Filed 8/20/18 P. v. Ratliff CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. KEITH L. RATLIFF, Defendant and Appellant.	B282287 (Los Angeles County Super. Ct. No. GA007500)

APPEAL from an order of the Superior Court of Los Angeles County, Stan Blumenfeld, Judge. Affirmed.

Elizabeth K. Horowitz, 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, Shawn McGahey Webb and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

Keith Ratliff appeals from the order resentencing him to life without parole based on his 1993 convictions for murder, rape, kidnapping, and robbery, crimes that were committed when he was a juvenile. (Pen. Code, § 1170, subd. (d)(2).) We affirm, holding that: (1) to the extent the appeal is based on the Eighth Amendment to the United States Constitution, the trial court made the findings required by recent United States Supreme Court authority; and (2) to the extent the appeal is based on the statutory recall and resentencing provision, the trial court correctly considered and weighed certain disputed mitigating factors.

FACTS AND PROCEDURAL HISTORY[1]

1. *Facts Concerning Appellant's Crimes*

On the night of April 27, 1991, Keith Ratliff, in concert with two fellow members of the Shotgun Crips gang, kidnapped, raped, and robbed Cheryl Clayton. The trio, in various combinations, took Clayton to two motels, where she was made to

---

[1] Our statement of the facts concerning Ratliff's crimes is drawn in large part from our decision affirming his convictions. (*People v. Ratliff* (July 10, 1995, B081788) [nonpub opn.] (*Ratliff I*).)

pay for the rooms and then raped. A handgun rested on a nearby chair while Ratliff raped Clayton at the second motel. (*Ratliff I*, *supra,* B081788.)

Afterward, the three men brought Clayton to a car, where they took money from her purse and split it among themselves. At the direction of one of those men, Larounce Sanders, Ratliff drove down an alley with the headlights off. Sanders said "Trey-9," which meant that Clayton would be killed. She was shot three times while in the car, and yet again after she had been dragged from the car and left in the alley.[2] The gun used to kill Clayton was later found in Ratliff's bedroom. (*Ratliff I, supra,* B081788.)

Eleven days earlier, Ratliff, accompanied by Sanders, robbed two people at gunpoint as they prepared to pump gas, making off with one victim's car. (*Ratliff I, supra,* B081788.)

At the time of these crimes, Ratliff was 17 years and four months old. He was tried as an adult and claimed at trial that Sanders had shot Clayton. Sanders testified that Ratliff had been the shooter. (*Ratliff I, supra,* B081788.) A jury convicted Ratliff of felony murder and multiple counts of kidnapping, rape, and robbery in connection with both sets of crimes. He was given a sentence of life without parole (LWOP) for the felony murder count, and a determinate term of 34 years for the others.

2. *Facts Concerning The Sentencing Recall Motion*

In November 2015, Ratliff filed a petition to recall the LWOP sentence and resentence him, pursuant to Penal Code

---

[2] We described these crimes as "vicious." (*Ratliff I, supra,* B081788.)

section 1170, subdivision (d)(2).[3] As part of his petition, Ratliff accepted responsibility for his part in the crimes, expressed great remorse for what he had done, and contended that he had taken great strides toward rehabilitation, as demonstrated by the facts that he had earned a G.E.D., learned to type, done prison work in building maintenance, painting, and plumbing, and become a clerk at the prison chapel.

Ratliff's supporting declarations stated that he became involved with gang activity when he was eight or nine years old, but was "no longer involved in gang activity . . . [and had] . . . long ago discontinued such conduct." He recalled that he had not wanted Clayton killed, but went along with it because Sanders had a gun and Ratliff feared Sanders might shoot him if he did not cooperate. Ratliff stated that he would do anything to change what happened, including giving his own life. He asked God to convey his apology and wishes for peace to Clayton's family, thought about the pain he caused, was sorry and had no excuse for what he had done, and had only remorse for his actions.

Ratliff claimed that he had maintained contact with nine friends and family members while in prison. He also participated in a rehabilitation program known as "Criminon." Ratliff explained that he had been "young and crazy" when the crimes took place, but had become a better person as he changed from a juvenile to an adult. He continued to grow as he learned more about himself and others.

Ratliff also provided letters of support from Correctional Counselor Karrie Hefner and Imam Muhammad Touré, the

---

[3] All further section references are to the Penal Code. For ease of reference we will hereafter refer to section 1170, subdivision (d)(2) as "section 1170."

prison's Muslim chaplain, each attesting to Ratliff's good character and many strides toward becoming a productive member of society. Hefner wrote that Ratliff realized the harm he caused and had tried to make amends, while Touré wrote that he believed Ratliff had evolved into a different man who wanted to leave prison and lead a productive life.

The prosecution's opposition evidence pointed to Ratliff's juvenile criminal history, which included sustained petitions for car theft, robbery, carrying a concealed and loaded firearm, felony grand theft auto, and evading a pursuing peace officer, resulting in serious injury.

Ratliff's post-conviction probation report said that he was "actively involved with a violent street gang whose members are well-known for their propensity for weapons usage and assaultive behavior. His participation in the instant offense exhibits a complete lack of regard for the personal and property rights of others. The brutalization of the victim showed a callousness and cold-bloodedness which merits the death penalty."

The probation report went on to state that the latest offense was "a link in an ongoing pattern of criminal activity," that Ratliff was "a definite threat to the safety of the community," and had "aligned himself with gang values and involved himself in seriously delinquent behavior." The threat he posed to the community could not "be minimized, excused or tolerated. . . . To provide relief from his predatory and inimical actions, a removal from the community is deemed imperative."

The prosecution's opposition also relied on a January 1994 California Youth Authority (CYA) report by two social workers and a psychologist who determined that Ratliff was not amenable to the training and treatment offered by the CYA. The starting

point for that report is the guideline by which an amenability determination is made. The report states that a person is amenable "when there is a reasonable possibility that his likelihood to commit criminal behavior can be significantly reduced or eliminated within the confinement time and jurisdiction time available." That inquiry turns on whether the person has "the capacity to change," and whether his criminal behavior is "so firmly established that there is little likelihood that it can be changed by commitment to (CYA)."

The CYA report found that Ratliff possessed average intelligence, came from an "intact family system," and had lived with both parents all his life. There was no evidence of psychosis.

Instead, the report found that Ratliff had "a history of significant sociopathic criminality, violence, and virtually no benefit from any experience that he has had with any kind of attempts at correction. His history shows a worsening of sociopathy and an increase in violence." Ratliff had virtually no empathy for his victims and showed concern for only his fellow gang members. Ratliff was "truly empathic for only [his gang] and all that they stand for." He was not a mentally disordered sex offender but instead committed his crimes "as an expression of a sociopathic personality."

According to the report, Ratliff was "intractable" and there was no reasonable possibility of significant change within the juvenile justice system's allotted confinement period. The report concluded that Ratliff was "heavily entrenched in his gang subcultural ideals. He saw his victim not as a human being but as someone that had to die for fear of her being able to identify all three [perpetrators]. He absolutely shows no remorse and remains very self-serving eluding [*sic*] to the fact that he was also

a victim for fear of co-defendant killing him if he did not go along with the plan. This young man is not only entrenched in his gang but clearly remains sociopathic in his thinking and will probably remain so in the future. He has been afforded the opportunity to enter two community camp placements, only to return to criminal behavior upon release. He has not learned from prior rehabilitative efforts and there does not appear to be much room for improvement in this particular area."

The prosecution's opposition also included reports showing that Ratliff had been disciplined multiple times for prison rules violations. In January 2007 he was found guilty of possessing a shank. In August 2010 he pleaded guilty to refusing the commands of prison personnel. In November 2011 he pleaded guilty to possession of three cell phones. In March 2012, he pled guilty to fighting with another inmate. Ratliff was also charged with taking part in race riots in December 2012 and November 2013, but those charges were dismissed.

The trial court recalled the LWOP sentence, but after reviewing the evidence and the applicable law, determined that an LWOP sentence was proper. In order to provide context for the trial court's ruling, we must first set forth the applicable law concerning both section 1170 and the extremely limited circumstances under which an LWOP sentence for juvenile homicide offenders is permissible under the Eighth Amendment to the United States Constitution.

THE APPLICABLE DECISIONAL AND STATUTORY LAW

1. *Miller v. Alabama*

In *Graham v. Florida* (2010) 560 U.S. 48, 63–64, 81–82 (*Graham*), the United States Supreme Court announced a

categorical rule prohibiting LWOP sentences for minors who were convicted of non-homicide offenses because they violated the Eighth Amendment's ban on cruel and unusual punishments. *Graham's* holding was based on the following: (1) scientific studies showing fundamental differences between the brains of juveniles and adults; (2) a juvenile's capacity for change as he matures, which shows that his crimes are less likely the result of an inalterably depraved character; (3) the notion that it is morally misguided to equate a minor's failings with those of an adult; and (4) the fact that even though non-homicide crimes may have devastating effects, they cannot be compared to murder in terms of severity and irrevocability. (*Id.* at pp. 67–70.)

In *Miller v. Alabama* (2012) 567 U.S. 460 (*Miller*), the United States Supreme Court extended *Graham* and held that sentencing schemes that mandated LWOP sentences for juveniles who commit homicide offenses also violated the Eighth Amendment. Mandatory LWOP sentencing schemes for juveniles "preclude[] consideration of [their] 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 [them]—and from which [they] cannot usually extricate [themselves]—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of [their] participation in the conduct and the way familial and peer pressures may have affected [them]. Indeed, it ignores that [they] might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, [their] inability to deal with police officers or prosecutors (including on a plea agreement) or [their] incapacity to assist

[their] own attorneys. . . . And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." (*Miller, supra,* 567 U.S. at pp. 477–478, citations omitted.)

Although LWOP sentences are still permissible under *Miller,* they may be imposed on only the "'rare juvenile offender whose crime reflects irreparable corruption'" as opposed to "'unfortunate yet transient immaturity.'" (*Miller, supra,* 567 U.S. at pp. 479–480.)

2. *People v. Gutierrez*

Minors who commit first degree special circumstances murder when they are 16 or 17 may be given a state prison sentence of either LWOP or 25 years to life, at the discretion of the trial court. (§ 190.5, subd. (b).) In light of *Miller,* the court in *People v. Gutierrez* (2014) 58 Cal.4th 1354 (*Gutierrez*) disapproved earlier case law interpreting that provision as supplying a presumption in favor of LWOP sentences. (*Id.* at p. 1387.)

The *Gutierrez* court held that California trial courts were now required to consider the *Miller* factors when sentencing juveniles who commit special circumstances murders. (*Gutierrez, supra,* 58 Cal.4th at pp. 1387–1389.) The court summed up by holding that trial courts "must consider all relevant evidence bearing on the 'distinctive attributes of youth' discussed in *Miller* and how those attributes 'diminish the penological justifications for imposing the harshest sentences on juvenile offenders.'" (*Id.* at p. 1390, quoting *Miller, supra,* 567 U.S. at p. 472.) "The question is whether [juvenile homicide offenders eligible for an LWOP sentence] can be deemed, at the time of sentencing, to be irreparably corrupt, beyond redemption, and thus unfit ever to

reenter society, notwithstanding the 'diminished culpability and greater prospects for reform' that ordinarily distinguish juveniles from adults." (*Id.* at p. 1391, quoting *Miller, supra,* 567 U.S. at p. 471.)

3. *Montgomery v. Louisiana*

In *Montgomery v. Louisiana* (2016) ___ U.S. ___, 136 S.Ct. 718 (*Montgomery*), the United States Supreme Court clarified that *Miller* had announced a new substantive rule of constitutional law that had retroactive application in state collateral review proceedings. (*Montgomery,* at pp. 727, 729, 736.) Under *Miller*, an LWOP sentence for a juvenile homicide offender was allowable under the Eighth Amendment as to only those juveniles whose crimes were the result of irreparable incorrigibility, not transient immaturity. (*Montgomery,* at p. 734.)

The State of Louisiana argued that *Miller* had formulated only a procedural rule that was not retroactive, relying in part on the *Miller* court's failure to require a factual finding of a juvenile's incorrigibility, and its statement that it "mandates only . . . a certain process." (*Montgomery, supra,* 136 S.Ct. at p. 734, quoting *Miller, supra,* 567 U.S. at p. 483.) The *Montgomery* court rejected that contention, holding that *Miller* had merely mandated a procedural component to implement its substantive holding, leaving it to the states to develop more detailed procedures on their own. (*Id.* at pp. 734–736.)

4. *Section 1170*

Subdivision (d)(2) was added to section 1170 before *Miller* but after *Graham* in response to concerns regarding LWOP sentences for juvenile offenders. (*In re Kirchner* (2017) 2 Cal.5th 1040, 1049 (*Kirchner*).) It allows most juveniles who received an LWOP sentence to petition for recall of their sentences and resentencing to a term that includes parole eligibility.[4] (*Ibid.*)

The petition cannot be brought until the defendant has been incarcerated for at least 15 years. (§ 1170, subd. (d)(2)(A)(i).) The defendant must express remorse, describe efforts made toward rehabilitation, and state that one of several qualifying circumstances exists. If the trial court finds by a preponderance of the evidence that one or more of those qualifying circumstances are true, the court must recall the defendant's sentence and hold a resentencing hearing. (*Kirchner, supra,* 2 Cal.5th at pp. 1049–1050.)

In deciding whether to resentence the defendant to a prison term that includes the possibility of parole, the trial court may consider the following factors: "(i) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law. [¶] (ii) The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the defendant was sentenced to life without the possibility of parole. [¶] (iii) The defendant committed the offense with at least one adult codefendant. [¶] (iv) Prior to the offense

---

[4] The recall procedure is not available to defendants who tortured their victim, or whose victim was a public safety official, law enforcement officer, or firefighter. (§ 1170, subd. (d)(2)(A)(ii).)

for which the defendant was sentenced to life without the possibility of parole, the defendant had insufficient adult support or supervision and had suffered from psychological or physical trauma, or significant stress. [¶] (v) The defendant suffers from cognitive limitations due to mental illness, developmental disabilities, or other factors that did not constitute a defense, but influenced the defendant's involvement in the offense. [¶] (vi) The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or showing evidence of remorse. [¶] (vii) The defendant has maintained family ties or connections with others through letter writing, calls, or visits, or has eliminated contact with individuals outside of prison who are currently involved with crime. [¶] (viii) The defendant has had no disciplinary actions for violent activities in the last five years in which the defendant was determined to be the aggressor." (§ 1170, subd. (d)(2)(F).) In addition, the court may consider "any other criteria that the court deems relevant to its decision, so long as the court identifies them on the record, provides a statement of reasons for adopting them, and states why the defendant does or does not satisfy the criteria." (*Id*., subd. (d)(2)(I).)[5]

---

[5] Ratliff contends, and respondent concedes, that he qualified for recall of his sentence because he was convicted of felony murder as an aider and abettor (§ 1170, subd. (d)(2)(B)(i)) and because he committed the offense with at least one adult codefendant. (§ 1170, subd.(d)(2)(B)(iii).)

The trial court has discretion to resentence the defendant in the same manner as if he had not previously been sentenced provided that the new sentence is not greater than the original sentence. (§ 1170, subd. (d)(2)(G).) If the first petition is not successful, the defendant may petition again after being in custody for at least 20 years, and may then petition again at the 24-year custody mark. (§ 1170, subd. (d)(2)(H).)

THE TRIAL COURT'S RULING

After determining that Ratliff qualified to have his sentence recalled, the trial court said it had considered all of the factors set forth in *Miller*, including: the defendant's age and its attendant features, such as immaturity, impetuosity, and the failure to appreciate risks and consequences; his inability to extricate himself from negative family and home consequences; the circumstances of the crime and defendant's participation in it; the effect of family or peer pressure; whether his youth-related disabilities prevented him from receiving a better result in the trial court; and the possibility of rehabilitation.

The court then went on to address the several factors set forth in section 1170, subdivision (d)(2)(F). First, the crime showed "an extremely high level of human cruelty and callousness." Second, Ratliff was an aider and abettor to felony murder.

Next, and the factor to which the trial court devoted the most time, was whether Ratliff had prior juvenile adjudications for assault or other felony crimes with a significant potential for personal harm to victims. The trial court found that to be an aggravating factor because "[*t*]*his crime was not an aberration in this young man's life, but rather reflected a way of his life.*"

(Italics added.) The court based this on Ratliff's prior juvenile adjudications for robbery, grand theft auto, evading a peace officer, and carrying a concealed weapon. On top of that, the court noted, Ratliff robbed two people at gunpoint just two weeks before taking part in Clayton's murder.

The trial court also relied on the CYA amenability report that found Ratliff was a deeply entrenched gang member with no empathy for anyone other than his fellow gang members, had a worsening and significant history of sociopathy, and had not benefitted from any attempts at correcting his behavior. Based on all this, the trial court found that Ratliff had a "formidable history" and that the Clayton murder was *"not a situation of a youth who had an isolated incident where he was placed in circumstances that might even explain to some extent or mitigate to some extent the heinous offense for which* [*he*] *was convicted."* (Italics added.)

Concerning whether Ratliff had sufficient adult support and supervision and had suffered from psychological stress or trauma, the court noted that Ratliff came from an intact family, but did grow up in an area with high gang activity. As for whether Ratliff had any cognitive limitations, the court pointed to the CYA amenability report, which stated that Ratliff was of average intelligence, but had no insight into his behavior, was "fairly well fixed in his antisocial value system," and was not motivated to change.

In regard to Ratliff's attempts at rehabilitation, the trial court concluded they amounted to a "thin effort" for someone who had been in prison for so long.

In regard to whether Ratliff had maintained ties with family and friends, the court characterized Ratliff's declaration

on that point as conclusory because it did no more than list the names of nine people with whom he had kept in touch by phone or by mail. As a result, the court said that even though it showed Ratliff had some family ties or connections, it was not "a particularly strong indication in his favor."

Finally, as to whether Ratliff had been disciplined for acts of violence during the previous five years, the trial court found that Ratliff had satisfied that factor. However, the court said that Ratliff's history of disciplinary violations was "at best ambiguous," noting that the prosecution had produced evidence of disciplinary actions in 2006 for manufacturing a shank, in 2010 for refusing commands by prison personnel, in 2011 for possession of three cell phones, and in 2012 for fighting with another inmate. The court expressly did not consider charges from 2012 and 2013 for taking part in race riots because those charges had been dismissed.

The trial court then made clear that it had taken into account the record as a whole and had spent hours struggling with the facts, doing more than just focusing on how terrible the crimes were because "there's more to the background of [Ratliff] than simply that. I took all of that into consideration and then reflected upon some of the positive aspects and some indications of measures along the way that reflected some measure of growth. And in looking at the entire picture, I arrived at the conclusion" that an LWOP sentence was proper.

DISCUSSION

1. *The Trial Court Made Adequate Findings Under Montgomery*

In *People v. Padilla* (2016) 4 Cal.App.5th 656 (*Padilla*), we considered a challenge to a trial court's order denying the defendant's habeas petition for resentencing under *Miller*. The defendant had been convicted in 1999 of murdering his mother when he was just 16. At the hearing on the habeas petition, there was abundant evidence of the defendant's good conduct while in prison and his high potential for rehabilitation. (*Padilla,* at pp. 668–670.) In re-imposing an LWOP sentence, the trial court focused on the circumstances of the crime, did not examine the *Miller* factors in light of the defendant's potential for rehabilitation, and made no finding concerning his rehabilitative potential. (*Padilla,* at pp. 670–671, 672.)

We held that under *Montgomery, supra,* 136 S.Ct. 718, a trial court considering whether to impose an LWOP sentence on a juvenile homicide offender must first consider the various factors set forth in *Miller* and then make an express finding whether the minor's offense "reflects irreparable corruption resulting in permanent incorrigibility, rather than transient immaturity." (*Padilla, supra,* 4 Cal.App.5th at p. 673.)[6]

---

[6] The California Supreme Court granted review of *Padilla* on January 25, 2017 (S239454), but did not order depublication, leaving the decision available for use for its persuasive value. Review was dismissed on June 13, 2018, on the ground that the appeal was moot in light of Senate Bill No. 394, which amended section 3051 by adding subdivision (b)(4), which provides juvenile LWOP defendants with parole eligibility hearings during their 25th year of incarceration. Respondent contends this appeal is

Appellant contends the trial court failed to consider *Montgomery* or make the express findings required by *Padilla*. Our task is complicated by the fact that the trial court combined its *Miller* analysis with the statutory factors that are part of the resentencing analysis under section 1170. As pointed out in *Kirchner, supra,* 2 Cal.5th at pages 1051–1054, section 1170 is the wrong procedural vehicle for obtaining relief under *Miller,* with the latter best raised in a habeas corpus petition.[7] As set forth below, however, we believe the record is sufficiently clear that the trial court in fact made the required findings, albeit through different phraseology.

The starting point for our analysis is appellant's failure to address whether the evidence was sufficient to support a properly worded finding that an LWOP sentence was authorized under

---

similarly moot, but we disagree, because appellant's continued LWOP sentence deprives him of the right to an even earlier parole eligibility date under recently enacted prison administrative rules that apply to only non-LWOP inmates. (Cal. Code Regs., tit. 15, § 3043.2, subd. (b)(1),(2).)

We also reject respondent's contention that appellant forfeited his constitutional argument by failing to object below that the trial court did not make the required findings. The forfeiture rule does not apply because appellant's new argument does not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely asserts that the trial court's omission had the additional legal consequence of violating the Constitution. (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.)

[7] We do not fault the trial court for combining its *Miller* and section 1170 analyses. *Kirchner* was decided after the trial court ruled, and it was the prosecution that raised the *Miller* factors in response to Ratliff's section 1170 petition.

Miller and *Montgomery*. In effect, appellant concedes there was sufficient evidence to support such a finding, but contends the trial court did not make one.

With that in mind, although it is undisputed that the trial court did not use the phrase "irreparable corruption resulting in permanent incorrigibility, rather than transient immaturity" as part of its ruling, we agree with respondent that the trial court's findings, taken as a whole, sufficiently expressed that concept.

The trial court began its analysis by setting forth the *Miller* factors and stating that it had considered them all. The court then pointed out the evidence that it relied on: (1) Ratliff's history of juvenile adjudications before the Clayton murder, including robbery, carrying a concealed and loaded firearm, and evading a pursuing peace officer, resulting in serious injury; (2) the two armed robberies Ratliff committed just 11 days before he took part in Clayton's kidnapping, rape, and murder; (3) the extremely high level of cruelty and callousness displayed in the Clayton murder incident; and (4) the CYA amenability report, which found, among other things, that Ratliff: had average intelligence, no history of psychosis, and came from an intact family; had received no benefit from previous attempts at rehabilitation or correction and showed little room for improvement in that area; was a hardcore gang member and a criminal sociopath with no remorse for his victims who would probably continue as such in the future; and was "intractable."

The court then found that Clayton's murder "was not an aberration in [Ratliff's] life at the time, but rather reflected a way of his life." The court added that the Clayton murder was "not a situation of a youth who had an isolated incident where he was placed in circumstances that might even explain to some extent

or mitigate to some extent the heinous offense for which [he] was convicted." These findings, especially when read in light of the evidence set forth above, seem to parallel the notion that Ratliff's crimes were the result of irreparable corruption resulting in permanent incorrigibility, and not transient immaturity. That this is so becomes clear when they are read in connection with the trial court's other findings, as set forth below.

In connection with Ratliff's history of prison discipline, which is one of the section 1170 factors (§ 1170, subd. (d)(2)(F)(viii)), the trial court said it had considered Ratliff's convictions for multiple prison rule violations, and then made the following seemingly contradictory statements: that Ratliff had "satisfied that factor," but that his record in that regard was "at best ambiguous."

Under the long-standing rule of appellate practice that requires us to indulge all presumptions to support the judgment (*People v. Fedalizo* (2016) 246 Cal.App.4th 98, 105 (*Fedalizo*)), we interpret these remarks as the trial court's attempt to distinguish its treatment of this evidence for purposes of its combined analysis under both *Miller* and section 1170. In other words, although the trial court did not believe that Ratliff's prison record qualified for negative treatment under section 1170, it still reflected negatively on his character during the last 10 years of his prison stay.

As for whether Ratliffe had performed acts that tended to indicate rehabilitation or the potential for rehabilitation, the court considered Ratliff's evidence to be "thin relative to what I have seen in other cases and . . . in looking in isolation at this matter, he has been in prison for a very long time thus far and that seems to be a fairly thin effort, in my view, at

rehabilitation."

Pressed later as to whether it had considered the letters of support from the prison counselor and the chaplain on the issue of rehabilitation, the court said it had read and considered them. The court said it had not "dismissed out of hand" evidence showing "some measure of growth" by Ratliff, but "[i]t's one thing though to say this person has demonstrated a certain measure of growth. It is another thing to say and conclude that he is not the same person he was previously, which suggests that he is an entirely different person than he was previously." The court said it took everything into consideration, including evidence of some measure of growth, and still believed an LWOP sentence was proper.

As we read it, the trial court said that although Ratliff might have taken some small steps forward, it could not conclude he was a different person from the young man who kidnapped, raped, robbed, and helped murder Clayton. This finding must be read in conjunction with the trial court's earlier assessment that Clayton's murder "was not an aberration in [Ratliff's] life at the time, but rather reflected a way of his life," and that the Clayton murder "was not a situation of a youth who had an isolated incident where he was placed in circumstances that might even explain to some extent or mitigate to some extent the heinous offense for which [he] was convicted."

Taken as a whole, we believe the trial court found that Ratliff had not changed from the person described in the CYA amenability report as a hardcore sociopathic gang member who was intractable, had not learned from prior rehabilitative efforts, and did not show much room for improvement. In short, Ratliff's prospects for rehabilitation were poor when he was first

sentenced and had not improved in any meaningful way during the more than 23 years that had elapsed since his conviction.

Based on the above, we conclude that this case is far different from the facts in *Padilla, supra,* 4 Cal.App.5th 656. The trial court in that case did not consider or make findings concerning the defendant's rehabilitative potential and otherwise failed to address *Miller* and *Montgomery* in light of that particular factor. By contrast, the trial court's findings here, when read in light of the evidence set forth above, adequately express the determination that Ratliff's crimes were the result of irreparable corruption resulting in permanent incorrigibility, and not transient immaturity, based in part on the trial court's assessment of his rehabilitative potential. (See *People v. Chambers* (2002) 104 Cal.App.4th 1047, 1051 [where trial court imposed 10-year consecutive sentence for firearm use allegation without expressly finding the allegation true as required by law, the sentencing record left no doubt that the trial court impliedly found the allegation true].) We believe that *Chambers* applies with even more force here, where the record shows that the trial court's findings actually encompassed the required elements, albeit through different terminology.[8]

---

[8] Although we affirm the trial court's order, we do not endorse the practice of combining a section 1170 hearing with a defendant's Eighth Amendment claim under *Miller* and *Montgomery*. (*Kirchner, supra,* 2 Cal.5th at pp. 1051–1054.) We also stress that, in order to make a clear record, trial courts considering Eighth Amendment challenges to a juvenile defendant's LWOP sentence should express their findings through the language endorsed in *Padilla, supra,* 4 Cal.App.5th at page 673.

2. *The Trial Court Properly Considered The Section 1170 Factors*

In connection with the section 1170 portion of the trial court's analysis, Ratliff contends the trial court erred when it discounted or failed to consider evidence related to his assertions of remorse (§ 1170, subd. (d)(2)(F)(vi)) and maintenance of contact with family and friends. (§ 1170, subd. (d)(2)(F)(vii).) He also contends that the trial court improperly considered evidence of his prison disciplinary action record because he had not been the aggressor in those incidents, all but one of which occurred outside the statutory five-year window. (§ 1170, subd. (d)(2)(F)(viii).)

We review the trial court's ruling under the abuse of discretion standard. (*People v. Willover* (2016) 248 Cal.App.4th 302, 320, 323.) A trial court abuses its discretion when making sentencing choices if it relies on circumstances that are not relevant to the decision or that otherwise constitute an improper basis for its decision. (*People v. Hicks* (2017) 17 Cal.App.5th 496, 512.) The circumstances relied on by the trial court to support its sentencing choice need be established by only a preponderance of the evidence. Therefore, when determining whether a trial court abused its discretion, we consider in part whether substantial evidence supports the court's finding that a particular factor was applicable. (*Ibid.*)

A. Evidence of Remorse

In determining whether an LWOP defendant has shown rehabilitation under section 1170, the trial court may consider evidence of the defendant's remorse. (§ 1170, subd. (d)(2)(F)(vi).) In connection with this, the trial court found that Ratliff was to some extent minimizing his behavior and had "limited insight into the gravity of those crimes . . . ." The court based this on

Ratliff's statement as part of his recall petition that he went along with Sanders on their crime spree because he was afraid Sanders would shoot him if he balked. The trial court found this was not credible given Ratliff's history as a hardcore gang member with a history of violent crimes.

Ratliff contends the trial court had no basis for drawing that conclusion and also improperly rejected evidence of his remorse contained in both his statements of remorse and the letters of support from a correctional counselor and a prison chaplain. We disagree.

Ratliff's declaration in support of the section 1170 petition stated that he went along with Sanders because he was afraid of Sanders. That is precisely what he said in connection with the 1994 CYA amenability report, which led the CYA evaluator to conclude the statement was self-serving. Based on this earlier assessment, the trial court could rationally conclude that Ratliff's reassertion of the same claim many years later showed he continued to make self-serving assertions concerning his culpability that showed his remorse was not genuine. Combined with the trial court's observations concerning Ratliff's status as a hardcore gang member with his own independent history of violent crimes, we believe there was sufficient evidence to support the trial court's determination that Ratliff continued to minimize his role in Clayton's murder, leading to a rejection of Ratliff's claim of unqualified remorse.

As for the two letters of support, although the trial court did not mention them initially, it later made clear that it had read and considered them. As stated in part 1 of our Discussion, the trial court said it had not "dismissed out of hand" evidence showing "some measure of growth" by Ratliff, but "[i]t's one thing

to say that this person has demonstrated a certain measure of growth. It is another thing to say and conclude that he is not the same person he was previously, which suggests that he is an entirely different person than he was previously." The court said it took everything into consideration, including evidence of some measure of growth, and still believed an LWOP sentence was proper.

We do not read this as an arbitrary rejection of Ratliff's supporting evidence. Instead, it appears to us that the trial court considered that evidence and determined that it showed an insignificant degree of remorse and rehabilitation. We therefore see no abuse of discretion.

B. Evidence of Contact With Family and Friends And Cutting Ties With Gang Members

Another statutory factor for the court to consider is whether the defendant maintains ties with family members and others, or has eliminated contact with people outside of prison who are currently involved with crime. (§ 1170, subd. (d)(2)(F)(vii).) Ratliff stated in his supporting declaration that he "maintained contact" with nine named friends and family members through phone calls and letters. He also stated that he became involved with gang activity when he was 8 or 9 but was "no longer involved in gang activity. I long ago discontinued such conduct."

Ratliff contends that the trial court improperly discounted evidence of his outside contacts and erred by failing to mention anything about his asserted abandonment of gang activity. We reject these contentions.

As to the first, the trial court deemed it conclusory and said that although it was a favorable indication, it was not

particularly strong. We agree. The declaration did no more than mention the names of nine people with whom Ratliff had contact. No further details were given, such as the duration, frequency, and nature of the contact, and we see no abuse of discretion in giving this only slight favorable weight.

As to whether the trial court failed to consider Ratliff's declaration concerning his cessation of gang activity, we note that the trial court said it "spent hours looking at all the information that was presented to me and struggled long and hard with those facts . . . ." Based on this, we hold that Ratliff has failed to demonstrate error. (*Fedalizo, supra,* 246 Cal.App.4th at p. 105 [it is fundamental rule of appellate law that challenged order is presumed correct, with all presumptions indulged to support it where the record is silent].)

Alternatively, even if error occurred, it was harmless. Ratliff was required to show that he had eliminated contact with people outside of prison who were currently involved with crime. (§ 1170, subd. (d)(2)(F)(vii).) His declaration stated only that he had ceased gang activity and therefore failed to adequately address this factor.

C. Evidence Of Prior Prison Discipline

Another factor the court must consider under section 1170 is whether the defendant has a prison disciplinary record for violent actions within the previous five years where the defendant was found to be the aggressor. (§ 170, subd. (d)(2)(F)(viii).) As discussed earlier, the record showed that Ratliff had been disciplined multiple times for prison rules violations: in January 2007 for possessing a shank; in August 2010 for refusing the commands of prison personnel; in November 2011 for possession of three cell phones; and in March 2012, for

fighting with another inmate. Ratliff was also charged with taking part in race riots in December 2012 and November 2013, but those charges were dismissed.

When discussing this factor, the trial court "found that he satisfied that factor," although it was "at best ambiguous." The court described each incident, noting that even though Ratliff claimed he acted in self-defense, the shank possession was a serious rule violation. The court also said it was "not taking . . . into consideration" the two dismissed race riot charges.

Ratliff extrapolates from this that the trial court improperly considered these disciplinary violations as part of its section 1170 analysis even though they did not qualify due to their age and the fact that Ratliff had not been determined to be the aggressor in any of them.[9] We believe the rule that all presumptions are drawn in favor of the order (*Fedalizo, supra,* 246 Cal.App.4th at p. 105) once more comes into play. The trial court explicitly said it found in Ratliff's favor in regard to the effect of his prison disciplinary record. As mentioned in part 1 of our Discussion, we believe the trial court's statement that Ratliff's prison history was somewhat ambiguous is best viewed in light of the trial court's dual determinations under both section 1170 and *Miller-Montgomery*, with the court's concerns about ambiguity relating to the latter only.

---

[9] It is at least arguable, as respondent points out, that the 2012 fighting incident would qualify because it occurred within the five-year period and because the fight was determined to be the result of mutual combat.

In short, on the record before us, we hold that the trial court did not abuse its discretion in regard to the three disputed factors found in section 1170.[10]

[10] Ratliff also contends we must reverse due to the effect of cumulative error and because the erroneous decision to re-impose an LWOP sentence violated his due process rights. We need not reach those issues because the court did not violate his due process rights and because there were no errors to accumulate.

DISPOSITION

The order resentencing Ratliff to life without parole is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MICON, J.*

We concur:

MANELLA, Acting P. J.

COLLINS, J.

---

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