But He's Just A Baby!

I Should Be Ashamed Of Myself

Though not within the meaning of Welfare and Institutions Code section 300 or Penal Code section 273a, I sometimes recognize that I neglect children in my column. (And suddenly the barometric pressure has fallen rapidly, as millions of readers gulp air in shock at that statement! Okay, hundreds, then. Well, maybe only a dozen or so. Mom? Dad? Sis? Anyone? You reading this?) So this time I thought I would report on some recent developments affecting (or not) the length of sentences being imposed on some of our state's yoots, as our Cousin Vinny called them. The issues are still a work in progress, and we need to await the California Supreme Court's weigh-in. But I think it is important to see the questions being considered.

Don't Be Cruel (Yes, I'm An Elvis Fan)

Specifically, California's courts and the Legislature are addressing sentences of life without the possibility of parole, or the functional equivalent of LWOP, for acts committed as a juvenile, given *Miller v. Alabama* (2012) 567 U.S. ___ [183 L.Ed.2d 407, 132 S.Ct. 2455] and *Graham v. Florida* (2010) 560 U.S. 48 [130 S.Ct. 2011].

In *Miller*, the United States Supreme Court held that the Eighth Amendment proscription of cruel and unusual punishment prohibited a mandatory sentence of life in prison without the possibility of parole for a defendant who committed capital murder when he was 14. In *Graham*, it held LWOP was not an available sentence for a juvenile who did not commit homicide. In short, kids are kids and are not necessarily lost souls, and any sentence needs to provide a meaningful opportunity for them to demonstrate a level of rehabilitation and maturity such that they can be released into the community within their lifetimes.

A Distinction With A Difference

Lest a casual reader (or perhaps one whose forays into the criminal and juvenile delinquency arena constitute only a tiny sliver of an otherwise lucrative family law, intellectual property, or corporate practice) miss the distinction, let me point out that *Miller* focused on the mandatory nature of an LWOP sentence for a homicide offense. *Miller* allows an LWOP for a juvenile-committed homicide under certain circumstances and if certain conditions were met that led to the conclusion that LWOP was an appropriate sentence. *Graham* held that LWOP is never appropriate for a juvenile whose crime was not a homicide offense.

(And though we speak in terms of juveniles, we mean under the age of 18 at the time of the offense. They may well have been tried as adults, and they may well have been actually tried after their 18th birthday (during their 19th year or later, a picayune detail that has relevance to this article only if you keep reading), but the term of art "juvenile" still applies.)

A Smattering Of Exegesis

The holding of each is simple, but the implementation is a bit more complex. When the High Court was speaking of LWOP, did it mean strictly those cases where the words uttered by the judge included "for life without the possibility of parole"? Such that an LWOP sentence would be cruel and unusual, whereas a strikes sentence of 400 years to life would NOT be, because, after all, the offender would be eligible for parole consideration after 400 years? Or do we look at the substance more than the form?

Quacks Like A Duck

The California Supreme Court accepts that the "functional equivalent" of a sentence of life without the possibility of parole constitutes cruel and unusual punishment. (*People v. Caballero* (2012) 55 Cal.4th 262, in which it concluded that a sentence of 110 years to life for a juvenile convicted of attempted murder violated the Eighth Amendment because the defendant's parole eligibility date would fall outside his natural life expectancy.)

If It Were That Easy, Would We Even NEED Lawyers?

Okay, that's settled. Juvenile offenders serving the functional equivalent of life without parole need only file a petition for writ of habeas corpus and get a parole date, right? That was one of the statements in *Caballero*, anyway. Let's all go home, right? Oh, wait, I forgot. Not that easy. It's never that easy. The Legislature responded with some remedies, and the courts have a variety of ways of seeing whether new laws make the issue moot or how or when the problem can be resolved. As I discuss those cases, please keep in mind that most have been granted review by the California Supreme Court, so they cannot be cited as authority. (Rules of Court, rule 8.1115(a).)

In The Corner On Your Left, Wearing Gold

In re Alatriste and *In re Joseph Bonilla* (2013) 220 Cal.App.4th 1232 (petition for review granted 2/26/14) involved two defendants who had committed homicides while under age 18, and were sentenced as adults to 77 years to life and 50 years to life, respectively. Their petitions claimed that their sentences were cruel and unusual. It is not clear from the opinion what relief

they were seeking, but the Court of Appeal held that they were not entitled to new sentencing hearings. Their plight was resolved by Senate Bill 260 (which I will talk about momentarily), according to the court. As I noted, the Supreme Court granted review in *Alatriste/Bonilla*, and has requested briefing on the merits.

A similar conclusion was reached in *People v. Martin* (2013) 222 Cal.App.4th 98 (petition for review granted 3/26/14 and held pending the outcome in *Alatriste/Bonilla*), which concluded that the consecutive life terms were constitutional because section 3051 (part of Senate Bill 260) provides a meaningful opportunity for Mr. Martin to attain release on parole. (He received life for one of the attempted murders, plus 25 to life for use of a firearm, consecutive to life for the second attempted murder, plus 20 years to life for its firearm enhancement.)

Shall We Use The Marquess Of Queensberry Rules?

Senate Bill 260 was enacted during the Legislature's 2013-2014 session to address the concerns of *Miller*, *Graham*, and *Caballero*, effective this past January 1 (yes, AFTER the *Alatriste* and *Martin* Court of Appeal decisions were decided that relied on it for their resolution of the cases). It expressly applies to any prisoner who was under 18 years of age at the time of his or her controlling offense. (Penal Code section 3051, subd. (a).)

Section 3051 sets forth various milestones at which the juvenile offender may be considered for release on parole. If the sentence for the "controlling offense" (the offense or enhancement for which the longest term of imprisonment was imposed) is determinate, the person can be considered for parole after 14 years ("during his or her 15th year of incarceration"). If the sentence is life with a minimum of less than 25 years, the person is eligible after 19 years ("during his or her 20th year of incarceration"). And if the sentence for the controlling offense is 25 years to life, the person is eligible "during his or her 25th year of incarceration," which I calculate as being after 24 years.

So What Exactly IS The Eleventh Hour?

I mention the number of years with precision only because the appellate opinion in *Martin* uses the language "We do not see any constitutional infirmity in requiring petitioners to serve 20 or 25 years before they have the opportunity …." It seems the Court of Appeal and I may interpret "during his or her 20th [25th] year of incarceration" differently. I don't see any requirement that the petitioners have to serve a full 20 or 25 years. I see 19 or 24 years as the thresholds. But keep in mind that I have always been

confused by the phrase "11th hour" in the context of last minute decisions. My friends think of it as between 11 p.m. and midnight. But my literalist mind believes that, starting at noon, the first hour is the hour between 12 and 1, the second hour is between 1 and 2, and so on, where the eleventh hour is between 10 and 11, and the twelfth hour is the hour between 11 and midnight. When it comes to eligibility for parole, I prefer my way of thinking on behalf of my client. Of course, I'm not in charge.

As In Fizzbin, Except On Tuesdays

But section 3051, subdivision (h) states that section 3051 does NOT apply to anyone sentenced under the one-, two-, or three-strike provisions (sections 667.61, 1170.12, or 667, subd. (b) through (i)) or to any person sentenced to LWOP. And, if after reaching age 18, the person commits an additional crime for which malice aforethought is a necessary element, the section does not apply.

And On Your Right, In Silver

Unlike *Alatriste/Bonilla* and *Martin*, the juvenile in *People v. Lewis* (2013) 222 Cal.App.4th 108 was sentenced for both murder and a series of offenses resulting in a sentence under the one-strike law. He was sentenced to 40 years to life for the murder with a firearm and 75 years to life for his nonhomicide offenses. There was no discussion about SB 260, and I presume that is because section 3051, subdivision (h) excludes those sentenced under the one-strike law. The appellate court concluded that the 40 years to life for the murder was not a de facto LWOP, but that the 75 years to life for the remaining counts was, and then it treated the entire composite sentence of 115 years to life as a de facto LWOP. It concluded that the case had to be remanded to the lower court "to determine a parole eligibility date within Lewis' expected lifetime, unless it finds that Lewis' offenses reflect his irreparable corruption within the meaning of *Miller v. Alabama* (2012) 132 S.Ct. 2455."

When Is Never Not Never?

But wait, you say, if the 75 to life for a nonhomicide crime violates *Graham* (as interpreted by *Caballero* to mean no functional equivalent of an LWOP for nonhomicide offenses), and the appellate court concluded that the 40 to life for the murder was NOT the functional equivalent of an LWOP sentence, what is the relevance of the "irreparable corruption" language? Good question, but the opinion answers it. "Since the United States Supreme Court recognizes there are circumstances in which a juvenile who commits a

single homicide as his only offense might be found to be of such irreparable corruption as to warrant an actual LWOP without offending the Eighth Amendment, certainly there could be circumstances in which a juvenile who commits a homicide and three separate one strike sexual offenses could be of such irreparable corruption as to warrant a de facto LWOP without offending the Eighth Amendment." It's all in the wrist, folks, all in the wrist. By the way, the petition for review was denied by the Supreme Court, so *Lewis* is on the books for real.

When Is A Choice Not A Choice, Or Is It?

All righty then, we have two cases (*Alatriste/Bonilla* and *Martin*) where SB 260 is the cure-all, and another case (Lewis) where the matter was remanded for a trial court to set a parole eligibility date (unless the court finds irreparable corruption). Then there is *People v. Ramirez* (co-appellant was *Armendariz*) (2013) 219 Cal.App.4th 655 (petition for review granted 12/18/13), which directed the trial court to impose a different sentence. Ramirez and Armendariz were both convicted of murder, among other things. Ramirez was sentenced to LWOP plus 65 years to life. Although there was some discussion that the LWOP was not actually mandatory (section 190.5 provides for an LWOP or 25 to life term if the perpetrator was 16 or 17 and special circumstances were found true), the appellate court concluded that even had the trial court imposed 25 years to life, the combined 90 years to life is the functional equivalent of LWOP. So it delved further into the problem. Armendariz was sentenced to 90 years to life from the start. After concluding that these sentences were cruel and unusual, it remanded to the trial court "to exercise its discretion to impose sentences which [*sic*] ensure these juvenile defendants have a meaningful opportunity to demonstrate rehabilitation and potentially obtain their release within a reasonable period of time."

Waiting For Instant Replay

Again, *Ramirez* was granted review, so it is off the books. Though review was granted, it was on a "grant and hold" basis, which means that nothing further will happen to it until the lead cases are decided. Those are *People v. Gutierrez* (2012) 209 Cal.App.4th 646 (in which the Court of Appeal held that section 190.5 does not make LWOP mandatory, so *Miller* does not apply) and *People v. Moffett* (2012) 209 Cal.App.4th 1465 (in which the court held that even though section 190.5 does not make LWOP mandatory, courts have judicially construed section 190.5 as making LWOP the presumptive choice). *People v. Guinn* (1994) 28 Cal.App.4th 1130 is the seminal case applying that presumption. The appellate court in *Moffett* concluded that a presumption of LWOP is contrary to the spirit, if not the letter, of *Miller*. So the matter was

remanded for the court to reconsider the appropriate sentence without regard to any presumption. Again, both *Gutierrez* and *Moffett* have been granted review, so they, too, are off the books.

Tag Team Member Joins Silver Trunks In The Ring!

But wait, there's more! The Court found that SB 260 was not an adequate remedy in *In re Heard* (2014) 223 Cal.App.4th 115 (review granted 4/30/14 and held pending the outcome in *Alatriste*/*Bonilla*). Heard was convicted of a homicide (manslaughter), for which he was sentenced to 23 years, and two counts of attempted murder, for which he was sentenced to 80 years to life. All parties agreed this was the functional equivalent of an LWOP sentence. The attorney general contended that it was not unconstitutional because it involved a homicide, albeit manslaughter, and thus *Graham* and *Caballero* did not apply. The Court of Appeal concluded that, "Under the novel circumstances before us, we conclude that Heard's particular homicide offense does not take this case outside the safety of *Graham* and *Caballero*."

Mother, Please! I'd Rather Do It Myself!

Further, it disagreed with *Alatriste*/*Bonilla* and *Martin*, and concluded that SB 260 does not allow the sentencing court to ignore the requirements of *Graham*, *Miller*, and *Caballero* regarding setting the sentence in the first place. The High Courts require the SENTENCING court to consider the differences between adults and juveniles, and to impose a proper sentence accordingly. Merely allowing the opportunity to seek a parole hearing years down the road is not a satisfactory solution, according to *Heard*. "We do not read SB 260 as a replacement of the sentencing court's execution of its constitutional duties as required under *Graham*, *supra*, 560 U.S. 48, *Miller*, *supra*, 132 S.Ct. 2455 and *Caballero*, *supra*, 55 Cal.4th 262 to consider the differences between juveniles and adults when sentencing a juvenile offender. Instead, we view SB 260 as a 'safety net' to guarantee a juvenile offender the opportunity for a parole hearing during his or her lifetime. As a result, we conclude the sentencing court still must attempt to prescribe the constitutionally appropriate sentence under *Graham*, *Miller*, and *Caballero*." The appellate court reversed the sentence and remanded for the trial court to impose a sentence consistent with the analysis of the appellate decision. Again, the Supreme Court granted review on a "grant and hold" basis, pending the outcome in *Alatriste*/*Bonilla*.

A Little Of This, A Little Of That, Et Voila! Goulash!

Blending the various principles, *People v. Superior Court* (*Flores*) (2014) 223 Cal.App.4th 1535 (petition for review granted and held 5/21/14 pending the

outcome of *Altriste*/*Bonilla*), held that subdivision (d)(2) of section 1170 does not apply unless the stated sentence is life without the possibility of parole. First, section 1170, subdivision (d)(2) expressly states that the defendant must have been sentenced to life without the possibility of parole. The appellate court reviewed the legislative history and concluded that the Legislature was aware of de facto LWOP sentences, and *Caballero* was decided four days before the Senate passed the legislation, so the absence of language indicating an intent to include de facto LWOP sentences was a significant indicator that it did not intend section 1170 to apply to de facto LWOP terms. Further, since SB 260 provides an opportunity for long-sentence defendants to secure parole (a la *Alatriste*/*Bonilla* and *Martin*), Flores's sentence was not the functional equivalent of an LWOP, and thus the defendant is not denied equal protection. Again, review was granted and held.

Tag Team Redux: Left Corner Gold Gets Help

Concurring with the result in *Alatriste*/*Bonilla* and *Martin*, the appellate court in *People v. Franklin* (2014) 224 Cal.App.4th 296 likewise concluded that Penal Code section 3051 (part of SB 260) provides a meaningful opportunity for parole, so the mandatory term of 50 years to life for first degree murder with a firearm therefore did not constitute cruel and unusual punishment. Disagreeing with *Heard*, the court viewed the sentence as not the functional equivalent of an LWOP, because of SB 260, and thus there was no need for the exercise of discretion at the time of sentencing. It pointed out that section 3051 is precisely what the Supreme Court in footnote 5 of *Caballero* urged the Legislature to adopt: legislation establishing a parole eligibility mechanism that would provide an opportunity for parole on a showing of rehabilitation and maturity. A petition for review was filed on 4/9/14, but as of the writing of this article, the Supreme Court has not decided whether to grant or deny it. I'm not much of a gambler, but I would almost be willing to bet something of no value that review will be granted (or at least the opinion be ordered depublished), given the next case I discuss (*Rainey*), decided by the same day by the same court (but different division and different justices), reaching somewhat of an opposite conclusion, although in the context of a different statute.

Did You Know They Have Tours?

Here's my segue: don't forget Penal Code section 1170, subdivision (d)(2), which attempts to address *Miller* by providing that a juvenile sentenced to LWOP may submit a petition to the trial court for resentencing after having served at least 15 years. Unless (there's always an "unless," no?) the victim was tortured, or was a public safety official or firefighter. There are other

prerequisites, so look at the statute itself. While I think it is certainly helpful to the defense, the restrictions may affect whether it would be the only game in town. If the rationale reached in *Heard* holds up, the requirements that must be met before a petition can be filed may deprive the juvenile of the analysis the trial court judge must perform to determine the appropriate sentence. If that is the case, then it would seem to me that a writ of habeas corpus may lie. Oh, wait, there IS a case on that (albeit quite new, and subject to going bye-bye if review is granted).

Silver Trunks Counters Gold With An Assist

So that leads into *In re Rainey* (2014) 224 Cal.App.4th 280, in which the court concluded that section 1170, subdivision (d)(2) was not an adequate remedy, agreeing with *Heard* (which construed a similar delayed gratification mechanism under section 3051) that the trial court must set a proper sentence, and it does not comport with *Miller*/*Graham* to require the defendant to wait years (15 or more) before a determination is made for even eligibility for consideration for parole.

One important aspect present in *Rainey* is the question whether *Miller* is retroactive to cases on collateral review (i.e., through habeas corpus petitions). In other words, if the judgment is already final when something like *Miller* is handed down, does it apply retroactively? (This is in contrast to my previous two articles discussing *In re Estrada* (1965 63 Cal.2d 740, in which the presumption generally was applied only in cases that had not become final when the law changed.)

In Case You're Feeling FaTeagued,

Mr. Rainey was sentenced to LWOP for murder under section 190.5 (which, I repeat, sets LWOP or 25 years to life as the choices for the murderer who was 16 or 17 at the time of the crime). The case presents a good summary of *Teague v. Lane* (1989) 489 U.S. 288 [103 L.Ed.2d 334, 109 S.Ct. 1060], which generally bars retroactive application of new constitutional rules of criminal procedure to those cases that became final before the new rule was announced. "A holding constitutes a 'new rule' within the meaning of *Teague* if it 'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not 'dictated by precedent existing at the time the defendant's conviction became final.' [Citation omitted]." (*Graham v. Collins* (1993) 506 U.S. 461, 467 [122 L.Ed.2d 260, 113 S.Ct. 892].).

As you might expect, there are a couple of exceptions. The *Teague* rule is not the focus of this article, so I encourage you to read *Teague* itself, or at least the *Rainey* discussion of it, because I'm going to say simply that *Rainey*

concluded that *Miller* constituted one of the exceptions to *Teague*'s bar in retroactivity, and thus was available in support of habeas relief. (California will generally provide a remedy on collateral review if that remedy would be available in the federal courts. (See *In re Gomez* (2009) 45 Cal.4th 650, 655.)) Hence, it was proper for Mr. Rainey to seek relief from his cruel and unusual sentence of LWOP by way of habeas corpus, even though his judgment was long since final before *Miller* was decided.

Hmm, Do The Corners See Each Other?

Although *Rainey* was decided the same day as *Franklin*, by different divisions of the same appellate court (First District), there was no indication in either opinion that one panel was aware of the other's case. There is no mention of *Franklin* in *Rainey*, nor of *Rainey* in *Franklin*. That seems odd to me, because they reached opposite conclusions on similar issues, even though the specific statutes were different. I could imagine that the lack of inclusion and reference could be intentional, allowing each division to express its own opinion without implicitly casting aspersions on the reasoning employed by the other division on questions that surely must eventually be decided by the California Supreme Court. Pure speculation by me, of course. I simply was surprised at the absence of overt recognition.

The People filed a petition for review in *Rainey* on 4/3/2014, but as I write this article the Supreme Court has not yet decided whether to grant review. As I intimated in my discussion of *Franklin*, I suspect review will be granted.

Chubby Didn't Have A Lock On It

Another twist is present in *People v. Solis* (2014) 224 Cal.App.4th 727. The trial judge concluded that the juvenile offender did not merit the LWOP sentence despite his conviction of murder with special circumstances, and imposed a sentence of 50 years to life. The Court of Appeal concluded that this was nonetheless the functional equivalent of an LWOP, and relying on the recent enactment of section 3051 (again, SB 260), which guarantees a person like Solis a parole hearing after 25 years (or, more strictly, during his 25th year of incarceration), the Court of Appeal itself modified the sentence to include a minimum parole eligibility date of 25 years. (Why not 24 years "during the 25th year"? I dunno.)

Daughter, Please! I'd Rather Do It Myself!

Unlike the other cases I discussed, in *Solis* the trial judge did go through the process of evaluating the juvenile, and in fact exercised discretion to not impose the LWOP term, demonstrating complete awareness of *Miller*, *Graham*, and *Caballero*. There was full discussion, so the appellate court

found it unnecessary to remand the case for the trial court to comply with the demands of *Miller*. The attorney general argued that SB 260 filled the need, but the Court seemed to agree with the line of cases holding that the determination needs to be made at the time of the sentencing and not be delayed for decades. "Because the judge determined appellant is reformable, and because SB [260] affords appellant the opportunity for a parole hearing 25 years into his prison term, we will modify appellant's sentence to include a minimum parole eligibility date of 25 years. That way, even if SB 260 is repealed in the future, appellant will be guaranteed a parole hearing after 25 years by virtue of this judicial determination." (*Solis*, pp. 736-737.)

As long as I'm mentioning twists, neither party filed a petition for review in this case, but on 5/2/14, the Supreme Court, on its own motion, extended its time to grant or deny review on its own motion (to 7/9/14).

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And the last case is *People v. Dubose* (2014) 224 Cal.App.4th 1416. The defendant was sentenced to LWOP for first degree murder with special circumstances and life with possibility of parole for kidnaping for purpose of robbery (and a short determinate sentence under six years for other offenses). Because he was sentenced under section 190.5 (LWOP or 25 years to life if the murder was committed while the defendant was 16 or 17 years old), the sentence did not run afoul of *Miller* because it was not mandatory. The appellate court rejected the argument that LWOP was the presumptive sentence, stating that the case establishing that presumption (*Guinn*) was overruled by *Miller*. And from that it concluded that the trial court was not applying the presumption that had existed for the previous 18 years, because there was no presumption. But because *Miller* had not yet been decided when Dubose was sentenced, the trial court could not have known it had to consider the *Miller* factors. Therefore the Court of Appeal reversed the LWOP sentence and directed the trial court to resentence Dubose, taking into consideration the factors set forth in *Miller*.

(That's The Sound Of Scratching My Head)

I guess one thing I'm having a little trouble wrapping my head around is the court's reasoning that the presumption of *Guinn* (that LWOP should be imposed under section 190.5 unless the court determines it to be so unusual as to merit the alternative 25 years to life) had been overruled by *Miller*, so therefore (according to the appellate court) the trial judge would not have applied the presumption. Yet the Court of Appeal simultaneously concluded that the trial court could not have applied the *Miller* factors because *Miller* had not yet been decided. So wasn't *Guinn* the law at the time of sentencing?

If so, why wouldn't the trial judge have applied the presumption? The outcome was the same (remanded for the trial judge to exercise discretion regarding the LWOP sentence), so all's well that ends well, I suppose. My inability to follow reasoning notwithstanding. It may well be that I simply misunderstood the argument that the Court was responding to.

The petition for review was filed 4/29/14, but the Supreme Court has not acted on it as of the writing of this article.

But Not A Gyro

So that's a wrap for this edition. Bear in mind that most of the recent cases have been granted review and therefore don't count for anything as far as authority in a court of law. But it is important to understand the rationale between contrasting points of view. You obviously want to be able to assert the argument most favorable to your client. Though you cannot give the citation of the case, you should be able to follow the reasoning and authorities that the review-granted cases relied on.

As usual, the usual disclaimer. If I've touched on anything pertinent to your practice, be sure to read the actual cases.