Practice Memo

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

(Last rev. August 2016)

LEAD CASES

Graham: In *Graham v. Florida* (2010) 560 U.S. 48, the United States Supreme Court held that a life without parole sentence for juveniles who commit crimes other than homicide 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 youth 14 years old is cruel and unusual punishment].)

Miller: In *Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct. 2455, 183 L.Ed.2d 407], the court further decided that mandatory LWOP sentences for minors under age 18 at the time of a homicide violate the prohibition against cruel and unusual punishment. The decision relied on two main areas of law: (1) *Graham v. Florida* and kin and (2) cases beginning with *Woodson v. North Carolina* (1976) 428 U.S. 280, which require a death sentence be imposed only after considering the characteristics of the offender and offense. "Mitigating qualities of youth" is one such characteristic. (*Johnson v. Texas* (1993) 509 U. S. 350, 367.)

Caballero: In *People v. Caballero* (2012) 55 Cal.4th 262, 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.)

Gutierrez: *People v. Gutierrez* (2014) 58 Cal.4th 1354 interpreted Penal Code section 190.5, subdivision (b), as allowing the free exercise of discretion between LWOP and 25-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, the trial court must consider the full range of relevant factors, as laid out by *Miller*. These include the 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, the Supreme Court held the enactment of Penal Code section 3051 satisfies the requirement of *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 requires that the defendant receive a parole hearing during his 25th year of incarceration. The court remanded to the trial court to determine whether the defendant had an adequate opportunity at trial to make a record on applicable mitigating evidence tied to his youth. Such a record would play a major role at any parole release hearing under section 3051.

Reyes (remand order): Addressing a loose end from *Franklin* – whether the Supreme Court was generally authorizing evidentiary hearings in final cases to make an inquiry into youth-related mitigating factors – an order in *In re Reyes* (S233936[1]) granted review in a *Miller-Caballero* habeas corpus proceeding, then remanded to the Court of Appeal with directions to issue an order to show cause returnable before the superior court:

> The Secretary of the Department of Corrections and Rehabilitation is to be ordered to show cause, when the matter is placed on calendar, why petitioner is not entitled to make a record of "mitigating evidence tied to his youth." [Citing *Franklin*.]

APPLYING THESE CASES IN PRACTICE

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

For defendants affected by *Franklin* – those entitled to an eventual hearing under section 3051 – several issues that had been on review until that decision 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.

- Whether a given lengthy sentence is the functional equivalent of LWOP.

The retroactivity of *Gutierrez-Caballero* had been resolved, anyway: *Montgomery v. Louisiana* (2016) ___ U.S. ___ [136 S.Ct. 718, 193 L.Ed.2d 599], held *Miller* retroactive as a substantive provision of law. (See also *People v. Berg* (2016) 247 Cal.App.4th 418.)

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[1] http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=2139104&doc_no=S233936

Attorneys with defendants who will eventually be entitled to a section 3051 parole hearing should consider whether a *Franklin* hearing to preserve evidence is likely to be beneficial.

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

Some categories of juvenile offenders are ineligible for a 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 in which an individual was sentenced to life in prison without the possibility of parole. This section shall not apply to an individual to whom this section would otherwise apply, but who, subsequent to attaining 23 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*. ADI has briefing raising equal protection and cruel and unusual punishment grounds for requiring all juvenile offenders have the opportunity for release in their lifetime.

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 1354, 1387-1390.) Under *Franklin*, this issue is mooted for 3051-eligible defendants, but the issue still arises for non-section 3051 defendants.

On August 17, 2016, the Supreme Court ordered supplemental briefing in *People v. Contreras*, S224564, where the defendants are not within the provisions of section 3051, on the question whether a total sentence of 50 years to life or 58 years to life is the functional equivalent of life without the possibility of parole for a juvenile offender.[2]

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[2]Such an argument may be foreclosed if the record leaves no doubt that the trial court would have reached the same conclusion "even if it had been aware that it had [the] discretion" mandated by *Gutierrez*. Counsel should point out, however, that the record must explicitly rebut the inference that the trial court relied at least in part on *Guinn* and must affirmatively show the court would have chosen LWOP, anyway, in the exercise of unfettered discretion. A silent or ambiguous record requires resentencing. (See *People v. Chavez* (2014) 228 Cal.App.4th 18.)

Attorneys should preserve any of these issue if relevant; they may ask staff attorney Helen Irza (hsi@adi-sandiego.com) for sample briefing.

Responsibilities of counsel

Pre-remittitur cases: In pre-remittitur cases, appellate counsel should raise issues related to *Caballero- Gutierrez-Franklin* 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*, *supra*, discussing procedures at each stage of an appeal.

Post-remittitur cases: In post-remittitur cases, *Caballero* suggests defendants "may file petitions for a writ of habeas corpus in the trial court in order to allow the court to weigh the mitigating evidence in determining the extent of incarceration required before parole hearings." *Reyes* ordered habeas proceedings to gain evidentiary hearing in final cases that will eventually come under section 3051. 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 inmates (next topic).

Materials for unrepresented inmates

All materials can be accessed through links at
http://www.adi-sandiego.com/news_alerts/recent_changes_cases.asp#LWOP

Caballero materials

1. Cover letter to inmate 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 inmate 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 inmate 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)

RELATED ISSUES

Additional potential issues flowing from these decisions on juvenile LWOP or the equivalent 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 v. Alabama*, *supra*, 132 S.Ct. at pp. 2475-2477.) (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 v. Florida*, *supra*, 560 U.S. 48, ["[W]hen compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability"].)

Mandatory laws applying to youth

The reasoning of *Miller* might permit challenges to some mandatory or quasi-mandatory California laws as negating individualized decision-making. For example, *Miller* might provide ammunition for a challenge to laws requiring transfer of minors to adult court (Welf. & Inst. Code, § 602, subd. (b)) or permitting prosecutorial discretion to transfer minors to adult court (Welf. & Inst. Code, § 707, subd. (d)), both without judicial consideration of minors' individual characteristics. *Manduley v. Superior Court* (2002) 27 Cal.4th 537 upheld the constitutionality of 707(d) against arguments based on separation of powers, due process, equal protection, and California's single-subject rule; it did not, however, consider cruel and unusual punishment. *Miller* suggests its rationale may extend beyond the length of sentence: "[C]riminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed. . . . [I]mposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." (132 S.Ct. at p. 2466.)

PC 1170(d)(2) as remedy

Penal Code section 1170, subdivision (d)(2), effective January 1, 2014, allows a defendant who has served at least 15 years of a juvenile LWOP sentence to petition for recall and resentencing. *Gutierrez* found this to be an inadequate remedy to cure a sentence in violation of that case: "The potential for relief under section 1170(d)(2) does not eliminate the serious constitutional doubts arising from a presumption in favor of life without parole under section 190.5(b) because the same questionable presumption would apply at resentencing." (*Gutierrez*, 58 Cal.4th at p. 1385.) This avenue for potential relief remains available to juvenile offenders who have served at least 15 years of an LWOP sentence.