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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. WHITNEY GALLOW, Defendant and Appellant.	B291217 (Los Angeles County Super. Ct. No. BA091853)

APPEAL from an order of the Superior Court of Los Angeles County, Laura F. Priver, Judge. Affirmed.

William L. Heyman, 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, Assistant Attorney General, Michael C. Keller and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION AND BACKGROUND

In 1992, when defendant Whitney Gallow was 25 years old, he and an accomplice sought to purchase several kilograms of cocaine from three men. An argument ensued. Gallow shot and killed two of the men, and injured the third while attempting to kill him. (See *People v. Gallow* (Sep. 20, 1996, B088383) [nonpub. opn.].)

In 1994, a jury convicted Gallow on two counts of first degree murder (Pen. Code, § 187; counts 1 & 2)[1] with robbery and multiple murder special circumstance findings (§ 190.2, subds. (a)(3) & (a)(17)(i)), one count of attempted willful, deliberate, and premeditated murder (§§ 187, 664; count 3), and one count of first degree robbery (§§ 211, 212.5; count 4), with firearm use enhancements (§ 12022.5, subd. (a)) as to each count. The trial court sentenced Gallow to consecutive terms of life without the possibility of parole (LWOP) on counts 1 and 2 (§ 190.2, subd. (a)(3)), a consecutive term of life with the possibility of parole on count 3, plus three five-year terms for the firearm enhancements.[2] On appeal, the judgment was modified by striking the firearm enhancements on counts 2 and 3 and, as modified, affirmed. (*People v. Gallow*, *supra*, B088383.)

Following the enactment of section 3051 and subsequent amendments to its provisions for parole hearings for certain youthful offenders, Gallow asserted a right to a parole hearing

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

[2] The record does not reflect whether the trial court sentenced Gallow for the robbery or whether the court referred to the robbery special circumstance as a basis for the LWOP sentences.

despite his LWOP sentence because he had been incarcerated for over 25 years. On May 30, 2018, Gallow filed a petition to require the court to hold a hearing pursuant to *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*) so he could present mitigating, youth-related information for possible parole. On June 12, 2018, the trial court rejected the request, as section 3051 expressly states that its terms "shall not apply . . . to cases in which an individual is sentenced to life in prison without the possibility of parole for a controlling offense that was committed after the person had attained 18 years of age." (§ 3051, subd. (h); see also subd. (b)(4).)

Gallow now appeals the denial of his request for a *Franklin* hearing. Gallow acknowledges his ineligibility for relief under section 3051 as written. He instead argues the Legislature's decision to give parole hearings to offenders who committed offenses when under the age of 26, and who did not receive an LWOP sentence, means his LWOP sentence now constitutes cruel and unusual punishment. Gallow further asserts section 3051's exclusion of individuals over 18 years of age with LWOP sentences from its parole hearing provisions violates the constitutional guarantee of equal protection.

DISCUSSION

A. Gallow's Sentence Is Not Cruel or Unusual Punishment

Because the pertinent facts are undisputed, we review de novo Gallow's constitutional cruel or unusual punishment claim. (*People v. Palafox* (2014) 231 Cal.App.4th 68, 82-83.)

1. *History Underlying Section 3051*

While Gallow was an adult when he committed the offenses at issue, to provide context we start with an overview of the

juvenile sentencing jurisprudence that led to the enactment of section 3051. In recent years, the United States and California Supreme Courts have imposed limitations on the sentences which may be imposed on juvenile offenders. "In a series of cases, our high courts have recognized that 'children are constitutionally different from adults for purposes of sentencing' because of their diminished culpability and greater prospects for reform. (*Miller v. Alabama* (2012) 567 U.S. 460, 471 [183 L.Ed.2d 407, 132 S.Ct. 2455] (*Miller*).)" (*In re Jenson* (2018) 24 Cal.App.5th 266, 276.) The Eighth Amendment's prohibition on cruel and unusual punishment and its state constitutional corollary have been held to prohibit LWOP sentences for juveniles who commit nonhomicide offenses (*Graham v. Florida* (2010) 560 U.S. 48 [130 S.Ct. 2011, 176 L.Ed.2d 825]), de facto LWOP sentences for juvenile nonhomicide offenders (*People v. Caballero* (2012) 55 Cal.4th 262), and mandatory LWOP sentences for juveniles in homicide cases (*Miller*, *supra*, 567 U.S. 460).

In response to these developments, "our Legislature enacted Senate Bill No. 260 in 2013 [effective January 1, 2014] to implement the limitations on juvenile sentencing articulated in these cases. In adopting Senate Bill No. 260, which added section 3051 and amended sections 3041, 3046, and 4801,[3] the

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[3] As amended in 2014, section 4801, subdivision (c), stated: "When a prisoner committed his or her controlling offense, as defined in subdivision (a) of Section 3051, prior to attaining 18 years of age, the board, in reviewing a prisoner's suitability for parole pursuant to Section 3041.5, shall 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." The statute was more recently amended to state,

Legislature explained 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.' [Citation.] Thus, the bill's purpose was '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.' [Citation.] [¶] To this end, section 3051 provides that an offender who committed a 'controlling offense' as a youth is entitled to a 'youth offender parole hearing' after a fixed period of years set by statute." (*In re Jenson*, *supra*, 24 Cal.App.5th at pp. 276-277.)

"[W]hereas Senate Bill No. 260 made youth offender parole hearings available for juveniles who committed their controlling offense before age 18 (. . . Stats. 2013, ch. 312, § 5), the Legislature has since amended the age threshold to age 23 (. . . Stats. 2015, ch. 471, § 2) and now to age 25 (. . . Stats. 2017, ch. 684, § 2.5, eff. Jan. 1, 2018)." (*People v. Contreras* (2018) 4 Cal.5th 349, 381.) The "amendment effective January 1, 2018, raised the age of eligibility to 25 years and included LWOP offenses committed before age 18. [Citations.] Thus, section

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"When a prisoner committed his or her controlling offense, as defined in subdivision (a) of Section 3051, when he or she was 25 years of age or younger, the board, in reviewing a prisoner's suitability for parole pursuant to Section 3041.5, shall give great weight to the diminished culpability of youth 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."

3051 now provides that an offender who committed a 'controlling offense' under the age of 26 is entitled to a 'youth offender parole hearing' during his 15th year of incarceration if he received a determinate sentence; during his 20th year of incarceration if he received a life term of less than 25 years to life; and during his 25th year of incarceration if he received a term of 25 years to life. (§ 3051, subd. (b)(1)-(3).) An offender convicted of a controlling offense committed before the age of 18 for which he was sentenced to LWOP is entitled to a youth offender parole hearing during his 25th year of incarceration. (§ 3051, subd. (b)(4).)" (*In re Jenson*, *supra*, 24 Cal.App.5th at p. 277.)

Several categories of youthful offenders are excluded from the application of section 3051, including those—like Gallow—sentenced to LWOP for offenses committed when they were over the age of 18. (*In re Jenson*, *supra*, 24 Cal.App.5th at pp. 277-278; see § 3051, subd. (h).)

2. *The Enactment of Section 3051 Did Not Make Gallow's Sentence Cruel and Unusual Punishment*

Gallow acknowledges that the United States and California Supreme Court cases on which he relies apply only to juvenile offenders, and that he was not a juvenile at the time of his offense conduct. He also acknowledges, as he must, that his LWOP sentences for first degree murder with special circumstances, committed when he was an adult, were not cruel and unusual punishment when they were imposed. He instead argues that "[b]ecause the Legislature has embraced the concept that certain classes of offenders who were under 26 years of age at the time of commission of the offense and received lengthy sentences should be given the possibility of parole, . . . the

Legislature has thereby determined that youthful offenders committing offenses when they are under 26 years of age are less culpable than those committing offenses after they turn 26." Therefore, Gallow claims, an LWOP sentence such as the one imposed on him is now grossly disproportionate to his offense conduct, and constitutes cruel or unusual punishment.

We reject this argument. It has long been established that "[w]hether a particular punishment is disproportionate to the offense is, of course, a question of degree. The choice of fitting and proper penalties is not an exact science, but a legislative skill involving an appraisal of the evils to be corrected, the weighing of practical alternatives, consideration of relevant policy factors, and responsiveness to the public will; in appropriate cases, some leeway for experimentation may also be permissible. The judiciary, accordingly, should not interfere in this process unless a statute prescribes a penalty 'out of all proportion to the offense' [citations], i.e., so severe in relation to the crime as to violate the prohibition against cruel or unusual punishment." (*In re Lynch* (1972) 8 Cal.3d 410, 423-424.)

Gallow cites no case holding that where a punishment is proportionate to the offense and does not constitute cruel or unusual punishment when imposed, it may later be rendered cruel or unusual by the subsequent enactment of legislation granting a degree of leniency to a different group of offenders. Gallow's LWOP sentences for first degree murder with special circumstances, which were constitutional when imposed, did not become unconstitutional when the Legislature enacted section 3051 or the pertinent amendments to it extending its initial reach.

The Legislature enacted section 3051 in general "to implement the limitations on juvenile sentencing articulated in" recent cases addressing that issue. (*In re Jenson*, *supra*, 24 Cal.App.5th at p. 276.) The section's purpose was " '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 . . . .' [Citation.]" (*Id.* at pp. 276-277.) Gallow argues that subdivision (b)(1) through (3) of section 3051 focus on the age of the offender and his or her immaturity. Gallow concludes these legislative expressions are inconsistent with denying him a youth offender parole hearing.

Gallow's analysis omits, however, the Legislature's prerogative to consider an additional factor regarding eligibility: whether a person received an LWOP sentence for his or her controlling offense. An LWOP sentence "is the second most severe penalty allowed under the law." (*People v. Scott* (2016) 3 Cal.App.5th 1265, 1272.) It reflects an underlying crime of distinct seriousness. While Gallow may disagree with the Legislature's assessment of the significance of various factors in section 3051, we are obligated to defer to them. (*In re Lynch*, *supra*, 8 Cal.3d at pp. 423-424.)

To qualify as punishment under the Eighth Amendment, "the burden or disability [at issue] must be imposed as a consequence of a law violation, and must either be intended as punishment, or have no other legitimate aim." (*In re Alva* (2004) 33 Cal.4th 254, 282.) Precluding Gallow from obtaining a parole hearing when he was sentenced to consecutive LWOP terms did not impose any additional burden or disability on Gallow. Accordingly, Gallow's sentence did not become cruel and unusual punishment by virtue of the Legislature granting parole hearings

to those with less serious offenses, or who committed their controlling LWOP offense as a juvenile.

B. No Equal Protection Violation Occurred

Gallow also asserts section 3051, subdivisions (b)(4) and (h), violate his equal protection rights to a *Franklin* evidentiary preservation hearing and a later parole hearing.[4] He argues he is similarly situated to juveniles who committed controlling offenses and received LWOP sentences, and who are thus entitled to a parole hearing, "because the distinction that he was 25 [years old] when he committed the offenses in this case has been found in effect by the Legislature in . . . section [3051] not to prevent other defendants who committed serious crimes from eventually having a parole hearing." We review such an equal protection claim de novo. (*People v. Laird* (2018) 27 Cal.App.5th 458, 469.)

1. Gallow's Equal Protection Claim Is Subject to Rational Basis Review

" ' "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." ' [Citations.]" (*People v. Morales* (2016) 63 Cal.4th 399, 408, italics omitted.)

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[4] In his petition, Gallow complained his sentence was cruel and unusual, but made no separate equal protection claim. Because his equal protection claim is closely related to his cruel and unusual punishment claim, we assume without deciding that Gallow did not forfeit his equal protection claim by failing to raise it below.

If a class of criminal defendants is in fact similarly situated to another class of defendants who are sentenced differently, we then "look to determine whether there is a rational basis for the difference. [Citation.] '[E]qual protection of the law is denied only where there is no "rational relationship between the disparity of treatment and some legitimate governmental purpose." ' [Citation.] 'This standard of rationality does not depend upon whether lawmakers ever actually articulated the purpose they sought to achieve. Nor must the underlying rationale be empirically substantiated. [Citation.] While the realities of the subject matter cannot be completely ignored [citation], a court may engage in " 'rational speculation' " as to the justifications for the legislative choice [citation]. It is immaterial for rational basis review "whether or not" any such speculation has "a foundation in the record." ' [Citation.]" (*People v. Edwards* (2019) 34 Cal.App.5th 183, 195 (*Edwards*).)

To successfully challenge a law on equal protection grounds, the defendant must negate " ' "every conceivable basis" ' " on which "the disputed statutory disparity" might be supported. (*Edwards*, *supra*, 34 Cal.App.5th at p. 195.) "If a plausible basis exists for the disparity, '[e]qual protection analysis does not entitle the judiciary to second-guess the wisdom, fairness, or logic of the law.' [Citation.]" (*Id.* at pp. 195-196.)

2. *Section 3051 Does Not Provide Relief to Defendants Who Committed More Serious Offenses*

Gallow's equal protection claim fails because he has not demonstrated the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.

Criminal sentencing has long distinguished between someone like Gallow, who was 25 years old at the time of his controlling offense, and juveniles. (E.g., *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1380 [" 'the age of 18 is the point where society draws the line for many purposes between childhood and adulthood' [citation], and that is the line the [United States Supreme Court] has drawn in its Eight Amendment jurisprudence"].) The law has also long distinguished between LWOP and lesser sentences. Accordingly, the relevant group of which Gallow is a member for purposes of equal protection analysis is the group of persons who, as adults over the age of 18 but under the age of 26, committed a controlling offense resulting in an LWOP sentence. None of the persons described in section 3051, subdivision (b)(1) through (3), fall within that group, including persons who committed serious offenses as adults. Therefore, Gallow is not similarly situated with respect to those persons.

Edwards, on which Gallow relies, does not compel a contrary conclusion. It held that the portion of section 3051, subdivision (h), which denies relief to defendants who have received one strike law sentences for sexual offenses, violates those defendants' equal protection rights. *Edwards* reached that conclusion because section 3051 relief is available to persons who have committed the more serious offense of intentional first degree murder. (*Edwards*, *supra*, 34 Cal.App.5th at pp. 192, 194-197, 199.)

Unlike the defendant in *Edwards*, Gallow cannot point to any more serious offense for which section 3051 provides relief. As *Edwards* itself notes, "there is no crime as horrible as intentional first degree murder" and "case law has long distinguished between such murders and other crimes against

persons, reserving the most draconian sentences for murderers alone." (*Edwards*, *supra*, 34 Cal.App.5th at p. 197.) "The parties point to no other provision of our Penal Code, and we are aware of none, that treats a nonhomicide offense more harshly than special circumstance murder." (*People v. Contreras*, *supra*, 4 Cal.5th at p. 382.) As there is no crime more serious than the special circumstance murders committed by Gallow, much less one for which section 3051 permits relief, *Edwards* provides no support for Gallow's equal protection claim.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED

WEINGART, J.*

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.