

## Concurring Statement by Justice Liu – denying review in Montelongo case

In 2013, the Legislature passed Senate Bill No. 260 (2013-2014 Reg. Sess.), which enacted Penal Code section 3051. (All undesignated statutory references are to the Penal Code.) The bill required the Board of Parole Hearings to conduct youth offender parole hearings and consider release of offenders who committed specified crimes before the age of 18. (Legis. Counsel's Dig., Sen. Bill No. 260 (2013-2014 Reg. Sess.)). In establishing this parole eligibility mechanism, the Legislature sought to account for the fact 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." (Stats. 2013, ch. 312, § 1.) It was "the intent of the Legislature to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established." (Ibid.)

Soon thereafter, the Legislature amended the age threshold for youth offenders to age 23 (Stats. 2015, ch. 471, § 2) and then age 25 (Stats. 2017, ch. 684, § 2.5). The Legislature made these changes in light of scientific evidence that "certain areas of the brain, particularly those affecting judgment and decision-making, do not develop until the early-to-mid-20s." (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 1308 (2017-2018 Reg. Sess.) as amended Mar. 30, 2017, p. 2.) The Legislature also extended parole hearings in the 25th year of incarceration to youth offenders sentenced to life imprisonment without the possibility of parole, but only for an offense committed before age 18. (People v. Contreras (2018) 4 Cal.5th 349, 381 (Contreras), citing § 3051, subd. (b)(4), as amended by Stats. 2017, ch. 684, § 1.5.)

I write to underscore that section 3051's parole eligibility scheme - specifically, its exclusion of persons sentenced to life without parole for offenses committed between ages 18 and 25 - stands in "tension" with Miller v. Alabama (2012) 567 U.S. 460 (Miller). (People v. Montelongo (2020) 55 Cal.App.5th 1016, 1036 (conc. opn. of Segal, J.) (Montelongo).) Miller identified three significant differences between juveniles and adults that bear on culpability. "First, children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking. [Citation.] Second, children 'are more vulnerable . . . to negative influences and outside pressures,' including from their family and peers; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings. [Citation.] And third, a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity]'" (Miller, supra, 567 U.S. at p. 471, citing Roper v. Simmons (2005) 543 U.S. 551, 569-570 (Roper).) "The Supreme Court based these conclusions on 'what "any parent knows," ' scientific research, and social science." (Montelongo, supra, 55 Cal.App.5th at p. 1036 (conc. opn. of Segal, J.), citing Miller, at p. 471.)

Crucially, Miller explained that in this context "none of what [high court precedent has] said about children . . . is crime-specific." (Miller, supra, 567 U.S. at p. 473.) The distinctive attributes of youth that mitigate culpability - transitory mental traits and environmental vulnerabilities - "are evident in the same way, and to the same degree,' when a juvenile commits robbery or 'when (as in [Miller]) a botched robbery turns into a killing.'" (Montelongo, supra, 55 Cal.App.5th at p. 1037 (conc. opn. of Segal, J.)) I write to underscore that section 3051's parole eligibility scheme - specifically, its exclusion of persons sentenced to life without parole for offenses committed between ages 18 and 25 - stands in "tension" with Miller v. Alabama (2012) 567 U.S. 460 (Miller). (People v. Montelongo (2020) 55 Cal.App.5th 1016, 1036 (conc. opn. of Segal, J.) (Montelongo).)

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p. 1036 (conc. opn. of Segal, J.), citing Miller, at p. 471.)Crucially, Miller explained that in this context "none of what [high court precedent has] said about children . . . is crime-specific." (Miller, supra, 567 U.S. at p. 473.) The distinctive attributes of youth that mitigate culpability - transitory mental traits and environmental vulnerabilities - "are evident in the same way, and to the same degree,' when a juvenile commits robbery or 'when (as in [Miller]) a botched robbery turns into a killing.' " (Montelongo, supra, 55 Cal.App.5th at p. 1037 (conc. opn. of Segal, J.).)

The Legislature has recognized that Miller's observations about juveniles also apply to young adults up to age 25. (Stats. 2017, ch. 684, § 2.5.) Yet it has excluded certain youth offenders from parole hearings based on the type of crime they committed. In particular, section 3051 does not allow for resentencing of 18- to 25-year-old offenders convicted of special circumstance murder and sentenced to life in prison without the possibility of parole. (§ 3051, subd. (h).) I agree with Justice Segal that "a juvenile offender's eligibility for a youthful parole hearing should not hinge on the crime he or she committed, the statute under which the prosecutor elected to charge him or her, or the sentence mandated by statute. None of those factors is relevant to determining whether a young adult offender is irreparably corrupt." (Montelongo, supra, 55 Cal.App.5th at p. 1041 (conc. opn. of Segal, J.)) In light of the high court's clear statement that the mitigating attributes of youth are not "crime-specific" (Miller, supra, 567 U.S. at p. 473) and our Legislature's recognition that those attributes are found in young adults up to age 25, it is questionable whether there is a rational basis for section 3051's exclusion of 18- to 25-year-olds sentenced to life without parole. The Court of Appeal declined to resolve whether section 3051 violates equal protection because defendant raised this argument for the first time in his reply brief. (See Montelongo, supra, 55 Cal.App.5th at p. 1030, fn. 8.) But, as Justice Segal noted, "under section 3051, a young adult sentenced to an indeterminate prison term for premeditated first degree murder has an opportunity for parole, whereas Montelongo, who may not have intended to kill Brooks but was subject to a mandatory sentence of life without the possibility of parole (because the People did not seek the death penalty), does not." (Id. at p. 1039 (conc. opn. of Segal, J.)) Indeed, the evidence in this case supported a finding of felony murder, which qualifies as first degree murder but does not require an intent to kill. (§ 189, subd. (a).)

As we observed in Contreras, there is a colorable claim that section 3051's exclusion of certain juvenile offenders based on their controlling offense "violates principles of equal protection and the Eighth Amendment" or "constitutes 'unusual punishment' within the meaning of article I, section 17 of the California Constitution." (Contreras, supra, 4 Cal.5th at p. 382; see *People v. Williams* (2020) 47 Cal.App.5th 475, review granted July 22, 2020, S262669; *People v. Edwards* (2019) 34 Cal.App.5th 183, 197, 199 ["section 3051's carve-out for One Strike defendants violates principles of equal protection" and is "unconstitutional on its face"].) Because there is a substantial question whether section 3051's exclusion of 18- to 25-year-olds sentenced to life without parole violates equal protection, "there is good reason for legislative reconsideration" of the statute. (*In re Jones* (2019) 42 Cal.App.5th 477, 486-487 (conc. opn. of Pollak, J.)) Further, in light of "changes in the legal and scientific landscape," I join Justice Segal's suggestion that the Legislature "reconsider the propriety, wisdom, and perhaps even the constitutionality of imposing a mandatory sentence of life without the possibility of parole on an 18-year-old." (Montelongo, supra, 55 Cal.App.5th at p. 1040 (conc. opn. of Segal, J.); see id. at p. 1041 ["it may be time for the Legislature to rethink the old Roper line"].) Advances in scientific understanding have revealed that the ordinary process of neurological and cognitive development continues for several years past age 18, and our Legislature recognized as much when it extended youth offender parole eligibility to persons who committed their controlling offense at or before age 25. That recognition calls into question whether it is tenable, without an individualized showing of irreparable corruption, to lock up young adult offenders and throw away the key. If what the high court has said about juveniles also applies to young adults, then so does "the truth of Miller's central intuition" that such offenders "who commit even heinous crimes are capable of change." (*Montgomery v. Louisiana* (2016) 577 U.S. \_\_\_, \_\_\_ [136 S.Ct. 718, 736].)