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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. GERARDO CRUZ CISNEROS, Defendant and Appellant.	H050584 (Santa Clara County Super. Ct. No. F1554600)

Gerado Cruz Cisneros appeals his sentence of life in prison without the possibility of parole (LWOP). Seeking to distinguish *People v. Hardin* (2024) 15 Cal.5th 834 (*Hardin*), Cisneros argues that equal protection principles entitle him to a youth offender parole hearing under Penal Code section 3051, subdivision (a) (section 3051(a)), despite his disqualifying conviction for first degree special-circumstance murder.[1] Cisneros also argues that the trial court's reimposition of the LWOP sentence violates federal and state constitutional prohibitions against cruel and/or unusual punishment. Finally, Cisneros contends that the abstract of judgment from his resentencing must be amended to delete the criminal justice administration (CJA) fee.

We agree with the parties that the abstract of judgment must be corrected to reflect the trial court's deletion of the CJA fee. But finding no merit to Cisneros's constitutional claims, we affirm.

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

I. BACKGROUND

Our factual summary derives from this court's prior unpublished opinion on direct appeal, in *People v. Cisneros* (June 22, 2021, H046294, H048649). We cite the opinion "to explain the factual background of the case and not as legal authority." (*Pacific Gas & Electric Co. v. City & County of San Francisco* (2012) 206 Cal.App.4th 897, 907, fn. 10.)

Cisneros's underlying convictions stem from a home invasion robbery and homicide that he and three other individuals committed in February 2015. One of Cisneros's female coparticipants met Robert Heiser for a date, lured Heiser back to his home, and drugged him. Cisneros and his remaining two coparticipants entered the residence and robbed Heiser. Cisneros tied Heiser's hands and repeatedly punched him, inflicting blunt force injuries. The foursome departed the home with Heiser's valuables but left him restrained in his bedroom. Cisneros briefly returned to the home to retrieve his hat and, on reemerging, told the others he punched Heiser "one last time and put him to sleep." Upon later learning that Heiser had died, Cisneros told one of his coparticipants "not to worry about it."

A jury convicted Cisneros of first degree murder (§ 187, subd. (a)) and found true two special-circumstance allegations—that Cisneros committed murder (1) in the course of a burglary (§ 190.2, subd. (a)(17)(G)) and (2) in the course of a robbery (§ 190.2, subd. (a)(17)(A)). The jury also convicted Cisneros of first degree robbery while acting in concert (§§ 211, 213, subd. (a)(1)(A)), first degree burglary (§§ 459, 460, subd. (a)), and with respect to the burglary, found true the allegation that a person other than an accomplice was present in the residence during the offense (§ 667.5, subd. (c)(21)). The trial court found true allegations that Cisneros had sustained two prior convictions for strike offenses (§§ 667, subd. (b)–(i), 1170.12), one of which also constituted a prior conviction for a serious felony (§ 667, subd. (a)).

The trial court sentenced Cisneros to life without possibility of parole for the special circumstance murder, consecutive to five years for the prior serious felony

enhancement. The court imposed and stayed two three-strike terms of 25 years to life, for the robbery and burglary convictions, and ordered Cisneros to pay a CJA fee of $129.75.

A. *The Direct Appeal*

Cisneros appealed from the judgment and petitioned for a writ of habeas corpus. The court rejected his challenge to the sufficiency of the evidence to support the special circumstance allegations, concluding there was substantial evidence to support the jury's finding that Cisneros was an "actual killer," or alternatively, a "major participant" who acted "with reckless disregard to human life." (§ 190.2, subds. (b), (d).)

Cisneros, who was 20 at the time of the offenses, also argued he was entitled to a youth offender parole hearing under section 3051(a). As relevant here, section 3051, subdivision (h) (section 3051(h)) excludes from eligibility for a youth offender parole hearing those sentenced under the Three Strikes law and those who receive an LWOP sentence "for a controlling offense that was committed after the person had attained 18 years of age."

Cisneros acknowledged he was ineligible for a parole hearing under the express terms of section 3051(h) but contended that the exclusion violated equal protection in three ways. First, the statute treated youth offenders differently based on their sentence: LWOP youth offenders are not eligible for a parole hearing, while youth offenders sentenced to parole-eligible life terms are. Second, the statute treated LWOP offenders differently based on age: LWOP offenders who committed the controlling offense between the ages of 18 and 25 are not eligible for a parole hearing, while LWOP offenders who committed the controlling offense while under 18 are. Third, Cisneros argued that section 3051(h) violated equal protection because it permitted parole hearings when the youth offender was sentenced to a parole-eligible life term for a homicide offense, but denied parole hearings to a youth offender sentenced to a nonhomicide

offense under the Three Strikes law. This court concluded none of these exclusions violated equal protection.

As for the stayed sentences for Cisneros's robbery and burglary convictions (counts 2 and 3), Cisneros argued that the trial court erred by imposing terms of 25 years to life—a third-strike sentence. This court agreed with Cisneros that his prior strike convictions should be considered a single strike, so that he should have received determinate second-strike sentences (doubled), and not third-strike sentences of 25 years to life. Accordingly, we remanded the matter for resentencing. We otherwise affirmed the judgment.

B. *The Resentencing*

On remand, Cisneros filed an extensive mitigation statement for resentencing. The mitigation statement included a social history compilation by mitigation specialist Mara Hickey. Hickey detailed the personal struggles Cisneros faced as a child, the substance abuse issues and gang involvement that started at an early age, and the educational struggles Cisneros endured as an adolescent. Hickey reported that Cisneros's partial IQ score was 77, which "placed him in the borderline range for an [i]ntellectual [d]isability," and that he displayed symptoms of ADHD. Hickey faulted the juvenile and adult criminal justice systems for not assisting Cisneros more with his rehabilitation.

The mitigation statement also included a report by clinical and forensic psychologist Rahn Y. Minagawa, Ph.D., who interviewed Cisneros in 2022, when Cisneros was 28 years old. Relying on intelligence tests he administered during the interview, Minagawa stated that Cisneros had an IQ score of 75, and "function[ed] at the borderline range of intellectual functioning." Noting that Cisneros was 20 years old when he committed the offenses, Minagawa opined, "[b]ased on his chronological age, there [was] no question that [he] was still in the process of adolescent brain development," and that his "ability to engage in abstract reasoning, process information, make informed decisions, and control his emotional responses would still be at a

developmentally underdeveloped level." Minagawa further opined that at the time of the offenses, Cisneros was susceptible to "peer influence," and that his decision-making abilities would have been "further impaired as a result of his borderline level of cognitive functioning, his untreated impulse control disorder, his history of exposures to traumatic events, and his years of abuse of marijuana prior to the instant offense." Ultimately, Minagawa concluded, "[Cisneros's] actions at the time of the offense reflected the impulsive and impetuous behaviors commonly observed in teenagers and young adults with incomplete brain structures, compounded by his borderline level of intellectual functioning, the presence of peers, and the impact of years of marijuana abuse."

Based on these reports, Cisneros argued that an LWOP sentence would be cruel and/or unusual punishment in violation of the federal and state Constitutions. Instead, Cisneros urged the trial court to stay the LWOP sentence as to count 1 (special circumstance murder), in favor of determinate terms for count 2 (robbery) and count 3 (burglary). Cisneros further urged the trial court to exercise its discretion to dismiss his remaining strike prior.

The trial court held a resentencing hearing in September 2022, during which it rejected Cisneros's constitutional argument and resentenced Cisneros to the same LWOP term it had during the initial sentencing on count 1 (special circumstance murder). In so doing, the court emphasized it had "considered and . . . given great weight to the comments [defense counsel] has given regarding [Cisneros's] background and his upbringing, the limitations that he may have with regard to his cognitive capacity and functioning." Nevertheless, "when I look at the criminal offenses for which [Cisneros] has been convicted, and particularly the manner in which these crimes were committed, I continue to believe [an LWOP sentence] really reflects the most correct assessment of the interest of justice."

The trial court resentenced Cisneros to the low terms of three years for the robbery conviction (count 2) and two years for the burglary conviction (count 3), both doubled in

light of Cisneros's remaining strike prior, and stayed the sentence pursuant to section 654.

In declining to dismiss the remaining strike prior, the court explained, "the circumstances of the crimes in this case were particularly callous, violent, extremely reprehensible . . . . [¶] The manner in which [Cisneros] and his coparticipants lured the victim into a state of vulnerability, the manner in which they treated him inside his own home during the home invasion, the manner in which they committed violence upon him, left him helpless and abandoned him as he [lay] dying in his upstairs bedroom, the manner in which they fled the scene, the planning that was involved in this, the evidence that was before the [c]ourt regarding earlier criminal activity of a similar nature, [Cisneros's] criminal history that included a serious assaultive felony conviction which the presentence investigation report accurately described as nearly killing a man in the process of a robbery, all lead the [c]ourt to believe that the strike prior allegation is appropriate to be imposed and the [c]ourt would not strike it in the interest of justice." The court also considered Cisneros's "prior criminal history of prison commitments and poor performance on parole supervision."

The trial court also declined to exercise its discretion to strike the serious felony enhancement alleged under section 667, subdivision (a), and again imposed the consecutive five-year term. The court ordered the CJA fee stricken, but that order was not reflected in the abstract of judgment .

Cisneros timely appealed.

II. DISCUSSION

A. *Cisneros Is Not Entitled to a Youth Offender Parole Hearing*

On appeal from the resentencing, Cisneros renews his equal protection challenges to section 3051(h). Cisneros argues that section 3051(h) irrationally discriminates against youth offenders based on their sentence—i.e., youth offenders with LWOP sentences are not eligible for a parole hearing, while youth offenders serving parole-eligible life

sentences are. He also argues that section 3051(h) irrationally distinguishes between LWOP offenders based on their age, and that the provision discriminates against youth offenders sentenced under the Three Strikes law.

We understand Cisneros's relitigation of issues already decided in his first appeal to have been intended to preserve his equal protection claim pending the Supreme Court's review of *People v. Hardin* (2022) 84 Cal.App.5th 273. (See, e.g., *People v. Cooper* (2007) 149 Cal.App.4th 500, 525 [noting that the law of the case doctrine does not apply if "the controlling rules of law have been altered or clarified"].) But after Cisneros filed his opening brief, the Supreme Court in *Hardin* rejected the proposition that "section 3051's exclusion of young adult offenders sentenced to life without parole is constitutionally invalid under a rational basis standard, either on its face or as applied to [defendant] and other individuals who are serving life without parole sentences for special circumstance murder." (*Hardin*, *supra*, 15 Cal.5th at p. 839.)

Hardin squarely forecloses Cisneros's equal protection challenge to section 3051(h)'s exclusion of young adult offenders sentenced to LWOP for special circumstance murder. (*Hardin*, *supra*, 15 Cal.5th at p. 839 [exclusion does not violate equal protection, "either on its face or as applied to . . . other individuals who are serving life without parole sentences for special circumstance murder"].) Recognizing this, Cisneros in his reply brief abandons this strand of his equal protection argument. Cisneros instead argues that because *Hardin* did not "foreclos[e] the possibility of other as-applied challenges to the statute," he may continue to "raise[] a challenge to the application of the three strikes exception in section 3051(h) to him, because the prior conviction that gives rise to the exception was for an incident that occurred when he was under 18 years of age."

To prevail on an as-applied constitutional challenge, however, Cisneros must show that " 'the particular application of the statute violates [*his*] constitutional rights.' " (*People v. Superior Court (J.C. Penney Corp., Inc.)* (2019) 34 Cal.App.5th 376, 387,

italics added.) Because Cisneros is independently ineligible for a youth offender parole hearing as an individual "serving [a] life without parole sentence[] for special circumstance murder" (*Hardin*, *supra*, 15 Cal.5th at p. 839), the theoretical infirmity of section 3051(h) as applied to the six- and four-year determinate terms that the court stayed would do nothing to aid him.

B. *Cisneros's LWOP Sentence Is Not Cruel or Unusual*

Cisneros next argues that his LWOP sentence violates the federal and California constitutional prohibitions against cruel and/or unusual punishment, based on his age, his intellectual limitations, and the nature of the offense and his personal situation and characteristics. In a constitutional challenge to a statutorily mandated sentence (see § 1385.1; *People v. Garcia* (2022) 83 Cal.App.5th 240, 257), " 'we are authorized to consider proportionality [of punishment] based on the facts,' " and " 'determine ourselves, on de novo review, whether defendant's sentence was cruel or unusual.' " (*People v. Baker* (2018) 20 Cal.App.5th 711, 722 (*Baker*).) "[A]ny factual findings the trial court could make in [the defendant's] favor . . . we can (and do) assume . . . ." (*Id.* at pp. 721–722.) But "[t]he *significance* of those facts under the federal and state Constitutions 'presents a question of law subject to independent review; it is "not a discretionary decision to which the appellate court must defer." ' " (*Id.* at p. 722.)

1. *Legal Principles*

The Eighth Amendment's prohibition on cruel and unusual punishment " 'flows from the basic "precept of justice that punishment for crime should be graduated and proportioned" ' to both the offender and the offense. [Citation.]" (*Miller v. Alabama* (2012) 567 U.S. 460, 469 (*Miller*).) " '[T]he concept of proportionality is central to the Eighth Amendment.' " (*Miller*, at p. 469, quoting *Graham v. Florida* (2010) 560 U.S. 48, 59.) "And we view that concept less through a historical prism than according to ' "the evolving standards of decency that mark the progress of a maturing society." ' [Citation.]" (*Miller*, at p. 469.)

Article I, section 17 of the California Constitution, unlike the Eighth Amendment, prohibits the infliction of "[c]ruel *or* unusual punishment." (Italics added.) This is "a distinction that is purposeful and substantive rather than merely semantic." (*People v. Carmony* (2005) 127 Cal.App.4th 1066, 1085 (*Carmony*).) A sentence violates California's prohibition if it is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*.) "A petitioner attacking his sentence as cruel or unusual must demonstrate his punishment is disproportionate in light of (1) the nature of the offense and the defendant's background, (2) the punishment for more serious offenses, or (3) punishment for similar offenses in other jurisdictions." (*In re Nunez* (2009) 173 Cal.App.4th 709, 725, citing *Lynch, supra,* 8 Cal.3d at pp. 425, 431, 436.) "The weight afforded to each prong may vary by case," and " '[d]isproportionality need not be established in all three areas.' " (*Baker, supra,* 20 Cal.App.5th at p. 723.)

Ultimately "[i]t is a rare case that violates the prohibition against cruel and/or unusual punishment." (*Carmony, supra,* 127 Cal.App.4th at p. 1072; *People v. Abundio* (2013) 221 Cal.App.4th 1211, 1221 (*Abundio*).)

2. *Challenge Based on Nature of Offense and Offender*

Because Cisneros relies only upon the first prong of *Lynch*, our analysis is limited to whether his sentence is unconstitutionally disproportionate when compared against the nature of the offense and his background. (See *Lynch*, *supra*, 8 Cal.3d at p. 425.) We rely on the findings about Cisneros and the offense that the trial court made in explaining its discretionary sentencing decisions, and we defer to those findings to the extent supported by substantial evidence.[2] (See *Baker*, *supra*, 20 Cal.App.5th at p. 721.)

[2] The trial court's analysis of Cisneros's constitutional claims at the outset of the sentencing was brief and did not include express factual findings, but the court explained its findings about the offense and addressed Cisneros's background in applying section 654, declining to dismiss the strike prior or serious felony enhancement.

a. *Nature of the Offense*

"Factors to consider in evaluating the nature of the offense include the seriousness of the offense and the presence of violence, victims, or aggravating circumstances." (*Baker*, *supra*, 20 Cal.App.5th at p. 724.) "We consider not only the offense in the abstract but also the facts of the crime in question—'i.e., the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts.' " (*Ibid.*)

To begin, Cisneros was convicted of special circumstances murder—"an offense deemed sufficiently culpable that it merits society's most stringent sanctions." (*Hardin*, *supra*, 15 Cal.5th at p. 864.) As the Supreme Court recently reiterated, "[i]n the criminal law, there is no violent crime or set of violent crimes considered more serious, or that trigger more severe punishment, than special circumstance murder." (*Id.* at p. 863.)

In addition, the trial court found, at the resentencing, that "the circumstances of [Cisneros's] crimes in this case were particularly callous, violent, extremely reprehensible." The trial court emphasized, in particular, "the planning that was involved" in the commission of the offenses, "the manner in which [Cisneros and his coparticipants] fled the scene," and the way they treated the victim, Heiser, during the commission of the home invasion robbery. Specifically, the court found that Cisneros and his coparticipants "lured [Heiser] into a state of vulnerability," "committed violence upon him" in his own home, and "left him helpless . . . as he [lay] dying in his upstairs bedroom." While Cisneros offers an alternative interpretation of the evidence on appeal, he does not dispute that the trial court's findings are supported by substantial evidence.

b. *Defendant's Background*

Nor are we persuaded that Cisneros's sentence is cruel or unusual given his background. (See *Lynch*, *supra*, 8 Cal.3d at p. 425.) In considering this factor, we

evaluate "whether the punishment fits the [individual]." (*Baker*, *supra*, 20 Cal.App.5th at p. 724, italics omitted.) We " 'focus[] on the particular person before the court, [asking] whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind.' " (*Ibid*.) In connection with this factor, Cisneros argues that the circumstances of the offenses, when coupled with his young age, "history of trauma [and] substance abuse," undiagnosed mental disorders, "borderline intelligence level," and susceptibility to peer pressure, all mitigated his culpability and rendered his LWOP sentence cruel and/or unusual.

Because Cisneros was 20 when he committed the offenses, he is not entitled to the benefit of *Miller*, which held that mandatory LWOP sentences for juveniles violate the Eight Amendment. (See *Miller*, *supra*, 567 U.S. at p. 470.) Though not a juvenile, Cisneros argues the rationale of *Miller* should apply to him because modern research has shown that the type of immaturity typically associated with juveniles can easily follow an offender into adulthood, thereby reducing criminal culpability. The Supreme Court acknowledged similar points in *Roper v. Simmons* (2005) 543 U.S. 551 (*Roper*), noting there that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach." (*Id.* at p. 574.) The court concluded, however, that "a line must be drawn" for purposes of the Eighth Amendment, and the *Roper* court drew that line at "the point where society draws the line for many purposes between childhood and adulthood"—age 18. (*Ibid*.) California courts have similarly declined to extend *Miller*'s rationale to offenders over age 18. (See, e.g., *People v. Powell* (2018) 6 Cal.5th 136, 192 (*Powell*) ["*Roper* teaches that a death judgment against an adult is not unconstitutional merely because that person may share certain qualities with some juveniles"]; *People v. Perez* (2016) 3 Cal.App.5th 612, 617 ["[o]ur nation's, and our

state's, highest court have concluded 18 years old is the bright-line rule and we are bound by their holdings"].)

Nor is Cisneros's LWOP sentence cruel or unusual under *Atkins v. Virginia* (2002) 536 U.S. 304 (*Atkins*). *Atkins* held that imposition of the death penalty against developmentally disabled individuals violated the Eighth Amendment, but defined developmentally disabled individuals narrowly, as individuals with "not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." (*Atkins*, at p. 318.) Cisneros does not purport to meet this standard, but contends that "while [he] may not be as severely disabled as was defendant in *Atkins*, the evidence shows that his actions were ill conceived and the product of immaturity and impulsive behavior." But "nothing in *Atkins* suggests that the execution of someone who is neither a juvenile nor developmentally disabled may nevertheless be unconstitutional based on a showing that person is *actually* immature." (*Powell*, *supra*, 6 Cal.5th at p. 192.) In addition, "the high court in *Atkins* did not prohibit an LWOP sentence for . . . developmentally disabled . . . adult defendants." (*People v. Brewer* (2021) 65 Cal.App.5th 199, 217.) Because Cisneros was neither sentenced to death, nor meets the threshold definition of being "intellectually disabled," *Atkins* is not controlling.

Setting *Miller* and *Atkins* aside, the trial court gave "great weight to the comments [defense counsel] has given regarding [Cisneros's] background and his upbringing, the limitations that he may have with regard to his cognitive capacity and functioning." So we assume the truth of all mitigating factors Cisneros proffered about himself and his history. (See *Baker*, *supra*, 20 Cal.App.5th at pp. 721–722.)

In our independent judgment, these mitigating factors do not so outweigh the circumstances of the crime as to render the LWOP sentence cruel or unusual. We do not doubt that Cisneros's participation in the home invasion robbery and Heiser's death reflects, in some measure, his youth, intellectual functioning, and adverse childhood

experiences. But as the trial court's findings of planning, calculation, and overall callousness reflect, this was not a circumstance in which Cisneros was heedlessly swept into the criminality of older and more sophisticated associates. The court's findings about the offense foreclose a conclusion that Cisneros's mitigating background factors were so dominant as to invalidate a mandatory noncapital sentence as applied here.

Consideration of Cisneros's background necessarily includes the aggravating factor of his prior criminal history—in particular the trial court's finding that Cisneros had previously committed "criminal activity of a similar nature." The trial court noted Cisneros's "serious assaultive felony," in which Cisneros "nearly kill[ed] a man in the process of a robbery" four years before the murder of Heiser. The court also found aggravating Cisneros's "history of prison commitments," "poor performance on parole supervision," and "multiple forms of violent criminal activity." These findings, which Cisneros does not dispute, prevent us from considering Heiser's killing to be an anomaly explainable solely by immaturity or cognitive impairment in appreciating the consequences of impulsive actions.

Having carefully examined Cisneros's LWOP sentence in light of the nature of the offense and offender, and with due consideration for Cisneros's youth and intellectual limitations, we cannot say this is the "rare case" that violates the federal and state constitutional prohibitions against cruel and/or unusual punishment. (*Abundio*, *supra*, 221 Cal.App.4th at p. 1221.)

III. DISPOSITION

The judgment is affirmed. The clerk of the Superior Court is ordered to modify the abstract of judgment to delete the $129.75 criminal justice administration fee, and to transmit to the California Department of Corrections and Rehabilitation a new abstract of judgment reflecting that modification.

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LIE, J.

WE CONCUR:

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GREENWOOD, P. J.

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GROVER, J.

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