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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL DEMOND RUSSELL,

Defendant and Appellant.

F071676

(Super. Ct. No. SC063190A)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Kern County. Steven M. Katz,
Judge.

Michael Evan Beckman for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and
Sarah J. Jacobs, Deputy Attorneys General, for Plaintiff and Respondent.

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Michael Demond Russell appeals from an order denying his petition for a recall of
sentence and resentencing filed pursuant to Penal Code¹ section 1170, subdivision (d)(2).

* Before Gomes, Acting P.J., Kane, J. and Detjen, J.

The petition was deemed moot in light of appellant's then-pending petition for writ of habeas corpus, which separately challenged the legality of his sentence. We agree with appellant that the trial court erred by denying his petition for recall and resentencing on mootness grounds. We reverse the order of dismissal and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant is a 41-year-old man who is currently serving a prison term of life without the possibility of parole (LWOP). In 1992, at the age of 17, he committed two murders within a span of seven weeks. He was convicted of both crimes, one of which resulted in a sentence imposed pursuant to section 190.5. Although section 190.5 gives trial courts two sentencing options, LWOP or 25 years to life, appellant received the harsher punishment. In addition to LWOP, appellant is serving a consecutive sentence of 29 years to life for the other murder conviction.

On December 1, 2014, appellant simultaneously filed a petition for writ of habeas corpus and a petition for recall and resentencing, both pertaining to his LWOP sentence. On or about March 3, 2015, the superior court issued an order to show cause in the habeas matter as to why appellant should not be resentenced in light of the California Supreme Court's opinion in *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1371 (*Gutierrez*). On March 17, 2015, appellant's legal counsel sent a letter to the superior court complaining that it had taken no action on his client's petition for recall and resentencing. The letter states, in pertinent part and in reference to the March 3, 2015 order to show cause: "NOWHERE IN THIS ORDER DOES THE COURT REFERENCE THE PETITION FOR RECALL UNDER CASE NO. SC063190A AND THE ORDER ON ITS FACE DOES NOT RULE ON THIS PETITION OR EVEN CITE

¹ Except where otherwise specified, all further statutory references are to the Penal Code.

THAT PETITION’S CASE NO.[,] NOR SHOULD OR COULD IT, BECAUSE THE PETITION FOR RECALL IS WHOLLY DIFFERENT AND SEPARATE FROM THE HABEAS PETITION AND REQUIRES DIFFERENT PROCEDURES BE TAKEN BY THE COURT.” (Original capitalization, bold type omitted.)

On March 27, 2015, the trial court issued an order concerning the petition for recall and resentencing. The order acknowledges receipt of counsel’s letter and chastises appellant for not filing his petition prior to seeking habeas relief, referring to the rule that habeas procedure may not be used to avoid otherwise available and adequate remedies.² Notwithstanding the timing of the two petitions, the court noted it had “found that Petitioner met his burden to show a prima facie case for habeas relief due to an allegation of error in the sentencing in light of [the *Gutierrez* decision].” The order continues: “Thus[,] there is no need to adjudicate the motion [i.e. the section 1170, subdivision (d)(2) petition] since that question is before the court in the petition for writ of habeas corpus. This renders the [petition] moot. On the basis of the foregoing, the [Petition] to Recall Sentencing is accordingly denied.”

On May 26, 2015, appellant filed his notice of appeal. In their briefing, the parties submit that on May 22, 2015, the superior court issued an order discharging its prior order to show cause in the habeas matter. Although there is nothing in the record to substantiate this contention, we know it is true because appellant currently has a petition for writ of habeas corpus pending before this court in case no. F071970, wherein he alleges that the trial court misinterpreted applicable case law in denying his request for

² The California Supreme Court is presently considering whether a section 1170, subdivision (d)(2) petition for recall of an LWOP sentence imposed pursuant to section 190.5 provides an adequate remedy under *Miller v. Alabama* (2012) 567 U.S. ____ [132 S.Ct. 2455] (*Miller*), as recently construed in *Montgomery v. Louisiana* (2016) 577 U.S. ____ [136 S.Ct. 718]. (*In re Berg* (2016) 247 Cal.App.4th 418, rev. granted July 27, 2016, S235277; *In re Kirchner* (2016) 244 Cal.App.4th 1398, rev. granted May 18, 2016, S233508.) That issue is not before us in this appeal because the trial court did not deny appellant’s petition on those grounds.

habeas relief. On our own motion, we take judicial notice of the petition for writ of habeas corpus filed in case no. F071970 and all exhibits attached thereto, including the trial court's May 22, 2015 order discharging its earlier order to show cause. (Evid. Code, §§ 452, subd. (d), 459.)

DISCUSSION

“Section 1170, subdivision (d)(2), enacted in 2012 (Stats. 2012, ch. 828, § 1), provides a procedural mechanism for resentencing of defendants who were under the age of 18 at the time of the commission of their offenses and who were given LWOP sentences. If the defendant has served at least 15 years of the LWOP sentence, he or she may ‘submit to the sentencing court a petition for recall and resentencing’ (§ 1170, subd. (d)(2)(A)(i)), so long as the LWOP sentence was not imposed for an offense in which the defendant tortured the victim or an offense in which the victim was a public safety official (*id.*, subd. (d)(2)(A)(ii)).” (*People v. Willover* (2016) 248 Cal.App.4th 302, 310.) It does not appear that the crime underlying appellant's LWOP sentence involved either of these disqualifying circumstances.

As a further prerequisite to obtaining relief under the statute, petitioners must establish that one of four qualifying factors is true: “(i) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law[;] (ii) 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[;] (iii) The defendant committed the offense with at least one adult codefendant[; or] (iv) The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or showing evidence of remorse.” (§ 1170, subd. (d)(2)(B).) Section 1170, subdivision (d)(2)(E) mandates that the trial court “shall hold a hearing” to

consider whether to recall the sentence and resentence the petitioner if it finds by a preponderance of the evidence that the statements in the petition are true. If the process moves to the hearing stage, the trial court may consider a number of different factors to determine the propriety of granting relief, including those set forth in section 1170, subdivision (d)(2)(F).

Appellant's petition was based on section 1170, subdivision (d)(2)(B)(iv), i.e., the performance of acts tending to indicate rehabilitation and/or the potential for rehabilitation. He correctly notes that if his petition demonstrated such acts by a preponderance of evidence, the superior court was statutorily required to conduct a hearing to determine the propriety of recalling the LWOP sentence and resentencing him. (§ 1170, subd. (d)(2)(E).) Appellant thus argues that consideration of the merits of his then-pending habeas petition did not render moot his petition for recall and resentencing because the petitions involved separate procedures and distinct matters of inquiry. Whereas the former was concerned with the legality of his sentence in light of new case law, the latter involved consideration of his behavior and personal growth over an approximate 21-year period of incarceration, among a variety of other factors.

In his briefing, appellant refers to his earlier habeas petition as the "The *Miller* Petition," alluding to the fact that it was based on the United States Supreme Court's decision in *Miller, supra*, and the California Supreme Court's interpretation of that case in *Gutierrez, supra*. By way of further background, *Miller* holds that it is cruel and unusual to impose a mandatory sentence of life without parole for a homicide committed prior to the defendant's 18th birthday, and requires that sentencing courts be given discretion to consider the juvenile offender's age and youthful characteristics before ordering such punishment. (*Miller, supra*, 567 U.S. at p. _ [132 S.Ct. at p. 2475].) In *Gutierrez*, the California Supreme Court considered "whether a presumption in favor of a sentence of life without parole under section 190.5(b) violates the Eighth Amendment to the United States Constitution under the principles announced in *Miller*." (*Gutierrez*,

supra, 58 Cal.4th at p. 1360.) Although section 190.5 is facially constitutional because it “confers discretion on a trial court to sentence a 16- or 17-year-old juvenile convicted of special circumstance murder to life without parole or to 25 years to life, with no presumption in favor of life without parole,” the courts of this state had previously interpreted the statute as favoring LWOP as the default punishment. (*Id.* at pp. 1360-1361.) The *Gutierrez* opinion holds that such a presumption is erroneous and potentially unconstitutional, and explains that, in light of *Miller*, defendants who were sentenced to LWOP pursuant to section 190.5 and under the prior presumption in favor of LWOP are entitled to resentencing unless there is a clear indication that the sentencing court would have nevertheless imposed LWOP had it been fully aware of its discretion to do otherwise. (*Gutierrez, supra*, 58 Cal.4th at pp. 1387, 1390-1391.)

We now turn to the question in this appeal. “[A]s a general matter, an issue is moot if ‘any ruling by [the] court can have no practical impact or provide the parties effectual relief.’ ” (*People v. J.S.* (2014) 229 Cal.App.4th 163, 170.) Our foregoing discussion highlights the differences between a section 1170, subdivision (d)(2) petition and a habeas petition that is based on the holdings of *Miller* and *Gutierrez*. The analysis under *Miller* and *Gutierrez* is inherently retrospective, examining the constitutionality of a defendant’s LWOP sentence based on what the trial court did or did not take into consideration at the time of sentencing. The absence of sentencing error under *Miller* and *Gutierrez* does not preclude a defendant from obtaining statutory relief under section 1170, subdivision (d)(2). (See *People v. Lozano* (2016) 243 Cal.App.4th 1126, 1137-1138 (*Lozano*)). Even if the sentencing court is shown to have properly considered all factors relevant to its discretion to impose LWOP under section 190.5, the statutory procedure for recall and resentencing affords the petitioner an opportunity to obtain relief in light of subsequent events and changed circumstances (§ 1170, subs. (d)(2)(F)(vi)-(viii)), and “any other criteria that the court deems relevant to its decision” (*id.*, subd. (d)(2)(I)). “If anything, a decision to recall the sentence pursuant to section 1170(d)(2) is

a recognition that the initial judgment of incorrigibility underlying the imposition of life without parole turned out to be erroneous.” (*Lozano, supra*, 243 Cal.App.4th at p. 1137.) In sum, the mere possibility that appellant could achieve resentencing by challenging the *legality* of his sentence through the habeas procedure did not render moot his efforts to obtain the same type of relief on other grounds pursuant to section 1170, subdivision (d)(2).

Respondent argues the mootness finding was correct because the trial court “considered the same factors in ruling on the habeas petition that it would have considered if it had instead considered whether to recall the sentence under section 1170.” No evidence is cited in support of this assertion, but we assume respondent is referring to the trial court’s statement in its May 22, 2015 order that some of the exhibits filed with the habeas petition demonstrated appellant’s “growth and maturity and remorse for the life crimes.” This statement was made as a preface to the court’s conclusion that the People had accurately characterized appellant’s case as “one of those rare exceptions where no sentence modification is warranted.” Critically, however, the habeas petition was denied based on the conclusion that the trial court “functionally complied with the guidelines in *Gutierrez*” and *Miller* at the time of sentencing, “and thus a further hearing is not warranted.”

Appellant points out that the trial court’s issuance of an order to show cause in the habeas matter did not result in a hearing on his suitability for resentencing. In contrast, a formal hearing would have been statutorily required had the trial court evaluated his section 1170, subdivision (d)(2) petition and determined that he made a prima facie showing of acts tending to indicate rehabilitation or the potential for rehabilitation. Furthermore, the trial court’s statements in the May 22, 2015 order regarding appellant’s “growth and maturity and remorse” tend to suggest the probability of appellant clearing the procedural hurdle under section 1170, subdivision (d)(2)(E), meaning an evidentiary hearing might have taken place but for the mootness finding. Respondent seems to

equate mootness with the unlikelihood of appellant's ultimate success on the petition for recall and resentencing, which is not accurate. For the reasons discussed, the trial court erred by denying the section 1170, subdivision (d)(2) petition on mootness grounds. The matter will be remanded for the trial court to consider appellant's petition on the merits.

DISPOSITION

The order denying as moot appellant's petition for recall and resentencing under Penal Code section 1170, subdivision (d)(2) is reversed. The matter is remanded for further proceedings consistent with this opinion. On remand, the trial court shall consider appellant's petition on the merits and rule upon it accordingly.