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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DAVID GALVEZ, Defendant and Appellant.	B279420 (Los Angeles County Super. Ct. No. KA070312)

APPEAL from a postjudgment order of the Superior Court of the County of Los Angeles, Robert M. Martinez, Judge. Dismissed in part and remanded in part with directions.

Law Offices of Chris R. Redburn and Chris R. Redburn under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General, and Gary A. Lieberman, Deputy Attorney General, for Plaintiff and Respondent.

Defendant David Galvez appealed from the trial court's postjudgment order denying resentencing under *Miller v. Alabama* (2012) 567 U.S. 460 (*Miller*) and the Eighth Amendment to the United States Constitution. During the pendency of this appeal, defendant additionally sought to remand the matter to the trial court for a record development hearing in light of *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*) and a resentencing hearing under newly enacted Penal Code section 12022.53, subdivision (h).[1]

The appeal from the order denying resentencing under *Miller, supra*, 567 U.S. 460 and the Eighth Amendment is dismissed as moot: Section 3051, subdivision (b)(4) has provided defendant with the 25-years-to-life sentences he sought. Defendant's request for remand for further proceedings under *Franklin, supra*, 63 Cal.4th 261 is denied as defendant already has had the opportunity to present evidence necessary for a future youth offender parole hearing. We do remand, however, for the limited purpose of allowing the trial court to consider whether to exercise its discretion under section 12022.53, subdivision (h), to strike or dismiss the firearm enhancements in furtherance of justice (§ 1385).

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[1] All statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

This court affirmed defendant's conviction and sentence in an opinion filed August 22, 2007.[2] We summarized the factual and procedural background as follows: "Shortly after noon on March 20, 2005, sixteen-year-old gang member David Alejandro Galvez (defendant) took a .22 caliber semi-automatic rifle, drove with two accomplices into the territory of a rival gang on what the trial court characterized as a 'hunting trip,' and murdered two young men. A jury convicted defendant of two counts of first-degree murder (Pen. Code, § 187, subd. (a)) with a multiple-murder special circumstance (§ 190.2, subd. (a)(3)). The jury also found true the allegations that defendant personally used a firearm causing great bodily injury or death (§ 12022.53, subd. (d)), and that the murders were committed for the benefit of a street gang (§ 186.22, subd. (b)(1)(A)). The trial court sentenced defendant to two terms of life without the possibility of parole ("LWOP"), plus two terms of 25 years-to-life for the firearm enhancement, and ordered the sentences to run consecutively. The trial court struck the gang enhancement." (*Galvez I, supra,* B194868).)

In 2015, defendant petitioned for habeas corpus relief seeking a resentencing hearing pursuant to *Miller, supra,* 567 U.S. 460, to reduce the two LWOP sentences to 25 years-to-life each. The petition was granted, and the resentencing hearing conducted; but the trial court reimposed the LWOP sentences. Defendant appealed.

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[2] We granted defendant's request for judicial notice of our decision in *People v. Galvez* (Aug. 22, 2007, B194868) [nonpub. opn.] (*Galvez I*).)

While this appeal has been pending, section 3051, subdivision (b)(4) became effective, making defendant "eligible for release on parole . . . during his . . . 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions." (*Ibid.*) Asserting defendant obtained by legislation the relief he sought in this appeal, the Attorney General asked this court to dismiss the appeal as moot. Defendant countered the appeal is not moot because he is entitled to a remand for a *Franklin* hearing to develop a record for his future youthful offender parole hearing.

We also granted defendant's request for supplemental briefing to address section 12022.53, subdivision (h), which authorizes trial courts to exercise their discretion to strike firearm enhancements. Defendant sought remand for a section 12022.53, subdivision (h) resentencing hearing. The Attorney General opposed the request, arguing the trial court's statements at the two previous sentencing hearings clearly signaled it would not strike the firearm enhancements.

DISCUSSION

A. Defendant's Appeal Under *Miller* and the Eighth Amendment is Moot

By statute, a defendant sentenced to LWOP for crimes committed before he attained the age of 18 "shall be eligible for release on parole by the board during his . . . 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions." (§ 3051, subd. (b)(4).) As we held in *People v. Lozano* (2017) 16 Cal.App.5th

1286, 1289, "the issue is moot because [defendant] is no longer subject to an LWOP sentence." This portion of the appeal must be dismissed.

B. Defendant Has Already Been Afforded the Opportunity for a Record Development Hearing

To ensure fair and meaningful youth offender parole hearings under *Miller, supra*, 567 U.S. 460, juvenile offenders must be provided a "sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant . . . ." (*Franklin, supra*, 63 Cal.4th at p. 284.) For example, section 3051, subdivision (f)(1) provides that any "psychological evaluations and risk assessment instruments . . . [must] be administered by licensed [parole board] psychologists . . . and [must] 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 [defendant]. Defendant also may present the parole board with statements from "[f]amily members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about [him] before the crime or his . . . growth and maturity since the time of the crime." (§ 3051, subd. (f)(2).) Additionally, section 4801, subdivision (c) requires the parole board "to give great weight to the diminished culpability of juveniles, the hallmark features of youth, and the offender's subsequent maturity."

In *Franklin*, *supra*, 63 Cal.4th 261, it was not clear the defendant had been given the opportunity to present this type of evidence at his original sentencing. Accordingly, the matter was remanded to the trial court to first determine whether the

defendant had that opportunity and, if not, to hold a hearing so the defendant could "make a record of information relevant to his eventual youth offender parole hearing." (*Id.* at p. 284.) As *Franklin* explained, a defendant "may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors. The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors (§ 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law.'" (*Id.* at p. 284.)

Here, unlike the circumstances in *Franklin,* it is clear defendant had the opportunity to develop a record to be used at a future youth offender parole hearing. Defendant's October 4, 2016 resentencing hearing was conducted "pursuant to" *Miller, supra,* 567 U.S. 460, *Montgomery v. Louisiana* (2016) 136 S.Ct. 718 and *People v. Gutierrez* (2014) 58 Cal.4th 1354 (*Gutierrez*).[3]

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[3] In *Gutierrez,* the California Supreme Court discussed the "range of factors" *Miller* requires the trial court to consider. (*Gutierrez, supra,* 58 Cal.4th at p. 1388.) They include the juvenile offender's "'chronological age and its hallmark features;'" "'his family and home environment;'" "'the circumstances of the homicide offense'" and the extent of the juvenile's participation;

The parties briefed the *Miller/Gutierrez* factors and discussed them at the hearing. Defendant presented evidence and information relevant to youth offenders generally and to himself individually. The trial court organized its reasons for denying resentencing according to the *Miller/Gutierrez* factors. The requisites of *Franklin* have been satisfied in this case, and no remand for that purpose is warranted.

C. Remand for Resentencing Under Section 12022.53, Subdivision (h)

Defendant also seeks a remand under section 12022.53, subdivision (h), which now authorizes a trial court to exercise its discretion and strike firearm enhancements "in furtherance of justice." (§ 1385, subd. (a).)[4] The Attorney General opposes the request, noting the trial court's statements at the sentencing and resentencing hearings render it highly unlikely the trial court will exercise its discretion and strike defendant's firearm enhancements.

That may be, and we note defendant has not yet suggested how striking the enhancement would satisfy the requisites of section 1385 and be "in furtherance of justice," but we nonetheless

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whether the record reflects the juvenile might not have been treated so harshly under the law if he had been more mature and better able "'to deal with'" law enforcement, court processes, and his own attorney; and any information addressing the potential for rehabilitation. (*Id.* at pp. 1388-1389.)

[4] Section 1385, subdivision (a) provides in pertinent part: "The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed."

conclude remand is appropriate. The Legislature vested the trial court in the first instance with the discretion to strike firearm enhancements in the furtherance of justice. The trial court has not yet had the opportunity to do so, and we remand for that limited purpose. (*People v. Woods* (Jan. 26, 2018, C081813) __ Cal.App.5th __ [2018 Cal.App. LEXIS 68].)

DISPOSITION

That portion of the appeal from the postjudgment order denying resentencing under *Miller, supra,* 567 U.S. 460 is dismissed as moot. Defendant's request for remand for a hearing pursuant to *Franklin, supra,* 63 Cal.4th 261 is denied. Defendant's request for remand to permit the trial court to consider whether to exercise its discretion under section 12022.53, subdivision (h) is granted.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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* Judge of the Orange Superior Court appointed by the Chief Justice pursuant to article VI, section 6, of the California Constitution.