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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. EDWIN CRUZ, Defendant and Appellant.	B271332 (Los Angeles County Super. Ct. No. KA079316)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bruce F. Marrs, Judge. Affirmed in part, reversed and remanded.

Mary Jo Strnad, 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 and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

In 2008, Edwin Cruz was sentenced to life without the possibility of parole (LWOP) for a crime he committed when he was 17 years old. In 2015, Cruz was granted a resentencing hearing pursuant to *Miller v. Alabama* (2012) 567 U.S. 460 (*Miller*), when he was again sentenced to LWOP. Cruz appealed and challenged the LWOP sentence on Eighth Amendment grounds. During the pendency of this appeal, the Governor signed into law Senate Bill No. 394 (SB 394) and Senate Bill No. 620 (SB 620). SB 394 provides all youth offenders serving LWOP sentences in California a parole suitability hearing after 25 years of incarceration. We find SB 394 renders Cruz's *Miller* challenge to his LWOP sentence moot. However, we reverse this case, again, to correct certain sentencing errors. We also remand for correction of the abstract of judgment and to allow the trial court the opportunity to exercise its newly granted discretion under SB 620 to strike or dismiss the firearm enhancements.

FACTS

A jury convicted Cruz of the first degree murder of Mychael Whittaker (count 1) and the attempted murder of Victor T. (count 2) in 2008.[1] Cruz was 17 years old at the time of his crimes. As to count 1, the trial court imposed an LWOP term plus a concurrent 25-years-to-life term for a firearm enhancement under Penal Code[2] section 12022.53, subdivisions (d) and (e)(1). As to count 2, the trial court imposed a term of life with the

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[1] A more thorough factual recitation of the underlying crimes may be found in our previous opinion, *People v. Cruz* (May 26, 2010, B209375) [nonpub. opn.].

[2] All further section references are to the Penal Code unless otherwise specified.

possibility of parole plus a 25-years-to-life term for a firearm enhancement, also under section 12022.53, subdivisions (d) and (e)(1).

In the first appeal, we found the firearm enhancement in count 1 was imposed in an unauthorized manner and modified the judgment to reflect that the 25 years to life term under section 12022.53, subdivisions (d) and (e)(1), was to run consecutive, rather than concurrent, to the LWOP term. The abstract of judgment was so amended and filed on October 15, 2010.

Cruz filed a petition for writ of habeas corpus on March 5, 2015, on the ground that his juvenile LWOP sentence was cruel and unusual punishment in violation of the Eighth Amendment. He sought resentencing under *Miller, supra,* 567 U.S. at page 460. The People conceded Cruz was entitled to a resentencing hearing. The trial court issued an order to show cause and appointed counsel to represent Cruz.

Cruz submitted a sentencing memorandum arguing he can be rehabilitated and returned to society. Cruz blamed his troubled childhood for contributing to his participation in gang activity and poor decision-making. He further set forth his rehabilitation in prison, showing he had earned a GED, continued his education, and participated in religious activities. He also attached a neuropsychological assessment by Dr. Stacey Wood, numerous character letters from friends and family, and school and prison records to show his development.

The People argued that the character letters supporting Cruz and Dr. Wood's neuropsychological assessment demonstrated Cruz was not an immature young man at the time he committed his crimes. Instead, his friends and family

described him as responsible and smart. The People also noted his rehabilitation efforts began in earnest only after the U.S. Supreme Court issued its decision in *Miller* and after he filed his habeas petition.

The sentencing court examined each of the five factors listed in *Miller*. The court extensively referenced Dr. Wood's assessment, noting her "mixed" findings with respect to brain development and that Dr. Wood gave no indication that marijuana abuse or his peers affected his impetuosity. In connection with his possible improvement with maturity, the sentencing court noted he was working toward rehabilitation, though most of it "started fairly late in the game." The court concluded, "the circumstances of this case, as well as the conclusions of the doctor, militate [for] the more severe sentence."

As a result, Cruz was resentenced to LWOP on the first degree murder conviction. This appeal followed.

DISCUSSION

I. Cruz's Challenge to His LWOP Sentence Is Moot

Cruz challenges the sentencing court's decision, contending it violated the Eighth Amendment. Cruz further argues the sentencing court abused its discretion by applying an incorrect legal standard and conducting a "perfunctory" consideration of the *Miller* factors, which ignored mitigating evidence. Alternatively, he argues he received ineffective assistance of counsel at resentencing.

Less than one month after briefing was completed in this appeal, the Governor signed SB 394 into law, which entitles Cruz to a youth offender parole hearing during his 25th year of incarceration. The parties submitted supplemental briefing to discuss whether SB 394 renders Cruz's appeal moot. In addition,

an amicus brief was accepted on the issue from the American Civil Liberties Union of Northern California and the American Civil Liberties Union of Southern California (collectively, the ACLU). We conclude SB 394 renders moot Cruz's challenge to his LWOP sentence.

A. Juvenile Sentencing Law

The U.S. and California Supreme Courts have issued a series of decisions limiting the types of sentences which may be imposed on juvenile offenders. (See *Roper v. Simmons* (2005) 543 U.S. 551 [juveniles not eligible for death penalty]; *Graham v. Florida* (2010) 560 U.S. 48 (*Graham*) [juvenile convicted of a nonhomicide offense may not be sentenced to LWOP]; *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*) [extending *Graham* to juveniles who receive sentences which are the functional equivalent of LWOP].)

In *Miller,* the U.S. Supreme Court held that a mandatory LWOP sentence for juvenile offenders violates the Eighth Amendment's prohibition against cruel and unusual punishment. (*Miller, supra,* 567 U.S. at p. 465.) Although the *Miller* court did not foreclose an LWOP term for juveniles, it noted the "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." (*Id.* at p. 479.) To that end, the *Miller* court discussed a range of factors for a sentencing court to consider before imposing LWOP on a juvenile offender. (*Id.* at pp. 477–478; *In re Kirchner* (2017) 2 Cal.5th 1040, 1048 (*Kirchner*) [discussing *Miller* factors].) In *Montgomery v. Louisiana* (2016) 577 U.S. ___, 136 S.Ct. 718, 734, the U.S. Supreme Court held *Miller* operates retroactively because it announced a substantive rule of constitutional law.

In response to *Miller, Graham,* and *Caballero,* the California Legislature enacted Senate Bill No. 260 (SB 260), which became effective January 1, 2014. SB 260 provided a juvenile who was under the age of 18 at the time of his crime with a "youth offender parole hearing" during the 15th, 20th, or 25th year of his incarceration, depending on his "controlling offense." (§ 3051, subds. (a) & (b).)[3] At the youth offender parole hearing, the Board of Parole Hearings is directed to "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." (§ 4801, subd. (c).) SB 260 excluded juveniles who were sentenced to LWOP, however. (§ 3051, subd. (h).)[4]

The California Supreme Court examined the consequences of SB 260 in *People v. Franklin* (2016) 63 Cal. 4th 261 (*Franklin*). There, the defendant was 16 years old when he shot another

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[3] In 2015, the statute and associated Penal Code provisions were amended to apply to offenders sentenced to state prison for crimes committed when they were less than 23 years of age. (Stats. 2015, ch. 471.) Assembly Bill No. 1308, which the Governor signed on October 11, 2017, and which became effective on January 1, 2018, further amends the statute to extend youth offender parole hearing eligibility to persons who are 25 years of age or younger at the time of the offense. (Stats. 2017, ch. 675, § 1.)

[4] Also excluded were those juveniles who were sentenced under the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12) or Jessica's Law (§ 667.61), and those who commit another crime "subsequent to attaining 26 years of age . . . for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison." (§ 3051, subd. (h).)

teenager. He received two mandatory consecutive 25-year-to-life terms. The defendant challenged his 50-year-to-life sentence on the ground it was the functional equivalent of LWOP and he should be afforded the protections outlined in *Miller*. (*Id.* at p. 276.) The high court concluded SB 260 entitled the defendant to a parole hearing during his 25th year in prison and rendered moot any infirmity in his sentence under *Miller*. (*Id.* at p. 276.) The court reasoned, SB 260 "means that [defendant] is now serving a life sentence that includes a meaningful opportunity for release during his 25th year of incarceration. Such a sentence is neither LWOP nor its functional equivalent. Because [the defendant] is not serving an LWOP sentence or its functional equivalent, no *Miller* claim arises here." (*Id.* at pp. 279–280.) It specifically noted the Legislature did not intend to require any additional resentencing procedures. (*Ibid.*)

On October 11, 2017, during the pendency of this appeal, the Governor signed SB 394 into law. SB 394 expands the youth offender parole hearing process under SB 260 to those persons sentenced to LWOP. (Stats. 2017, Ch. 684, § 1.5.) To that end, SB 394 amends section 3051 to add subdivision (b)(4), which provides: "A person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is life without the possibility of parole 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 previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions." Our colleagues in Division Five examined the effect of SB 394 on a defendant's LWOP sentence and concluded her

Miller claims were moot. (*People v. Lozano* (2017) 16 Cal.App.5th 1286 (*Lozano*).)

B. Analysis

Similar to the defendants in *Franklin* and *Lozano,* SB 394 has rendered Cruz's *Miller* claims moot. (*Jordan v. Cty. of L.A.* (1968) 267 Cal.App.2d 794, 799 [repeal or modification of a statute may render moot the issues in a pending appeal].) An issue is moot when an event occurs which renders it impossible for this court, if it should decide in favor of the defendant, to grant him any effectual relief. (*People v. DeLeon* (2017) 3 Cal.5th 640, 645.)

The analysis in *Franklin* applies equally to this situation as SB 394 extends SB 260 to juvenile offenders with LWOP sentences. SB 394 entitles Cruz to a youth offender parole hearing, which means Cruz is now serving a life sentence that includes a meaningful opportunity for release during his 25th year of incarceration. Thus, Cruz is no longer serving an LWOP sentence and no *Miller* claims arise.

Moreover, SB 394 comports with the U.S. Supreme Court's suggestion in *Montgomery* that "[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, supra,* 136 S.Ct. at p. 736.) We are unable to grant Cruz the relief he

seeks; SB 394 did that when it became effective on January 1, 2018. The issue is moot.

We are not persuaded by Cruz's or the ACLU's arguments to the contrary. First, Cruz argues his challenge to his LWOP sentence rests on both federal and state law grounds. Thus, even if his federal constitutional claims are rendered moot, his state law claims are not impacted by SB 394 and he urges us to review the sentencing court's decision for an abuse of discretion. It is apparent, however, that his state law claims are identical to, and rest on, his federal claims. Cruz appeals from the resentencing he sought under *Miller,* in which he claimed a violation of the Eighth Amendment under the U.S. Constitution. Indeed, Cruz acknowledges that the sentencing court abused its discretion because it failed to properly consider the *Miller* factors, address rehabilitation, or assess whether his youth impeded his ability to assist in his defense. Cruz may not circumvent the effects of SB 394 by simply labeling his *Miller* claims as state claims.

Second, Cruz contends his original sentence was imposed in violation of the law and thus, the remedy of a parole hearing to cure *Miller* errors was insufficient to address his sentence, which was illegal "ab initio." Again, Cruz conveniently ignores the fact that his original sentence, whether illegal or not, was overturned when he was resentenced in 2015. In any event, SB 394 has afforded him the relief he seeks—he is no longer serving an LWOP sentence. To the extent he argues his resentencing was illegal because the sentencing court failed to adequately consider the *Miller* factors, that argument has been rendered moot under SB 394 and *Franklin*.

Cruz argues *People v. Gutierrez* (2014) 58 Cal.4th 1354 (*Gutierrez*) and *Kirchner, supra,* 2 Cal.5th at page 1049 control in this case over *Franklin*. We disagree. In *Gutierrez,* the court held there was no presumption in favor of an LWOP sentence under section 190.5.[5] (*Gutierrez, supra,* at p. 1391.) The Attorney General argued that any doubts about the presumption were alleviated by section 1170, subdivision (d)(2), which provides an avenue for juvenile offenders serving LWOP terms to seek recall of their sentences and resentencing to a term that includes an opportunity for parole. The *Gutierrez* court rejected this argument, reasoning the same questionable presumption in favor of LWOP would apply at resentencing. (*Id.* at p. 1385.)

In *Kirchner*, the California Supreme Court examined section 1170, subdivision (d)(2), and relying on *Gutierrez,* emphasized that the recall and resentencing process did not cure a sentence which was originally "infirm" under *Miller*. (*Kirchner, supra,* 2 Cal.5th at pp. 1052–1053.) Thus, the defendants did not have to exhaust the recall and resentencing procedure under section 1170, subdivision (d)(2), prior to seeking habeas corpus relief based on an Eighth Amendment challenge under *Miller*. Moreover, the court held that section 1170, subdivision (d)(2), does not provide an adequate remedy at law for *Miller* error; the inquiry under section 1170, subdivision (d)(2), is not designed to address *Miller* error.

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[5] Section 190.5, subdivision (b) allows the court discretion to sentence a juvenile defendant (aged 16 to 18 years old) who is convicted of first degree special circumstance murder to a term of LWOP or 25 years to life.

SB 394 does precisely what section 1170, subdivision (d)(2) did not. It provides an adequate remedy for *Miller* error, it is designed to address *Miller* error, and it bypasses the recall and resentencing process, which was the basis for the high court's unease. Given their focus on the recall and resentencing procedure under section 1170, subdivision (d)(2), neither *Kirchner* nor *Gutierrez* applies here.

Third, Cruz contends his appeal is not moot because he would suffer "disadvantageous collateral consequences" as a result of his LWOP sentence. The ACLU joins and expands on this argument. Cruz identifies two collateral consequences that he would suffer if he continued to be a prisoner serving an LWOP sentence: he is unable to earn conduct and other credits toward an early release that explicitly exclude LWOP inmates and he will be housed in a maximum security Level IV institution where opportunities to participate in rehabilitative programs are limited. The Attorney General contends the instant appeal concerns the constitutionality of his LWOP sentence, not these collateral consequences, and thus, the issues are not properly before this court. The Attorney General also argues such concerns are too speculative to present a justiciable controversy. (*People v. DeLeon, supra,* 3 Cal.5th at p. 645, fn. 2; *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 998 (*Hunt*).)

We agree that the purported collateral consequences are not properly before us. SB 394 was signed into law on October 11, 2017, and became effective January 1, 2018. There is no indication that the Department of Corrections and Rehabilitation has adopted regulations or otherwise addressed how inmates subject to SB 394 will be treated. Thus, the issue is not ripe for our consideration. (*Hunt, supra,* 21 Cal.4th at p. 998.)

II. The Trial Court Imposed Unauthorized Sentences. In Addition, Remand is Required for Further Sentencing

After the first appeal, at the resentencing hearing in 2015, Cruz was sentenced to LWOP on count 1, the murder conviction, pursuant to section 190.2, subdivisions (a)(17) and (a)(22). The sentencing court then imposed and stayed all of the firearm enhancements under subdivisions (b)–(d) of section 12022.53. The court had no authority to stay the firearm enhancements. (§ 1170.1, subds. (f) & (g).) Instead, it was required to impose the greatest of these enhancements, the 25-year-to-life term for use of a deadly weapon causing death under section 12022.53, subdivision (d), and to impose and stay the other enhancements. (*Ibid.*)

On Count 2, the sentencing court imposed a consecutive[6] 15-year-to-life term for the attempted murder conviction with a true finding on the gang allegation pursuant to section 186.22,

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[6] The reporter's transcript shows the sentencing court specified, "15-years-to-life on that one [section 186.22(b)(5)]. And 25 years-to-life on the 12022.53(d) pursuant to (e)(1). That would be consecutive." Immediately thereafter, the court stated, "To run consecutive to the 187(a) count 1." The abstract of judgment and minute order, however, both show the sentence for count 2 to run concurrently with that of count 1. We interpret the court's oral pronouncement of judgment to mean the sentence for count 2 is to run consecutively to count 1. This oral pronouncement of judgment controls over any conflicting minute orders or abstracts of judgment. (*People v. Walz* (2008) 160 Cal.App.4th 1364, 1367, fn. 3.) Because we remand the matter for further sentencing, the current abstract of judgment need not be corrected. However, an amended abstract of judgment should accurately reflect the court's sentence on remand.

subdivision (b)(5), plus a consecutive 25-year-to-life term for the firearm enhancement under section 12022.53, subdivision (d). The court then struck the firearm enhancements under section 12022.53, subdivisions (b) and (c). At that time, the court had no authority to strike these enhancements; they should have been imposed and stayed as we have just pointed out. Because the court had no authority to strike the enhancements at that time, any one of them may be imposed upon resentencing, as we describe below.

Now that we have set forth how the sentence should have been imposed previously, we turn to the new law. On January 1, 2018, SB 620 took effect, which amends section 12022.53, subdivision (h) to remove the prohibition against striking the gun use enhancements under this and other statutes. The amendment grants the trial court discretion to strike or dismiss an enhancement imposed under section 12022.53. (Stats. 2017, ch. 682, § 2.)

In supplemental briefing, Cruz requests we reverse that portion of his sentence related to the firearm enhancements and remand this matter for the sentencing court to exercise its newly granted discretion. We do so.

The discretion to strike a firearm enhancement under section 12022.53 may be exercised as to any defendant whose conviction is not final as of its effective date. (See *In re Estrada* (1965) 63 Cal.2d 740, 742–748; *People v. Brown* (2012) 54 Cal.4th 314, 323.) Here, there is no dispute that Cruz's appeal was not final when SB 620 went into effect on January 1, 2018. (See *People v. Vieira* (2005) 35 Cal.4th 264, 305–306 ["a defendant generally is entitled to benefit from amendments that become effective while his case is on appeal"]; see also *Bell v. Maryland*

(1964) 378 U.S. 226, 230 ["The rule applies to any such [criminal] proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it"].)

The Attorney General relies on *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 (*Gutierrez*) to argue remand is unwarranted because there is no reasonable possibility the court would exercise its new discretion to strike the firearm enhancement. In *Gutierrez,* the trial court sentenced the defendant to the maximum possible sentence and indicated it would not have exercised its discretion to lessen the sentence. (*Id*. at p. 1896.) Thus, the court on appeal found it was unnecessary to remand to allow the trial court to exercise its discretion since it was obvious it would not do so. (*Ibid*.)

The Attorney General contends the trial court's statement here, that "the circumstances of this case, as well as the conclusions of the doctor, militate the more severe sentence[]" likewise demonstrate that remand is not required. We are fairly certain this is not the case.

First, the court's statements at resentencing were not as unequivocal as they were in *Gutierrez*. More significantly, the court in this case has demonstrated that it was inclined to impose a more lenient sentence. In point of fact, the court initially imposed an unauthorized concurrent term on the firearm enhancement in count 1, and after remand, the court, again without authority, stayed all of the firearm enhancements in count 2. We interpret these actions to suggest the court may be inclined to strike one or more of the firearm enhancements on remand. Accordingly, we remand to allow the trial court the opportunity to exercise its new discretion under subdivision (h) of

section 12022.53. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 257.)

On remand, the court is directed to consider its discretion under section 12022.53, subdivision (h) as to the firearm enhancements of each count. As to count 1, the court may strike all of the firearm enhancements or impose any one of the enhancements. If the court chooses to impose a firearm enhancement, it must strike any enhancement(s) providing a longer term of imprisonment, and impose and stay any enhancement(s) providing a lesser term. (§ 12022.53, subds. (f) & (h).)

For example, the court may choose to impose the 25-year-to-life enhancements under subdivision (d). If so, it should impose and stay the enhancements under subdivisions (c) and (b). If the court imposes the 20-year enhancement under subdivision (c) of section 12022.53, it must then strike the 25-year-to-life enhancement under subdivision (d), and impose and stay the 10-year enhancement under subdivision (b). Moreover, we remind the court that any enhancement imposed under section 12022.53 must be imposed consecutively rather than concurrently.

As to count 2, the court may likewise strike the firearm enhancements or impose one, as described above. If it chooses to strike all of the enhancements attendant to count 2, however, the court is required to impose a penalty of life imprisonment with a minimum term of no less than 15 years under section 186.22, subdivision (b)(5) as an alternate penalty for the attempted murder conviction in count 2. (See *People v. Brookfield* (2009) 47 Cal.4th 583, 591; *People v. Jones* (2009) 47 Cal.4th 566, 576.)

DISPOSITION

The matter is remanded for the purpose of allowing the sentencing court to exercise its discretion under section 12022.53, subdivision (h). The judgment is affirmed in all other respects.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.