

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re ANTHONY MAURICE COOK, JR.

on Habeas Corpus.

G050907

(Super. Ct. No. WHCSS1400290)

O P I N I O N

Original proceedings; petition for writ of habeas corpus after a judgment of the Superior Court of San Bernardino County, Katrina West, Judge. Petition denied.

Anthony Maurice Cook, Jr., in pro. per.; and Michael Satris, under appointment by the Court of Appeal, for Petitioner.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Parag Agrawal and Lynne McGinnis, Deputy Attorneys General, for Respondent.

* * *

INTRODUCTION

In 2009, the convictions against petitioner Anthony Maurice Cook, Jr. (Petitioner), for two counts of murder, one count of attempted murder, and firearm enhancements were affirmed in *People v. Shaw* (May 28, 2009, G041439) (nonpub. opn.). By petition for writ of habeas corpus, Petitioner challenges his sentence of 125 years to life in prison. Petitioner, who was 17 years old when he committed the crimes, contends his sentence is unconstitutional under *Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 2455] (*Miller*) and, as relief, asks to be resentenced.

At the outset, it is important to note what is not in dispute in this proceeding. Respondent, represented by the California Attorney General, does not dispute (1) Petitioner's sentence of 125 years to life is a de facto sentence of life without the possibility of parole; (2) when sentencing Petitioner, the trial court did not consider his age, youthful attributes, and capacity for reform and rehabilitation; and (3) *Miller* applies retroactively to matters on collateral review. As to the last point, in *Montgomery v. Louisiana* (2016) 577 U.S. ___ [136 S.Ct. 718], the United States Supreme Court held that *Miller* applies retroactively to state convictions on collateral review.

The sole issue, as framed by the petition and supplemental petition for writ of habeas corpus, the return filed by respondent, and the traverse, is whether on collateral review or petition for writ of habeas corpus, Petitioner's sentence is constitutional in light of recently enacted Penal Code section 3051 (section 3051). We are compelled by *Montgomery v. Louisiana, supra*, 577 U.S. at page ___ [136 S.Ct. at page 736] to conclude that section 3051 ensures Petitioner will not have to serve a disproportionate sentence in violation of the Eighth Amendment to the United States Constitution.

BACKGROUND

In December 2003, Petitioner and Rufus Raymond Shaw shot and killed Odrum Nader Brooks and his son, Demarcus T. Brooks, while they sat in an automobile.

Petitioner was 17 years old at the time. In 2007, a jury convicted Petitioner of two counts of first degree murder (Pen. Code, § 187, subd. (a)) and one count of attempted murder (*id.*, §§ 664, 187, subd. (a)), and found true the allegations that Petitioner personally and intentionally discharged a firearm (*id.*, § 12022.53, subd. (c)) and personally and intentionally discharged a firearm proximately causing great bodily injury (*id.*, § 12022.53, subd. (d)).

The trial court sentenced Petitioner to an indeterminate term of life with the possibility of parole for the attempted murder, plus five consecutive indeterminate terms of 25 years to life for murder and discharging a firearm, for a total sentence of 125 years to life. The convictions and sentence were affirmed in *People v. Shaw and Cook, supra*, G041439.

In 2014, Petitioner filed a petition for writ of habeas corpus in the superior court in which he had been convicted. The superior court denied the petition without an evidentiary hearing in September 2014.

One month later, Petitioner, who was self-represented at the time, filed a petition for writ of habeas corpus in the Court of Appeal. He sought relief based on *Miller, supra*, 567 U.S. ___ [132 S.Ct. 2455]. Counsel was appointed to represent Petitioner, and counsel filed a supplement to the petition for writ of habeas corpus and an appendix of exhibits. We issued an order to show cause, in response to which respondent filed a return. Petitioner filed a traverse, thereby joining the issues for review.

DISCUSSION

I.

Petitioner's Sentence of 125 Years to Life in Prison Is Unconstitutional.

In *Graham v. Florida* (2010) 560 U.S. 48, 82 (*Graham*), the United States Supreme Court announced that the “Constitution prohibits the imposition of a life without

parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.” Two years later, in *Miller*, the Supreme Court declared, “[j]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered’ in assessing his [or her] culpability.” (*Miller, supra*, 567 U.S. at p. __ [132 S.Ct. at p. 2467], quoting *Eddings v. Oklahoma* (1982) 455 U.S. 104, 116.) The court held that “mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on ‘cruel and unusual punishments.’” (*Miller, supra*, at p. __ [132 S.Ct. at p. 2460].)

The *Miller* court summarized its holding as follows: “Mandatory life without parole for a juvenile precludes consideration of his [or her] chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him [or her]—and from which he [or she] cannot usually extricate himself [or herself]—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his [or her] participation in the conduct and the way familial and peer pressures may have affected him [or her]. Indeed, it ignores that he [or she] might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his [or her] inability to deal with police officers or prosecutors (including on a plea agreement) or his [or her] incapacity to assist his [or her] own attorneys. [Citations.] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.” (*Miller, supra*, 567 U.S. at p. __ [132 S.Ct. at p. 2468].)

The *Miller* court emphasized both that juvenile offenders are different from adult offenders and that the proportionality principle remains a core precept of Eighth

Amendment scrutiny of juvenile sentencing. The *Miller* court distinguished *Harmelin v. Michigan* (1991) 501 U.S. 957, which had rejected an Eighth Amendment proportionality claim, on the ground “*Harmelin* had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders.” (*Miller, supra*, 567 U.S. at p. ___ [132 S.Ct. at p. 2470].) The *Miller* court analyzed its prior opinions in *Roper v. Simmons* (2005) 543 U.S. 551 (*Roper*) and *Graham, supra*, 560 U.S. 48, and concluded, “*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing.” (*Miller, supra*, at p. ___ [132 S.Ct. at p. 2464].) The court cited to “*Graham*’s admonition that “[a]n offender’s age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.”” (*Id.* at p. ___ [132 S.Ct. at p. 2462].) The court relied on *Roper* and *Weems v. United States* (1910) 217 U.S. 349, 367, for “the basic “precept of justice that punishment for crime should be graduated and proportioned”” to both the offender and the offense.” (*Miller, supra*, at p. ___ [132 S.Ct. at p. 2463].) Indeed, “[t]he concept of proportionality is central to the Eighth Amendment.” (*Id.* at p. ___ [132 S.Ct. at p. 2463].)

After discussing *Graham*’s emphasis on “individualized sentencing,” albeit in the context of the death penalty, the *Miller* court listed Supreme Court cases requiring that the “sentencer have the ability to consider the ‘mitigating qualities of youth’” (*Miller, supra*, 567 U.S. at p. ___ [132 S.Ct. at p. 2467]), and stated that *Graham* “indicates that a similar rule should apply when a juvenile confronts a sentence of life (and death) in prison” (*Miller, supra*, at p. ___ [132 S.Ct. at p. 2468]). Again emphasizing that juvenile offenders are different, the Supreme Court stated, “[w]e have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children.” (*Miller, supra*, at p. ___ [132 S.Ct. at p. 2470].) The court described its “mandate[]” as follows: “[A] sentencer follow[s] a certain process—considering an

offender’s youth and attendant characteristics—before imposing a particular penalty.” (*Id.* at p. ___ [132 S.Ct. at p. 2471].)

The critical point in *Miller* is its explanation of how and why juvenile offenders differ from adult offenders. The *Miller* court invested a significant amount of its analysis in so doing and, citing *Graham* and *Roper*, made three points: (1) “juveniles have diminished culpability and greater prospects for reform” and are “less deserving of the most severe punishments”; (2) “children ‘are more vulnerable . . . to negative influences and outside pressures,’ including from their family and peers; they have limited ‘contro[l] over their own environment’ and lack the ability to extricate themselves from horrific, crime-producing settings”; and (3) “a child’s character is not as ‘well formed’ as an adult’s; his traits are ‘less fixed’ and his actions less likely to be ‘evidence of irretrievabl[e] deprav[ity].”” (*Miller, supra*, 567 U.S. at p. ___ [132 S.Ct. at p. 2464].) The *Miller* court noted its decision was based not only on “what ‘any parent knows’” but on “‘developments in psychology and brain science [that] continue to show fundamental differences between juvenile and adult minds’—for example, in ‘parts of the brain involved in behavior control.’” (*Id.* at p. ___ [132 S.Ct. at p. 2464].) These findings “of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child’s ‘moral culpability’ and enhanced the prospect that, as the years go by and neurological development occurs, his “‘deficiencies will be reformed.’”” (*Id.* at pp. ___-___ [132 S.Ct. at pp. 2464-2465].)

Following *Graham* and *Miller*, the California Supreme Court held a 110-year-to-life sentence imposed for three counts of attempted murder committed as a minor constituted cruel and unusual punishment. (*People v. Caballero* (2012) 55 Cal.4th 262, 265 (*Caballero*)). As the *Caballero* court explained, “the Eighth Amendment requires the state to afford the juvenile offender a ‘meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation,’ and that ‘[a] life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth

and maturity.’ (*Graham, supra*, 560 U.S. at p[p]. [75, 73].) The court observed that a life without parole sentence is particularly harsh for a juvenile offender who ‘will on average serve more years and a greater percentage of his [or her] life in prison than an adult offender.’ (*Id.* at p. [70].) *Graham* likened a life without parole sentence for nonhomicide offenders to the death penalty itself, given their youth and the prospect that, as the years progress, juveniles can reform their deficiencies and become contributing members of society. ([*Id.* at p. 71].)” (*Id.* at p. 266.)

In *Caballero*, the Attorney General had argued the 110-year-to-life prison sentence for a minor did not violate the Eighth Amendment, even though it was the “functional equivalent of a life without parole term,” because no individual component of the defendant’s sentence by itself amounted to a life sentence. (*Caballero, supra*, 55 Cal.4th at p. 271 (conc. opn. of Werdegar, J.)) Justice Werdegar rejected that argument because “the purported distinction between a single sentence of life without parole and one of component parts adding up to 110 years to life is unpersuasive.” (*Id.* at pp. 271-272 (conc. opn. of Werdegar, J.))

The *Caballero* court reversed the sentence and instructed that “the sentencing court must consider all mitigating circumstances attendant in the juvenile’s crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board. The Board of Parole Hearings will then determine whether the juvenile offender must be released from prison ‘based on demonstrated maturity and rehabilitation.’” (*Caballero, supra*, 55 Cal.4th at pp. 268-269, quoting *Graham, supra*, 560 U.S. at p. 75.)

In this case, the sentence of 125 years to life in prison imposed against Petitioner is unconstitutional under *Miller*. The trial court, when sentencing Petitioner, did not consider his “youth and attendant characteristics” (*Miller, supra*, 567 U.S. at p. ___

[132 S.Ct. at p. 2471]), his “physical and mental development” (*Caballero, supra*, 55 Cal.4th at p. 269), and his ability to “reform [his] deficiencies” and become a contributing member of society (*Caballero, supra*, at p. 266).

II.

Under the United States Supreme Court Opinion in *Montgomery v. Louisiana*, Section 3051 Cures the Constitutional Error in Sentencing.

The California Legislature responded to *Miller* and *Caballero* by passing Senate Bill No. 260 (2013-2014 Reg. Sess.), which became effective on January 1, 2014. By enacting Senate Bill No. 260 (2013-2014 Reg. Sess.), the Legislature “recognize[d] that youthfulness both lessens a juvenile’s moral culpability and enhances the prospect that, as a youth matures into an adult and neurological development occurs, these individuals can become contributing members of society.” (Sen. Bill No. 260 (2013-2014 Reg. Sess.) § 1.) The Legislature declared, “[t]he purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with the decision of the California Supreme Court in [*Caballero*] and the decisions of the United States Supreme Court in [*Graham*], and [*Miller*]. . . . It is the intent of the Legislature to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established.” (Sen. Bill No. 260 (2013-2014 Reg. Sess.) § 1.)

Senate Bill No. 260 (2013-2014 Reg. Sess.) added section 3051 to the Penal Code, which requires the Board of Parole Hearings to conduct youth offender parole hearings during the 15th, 20th, or 25th year of incarceration, depending upon the nature and length of the sentence. (§ 3051, subds. (a), (b).) Subdivision (a)(1) of

section 3051 states, “any prisoner who was under 23 years of age at the time of his or her controlling offense” shall be afforded a “youth offender parole hearing.” Youth offenders with determinate sentences of any length receive a hearing during the 15th year of incarceration (§ 3051, subd. (b)(1)), youth offenders sentenced to life terms of less than 25 years to life receive a hearing during the 20th year of incarceration (§ 3051, subd. (b)(2)), and youth offenders sentenced to an indeterminate base term of 25 years to life receive a hearing during the 25th year of incarceration (§ 3051, subd. (b)(3)). The youth offender parole hearing “shall provide for a meaningful opportunity to obtain release.” (§ 3051, subd. (e).) In conducting youth offender parole hearings under section 3051, the Board of Parole Hearings is required to “give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.” (Pen. Code, § 4801, subd. (c).) If the youth offender is found suitable for parole by the Board of Parole Hearings, he or she must be released even if the full determinate term originally imposed has not yet been completed. (Pen. Code, § 3046, subd. (c).)

Respondent contends these amendments to the Penal Code defeat Petitioner’s Eighth Amendment claim on collateral review because Petitioner will be entitled to a parole hearing after serving 25 years of his sentence. We are compelled by the United States Supreme Court to agree.

In *Montgomery v. Louisiana, supra*, 577 U.S. at page ___ [136 S.Ct. at page 736], the United States Supreme Court held that *Miller* applies retroactively to state convictions on collateral review. The Supreme Court then stated: “Giving *Miller* retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. See, e.g., Wyo. Stat. Ann.

§ 6-10-301(c) (2013) (juvenile homicide offenders eligible for parole after 25 years). Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.” (*Montgomery v. Louisiana, supra*, at p. ___ [136 S.Ct. at p. 736].) Under this reasoning, section 3051, which, similar to the Wyoming statute cited in *Montgomery v. Louisiana*, grants a juvenile offender a parole hearing during the 15th, 20th, or 25th year of incarceration, would prevent a disproportionate sentence in violation of the Eighth Amendment.

We are bound by *Montgomery v. Louisiana* and its conclusion that a future parole hearing can make a sentence valid when it had been imposed in violation of the Eighth Amendment. We recognize that in cases involving direct appeals, as distinguished from collateral review, the California Supreme Court rejected the argument that section 3051 does not eliminate the need for remand for resentencing that comports with the Eighth Amendment. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1384-1386; *Caballero, supra*, 55 Cal.4th at pp. 265-269.)

However, we also recognize that the United States Supreme Court held in *Montgomery v. Louisiana, supra*, 577 U.S. ___ [136 S.Ct. 718] that the analysis is different if the issue arises on collateral review. According to *Montgomery v. Louisiana*, after years of a defendant’s confinement, the issue for the parole board is whether, looking retrospectively, the defendant has demonstrated incorrigibility or rehabilitation. (See *In re Kirchner* (2016) 244 Cal.App.4th 1398, 1419.) For us to go further than following *Montgomery v. Louisiana* would be dicta and we decline to do so. We note that the California Supreme Court has granted review in cases on the issue whether section 3051 cures the unconstitutional sentence imposed on a juvenile.¹

¹ For example, *People v. Garcia* (2015) 240 Cal.App.4th 1282, review granted January 13, 2016, S230616; *People v. Scott* (2015) 235 Cal.App.4th 397, review granted July 8, 2015, S226155; *People v. Hernandez* (2014) 232 Cal.App.4th 278, review granted

DISPOSITION

The order to show cause is discharged and the petition for a writ of habeas corpus is denied.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

THOMPSON, J.

April 1, 2015, S224383; *People v. Garrett* (2014) 227 Cal.App.4th 675, review granted September 24, 2014, S220271; *People v. Franklin* (2014) 224 Cal.App.4th 296, review granted June 11, 2014, S217699; *In re Bonilla* (2013) 220 Cal.App.4th 1232, review granted February 19, 2014, S214960; and *In re Alariste* (2013) 220 Cal.App.4th 1232, review granted February 19, 2014, S214652. The Supreme Court heard argument in *People v. Franklin* on March 1, 2016, and the cause has been submitted.