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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARIO ORTEGA et al., Defendants and Appellants.	E061027 (Super.Ct.No. RIF72231) OPINION

APPEAL from the Superior Court of Riverside County. Michele D. Levine, Judge. Affirmed with directions.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant Mario Ortega.

Kimberly J. Grove, under appointment by the Court of Appeal, for Defendant and Appellant Jimmy Arevalo.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Peter Quon, Jr., Randy

Einhorn, and Susan Elizabeth Miller, Deputy Attorneys General, for Plaintiff and Respondent.

In December 1998, defendants and appellants Mario Ortega and Jimmy Arevalo were convicted by separate juries of multiple offenses as a result of their carjacking and robbing two individuals, one male and one female, and repeatedly raping, sodomizing, and forcing the female to orally copulate each defendant. Defendants' sentences were vacated when the People conceded that defendants were entitled to resentencing in compliance with the California Supreme Court's decision in *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*) [juvenile's sentence violates Eighth Amendment rights against cruel and unusual punishment because it amounts to a de facto life without the possibility of parole (LWOP) sentence for nonhomicide crimes]. Both defendants were resentenced to terms of 40 years to life.

On appeal, defendants contend: (1) Penal Code[1] section 3051 violates their equal protection rights because it excludes juveniles tried as adults and sentenced under the One Strike law from a youth offender parole hearing after serving at most 25 years in prison; (2) their sentences of 40 years to life constitute de facto LWOP sentences in violation of the Eighth Amendment; (3) the resentencing court was unaware of the scope of its discretionary powers; (4) the court was required to calculate defendants' credits for actual days spent in custody; and (5) the second amended abstracts of judgment contain errors requiring correction. We concur with defendants' claims regarding the calculation

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

of custody credits and the need to correct the second amended abstracts of judgment and order them to be corrected accordingly. In all other respects, we affirm the judgments.

I. PROCEDURAL BACKGROUND

The facts of the underlying crimes are not pertinent to the issues raised on appeal. Briefly, during the early morning hours of June 29, 1996, defendants Arevalo (born on October 29, 1980; age 15) and Ortega (born on September 18, 1979; age 16) carjacked two individuals, one male and one female, while they had stopped at a fast-food restaurant in the Casa Blanca area of Riverside.[2] Defendants forced the male to drive to a secluded area where defendants (under the threat of shooting the victims) robbed the victims, repeatedly raped and sodomized the female, and forced her to orally copulate each defendant. Defendants claimed that what they were doing was part of a gang initiation. (See *People v. Arevalo*, *supra*, E024506, E024509 [nonpub. opn.].)

Separate juries convicted defendants of two counts each of kidnapping during a carjacking (§ 209.5), kidnapping to commit robbery (§ 209, subd. (b)), robbery (§ 211) and carjacking (§ 215), during all of which Ortega used a sawed-off rifle (§ 12022.5, subd. (a)), a principal was armed with a sawed-off rifle (as to Arevalo) (§ 12022, subd. (a)(1)), and both committed the crimes for the benefit of a street gang (§ 186.22, subd. (b)(1)). (See *People v. Arevalo*, *supra*, E024506, E024509 [nonpub. opn.].) The juries further convicted each defendant of forcible sodomy (§ 286, subd. (c)), forcible rape (§ 261, subd. (a)(2)) and four counts of forcible oral copulation in concert (§ 288a,

[2] We have taken judicial notice of our opinion in defendants' first appeal, *People v. Arevalo* (June 29, 2000, E024506, E024509) [nonpub. opn.].)

subd. (d)). (See *People v. Arevalo*, *supra*, E024506, E024509 [nonpub. opn.].) As to each of these offenses, the juries found that Ortega used a sawed-off rifle, while, as to Arevalo, that a principal was armed with the weapon. The juries further found as to each sex offense that the defendants had kidnapped the female victim and substantially increased the risk of harm to her due to the movement (§ 667.61, subd. (d)(2)) and had acted in concert (§ 264.1). (See *People v. Arevalo*, *supra*, E024506, E024509 [nonpub. opn.].) Defendants' original sentences were vacated when the People conceded that defendants were entitled to resentencing in compliance with the *Caballero* decision.

On April 10, 2014, the trial court conducted the resentencing hearing. The court stated that it had received and read letters and exhibits on Arevalo's behalf. The court noted that it would be considering a number of different factors; however, it would not consider the letters in favor of mitigation, but would make them a part of the record to be considered by the Board of Prison Terms. The court noted that it would be "mak[ing] sure that both [defendants] have a meaningful opportunity to be able to . . . demonstrate that they have been rehabilitated and should, in fact, be released." The court then asked for argument regarding life expectancy.

Arevalo's counsel argued: "I think that *Graham*,[3] *Miller*,[4] and *Caballero* talk about how the Court must consider the difference between youth and adults because . . .

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[3] *Graham v. Florida* (2010) 560 U.S. 48, 75 [130 S.Ct. 2011, 176 L.Ed.2d 825] (*Graham*) [Eighth Amendment prohibits states from sentencing a juvenile convicted of a nonhomicide offense to life imprisonment without the possibility of parole].

children are more capable of change than are adults, and their actions are less likely to be evidence of irretrievable, depraved character than are the actions of adults." Counsel added that the court needed to "consider a juvenile defendant's age . . . physical and emotional development before imposing sentence." The court interrupted, stating, "I agree with you, I think that's what the cases say, that that is the basis upon which this Court is then altering the sentence in this instance, so that it—it recognizes in many respects the actions of a juvenile in an adult crime versus an adult with an adult crime."

Arevalo's counsel continued: "I think that the reason behind . . . the Supreme Court cases, it talked about the changes and the distinct issues with juveniles and their lack of maturity, their undeveloped sense of responsibility, which leads to recklessness, impulsivity, risk taking. They're also more vulnerable to negative influences or outside pressures, including family and peers. They have limited control over their environment and lack the ability to extricate themselves from horrific . . . crime producing settings." Counsel argued that "a child's character is not as well formed as adults and their traits are less fixed and their actions less likely to be evidence of irretrievable deprav[ity]." Counsel asserted that the court must take into account the "upbringing and the negative situations that [defendants] . . . were in." Counsel pointed out there was no discussion

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[4] *Miller v. Alabama* (2012) __ U.S. __, __ [132 S.Ct. 2455, 2464, 183 L.Ed.2d 407] (*Miller*) [Even in homicide cases a mandatory sentence of life in prison without the possibility to parole imposed on a defendant who was under the age of 18 at the time of his or her crime violates the Eighth Amendment].

regarding Arevalo's individual characteristics, such as age, life or upbringing, at the original sentencing hearing.

The trial court observed that Arevalo's original sentence of 199 years to life was reduced to 77 years to life "even without taking that into account because of the Eighth Amendment issue." The court again stated that it was "incorporating those issues of youth into its consideration in terms of the sentence that [it would] be imposing . . . ." The court added that it had "read and considered" the letters from family members, including the recent one from Arevalo's mother conveying her "heartbreak," and was taking them "into consideration along with the severity of the crimes."

Arevalo's counsel presented mitigating evidence including Arevalo's "very turbulent childhood, the difficulties he had, the fact his mother used methamphetamine throughout her pregnancy, the fact that he was raised by his grandmother for the most part, and had troubles in school." According to counsel, Arevalo's "severe emotional disturbance is likely due to the extreme instability of his life at the time" and his inability to control his impulses was likely because of his youth. Counsel added that Arevalo lacked adult supervision and proper role models and instead joined a gang; however, since the time of the commission of the crimes, he had obtained his G.E.D. (general equivalency diploma) and certification as a small engine mechanic; he was working as a clerk in the state prison; he had "received certificates in AA, NA, anger management"; he had not been validated or classified as a gang member; and he had no writeups for use or possession of weapons. Arevalo's counsel asked the court for a chance that Arevalo be released within his lifetime, to "reintegrate" and become a contributing member of

society. Arevalo's counsel asked that his client's sentence be modified to 25 years to life, or in the alternative, 32 years four months to life.

Ortega's counsel also pointed out several mitigating factors to support his client's request to reduce his sentence to 25 years to life, or in the alternative, 34 years four months to life.

In response, the People asserted there is no exact formula for the court to determine the correct sentences in this case; rather, it is within the court's discretion to decide the maximum sentences. The People asked that Arevalo be sentenced to 55 years to life, or in the alternative, "40 something to life." The People maintained that all *Caballero* required was that defendants "have a meaningful opportunity to have a parole hearing within their natural life expectancy." Arevalo's counsel challenged the People's interpretation of *Caballero*, arguing that the Supreme Court wanted defendants to be able to demonstrate their "rehabilitation to be able to get out prior to being placed into a nursing home."

The trial court explained that it was summarizing the facts of the crimes "to reflect what this Court understands the facts to be and why [it is] sentencing in the manner in which [it is]"; it was sentencing "consistently with the Eighth Amendment," and it was satisfying the constitutional mandates involving juvenile offenders in consideration of the severity of the offenses. After reviewing and considering the life expectancy documents submitted by both sides, the court calculated defendants' life expectancies to be between 77 and 82. The court observed that a sentence of 40 years to life "satisfies the Eighth Amendment and also . . . recognizes and respects the severity of the crimes and

offenses." The court noted that if it imposed a 40 year-to-life sentence and 15 percent conduct credits were earned, the initial parole eligibility date would be after 34 years of imprisonment, when Arevalo would be 50 years old and Ortega would be 51 years old. The court observed: "Even generously discounting their life expectancies to 70 due to their imprisonment, this would still leave them with a remaining life expectancy of 20 and 19 years respectively." The court concluded that period constituted a "meaningful length of time." The court also noted that, even if no conduct credits were awarded, Arevalo would be eligible for parole at age 56 and Ortega at age 57, such that each would still have over a decade of remaining life expectancies. The court sentenced both defendants to aggregate terms of 40 years to life.

II. DISCUSSION

A. Defendants' Exemption From the Provisions of Section 3051 Due to Their Status as "One Strike" Offenders Does Not Violate Their Right to Equal Protection.

Defendants contend that their equal protection rights have been violated because section 3051 provides most juveniles tried as adults with a youth offender parole hearing after serving at most 25 years in prison, but excludes those who are sentenced under section 667.61, also known as the "One Strike" law.[5]

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[5] The One Strike law "ensures serious sexual offenders receive long prison sentences whether or not they have any prior convictions." (*People v. Wutzke* (2002) 28 Cal.4th 923, 929.) "The sex crimes qualifying for One Strike treatment appear in section 667.61, subdivision (c). Almost all of the enumerated crimes involve the use of force or fear . . . ." (*Id.* at p. 930.) "The law expressly divests trial courts of authority to avoid these severe sentences: it provides that courts are barred from exercising their traditional

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Section 3051, subdivision (b)(3), provides that a youth offender sentenced to a term of 25 years to life, "shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing," unless otherwise released or is eligible for an earlier parole hearing date under other provisions. Thus, most youth offenders are eligible for a parole hearing after a maximum of 25 years of incarceration. However, this subdivision does not apply to three strikes sentences, one strike sentences, or LWOP sentences, or to those who commit certain additional offenses after reaching the age of 18. (§ 3051, subd. (h).)

The Fourteenth Amendment to the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." A similar requirement appears in California Constitution, article I, section 7. ""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." [Citation.]"" (*People v. McKee* (2010) 47 Cal.4th 1172, 1218-1219, quoting *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.)

"Being similarly situated with others who receive different treatment under the law does not necessarily mean that the challenged statute violates equal protection

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discretion to 'strike' any of the triggering circumstances specified in the One Strike law. [Citation.]" (*People v. Hammer* (2003) 30 Cal.4th 756, 761.)

guarantees. Instead, a finding that a defendant is similarly situated requires us to determine whether the statutorily authorized difference in treatment withstands the appropriate level of scrutiny. If a statute neither implicates a fundamental right nor operates to the singular disadvantage of a suspect class, only a rational relationship to a legitimate state purpose is necessary to uphold the constitutional validity of the legislation. [Citations.]" (*People v. Jeha* (2010) 187 Cal.App.4th 1063, 1073.)

In general, offenders who commit different crimes are not similarly situated. (*People v. Macias* (1982) 137 Cal.App.3d 465, 472-473; *Smith v. Municipal Court* (1978) 78 Cal.App.3d 592, 601 ["it is one thing to hold . . . that persons convicted of the same crime cannot be treated differently. It is quite another to hold that persons convicted of *different crimes* must be treated equally"].) In this case, defendants kidnapped *and* raped the female victim, substantially increasing the risk of harm inherent in the underlying rape under the One Strike law. Thus, defendants are not similarly situated to juvenile offenders who committed only homicide, attempted homicide, gang offenses, kidnapping, or sex offenses, for purposes of section 3051. "It is the prerogative of the Legislature, and the electorate by initiative, to recognize degrees of culpability and penalize accordingly. [Citations.]" (*People v. Jacobs* (1984) 157 Cal.App.3d 797, 804.) All juveniles who are convicted of a designated offense in section 667.61, subdivision (c), under any of the circumstances identified under subdivision (d), are subject to the same punishment and exclusion from section 3051.

Moreover, """"a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection

challenge *if there is any reasonably conceivable state of facts that could provide a rational basis for the classification*. [Citations.] Where there are "plausible reasons" for [the classification], our inquiry is at an end."""' [Citations.]" (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200-1201 (*Hofsheier*), overruled on other grounds in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 888.) "'[T]hose attacking the rationality of the legislative classification have the burden "to negative every conceivable basis which might support it."""' (*Hofsheier*, *supra*, at p. 1201.)

For purposes of a statute which allows most youth offenders to be eligible for a parole hearing after a maximum of 25 years of incarceration, it is clearly rational to distinguish between youth offenders convicted of kidnapping *and* raping a victim and youth offenders convicted only of one offense such as homicide, attempted homicide, gang offenses, kidnapping, or sex offenses. Defendants offer no compelling argument to the contrary. Rather, Ortega asserts that the only "'rationale'" appears to be "to provide cover for the Legislature in enacting the bill into law due to the fact that the public has a special distaste for sex offenders." And, Arevalo argues that because persons sentenced under section 667.61 are not exempt from the requirements of *Graham*, *Miller*, and *Caballero*, there appears to be "no reason for exempting them from the ameliorative provision of section 3051." Neither of these arguments is persuasive. Rational reasons exist for differentiating between One Strike sex offenders and other defendants; one reason being to punish those who commit sex crimes under certain aggravated circumstances more harshly. The fact that the requirements of *Graham*, *Miller*, and *Caballero* apply to defendants sentenced under the One Strike law is irrelevant to the

application of section 3051 to those same defendants. Accordingly, defendants have failed to meet their burden """to negative every conceivable basis""" which supports the legislation's distinction. (*Hofsheier*, *supra*, 37 Cal.4th at pp. 1200-1201.)

B. Defendants' Sentences of 40 Years to Life Do Not Constitute De Facto LWOP Sentences in Violation of the Eighth Amendment.

Defendants contend that their sentences of 40 years to life constitute de facto LWOP sentences in violation of the Eighth Amendment's bar against sentencing juveniles convicted of non-homicidal offenses to LWOP under *Graham*, *Caballero*, and *Miller*. We disagree.

As previously noted, the trial court calculated defendants' life expectancies to be between 77 and 82. Thus, assuming a 40 year-to-life sentence and 15 percent conduct credits were earned, the initial parole eligibility date would be after 34 years of imprisonment, when Arevalo would be 50 and Ortega would be 51. Further assuming life expectancies to be 70 due to imprisonment, they would have remaining life expectancies of 20 and 19 years, respectively. Even if no conduct credits were awarded, Arevalo would be eligible for parole at age 56 and Ortega at age 57, such that each would still have over a decade of remaining life expectancies.

Currently there is no guidance from either the United States Supreme Court or the California Supreme Court on what constitutes a meaningful opportunity for parole; however, the parties acknowledge that the California Supreme Court is currently reviewing the matter. (*In re Alatriste* (2013) 220 Cal.App.4th 1232, review granted February 19, 2014, S214652, and *In re Bonilla* (2013) 220 Cal.App.4th 1232, review

granted February 19, 2014, S214960.) Under section 3051, defendants will receive parole hearings and will be given a meaningful opportunity for release during their lifetime. Assuming the worst case scenario, those hearings will occur no later than defendants turning 56 and 57. The Board of Parole Hearings will provide a "meaningful opportunity to obtain release" (§ 3051, subd. (e)) and will "take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual." (§ 3051, subds. (f)(1).) Thus, defendants will be provided with a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" (*Graham*, *supra*, 560 U.S. at p. 75) within their life expectancies. As a result, defendants' sentences are not de facto LWOP sentences. Hence, they have no claim that their sentences constitute cruel and unusual punishment under the Eighth Amendment.

C. The Trial Court Properly Exercised Its Sentencing Discretion.

Arevalo contends "the trial court incorrectly believed it was required only to fashion a sentence that afforded defendant a meaningful opportunity to seek release on parole during his lifetime, by taking into consideration the amount of credits [he] might be entitled to and utilizing actuarial skills to determine how long [his] lifetime might be." He faults the court for discounting mitigating circumstances, discussed in *Graham*, *Miller*, and *Caballero*, as being irrelevant to its sentencing decision. We conclude the trial court was aware of its sentencing discretion, allowed Arevalo to introduce and discuss mitigating circumstances, and considered all relevant factors in sentencing him.

In sentencing defendants, the trial court stated that it was incorporating the issues of youth into its consideration. The court read and considered the probation report which sets forth defendants' chronological ages at the time of the crimes, this court's prior opinion detailing the facts of each defendant's participation and role in the crimes, and the letters and exhibits (including a school psychological/educational evaluation and review of Arevalo at age 13) discussing Arevalo's physical and mental development. The court listened to defense counsel's description of Arevalo's childhood, difficulties he faced, his instable life at the time of the crimes, the fact that his mother used methamphetamine while she was pregnant with him, the fact that he was raised by his grandmother, and the fact that his actions at school warranted discipline. Counsel attributed Arevalo's inability to control his impulses to his young age, noting that his lacked of adult supervision and proper role models led to his gang membership. Although counsel asked that Arevalo receive no more than a 25 year-to-life sentence, he was willing to accept 32 years four months to life.

Contrary to Arevalo's claims, we conclude the trial court understood the scope of its discretionary powers and considered the mitigating circumstances in making its sentencing decision. The trial court's sentence was 40 years to life. This sentence is only seven years eight months, greater than the sentence deemed acceptable to defense counsel. We reject Arevalo's contention that the sentencing court calculated the maximum sentence which could be imposed based solely on affording Arevalo a meaningful opportunity to seek release on parole during his lifetime, disregarding the mitigating circumstances discussed in *Graham*, *Miller*, and *Caballero*. It could have

imposed a much greater sentence, as urged by the prosecution. The trial court was tasked with sentencing juvenile defendants for their commission of serious, heinous crimes. In doing so, the court stated its need "to satisfy [the] constitutional mandates" while "recognize[ing] the severity of the offenses that were committed." After reviewing the record, we conclude the trial court properly exercised its discretion in sentencing defendants.

D. Defendants' Abstracts of Judgment Must Be Corrected.

1. Presentence custody credits.

The parties concur that the trial court was required to calculate defendants' credits for actual days spent in custody, and that the abstract of judgment must be corrected to reflect 6382 days of actual presentence custody credits from the time of their original sentencing to their resentencing. We agree. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 41.)

2. Errors on the second amended abstract of judgment.

The parties concur that the second amended abstracts of judgment contain three errors that should be corrected. We agree. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) The errors in the second amended abstracts of judgment that require correction are as follows: (1) Defendants' resentencing took place on April 10, 2014, not February 26, 1999. (2) Defendants' offenses were committed in 1996, not 1997. (3) Defendants are to pay $500 each in restitution, jointly and severally.

III. DISPOSITION

The superior court clerk is directed to correct the second amended abstract of judgment for each defendant to reflect: 6382 days of actual presentence custody credits; resentencing occurred on April 10, 2014; the offenses were committed in 1996; and the $500 restitution fine is to be paid jointly and severally. The clerk is then ordered to forward a certified copy of each of the corrected second amended abstracts of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgments are affirmed.

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HOLLENHORST
Acting P. J.

We concur:

MCKINSTER
J.

KING
J.