IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. JESUS MANUEL RODRIGUEZ, et al., Defendants and Appellants.	Supreme Court No. S239713

STANISLAUS SUPERIOR COURT, Nos. 1085319 and 1085636
THE HONORABLE NANCY ASHLEY, JUDGE PRESIDING

REVIEW FROM THE 2016 DECISION ON DIRECT APPEAL OF THE
FIFTH APPELLATE DISTRICT, No. F065807

OPENING BRIEF ON THE MERITS

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ISSUES FOR REVIEW

By an April 12, 2017 Order, this Court established the following two questions as the issues to be briefed and argued:

"(1) Was the accomplice testimony in this case sufficiently corroborated? (See *People v. Romero and Self* (2015) 62 Cal.4th 1, 36.)

"(2) Is the defendant's constitutional challenge to his 50 years to life sentence moot when, unlike in *People* v. *Franklin* (2016) 63 Cal.4th 261, his case was not remanded to the trial court to determine if he was provided an adequate opportunity to make a record of information that will be relevant to the Board of Parole Hearings as it fulfills its statutory obligations under Penal Code sections 3051 and 4801?"

STATEMENT OF THE CASE

A May 26, 2004 drive-by gang shooting into a park resulted in a death; the appellants, fifteen-year-old Jesus Manuel Rodriguez ("Rodriguez"), and sixteen-year-old Edgar Barajas ("Barajas"), were arrested.[1] (C.T.2, pp. 528, 539 [Rodriguez was born on June 12, 1988, and Barajas on July 23, 1987].) Both were within the jurisdiction of juvenile court. (Welf. & Inst. Code, §§ 602, 603.)

On September 20, 2004, a juvenile fitness report was filed in In re Jesus Manuel Rodriguez, Juvenile Court case no. 506846. (2nd Supp. C.T.1, pp. 1-21.) Due solely to the nature of the charges, the report concluded Rodriguez was not a fit subject for juvenile court jurisdiction. (2nd Supp. C.T.1, p. 19.)

On December 14, 2004, Rodriguez's fitness hearing was held.[2] (Rough Draft #2, pp. 1-2; 4/23/13 R.T.1, pp. 1-27.) He was deemed not to be a fit subject for juvenile court jurisdiction due to his "criminal sophistication" and the circumstances and gravity of the offense. (Rough Draft #2, p. 2; C.T.1, pp. 1-2.) On December 16, 2004, Rodriguez was arraigned in Stanislaus County case no. 1085319. (2nd Aug. R.T.2, pp. 201-203.)

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[1] Accomplices Luis Acosta, Pedro Castillo and Rigoberto Moreno pled to lesser offenses in exchange for lesser sentences. (C.T.2, p. 546.) None testified at trial and none are joined on appeal.

[2] A settled statement of this hearing in lieu of the reporter's transcript was augmented to the record, consisting of a two-page summary (Rough Draft #2, pages 1-2), and a reporter's transcript of an April 23, 2013 settled statement hearing, pages 1-27. *See*, http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=5&doc_id=2026506&doc_no=F065807.

On December 23, 2004, Barajas's fitness hearing was held in Juvenile Court case no. 507371.[3] (C.T.1, pp. 7-8.) He too was deemed not to be a fit subject for juvenile court jurisdiction. (Ibid.) He was separately arraigned in Stanislaus County case no. 1085636.

Identical but separate Informations then charged Rodriguez and Barajas with premeditated first-degree murder (count 1) and conspiracy to commit murder (count 2), with special allegations that both offenses were committed on behalf of a criminal street gang, through a principal's personal and intentional discharge of a firearm causing great bodily injury; they both also were charged with active participation in a criminal street gang (count 3). (Pen. Code, §§ 182; 186.22, subds. (a) and (b)(1); 187, subd. (a); 12022.7; and 12022.53, subds. (d) and (e)(1).) (C.T.1, pp. 181-185, 188-193.)

The People's motion to join these cases for trial was granted. (C.T.1, pp. 198, 296.) On May 11, 2011, following a 15-day jury trial before the honorable Nancy Ashley, a single jury convicted Rodriguez and Barajas of all three counts as charged, finding all overt acts underlying the conspiracy and all special allegations "true." (C.T.2, pp. 501-506, 507-512; R.T.5, pp. 1205-1208.)

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[3] The appellate court denied Barajas's motion to augment the record with the transcript of this hearing, as it did not see "how the requested materials, regarding the juvenile court's 2004 unfitness determination under Welfare and Institutions Code section 707, may be useful in assessing the 2012 sentence imposed for possible Miller/Caballero error on appeal." (http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=5&doc_id=2026506&doc_no=F065807.)

Separate probation reports (C.T.2, pp. 528-548 [Rodriguez], 549-573 [Barajas]), both appellants' motions for new trials (C.T.3, 629-653, 654-686), and Rodriguez's opposition to his probation report (C.T.3, 771-774), were filed. At the September 4, 2012 sentencing hearing the motions were denied. (C.T.3, pp. 765, 766; R.T.5, pp. 1243-1244.) The court then imposed identical total terms of 50 years to life upon each appellant.[4] (R.T.5, pp. 1251-1252.)

Both appellants pursued direct appeals in Fifth Appellate District case no. F065807. On February 17, 2015, the appellate court rejected their challenges in an initial unpublished opinion, affirming their convictions and sentences. (People v. Rodriguez and Barajas (Feb. 17, 2015, F065807) [nonpub. opn.] at pp. 2, 25.)

Both petitioned for review. (Cal. Sup. Ct. dock. no. S225231.) On June 10, 2015, this Court granted review but deferred further action pending disposition of related issues in other cases.

On August 17, 2016, this Court ordered this matter transferred back to the Fifth Appellate District, "with directions to vacate its decision and reconsider the cause in light of *People* v. *Franklin* (2016) 63 Cal.4th 261, 269 as to defendant Rodriguez, and in light of *People* v. *Franklin* (2016) 63 Cal.4th 261, 269, and *People* v. *Romero & Self* (2015) 62 Cal.4th 1 as to defendant Barajas."

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[4] For count 1's first-degree murder the court imposed the mandatory term of 25 years to life with a mandatory, consecutive firearm enhancement of 25 years to life, and imposed but stayed a 10-year gang enhancement. It imposed but stayed subordinate terms on counts 2 and 3. (Pen. Code, § 654.) (R.T.5, pp. 1251-1252.)

On December 20, 2016, the Fifth Appellate District issued an amended unpublished opinion, again rejecting all challenges and affirming both appellants' convictions and sentences. (People v. Rodriguez and Barajas (Dec. 20, 2016, F065807) [nonpub. opn.] at pp. 2, 26.)

On January 24, 2017, Barajas filed a petition for rehearing.[5] On January 6, 2017, his petition was summarily denied.

STATEMENT OF APPEALABILITY

On January 26, 2017, Barajas timely filed another petition for review in this Court.[6] (Cal. Sup. Ct. dock. no. S239713.)

On April 12, 2017, this Court granted review, specifying the above-cited two issues as the matters to be briefed and argued.

On May 2, 2017, counsel were appointed for both appellants.

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[5] Rodriguez did not file a petition for rehearing.

[6] Rodriguez did not file a second petition for review. However, he raised the second issue granted review in his Opening Brief (Rodriguez AOB, § V, at pp. 85-98), formally joined Barajas's Opening Brief on that issue (Rodriguez's 7/18/13 Notice of Joinder, citing Barajas's AOB, § F, at pp. 81-88), supported that argument in his Reply Brief (Rodriguez ARB, § V, at pp. 20-24), and included that issue in his 2015 petition for review. (Rodriguez Rev. Ptn, dock. no. S225231, § V, at pp. 4, 28-33.)

STATEMENT OF FACTS

Gang investigator Froilan Mariscal testified the Surenos are a criminal street gang. (R.T.4, pp. 716-717, 726, 731-732.) At trial, self-admitted Sureno Mario Garcia[7] testified that in May, 2004 fellow Surenos included 15-year-old Rodriguez,[8] 16-year-old Barajas,[9] and 16-year-old Luis Acosta. (R.T.3, pp. 526-530, 537-540, 610-611; R.T.4, pp. 756-757, 812-813.)

Garcia and Acosta's houses were near Oregon Park. (R.T.3, pp. 502, 540, 610-611.) That park was well known as a Nortenos hangout; gang members played basketball there and wore red. Surenos never used the park; Garcia said it would have been "suicide" for him or any Southerners to do so. (R.T.1, pp. 107-108, 157-158; R.T.4, pp. 739-741.) Mariscal testified Garcia and Acosta's houses were considered Sureno "pockets" in Norteno territory. (R.T.4, p. 794.)

Between December 12, 2003 and May 20, 2004, Nortenos subjected Acosta, his family and his house to escalating and increasingly

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[7] Garcia was subject to the same charges in this case, but in exchange for his testimony he was allowed to plead to a single count of accessory after the fact, and was sentenced to serve seven years followed by eventual deportation. (R.T.3, pp. 590-591.)

[8] In November, 2003 Rodriguez told police he became a Sureno four or five months earlier, but ended the relationship one month earlier. (R.T.4, pp. 761-762, 787.) However, in a 2004 post-arrest statement to police, Rodriguez said he was a "southerner" (i.e., a Sureno), and had been for six months. (R.T.3, pp. 762-763.)

[9] Mariscal testified that in the four months before the shooting in this case, Barajas was involved in three gang-related issues at his school. (R.T.4, pp. 747-749.)

more frequent assaults, including repeated invitations to fight, graffiti defacement, a drive-by shooting and attacks with rocks, bottles, firearms and Molotov cocktails. The attacks culminated in an incident in which Acosta's arm and the windows of his van were broken, and a semi-automatic handgun was fired at him. (R.T.3, pp. 507, 543-544; R.T.4, pp. 769-770, 772-773.)

On May 25, 2004 Rodriguez, accompanied by Garcia, drove his Blazer past Oregon Park to Acosta's house. When Rodriguez parked, Nortenos broke the Blazer's windows with baseball bats. (R.T.3, pp. 499, 501-502, 548-552.)

Garcia admitted he wanted revenge, including killing Nortenos. (R.T.3, pp. 554-555.) He claimed the next day (May 26, 2004), he phoned Barajas about getting a gun; Barajas needed a ride to pick it up. According to Garcia, he and Rodriguez drove Barajas in the Blazer and obtained a Savage .22-caliber rifle. On the ride home they discussed getting revenge on Nortenos. (R.T.2, pp. 298-299; R.T.3, pp. 561-564, 568-569.)

With Rodriguez driving they picked up Rigoberto Moreno and Pedro Castillo, who sat in the front passenger seat with a blue rag over his face.[10] Garcia testified he sat by the broken rear window with Barajas in the rear cargo area holding the .22-caliber rifle. (R.T.3, pp. 571-576.) Garcia's understanding was that they were looking for, and were going to "get at" Nortenos. (R.T.3, p. 577.)

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[10] Mariscal testified that in January, 2004, Castillo had a fight with a Norteno, while Moreno is a self-admitted Sureno associate. (R.T.4, pp. 752-755, 758-760.)

Around 5:00 p.m. a number of people including Ernestina Tizoc were under a gazebo in Oregon Park. Nortenos in the basketball area wore red. (R.T.1, pp. 109-110, 113-116; R.T.2, pp. 222-223, 230, 340-342.) Tizoc was wearing a top the color of a fire engine. (R.T.1, p. 117; R.T.4, pp. 831-833.)

According to Garcia, he, Rodriguez and the others drove past the park looking for anyone, male or female, wearing red. At the gazebo they saw someone wearing red and thought it was a Norteno; they wanted revenge. (R.T.3, pp. 577-579.) Other people under the gazebo with Tizoc noticed a white Blazer with broken back windows circling the park, driving very slowly; its occupants were displaying a Sureno hand sign. (R.T.1, pp. 117, 122-123, 126-127; R.T.2, pp. 226-230.)

The Blazer drove around the park a second time and stopped right before an intersection. Someone in the back with a bandanna covering his face pulled out a gun and began shooting continuously toward the gazebo. (R.T.1, pp. 120, 128-129, 132-133, 152, 178.) According to Garcia it was Barajas, who shouted "*puro sur*" ("pure south"), before firing. (R.T.3, pp. 579-580.)

Tizoc, who was facing the basketball courts, was shot. Someone called 911 and the police. (R.T.1, pp. 187-188; R.T.2, pp. 243-244, 277-278, 344.) Tizoc died at the scene from a single gunshot wound to the heart and lung. (R.T.2, pp. 279-282, 437-438.)

The Blazer sped off after the firing stopped. (R.T.3, pp. 580-581.) Garcia testified they drove to Modesto talking about whether they "got one." (R.T.3, p. 583.) They separated, but reunited after

half an hour. Garcia did not know what happened to the gun, but testified Barajas phoned the friend who gave him that gun, and this friend drove all five of them to a ranch. (R.T.3, pp. 585-587.)

Police quickly established who certain suspects were. (R.T.2, pp. 282-285.) On May 27, 2004, Rodriguez was taken into custody. (R.T.3, pp. 325, 494-495, 498.) Officers found clothing with Sureno indicia, which Rodriguez admitted were his. (R.T.3, pp. 496-498; R.T.4, pp. 761-762.) He agreed he considered himself a Sureno, a "southerner." (R.T.3, p. 513.) While driving to the station he was advised of and waived Miranda rights. (R.T.3, pp. 498-499, 501.)

Rodriguez said the Blazer was his and Nortenos broke the front windshield and two side windows with a baseball bat. Before the shooting he and others agreed the "fucking Nortenos" "were going to pay." There was only one gun in the Blazer, which he himself put behind the back seat.[11] He was the driver; moments before the shooting the conversation in the Blazer was that a shooting was going to occur that night. While driving they passed the park and he saw Nortenos. (R.T.3, pp. 499-501.)

At the station Rodriguez was placed in an interrogation room and was reminded of his Miranda rights, which he again waived. (R.T.3, p. 501.) He then said they had no particular target(s) in mind, just any Norteno in general. (R.T.3, p. 509.)

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[11] At some point Rodriguez said Acosta was afraid the Nortenos who fire-bombed his house might do something else to him, and he needed a gun for protection. (R.T.3. pp. 514-515.) Rodriguez was supposed to drive to Acosta's house to show him the rifle, but they never got to Acosta's house because the drive took them past Oregon Park first. (R.T.3, pp. 517-521, 524.)

After the shooting he found shell casings in the Blazer and discarded them near an alley; he hid the .22-caliber rifle in some bushes in that alley, and parked his Blazer in Modesto. (R.T.3, pp. 502, 507-508.) Officers went to a dairy farm Rodriguez described and located the .22-caliber rifle. (R.T.2, pp. 325-326.)

Ammunition test-fired from it was compared to a slightly deformed bullet retrieved during Tizoc's autopsy. A firearms expert could say no more than that the autopsy bullet was consistent with the Savage rifle. (R.T.2, pp. 377-378.) Theoretically it could have been fired from thousands of other firearms. (R.T.2, pp. 392-393.)

The Defense Case

Three Nortenos -- brothers Nicholas and Jason Jones, and Anthony Quijas -- testified for the appellants because it was the right thing to do, knowing they could be killed by Nortenos for doing so. (R.T.4, pp. 863-864, 893-894, 896, 950.)

On May 26, 2004, all three were in the park while Tizoc was sitting under the gazebo. (R.T.4, pp. 868, 870, 897, 927-928.) Jason was armed and knew other Nortenos were as well, because of what happened to Rodriguez's car the night before. (R.T.4, p. 901, 922-923.) Nicholas saw the Blazer arrive. (R.T.4, pp. 871, 883.)

The first shots Quijas heard came from the park; he saw a Norteno fire up to seven shots with a .22-caliber handgun. The next shots came from the street where the Blazer was. (R.T.4, pp. 931-934.) The Jones brothers also heard shots coming from two directions: from the Blazer toward the park, and from one or two

Nortenos shooting at the Blazer from the back of the gazebo. (R.T.4, pp. 871-873, 897-898, 900, 904-905.) Tizoc was hit some time between the two sets of shots. (R.T.4, p. 936.)

Nicholas knew one of the Norteno guns was a .22-caliber, while Jason identified for police two Nortenos with .22-caliber firearms who might have shot Tizoc. (R.T.4, pp. 875, 953-954.)

In 2010 an accident reconstructionist positioned a mannequin in Oregon Park where Tizoc sat. (R.T.4, pp. 959-960.) With a rod in the mannequin to simulate the path of the bullet, laser beams established the fatal wound could have been fired from someone behind Tizoc, firing at the street. (R.T.4, pp. 961-964.)

ARGUMENT

I.

THE FIRST ISSUE GRANTED REVIEW IS MOOT AS TO RODRIGUEZ, AS GARCIA'S ACCOMPLICE TESTIMONY WAS CORROBORATED BY RODRIGUEZ'S OWN STATEMENTS TO POLICE

Accomplice Garcia testified at trial, incriminating Rodriguez. (R.T.3, pp. 526-694.) Penal Code section 1111 requires accomplice testimony be corroborated. The first issue granted review asks whether accomplice testimony here was sufficiently corroborated, in accordance with People v. Romero and Self (2015) 62 Cal.4th 1, 36.

This issue is moot as to Rodriguez.[12] After his arrest he was twice advised of his Miranda rights and twice waived them. (R.T.3, pp. 498-499, 501.) His statements were introduced against him at trial and his admissions corroborated Garcia's testimony, that he (Rodriguez) was a Sureno; that the Blazer used in the drive-by shooting was his, and that he was the driver that night; that he himself put a gun behind the back seat; that he and others agreed Nortenos "were going to pay" for breaking the Blazer's front windshield and two side windows; that they targeted any Norteno in general; and that moments before the shooting the conversation in

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12 Rodriguez did not raise the issue of accomplice corroboration in the court of appeal; only Barajas did. Indeed, in its first grant of review in this case, this Court remanded this matter to the appellant court with the very specific direction to reconsider the cause in light of Romero and Self only as to Barajas. (Cal. Sup. Ct. dock. no. S225231, Order of 8/17/16.)

But the order granting this second review was not similarly specific. (Cal. Sup. Ct. dock. no. S239713, Order of 4/12/17.) Rodriguez therefore includes this section to explain why the first issue granted review does not apply to him.

the Blazer was that a shooting was going to occur that night. (R.T.3, pp. 496-501, 509, 762-763; R.T.4, pp. 761-762.)

These admissions established Rodriguez's aiding and abetting count 1 murder, his agreement with count 2 conspiracy and one overt act in support of it, the "principal armed" enhancement attached to counts 1 and 2, part of the requisite elements for count 3 gang participation, and gang enhancements attached to counts 1 and 2.

Accordingly, Garcia's accomplice testimony as to Rodriguez was corroborated as required by Penal Code section 1111 and People v. Romero and Self, *supra*, 62 Cal.4th 1.

II.

AS THIS CASE WAS NOT REMANDED FOR A TRIAL COURT DETERMINATION THAT RODRIGUEZ AND BARAJAS WERE ALLOWED TO MAKE AN ADEQUATE RECORD FOR FUTURE PAROLE REVIEW, THEY HAD NO *MEANINGFUL* OPPORTUNITY TO DEMONSTRATE MATURITY, REHABILITATION AND FITNESS TO REENTER SOCIETY, THUS THEIR EIGHTH AMENDMENT CHALLENGES TO THEIR CURRENT SENTENCES ARE NOT MOOT; IN THE ABSENCE OF REMAND, THEY WILL BE DENIED THEIR EIGHTH AMENDMENT RIGHTS TO BE FREE OF CRUEL AND UNUSUAL PUNISHMENT AND THEIR FOURTEENTH AMENDMENT DUE PROCESS RIGHTS TO MAKE A RECORD AFTER SUFFICIENT NOTICE

The Eighth Amendment prohibits cruel and unusual punishment. (U.S. Const., Amend. VIII.) It encompasses a foundational principle that "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." (Miller v. Alabama (2012) 567 U.S. 460, 474 [132 S.Ct. 2455, 183 L.Ed.2d 407] (hereinafter "Miller").) This prohibition is binding on the states through the Fourteenth Amendment. (Robinson v. California (1962) 370 U.S. 660, 667 [82 S.Ct. 1417, 8 L.Ed.2d 758].)

Rodriguez and Barajas were, respectively, 15 and 16 years old when they committed the May 26, 2004 offenses for which they were sentenced to mandatory terms of 50 years to life. (R.T.5, p. 1251.) In the court of appeal, citing Miller and other authorities, both argued their sentences are the functional equivalent of life without parole, an unconstitutionally cruel and unusual punishment for a child. (Rodriguez AOB, § V, at pp. 85-98; Barajas AOB, § F, at pp. 81-88; Rodriguez's 7/18/13 Notice of Joinder in Barajas's AOB, § F; Rodriguez ARB, § V, at pp. 20-24.)

Certain post-sentencing reforms now entitle both to youthful offender parole review hearings (which must give great weight to

youth-related mitigating factors), during their 25th years of incarceration. (Pen. Code, § 3051, subd. (b)(3).) This Court has held an identical Eighth Amendment challenge under Miller was mooted by enactment of section 3051. (People v. Franklin (2016) 63 Cal.4th 261, 280 (hereinafter "Franklin").) In light of Franklin, the court of appeal concluded Rodriguez and Barajas's Eighth Amendment challenges similarly were mooted by section 3051. (People v. Rodriguez and Barajas (Dec. 20, 2016, F065807) [nonpub. opn.], at p. 25.)

This case is on all fours with Franklin, with one exception: in Franklin the case was remanded to the trial court to ensure the defendant was "afforded an adequate opportunity to make a record of information that will be relevant to the Board" at his future parole review hearing. (Franklin, *supra*, 63 Cal.4th at pp. 286-287.) By contrast, the court of appeal here decided remand was unnecessary. (People v. Rodriguez and Barajas (Dec. 20, 2016, F065807) [nonpub. opn.], at p. 25.)

As will be established below, the reviewing court was wrong. Although enactment of section 3051 provides a bare *opportunity* for Rodriguez and Barajas to obtain early parole, absent a remand to allow them to put relevant information on the record they will be denied a *meaningful* opportunity to obtain early parole, so their Eighth Amendment challenges under Miller are not moot. Moreover, in the absence of an opportunity to make a full record of relevant information *after notice that they should do so*, they will be denied their Fourteenth Amendment procedural due process rights.

A. The History of This Case, Including Changes In Juvenile Sentencing Before and After Sentencing and Direct Appeal

Although the offenses in this case took place in mid-2004, Rodriguez and Barajas were not sentenced until mid-2012. Moreover, the instant proceeding is the second grant of review in the same direct appeal, so this Opening Brief is being filed thirteen years after the 2004 fitness reports and juvenile court proceedings. To answer the second question granted review, one must bear in mind the evolution in juvenile sentencing which began one year after the 2004 underlying offenses.

1. **2004: Rodriguez's Minimal Prior Juvenile History, the Petitions Against Him, His Fitness Hearing Report and the Juvenile Court Order**

Rodriguez was born on June 12, 1988. (C.T.2, p. 528.) On January 7, 2004, while he was 15 years old, he drove a stolen vehicle and was declared a ward of the Stanislaus County juvenile court. (2nd Supp. C.T.1, p. 17.) On March 9, 2004 he violated probation by repeated truancies from school. (Ibid.) On May 25, 2004, a Welfare and Institutions Code section 602 petition was filed alleging he committed the vehicle theft. (2nd Supp. C.T.1, p. 1.) The next day, May 26, 2004, the drive-by shooting and murder underlying this case occurred; on June 1, 2004, a second section 602 petition was filed alleging he committed those crimes. (Ibid.)

The probation office was required "to investigate and submit a report on the behavioral patterns and social history of the

minor" to the juvenile court. (Welf. & Inst. Code, § 707, subd. (c).) Rodriguez could submit "any other relevant evidence," but by statute was "presumed to be not a fit and proper subject for juvenile court unless the evidence shows extenuating or mitigating circumstances." (Ibid.)

On September 20, 2004 the fitness hearing report was filed in In re Jesus Manuel Rodriguez, juvenile court case no. 506846. (2nd Supp. C.T.1, pp 1-21.) The report noted Rodriguez by then was 16 years of age. (2nd Supp. C.T.1, p. 1.)

The recitation of charges and summary of evidence (including both the March, 2004 as well as May, 2004 offenses), took up two-thirds of the report. (2nd Supp. C.T.1, pp. 1-15.) By contrast, the social study was just one and one-half pages long. (2nd Supp. C.T.1, pp. 15-16.)

In summary the report recognized Rodriguez was doing well in juvenile hall and showed he could be rehabilitated prior to expiration of Juvenile Court jurisdiction. (2nd Supp C.T.1, pp. 19-20, ¶ 2.) In that regard he was a fit and proper subject for Juvenile Court. (2nd Supp C.T.1, p. 20, ¶¶ 3, 4.) But the report had to acknowledge the statutory presumption of unfitness. (2nd Supp C.T.1, p. 17.) Solely in light of the charges it had to conclude he was not a fit subject for juvenile court. (2nd Supp. C.T.1, pp. 17, 19, ¶¶ 1, 5; *see also*, 2nd Supp. C.T.1, p. 21.)

On December 14, 2004, a fitness hearing was held. (Settled Statement Rough Draft #2, p. 1.) Rodriguez called four witnesses, including police officers and the author of the fitness report. All

testified he "was cooperative, forthright, and helpful about his involvement throughout the investigation, that he had confessed fully, and that he appeared to be remorseful and generally seemed to lack sophistication." (Ibid.) But the juvenile court judge decided there were no extenuating or mitigating circumstances and found Rodriguez unfit for juvenile court jurisdiction. (Ibid.)

2. 2005 to June, 2012: The United States Supreme Court Invalidates the Death Penalty For All Juvenile Offenders Under 18 Years of Age, Life Without Parole For Nonhomicide Juvenile Offenders Under 18 Years of Age, and Automatic LWOP Sentences for Juveniles

In Roper v. Simmons (2005) 543 U.S. 551 [125 S.Ct. 1183, 161 L.Ed.2d 1] (hereinafter "Roper"), the United States Supreme Court held the Eighth Amendment requires rejection of the death penalty for juvenile offenders under 18 years of age. (Id., at pp. 568, 578-579.) The high court found "[t]hree general differences between juveniles under 18 and adults" which demonstrate juvenile offenders "cannot be classified among the worst offenders." First, a "lack of maturity and an underdeveloped sense of responsibility" which "often result in impetuous and ill-considered actions and decisions"; second, vulnerability or susceptibility "to negative influences and outside pressures, including peer pressure"; and third, "that the character of a juvenile is not as well formed as that of an adult." (Id., at pp. 569-570.)

As a result, a juvenile's "irresponsible conduct is not as morally reprehensible as that of an adult," thus juveniles "have a

greater claim than adults to be forgiven for failing to escape negative influences in their whole environment" and "a greater possibility exists that a minor's character deficiencies will be reformed." (Id., 543 U.S. at pp. 569-570.)

Several years later, in a non-death penalty case, the high court announced as a categorical rule that the Cruel and Unusual Punishments Clause of the Eighth Amendment prohibits no-parole life sentences for minors convicted of non-homicide offenses. (Graham v. Florida (2010) 560 U.S. 48, 61-62, 75-79 [130 S.Ct. 2011, 176 L.Ed.2d 825] (hereinafter "Graham").)

It found no reason to reconsider its observations in Roper about the nature of juveniles. (Graham, *supra*, 560 U.S. at p. 68.) *Inter alia*, its holding was based on (1) scientific studies showing fundamental differences between the brains of juveniles and adults; (2) a juvenile's capacity for change as he matures, which shows his crimes are less likely to be the result of an inalterably depraved character; and (3) that it is morally misguided to equate a minor's failings with those of an adult. (Id., at pp. 68-69.)

Against this it weighed the punishment at issue, life without the possibility of parole (hereinafter "LWOP"), "the second most severe penalty imposed by law." (Id., at p. 69.) It recognized that while an offender sentenced to LWOP is not executed, his life is altered "by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration," so that the sentence "means denial of hope; it means that good behavior and character improvement are immaterial ...."

(Id., at pp. 69-70.) And so it likened a sentence of LWOP on a juvenile to the death penalty itself, as "a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender." (Graham, *supra*, 560 U.S. at 70.)

In a guideline that speaks directly to *this* case, it said:

> "**A State is not required to guarantee eventual freedom to a juvenile offender** convicted of a nonhomicide crime. **What the State must do, however, is give defendants like Graham some *meaningful* opportunity to obtain release based on demonstrated maturity and rehabilitation.** It is for the State, in the first instance, to explore the means and mechanisms for compliance. ... The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. **It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society.**" (Id., at p. 75; emphasis added.)

The Eighth Amendment therefore does not permit a state to deny a defendant "**any chance to later demonstrate that he is fit to rejoin society** based solely on a nonhomicide crime that he committed when he was a child in the eyes of the law." (Id., at p. 79; emphasis added.)

On June 25, 2012 -- ten weeks before the September 4, 2012 sentencing hearing in this case -- the United States Supreme Court decided Miller, *supra*, 567 U.S. 460.) There, 14-year-old offenders convicted of murder were sentenced to LWOP; there was no discretion to impose a different punishment. (Id., at p. 465.)

In Miller the high court criticized any "scheme [that] prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change'

(citation), and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties." (Id., at p. 465.) For a "sentencer must have the ability to consider the 'mitigating qualities of youth' (citation)." (Id., at p. 476.) But a mandatory sentencing scheme,

> "precludes consideration of [the juvenile offender's] chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him – and from which he cannot usually extricate himself – no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth – for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. (Citation.) (Id., at pp. 477-478.)

The high court therefore held that mandatory LWOP for those under the age of 18 at the time of their crimes, without consideration of the nature of their crimes or their level of culpability, violates the Eighth Amendment, even for juveniles who committed murder. (Id., at pp. 465, 475-476, 479.)

The high court now requires sentencing courts to consider the differences between children and adults. (Id., at p. 477.) Although it did not foreclose a sentencer's ability to impose the harshest possible penalty in homicide cases, it did "require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (Id., at p. 480.) "*Graham, Roper* and our individualized

sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." (Id., at p. 489.)

3. June, 2012 to August, 2012: Rodriguez's Presentence Report and Motion to Reduce His Sentence

Rodriguez and Barajas were convicted as charged on May 11, 2012. (R.T.5, pp. 1202-1208.) On June 11, 2012 -- after Roper and Graham were decided, but two weeks before Miller was -- the Probation Office submitted a report and recommendations. (C.T.2, pp. 528-548.) It described the underlying facts in detail. (C.T.2, pp. 529-542.) Under "Criminal History" it listed only that Rodriguez was declared a ward of the juvenile court in January, 2004, and that this continued until August, 2005. (C.T.2, p. 542.)

Rodriguez's trial counsel declined to allow him to be interviewed for the presentence report, so,

> "**there is no updated statement or updated information regarding the defendant's social history.** The information included in this report for defendant's statement and social history **was extracted entirely from the Fitness Hearing Report** pursuant to 707(c) W&I Code, which was prepared as ordered by the Court for the Court date of October 12, 2004." (C.T.2, p. 542; emphasis added.)

Under "Defendant's Social History" the 2012 probation report did, indeed, simply repeat what the 2004 fitness report said, without updating anything or adding any further information. (C.T.2, pp. 545-546.)

It listed four circumstances in aggravation but none in mitigation (C.T.3, pp. 546-547), even though it noted Rodriguez had a narcotics habit of an "8-ball" of methamphetamine a day[13] (C.T.2, p. 546), was beaten and physically abused by a brother (C.T.2, p. 545), and confessed to all charges and special allegations in his 2004 statement.[14] (C.T.2, pp. 542-543.) The report considered Rodriguez's age at the time of the offenses so unimportant that it did not report his birth date (C.T.2, pp. 528-548), stating only that he was "born in Mexico" without saying when he was born. (C.T.2, p. 545.) At the end of an offhanded mention was made that he was just 15 years old when he committed the offenses, but as of the time of sentencing was 22 years of age. (C.T.2, p. 547.)

On August 12, 2012, Rodriguez filed an opposition to the probation report. (C.T.3, pp. 771-774.) He asked the trial court, *inter alia*, to exercise discretion and stay or strike the firearm enhancement, so that his sentence would be halved, from 50 years to life to 25 years to life. (C.T.3, p. 773.)

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[13] An 8-ball is one-eighth ounce (3.5 grams), and costs around $120. (https://www.quora.com/How-much-is-in-an-eight-ball-of-meth.)

[14] The report should have recognized two of these three facts were factors in mitigation. (Cal. Rules of Court, rule 4.423 (b)(2) and (3) [respectively, suffering from a mental condition (drug addiction), and early acknowledgment of wrongdoing].)

In addition, appellant's minimal prior record before the May, 2004 drive-by shooting also was a factor in mitigation. (Cal. Rules of Court, rule 4.423(b)(1).)

4. **August 16, 2012: A Term Of Years Beyond A Minor's Life Expectancy Is Invalidated By This Court**

On August 16, 2012 (four days after Rodriguez requested sentencing leniency, and three weeks before the sentencing hearing), this Court addressed a nonhomicide case where the defendant was required to serve a minimum of 110 years to become parole eligible, so "[c]onsequently ... would have no opportunity to 'demonstrate growth and maturity' to try to secure his release, in contravention of *Graham*'s dictate." (People v. Caballero (2012) 55 Cal.4th 262, 268 (hereinafter "Caballero").)

This Court held a term of years beyond a minor's natural life expectancy "amounts to the functional equivalent of a life without parole sentence" (id., at p. 265), thus violates Graham and is unconstitutionally cruel and unusual punishment. (Caballero, 55 Cal.4th at p. 268.) Significantly for this case, this Court said,

> "Although proper authorities may later determine that youths should remain incarcerated for their natural lives, **the state may not deprive them at sentencing of a *meaningful* opportunity to demonstrate their rehabilitation and fitness to reenter society in the future. Under Graham's nonhomicide ruling, the sentencing court must consider all mitigating circumstances** attendant in the juvenile's crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, **so that it can impose a time when the juvenile offender will be able to seek parole from the parole board.**" (Citation.)" (Id., at pp. 268-269; emphasis added.)

But California's sentencing scheme rendered it pointless for a trial court to consider mitigating circumstances when a mandatory sentence was the only possible choice, so this Court "urge[d] the Legislature to enact legislation establishing a parole eligibility mechanism that provides a defendant serving a de facto life sentence without possibility of parole for nonhomicide crimes that he or she committed as a juvenile with the opportunity to obtain release on a showing of rehabilitation and maturity." (Id., at p. 269, fn. 5.)

5. **September 4, 2012: The Mandatory Sentences Imposed In This Case**

At the September 4, 2012 sentencing hearing, the People opposed Rodriguez's motion by successfully arguing that Penal Code section 12022.53, subdivision (h), made the firearm enhancement both mandatory and consecutive. (R.T.5, p. 1250.)

Pursuant to Penal Code sections 1203.75, subdivision (a)(1) and 12022.53, subdivision (g), neither Rodriguez nor Barajas were eligible for probation. The trial court then sentenced both to the mandatory term of 50 years to life.[15]

> "So for both Mr. Barajas and Mr. Rodriguez, I have read and considered the probation report and also the last court hearing we had the victim impact statement, and for

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[15] Pursuant to Penal Code section 190, subdivision (a) a mandatory term of 25 years to life was imposed for the first-degree murder, and pursuant to Penal Code section 12022.53, subdivision (h), the court added a mandatory and consecutive enhancement of 25 years to life for a principal's use of a firearm causing death.

> each of the defendants, then, probation will be denied, as the Court has indicated, and the probation report will cite the circumstances in aggravation, Rule 4.421(a)(h) and Rule 4.421(b)(1), and the circumstances in mitigation for each -- actually, as to Mr. Barajas, it's Rule 4.423(b)(1), **and for Mr. Rodriguez there were none found.** ... So the total commitment, then, will be a total of 50 years for each." (R.T.5, p. 1251; emphasis added.)

In its first opinion the Fifth Appellate District found the Social Security Administration's Actuarial Life Table established Rodriguez and Barajas have life expectancies of slightly over 77 years. (People v. Rodriguez and Barajas (Feb. 17, 2015, F065807) [nonpub. opn.] at p. 23.) Their mandatory sentences of 50 years to life meant both would not become *eligible* for parole until they were in their mid-60's, when very few years would be left to them.

6. **January 1, 2014: New Penal Code section 3051 and Subdivision (c) of Penal Code section 4801 Are Added**

In express response to Graham, Miller and Caballero, the California Legislature enacted Senate Bill No. 260, a parole eligibility mechanism for juveniles to obtain release after showing "he or she has been rehabilitated and gained maturity ...." (Sen. Bill No. 260 (2013-2014 Reg. Sess.) ch. 312, § 1, pp. 2-3; *see*, 2013 Cal. Legis. Serv. Ch. 312 (S.B. 260) (WEST).) It expressly 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." (Sen. Bill No. 260 (2013-2014 Reg. Sess.) ch. 312, § 1, p. 3.)

The act did two things. First, it added new Penal Code section 3051, which provides minors sentenced to a determinate term of years or a life term an opportunity to prove their rehabilitation and secure release on parole after serving a prescribed term of confinement, irrespective of the sentence imposed by the trial court. (Added by Stats. 2013, c. 312 (S.B. 260), § 4.) Specifically, section 3051 requires the Board of Parole Hearings to conduct "youth offender parole hearings" (Sen. Bill No. 260 (2013-2014 Reg. Sess.) ch. 312, § 4, p. 7), to consider the release of juvenile offenders sentenced to prison for specified crimes.[16] For prisoners such as Rodriguez and Barajas, who are serving terms of at least 25 years to life, it provides a parole hearing during the 25th year of incarceration. (Pen. Code, § 3051, subd. (b)(3).)

To effectuate this, section 3051 requires the Board to "take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual." (Id., at subd. (f)(1).)

Second, and parallel to section 3051, Senate Bill No. 260 also amended pre-existing Penal Code section 4801 (which permits the Board to report to the Governor the names of any state prisoners "who, in its judgment, ought to have a commutation of sentence or be pardoned and set at liberty ..."), by adding subdivision (c):

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[16] The measure exempts from its provisions inmates sentenced under certain code sections not relevant here. (Pen. Code, § 3051, subd. (h).)

"When a prisoner committed his or her controlling offense, as defined in subdivision (a) of Section 3051, prior to attaining 23 years of age, the board, in reviewing a prisoner's suitability for parole pursuant to Section 3041.5, shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (Pen. Code, § 4801, subd. (c), added by Stats. 2013, c. 312 (S.B. 260), § 5.[17])

The general consensus in the courts of appeal was that any violation of Miller's requirements was rendered harmless by the enactment of Senate Bill no. 260, which affords juveniles more favorable relief than sentencing courts could provide. (*See*, People v. Gonzalez (2014) 225 Cal.App.4th 1296, 1309.) But some cases took the position that "a statutory promise of future correction of a presently unconstitutional sentence does not alleviate the need to

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[17] The Legislative Counsel's Digest stated (in part), that:

"The bill would require the board, in reviewing a prisoner's suitability for parole, to give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law. The bill would require that, in assessing growth and maturity, psychological evaluations and risk assessment instruments, if used by the board, be administered by licensed psychologists employed by the board and take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual. The bill would permit family members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the young person prior to the crime or his or her growth and maturity since the commission of the crime to submit statements for review by the board." (2013 Cal. Legis. Serv. Ch. 312 (S.B. 260) (WEST).)

remand for resentencing that comports with the Eighth Amendment." (*See*, People v. Garrett (2014) 227 Cal.App.4th 675, 690-691.)

7. **February, 2015: The First Opinion On Direct Appeal and First Grant Of Review**

On direct appeal Rodriguez and Barajas both relied on Graham, Miller and Caballero in arguing, *inter alia*, that their sentences, which are the functional equivalent of life without parole for a crime committed when they were 15 and 16 years of age, is unconstitutionally cruel and unusual punishment under the Eighth Amendment, and that this case must be remanded for a consideration of the Miller hallmarks of youth and immaturity, impetuosity, the failure to appreciate risks and consequences, the circumstances of the homicide offense, and the family and home environments. (Rodriguez AOB, Section V at pp. 86-98; Barajas AOB, Section F, at pp. 81-88; Rodriguez's 7/18/13 Notice of Joinder; Rodriguez ARB, section V, at pp. 20-24.)

On February 17, 2015, the Fifth Appellate District issued its initial opinion in this case and disagreed the mandatory terms of 50 years to life were disproportionate to the offense. (People v. Rodriguez and Barajas (Feb. 17, 2015, F065807) [unpub. opn.] at p. 21.) Although the court recognized the advances made by Miller, Graham and Caballero, it found Rodriguez's sentence of 50 years to life against an anticipated life expectancy of 77 years meant he would be eligible for parole at 66 years of age, "a decade or more before the end of [his] anticipated life expectancy." (People v.

Rodriguez and Barajas (Feb. 17, 2015, F065807) [unpub. opn.] at pp. 22-23.) As both appellants would be eligible for parole "well within their natural life expectancy ... the sentences are not the functional equivalent of a life term, [and] the trial court was not required to engage in a proportionality analysis." (Id., at p. 24.)

Both appellants petitioned for review from this decision. (People v. Rodriguez and Barajas, Cal. Sup. Ct. dock no. S225231.) The petitions were granted and deferred pending this Court's decisions in other, pending cases.

8. **January 25, 2016: The United States Supreme Court Establishes Retroactivity Of Its Decisions On Juvenile Sentences**

In Montgomery v. Louisiana (2016) 577 U.S. ___ [136 S.Ct. 718, 193 L.Ed.2d 599] (hereinafter "Montgomery"), the United States Supreme Court held Miller's requirements "announced a substantive rule of constitutional law," therefore have retroactive effect. (Montgomery, *supra*, 136 S.Ct. at p. 736.)

However, giving Miller retroactive effect does not require States to relitigate sentences. (Montgomery, *supra*, 126 S.Ct. at p. 736.) The high court said "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." (Ibid.) For then an "opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition -- that children who commit even heinous crimes are capable of change." (Ibid.) "Allowing those offenders to be considered for parole ensures that juveniles whose

crimes reflected only transient immaturity – and who have since matured – will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." (Ibid.)

9. June, 2016: This Court's Decision On Youth Offender Parole Hearings And the Eighth Amendment

On May 26, 2016, this Court issued its decision in Franklin, *supra,* 63 Cal.4th 261. The facts in Franklin exactly parallel those here: a 16-year-old juvenile shot and killed another teenager and was sentenced to a mandatory term of 50 years to life (25 years to life for first-degree murder and a consecutive 25 years to life for firearm use). (Id., at pp. 268, 271.) Miller, Graham and Caballero were decided after Franklin was sentenced; he challenged the constitutionality of his sentence under those authorities. (Franklin, 63 Cal.4th at pp. 268, 272.)

a. this court's conclusion that section 3051 mooted any *Miller* unconstitutionality

This Court found enactment of section 3051 mooted Franklin's Eighth Amendment claim, as subdivision (b)(3) provided him the *possibility* of release after 25 years of imprisonment.[18] (Franklin, *supra,* 63 Cal.4th at pp. 268, 276-277.)

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[18] The United States Supreme Court still has not held that parole release programs, such as that established by Penal Code sections 3051 and 4801, subdivision (c), satisfy the Eighth Amendment. (*See,* Virginia v. LeBlanc (2017) __ U.S. __ [137 S.Ct. 1726, 1728-1729, 17 Cal. Daily Op. Serv. 5509].)

Section 3051 "reflects the Legislature's judgment that 25 years is the maximum amount of time that a juvenile offender may serve before becoming eligible for parole." (Franklin, *supra*, 63 Cal.4th at p. 278.) It "effectively reforms the parole eligibility date of a juvenile offender's original sentence ..." (id., at p. 281), which means juvenile offenders will have a "meaningful opportunity for release no more than 25 years into their incarceration." (Id., at p. 277.) And the "Legislature has effected this change by operation of law, with no additional resentencing procedure required." (Id., at p. 279.)

Since a meaningful opportunity for release will occur during Franklin's 25th year of incarceration, his sentence is not the functional equivalent of an LWOP and so "no *Miller* claim arises here." (Id., at p. 280.) "The Legislature's enactment of Senate Bill No. 260 has rendered moot Franklin's challenge to his original sentence under *Miller*." (Ibid.)

b. this court's conclusion that a remand was required to ensure the future Board Of Parole Hearings had *Miller* factors before it when it considered Franklin's release

This Court acknowledged "a sentence that is the functional equivalent of LWOP under *Caballero* is subject to the strictures of *Miller*," and a "juvenile may not be sentenced to the functional equivalent of LWOP for a homicide offense without the protections outlined in *Miller*." (Franklin, *supra*, 63 Cal.4th at p. 276.) It observed that subdivision (c) of Penal Code section 3051 requires

the Board of Parole Hearings to "give great weight" to Miller factors. (Franklin, *supra*, 63 Cal.4th at p. 268),

Although nothing in Miller prohibited reliance on an administrative hearing to determine Franklin's ultimate release date, he contended the statutory scheme did not set forth adequate procedures to ensure a "meaningful opportunity for release" under section 3051, subdivision (e), so even with parole eligibility during his 25th year of incarceration his sentence remained the functional equivalent of a mandatory LWOP in violation of Miller.

Specifically, he argued that even though Senate Bill No. 260 directs the entity that will determine if and when he is released to "give great weight" under section 4801, subdivision (c) to the salient characteristics of youth outlined in Miller, Graham, and Caballero, the Board of Parole Hearings "will not be able to give great weight to these characteristics at a youth offender parole hearing because 'there would be no reliable way to measure his cognitive abilities, maturity, and other youth factors when the offense was committed 25 years prior.'" (Franklin, *supra*, 63 Cal.4th at p. 282.)

And so even though passage of Senate Bill no. 260 mooted Franklin's constitutional claim, this Court recognized he raised:

> "colorable concerns as to whether he was given adequate opportunity at sentencing to make a record of mitigating evidence tied to his youth. The criteria for parole suitability set forth in Penal Code sections 3051 and 4801 contemplate that the Board's decision making at Franklin's eventual parole hearing will be informed by youth-related factors, such as his cognitive ability, character, and social and family background at the time of the offense." (Franklin, *supra*, 63 Cal.4th at p. 269.)

This Court recognized the statutes contemplate that **"information regarding the juvenile offender's characteristics and circumstances at the time of the offense** will be available at a youth offender parole hearing to facilitate the Board's consideration." (Franklin, *supra*, 63 Cal.4th at p. 283; emphasis added.) As it was not clear whether Franklin had sufficient opportunity to put on the record the kinds of information that will be relevant at a future youth offender parole hearing, his case was remanded to the trial court for a determination of whether he was afforded sufficient opportunity to make a record at sentencing of information relevant to that eventual hearing.[19] (Franklin, *supra*, 63 Cal.4th at pp. 269, 284.)

The "goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances **at the time of the offense** so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors ... in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law.'" (Id., at p. 824, quoting Graham, *supra*, 560 U.S. at p. 79; emphasis added.)

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[19] If the trial court determined Franklin did not have sufficient opportunity, the court was empowered to receive submissions and take testimony, and Franklin and the prosecution both were authorized to place on the record anything that might be relevant at his eventual parole hearing. (Id., at p. 284.)

10. **December, 2016: The Second Opinion On Direct Appeal and Second Grant Of Review**

On August 17, 2016, this Court ordered Rodriguez and Barajas's cases transferred back to the court of appeal, with directions to reconsider the cause as to both of them in light of Franklin.

On December 20, 2016, the Fifth Appellate District issued its second opinion on direct appeal. In response to Eighth Amendment arguments it relied on Franklin in finding section 3051 effectively reformed the parole eligibility date of the original sentences, and "essentially rendered moot" the constitutional challenges. (People v. Rodriguez and Barajas (Dec. 20, 2016, F065807) [unpub. opn.] at p. 24.) However, unlike this Court in Franklin, the Fifth Appellate District refused to remand this case to allow either appellant the opportunity to present youth-related mitigating evidence for future use at a parole hearing:

> "Information 'regarding the juvenile offender's characteristics and circumstances at the time of the offense will be available' at the youth offender parole hearing. (Citation.) Information from the probation reports prepared for both defendants, the juvenile fitness hearing reports, their pretrial statements to officers, as well as what was provided at the sentencing hearings, would all be available for consideration at the youth offender parole hearing. (Citation.) **It appears that Barajas and Rodriguez had 'sufficient opportunity to put on the record the kinds of information' deemed relevant to a youth offender parole hearing,** although they are not precluded from submitting additional information for review by the parole board. (Citation.)" (People v. Rodriguez and Barajas (Dec. 20, 2016, F065807) [unpub. opn.] at pp. 25-26; emphasis added.)

In his petition for rehearing Barajas protested that the September, 2012 sentencing hearing predated the passage of Senate Bill No. 260 and enactment of sections 3051 and 4801, as well as this Court's decision in Franklin, all of which emphasized the eventual youth hearing parole board must give great weight to youth-related factors. He argued "neither the probation officer nor [the appellants] had any reason to present the types of youth-related mitigating evidence referred to in those provisions," so that "such evidence was not presented." (Barajas's 1/04/17 rehr. ptn., at p. 21.) But on January 6, 2017, that petition was summarily denied by the court of appeal.

The second opinion and subsequent denial of rehearing thus frames the second question for review: whether reformation of Rodriguez and Barajas's parole eligibility dates via enactment of sections 3051 and 4801, subdivision (c) moots the Eighth Amendment challenges, when (unlike Franklin), they were not afforded a remand to make a record of information that eventually will be relevant at their youth offender parole hearings -- and whether a future Board can discharge its statutory obligations without that information.

B. *Ab Initio*, The Mandatory Sentences Imposed on Rodriguez and Barajas Violated the Eight Amendment

We now know the "Eighth Amendment ... does prohibit States from making the judgment at the outset that [juvenile] offenders never will be fit to reenter society." (Graham, *supra*, 560 U.S. at p. 75.) We also now know that a mandatory term of life without

parole for those under eighteen at the time of their crimes (even murder), without consideration of the nature of their crimes or their level of culpability, violates the Eighth Amendment. (Miller, *supra*, 567 U.S. at pp. 465, 475-476, 479.) These rulings are retroactive. (Montgomery, *supra*, 136 S.Ct. at p. 736.)

And we now know a term of years beyond a minor's natural life expectancy, such as was imposed on both appellants here, "amounts to the functional equivalent of a life without parole sentence," thus violates Graham and is unconstitutionally cruel and unusual punishment.[20] (Caballero, *supra*, 55 Cal.4th at pp. 265, 268.)

At sentencing, however, neither Rodriguez nor Barajas received individualized sentencing consideration. To the contrary, the court was told, and believed, it had no discretion to impose anything except the mandatory base term and mandatory consecutive firearm enhancement, and could not strike the latter even though Rodriguez asked that it do so. (R.T.5, p. 1251.) In imposing the mandatory terms the trial court did *not* "consider all mitigating circumstances attendant in the juvenile's crime and life, including but not limited to his or her chronological age at the time of the

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[20] In Franklin the defendant argued his 50-years-to-life term was the functional equivalent of LWOP, but this Court did not reach his contention as it held the issue was mooted by enactment of sections 3051 and 4801. (Franklin, *supra*, 63 Cal.4th at pp. 273, 278.)

But this Court has pending before it a case that is expected to address whether a "total sentence of 50 years to life or 58 years to life [is] the functional equivalent of life without the possibility of parole for juvenile offenders[.]" (People v. Contreras (Jan. 15, 2015, D063428) [nonpub. opn.] review granted Apr. 15, 2015, S224564.). As of the date this Opening Brief is being filed, briefing in Contreras is complete, and a letter regarding oral argument was sent on July 5, 2017.

crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development ...." (Caballero, *supra*, 55 Cal.4th at pp. 268-269.)

As neither Rodriguez nor Barajas received individualized sentencing consideration, both were denied Graham's "categorical bar" on sentences of life in prison (or the functional equivalent thereof, under Caballero), with no "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (Graham, *supra*, 560 U.S. at p. 75.) As the trial court did not consider the factors of youth set forth in Graham, Miller and Caballero, their sentences violate the Eighth Amendment as they comprise unconstitutionally cruel and unusual punishment under those authorities. If the sentences are not reformed, their Eighth Amendment challenges under Miller are not moot.

C. In Cases Such As This, Where Sentencing Occurred Before the Law Developed, Sections 3051 and 4801 Afford Only A Bare Opportunity to Demonstrate Rehabilitation, But Not the ***Meaningful*** Opportunity Required By Law; Absent a Remand Rodriguez and Barajas's Eighth Amendment Challenges Are Not Moot

Recall that the United States Supreme Court has not yet addressed whether "geriatric parole release" programs satisfy the Eighth Amendment in this context. (LeBlanc, *supra*, 137 S.Ct. at pp. 1728-1729.) But it suggested, in *dicta*, that "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." (Ibid.)

Assuming the high court in future will approve a parole release scheme such as that contemplated by sections 3051 and 4801, subdivision (c), then *if* those sections operate as envisioned, Rodriguez and Barajas's Eighth Amendment challenges as juvenile offenders under Miller would be mooted. But the lack of remand to develop a record in this case precludes a future Board of Parole Hearings from correctly discharging its statutory obligations in evaluating *Miller* factors under sections 3051 and 4801 -- thus the Eighth Amendment claims are not moot.

1. The Law Requires a Future Board of Parole Hearings Conduct A ***Meaningful*** Review, And For It To Do So, Certain Factors Must Be Included In the Record

Statutory and case law establish that a bare opportunity for a juvenile offender to demonstrate rehabilitation, maturity and personal growth at a parole hearing is not enough to satisfy Miller and the Eighth Amendment. Instead, only a ***meaningful*** opportunity to do so ensures the juvenile offender's Eighth Amendment rights are protected. (*See*, Graham, *supra*, 560 U.S. at 75 ["What the State must do ... is give defendants ... some **meaningful** opportunity to obtain release based on demonstrated maturity and rehabilitation"]; (Caballero, *supra*, 55 Cal.4th at p. 268 ["the state may not deprive them at sentencing of a **meaningful** opportunity to demonstrate their rehabilitation and fitness to reenter society in the future"]; Franklin, *supra*, 63 Cal.4th at p. 277 ["juvenile offenders will have a "**meaningful** opportunity for release no more than 25 years

into their incarceration"]; Pen. Code, § 3051, subd. (e) [The contemplated hearing "shall provide for a **meaningful** opportunity to obtain release"]; emphasis added in all.)

To effectuate the requirement that a juvenile offender's opportunity to obtain release is a "meaningful" one, the relevant statutes require that, in assessing growth and maturity, the Board must "take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual." (Pen. Code, §§ 3051, subd. (f)(1) and 4801, subd. (c).) This can be accomplished if "Family members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual **before the crime** or his or her growth and maturity since the time of the crime ... submit statements for review by the board." (Pen. Code, § 3051, subd. (f)(2); emphasis added.)

In Franklin, this Court already presupposed a future Board cannot do its job properly under sections 3051 and 4801 without this information, as the stated "goal of any such proceeding is to provide an opportunity for the parties to make **an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense** so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors ... in determining whether the offender is 'fit to rejoin society' ...." (Franklin, *supra*, 63 Cal.4th at p. 284, quoting Graham, *supra*, 560 U.S. at p. 79; emphasis added.)

The expectation, therefore, is that people who knew a juvenile offender before he committed his crime will be among those who will submit statements for future Board review. (Pen. Code, § 3051, subd. (f)(2).) As this Court correctly noted, assembling statements "about the individual before the crime" is typically "**a task more easily done at or near the time of the juvenile's offense** rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away." (Franklin, *supra*, 63 Cal.4th at pp. 283-284; emphasis added.) In addition, "consideration of 'subsequent growth and increased maturity' implies the availability of information about the offender when he was a juvenile." (Id., at p. 284.)

As expressed in Miller, *supra*, 567 U.S. 460 at pp. 477-478, factors to be considered in assessing a juvenile offender's growth and maturity between the commission of the offense and a future parole hearing include:

(1) the "chronological age" of the youth and the hallmark features of youth, including "immaturity, impetuosity, and failure to appreciate risks and consequences";

(2) the "family and home environment" that surrounded the youth, "from which he cannot usually extricate himself – no matter how brutal or dysfunctional";

(3) "the circumstances of the ... offense, including the extent of [the youth's] participation in the conduct and the way familial and peer pressures may have affected him";

(4) the "incompetencies associated with youth -- for example, his inability to deal with police officers or prosecutors (including on a plea agreement) ..."; and,

(5) "the possibility of rehabilitation even when the circumstances most suggest it."

As shown immediately below, almost none of these factors were discussed in Rodriguez's 2004 fitness report or at his fitness hearing, nor were they amplified upon in his 2012 presentence report; none were taken into account when the mandatory sentence was imposed on him.

2. Almost None Of the Key Factors For Future Parole Were Included In Rodriguez's 2004 Fitness Report, Which Contained the Only Social History About Him, or During the 2004 Fitness Hearing Or 2012 Presentence Report or Sentencing Hearing

In its second opinion the court of appeal concluded that Rodriguez and Barajas both had "sufficient opportunity to put on the record the kinds of information deemed relevant to a youth offender parole hearing...." (People v. Rodriguez and Barajas (Dec. 20, 2016, F065807) [unpub. opn.] at p. 26.)

The court of appeal was wrong. Recall that Rodriguez's post-conviction presentence report admittedly did not conduct any new investigation into his social history or background (C.T.2, p. 542), and simply parroted what his eight-year-old 2004 juvenile fitness report said about him, without updating anything or adding any further information. (C.T.2, pp. 545-546.) Therefore, the only

report that took a good, hard look at Rodriguez was his 2004 fitness report, prepared just one month after his arrest, right after he turned 16 years of age.

But that 2004 report was severely lacking. Most of it was taken up with reciting the charges and summarizing evidence against Rodriguez. (2nd Supp. C.T.1, pp. 1-15.) As to the five Miller factors set out in the preceding subsection, the cursory one and one-half page long social study (2nd Supp. C.T.1, pp. 15-16), supplemented by the 2004 fitness hearing and 2012 presentence report, advised of the following:

a. deficiencies in the discussion of Rodriguez's chronological age, immaturity, impetuosity and failure to appreciate risks and consequences

"Petitioner's youth is relevant because the harshness of the penalty must be evaluated in relation to the particular characteristics of the offender." (In re Nuñez (2009) 173 Cal.App.4th 709, 735, citing Enmund v. Florida (1982) 458 U.S. 782 [102 S.Ct. 3368, 73 L.Ed.2d 1140].) The 2004 fitness report was created *because of* Rodriguez's chronological age, to determine whether he was amendable to juvenile court jurisdiction. (Welf. & Inst. Code, § 707, subd. (a)(1).) It therefore did not make any special point of discussing his age, nor did it make a special point of comparing him to others his age, or discussing whether he was among the most irredeemable.

The 2012 presentence report, which relied entirely on the 2004 fitness report, considered Rodriguez's age at the time of the

offenses to be so unimportant that it did not report his birth date (C.T.2, pp. 528-548), and stated only that he was "born in Mexico" without saying when he was born. (C.T.2, p. 545.) At the end of the report an offhanded mention was made that he was just 15 years old when he committed the offenses (C.T.2, p. 547 at ¶ 2]), even though it recognized he was made a ward of the Juvenile Court just five months before the underlying offenses and that its office prepared a 2004 fitness hearing report. (C.T.2, p. 542.) Instead, what the 2012 report did highlight was that Rodriguez was, by the time of sentencing, 22 years of age. (Ibid.)

With respect to immaturity, impetuosity and poor choices, the 2004 fitness report stated Rodriguez's mother described him as "sometimes act[ing] like a little kid, very immature ..." (2nd Supp. C.T.1, p. 17), but it in no way evaluated his level of maturity, and there was no follow-up on that comment at the 2004 fitness hearing or in the 2012 presentence report.

In addition, at the 2004 fitness hearing a former teacher testified. (*See*, Settled Statement Rough Draft #2, at p. 2.) She explained Rodriguez was shy and easily abused by older children, suffered from low self-esteem, never showed aggression, was never a discipline problem and that it would be a "great injustice" if he was remanded to adult court. (Court Exhibit A to Settled Statement, at p. 1 of Exhibit A.) But nothing else about these character traits was presented at the 2004 fitness hearing, nor was there any follow-up about it in the 2012 presentence report.

The 2004 fitness report instead indicated Rodriguez had friends and relatives in both Sureno and Norteno gangs (2nd Supp. C.T.1, p. 16), and went from being an above-average student at age 13 to failing out of school after he repeatedly played truant to associate with a Modesto gang. (2nd Supp. C.T.1, pp. 16-17.) Reading between the lines, it appears very little effort was made to get him into a High Risk Offender Unit and rescue him from gang life. (2nd Supp. C.T.1, p. 19.) But this would need to be made expressly clear, with the addition of further facts, in order for a future Board to consider it as a factor.

The 2004 report stated Rodriguez used "an 8-ball of methamphetamine a day," admitted committing a March, 2004 car theft while under the influence of methamphetamine, and recognized "he would benefit from substance abuse counseling." (2nd Supp. C.T.1, pp. 16, 19.) The 2012 presentence report also acknowledged this drug use. (C.T.2, p. 546.) But neither report said anything else about Rodriguez's addiction, his self-awareness regarding the influence of drugs, or whether drug counseling had been or would be made available to him.

b. deficiencies in the discussion of Rodriguez's family and home environment, whether it was brutal or dysfunctional, and whether he could extricate himself from it

The 2004 fitness report stated the teenaged Rodriguez had no relationship with his father or any of his six siblings, and would "leave the home for a couple of days" after he fought with his

mother; his relationships with two other adult males living in his home was not discussed. (2nd Supp. C.T.1, p. 15.) According to his mother, "his older brothers used to physically abuse" him. (2nd Supp. C.T.1, p. 17.) One was arrested for whipping him. (2nd Supp. C.T.1, p. 16.) His mother said that as a result he "had a lot of anger toward" them. (2nd Supp. C.T.1, p. 17.)

The report thus suggests Rodriguez's home life was dysfunctional *and* brutal, and that the only way this child could escape it was to run away from home. What the report did not indicate was where he would go, who he would stay with or how he survived during the times he left home, nor did it mention whether he received any counseling for the physical abuse he suffered. (2nd Supp. C.T.1, pp. 16-17.)

It appears Rodriguez's only recourse upon extricating himself from his home life was to shelter with a gang member, as the 2004 report states Rodriguez repeatedly played truant from age 13 on, to associate with a Modesto gang. (2nd Supp. C.T.1, pp. 16-17.) If so, that fact must be more explicitly stated so that a future Board can take it into consideration.

c. <u>deficiencies in the discussion of the offense and Rodriguez's participation in it, including any familial or peer pressures</u>

The United States Supreme Court recognizes children not only are generally less mature and responsible than adults, and "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," but that they

also "are more vulnerable or susceptible to ... outside pressures than adults...." (J.D.B. v. North Carolina (2011) 564 U.S. 261, 272 [131 S.Ct. 2394, 180 L.Ed.2d 310].)

In no way did the 2004 fitness report acknowledge this. Nowhere did it discuss what might have led Rodriguez to participate in the underlying offenses. (2nd Supp. C.T.1, pp. 4-15 [and pages 6-11 in particular; *see also*, p. 16].) No mention is made that Rodriguez himself was attacked by Nortenos and suffered property damage, or that he obtained the gun to give to a friend (Acosta), who suffered a long and even more serious series of Norteno attacks. (R.T.3. pp. 514-515, 517-521, 524.)

In addition, discussed above in subsection II(C)(2)(b), *supra*, are facts leading to the possible conclusion that Rodriguez's home life led him to abandon family and school for the protection of a gang. Small wonder, then, that Rodriguez was susceptible to the influence of a Big Brother figure: fellow Sureno Mario Garcia, then 17 years old (two years older than Rodriguez), who was the motivating force behind this incident. For Garcia thirsted for revenge, arranged with someone to get a gun, and had Rodriguez provide the ride to pick it up. (R.T.3, pp. 561-564.) Unlike Rodriguez, who waived Miranda rights and confessed to police in exchange for no considerations whatsoever, Garcia plea-bargained his way out of identical charges of first-degree murder with a firearm enhancement, and the mandatory sentence of 50 years to life, by testifying at trial. (R.T.3, pp. 590-591.)

Those facts, however, exist only in the transcript of the trial; nowhere are they mentioned in the fitness or presentence reports or either of the 2004 or 2012 hearings. According to what the court of appeal believes are the relevant materials a future Board of Parole Hearings will review (*see*, People v. Rodriguez and Barajas (Dec. 20, 2016, F065807) [unpub. opn.] at p. 26), a future Board will not take trial testimony into consideration -- thus the record for a future section 3051 and 4801 hearing is deficient.

d. deficiencies in the discussion of Rodriguez's incompetencies due to his youth, including his dealings with police officers

The 2004 fitness report stated Rodriguez admitted committing the March, 2004 car theft (his original juvenile petition), while under the influence of methamphetamine, and also admitted all the facts establishing the offenses charged in the drive-by shooting (his second and only other juvenile petition); he himself stated he fully cooperated with detectives. (2nd Supp. C.T.1, p. 16.)

As a result, both the investigators and the 2004 juvenile court acknowledged Rodriguez's "confession." (Settled Statement Rough Draft #2, p. 1; 4/23/13 Settled Statement R.T.1, p. 13; *see also*, Settled Statement Rough Draft #2, p. 2 [detectives agreed Rodriguez "confessed fully ... and generally seemed to lack sophistication"].)

But the report did not praise Rodriguez for fully cooperating with detectives or admitting culpability at an early stage. (2nd Supp. C.T.1, p. 16.) And neither the 2012 presentence report nor

the judge at the subsequent sentencing hearing recognized this was a factor in mitigation, as both found none existed. (C.T.3, pp. 542-535, 546-547 [presentence report noted Rodriguez essentially confessed to all charges and special allegations but found no mitigating circumstances]; R.T.5, p. 1251 [sentencing court found no mitigating circumstances].)

Within days of the shooting Rodriguez -- who was still just 15 years old -- therefore confessed to all the crimes, overt acts and special circumstances. In exchange for his cooperation, he received literally nothing. No reduction in charges, no time off the mandatory sentence. To the contrary, Rodriguez was deemed an unfit subject for juvenile court jurisdiction based solely on the charges against him. (2nd Supp C.T.1, pp. 17, 19, ¶¶ 1, 5; *see also*, 2nd Supp. C.T.1, p. 21.) His forthrightness with police in admitting his crimes was what made him unfit for juvenile court adjudication.

The criminal justice system took advantage of this child and offered him nothing in return. But if no one pointed it out -- and until now, no one has -- will a future Board know to take that into consideration?

e. <u>deficiencies in the discussion of Rodriguez's future rehabilitation</u>

The 2004 fitness report did state Rodriguez was capable of rehabilitation as he was doing well in juvenile hall, following "a good program," and had no behavioral issues. (2nd Supp C.T.1, pp. 19-20, ¶ 2.) But the 2012 presentence report did not follow up on any of this; there was no information about what Rodriguez did in

jail during those eight years -- whether he stayed out of trouble, worked at assigned jobs, obtained a GED, took college classes, or did anything else positive to show he was maturing well and was capable of rehabilitation.

Instead, all it listed were four circumstances in aggravation while finding none in mitigation (C.T.3, pp. 546-547), even though as discussed previously several mitigating circumstances existed. And the sentencing court relied on the presentence report for the circumstances in aggravation and mitigation before imposing the mandatory sentence. (R.T.5, p. 1251.)

The only reason the presentence report and the sentencing court paid such short shrift to Rodriguez's social history or any factors in mitigation was a pervading attitude of, *why bother*? Why bother considering Rodriguez's background, when the sentence was mandatory and therefore inevitable? Since the sentencing hearing in this case occurred before the reforms of sections 3051 and 4801 went into effect, none of the facts that could establish Rodriguez was capable of growth and maturity (and thus worthy of being released back into society), would have been worth discussing. Yet now, with the statutory reforms in place, those facts have become paramount in importance.

3. Based On the Current Record There Cannot Be A ***Meaningful*** Review By a Future Board of Parole Hearings, Thus the Eighth Amendment Claim Is Not Moot

As shown immediately above in section II(C)(2)(a)-(e), *supra*,

the *only* information about any Miller factors which a future Board will review when considering Rodriguez for parole is from the 2004 fitness report, which stops one month after the crime in this case. There is nothing in the record about how Rodriguez fared pretrial in juvenile hall or jail, and nothing about how likely it is he can be rehabilitated. At sentencing everyone simply assumed the court had no discretion and the terms of the sentence were mandatory, so no Miller factors were discussed there, either. (R.T.5, p. 1251.)

In addition, there are no psychological evaluations or risk assessments. It will be almost impossible for a future Board to "take into consideration ... any subsequent growth and increased maturity" of Rodriguez, as the Board will be required to do by section 3051, subdivision (f)(1), when there is no baseline against which to gauge any growth.

The record reflects Miller factors were not taken into consideration at any time; it is clear the statutory scheme in existence at sentencing did not allow for any "meaningful" opportunity to demonstrate Rodriguez's potential for growth and rehabilitation. Thus his Eighth Amendment challenge is not moot.

D. In the Absence Of a Remand Rodriguez and Barajas Also Will Suffer Fourteenth Amendment Procedural Due Process Violations, As They Will Be Denied the Right To Make a Full Record After Notice To Do So

The only reason the current sentences do not violate the Eighth Amendment is because after their 25th years of incarceration Rodriguez and Barajas will be eligible for youth offender parole

review. (Pen. Code, § 3051, subd. (b)(3); Franklin, *supra*, 63 Cal.4th at pp. 273, 278.) But the current (and deficient), state of the records as to their respective social histories will preclude any future Board of Parole Hearings from adequately doing its job under sections 3051 and 4801, subdivision (c). Therefore, absent a remand, Rodriguez and Barajas's inability to make their respective records demonstrating their rehabilitation also violates their Fourteenth Amendment due process rights.

"A fundamental requirement of due process is 'the opportunity to be heard.' (Citation.) It is an opportunity which must be granted at a meaningful time and in a meaningful manner." (Armstrong v. Manzo (1965) 380 U.S. 545, 551 [85 S.Ct. 1187, 14 L.Ed.2d 62], citing Grannis v. Ordean (1914) 234 U.S. 385, 394 [34 S.Ct. 779, 58 L.Ed. 1363]; *see also*, (Mathews v. Eldridge (1976) 424 U.S. 319, 333 [96 S.Ct. 893, 47 L.Ed.2d 18] [same]; People v. Hansel (1992) 1 Cal.4th 1211, 1219 [same].)

In this case, "a meaningful time" to put on the record material that will be relevant to a future Board in discharging its statutory obligations under section 3051 and 4801, is now. For as this Court recognized, statements "about the individual before the crime" typically is "more easily done at or near the time of the juvenile's offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away." (Franklin, *supra*, 63 Cal.4th at pp. 283-284.)

A failure to ensure all relevant findings are on the record denies a defendant his due process right to meaningful review. (In re Carmen M. (2006) 141 Cal.App.4th 478, 496.) In this case the right to review would be at an administrative hearing where parole is at issue, but that is a distinction without a difference as Rodriguez and Barajas's liberty interests are at stake.[21]

Here, however, there was no need in 2004 at the fitness hearings or in 2012 at the sentencing hearing for Rodriguez or Barajas to put on the record those things which would be helpful to a future Board of Parole Hearings as it fulfills its statutory obligations under sections 3051 and 4801. Thus there was no notice that such information would be important to either appellants' liberty interest. Yet "[w]hat due process does require is notice reasonably calculated to apprise interested parties of the pendency of the action affecting their property interest and an opportunity to present their objections." (Bergeron v. Department of Health Services (1999) 71 Cal.App.4th 17, 24.)

"If, as is often said, the opportunity to be heard is the fundamental requisite of constitutional due process (citation), this right can only be given meaning and vitality by the parallel requirement that a person be adequately informed of the imminent governmental action.... The notice must be of such nature as

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[21] A liberty interest may arise from an expectation or interest created by state laws or policies, such as a youthful offender parole hearing. (*See, e.g.*, Wolff v. McDonnell (1974) 418 U.S. 539, 556-558 [94 S.Ct. 2963, 41 L.Ed.2d 935] (a liberty interest in avoiding withdrawal of state-created good-time credits).)

reasonably to convey the required information ... and it must afford a reasonable time for the interested to make their appearance...." (Conservatorship of Moore (1999) 185 Cal.App.3d 718, 725-726, quoting as the "frequently cited standard for the adequacy of notice" Mullane v. Central Hanover Bank & Trust Co. (1950) 339 U.S. 306, 314-315 [70 S.Ct. 652, 94 L.Ed. 865.)

If the opportunity to be heard is "a fundamental requirement of due process," then what must be afforded is a "'reasonable' opportunity to be heard.'" (Saleeby v. State Bar (1985) 39 Cal.3d 547, 565, quoting Stanson v. San Diego Coast Regional Com. (1980) 101 Cal.App.3d 38, 45 and Anderson Nat. Bank v. Luckett (1944) 321 U.S. 233, 246 [64 S.Ct. 599, 606, 88 L.Ed. 692].) As notice in this case that sections 3501 and 4801 required certain information be in the record occurred after the only opportunities to be heard (that is, after the 2004 and 2012 reports and hearings), remand is required, otherwise there will have been no "reasonable" opportunity for Rodriguez and Barajas to be heard on section 3501 and 4801 factors.

An identical situation occurred in Franklin, where the defendant was sentenced in 2011, before Miller or our Legislature's enactment of Senate Bill No. 260. At sentencing, even though Franklin raised concerns about the record at his eventual parole hearing, his trial court said, "it sort of doesn't matter because the statute mandates the sentence here. So there's no basis and occasion for any findings to be made on aggravation and mitigation at all." (Franklin, *supra*, 63 Cal.4th at pp. 282-283.)

Franklin subsequently argued before this Court that his sentencing proceeding resulted in a record that may be incomplete or missing mitigation information because the trial court deemed such information irrelevant to its pronouncement of his *mandatory* sentence. That is the same argument Rodriguez and Barajas now make. As it was unclear whether Franklin had sufficient opportunity to put on the record the kind of information that would be relevant to a future parole board, this Court remanded the case to the trial court to make that determination. (Franklin, *supra*, 63 Cal.4th at p. 284.) There is no rational distinction that will support the court of appeal's contrary decision here, to *not* extend the same opportunity to Rodriguez and Barajas. (*See also*, People v. Perez (2016) 3 Cal.App.5th 612, 619-620 [matter remanded for the limited purpose of affording both parties the opportunity to make an accurate record of Perez's characteristics and circumstances *at the time of the offense*, as set forth in Franklin].)

What makes the right to a full and accurate *presentence* record so compelling is that the Ninth Circuit has not found prisoners have an independent right, grounded in the Due Process Clause, to an accurate prison record. (Hernandez v. Johnston (9th Cir. 1987) 833 F.2d 1316, 1319.) When the Board of Parole Hearings contemplates Rodriguez and Barajas's future applications for parole, its members will be required under Miller to consider their potential rehabilitation. But if their post-sentencing prison records are not required to be accurate, then the Board cannot properly do its job unless their pre-sentence records are.

CONCLUSION

The only way to ensure the pre-sentence records are accurate is to remand for a trial court determination on all relevant Miller factors. Rodriguez and Barajas respectfully request this Court remand this matter to the trial court for determinations on the adequacy of information in the record about them, that will be relevant to a future Board of Parole Hearings in carrying out its analysis under sections 3051 and 4801, subdivision (c).

Respectfully submitted,

/ss/
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BRIEF LENGTH AND FORMAT CERTIFICATION

I, Cara DeVito, counsel for Jesus Manuel Rodriguez, certify that the word count for the foregoing Opening Brief On the Merits is 13,882 words, excluding tables; that this document was prepared in WordPerfect 12, font size 12; and that this is the word count generated by that program.

I certify under penalty of perjury under the laws of the State of California that foregoing is true and correct. Executed at Summerlin, Nevada on July 26, 2017.

/ss/
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I, Cara DeVito, declare that I am employed in the County aforesaid; I am over the age of eighteen (18) years and not a party to the within action; my business address is 9360 W. Flamingo Road, No. 110-492, Las Vegas, NV 89147.

PROOF OF SERVICE BY ELECTRONIC TRANSMISSION

I declare that on July 27, 2017, before the 5:00 p.m. close of business, I electronically served from my electronic service address of CDVeserve@aol.com the within Opening Brief on the Merits (appellant Jesus Manuel Rodriguez) to:

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I declare that on July 27, 2017, I served the within Opening Brief on the Merits (appellant Jesus Manuel Rodriguez), on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Summerlin, Nevada, addressed as follows:

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I then sealed each envelope and, with the postage thereon fully prepaid, I place each for deposit with the United States Postal Service this same day, at my business address shown above, following ordinary business practices.

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/ss/
Cara DeVito