differently].)

Currently, the California Supreme Court is considering the issue of whether section 3051, subdivision (h), violates the equal protection clause of the Fourteenth Amendment by excluding young adults convicted and sentenced for serious sex crimes under the One Strike law (§ 667.61) from youth parole consideration, while young adults convicted of first degree murder are entitled to such consideration. (*People v. Williams* (2020) 47 Cal.App.5th 475, review granted July 22, 2020, S262229.)

Section 1170(d)(1)(A) petition process for LWOP and Functional Equivalent of LWOP

Section 1170, subdivision (d)(1)(A) (formerly section 1170, subdivision (d)(2)) allows a statutorily eligible defendant who has served at least 15 years of a juvenile LWOP sentence to petition for recall and resentencing. The specific criteria are the defendant (1) "was under 18 years of age at the time of the commission of the offense"; (2) "was

sentenced to imprisonment for life without the possibility of parole"; and (3) "has been incarcerated for at least 15 years." (§ 1170(d)(1)(A).)

The California Supreme Court has held that section 1170(d)(1)(A) does *not* provide an adequate remedy where the sentencing court applied a presumption in favor of LWOP under section 190.5, subdivision (b) (*Gutierrez*, *supra*, 58 Cal.4th at pp. 1384-1387), nor where the sentencing court failed to apply the *Miller* factors (*In re Kirchner* (2017) 2 Cal.5th 1040).

The petition process afforded by section 1170(d)(1)(A) is also available to juvenile offenders who have been sentenced to a *functional equivalent* of LWOP under equal protection principles. (*People v. Heard* (2022) 83 Cal.App.5th 608.) *Heard* held "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." (*Id*. at p. 622.)

Responsibilities of counsel

Pre-remittitur cases: In pre-remittitur cases, appellate counsel should raise issues related to the foregoing authorities when they would be beneficial, no matter what the stage of the appeal — in the opening brief, a supplemental brief, petition for rehearing or review, or other appropriate pleading. See *Potentially Favorable Changes in the Law* discussing procedures at each stage of an appeal.

Post-remittitur cases: *Cook* clarified that a request for a *Franklin* proceeding must be presented by motion under section 1203.01. Normally, trial counsel would be responsible for seeking relief in the trial court. ADI cannot offer any realistic expectation that appellate counsel would receive compensation from the Court of Appeal for efforts on post-remittitur cases. Counsel may wish to seek a superior court appointment, however — or at least voluntarily help affected former clients by alerting them and/or their trial counsel to these new cases and the materials ADI has prepared for unrepresented defendants. Represented defendants should contact trial counsel to file the section 1203.01 motion; unrepresented defendants may use the materials below.

Materials for unrepresented inmates

Caballero materials

1. Cover letter to defendant introducing the materials and procedures.
2. Instructions for preparing the habeas corpus petition.
3. Answer to Question 6, "Grounds for Relief" (Attachment).
4. MC-275 (required form for pro per habeas corpus petition).

Gutierrez materials

1. Cover letter to defendant introducing the materials and procedures.
2. Instructions for preparing the habeas corpus petition.
3. Answer to Question 6, "Grounds for Relief" (Attachment)
4. MC-275 (required form for pro per habeas corpus petition)

Franklin materials

1. Cover letter to defendants introducing the materials and procedures.
2. Instructions for preparing the Penal Code section 1203.01 motion.
3. Sample Penal Code section 1203.01 motion.
4. Links to Penal Code sections 1203.01, ~~3041.5~~, 3051, 4801.

RELATED ISSUES

Additional potential issues flowing from these decisions include:

Absence of finding defendant killed or intended to kill

Justices Breyer and Sotomayor's concurrence in *Miller* emphasized they would not support even a discretionary LWOP unless it was shown the defendant killed or intended to kill. (*Miller*, *supra*, 567 U.S. at pp. 489-493.) (The majority opinion did not discuss this point and so did not reject it, although it used a different rationale.) If the record in a given case shows or permits the inference the client did not kill or intend to kill, a cruel and unusual punishment based on diminished individual culpability would be feasible. (See also *Graham*, *supra*, 560 U.S. at p. 69 ["[W]hen compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability"].)

Reckless indifference to human life

Under section 189, as amended by Senate Bill No. 1437, a person may be liable for felony murder only if the person was the actual killer, acted with intent to kill, or was a major participant in the underlying felony who acted with reckless indifference to human life. The appellate courts have held that youth can be relevant to deciding whether the defendant acted with reckless indifference to human life. (See, e.g., *People v. Jones* (2023) 86 Cal.App.5th 1076; *People v. Keel* (2022) 84 Cal.App.5th 546; *In re Moore* (2021) 68 Cal.App.5th 434, 453-454.)