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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

The People of the State of California,
Plaintiff and Respondent
v.
Rodrigo Caballero,
Defendant and Appellant

Case No. B 217709

In re Rodrigo Caballero, on Habeas Corpus

Case No. B 221833

Court of Appeal, Second Appellate District, Division 4

Appeal from Superior Court, Los Angeles County, Hon. Hayden Zacky, Judge (LASC Case No. MA043902)

PETITION FOR REVIEW

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PETITION FOR REVIEW

To the Honorable Chief Justice of California and the Associate Justices of the Supreme Court of California:

Rodrigo Caballero, defendant and appellant, respectfully petitions this court for review following the decision of the Court of Appeal, Second Appellate District, Division Four, filed on January 18, 2011, affirming his conviction for attempted murder. A copy of the opinion of the Court of Appeal is attached to this petition. A petition for rehearing was not filed by appellant in the Court of Appeal.

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Issues Presented for Review

1. Does *Graham v. Florida* invalidate as cruel and unusual punishment only the convictions of juveniles sentenced to life with no possibility of parole for nonhomicide offenses?

2. Are all juvenile sentences unconstitutional whenever parole eligibility exceeds life expectancy?

Necessity for Review

Last year the Supreme Court ruled that the Eighth Amendment prohibits sentencing a juvenile who did not commit homicide to life without parole. *Graham v. Florida,* U.S. , 130 S.Ct. 2011, 2034, 176 L.Ed.2d 825 (2010) (*Graham*). Such minors must now receive "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 2030. The Court left it to the states to decide when juveniles sentenced to life should be considered for parole. *Id.*

California's attempt to implement this mandate has been inconsistent and conflicting. A bill to provide periodic parole consideration for juveniles serving life was defeated in the Legislature. Two decisions from the Court of Appeal applying *Graham* are in conflict. Review should be granted to resolve which juvenile sentences are unconstitutional.

A. The Conflict in the Court of Appeal

Petitioner is a 16-year-old schizophrenic who was sentenced to 110 years to life on three counts of attempted murder. He will not become eligible for parole until age 122. Petitioner challenged his lengthy sentence, but, in a published opinion, the Second District (Div. 4) denied all relief maintaining that *Graham* only applies to juveniles sentenced to life with *no possibility* of parole. (Opin. 17-20.)

However, in another recent published decision, the Second District (Div. 2) concluded the opposite—a juvenile's 84-year-to-life sentence was cruel and unusual because parole eligibility exceeded his life expectancy. *People v. Mendez* (2010) 188 Cal.App.4th 47, 64 (*Mendez*). "[C]ommon sense dictates that a juvenile who is not eligible for parole until after he is expected to die does not have a meaningful, or as the Court also put it, 'realistic,' opportunity of release." *Mendez, supra* at 63 [quoting] *Graham*.

B. Questions Presented

In the absence of a legislative solution, this Court should grant review under Cal. Rules of Court, R. 8.500(b) (1) to determine *Graham's* scope and which nonhomicide convictions are entitled to post-conviction review as follows:

1. Does *Graham v. Florida* only apply to juveniles who are sentenced to life with no possibility of parole?

2. Is a sentence unconstitutional whenever a juvenile's parole eligibility exceeds his life expectancy?

C. The Potential Impact of *Graham* in California

Petitioner contends his 110-year-to-life sentence is cruel and unusual because it assures he will die in prison. Children who do not commit murder, but receive adult high fixed terms that extend parole eligibility beyond life expectancy, are functionally deprived of the chance to demonstrate fitness to reenter society. This is *Graham's* central rationale and it should apply regardless of whether youthful offenders receive life, life without possibility of parole, or any extreme sentence.

As of 2007, there were 227 juveniles serving terms of life without possibility of parole in California. De la Vega, 42 Univ. of San Francisco Law Rev. 993, *Global Law and Practice* (2008).

The numbers of juvenile offenders sentenced to life or near-life terms in California for nonhomicide offenses is not easy to obtain. In 2009 alone, 363 minors were tried in California's adult courts for serious, nonhomicide offenses including forcible rape, robbery, assault, and kidnapping. California DOJ, *Juvenile Justice in*

California, Adult Court Dispositions for Felony Offenses, Table 31 (July 2010). Over 60% were sentenced to prison. *Id.*

It's likely many such convictions implicate life or near-life terms because of the interplay of high initial sentences, enhancements, special allegations, consecutive terms, aggravating factors, and multiple counts.[1]

But the number of juvenile offenders that may be affected by this case is not the only reason for granting review. Review will secure sentencing uniformity and settle important questions that will affect the trajectory of juvenile justice in California for generations.[2]

Petitioner's 110-year-to-life sentence was imposed without regard to his mental illness, lack of prior record, or potential for growth and maturity. Juvenile offenders tried as adults are subjected to mandatory sentencing schemes that render the offender's personal circumstances irrelevant. This practice was deemed cruel and unusual in *Graham* because, "[b]y denying the defendant the right to reenter

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[1] Life imprisonment can be imposed for offenses not involving homicide in several instances: attempted murder (Penal Code § 664(a)), multiple drug offenses (§ 667.75), aggravated sex offenses (§ 667.61), assault with a deadly weapon while undergoing a life sentence (§ 4500), kidnapping (§ 209), subornation of perjury (§ 128), and treason against California (§ 37) to name a few.

[2] SB 399 was introduced in the California Senate on February 26, 2009 and defeated August 31, 2010. It would have amended Penal Code § 1170 to provide periodic sentence review of juveniles imprisoned for life without the possibility of parole after 10, 15, 20, and 24 years' confinement. A portion of the bill is attached to this petition and follows the published decision of the Court of Appeal.

the community, the State makes an irrevocable judgment about that person's value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability." *Graham, supra*, 130 S. Ct. at 2030. California must reshape its juvenile sentencing landscape to comply with the implications of the Supreme Court's landmark decision.

D. This Case Contains Legal Issues Common to Juveniles Tried as Adults

Petitioner's case is particularly suited for review because his sentence is entwined with claims of mental illness, incompetency, inadequate medical treatment, and ineffective assistance of counsel. These issues are common to juveniles who are tried as adults in California and implicate *Graham's* core concerns.

Teenagers like Rodrigo Caballero are at a peculiar disadvantage in adult court because they possess neither the maturity nor intelligence to meaningfully participate in criminal proceedings. Rodrigo couldn't remember where he went to elementary school or where he attended 9th grade high school. He had no prior felony convictions and believed a misdemeanor was more serious than a felony.

Shortly after arrest, petitioner began hearing voices. (Opin. 4, 13.) Within 3 months of the shooting, Rodrigo was diagnosed with schizophrenia. Two medical experts appointed by the juvenile court

declared petitioner delusional and mentally incompetent. (Opin. 3, 13.) Petitioner was intelligent, but incapable of cooperating with his lawyer. (Opin. 3, 13.) Petitioner believed his lawyer was working against him. (Opin. 13.) Petitioner received the antipsychotic medication Risperdal to treat Paranoid Schizophrenia. (Opin. 3, 4, 11.) With Risperdal, the voices stopped. (Opin. 3, 4.)

Petitioner regained competence 13 months of arrest and was eventually tried in adult court one year later. (Opin. 4.) Four percipient witnesses refused to identify him as the shooter in court. Before he took the stand, Rodrigo was asked if he would like to testify or remain silent. Counsel told the court petitioner elected not to testify. (Opin. 9.) Rodrigo told the judge he wanted to do both. *Id.* He took the stand and confessed. (Opin. 7-8.)

After *Graham v. Florida,* no moral or legal justification exists to imprison young offenders for life for nonhomicide crimes. Where, as here, youthful offenders are diagnosed with serious mental disorders that interfere with their ability to comprehend or participate in the proceedings, doubt over the reliability of the verdict and the appropriateness of a life sentence increases.

Statement of the Case and Facts

A direct appeal and an original petition for writ of habeas corpus were filed in the Court of Appeal. The published decision on January 18, 2011 affirmed the judgment and denied the petition

without issuance of an order to show cause. (Opin. 1, 21, n 8.) No petition for rehearing was filed.

Accordingly, Rodrigo Caballero files this petition to review the issues in the direct appeal and has filed a separate petition for review of denial of the petition for writ of habeas corpus. Cal. Rules of Court, R. 8.500(d).

For purposes of this petition, the statement of facts contained in the court of appeal's opinion is adopted.

Argument

I. THE SEVERITY OF PETITIONER'S SENTENCE AND THE MANNER IT WAS IMPOSED VOLATES THE EIGHTH AMENDMENT

Petitioner's 110 year to life sentence was imposed minutes after the jury announced its verdict. Counsel waived time for sentencing. The judge was not presented—and did not consider—mitigating factors such as petitioner's mental disease, his age, lack of prior record, or potential for growth and maturity. This makes the sentence unconstitutional because petitioner is serving life without having committed a homicide and he has no meaningful chance of release.

The Court of Appeal's interpretation of *Graham v. Florida*, by strictly limiting Eighth Amendment relief to minors serving life with no possibility of parole (LWOP), is too rigid. (Opin. 17-20.) Florida

abolished parole so all Florida life sentences carry a lifetime of incarceration unless executive clemency is granted. *Graham, supra*, 130 S.Ct. at 2020. There is no distinction in Florida between life with no possibility of parole and life with possibility of parole as in California.

Thus, *Graham's* use of the term "life without parole" merely reflects a generic use of the term—Graham was sentenced to life and there is no parole in Florida. The Court of Appeal's reliance on Justice Alito's dissent is therefore misplaced. (Opin. 18.)

However, other language in the Supreme Court's decision seems to apply to all life sentences—not just LWOP. This is made clear by the broad holding: "A State need not guarantee the offender eventual release, but if it imposes *a sentence of life* it must provide him or her with some realistic opportunity to obtain release before the end of that term." *Id.* [emphasis added]. Hence, *Graham* applies to all life sentences for nonhomicide crimes—not just LWOP.

Another reason the Court of Appeal's attempt to distinguish *Graham* should be rejected is because defendants who are sentenced to LWOP are more culpable than defendants who receive life with the possibility of parole. The Supreme Court excluded juvenile murderers from its decision because "a criminal sentence must be directly related to the personal culpability of the criminal offender." *Graham, supra* at 2028 [internal quote and citation omitted]. If the Court of Appeal's decision were allowed to stand, offenders who were imprisoned for more heinous crimes would be entitled to Eighth Amendment

protection, but juveniles who received "lighter" life sentences because they are morally less culpable would not. This stands the reasoning of the landmark decision on its head.

Lastly, a narrow application of *Graham* would exclude a whole class of imprisoned youth who, like petitioner, are especially vulnerable to adult criminal prosecution. We develop this argument next.

II. THE IMPACT OF THE ADULT CRIMINAL JUSTICE SYSTEM ON JUVENILES WITH SERIOUS DISABILITIES IS DISPROPORTIONATE

Petitioner has alleged the recurrence of his mental disease rendered him incompetent to stand trial. However, even if Risperdal had been administered without interruption, petitioner's underlying schizophrenia makes a de facto life sentence inappropriate. If the law recognizes that "normal" children are less culpable than adults, surely mentally impaired juveniles are less blameworthy still.

The incidence of disabled youth in prison is disproportionate. Imprisoned youth are up to twenty times more likely to have serious mental disorders than comparable teens. Seena Fazel et al., *Mental Disorders Among Adolescents in Juvenile Detention and Correctional Facilities: A Systematic Review and Metaregression Analysis of 25 Surveys,* 47 J. Am. Acad. Child Adolescent Psych. 1010, 1016 (2008). Confinement in adult lockup aggravates the condition of minors with

disabilities. They are at greater risk of depression and increased suicide. Lindsay M. Hayes, U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Suicide in Confinement: A National Survey* 1-2 (2009). The constellation of symptoms petitioner displayed shortly after arrest including auditory hallucinations and paranoia, proves the claim.

As the Supreme Court noted, vocational training and rehabilitative services available to others are denied life inmates. For juvenile offenders, the absence of treatment makes the incarceration more disproportionate. *Graham, supra* at 2030.

The same reasons that justify eliminating life without parole for nonhomicide youthful offenders make the imposition of extreme terms of imprisonment inappropriate for disabled children. Petitioner has alleged his mental disease casts significant doubt on the reliability of the verdict or the appropriateness of the sentence. But even if petitioner is wrong, the categorical rule announced in *Graham* mitigates the risk of over-incarcerating juvenile offenders who have fallen through the cracks. Review should be granted to construct a sentencing formula that accounts for such disparities.

February 21, 2011

Respectfully submitted,

KOSNETT & DURCHFORT

By David E. Durchfort

Certification

In accordance with Cal. Rules of Court, R. 8.504(d), I certify this brief contains 2,419 words according to the word-count function of the program used to prepare it.

February 21, 2011

KOSNETT & DURCHFORT

By David E. Durchfort

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RODRIGO CABALLERO, Defendant and Appellant.	B217709 (Los Angeles County Super. Ct. No. MA043902)
In re RODRIGO CABALLERO, on Habeas Corpus.	B221833

APPEAL from a judgment of the Superior Court of Los Angeles County, Hayden Zacky, Judge. Affirmed.

ORIGINAL PROCEEDINGS; petition for a writ of habeas corpus. Writ denied.

Kosnett & Durchfort and David E. Durchfort for Defendant and Appellant.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts I through IV of the Discussion.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Chung L. Mar and Lauren E. Dana, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Rodrigo Caballero appeals from the judgment entered following his conviction by jury of three counts of willful, deliberate, and premeditated attempted murder, with findings that he personally and intentionally discharged a firearm, inflicted great bodily injury upon one victim, and committed the crimes for the benefit of a criminal street gang. (Pen. Code, §§ 664/187, subd. (a), 664, subd. (a), 12022.53, subds. (b)-(d), 186.22, subd. (b)(1)(C).)[1] He was sentenced to 110 years to life in state prison. Caballero contends: (1) he was mentally incompetent to waive his right against self-incrimination; (2) the failure to conduct a competency hearing deprived him of due process; (3) he was denied effective assistance of counsel; (4) there was instructional error; and (5) his sentence constitutes cruel and unusual punishment. In the published portion of the opinion, we conclude his sentence passes constitutional muster. In the unpublished portion, we reject the remainder of defendant's claims. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The Pretrial Proceedings

On June 8, 2007, a petition pursuant to Welfare and Institutions Code section 602 was filed against defendant, charging him with three counts of willful, deliberate, and premeditated attempted murder and three counts of assault with a semi-automatic firearm. (§ 245, subd. (b).) The petition also contained gang and firearm allegations. The alleged

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

incident took place two days earlier, on June 6. Although the record does not include the complete juvenile court file, we are able to determine from the register of actions page that on August 22, 2007, counsel for the parties and the court declared a doubt as to defendant's mental competence to proceed. Reports pursuant to Evidence Code section 730 were ordered.

Defendant was examined by two psychologists, Drs. Raymond Anderson and Haig Kojian. Dr. Anderson opined that defendant had "Schizophrenia, Paranoid Type," which caused him to be delusional. He concluded that defendant was incapable of cooperating with counsel, although he appeared "to be a rather intelligent minor who has chronically worked below his potential because of his disorder or the precursors of his disorder." Dr. Kojian was asked to determine whether defendant was competent to make the decision to waive his fitness hearing.[2] He found that defendant was not. Dr. Kojian concluded his report by writing, "Should an opinion regarding competence to stand trial in general be required, I would like to receive all of the prior evaluations, I would like to interview the minor again especially if he is placed on medication, and I would also like to receive the juvenile hall mental health record." On November 29, 2007, based on the reports and the stipulation of counsel, the juvenile court found defendant mentally incompetent and criminal proceedings were suspended.

At some point, the court ordered that defendant be reevaluated.[3] On June 25, 2008, Dr. Kojian reinterviewed defendant. Defendant told him that he was taking anti-psychotic medication and was no longer hearing voices as he had in the past. Defendant reported he was currently housed in general population. Dr. Kojian confirmed defendant had been given Risperdal to treat his schizophrenia. Dr. Kojian concluded that through the use of medication, defendant had regained competency to stand trial.

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[2] A fitness hearing determines whether a minor 16 years or older should remain in the juvenile justice system or have his or her case adjudicated in adult court.

[3] According to one of the doctors who performed the later evaluation, Dr. Joseph Simpson, the court order requesting that he evaluate defendant was dated June 17, 2008.

On July 11, 2008, Dr. Joseph Simpson spoke to defendant. Defendant told Dr. Simpson that he began experiencing auditory hallucinations shortly after his arrest in June 2007. He said he was currently taking Risperdal and the hallucinations had ceased. Defendant understood it was important to proceed with the fitness hearing, as the sentence in juvenile court would be less punitive. Dr. Simpson determined that defendant's schizophrenia was being successfully treated with medication and concluded defendant was competent to stand trial.

According to the register of actions page, on July 23, 2008, counsel submitted on the experts' reports and the court found defendant competent and reinstituted criminal proceedings. On November 4, 2008, defendant was found unfit to remain in juvenile court and the petition was dismissed.

A complaint was filed in adult court. A preliminary hearing was conducted, an information was filed, and trial commenced on May 28, 2009.

The Prosecution's Case

On June 6, 2007, at about 1:25 p.m., 14-year-old Jesse Banuelos was walking home from school with friends Mark Johnson and Adrian Bautista. Banuelos noticed two individuals who he believed were friends of Bautista's. Banuelos knew one of the friends was named Carlos. The five youths continued down the street together.

Banuelos and Johnson separated from the group to go to Johnson's house. The other three continued to walk ahead of Banuelos and started to turn the corner at 37th Street and Sunstream. Banuelos saw a young Hispanic male appear. The male yelled out, "Lancas," which Banuelos thought was the male's gang's name. Banuelos saw a black gun, heard three or four shots, and started running. He stopped to turn toward the area where he heard the gunshots. He saw someone fall to the ground. Banuelos returned to the corner after the shooting and realized it was Bautista who had fallen. Banuelos noticed that Bautista's back was bleeding. Banuelos said that Val Verde Park was a gang, and he believed Bautista was a member. He could not identify the person who fired the weapon.

Mark Johnson testified he was going home from school on the afternoon of June 6 in the company of Jesse Banuelos and Adrian Bautista. At some point, the group met up with two or three of Bautista's friends. Bautista and his friends walked ahead. Johnson heard three or four gunshots and ran. He returned to the area where he had last seen Bautista and his friends and saw Bautista on the ground. He did not know where Bautista's friends had gone. Johnson described the shooter as a male Hispanic. Johnson estimated the male was a couple of years older than he was (Johnson was 14 at the time of the incident). He could not identify the shooter.

On the day of the shooting, Carlos Vargas was in the company of Vincent Valle, Adrian Bautista, and two others. A male approached and began asking where they were from. The male yelled, "Lancas," and Vargas responded by shouting, "Val Verde." Vargas, Valle, and Bautista were members of the Val Verde Park gang and one of their rivals was the Lancas gang. The male opened fire and Bautista was shot in the back.

Although the shooter was approximately 20 feet away and Vargas had a clear view of him, the only description Vargas could provide at trial was that he was Hispanic and about 17 years old. Vargas denied that defendant looked familiar, that he knew defendant as "Dreamer," and that he was acquainted with anyone in the Lancas gang.

After the incident, Vargas was interviewed by Detective Robert Gillis at the scene. When asked by the prosecutor if he told the detective that he knew defendant and that defendant had shot at him, Vargas claimed he did not remember. After further questioning, Vargas acknowledged he told the detective that before shooting Dreamer got out of the car and yelled, "Vario Lancas." Vargas conceded that if he knew the identity of the shooter he would not say so because the gang code provides that a member does not snitch and snitches can be killed by other gang members. Vargas admitted and then denied that he selected defendant's picture from a photographic lineup and informed Detective Gillis that defendant was the shooter. On cross-examination, he said defendant was not the shooter.

Adrian Bautista confirmed that he, Jesse Banuelos, and Mark Johnson were walking home from school on the afternoon of June 6, 2007. They met up with Carlos

Vargas and Vincent Valle, whom Bautista knew to be members of the Val Verde Park gang. Bautista said he was shot in the back and upper shoulder, but he did not know who shot him or where the shooter was located when he fired. He thought the shooter said "Lancas" before opening fire.

Bautista was asked a series of questions about an interview conducted by Detective Gillis. He did not remember looking at a number of photographs and telling Detective Gillis that none of the individuals depicted was the person who fired the gun. Nor could he recall circling a photograph of a male and identifying him as the shooter or stating the shooter drove up in a blue or green Toyota Celica. Bautista acknowledged he was a member of the Val Verde Park gang and gang members do not testify.

Vincent Valle stated that on June 6, 2007, he was with friends Carlos Vargas and Adrian Bautista and two others. Someone approached and shot towards the group. After Vargas told him the identity of the shooter, Valle realized that he recognized the shooter as someone he knew who was a friend of Valle's sister. That person had been to his house once before. Valle identified defendant as the individual who fired the gun at the group when shown photographs by Detective Gillis and before the jury. On cross-examination, Valle conceded that when he was initially questioned by a deputy at the scene he said that he was unable to identify the shooter.

Valle, who was a member of the Val Verde Park gang at the time of the shooting, said he got out of the gang a couple of weeks after the incident. He was aware that gangs retaliate against people who testify in court and expressed concerns for his safety.

On June 6, 2007, Los Angeles County Sheriff's Deputy Jason Jones was driving a patrol unit in the City of Palmdale. At approximately 1:30 p.m., he was flagged down by several people. Deputy Jones stopped and got out of his vehicle. He was informed that someone was lying on the grass in a nearby front yard. He walked to the yard and observed Bautista face down on the lawn and bleeding from an injury to his back. The deputy lifted Bautista's shirt and observed what appeared to be a bullet wound near his shoulder blade. Deputy Jones called for paramedics.

While waiting for them to arrive, Deputy Jones spoke to several witnesses in the area, including Carlos Vargas, Vincent Valle, Jesse Banuelos, and Mark Johnson. Banuelos said he saw a Hispanic male wearing black clothing emerge from an older model green Toyota Celica. The male approached Bautista and Vargas and asked them where they were from. The male said, "Lancas," and started shooting. Johnson told Deputy Jones substantially the same. The deputy searched the area and located five shell casings on the sidewalk.

Detective Gillis is assigned to the Antelope Valley Gang Task Force and works exclusively with the Lancas gang. The primary activity of the gang is shooting members from other gangs. Detective Gillis had investigated approximately 20 such incidents involving Lancas and their rivals. He testified to the predicate acts required by the Penal Code to establish that Lancas is a criminal street gang.

As part of his investigation into Bautista's shooting, Detective Gillis interviewed defendant. Defendant admitted he was a member of the Lancas gang and had the moniker "Dreamer." Detective Gillis opined that the shooting benefitted the Lancas gang. One of the effects of committing a shooting in a neighborhood is that residents become afraid to cooperate with police or testify in court.

Detective Gillis said he spoke to Carlos Vargas within a half hour of the shooting. Vargas told him that Dreamer from Lancas was the shooter. Vargas said he had known Dreamer for a couple of years. He stated that just prior to the shooting Dreamer got out of a car and yelled, "Vario Lancas." In response, Vargas shouted, "Val Verde Park."

Detective Gillis showed Vargas a photographic lineup. Vargas circled a picture and said the person depicted was Dreamer, the shooter. Detective Gillis gave Adrian Bautista a series of photographs to look at. Bautista selected one photograph, that of defendant, and said, "[T]hat's him. That's the person who shot me."

The Defense Case

Defendant testified that on the afternoon of June 6, he was at 37th Street and Sunstream. When asked what he was doing, he replied, "I was straight trying to kill

somebody." He then denied he intended to kill anyone, but admitted to shooting at the victims because they were his "enemies." He said he was able to determine the victims were enemies because he asked them where they were from and they answered, "VVP," the initials of the rival Val Verde Park gang. Defendant claimed that by shooting he "saved [his] hood. Lancas. West Side Lancas. That [was why he] shot at them." Defendant repeated that he did not intend to kill anyone, but shot to scare the group. He could not recall what he did prior to the shooting.

DISCUSSION

I. Defendant's Trial Was Not Fundamentally Unfair

Defendant contends his mental illness rendered his trial fundamentally unfair. He asserts he was incapable of intelligently waiving his right against self-incrimination and his counsel and the court erroneously failed to stop the proceedings to conduct a competency hearing.

Regarding defendant's decision to testify, the court twice explained to him that he had a right to remain silent. On June 2, at the end of the court day, defendant's attorney informed the court that he had not yet discussed with his client whether he would be testifying. The court stated: "Mr. Caballero, let me just explain something to you. You have an absolute right to remain silent. You have a Fifth Amendment right against self-incrimination. You could sit there during trial and not utter a word. The jury will be instructed they are not to consider your silence in any way. That's your right. On the other hand, if you want to waive and give up those rights, you can testify on behalf of yourself in this case. That's your right as well, even — you know, you listen to what your attorney has to say. Take his advice. But it's ultimately your decision and your decision alone to make. So he will talk to you today, and tomorrow morning I will address that issue again and you will have to tell me what you want to do. Do you understand that?" Defendant replied, "Yes."

The next morning, after the prosecution had called its last witness, the court sought to ascertain whether defendant would be testifying.

"[The Court]: [Counsel], have you had a chance to speak to your client about whether or not he wishes to testify or whether or not he wishes to remain silent?

"[Counsel]: I have, Your Honor. It's his election to remain silent.

"[The Court]: Is that correct, Mr. Caballero?

"The Defendant: Um, no.

"[The Court]: You want to testify?

"The Defendant: Yes.

"[The Court]: All right. Let me explain a few things to you. Number one, you have a right to remain silent in this case. You can just sit there and not utter one word. I told you that yesterday. If you do remain silent, I will instruct the jury they are not to consider your silence in any way. On the other hand, you could waive and give up your right to remain silent and you could testify on your own behalf in this case. Which one would you like to do?

"The Defendant: I want to do all of them.

"[The Court]: Pardon me?

"The Defendant: All of them.

"[The Court]: What? You can't do all of them. Which one do you want to do?

"The Defendant: Can you repeat what you said?

"[The Court]: Do you want to remain silent and not testify, or do you want to testify? If you testify, that means that you are going to get up here like these other witnesses. You will be sworn to tell the truth. Your attorney will ask you questions. Mr. Sherwood [the prosecutor] will then cross-examine you. Do you want to do that or do you want to sit there and remain silent?

"The Defendant: I want to go up there and testify.

"[The Court]: All right. So you waive and give up your right to remain silent?

"The Defendant: Yes.

"[The Court]: Okay. Very good."

Defendant points to the latter discussion with the court and asserts, "[t]he record makes evident [he] didn't understand his rights, was confused, and didn't have the mental acuity to make a knowing waiver." We disagree.

Defendant starts with the incorrect premise that the record establishes he was mentally incapacitated at the time of trial. It is true that criminal proceedings were initially suspended due to defendant's mental issues; however, two experts reexamined defendant and found his symptoms had abated through the use of medication. Defendant was no longer suffering from auditory hallucinations. He was deemed fit to proceed. There was no evidence that defendant's mental condition had changed at the time of trial.

At best, defendant has shown that he was confused by the court's explanation of his Fifth Amendment right to remain silent as it related to his right to testify. Confusion does not equate to mental incompetency to stand trial. "A defendant is presumed competent unless it is proved otherwise by a preponderance of the evidence. (§ 1369, subd. (f).)" (*People v. Ramos* (2004) 34 Cal.4th 494, 507.) No such evidence was presented at trial.

Defendant argues that his counsel and the court were well aware of his history of schizophrenia and had an obligation to ensure that he understood his options. He accuses each of failing to meet that obligation. We are not persuaded. The transcript shows that defendant knowingly waived his right against self-incrimination. His initial confusion notwithstanding, after being told he would be required to take an oath to tell the truth and would be subjected to cross-examination by the prosecutor, defendant made it clear that he wanted to testify.

Next, defendant asserts that, "[i]f evidence of incompetence wasn't apparent before [he] testified, ample proof existed later." He observes that when he testified he suffered from memory lapses, could not articulate his intent at the time of the shooting, and offered such a complete on-the-stand confession that he established he was an incompetent individual incapable of assisting in his defense. Thus, he contends, in combination with the experts' prior diagnosis of schizophrenia, his performance on the

stand provided substantial evidence that he was mentally incompetent and a competency hearing should have been held.

"If a defendant presents substantial evidence of his lack of competence and is unable to assist counsel in the conduct of a defense in a rational manner during the legal proceedings, the court must stop the proceedings and order a hearing on the competence issue." (*People v. Ramos*, *supra*, 34 Cal.4th at p. 507.) "'There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.'" (*People v. Ary* (2004) 118 Cal.App.4th 1016, 1024, quoting *Drope v. Missouri* (1975) 420 U.S. 162, 180.) "If a defendant presents merely 'a litany of facts, none of which actually related to his competence at the time [of trial] to understand the nature of that proceeding or to rationally assist his counsel at that proceeding,' the evidence will be inadequate to support holding a competency hearing. [Citation.] In other words, a defendant must exhibit more than bizarre, paranoid behavior, strange words, or a preexisting psychiatric condition that has little bearing on the question of whether the defendant can assist his defense counsel." (*People v. Ramos*, *supra*, 34 Cal.4th 508.)

Defendant relies heavily on the experts' prior diagnosis that he was unable to assist in his defense in a rational manner. However, as we have discussed, those opinions were later changed after defendant was provided with the proper medication. Moreover, at the time he was declared incompetent, defendant experienced specific symptoms—auditory hallucinations. There is nothing in the record remotely demonstrating that a recurrence of those symptoms developed during trial. Nor is there any evidence that defendant's mental condition had deteriorated in any other manner.

Defendant suggests that his act of confessing to the crimes during his testimony provides substantial evidence of his incompetence. Not so. A defendant's decision to take steps that do not appear to be in his or her best interests does not equate to a reason to doubt his or her ability to assist counsel in a rational manner. Indeed, an accused's "preference for the death penalty and overall death wish does not alone amount to

substantial evidence of incompetence or evidence requiring the court to order an independent psychiatric evaluation." (*People v. Ramos*, *supra*, 34 Cal.4th at p. 509.) Without more, defendant's act of admitting culpability did not constitute substantial evidence of his incompetence. Thus, another competency hearing was not required.

II. Counsel Did Not Provide Ineffective Assistance

Defendant faults trial counsel for failing: (1) to request a competency hearing; (2) to develop a defense based on defendant's mental illness; (3) to object to the introduction of prejudicial evidence; and (4) to request appropriate instructions. We examine his claims in turn.

Defendant chides counsel for not requesting a competency hearing. His criticism is unwarranted. He implies there was no harm in requesting such a hearing when he argues a "competency hearing would have halted the superior court trial or sentencing." He ignores the fact that a court shall order a competency hearing when "counsel informs the court that he or she believes the defendant is or may be mentally incompetent." (§ 1368, subd. (b).) Defendant points to nothing that occurred after he was declared fit to face the charges (other than his testimony, which we have already discussed) that would have provided the substance for counsel's belief that defendant was incompetent at the time of trial.

Defendant complains that any competent attorney would have examined the file and discovered he was diagnosed with schizophrenia prior to trial. From this premise, defendant leaps to the conclusion that he must have suffered from that condition at the time of the shooting and that further investigation into his condition would have yielded a defense to the charge of premeditated attempted murder. We are not persuaded.

"Criminal trial counsel have no blanket obligation to investigate possible 'mental' defenses, even in a capital case." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1244, superseded by statute on another ground as stated in *In re Steele* (2004) 32 Cal.4th 682, 691.) Before counsel can be found to have conducted an inadequate investigation into a mental defense, there must be "initial facts *known to counsel* from which he reasonably

should have suspected that a meritorious defense was available." (*People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1244.) The record discloses no such facts here.

As defendant concedes, the first expert's examination was conducted on September 27, almost four months after the shooting. More to the point, neither expert gave any indication that defendant's condition affected his ability to form the intent to kill or to premeditate. Dr. Anderson stated that defendant's delusional beliefs caused him to be "willing to believe that anyone is working assiduously against him if they show the slightest deviation from his (often delusional) expectations." This condition made it difficult for defendant to cooperate with his attorney. Dr. Kojian found defendant was not "acutely psychotic or irrational." Nonetheless, his paranoia caused him to believe his attorney was working against him and led to his inability to cooperate with counsel to discuss defense strategy. Significantly, defendant told Dr. Simpson that he began suffering auditory hallucinations *shortly after* being arrested for the shooting. On these facts, counsel had no reason to suspect that defendant's mental issues, which resulted only in his inability to cooperate with a prior attorney, could lead to a defense to the shooting.

In any event, even assuming counsel's representation fell below the professional standard, reversal is not required unless defendant "'suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome.'" (*People v. Gray* (2005) 37 Cal.4th 168, 207.) Defendant claims the jury might have found the premeditation allegation not true had the appropriate defense been developed. His contention is belied by the testimony at trial.

The prosecution witnesses said the shooter approached them and loudly announced his gang affiliation, Lancas. Vargas responded by shouting the name of his gang, the rival Val Verde Park gang. His retort was immediately followed by at least five shots (Deputy Jones recovered five shell casings). The evidence clearly demonstrated that the shooter knew the gang affiliation of his targets, emerged on the scene with the means to do them harm, and fired multiple times at close range to carry out his plan. Defendant's testimony confirmed that he reflected prior to acting when he admitted he

selected his victims because they were "enemies" and shot at them in order to "save[] [his] hood. Lancas." As there is no reasonable probability that the result would have been different absent counsel's alleged error, defendant cannot establish prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.)

Defendant contends counsel was ineffective for failing to object to the admission of certain evidence. He provides two examples. In the first, Detective Gillis was opining that defendant was a Lancas gang member. In explaining his conclusion, he said "that the defendant yelled out 'Lancas' before he committed the shooting." Defendant urges that competent counsel would have objected to Detective Gillis's statement identifying defendant as the shooter. In the second, Detective Gillis testified about an incident that occurred six months prior to the instant offense. He stopped defendant's brother, who goes by the moniker "Little Dreamer," and the brother pulled a gun and tossed it on the ground. Defendant urges the evidence was irrelevant and prejudicial.

Assuming counsel had no justification for failing to object, defendant cannot establish prejudice. In an attempt to avoid the effect of his testimony, defendant argues he had not yet testified when Detective Gillis's evidence was received and the identity of the shooter was still at issue. Defendant offers no authority in support of his implicit claim that we examine the effect of counsel's error at the moment it occurred. To the contrary, we determine prejudice by examining all of the evidence presented. (See *People v. Montoya* (2007) 149 Cal.App.4th 1139, 1152 [court found it highly unlikely a different result would have occurred absent counsel's deficient performance "[b]ased on the totality of the evidence"].) Contrary to defendant's belief, we find the prosecution's evidence establishing his identity as the shooter compelling. Two witnesses identified him (one at the scene) and recanted at trial after conceding that as gang members they faced reprisals if they testified against another gang member. Another identified defendant in a photographic lineup and in the courtroom. When we add defendant's

admission to the mix, it is clear the result would not have been altered had Detective Gillis's testimony not been heard.[4]

Finally, defendant criticizes counsel for failing to request instructions on lesser included offenses. He notes that counsel "hinted that 'additional instructions' would be provided, but none appears of record and none were offered," and asserts, "[t]his was error and it was prejudicial." (Internal record citations omitted.) Defendant does not hint at what instructions counsel should have requested. On this point he offers no legal argument or authority in support and we may treat it as forfeited. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

III. The Court Had No Sua Sponte Duty to Instruct on Lesser Offenses

Defendant asserts the trial court had a duty to instruct on the lesser crimes of attempted voluntary manslaughter and assault. We disagree.

Initially, the claim is forfeited as defendant has provided neither argument nor authority to support it. As to the necessity of the attempted voluntary manslaughter instruction, he simply points to his testimony that he lacked the intent to kill the group at whom he aimed and offers no argument as to why this evidence is relevant. He mentions the "heat of passion defense might lie because witnesses claimed competing gang slogans were exchanged before shots were fired." He does not explain why this snippet of evidence was sufficient to require the trial court to instruct on lesser crimes. In any event, on the merits, his contention fails.

"[A] trial court must instruct a criminal jury on any lesser offense 'necessarily included' in the charged offense, if there is substantial evidence that only the lesser crime was committed." (*People v. Birks* (1998) 19 Cal.4th 108, 112.) "When relying on heat of passion as a partial defense to the crime of *attempted* murder, both provocation and heat of passion must be demonstrated." (*People v. Gutierrez* (2003) 112 Cal.App.4th

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[4] Defendant suggests the lack of an appropriate objection "may have impelled [him] to take the stand to cover for his counsel's failure to exclude the evidence." We reject this speculative claim that is unsupported by the record.

704, 709.) Thus, the bare fact defendant claimed that he lacked the intent to kill is not sufficient evidence to impose a sua sponte duty on the trial court to instruct on attempted voluntary manslaughter. Because there was no substantial evidence of either provocation or heat of passion, and defendant does not attempt to demonstrate otherwise, the court did not err by not instructing on the lesser offense of attempted voluntary manslaughter. (*Id.* at p. 710.)

As to the necessity for an instruction on assault with a firearm, that crime is not a lesser included offense of attempted murder. (*People v. Parks* (2004) 118 Cal.App.4th 1, 6.) To the extent defendant urges the court had an obligation to instruct on the lesser *related* offense of assault, that is no longer the law. (*People v. Birks*, *supra*, 19 Cal.4th 108.)

IV. The Court Did Not Err by Giving the Flight Instruction

The court gave the jury the flight instruction contained in CALCRIM No. 372.[5] Defendant's claim this was improper is unavailing.

"In general, a flight instruction 'is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt.' [Citation.]" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055.) Although defendant asserts there "was no testimony [he] acted with the purpose of avoiding observation or arrest," "[t]o obtain the instruction, the prosecution need not prove the defendant in fact fled, i.e., departed the scene to avoid arrest, only that a jury *could* find the defendant fled and permissibly infer a consciousness of guilt from the evidence." (*People v. Bonilla* (2007) 41 Cal.4th 313, 328.)

The evidence supported such a finding and inference. Defendant arrived at the scene in a vehicle. Immediately upon firing at the victims in broad daylight on a city

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[5] The instruction reads: "If the defendant fled or tried to flee immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself."

street, he fled from the site. Deputies arrived at the location of the shooting roughly five minutes after it occurred. The jury could reasonably infer that defendant beat a hasty retreat in order to avoid being arrested. The instruction was appropriate.

V. Defendant's Sentence Is Not Unconstitutional

At oral argument, for the first time on appeal, defendant cited the high court's opinion in *Graham v. Florida* (2010) ___ U.S. ___, 130 S.Ct. 2011 (*Graham*), and asserted that it required a remand of the case for resentencing. We gave the Attorney General an opportunity to brief the matter and defendant the option to file a reply. Both parties submitted a brief.

In *Graham*, a 16-year-old pled guilty to armed burglary with assault or battery, a felony that carried a maximum penalty of life imprisonment, and attempted armed robbery, a felony that carried a maximum penalty of 15 years in prison. The court withheld adjudication of guilt as to both charges and placed Graham on probation for a three-year term. (*Graham, supra*, 130 S.Ct. at p. 2018.) Less than six months later, Graham was arrested for participating in a series of robberies. The trial court found Graham guilty of the earlier burglary and robbery charges and imposed the maximum sentence for both crimes. Because Florida did not have a parole system, Graham's life sentence was without the possibility of parole. (*Id.* at pp. 2019-2020.) The Supreme Court reversed the judgment of the Florida court, holding that the Eighth Amendment "prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." (*Id.* at p. 2034.)

Defendant argues, "*Graham* held that the Eighth Amendment must give juveniles convicted of nonhomicide crimes some chance of release based on rehabilitation. [His] sentence of three consecutive life terms is therefore unconstitutional because [he] is denied any 'meaningful' change of release and cannot earn good conduct/work credits to mitigate his sentence." We disagree that *Graham* applies to individuals in defendant's position.

The *Graham* court applied a categorical rule that implicated "a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes." (*Graham, supra*, 130 S.Ct. at pp. 2022-2023.) As the Attorney General points out, the court specifically limited the scope of its decision. The court defined the class of offenders with which it was dealing thusly: "The instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense." (*Id.* at p. 2023.) In the present case, defendant's sentence was a term of years (110) to life, not life without the possibility of parole, and no language in *Graham* suggests that the case applies to such a sentence. If the court had intended to broaden the class of offenders within the scope of its decision, it would have stated that the case concerns any juvenile offender who receives the functional equivalent of a life sentence without the possibility of parole for a nonhomicide offense. But as Justice Alito observed in his dissent, "[n]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole." (*Id.* at p. 2058 [dis. opn. of Alito, J.]; accord *People v. Mendez* (2010) 188 Cal.App.4th 47, 63 (*Mendez*) [*Graham's* holding is limited to juveniles actually sentenced to life without the possibility of parole].) Thus, *Graham* provides defendant no basis for relief.

Although not cited by defendant, the Attorney General addressed the holding of *Mendez*, a case authored by our colleagues in Division Two. Mendez was 16 years old when he committed offenses that led to his conviction of one count of carjacking, one count of assault with a firearm, and seven counts of second degree robbery, with findings that he used a firearm during the commission of the offenses and that the crimes were carried out with the intent to benefit a criminal street gang. He was sentenced to state prison for 84 years to life.

On appeal, Mendez claimed that his sentence is a de facto life without the possibility of parole sentence because, due to the length of his sentence (84 years), he will not be eligible for parole during his lifetime. Although the court found that "*Graham* expressly limited its holding to juveniles actually sentenced to [life without parole]" (*Mendez, supra*, 188 Cal.App.4th at p. 63), it noted the Supreme Court did "require that a

state 'must' give a juvenile 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" (*Ibid.*, quoting *Graham*, *supra*, 130 S.Ct. at p. 2030.) The *Mendez* panel acknowledged *Graham* stated that some juveniles who commit certain crimes may turn out to be deserving of incarceration for the rest of their lives. It noted, however, the Supreme Court also found that such a determination could not be made at the outset because it denies the juvenile offender an opportunity to show he or she has learned from past mistakes. (*Mendez*, *supra*, at p. 64.) Observing that the trial court found that Mendez deserved the sentence he received, the *Mendez* court stated: "The trial court may turn out to be correct in its implied assessment that Mendez is a sociopath, or at the very least that Mendez should be separated from society for the duration of his life, but *Graham* makes clear that a sentence based on such a judgment at the outset is unconstitutional." (*Ibid.*)[6] The case was remanded to the trial court for a new sentencing hearing.

We disagree with the *Mendez* court's conclusion that *Graham* applies to the issue presented. *Mendez* correctly finds that *Graham* is expressly limited to those cases where a juvenile offender actually receives a sentence of life without the possibility of parole for a nonhomicide offense. The court then relies on language in the opinion and determines that the case applies to a term-of-years sentence that has the same effect as a life sentence without the possibility of parole.

We decline to follow *Mendez's* holding that the principles stated in *Graham* bar a court from sentencing a juvenile offender to a term-of-years sentence that exceeds his or her life expectancy. Under our sentencing rules, there are only two ways a juvenile defendant can receive such a sentence. One is to commit crimes against multiple victims during separate incidents and the other is to commit certain enumerated offenses,

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[6] The court also concluded, independent of *Graham*, that Mendez's sentence was grossly disproportionate to his crimes and culpability and constituted cruel and unusual punishment. (*Id.* at pp. 64-68.)

discharge a gun, and inflict great bodily injury upon at least two victims.[7] Following *Mendez's* reasoning, an individual who shot and severely injured any number of victims during separate attempts on their lives could not receive a term commensurate with his or her crimes if all the victims had the good fortune to survive their wounds, because the sentence would exceed the perpetrator's life expectancy. *Graham* does not purport to compel such a result. Otherwise, there would have been no reason for the court to write, "Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life." (*Graham*, *supra*, 130 S.Ct. at p. 2030.) The only way to make sense of the caveat that comes in the next sentence, that states are forbidden "from making the judgment at the outset that those offenders never will be fit to reenter society" (*ibid.*), is by concluding the court intended that no juvenile receive a sentence that by its own terms would bar parole. In other words, the court was referring to a sentence of life without the possibility of parole. That is not our case. Defendant's sentence resulted from his intentionally discharging a firearm during an attempt to kill three individuals, leading to the infliction of great bodily injury upon one of them. Nothing in *Graham* renders the punishment constitutionally infirm.

As defendant does not claim his sentence was unconstitutional by any other measure, we need go no further. His sentence will not be disturbed.

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[7] One gang-related attempted willful, deliberate, and premeditated murder committed by discharging a firearm and resulting in great bodily injury to the victim would result in a sentence of 40 years to life, a term that could be completed within the lifetime of a youthful offender.

DISPOSITION

The judgment is affirmed.[8]

CERTIFIED FOR PARTIAL PUBLICATION

SUZUKAWA, J.

We concur:

EPSTEIN, P.J.

WILLHITE, J.

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[8] Defendant filed a concurrent petition for writ of habeas corpus alleging the same failings of counsel as those presented in the direct appeal. As we have concluded counsel was not ineffective in some instances and defendant was unable to demonstrate he was prejudiced by counsel's alleged errors in the others, his petition is denied.

SB 399 was introduced in the California Senate on February 26, 2009 and defeated August 31, 2010. It would have amended Penal Code § 1170 to provide:

(e) (1) When a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has been committed to the custody of the Department of Corrections and Rehabilitation, the secretary of the department or the Board of Parole Hearings shall review the case no later than 90 days before the time that the defendant has served 10 years to determine if the defendant satisfies three or more of the criteria set forth in paragraph (2). The secretary or the board shall consider any documentation relevant to that determination, including documentation presented by the defendant, and shall issue written findings not later than 90 days after the date of review.

(2) If the secretary or the board finds, based on a preponderance of the evidence, that the defendant satisfies three or more of the following criteria, that finding shall be forwarded to the sentencing court, which shall conduct a hearing as specified in paragraph (3):

(A) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law.

(B) 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 sentence is being considered for recall.

(C) The defendant committed the offense with at least one adult codefendant.

(D) Prior to the offense for which the sentence is being considered for recall, the defendant had insufficient adult support or supervision and had suffered from psychological or physical trauma, or significant stress.

(E) 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.

(F) 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 taking action that demonstrates the presence of remorse.

(G) 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.

(H) The defendant has had no violent disciplinary violations in the last five years in which the defendant was determined to be the aggressor.

(3) The court shall have the discretion to recall the sentence and commitment previously ordered and to resentence the defendant in the same manner as if the defendant had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence. The discretion of the court shall be exercised in consideration of the criteria in paragraph (2). Victims, or victim family members if the victim is deceased, shall be notified of the resentencing hearing and shall retain their rights to participate in the hearing.

(4) If the sentence is not recalled, the board shall make the determination mandated by subdivision (a) again when the defendant has been committed to the custody of the department for 15 years, 20 years, and 24 years. The final review shall be during the 24th year of the defendant's sentence.

(5) In addition to the criteria in paragraph (2), 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.

(6) This subdivision shall have retroactive application.

Legislative Counsel's Digest

PROOF OF SERVICE

CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 11355 W. Olympic Boulevard, Suite 300, Los Angeles, California 90064.

On the date set forth below, I caused the document(s) described as **PETITION FOR REVIEW** to be served on interested parties in this action as follows:

State Attorney General
300 Spring St.
North Tower, Suite 1701
Los Angeles, CA 90012

Clerk Superior Court
42011 4th St. West
Lancaster, CA 93534

Clerk of Court of Appeal
300 S. Spring Street, Fl 2
North Tower
Los Angeles, CA 90013-1213

Office of the District Attorney
42011 4th Street West
Lancaster, CA 93534

Rodrigo Caballero
High Desert State Prison
CDC G68431D214UP
P.O. Box 3030
Susanville, CA 96127

[X] **BY MAIL**–I caused such envelope(s) to be deposited in the mail at Los Angeles, California, with first class postage thereon fully prepaid. I am readily familiar with the business practice for collection and processing of correspondence for mailing. Under that practice, it is deposited with the United States Postal Service on that same day, at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one (1) day after the date of deposit for mailing in affidavit.

[X] **STATE** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on February 22, 2011, at Los Angeles, California.

Juanita Teall